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The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996

Carrie M. Bowden

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The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996†

Carrie M. Bowden*

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I. Introduction

Consider a federal prosecution that occurs after a state prosecution. The federal prosecution concerns the very same defendant, conduct, and evidence as did the state prosecution. In the state prosecution, the state court suppressed evidence on federal constitutional grounds; subsequently, a jury acquitted the defendant. In the federal prosecution, the federal court refuses to give collateral estoppel effect to the previous state court suppression ruling. In fact, the federal court does not even consider why the state court suppressed the evidence on federal constitutional grounds; instead, it treats the state court's suppression ruling as if it were a nullity.

This scenario raises many questions. First, how could a federal prosecution occur after a state prosecution in this situation? Isn't this a violation of the Double Jeopardy Clause? Second, why doesn't the federal court even consider why the state court suppressed such evidence? Shouldn't the federal court give some sort of deference to the findings of the state court under

principles of comity? Unfortunately, for many defendants the answer to each of these questions is no. The subsequent federal prosecution does not violate the Double Jeopardy Clause because the prohibition on double jeopardy is not enforceable when two distinct sovereigns, such as the state and federal governments are involved.[1] Similarly, the federal court owes no deference to the state court suppression ruling because the federal government was not a party to the prior prosecution, and therefore the federal government is not bound by the state court's actions.[2]

But what if federal courts gave substantial deference to state courts in other collateral proceedings, such as those that occur when a federal court considers a state prisoner's petition for a writ of habeas corpus?[3] Suppose that federal courts in this situation must give complete deference to state court findings of fact, substantial deference to state court findings on mixed questions of law and fact, and even some degree of deference to state court findings on questions of federal law. Wouldn't this deference that federal courts exhibit in the habeas context also apply to other criminal collateral proceedings? Shouldn't notions of fairness, justice, and simple uniformity in federal criminal law compel federal courts to apply deference in all such collateral proceedings?

Apparently not. Even after Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[4] which extensively reformed habeas corpus law and mandated strong deference to state court evidentiary findings, federal courts still allow the introduction of evidence that a state court previously suppressed into federal collateral proceedings that occur under the dual sovereignty exception.[5] Federal courts, still clinging to the

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1. *See infra* Part II.A (discussing dual sovereignty exception to double jeopardy prohibition). This Note refers to this doctrine as the "dual sovereignty doctrine." Some courts and commentators also refer to the doctrine as the "separate sovereignty doctrine."

2. *See infra* Part III (discussing dual sovereignty doctrine as applied to suppression of evidence rulings).

3. *See infra* Part IV (explaining similarities between dual sovereignty proceedings and habeas proceedings). This Note uses the term "collateral proceedings" to refer to a federal prosecution that occurs after a state prosecution under the dual sovereignty doctrine as well as a habeas corpus proceeding that occurs after a state prosecution. Part IV of this Note explains why this terminology is proper for both proceedings.

4. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

5. *See* United States v. Charles, 213 F.3d 10, 21 (1st Cir. 2000) (finding that state court suppression ruling did not collaterally estop federal government from using evidence in subsequent federal prosecution occurring under dual sovereignty exception); United States v. Ealy, 163 F. Supp. 2d 633, 634–35 (W.D. Va. 2001) (finding that federal court was not bound by principles of res judicata or comity to follow earlier state court decision to exclude evidence).

notion that the federal and state governments are separate sovereigns, find that they can rule independently on the suppression of evidence in a federal prosecution, even when a state court suppressed the same evidence in a prior state prosecution on federal constitutional grounds.[6]

This Note argues that federal courts' refusal to defer to state court rulings on suppression issues in these circumstances is erroneous and that, alternatively, federal courts should use AEDPA's standards of deferential review for evidentiary matters in collateral proceedings that occur under the dual sovereignty exception.[7] Thus, this Note asserts that the latest congressional statement on the rule of comity with regard to evidentiary matters is AEDPA.[8] This Note contends that the general congressional intent behind the passage of AEDPA—that federal courts should review the actions of state courts regarding evidentiary issues in the criminal context only in extremely limited circumstances—is not confined to the habeas context.[9] Rather, Congress's insistence that federal courts defer to state court evidentiary rulings can be extended logically to evidentiary matters in collateral proceedings that occur under the dual sovereignty exception.[10]

The importance of this issue cannot be overstated. The state and federal criminal justice processes affect citizens in fundamental ways. These processes not only restrict individual liberty, but also influence decisions of life and death.[11] In particular, the prohibition against double jeopardy is "funda-

6. *See supra* note 5 (describing cases under AEDPA in which federal courts applied dual sovereignty doctrine to suppression rulings).

7. *See infra* Part VI (illustrating how federal courts could apply this Note's proposal).

8. *See infra* Part V (discussing legislative intent behind AEDPA).

9. *See infra* Part VI (arguing that rule of comity underlying AEDPA applies to other collateral proceedings).

10. *See infra* Part VI (arguing that rule of comity underlying AEDPA applies to other collateral proceedings).

11. The dual sovereignty exception does implicate capital crimes. United States v. Ealy, 163 F. Supp. 2d 633, 634 (W.D. Va. 2001). In *Ealy*, the Commonwealth of Virginia previously prosecuted the defendant, Samuel Ealy, for murder. Commonwealth v. Ealy, 407 S.E.2d 681, 683 (Va. Ct. App. 1991). However, a Virginia circuit court suppressed evidence on Fourth Amendment grounds and the state trial resulted in an acquittal. *Ealy*, 163 F. Supp. 2d at 634. Nine years later, a federal grand jury indicted Ealy for various federal crimes based on the same murders. *Id.* In August 2001, a federal district court denied Ealy's motion to suppress the same evidence, rejecting arguments that it should consider the state court's earlier suppression ruling. *Id.* at 634–35. In June 2002, after three days of deliberation, a federal jury convicted Ealy of capital murder. Jen McCaffery & Laurence Hammack, *Man Convicted in 1989 Killings*, ROANOKE TIMES & WORLD NEWS, June 7, 2002, at B1. However, the jury rejected arguments in favor of a death sentence, instead imposing a sentence of life in prison. Jen McCaffery, *Ealy Gets Life in Prison for Murders, Jury Spares Tazewell Man Death*, ROANOKE TIMES & WORLD NEWS, June 12, 2002, at B1.

mental to the American scheme of justice."[12] It is an ideal so important to a free, ordered, and just society that the Founders included it in the Bill of Rights.[13]

Because the Founders intended the Bill of Rights to protect individual rights and liberties, successive prosecutions should be limited and narrowly tailored to serve those societal interests that take precedence over the interests of an individual.[14] However, successive prosecutions today are not so limited. The rationale of the Supreme Court in its continuing adherence to the dual sovereignty doctrine does not adequately explain the societal rights that take precedence over the interests of the individual.[15] Given this inconsistency in the doctrine's underpinnings, this Note's proposal would help to safeguard the individual liberties that the Double Jeopardy Clause seeks to protect. Concurrently, this proposal recognizes the federal government's role in protecting society's interest in the enforcement of criminal laws and concedes that, in cases in which the state court has acted truly irrationally, the federal government should relitigate suppression rulings in the dual sovereignty context.[16]

This Note explores the effect of AEDPA on the dual sovereignty doctrine as applied to suppression of evidence cases. Part II examines the origin and development of the dual sovereignty doctrine.[17] This Part illustrates how the Supreme Court conceived of the doctrine under questionable precedent and explores the aversion to the doctrine among legal scholars, practitioners, and members of the judiciary. Part III surveys a cross-section of federal cases to illustrate how courts apply the dual sovereignty doctrine in suppression of evidence cases.[18] This Part analyzes the rationale of courts which assert that the principles of collateral estoppel do not apply to subsequent federal prosecutions occurring under the dual sovereignty exception. Part IV examines the writ of habeas corpus and its origin and explains how the history of the writ's

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12. Benton v. Maryland, 395 U.S. 784, 795 (1969). The *Benton* Court went on to state that "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted." *Id.*

13. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

14. *See* Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1161–62 (1995) (discussing intention of Framers to protect individual rights and liberties through Bill of Rights).

15. *See infra* Part II.C (discussing criticism of dual sovereignty doctrine).

16. *See infra* Part VI.B–C (arguing that federal government should relitigate evidentiary issues in cases in which state court judgment was "unreasonable" or "contrary to" clearly established federal law, thereby protecting societal interests of deterrence, retribution, and restoration of public confidence).

17. *See infra* Part II (examining dual sovereignty doctrine).

18. *See infra* Part III (discussing dual sovereignty doctrine as applied to suppression rulings).

pleading and practice demonstrates that habeas proceedings are analogous to other collateral proceedings, specifically those occurring under the dual sovereignty doctrine.[19] Part V discusses AEDPA with a particular emphasis on the legislative history and the current case law concerning the Act.[20] This Part also includes a discussion of recent Supreme Court jurisprudence supporting increased deference to state court rulings. Part VI considers rules of comity and illustrates how federal courts should apply this Note's proposal.[21] This Part concludes by addressing the potential criticisms of the proposal. This Note closes by explaining why federal court deference to state courts in the dual sovereignty context is essential to the protection of the individual liberties guaranteed by the United States Constitution.[22]

II. The Dual Sovereignty Doctrine

The application of the dual sovereignty doctrine rests at the core of this Note's analysis. In order to demonstrate how successive prosecutions occur, this Part will examine the development of the dual sovereignty doctrine, as well as its application in modern times. This Part will conclude by examining the criticisms of the dual sovereignty doctrine—criticisms that underscore the need for a deferential standard of review toward previous state court suppression rulings.[23]

A. The Historical Development of the Doctrine

The Supreme Court established the dual sovereignty exception to the Double Jeopardy Clause of the Fifth Amendment in a 1922 case, *United States v. Lanza*.[24] In *Lanza*, the Court held that an act denounced as a crime by both

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19. *See infra* Part IV (analogizing federal habeas proceedings to federal dual sovereignty proceedings).

20. *See infra* Part V (examining AEDPA).

21. *See infra* Part VI (illustrating proposal for federal court review of state court suppression rulings in dual sovereignty context).

22. *See infra* Part VII (explaining importance of proposal to protection of individual liberties).

23. *See infra* Part VI (proposing that federal courts should give deferential review to state court suppression rulings in dual sovereignty context).

24. United States v. Lanza, 260 U.S. 377 (1922). The *Lanza* case involved several individuals whom the federal government charged with violating various provisions of the National Prohibition Act. *Id.* at 378–79. The Court considered the defendant's claim that a prior prosecution under a Washington state statute for the same conduct barred the federal prosecution under the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 379–80. Writing for the majority, Chief Justice Taft found that each sovereign could enact laws to secure prohibition because each sovereign derived its power from different sources and thus each could deal with the same subject matter within the same territory. *Id.* at 382. The majority next stated

national and state sovereigns is an offense against the peace and dignity of both and that each sovereign can thus punish the act accordingly.[25] Although the *Lanza* Court noted that a long line of decisions by the Court supported this view of the Fifth Amendment,[26] today most scholars disagree with the *Lanza* Court's analysis of the then relevant case law.[27] The *Lanza* Court rationalized its decision by noting in dictum that if the Court barred a federal prosecution after a state prosecution, this prohibition would prompt a "race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution," especially in cases in which state penalties consist of small or nominal fines.[28]

Although the existence of any empirical evidence supporting the *Lanza* policy rationale is questionable,[29] the Supreme Court reaffirmed and extended the dual sovereignty exception in two cases during its 1959 Term: *Bartkus v. Illinois*[30] and *Abbate v. United States*.[31] The *Bartkus* Court upheld the state

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that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *Id.* The Court then held that a conviction by a Washington state court of an act against that state was not a conviction of the same act against the United States; thus, the subsequent prosecution by the federal government did not violate the prohibition against double jeopardy. *Id.*

25. *See id.* at 382 (establishing dual sovereignty exception).

26. *Id.* The *Lanza* Court primarily relied on *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). *Lanza*, 260 U.S. at 382. In *Fox*, the Court noted in dictum that, even if the federal and state governments prohibited the same offense, each government had the independent right to prosecute and punish a defendant for a violation of this offense. *Fox*, 46 U.S. (5 How.) at 435. Other pre-Civil War cases also mention the dual sovereignty doctrine in dicta. *See* Moore v. Illinois, 55 U.S. (14 How.) 13, 19–20 (1852) (noting, in response to defendant's argument of double jeopardy, that because same act produced two offenses, that act violated laws of two sovereigns); United States v. Marigold, 50 U.S. (9 How.) 560, 567–68 (1850) (reaffirming in dictum independent right of state and federal governments to prosecute same act when act violates statute of each sovereign).

27. *See* Guerra, *supra* note 14, at 1202–03 (noting that it is odd that *Lanza* Court cited *Fox v. Ohio* because *Fox* Court stated that successive prosecutions should occur only in instances of peculiar enormity, and then questioning whether manufacturing liquor, Lanza's offense, was crime of peculiar enormity); George. C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 CASE W. RES. L. REV. 700, 711 (1963) (stating that no clear and binding precedent forced *Lanza* Court to allow successive prosecutions because English precedent seemed to disallow such successive prosecutions and American precedent was contradictory and inconclusive).

28. *Lanza*, 260 U.S. at 385.

29. *See* J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1330–31 (1932) (noting that *Lanza* Court's argument that prohibition on successive prosecutions would result in voluntary rush of offenders to more lenient court was unsupported).

30. Bartkus v. Illinois, 359 U.S. 121 (1959). The *Bartkus* Court considered the issues of whether a state prosecution was a sham and in fact a second federal prosecution in violation of

court conviction of a defendant whose first federal trial based on the same robbery resulted in an acquittal.[32] In reaffirming the dual sovereignty doctrine, Justice Frankfurter referred to previous cases involving the dual sovereignty doctrine as "a long, unbroken, unquestioned course of impressive adjudication."[33] In *Abbate*, the Court held that the Double Jeopardy Clause does not protect a criminal defendant from a federal prosecution after a state conviction for the same act.[34] The *Abbate* Court declined to overrule *Lanza*, stating that, "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered."[35]

B. Modern Development of the Doctrine

Two significant extensions of the dual sovereignty doctrine occurred in the latter decades of the twentieth century. First, the Supreme Court extended

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the Fifth Amendment, and whether the subsequent state prosecution violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 123–24. Bartkus's federal trial resulted in an acquittal on National Bank Robbery Act charges, but an Illinois grand jury later indicted him for violations of the Illinois Robbery Act. *Id.* His state trial then resulted in a conviction. *Id.* at 122. The Supreme Court upheld his conviction. *Id.* at 123–24. On the first issue, the Court stated that, although the activities of the federal and state prosecuting authorities showed a high degree of cooperation, they did not establish that the county prosecutor was a mere agent of the federal prosecutor. *Id.* The Court reasoned that the record established that state officials undertook the prosecution within their discretionary authority and on the basis of evidence revealing the occurrence of a violation of Illinois state law. *Id.* at 123. On the second issue, the Court rejected the contention that the subsequent state prosecution violated the Due Process Clause of the Fourteenth Amendment and reasoned that the Fifth Amendment was not effective against the states. *Id.* at 124–26. The Court cited *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852), and noted that, because the laws of two sovereigns were applicable, the same act produced two offenses; therefore, the second prosecution did not put Bartkus twice in jeopardy for the same offense. *Bartkus*, 359 U.S at 131–32.

31. Abbate v. United States, 359 U.S. 187 (1959). In *Abbate*, the defendants previously pleaded guilty in state court to conspiring to injure or destroy the property of another. *Id.* at 188. After the defendants received a three-month sentence, a federal grand jury indicted them, and their federal court trial resulted in a conviction for violating the Federal Conspiracy Act. *Id.* at 188–89. At issue was whether the subsequent federal prosecution violated the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 189. Relying on *Lanza* and *Bartkus*, the *Abbate* Court determined that the federal conviction did not violate the Double Jeopardy Clause and thus upheld the conviction. *Id.* at 189–95. The Court reasoned that "unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions." *Id.* at 195.

32. *Bartkus*, 359 U.S. at 138.

33. *Id.* at 136.

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

35. *Id.* at 195.

the doctrine to authorize subsequent prosecutions by an Indian tribe and by the federal government.[36] Second, the Court held that separate states may prosecute a defendant for the same act.[37] In so doing, the Court noted that it "ha[d] plainly and repeatedly stated that two identical offenses are not the same offense within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."[38]

Currently, the dual sovereignty doctrine is limited in only three areas.[39] First, under the Petite Policy, adopted by the United States Department of Justice in 1959, the United States voluntarily abstains from bringing a federal action following a state prosecution unless the reasons for the federal prosecution are "compelling" and the appropriate Assistant Attorney General grants authorization.[40] However, the policy is not law, nor is it judicially enforceable,[41] and successive prosecutions, although rare, continue to occur despite the policy.[42] Second, many states have statutes or constitutional provisions that prohibit a state prosecution following a federal prosecution for the same conduct or offense.[43] Finally, the doctrine is limited by the sham

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36. *See* United States v. Wheeler, 435 U.S. 313, 328 (1978) (concluding that when Navajo tribe exercises power to punish offenses against tribal laws committed by tribe members, "it does so as part of its retained sovereignty and not as an arm of the Federal Government").

37. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985) (noting that dual sovereignty doctrine, as originally articulated and consistently applied by Court, compels conclusion that Double Jeopardy Clause does not bar successive prosecutions by two states for same conduct).

38. *Id.* at 92.

39. *See infra* notes 40–49 and accompanying text (noting limitations).

40. *See* United States v. Valenzuela, 584 F.2d 374, 375–76 (10th Cir. 1978) (recounting history of Petite Policy, which was named after Supreme Court case of *Petite v. United States*, 361 U.S. 529 (1960)). The United States Department of Justice incorporated this policy into the United States Attorneys' Manual. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (1999) (outlining guidelines for exercise of discretion by Department of Justice in determining whether to bring federal prosecution based on "substantially the same act(s) or transactions involved in a prior state or federal proceeding"), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031 (last visited Jan. 6, 2003).

41. *See* United States v. Raymer, 941 F.2d 1031, 1037 (10th Cir. 1991) (noting that court has consistently recognized dual sovereignty rule by holding that defendant is not entitled to dismissal of indictment even if Government does not comply with Petite Policy); United States v. Alston, 609 F.2d 531, 537 (D.C. Cir. 1979) (stating that Petite Policy provides no basis for substantive relief); United States v. Byars, 762 F. Supp. 1235, 1240 n.6 (E.D. Va. 1991) (same).

42. *See* Guerra, *supra* note 14, at 1207–09 nn.245–46 (listing numerous cases of successive federal-state and state-federal prosecutions).

43. *See* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 404 n.150 (1986) (listing such state statutes); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 294 (1992) (noting that, as of 1992, twenty-three states had statutes limiting

exception.[44] The *Bartkus* Court suggested the sham exception when it noted that the Double Jeopardy Clause would bar successive prosecutions in cases in which "the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution."[45] Relying upon this language, several courts have recognized the exception.[46] Yet, like the other limitations to the dual sovereignty doctrine, courts construe the sham exception very narrowly.[47] Significant cooperation between state and federal authorities does not provide a basis for applying the exception.[48] Nor does the cross-designation of a state district attorney as a federal official to assist or to conduct a federal prosecution satisfy the exception.[49]

C. Rationale and Criticism of the Doctrine

The Supreme Court has upheld the dual sovereignty doctrine based on its concern that elimination of the doctrine would undermine federalism by jeopardizing the distinct relationship between the federal and state governments.[50] The most widely cited rationale for the dual sovereignty doctrine is

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dual sovereignty doctrine).

44. *See* Bartkus v. Illinois, 359 U.S. 121, 124 (1959) (suggesting sham exception).

45. *Id.*

46. *See* United States v. G.P.S. Auto. Corp., 66 F.3d 483, 494 (2d Cir. 1995) (recognizing and defining *Bartkus* exception); United States v. Davis, 906 F.2d 829, 832–34 (2d Cir. 1990) (same); United States v. Guy, 903 F.2d 1240, 1242 (9th Cir. 1990) (same); United States v. Aboumoussallem, 726 F.2d 906, 910 (2d Cir. 1984) (same).

47. *See* United States v. Paiz, 905 F.2d 1014, 1024 (7th Cir. 1990) ("[T]he 'sham prosecution' exception to the dual sovereignty doctrine, if it exists at all, is a narrow one, an extremely narrow one. Cases of this Court dealing with claims of 'sham prosecutions' have recognized this: We have uniformly rejected such claims. Other circuits have done likewise.").

48. *See G.P.S. Auto. Corp.*, 66 F.3d at 495 (stating that significant cooperation does not fall under exception); United States v. Whalers Cove Drive, 954 F.2d 29, 38 (2d Cir. 1992) (same); United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987) (explaining that *Bartkus* exception clearly does not bar cooperation between prosecuting authorities).

49. *See G.P.S. Auto. Corp.*, 66 F.3d at 495 (explaining that cross-designation of attorneys does not fall under exception); *see also* United States v. Figueroa-Soto, 938 F.2d 1015, 1019 (9th Cir. 1991) (finding that designation of state prosecutor as Special Assistant to United States Attorney was not significant); United States v. Safari, 849 F.2d 891, 893 (4th Cir. 1988) (same). *But cf.* United States v. Belcher, 762 F. Supp. 666, 671 (W.D. Va. 1991) (holding that cross-designation of state attorney who conducted initial state trial amounted to "breakdown in federalism," and thus subsequent federal prosecution was "simply 'a sham and a cover' for the first"), *request for modification denied*, 769 F. Supp. 201 (W.D. Va. 1991). Although the court ultimately decided the case on other grounds, the *Belcher* court appears to be the only court to find a sham prosecution. *Id.* However, courts should limit the *Belcher* case to its very unusual factual circumstances.

50. *See* Heath v. Alabama, 474 U.S. 82, 92 (1985) (explaining that dual sovereignty exception finds weighty support in historical understanding and political realities of states' role

the argument that federalism requires each government to have the right to prosecute accused criminals within its jurisdiction because a single act is an offense against the peace and dignity of both the federal and state governments.[51] This argument considers the possibility that one sovereign may negate the ability of the other to punish the wrongdoer adequately,[52] the concern that if courts prohibit successive prosecutions, an unseemly competition among states in the prosecution of offenses will result,[53] and the belief that one sovereign's prosecution cannot vindicate another sovereign's interest in the enforcement of its own laws.[54]

Although firmly established in American jurisprudence,[55] the dual sovereignty doctrine is certainly not without its criticisms. The most frequently cited and forceful argument against the exception is that it violates the spirit and the letter of the Double Jeopardy Clause of the Fifth Amendment.[56] This view has ample support. First, the history of the Fifth Amendment shows that the Framers rejected such an exception.[57] Second, the spirit of the Double

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in federal system); Bartkus v. Illinois, 359 U.S. 121, 137 (1959) (noting that to displace reserved power of states over state offenses by reason of prosecution of federal offenses would derogate federal system); *see also* Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metropolitan Transit Authority, 22 NEW ENG. L. REV. 31, 31 (1987) (noting that putative justification for dual sovereignty exception is federalism); Murchison, *supra* note 43, at 403 (discussing influence of Supreme Court's concern over federalism in shaping dual sovereignty doctrine).

51. *See Heath*, 474 U.S. at 88 (noting that dual sovereignty doctrine is founded on common law conception of crime as offense against sovereignty of government and that when defendant violates peace and dignity of two sovereigns by breaking laws of each, defendant commits two distinct offenses); *Bartkus*, 359 U.S. at 131–32 (same); United States v. Lanza, 260 U.S. 377, 382 (1922) (same).

52. *See* United States v. G.P.S. Auto. Corp., 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (discussing rationales for continuing vitality of dual sovereignty doctrine).

53. *See Heath*, 474 U.S. at 93 (stating that to deny State power to enforce its criminal laws because another State wins race to courthouse "would be a shocking and untoward deprivation of the historic right and obligations of the States to maintain peace and order within their confines" (quoting *Bartkus*, 359 U.S. at 137)).

54. *See id.* (noting that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws").

55. *See* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 15 (1992) (stating that "[o]ne can no longer credibly question whether the rule permitting successive federal-state prosecutions has been 'firmly established'").

56. Guerra, *supra* note 14, at 1161–62.

57. *See* Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 816 (1985) (noting that best evidence of Framers' intent shows that they did not intend exception for separate federal and state prosecutions of same act); *see also* Christina G. Woods, Comment,

Jeopardy clause, as captured by Justice Black's famous language, guarantees that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[58]

Clearly, successive prosecutions undermine this spirit of the Double Jeopardy Clause by subjecting individuals to the harassment, embarrassment, and expense of reprosecutions.[59] Similarly, the doctrine is susceptible to criticism regarding the nature of the double jeopardy protection itself. Courts have described the nature of the double jeopardy protection as an "intrinsically personal" protection.[60] Thus, to eliminate such a protection in the name of sovereignty is especially difficult to justify given that the interests the Double Jeopardy Clause seeks to protect are those of individuals, not of a sovereign or even the people of that sovereign.[61] Furthermore, because the purpose of the Bill of Rights is to restrict a sovereign's power through placing limits on government, to allow courts to diminish an essential element of the Bill of Rights in the name of sovereignty is to compromise the integrity of the Constitution.[62]

That the Supreme Court invokes federalism concerns to support the dual sovereignty doctrine is also arguably inconsistent with the Court's decisions that reject dual federalism for a more functional view of the allocation of powers between state and federal governments.[63] Critics point to decisions of

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The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole, 24 U. BALT. L. REV. 177, 179–80 (1994) (arguing that failure of passage of proposed addendum to Bill of Rights that would have added words "by any law of the United States" to conclusion of Fifth Amendment's Double Jeopardy Clause strengthens argument that Fifth Amendment bars successive trials between any jurisdiction).

58. United States v. Green, 355 U.S. 184, 187–88 (1957).

59. *See* Guerra, *supra* note 14, at 1210 (explaining that Double Jeopardy Clause is not mere technicality).

60. United States v. Halper, 490 U.S. 435, 447 (1989).

61. *See* United States v. G.P.S. Auto. Corp., 66 F.3d 483, 498 (2d Cir. 1995) (Calabresi, J., concurring) ("[I]t is hard to justify limiting the reach of the Bill of Rights . . . on no stronger grounds . . . [than] the interests of the sovereigns involved.").

62. *See* Grant, *supra* note 29, at 1329 ("By very definition, the purpose of a bill of rights is to restrict sovereignty through placing limitations upon an otherwise legally omnipotent government.").

63. *See* Lee, *supra* note 50, at 52 (arguing that, because several modern Supreme Court decisions challenge substantive federalism, courts should begin thinking earnestly about future of dual sovereignty exception); Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy*

the Court that have made the Double Jeopardy Clause binding on the states.[64] Likewise, the reasoning of the Court in incorporating the Fourth Amendment's protections against illegal searches and seizures to the states,[65] and in incorporating the Fifth Amendment's protection against self-incrimination to the states,[66] illustrates this changing view of the nature of federalism. The dramatic changes in the relationship between the federal and state governments since the development of the doctrine also undermine the Supreme Court's rationale for upholding the dual sovereignty exception based on concerns over federalism.[67] In recent years, Congress has enormously enlarged the scope of federal criminal law, and cooperation between federal and state authorities in investigating and prosecuting crimes is now common.[68] Governments that cooperate with one another to solve the problems of a common constituency are thus not separate sovereigns in any sense.[69]

Finally, critics argue that whereas federalism's original purpose was the promotion of individual liberty and human freedom, the dual sovereignty doctrine frustrates those policies by allowing successive prosecutions.[70] They argue that a single prosecution of a single crime serves the interests and justifications of criminal law, such as deterrence, retribution, and restoration of the

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Clause: If At First You Don't Convict, Try, Try Again, 24 FORDHAM URB. L.J. 353, 370–71 (1997) (outlining Supreme Court decisions that undercut dual sovereignty doctrine).

64. *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (finding that retrial of defendant by State of Maryland for larceny, after previous state court trial resulted in acquittal for same crime, violated constitutional prohibition against double jeopardy).

65. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that all evidence obtained by searches and seizures in violation of Constitution is inadmissible in state court).

66. *See* Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding that Fourteenth Amendment guaranteed petitioner protection of Fifth Amendment's privilege against self-incrimination); *see also* Murphy v. Waterfront Comm'n, 378 U.S. 52, 77–79 (1964) (finding separate sovereignty theory of self-incrimination historically unfounded). Thus, the *Murphy* Court held that the privilege against self-incrimination protected a state witness against incrimination under federal and state law, as well as a federal witness against incrimination under federal and state law. *Id.*

67. *See* Braun, *supra* note 55, at 9 (arguing that as laws increase incidence of successive prosecutions, manner in which law enforcement officials enforce laws demonstrates corresponding need to re-examine rule and rationale of dual sovereignty doctrine).

68. *See* United States v. Davis, 906 F.2d 829, 831 (2d Cir. 1990) (noting that cooperation between federal and local agencies in area of law enforcement has become increasingly important and commonplace); *see also* Guerra, *supra* note 14, at 1163 (stating that "the creation of a massive, federally-operated criminal justice system turns the theory of our federalist system on its head").

69. *See* Guerra, *supra* note 14, at 1159 (arguing that, at least in field of law enforcement, nation is no longer one of separate sovereigns).

70. *See* Allen & Ratnaswamy, *supra* note 57, at 823 (arguing that *Heath* Court's justification for dual sovereignty is erroneous because state and federal governments protect same interest).

public confidence, just as well as successive prosecutions.[71] In fact, these critics point out that "[t]he only interests which cannot be served by a prior prosecution in another's state courts are the desire to inflict upon an individual the very multiple trials and punishments which the double jeopardy clause was meant to bar, and the desire to be the actual agent of punishment."[72] This criticism is especially poignant in light of the most notorious uses of the dual sovereignty exception[73]—cases that, while politically popular, reinforce the idea that the Constitution should not be abridged to placate public discontent.[74] To give the prosecution "a second bite at the apple" in such emotionally charged contexts undermines the purpose of the Double Jeopardy Clause by increasing the possibility that a defendant, though innocent, will nevertheless be found guilty.[75]

III. The Dual Sovereignty Doctrine and Suppression Rulings

Despite the foregoing criticisms, the dual sovereignty doctrine appears to be an enduring component of the criminal justice system.[76] The particular application of the doctrine in suppression of evidence proceedings implicates various other considerations important to this Note. To fully appreciate how courts use the doctrine, a brief explanation of exclusionary devices, as well as the jurisprudence concerning the dual sovereignty doctrine as applied to suppression of evidence cases, is necessary.

A. State Versus Federal Exclusionary Devices

Evidence obtained in violation of the Fourth Amendment of the United States Constitution is inadmissible in both federal and state courts under the exclusionary rule.[77] In a federal prosecution, federal law determines whether

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71. *See id.* (noting various justifications of criminal law).

72. *Id.*

73. *See* United States v. G.P.S. Auto. Corp., 66 F.3d 483, 499 (2d Cir. 1995) (Calabresi, J., concurring) (discussing recent notable examples of federal-state prosecutions, such as federal prosecution after state jury acquitted police officers accused of using excessive force on Rodney King, and federal prosecution after state jury acquitted African American youth of murdering Hasidic Jew).

74. *See* Matz, *supra* note 63, at 373 ("Admittedly, when our system of justice apparently fails us, it is often both desirable and reassuring when the federal government vindicates the interests of society. However, as the Supreme Court has held in other contexts, protections guaranteed by the Constitution cannot be abridged in order to mollify public disquiet.").

75. *See supra* note 59 and accompanying text (discussing spirit of Double Jeopardy Clause).

76. *See supra* note 55 and accompanying text (explaining endurance of dual sovereignty doctrine).

77. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that all evidence obtained by

suppression of evidence is appropriate under the Fourth Amendment regardless of whether state or federal officials seized the evidence.[78] However, because many states' constitutions and laws offer protections greater than those under the Fourth Amendment, evidence obtained in accordance with the Fourth Amendment may still violate state law.[79] Thus, when a federal court considers the suppression of evidence under federal law, it may allow the admission of evidence that violates a particular state's constitutional protections but does not violate the Fourth Amendment.[80] Given this scheme, when reviewing a state proceeding, federal courts may have difficulty in differentiating whether the state court suppressed evidence on federal or state exclusionary grounds.[81]

Until the 1960 case of *Elkins v. United States*,[82] the federal government

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searches and seizures in violation of Constitution is inadmissible in state court). Thus, if law enforcement officials violate the Fourth Amendment during a search or seizure and a prosecutor subsequently offers the fruits of that violation against a defendant, a court may suppress the evidence from use in the defendant's criminal trial. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.1 (3d ed. 1996) (describing remedy for Fourth Amendment violations).

78. *See* Preston v. United States, 376 U.S. 364, 366 (1964) (noting that courts must consider evidence obtained by state officers and used against defendant in federal trial as if federal officers made search and seizure); United States v. Turner, 558 F.2d 46, 49 (2d Cir. 1977) (noting that because case was federal prosecution, federal law determines whether suppression is appropriate).

79. *See* LAFAVE, *supra* note 77, § 1.5(a) (noting that, while particular search or seizure may not offend United States Constitution, search or seizure may be unlawful or illegal per state constitutional provision or statute).

80. *Id.*

81. *See id.* (describing difficulty in distinguishing between these two exclusionary grounds). The Supreme Court clarified these situations in *Michigan v. Long*, 463 U.S. 1032 (1983), by establishing a standard by which federal courts can determine if a state court decided a case on an "adequate and independent state ground" or on a federal constitutional ground. *Id.* at 1040–41. The difficulty of this distinction is important to this Note because this Note considers only those cases in which a state court clearly suppressed evidence on federal constitutional grounds.

82. Elkins v. United States, 364 U.S. 206 (1960). The *Elkins* Court addressed the issue of whether federal prosecutors could introduce articles obtained from an unreasonable search and seizure by state officers—without the involvement of federal officers—against the defendant in a federal criminal trial. *Id.* at 208. Prior to the defendant's federal trial, the defendant made a motion to suppress evidence originally seized by state law enforcement officers. *Id.* at 206–08. At the suppression hearing, the district court judge assumed, without deciding, that the state officers obtained the articles in violation of the Fourth Amendment, but denied the motion because no agent of the United States participated in the illegal search. *Id.* at 207. In its analysis, the Supreme Court considered the case of *Wolf v. Colorado*, 338 U.S. 25 (1949), in which it had held that the Fourteenth Amendment prohibits unreasonable searches and seizures by state officers, but found that this alone did not require federal courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents. *Elkins*, 354 U.S. at 213–14. In light of the underlying constitutional doctrine established by *Wolf*, the Court stated

could avail itself of evidence improperly seized by state officers operating independently of federal officers even though, had federal officials participated in the search, a court would have excluded such evidence under the Fourth Amendment.[83] The premise of the practice, called the "silver platter doctrine," was that the federal government could use the fruits of a search conducted by state officials in violation of the Fourth Amendment as if the state authorities had turned over the evidence they secured to the federal authorities on a silver platter.[84] However, the *Elkins* Court found this doctrine inconsistent with the rights protected by the Fourth Amendment.[85] Accordingly, the *Elkins* Court held that evidence obtained by state officials during a search that would have violated the defendant's Fourth Amendment rights if federal officers had conducted the search was inadmissible in a federal proceeding.[86] The demise of the silver platter doctrine demonstrates that, although federal courts at one time could allow the introduction of evidence that a state official obtained illegally, a violation of a defendant's Fourth Amendment rights by either sovereign is presently prohibited.

B. The Dual Sovereignty Doctrine as Applied to Suppression Rulings

The sound rejection of the silver platter doctrine is key to understanding the inherent incongruity in applying the dual sovereignty doctrine to suppression of evidence cases. First, when a state court considers a suppression issue, the Fourth Amendment binds the state court just as it does a federal court.[87] Similarly, the Fourth Amendment binds both state and federal law enforcement officers who conduct searches and seizures.[88] However, when a state court suppresses evidence on federal constitutional grounds, a federal court may allow introduction of the evidence in a collateral proceeding that occurs under

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that the foundation of the inapplicability of the exclusionary rule to state officers had disappeared. *Id.* at 213. Thus, the Court concluded that evidence obtained by state officers in violation of the Fourth Amendment was inadmissible in the defendant's federal trial, noting that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

83. *See* Byars v. United States, 273 U.S. 28, 33 (1927) (noting certainty of federal government's right to avail itself of evidence improperly seized by state officers operating entirely upon own account).

84. Lustig v. United States, 338 U.S. 74, 78–79 (1949).

85. *See Elkins*, 364 U.S. at 223 (overruling silver platter doctrine).

86. *Id.*

87. *See supra* note 77 and accompanying text (explaining that evidence obtained in violation of Fourth Amendment is inadmissible in state court).

88. *See supra* note 85 and accompanying text (discussing demise of silver platter doctrine).

the dual sovereignty exception without considering the state court's earlier suppression ruling.[89]

The United States Court of Appeals for the Fourth Circuit confronted this very scenario in *United States v. Safari*.[90] In *Safari*, the Commonwealth of Virginia charged Safari with possession of heroin with intent to distribute, but a state court later suppressed items seized from Safari's residence on the ground that the search warrant was invalid.[91] The Commonwealth subsequently dropped the charges against Safari, but then a federal grand jury indicted Safari on drug-related violations stemming from the same transaction alleged in the state court charges.[92] Following his conviction, Safari appealed, contending that the district court erred by failing to apply the principles of collateral estoppel to his pretrial motion to suppress.[93] The *Safari* court rejected the defendant's contention and held that collateral estoppel did not apply because the federal government was not a party to the state court action.[94] The court held that even though the federal government appointed the Assistant Commonwealth's Attorney from Safari's state case as a Special Assistant United States Attorney for prosecution of Safari's federal case, the appointment was subsequent to the state court action, and thus that executive branch function did not retroactively make the federal government a party to the earlier state proceeding.[95]

The *Safari* court did not fully explore why the dual sovereignty doctrine, coupled with principles of collateral estoppel, would prevent federal judges from considering a state court suppression ruling as binding on the federal collateral proceeding. Yet courts considering factual scenarios similar to

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89. *See infra* notes 90–107 and accompanying text (outlining court decisions that allow introduction of such evidence).

90. United States v. Safari, 849 F.2d 891 (4th Cir. 1988).

91. *Id.* at 892–93.

92. *Id.* at 893.

93. *Id.*

94. *Id.* The *Safari* Court relied on *United States v. Mejias*, 552 F.2d 435 (2d Cir. 1977), in which the United States Court of Appeals for the Second Circuit held that a prior state court ruling to suppress did not foreclose a federal prosecution arising from the same facts. *Safari*, 849 F.2d at 893 (citing *Mejias*, 552 F.2d at 441). The *Mejias* court cited previous Second Circuit decisions finding that a prior adverse suppression issue in state court does not collaterally estop the United States, which was not a party to the state action, from using the evidence in a federal proceeding. *Mejias*, 552 F.2d at 444. The Court also noted that "[w]hen the success of the state prosecution was seriously jeopardized by the state court suppression ruling . . . it became the clear duty of the federal authorities to proceed against the individuals involved . . . ." *Id.* at 441.

95. *Safari*, 849 F.2d at 893.

Safari follow that court's rationale.[96] In *United States v. Davis*,[97] the United States Court of Appeals for the Second Circuit explored the circumstances in which cooperation between federal and state law enforcement operations becomes so close that the federal government should be bound by a state court's suppression ruling.[98] After discussing the origin and purpose of the dual sovereignty doctrine, the *Davis* court stated that, for reasons analogous to the rationale of the dual sovereignty doctrine, suppression of evidence in a state prosecution normally does not prevent the United States from using that evidence in a federal proceeding.[99] Like the *Safari* court, the *Davis* court reasoned that, because the United States was not a party to the state action, was not present during the suppression hearing, and had no way of making its views known to the state judge, it could not fairly be considered to have had its day in court.[100] The *Davis* court then concluded that "[b]ecause the two prosecutions [were] independent, 'one sovereign should not be bound by the evidence or the strategy of the other.'"[101] The *Davis* court considered it firmly established "that 'collateral estoppel never bars the United States from using evidence previously suppressed in a state proceeding in which the United States was not a party,'"[102] yet it left open the possibility that under some circum-

96. *See infra* notes 97–107 and accompanying text (discussing case law that follows *Safari* rationale).

97. United States v. Davis, 906 F.2d 829 (2d Cir. 1990). In *Davis*, the court considered the issue of whether the suppression of evidence by a state court required the suppression of that same evidence in a later federal prosecution against the same defendants. *Id.* A district court granted the defendants' motion to suppress evidence, which a state court had previously suppressed, on collateral estoppel grounds. *Id.* at 831–32. However, the Second Circuit disagreed with the district court's ruling and reasoned that, because different sovereigns were involved in the previous and subsequent prosecutions, collateral estoppel did not apply. *Id.* at 832. The court rejected the defendants' argument that the relationship between the federal and state prosecutors was so close that it placed the federal government in privity with the state prosecution. *Id.* at 833–34. The court noted that the task force who arrested the defendant was comprised of both federal and state officers. *Id.* at 834. But the court stated that, because the task force officers did not file the charges or otherwise control the prosecutions, their status as federal agents was not determinative of the privity issue. *Id.* The *Davis* court left open the question concerning what level of participation a court would require before it would recognize privity and apply collateral estoppel; however, the court noted that "[a]t a minimum, it must be shown that federal prosecutors actively aided the state prosecutors during the local suppression hearing. Only then can it be said that their interests in enforcing federal law were sufficiently represented." *Id.* at 835.

98. *See id.* at 831 (discussing circumstances in which federal government is bound by state court determination).

99. *Id.* at 832.

100. *Id.*

101. *Id.* (quoting United States v. Ramirez, 404 F. Supp. 273, 275 (W.D. Tex. 1974)).

102. *Id.* (quoting United States v. Panebianco, 543 F.2d 447, 456 (2d Cir. 1976)); *see also*

stances the United States could be in privity with a party in the prior proceeding; therefore, principles of collateral estoppel could apply.[103]

The United States Court of Appeals for the Eleventh Circuit further considered these circumstances in *United States v. Perchitti*.[104] In *Perchitti*, the court stated that an open question existed as to whether issue preclusion applied in the criminal context that would bar one governmental entity from relitigating a pretrial suppression order previously rendered against another governmental entity.[105] Finding no need to decide the applicability of issue preclusion to successive criminal prosecutions by multiple sovereigns because

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United States v. Charles, 213 F.3d 10, 21 (1st Cir. 2000) (finding that state court suppression ruling does not collaterally estop federal government from using wiretap evidence in subsequent federal prosecution because courts have firmly established that ruling in state prosecution will collaterally estop federal government only if federal authorities substantially controlled state action or if state court prosecutor virtually represented federal government). In *Charles*, the United States Court of Appeals for the First Circuit went on to state that it joined the Fourth and Eleventh Circuits in holding that the appointment of a state prosecutor as a special federal prosecutor, subsequent to the state court action, does not retroactively make the federal government a party to an earlier state court proceeding. *Id.*; United States v. Peterson, 100 F.3d 7, 12 (2d Cir. 1996) (noting, in context of previous state court suppression ruling, that defendant generally may not invoke criminal collateral estoppel against one sovereign on basis of ruling in prosecution brought by different sovereign); United States v. Lloyd, 10 F.3d 1197, 1209 (6th Cir. 1993) (stating that prior adverse suppression decision in state court simply does not preclude federal government, which was not party to state action, from using evidence in federal proceeding); United States v. Culbreath, Nos. 89-5590, 89-6004, 1990 WL 148420, at *2 (4th Cir. Oct. 9, 1990) (per curiam) (holding that state court finding of unconstitutionality of search is not binding on district court and that collateral estoppel does not preclude district court from reviewing constitutionality of search de novo); United States v. Beigel, 370 F.2d 751, 755 (2d Cir. 1967) (noting that principles of collateral estoppel do not bar federal government from using evidence suppressed by state court because United States was not party to state proceeding); United States v. Ealy, 163 F. Supp. 2d 633, 635 (W.D. Va. 2001) (finding that federal court was not bound by principles of res judicata or comity to follow earlier decision by state court to exclude evidence).

103. *See* United States v. Davis, 906 F.2d 829, 835 (2d Cir. 1990) (noting that, at minimum, defendant must show federal involvement in state suppression hearing). For an interesting discussion concerning the circumstances in which the United States could be in privity with a state in these contexts, see *Londono-Rivera v. Virginia*, 155 F. Supp. 2d 551, 564–68 (E.D. Va. 2001).

104. United States v. Perchitti, 955 F.2d 674 (11th Cir. 1992). At issue in *Perchitti* was whether the district court erred in failing to apply issue preclusion to the defendant's motion to suppress because a state judge suppressed the same evidence in a previous state action for the same conduct. *Id.* After applying the traditional privity tests, including the presence of multiple sovereigns, the court found that the level of cooperation between federal and state officials did not establish privity between the state and federal government and thus issue preclusion did not apply. *Id.* at 676–77.

105. *See id.* at 675 (noting that First and Fourth Circuits recognize that issue preclusion may apply in criminal context).

no privity existed between Florida and the United States, the court did little to answer this question.[106] The court recounted a number of traditional considerations relevant to determining privity, but concluded that the Supreme Court's establishment of the dual sovereignty exception for double jeopardy offered the strongest support that separate sovereigns cannot be in privity with one another.[107]

C. Summary

Case law firmly supports the reasoning that collateral estoppel does not apply when different sovereigns, and thus different parties, are involved in the litigation.[108] Courts primarily support this rationale by pointing to the traditional principles of collateral estoppel and the endurance of the dual sovereignty concept.[109] Thus, when a federal court under the dual sovereignty exception considers evidence that a state court previously suppressed on federal constitutional grounds, it considers the evidence anew. A defendant who succeeded in suppressing evidence during a state proceeding must relitigate this issue in federal court. Many of the criticisms of the dual sovereignty exception are applicable to these situations because subjecting an individual to the expense, ordeal, and anxiety of relitigating the admission of evidence undermines the purpose and spirit of the Double Jeopardy Clause.[110] Therefore, this Note will implicate these situations—situations that, though perfectly legal, are nevertheless so similar to collateral habeas proceedings that recent congressional action concerning habeas should weigh heavily on federal courts' actions.

IV. Analogizing Federal Habeas Proceedings to Federal Dual Sovereignty Proceedings

A necessary assumption to applying this Note's proposal is that habeas corpus proceedings are analogous to collateral proceedings that occur under the dual sovereignty exception. Several potential problems challenge this assumption. First, the parties to a federal proceeding that follows a state

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106. *Id.* at 676.

107. *See id.* (noting that, when parties at issue are sovereigns, Supreme Court's teaching in double jeopardy context provides additional guidance for privity inquiry).

108. *See supra* notes 90–107 and accompanying text (discussing applicable case law); *see also* United States v. Ricks, 882 F.2d 885, 890 (4th Cir. 1989) (finding that doctrine of collateral estoppel was inapplicable to prosecution by dual sovereigns).

109. *See Ricks*, 882 F.2d at 890 (noting that inapplicability of collateral estoppel flows from Supreme Court's definition of collateral estoppel and from Court's continuing endorsement of dual sovereignty doctrine in related contexts).

110. *See supra* Part II.C (discussing criticism of dual sovereignty doctrine).

proceeding in the dual sovereignty context are different from the parties to a federal proceeding that follows a state proceeding in the habeas context. In the dual sovereignty context, the parties are the federal government and the defendant. In the habeas context, the parties are the petitioner for a writ of habeas corpus (the defendant in the state prosecution) and usually the warden of the prison where the state government holds the petitioner.[111] Second, successive federal prosecutions that occur under dual sovereignty are not normally considered collateral to the previous state prosecution. This section addresses these problems by explaining why the parties in a federal habeas proceeding are analogous to the parties in a federal dual sovereignty proceeding and why a successive federal prosecution under dual sovereignty is collateral to the previous state prosecution.

A. The Writ of Habeas Corpus

Before delving into the intricacies of party identity, a brief history of the function and origin of the writ of habeas corpus is necessary. The history of habeas corpus is important to understanding this Note's proposal for two reasons. First, it helps to place the discussion of party identity in the proper historical context.[112] Second, it demonstrates that, at its core, habeas corpus in the United States is about federalism.[113]

1. The General Function and Origin of the Writ

Translated literally, "habeas corpus" means "you have the body."[114] The primary function of the "Great Writ of Liberty" is to release a person from unlawful imprisonment—it serves to ensure the integrity of the process resulting in imprisonment.[115] The purpose of the writ, then, is not to deter-

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111. *See* DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF § 8-38 (1996) (noting that when state incarcerates petitioner in state prison facility, usual procedure is to name as respondent either warden of institution where state is incarcerating prisoner or chief officer in charge of state penal institutions).

112. *See infra* Part IV.A.2 (demonstrating how *ex rel.* form derives from prerogative nature of writ of habeas corpus).

113. *See infra* note 127 and accompanying text (discussing close relation of habeas corpus to notions of federalism in United States).

114. BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

115. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980) (describing purpose of habeas corpus); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (2001) (noting that "habeas corpus is universally known and celebrated as the 'Great Writ of Liberty'").

mine a prisoner's guilt or innocence, but rather to determine whether the state has denied the prisoner's liberty in violation of federal law.[116]

The writ originated in England as a device for compelling appearance before the King's judicial instrumentalities.[117] Although the date of the writ's origin is unknown, it was in use before the Magna Carta and was firmly established in England by the end of the thirteenth century.[118] All thirteen American colonies recognized the common law writ of habeas corpus.[119] However, scholars and jurists have debated the circumstances under which the writ evolved in the United States into its present form.[120] The United States Constitution mentions habeas corpus,[121] but whether this reference is to state or federal habeas remedies is unclear.[122]

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116. *See* Fay v. Noia, 372 U.S. 391, 401–02 (1963) (discussing purpose and history of writ of habeas corpus), *abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

117. *See* DUKER, *supra* note 115, at 62 (discussing English origins of writ of habeas corpus).

118. *See* CHESTER J. ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES § 1.00 (1987) (describing history of habeas corpus). The courts of England used habeas corpus as a means to increase and safeguard their jurisdictions from the fourteenth through seventeenth centuries. *See* DUKER, *supra* note 115, at 62 (discussing English origins of writ of habeas corpus). Later, when Parliament fought to restrain the Crown's powers to imprison, the executive and judicial branches of England employed the writ in their battle for jurisdiction. *Id.* at 62–63. Thus, the idea that habeas corpus originated primarily to protect a subject from illegal imprisonment is largely a myth. *Id.* at 13. Scholars note that "the unconscious forces of constitutional law crystallized the basic function of the writ as we know it today." *Id.* at 62.

119. *See* DUKER, *supra* note 115, at 115 (discussing history of writ of habeas corpus in America).

120. *See* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 928 (1998) (noting that scholars have vehemently debated and voluminously written about history of habeas corpus).

121. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

122. *Compare* DUKER, *supra* note 115, at 155 (arguing that habeas clause in Constitution was meant to restrict Congress from suspending state habeas) *with Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1267 (1970) (arguing that clause was meant to protect federal prisoners). In either case, the Judiciary Act of 1789 made the writ available only to federal prisoners. *See* Judiciary Act of 1789, 1 Stat. 73, 81–82 (codified as amended in scattered sections of 28 U.S.C.) (conferring upon courts of United States power to issue writ of habeas corpus). However, in the aftermath of the Civil War, primarily out of a concern for the protection of African American citizens, Congress extended the writ to state prisoners. *See* Charles F. Baird, *The Habeas Corpus Revolution: A New Role For State Courts?*, 27 ST. MARY'S L.J. 297, 300 (1996) (noting extension of writ in 1867). In granting the writ, courts continued to adhere to the traditional view of federal habeas review that limited the court's consideration to issues involving the jurisdiction of the sentencing court. *Id.*

Despite this early uncertainty, by the 1950s federal habeas emerged as an opportunity for full relitigation of federal constitutional claims arising from state criminal prosecutions.[123] By the early 1970s, federal habeas corpus for state prisoners "had become the principal instrument for assuring that state criminal proceedings were conducted in accordance with federal constitutional requirements," thus evincing "the transcendental, overriding importance of federal rights."[124] However, since this expansion, the federal courts and Congress have retrenched federal habeas relief for state prisoners, and such relief has become entangled in a maze of substantive and procedural restrictions.[125] A key aspect of this retrenchment has been the insistence of the Burger and Rehnquist Courts that federal courts respect the proper place of state courts in the federal system.[126]

The important point underlying this brief sketch of habeas corpus history is that "[t]hroughout this century in the United States, habeas corpus has been the medium of the dialogue of federalism between the federal and state courts."[127] In few other areas has the tension in the balance of power between the federal and state governments been more apparent. This history helps demonstrate why habeas is such an appropriate vehicle for studying congressional views on federalism.

2. *The Pleading and Practice of the Writ*

As noted, in order to apply the congressional intent behind recent habeas reforms to other collateral proceedings, the proceedings in the habeas corpus context must be analogous to the proceedings in the dual sovereignty context. Although the United States, as sovereign, is implicated in a federal prosecution following a state prosecution in the dual sovereignty context, the United States, as sovereign, is not considered a party to a federal habeas action in

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123. Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1725 (2000) (explaining expansion of federal habeas for state prisoners in conjunction with *Brown v. Allen*, 344 U.S. 443 (1953)).

124. WILKES, *supra* note 111, § 3-2 (1996).

125. *See* Baird, *supra* note 122, at 305–11 (noting cases that have increased restrictions on habeas corpus); *see also* WILKES, *supra* note 111, § 3-2 (noting that "since around 1972 . . . the United States Supreme Court has been engaged in an assiduous effort to restrict the availability of federal habeas corpus relief [for state convicts]" (quoting Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 4 (1978))).

126. *See* WILKES, *supra* note 111, § 3-2 (discussing Burger-Rehnquist Courts' narrow view of fact-finding power of federal habeas courts).

127. DUKER, *supra* note 115, at 156; *see also* FREEDMAN, *supra* note 115, at 1 (noting that federal habeas corpus is closely linked to federalism).

which a state prisoner challenges the state detention.[128] However, a strong argument can be made regarding the *ex rel.* form of pleading that courts historically used in some habeas proceedings and that is still in use today.

Ex rel. is an abbreviation for the Latin word *ex relationale*, meaning "upon being related" or "upon information."[129] Several federal courts of appeals and state courts employ the phrase in the caption of habeas corpus pleadings.[130] The real import of the use of the *ex rel.* form for this Note is its connection with the sovereign power of the government. According to *Black's Law Dictionary*, the *ex rel.* form is used "in the title of a legal proceeding filed by a state Attorney General (or the federal Department of Justice) on behalf of the government, on the instigation of a private person, who needs the state to enforce the rights of himself/herself and the public."[131] The private person in such a suit is called the *relator*.[132] Thus, when a case

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128. See *United States v. Safari*, 849 F.2d 891 (4th Cir. 1988), for an example of a dual sovereignty proceeding brought on behalf of the United States.

129. BLACK'S LAW DICTIONARY 603 (7th ed. 1999). A similar translation of the phrase is "from the information given by." ORAN'S DICTIONARY OF THE LAW 156 (2d ed. 1991).

130. *See, e.g.*, Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); United States *ex rel.* Salisbury v. Blackburn, 792 F.2d 498 (5th Cir. 1986); United States *ex rel.* Roche v. Scully, 739 F.2d 739 (2d Cir. 1984); United States *ex rel.* Shepherd v. Wyrick, 675 F.2d 161 (8th Cir. 1982); United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955). From my own research, the Seventh Circuit uses the *ex rel.* form in habeas corpus proceedings most frequently, followed by the Second and Third Circuits. I found isolated uses of the form in all federal circuits. Several states also use this *ex rel.* form in their habeas proceedings. *See, e.g.*, People *ex rel.* Hill v. McGinnis, 587 N.E.2d 44 (Ill. App. Ct. 1992); State *ex rel.* Parsons v. Bushong, 109 N.E.2d 692 (Ohio Ct. App. 1945); Commonwealth *ex rel.* Kelly v. Superintendent of House of Corr., 22 Pa. D. 92 (Pa. Quar. Sess. 1912); People *ex rel.* Meeker v. Baker, 127 N.Y.S. 382 (N.Y. App. Div. 1911). Illinois and New York use the *ex rel.* form most commonly in their state habeas proceedings. I could not locate an explanation for why some states and circuits use the form and others do not. The practice originated in England and presently habeas corpus is the only prerogative writ still in existence there. *See* WILKES, *supra* note 111, § 2-2 (noting continuing use of prerogative writ in England).

131. BLACK'S LAW DICTIONARY 603 (7th ed. 1999).

132. *Id.* at 1292 (defining *relator* as "1. The real party in interest in whose name a state or an attorney general brings a lawsuit . . . . 2. The applicant for a writ . . . . 3. A person who furnishes information on which a civil or criminal case is based"). Several other sources provide definitions that are of assistance in sorting out the history of this form. *See* ORAN'S DICTIONARY OF THE LAW 361 (2d ed. 1991) ("A person in whose name a state brings a legal action (the person who 'relates' the facts on which the action is based)."); A DICTIONARY OF MODERN LEGAL USAGE 470 (Bryan A. Garner ed., 1987) ("*Relator* is the legal term meaning 'a private person at whose relation or in whose behalf an application for a (writ) is filed.'"); 2 BOUVIER'S LAW DICTIONARY 424 (2d ed. 1843) ("[I]nformations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney general, and these are commonly called relators."); 5 JACOB'S LAW DICTIONARY 430 (1811) ("A rehearser, or teller;

is titled "'State *ex rel.* Doe v. Roe' it means that the state is bringing a lawsuit for Doe against Roe."[133] In addition to habeas corpus proceedings, the *ex rel.* form is generally used in proceedings in which a third party must act for the primary party, such as when a guardian must act for a child or a mentally incompetent relative, or when a state attorney general must act for a citizen.[134]

It is plausible to sketch out a history of the emergence of the *ex rel.* form by examining historical definitions of this form and comparing them with the history of the writ of habeas corpus. First, the writ of habeas corpus originated in England as "a highly prerogative writ by which the crown sought to compel the appearance of a subject before its judicial organ."[135] A key characteristic of the prerogative writs was their close association with the King.[136] Habeas corpus was a prerogative writ because "the King ought to know why any of his subjects are imprisoned"[137] and "he [has] a right to be informed of the state and condition of every prisoner, and for what reason he is confined."[138] Because the King had this right to inquire, the King originally brought the suit for a writ of habeas corpus in his name.[139]

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applied to an informer.").

133. ORAN'S DICTIONARY OF THE LAW 156 (2d ed. 1991). This definition can be somewhat misleading. Some case law discusses the *relator* as one who files for the writ on behalf of the sovereign, but other case law discusses the sovereign acting for the *relator*. See *infra* notes 134, 142 for examples of each.

134. *See generally* Ullmo *ex rel.* Ullmo v. Gilmour Acad., 273 F.3d 671 (6th Cir. 2001) (parent brought suit against school on behalf of child); Doering *ex rel.* Barrett v. Cooper Mountain, Inc., 259 F.3d 1202 (10th Cir. 2001) (guardian ad litem brought suit on behalf of minor children); United States *ex rel.* Haight v. Catholic Healthcare West, No. C-01-1202 PJH, 2001 WL 1463792 (N.D. Cal. Nov. 9, 2001) (relator brought *qui tam* complaint on behalf of United States); People *ex rel.* Ryan v. Telemarketing Assoc., Inc. 729 N.E.2d 965 (Ill. App. Ct. 2000) (attorney general brought suit on behalf of state's citizens against paid professional fundraisers hired by charitable organization).

135. DUKER, *supra* note 115, at 4. Strictly speaking, a "prerogative writ" is a term describing a writ's extraordinary character, in other words, a writ of this nature issued only when other remedies were unavailable or inadequate. *Id.*

136. *See* WILKES, *supra* note 111, § 2-2 (describing prerogative nature of writ). Five other prerogative writs existed: the writs of certiorari, mandamus, prohibition, quo warranto, and *scire facias*. *Id.*

137. WILLIAM S. CHURCH, CHURCH ON HABEAS CORPUS § 107 (1886).

138. ROLLIN C. HURD, HURD ON HABEAS CORPUS 230 (2d ed. 1876).

139. *See* DUKER, *supra* note 115, at 4–5 (describing remedial nature of writ); *see also* R. J. SHARPE, THE LAW OF HABEAS CORPUS 221 (2d ed. 1989) ("As the writ issues in the King's name, the status of the petitioner is immaterial and his detention may be inquired into even if legal disabilities would prevent his taking an action for the enforcement of civil rights." (quoting *Re* A.B. (1905) 9 C.C.C. 390, 391 (Que.))); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 53 (1951) ("Habeas Corpus was a beneficent remedy, and it was sound politics to associate its award with the King's personal solicitude for the welfare of his subjects.").

Second, early American jurisprudence incorporated this tradition of habeas as a writ belonging to the sovereign.[140] In 1834, the Supreme Judicial Court of Massachusetts noted that the writ of habeas corpus is always in the name of the state.[141] Other cases support this proposition and, apparently, in the early days of the United States, the government, as sovereign, brought the writ on behalf of its people as well.[142] This practice continued into the twentieth century.[143] In fact, many such cases begin with the words "[h]abeas corpus proceeding by the United States of America."[144]

Given this history, the emergence and use of the *ex rel.* form is logical. Prisoners believing themselves wrongly imprisoned related this information in the role of informant to the sovereign, which had an interest in the state not imprisoning its subjects wrongfully.[145] Because a writ of habeas corpus was

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140. *See* Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 204 (Mass. 1834) (noting in habeas corpus suit that "the writ [is] in the name of the Commonwealth").

141. *Id.*

142. *See* People v. Bradley, 60 Ill. 390, 399 (1871) (describing prerogative nature of writ and noting "[t]he proceeding in habeas corpus . . . 'is an inquisition by the government at the suggestion and instance of an individual, but still in the name and capacity of the sovereign'" (quoting Barry v. Mercein, 46 U.S. (5 How.) 103, 108 (1847))). The *Bradley* court also noted that "[w]hen independence was achieved, all of the prerogatives of the crown of England devolved upon the people of the States." *Id.* at 396; *see also* Wade v. Judge, 5 Ala. 130, 134 (1843) ("The writ of habeas corpus is a means provided by the law, by which one unlawfully held in custody may be released; . . . the plaintiff in the action is not a party to the proceeding, but as the petitioner affirms that he is wrongfully deprived of his liberty, the State in legal presumption, is concerned in having justice done."); Commonwealth *ex rel.* Clements v. Arrison, 15 Serg. & Rawle 127, 130 (Pa. 1827) (noting that "the commonwealth stands in the place of the king, and has succeeded to all the prerogatives . . . proper for a republican government").

143. *See* People *ex rel.* Jenkins v. Kuhne, 107 N.Y.S. 1020, 1028 (N.Y. Spec. Term 1907) (noting, in proceedings to punish police officer for disobeying writ of habeas corpus issued on relation of petitioner, that "[t]he entire dignity and power of the sovereign people of the state of New York are behind [the writ] to compel obedience to its provisions both in spirit and in letter" and that "[i]t is a state writ issued in behalf of the people of the state").

144. *See* Dowd v. United States *ex rel.* Cook, 340 U.S. 206, 206 (1951) (using this language). From my own research, I located 235 federal cases that begin with the language "[h]abeas corpus proceeding by the United States of America."

145. This explanation comports with the meaning of *relator* as being a "rehearser or teller" and "an applicant for a writ." BLACK'S LAW DICTIONARY 1292 (7th ed. 1999); 5 JACOB'S LAW DICTIONARY 430 (1811); *see* SHARPE, *supra* note 139, at 222 (discussing third party applications). Sharpe, in a general discussion of how a prisoner who is unable to instruct a legal adviser or friend to take steps to bring a habeas corpus proceeding, states that:

> It is obviously desirable to have flexible rules governing applications in this regard . . . . To a certain extent, the technical nature of habeas corpus reflects this need. The writ issues in the name of the sovereign and represents the prerogative power to have an account of any subjects who are imprisoned. The applicant,

prerogative, this *ex rel.* form was the means by which a party complained to the sovereign, as the sovereign alone could proceed against the usurper of its subject's liberty.[146] Although the reason why this convention has disappeared in some jurisdictions but has continued in others is unclear, the idea behind the *ex rel.* form is clear—the sovereign has an interest in protecting its citizens from wrongful deprivation of their liberty.

Today in the United States, a state prisoner directly applies for a writ of habeas corpus. The writ is considered extraordinary, not prerogative.[147] In present practice, the individual represents the sovereign's interests through the principle of surrogacy. For example, in the proceeding *United States ex rel. Doe v. Roe*, it is as if the United States has appointed Doe as its surrogate to make its claim, as sovereign, on behalf of its people. In essence, Doe has stepped into the shoes of the United States to litigate the claim. Again, this principle of surrogacy harkens back to the prerogative nature of the writ of habeas corpus because, at common law, the King brought an application for a writ of habeas corpus in his name.[148] As noted, the point in the development of habeas practice at which the prisoner began to apply directly for the writ is unclear; however, the *ex rel.* form and certainly the surrogacy principle behind the writ endures,[149] which is why the history of the pleading and practice of the writ is so important.

Most significantly, the surrogate nature of the *ex rel.* form remedies the previously described problem concerning the identity of the parties in a dual sovereignty proceeding and a habeas proceeding. In a federal habeas proceeding following a state proceeding, the United States as sovereign is implicated just as the United States as sovereign is implicated in a federal proceeding following a state proceeding in the dual sovereignty context. Consider the following visual explanation:

Dual Sovereignty Context	Habeas Corpus Context
State Proceeding → *People v. Doe*	State Proceeding → *People v. Doe*
Federal Proceeding → *U.S. v. Doe*	Federal Proceeding → *U.S. ex rel. Doe v. Warden*

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whether the prisoner or simply a concerned third party, is, strictly speaking, not so much a party to the proceedings as an informant.

Id.

146. *See* RADIN'S LAW DICTIONARY 120 (2d ed. 1970) (defining *ex rel.* as "[u]sed to designate the complaining party in a criminal action").

147. *See* ANTIEAU, *supra* note 118, § 1.00 (describing current writ of habeas corpus).

148. *See supra* note 139 (describing prerogative nature of writ).

149. See *supra* note 134 for recent examples of the surrogacy principle.

In both contexts, the United States is acting in its sovereign capacity. In a federal habeas proceeding, the United States, as sovereign, is litigating the interest of its people. Similarly, in a successive federal proceeding brought under dual sovereignty, the United States, as sovereign, is litigating the interest of its people. In the habeas case, this occurs in the sense that, historically, the sovereign and the sovereign's people have been concerned with the liberty interests of the sovereign's citizens.[150] In the dual sovereignty case, this occurs in the sense that the sovereign must independently prosecute an accused in order to vindicate the interests of the sovereign's people.[151]

Considered in this light, the actions of the United States in the federal dual sovereignty proceeding and the federal habeas proceeding are analogous. If the United States is acting in the same capacity in both proceedings, then the principles of comity that federal courts accord to previous state court actions should be similar.[152] This examination of the *ex rel.* form demonstrates that though at first glance the disparity in the identity of the parties counsels against the application of habeas law to other collateral proceedings, the parties and interests represented are, at least in the dual sovereignty context, analogous.

B. The Nature of Collateral Proceedings

A related assumption to the idea that collateral proceedings in the dual sovereignty context are analogous to those in the habeas context is that collateral proceedings somehow differ from direct proceedings in a meaningful way and, as such, may be characterized similarly.[153] *Black's Law Dictionary* defines collateral as something "[a]dditional or auxiliary" and "[r]elated to, complementary."[154] Collateral proceedings thus occur after a direct or principal proceeding and address issues "incidental to the principal proceeding."[155]

Habeas corpus proceedings clearly are proceedings collateral to a previous state action.[156] State prisoners use the federal writ of habeas corpus to

150. *See supra* notes 135–46 and accompanying text (discussing interest of sovereign and its people).

151. *See supra* Part II.C (discussing rationale of dual sovereignty doctrine).

152. *See infra* Part VI.A (discussing rule of comity).

153. *See* WILKES, *supra* note 111, § 1-3 (describing federal legal remedies). Judicial remedies for convicted persons include direct remedies, collateral remedies, and civil remedies. *Id.*

154. BLACK'S LAW DICTIONARY 261 (6th ed. 1990).

155. BLACK'S LAW DICTIONARY 1221 (7th ed. 1999).

156. *See* WILKES, *supra* note 111, § 1-5 (describing federal habeas corpus for state convicts

attack their state convictions collaterally.[157] A federal proceeding that occurs after a state proceeding in the dual sovereignty context is also collateral. Although a defendant does not initiate this proceeding, it involves the same issues, defendants, and evidence as the previous state action. Similarly, though the purpose of this federal proceeding is not to attack collaterally the previous state conviction, as the dual sovereignty cases discussed in this Note demonstrate, defendants use the federal forum to argue that a previous state court suppression ruling should bar admission of evidence by a federal court.[158]

Therefore, both federal habeas corpus proceedings and successive federal proceedings under the dual sovereignty exception can be considered collateral in nature.[159] They each occur after a state proceeding and involve issues litigated in the earlier state proceeding. The nature of these collateral proceedings therefore demonstrates that such proceedings are so similar to one another that recent congressional action concerning the rule of comity in the habeas context should weigh heavily on the actions of federal courts in the dual sovereignty context.

C. Summary

The history of habeas corpus, particularly in this country, is connected intrinsically to maintaining the federalist system.[160] From its origin, various branches and levels of government have used habeas as a tool in their fight for power.[161] Thus, habeas is not only about the liberties of individuals, but also about the proper role of the government. Originally, habeas corpus was a highly prerogative writ used by the King to inquire into the imprisonment of his subjects.[162] The use of the *ex rel.* form in habeas proceedings demonstrates the influence of the prerogative nature of the writ. Today, this close association embodies the principle of surrogacy, whereby the sovereign (for

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as "the most important and controversial of the various federal postconviction remedies").

157. *Id.*

158. *See supra* Part III (discussing these dual sovereignty cases).

159. The counterargument to this Note's contention that successive prosecutions occurring under the dual sovereignty exception are collateral proceedings is that successive prosecutions are simply fortuitous and are not at all connected with the previous state prosecution. Although such an observation has merit, because the federal government is reprosecuting the same defendant for the same crime, these circumstances strongly point to the collateral nature of these proceedings.

160. *See supra* notes 123–27 and accompanying text (discussing close ties between federalism and habeas corpus).

161. *See supra* Part IV.A.1 (discussing history of habeas corpus).

162. *See supra* Part IV.A.2 (explaining prerogative nature of writ of habeas corpus).

our purposes, the United States) appoints the state prisoner as its surrogate to represent its interests and those of its people.[163] In this way, the United States acts as a party in a federal habeas proceeding in the same manner as it acts as a party in a federal proceeding under dual sovereignty because, in both proceedings, the United States, as sovereign, is representing the interests of its people. Thus, the pleading and practice of the writ of habeas corpus, as well as the distinct nature of collateral proceedings themselves, demonstrate that federal habeas proceedings and federal dual sovereignty proceedings provide a persuasive analogy.

V. The Antiterrorism and Effective Death Penalty Act of 1996

This Part explores the modern law of habeas corpus, specifically by considering recent congressional action to reform the federal writ of habeas corpus for state prisoners. Increased deference to state court judgments has been the primary focus of this reform.[164] Such deference is the key component of this Note's proposal. The following discussion seeks to establish that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[165] is the latest congressional statement on the rule of comity regarding evidentiary matters and therefore should extend to other collateral proceedings—namely, those that occur under the dual sovereignty exception to the Double Jeopardy Clause.

A. Background

Efforts to reform the habeas corpus process and to ensure a speedier and more effective resolution of habeas claims began in the mid-1940s.[166] The efforts resumed in the 1980s as the Task Force on Violent Crime recommended various procedural amendments to the Habeas Corpus Act.[167] Advocates of these reforms later introduced bills containing the recommendations in both houses of Congress.[168]

The desire to reduce the time between conviction and execution in death penalty cases motivated these reforms.[169] Therefore, reform advocates tar-

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163. *See supra* Part IV.A.2 (explaining surrogacy principle).

164. *See infra* Part V.A–B (noting that deference was primary focus of reforms).

165. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

166. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 423–24 (1996) (outlining initial assaults on habeas corpus).

167. *Id.* at 426.

168. *Id.*

169. *See* Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's*

geted the following three persistent problems with the habeas system: delays associated with federal habeas in the wake of state court consideration of prisoners' habeas claims, inefficiencies associated with prisoners' failure to comply with state and federal procedural rules, and perceived redundancies associated with federal adjudication of claims previously rejected in state court.[170] Reform advocates pushed for reducing multiple appeals and for placing greater weight on state decisions, thus bringing finality more rapidly to capital cases.[171]

A complicated history of legislative wrangling followed these proposed reforms, resulting in a series of concessions by opposing sides of the reform movement and cumulating in the introduction of the Hatch/Specter compromise bill in 1995.[172] Reform advocates later incorporated the bill into the Senate antiterrorism bill in the 104th Congress.[173] The Antiterrorism and Effective Death Penalty Act (AEDPA), as it was named, then won initial passage in the summer of 1995, and President Clinton signed it into law on April 24, 1996.[174]

Although Congress considered habeas corpus reform for many years prior to the enactment of AEDPA, Congress wanted to take a hard line on crime after the Oklahoma City terrorism bombing.[175] Because habeas corpus review is an essential aspect of the appeals process in death penalty cases, Congress sought to achieve its goal by setting new limits on the habeas process.[176] Despite the title of this Act, most of its provisions substantially

Habeas Corpus Provisions, 66 GEO. WASH. L. REV. 414, 415 (1998) (discussing primary goal of habeas reform).

170. *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 5–6 (1997) (describing main problems associated with habeas system).

171. *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001) (noting that clear but unstated goal of AEDPA was to restrain ability of federal courts to review death sentences).

172. *See* Yackle, *supra* note 166, at 425–36 (tracing history of proposed reforms and noting crucial concessions by each side of reform movement).

173. *Id.* at 436.

174. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

175. *See* 142 CONG. REC. S3355 (daily ed. April 16, 1996) (statement of Sen. Hatch) ("[AEDPA] is a tough on crime bill."); Statement by President William J. Clinton Upon Signing S.735, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. 961-1 (April 24, 1996) (stating that as result of legislation, "our law enforcement officials will have tough new tools to stop terrorists before they strike and to bring them to justice if they do"); *see also* Williams, *supra* note 171, at 923 (examining reasons behind habeas reform's incorporation into antiterrorism bill).

176. *See* 142 CONG. REC. H3612 (daily ed. April 18, 1996) (statement of Rep. McCollum) ("[W]hen the President signs this bill into law . . . we will have limited the appeals that death

amend federal habeas corpus law as it applies to state and federal prisoners in both capital and noncapital cases.[177] Congress tied these reforms to its antiterrorism bill out of a belief that the ultimate perpetrators convicted of the Oklahoma City terrorist bombing would likely receive the death sentence.[178]

AEDPA makes several changes to existing statutory and judge-made habeas corpus law.[179] Specifically, the Act creates a general one-year statute of limitation within which a prisoner must file a habeas petition after the completion of direct appeal; creates a six-month statute of limitation in death-penalty cases; encourages states to appoint counsel for indigent state death row inmates during state habeas or unitary appellate proceedings; requires appellate courts to pre-approve repetitious habeas petitions; and, in the case of appeals, requires the state prisoner to secure a certificate of appealability from a circuit judge or justice.[180] However, most importantly, the Act in most instances bars federal habeas courts from reconsidering legal and factual issues ruled upon by state courts.[181] Such increased deference to state courts was not only the key component of the habeas reforms,[182] but also the most controversial one.[183]

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row inmates can take and will have assured that sentences of death in this country will be carried out expeditiously, as the American public wants."); *see also Congressional Research Service Report for Congress: Antiterrorism and Effective Death Penalty Act of 1996: A Summary*, CRS REP. NO. 96-499A, at 2–3 (June 3, 1996) (noting that federal habeas is last stage of review in most capital cases).

177. CRS REP. NO. 96-499A, *supra* note 176, at 2; *see also* 142 CONG. REC. H3606 (daily ed. April 18, 1996) (statement of Rep. Hyde) ("[H]abeas corpus reform . . . is the Holy Grail [of the AEDPA]. We have pursued that for 14 years, in my memory.").

178. *See* 142 CONG. REC. H3606 (daily ed. April 18, 1996) (statement of Rep. Hyde) ("Habeas corpus is tied up with terrorism because when a terrorist is convicted of mass killings, we want to make sure that terrorist ultimately and reasonably has the sentence imposed on him or her."). *But see* 142 CONG. REC. S3356 (daily ed. April 16, 1996) (statement of Sen. Biden) (disagreeing that habeas corpus and terrorism are connected). Senator Biden stated:

> [Terrorism] has nothing to do with State courts because . . . if it is in a State court, it is not a Federal crime. If it is in a State court, the Federal Government is not prosecuting. If it is in a State court, it is not international terrorism. If it is in a State court, it is not a terrorist under this bill.

142 CONG. REC. S3356 (daily ed. April 16, 1996) (statement of Sen. Biden).

179. CRS REP. NO. 96-499A, *supra* note 176, at 4.

180. *Id.* at 4, 6.

181. *Id.*

182. *See* 142 CONG. REC. H3608 (daily ed. April 18, 1996) (statement of Rep. Barr) ("[W]e need habeas reform. That is the one thing, that most important element, the crown jewel [in AEDPA], that we must have.").

183. *See* 142 CONG. REC. H3612 (daily ed. April 18, 1996) (statement of Rep. Waters) (stating that because of "[t]he habeas corpus reform provisions in this bill which require Federal

B. Federal Court Deference to State Courts

1. 28 U.S.C. § 2254

Under federal law, 28 U.S.C. § 2254 governs applications for habeas corpus by those in custody pursuant to a judgment of a state court.[184] Section 2254(d) codifies AEDPA's required deference to state courts.[185] Under § 2254(d), the Act bars federal habeas relief on a claim already passed upon by a state court unless adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[186]

Prior to the passage of AEDPA, state court interpretations or applications of federal law were not binding in subsequent federal habeas proceedings, but federal courts generally deferred to the fact-finding decisions of state courts.[187] The new deference provisions in § 2254(d) significantly affect the ways in which federal courts can now review state court judgments in the habeas context.[188] This fundamental change was one that proponents of the states' rights approach to habeas corpus had advocated for years.[189]

However, as a result of the various bills that Congress fiercely debated for many years, AEDPA was not well drafted.[190] Courts have had and will continue to have difficulty interpreting the precise meaning of the language

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courts to ignore unconstitutional court convictions and sentences unless the State court decision, though wrong as a constitutional matter, was unreasonably wrong, innocent persons will be held in prison or executed in violation of the Constitution"); *see also* Woolley, *supra* note 169, at 422 (noting that deference requirement was most controversial section of habeas reform and that bill's opponents focused efforts on eliminating this section).

184. *See* 28 U.S.C. § 2254 (2000) (governing federal habeas corpus for state prisoners).

185. *See id.* § 2254(d) (codifying section 104 of AEDPA).

186. *Id.*

187. CRS REP. NO. 96-499A, *supra* note 176, at 7.

188. *See* WILKES, *supra* note 111, § 8-1 (discussing manner in which AEDPA narrowed power of federal courts to review state court judgments).

189. *See* 142 CONG. REC. H3606 (daily ed. April 18, 1996) (statement of Rep. Hyde) (discussing how long Congress has pursued these provisions); *see also* Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1759 (2000) (noting that "[t]he quarrel is, and has always been, over whether federal habeas courts should entertain federal claims as a sequel to state court adjudication of those same federal claims").

190. *See* Lindh v. Murphy, 521 U.S. 320, 336 (1997) (stating, in one of first cases interpreting AEDPA, that "[a]ll we can say is that in a world of silk purses and pigs' ears, the Act [AEDPA] is not a silk purse of the art of statutory drafting").

of the statute.[191] Since passage of the Act, scholars' views of the deference provisions have differed broadly. Some argue that the provisions fit within the overarching scheme of federal jurisdiction,[192] while others contend that this type of increased deference to state courts is blatantly unconstitutional.[193]

Debate has centered on how courts should read AEDPA's deference requirement to apply to questions of law, questions of fact, and questions of mixed law and fact.[194] Appellate courts customarily use different standards of review for legal conclusions and findings of fact.[195] Section 2254(d) appears to establish standards of review based on the type of question involved;[196] however, commentators and courts disagree on what these standards entail.[197]

2. (Terry) Williams v. Taylor

The Supreme Court addressed some of these disagreements with its 2000 decision in *Williams v. Taylor*.[198] In *Williams*, the Court explored the level of

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191. *See* Yackle, *supra* note 166, at 382 (noting that "extraordinarily arcane verbiage [of law] will require considerable time and resources to sort out").

192. *See id.* at 384 (stating that "[i]f we put aside what some of us thought Congress would do and start looking (closely) at what Congress has actually done, I think we will find that there is more bark in this dog than bite").

193. *See* 142 CONG. REC. S3439 (daily ed. April 17, 1996) (statement of Sen. Moynihan) (quoting letter from former United States Attorneys General arguing that deference provisions are unconstitutional); Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 Harv. L. Rev. 1551, 1559 (2001) [hereinafter *Powers of Congress*] (discussing views of scholars who believe that deference provisions are unconstitutional because Court has same duties on both direct and habeas review); Woolley, *supra* note 169, at 416 (stating that, "[a]rguably, the AEDPA is unconstitutional").

194. *See* Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 108–15 (1998) (describing commentators' disagreement over correct standard of review).

195. *See id.* at 108 (explaining various standards of appellate review). Courts usually review trial court conclusions of law less deferentially than findings of fact and use a separate standard of review for mixed questions of law and fact. *Id.*; *see infra* note 270 (explaining distinction between legal conclusions and findings of fact).

196. *See id.* (noting that § 2254 appears to follow traditional approach, with separate standards of review for questions of fact, law, and mixed law and fact).

197. *See id.* (describing courts' and commentators' views of standard of review under § 2254).

198. (Terry) Williams v. Taylor, 529 U.S. 362 (2000). In *Williams*, the Court considered the issue of whether Terry Williams was denied effective assistance of counsel during the sentencing phase of his prosecution for capital murder. *Id.* at 367. The Court also examined whether the Virginia Supreme Court's refusal to set aside his death sentence "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

deference that federal courts must give to state courts in the habeas context under § 2254(d).[199] Although the Court rejected readings of § 2254 that would have essentially eliminated the availability of habeas review, the Court interpreted the language as mandating much more deference than many civil libertarians would have desired.[200]

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the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254(d)(1). *Id.* On the first issue, the Court found that Williams's counsel was constitutionally ineffective because counsel failed to investigate and present substantial mitigating evidence during the trial's sentencing phase. *Id.* at 395–99. On the second issue, under Justice Stevens's analysis of the statute, § 2254(d)(1) "directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law." *Id.* at 389 (Stevens, J., concurring). But Justice O'Connor, writing for the majority, disagreed with this interpretation and noted that Congress did not amend 28 U.S.C. § 2254 simply to maintain the present federal standard of review. *Id.* at 402–03. Justice O'Connor reiterated that under a cardinal principal of statutory construction, the Court must give effect to every word in the statute. *Id.* at 404. Under this construction, Justice O'Connor stated that Justice Stevens erred by failing to give independent meaning to both the "contrary to" and the "unreasonable application" clauses of the statute. *Id.* Justice O'Connor clarified the correct standard of review, stating that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412–13. Under the "unreasonable application" standard, Justice O'Connor noted that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410. Therefore, she explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. The Court ultimately held that the Virginia Supreme Court acted unreasonably by failing to consider the totality of the omitted mitigation evidence in its refusal to set aside Williams's death sentence. *Id.* at 416. The Court thus reversed the Court of Appeals' decision and remanded the case to the trial court for a new sentencing proceeding. *Id.* at 396.

199. *See id.* at 377 (discussing correct interpretation of § 2254(d)).

200. *See id.* at 410 (rejecting Fourth Circuit's "all reasonable jurists" standard, whereby application of law to fact is unreasonable only when all reasonable jurists would agree that application is unreasonable, and thus holding that standard of reasonableness is objective); *see also The Supreme Court 1999 Term: Leading Cases*, 114 HARV. L. REV. 179, 328–29 (2000) [hereinafter *The Supreme Court*] (acknowledging that language in *Williams* indicates that courts should give extreme deference, but noting that Court showed that neither "contrary" nor "unreasonable application" review is as deferential as interpretation indicates because Court found that counsel's assistance was ineffective and lower court's determination was unreasonable). The *Williams* decision has evoked criticism. *See* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 420 (2001)

a. Mixed Questions of Law and Fact

In the most significant portion of the Court's opinion, it read § 2254 to require federal courts to leave reasonable but wrong state court decisions undisturbed in the habeas context.[201] Therefore, a federal court cannot grant habeas relief if it simply disagrees with what a state court has done or believes that the state court incorrectly or erroneously applied the law; rather, the state court must have been unreasonable in its application of law to fact as well.[202] The Court thus interpreted § 2254(d)(1) to mandate an "unreasonableness" standard for mixed questions of law and fact.[203]

b. Questions of Law

The Court determined that the "contrary to . . . clearly established Federal law" language in 28 U.S.C. § 2254 applied only to clear questions of law.[204] A decision is "contrary" only if the Supreme Court has specifically ruled on the issue and the state court misapplies Supreme Court precedent. [205] In contrast, district and appellate court decisions on questions of law on which the Supreme Court has not clearly ruled do not qualify under this interpretation.[206] Therefore, if a state court decides a question of law in a manner contrary to the holdings of district courts or appellate courts, but this question

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(arguing that *Williams* Court's interpretation of § 2254(d) raises serious constitutional problems because it failed to consider fundamental role of Article III courts to assure that state law, "including state decisional law, does not contravene the U.S. Constitution and other federal law"); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1592 (2000) (criticizing *Williams* as artificially excluding considerations of unconstitutionality of AEDPA).

201. *See Williams*, 529 U.S. at 411 (noting difference between unreasonable and wrong state court decisions); *see also* Lockyer v. Andrade, 538 U.S. ___, ___, 123 S. Ct. 1166, 1174–75 (2003) (finding that United States Court of Appeals for Ninth Circuit erred in defining "unreasonable application" to mean clear error and noting that "unreasonable application" standard means an "objectively unreasonable" error must be found before federal court can grant habeas relief.).

202. *Williams*, 529 U.S. at 411.

203. *See* Yackle, *supra* note 189, at 1751 (noting that *Williams* Court interpreted § 2254(d)(1) as setting "unreasonableness" standard of review for mixed questions of law and fact).

204. *See* Williams v. Taylor, 529 U.S. 362, 406 (2000) (discussing analysis of "contrary to" clearly established federal law); *see also The Supreme Court*, *supra* note 200, at 322 (noting that Supreme Court reserved "contrary" analysis for clear questions of law).

205. *See Williams*, 529 U.S. at 412 (stating that "[the] statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision").

206. *Id.*

of law is not one upon which the Supreme Court has clearly ruled, this decision would not be a "contrary" application of federal law.[207]

But because the difference between a question of law and an application of law to facts can be one of semantics, the Supreme Court's interpretation of the statute in *Williams* "asks courts to impose and recognize categories on a spectrum that admits of no clear divisions."[208] Significantly, the *Williams* Court noted that it will often be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that arrives at a conclusion contrary to that reached by the Supreme Court on a question of law.[209] However, the Court concluded that the *Williams* case did not require it to decide how courts should treat these "extension of legal principle" cases.[210] The Court did not have to decide this issue because it found that the Virginia state court's decision was both "contrary to" and an "unreasonable application" of clearly established federal law.[211]

Although the Court could have interpreted the "contrary" language to prescribe de novo review, it did not.[212] By interpreting "clearly established Federal law" to refer only to Supreme Court holdings, the Court interpreted the statute to give some level of deference to state courts on review of questions of law.[213] While this interpretation requires federal courts to give deference to state court judgments under the "contrary" prong only on issues on which the Supreme Court has not ruled, district courts do not perform an independent review of state court decisions as they would under a traditional de novo review standard.[214] However, these situations admittedly are rare.

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207. *See* Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000) (commenting that federal court may only grant habeas relief if it determines that state court decision is contrary to, or unreasonable application of, Supreme Court jurisprudence, not circuit court precedent); *see also The Supreme Court*, *supra* note 200, at 322 ("For a decision to be 'contrary,' it cannot merely be a ruling that the district court would determine differently; it must be one with which the Supreme Court has specifically disagreed.").

208. *The Supreme Court*, *supra* note 200, at 326.

209. Williams v. Taylor, 529 U.S. 362, 408 (2000).

210. *Id.* at 408–09.

211. *Id.* at 416.

212. *See The Supreme Court*, *supra* note 200, at 327 (describing how Court could have interpreted "contrary" language to require de novo review, but chose not to do so).

213. *Id.*

214. *See id.* (noting that "contrary" inquiry will allow state court decisions to stand when decisions are contrary to lower federal court jurisprudence but not contrary to Supreme Court holdings); *see also Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1861 (2002) [hereinafter *The Law of Prisons*] (arguing that "AEDPA's 'clearly established law' requirement limits the federal district courts' ability to participate in the evolution of constitutional standards for state criminal cases"). Several courts of appeals have also interpreted

c. Questions of Fact

The *Williams* Court did not specifically consider how courts should review questions of fact in the habeas context, but commentators have gener-

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AEDPA to require federal courts to exhibit some deference to state courts on findings of law. *See* Boyette v. Lefevre, 246 F.3d 76, 88 (2d Cir. 2001) (stating that, in conducting habeas review, court must defer to state court conclusions of law); Harris v. Stovall, 212 F.3d 940, 944 (6th Cir. 2000) (noting that § 2254(d) marks significant change by preventing district courts from looking to lower federal court decisions in determining "whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law"). However, other circuits have interpreted AEDPA as requiring a traditional de novo standard of review for questions of law. *See* Rose v. Lee, 252 F.3d 676, 689–90 (4th Cir. 2001) (interpreting *Williams* to reaffirm federal habeas corpus courts' obligation to review state court judgment independently when that state court decision is "contrary to clearly established federal law"); Ouska v. Cahill-Masching, 246 F.3d 1036, 1044 (7th Cir. 2001) (noting that federal court review of whether state court ruling was "contrary to" clearly established federal law is de novo).

The Court's recent decision in *Lockyer v. Andrade*, 538 U.S. ____, 123 S. Ct. 1166 (2003), supports the view that § 2254(d)'s "contrary" language does not prescribe de novo review. In *Lockyer*, Justice O'Connor, writing for the majority, disagreed with the Ninth Circuit's interpretation of § 2254(d) that federal habeas courts should review a state court decision de novo before applying the AEDPA standard of review. *Id.* at 1172. The Ninth Circuit utilized a two-step approach in deciding whether a California Court of Appeal's decision affirming a habeas petitioner's sentence was "contrary to" or an "unreasonable application" of "clearly established" law as set forth by the Supreme Court. *Id.* at 1174–75. Under this approach, the Ninth Circuit first decided on a de novo basis whether a state court's decision was contrary to "clearly established" law; if the decision was "contrary," the Ninth Circuit then took up the "unreasonable application" prong of § 2254(d). *Id.* at 1171–73. However, the Court found such an approach inconsistent with the statutory language of § 2254(d), noting that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.* at 1172.

The Court also took a narrow view of "clearly established Federal law" in *Lockyer*. At issue was whether the habeas petitioner's sentence was so grossly disproportionate to his crime that it violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* A state jury found the habeas petitioner guilty of two felony counts of petty theft and the judge sentenced him to two consecutive terms of twenty-five years to life in prison under California's three strikes law. *Id.* at 1171. In reviewing the petitioner's habeas writ, the Ninth Circuit found that the California Court of Appeal disregarded the Supreme Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983), regarding proportionality analysis. *Lockyer*, 123 S. Ct. at 1171–72. Thus, the Ninth Circuit granted habeas relief under § 2254. *Id.* at 1172. However, the *Lockyer* Court found that the law in this area was far from clear. *Id.* at 1173. Specifically, it characterized its Eighth Amendment cases as "exhibit[ing] a lack of clarity regarding what factors may indicate gross disproportionality." *Id.* Because of this lack of clarity, the Court found the California Court of Appeal's decision was not "contrary to" or involved an "unreasonable application" of governing legal principles set forth in Supreme Court cases. *Id.* at 1174. The *Lockyer* case thus demonstrates that federal courts should interpret narrowly what constitutes "clearly established Federal law" under § 2254(d) and should only grant relief when the Court's jurisprudence in the particular area is clear and a state court disregards this clear precedent.

ally agreed that under § 2254 a federal court would have difficulty in overturning a state court finding of fact.[215] First, § 2254(d)(2) clearly prescribes an unreasonableness standard for questions of fact.[216] Second, § 2254(e) states that "a determination of a factual issue made by a State court shall be presumed to be correct."[217] These provisions taken together require federal courts to give state court determinations of fact complete deference.[218]

3. *Legislative History of Deference Provisions and Prior Supreme Court Jurisprudence*

In order to understand the impact of AEDPA and the *Williams* decision on this Note's proposal, a discussion of the legislative history of AEDPA's deference provisions and previous Supreme Court cases concerning habeas corpus is necessary. As previously discussed, habeas reformers long fought for the deference provisions in AEDPA.[219] Although the legislative history of AEDPA is unfortunately vague on how courts should interpret the actual language of AEDPA,[220] the legislative history reveals the tension between parties on both sides of the reform movement.[221]

A congressional floor debate that involved the proposal of two amendments to change the language of § 2254(d) during AEDPA's consideration is

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215. *See infra* notes 216–18 and accompanying text (explaining standard of review for questions of fact).

216. *See* 28 U.S.C. § 2254(d)(2) (2000) ("[R]esulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."); *see also* Lee, *supra* note 194, at 108 (stating that standard of review for findings of fact is "unreasonableness").

217. 28 U.S.C. § 2254(e)(1) (2000); *see also* Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 371–72 (1997) (noting that changes in § 2254(e) retain presumption of correctness for factual issues but abolish all exceptions to presumption contained in old statute).

218. *See* Fugate v. Head, 261 F.3d 1206, 1215 (11th Cir. 2001) (noting that § 2254(e)(1) provides highly deferential standard of review for state court factual determinations because federal court must presume that state court's factual determination is correct); Gilliam v. Mitchell, 179 F.3d 990, 992 (6th Cir. 1999) (same); *see also* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1439 n.67 (2001) (noting that §§ 2254(d)(2) and (e)(1) together make it extremely difficult for federal court to overturn state court's findings of fact).

219. *See supra* notes 166–77 and accompanying text (describing history of reform movement).

220. *See* Scheidegger, *supra* note 120, at 945 (noting that standard Congress actually adopted has sparse legislative history because of standard's late emergence in habeas debate).

221. *See infra* notes 222–28 and accompanying text (discussing legislative history of AEDPA).

particularly instructive. Senator Jon Kyl proposed language that would have largely eliminated federal habeas corpus as a vehicle for state prisoners to obtain postconviction review.[222] Senator Kyl argued that when the state court system offers a prisoner a complete and adequate remedy, that prisoner should not have the authority to proceed to the federal court system to relitigate all of the same claims.[223] Supporters of the Kyl amendment echoed Senator Kyl's reasoning and emphasized the need for federal courts to abstain from litigating issues already decided by state courts out of respect for state court judgments.[224] In contrast, Senator Joseph Biden proposed an amendment to strike the deference rule completely and to retain the pre-AEDPA practice of independent review.[225] Senator Biden believed that the § 2254 language, as enacted, gave too much deference to state courts.[226] The Senate ultimately rejected each of these amendments in favor of the current standard; however, the debate over these two amendments evinces the strong feelings of members of Congress concerning the federalist structure of the American judicial

222. *See* 141 CONG. REC. S7829 (daily ed. June 7, 1995) (statement of Sen. Kyl) (proposing amendment that would deny habeas relief to person in custody pursuant to state judgment unless remedies of state court were inadequate or ineffective to test legality of person's detention). The Senate rejected the amendment by a vote of thirty-eight in favor to sixty-one opposed. 141 CONG. REC. S7849 (daily ed. June 7, 1995).

223. *See* 141 CONG. REC. S7830 (daily ed. June 7, 1995) (statement of Sen. Kyl) (quoting letter from Judge Robert Bork); 141 CONG. REC. S7836 (daily ed. June 7, 1995) (statement of Sen. Kyl) (arguing that United States judicial system has been understood from its very beginning as allowing state courts to resolve federal constitutional issues).

224. *See* 141 CONG. REC. S7834 (daily ed. June 7, 1995) (statement of Sen. Lott) (speaking in support of Kyl amendment and stating that "there is simply no basis for allowing additional rounds of litigation on the same claims in the lower Federal courts"); 141 CONG. REC. S7835 (daily ed. June 7, 1995) (statement of Sen. Hatch) (speaking in support of Kyl amendment and discussing frustration with federal courts' micromanagement of state court decisions); *see also* *Crime Bill Issues: Hearing on S.735 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Daniel E. Lungren, Attorney General of California) (stating that "[r]eexamination of state convictions on federal habeas review frustrate[s] . . . [b]oth the state's sovereign power to punish offenders and their good faith attempt to honor constitutional rights").

225. *See* 141 CONG. REC. S7840 (daily ed. June 7, 1995) (statement of Sen. Biden) (proposing amendment to delete rule of deference from habeas corpus bill). The Senate voted to table the Biden amendment by a thin margin, with a vote of fifty-three in favor to forty-six opposed. 141 CONG. REC. S7849-50 (daily ed. June 7, 1995).

226. *See* 141 CONG. REC. S7843 (daily ed. June 7, 1995) (statement of Sen. Biden) ("Placing primary responsibility for the Federal Constitution in the hands of State courts is a dramatic departure from this country's historical principle, and that is that it is the Federal courts that should be the final arbiters of Federal law."); *see also* 141 CONG. REC. S7839 (daily ed. June 7, 1995) (statement of Sen. Cohen) (stating that bill would require federal court to stand by and do nothing even if presented with incorrect state court ruling, a result that would effectively prevent habeas corpus from serving any meaningful role).

system.[227] The strong words used by the opponents of the final deference provisions also help to illustrate the dramatic change that this provision made to existing law.[228]

Moreover, statements of Senator Orrin Hatch, the primary sponsor of the habeas deference provisions codified in § 2254, demonstrate that he believed that the Act established substantial deference.[229] Senator Hatch specifically referred to the case of *Harlow v. Fitzgerald*,[230] in which the Supreme Court held that qualified immunity protects public officials unless they violate

227. *See* Scheidegger, *supra* note 120, at 946 (describing current standard as compromise between positions of amendments).

228. *See* 142 CONG. REC. H3610 (daily ed. April 18, 1996) (statement of Rep. Berman) (stating that "this package of 'reforms' you are being asked to vote for would raise hurdles so high to such essential review as to effectively ensure injustices of wrongful conviction will go unremedied"); 142 CONG. REC. H3614 (daily ed. April 18, 1996) (statement of Rep. Pelosi) (noting that bill severely limits power of federal courts to correct unconstitutional incarceration); 142 CONG. REC. H3602 (daily ed. April 18, 1996) (statement of Rep. Kennedy) (stating that "[w]hat we have [in this bill] is an undoing of the Federal Government's rights to intervene in the State courts"); 142 CONG. REC. S3458 (daily ed. April 17, 1996) (statement of Sen. Kennedy) (stating that "[AEDPA] eviscerates the ancient Writ of Habeas Corpus, denying death row inmates the opportunity to obtain even one meaningful Federal review of the constitutionality of their convictions"); 142 CONG. REC. S3439 (daily ed. April 17, 1996) (statement of Sen. Moynihan) (noting distress over bill's virtual elimination of habeas corpus and stating, "if I had to choose between living in a country with habeas corpus but without free elections, or a country with free elections but without habeas corpus, I would choose habeas corpus every time"); *see also Crime Bill Issues: Hearing on S. 735 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Nicholas deB. Katzenbach, Emergency Committee to Save Habeas Corpus) (noting destructive impact of deference requirement on ability of federal courts to enforce United States Constitution by stating that "federal courts will be unconditionally barred from assessing the constitutionality of certain state judgments—judgments involving the most awesome power of the states over their citizens, the power to strip them of their liberty or life").

229. *See* 142 CONG. REC. S3447 (daily ed. April 17, 1996) (statement of Sen. Hatch) (discussing Supreme Court cases that support preference for reasonableness standard in reviewing state action).

230. Harlow v. Fitzgerald, 457 U.S. 800 (1982). The issue in *Harlow* concerned the scope of immunity available to President Nixon's senior aides and advisers in a suit for damages based upon their official acts. *Id.* at 802. The *Harlow* Court discussed the various types of immunity that a court could extend in cases involving government officials and concluded that a court, on the facts of the present case, should grant only qualified immunity. *Id.* at 809. The Court then held that government officials performing discretionary functions generally are immune from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818. The Court noted that this objective reasonableness standard for an official's conduct, as measured by reference to clearly established law, should avoid excess disruption of government. *Id.*

clearly established rights.[231] This reference is exceedingly important because Senator Hatch compared the deference provisions in the habeas reforms to the preference for reasonableness that courts give in other areas of the law.[232] The area of qualified immunity, in particular, is one of extreme deference.[233] Senator Hatch next stated:

> Our proposed standard simply ends the improper review of State court decisions. After all, State courts are required to uphold the Constitution and to faithfully apply Federal laws. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts.[234]

Other than qualified immunity, courts employ such reasonableness deference in only a few areas of the law, most notably in the areas of administrative law and political questions.[235]

Furthermore, the trend of decisions by the Supreme Court illustrates this concern for federalism.[236] After an expansion of defendants' rights under the Warren Court, the Burger and Rehnquist Courts started a pattern of retrenching the availability of habeas writs.[237] The Court's decision in *Wright v. West*[238]

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231. *See id.* (establishing qualified immunity for government officials).

232. *See* 142 CONG. REC. S3447 (daily ed. April 17, 1996) (statement of Sen. Hatch) ("Why then, given this preference for reasonableness in the law, should we empower a Federal court to reverse a State court's reasonable application of Federal law to the facts?"). Senator Hatch also cited *United States v. Leon*, 468 U.S. 897 (1984), in which the Supreme Court held that if the actions of police officers who conducted a search were reasonable, then no Fourth Amendment violation would occur and a court could not suppress evidence obtained as a result of the search. 142 CONG. REC. S3447 (daily ed. April 17, 1996) (statement of Sen. Hatch).

233. *See* Scheidegger, *supra* note 120, at 925 (discussing qualified immunity and noting close analogy between such immunity and new habeas reform). *But see* Lee, *supra* note 194, at 123–24 (arguing that one cannot assimilate meaning of "clearly established" as used in *Harlow* to meaning of "clearly established" in § 2254(d)(1) because qualified immunity protects officers from personal liability for damage awards and habeas jurisdiction does not impose personal liability on state judges).

234. 142 CONG. REC. S3447 (daily ed. April 17, 1996) (statement of Sen. Hatch).

235. *See Powers of Congress*, *supra* note 193, at 1560 (identifying areas of deferential review).

236. *See* Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 239 (2001) (arguing that recent opinions by United States Supreme Court demonstrate major shift in Court's view of federalism).

237. *See* Melissa L. Koehn, *A Line in the Sand: The Supreme Court and the Writ of Habeas Corpus*, 32 TULSA. L.J. 389, 390 (1997) (noting that approximately two decades ago Supreme Court began retrenching availability of habeas writs, particularly through creation of very technical procedures for petitions); Steiker, *supra* note 123, at 1709 (noting that Court has significantly retreated from landmark decisions of early Warren Court that secured robust

shows that several Justices already thought (prior to the passage of AEDPA) that federal courts should defer to state court decisions in the habeas context.[239] Similarly, in *Teague v. Lane*,[240] decided three years prior to *West*, the Court ruled that federal courts could not retroactively apply new constitutional rules to cases pending on collateral review.[241] *Teague* gave limited deference to

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habeas review of federal claims brought by state prisoners); David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire:* Jacobs v. Scott *and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 559–60 (1997) (discussing difference in treatment under Warren and Rehnquist Courts); *see also* McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.").

238. Wright v. West, 505 U.S. 277 (1992) (plurality opinion). In *Wright*, the Court faced the issue of whether the United States Court of Appeals for the Fourth Circuit correctly determined that the evidence against the defendant was insufficient, as a matter of due process, to support his state-court conviction for grand larceny. *Id.* at 280 (plurality opinion). The Court found that the evidence against the defendant was more than sufficient to support a conviction regardless of whether mixed constitutional questions were subject to plenary or deferential federal habeas review. *Id.* at 295 (plurality opinion). However, Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, stated that the Court should adopt deferential review of mixed questions of law and fact. *Id.* at 285–94 (plurality opinion). Justice Thomas noted that habeas should "guard against extreme malfunctions in the state criminal justice systems." *Id.* at 292 (plurality opinion) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). Justice Thomas argued that the need for finality and the intrusion upon state sovereignty by federal courts in habeas cases justified such a standard. *Id.* at 293 (plurality opinion).

239. *See id.* at 285–94 (plurality opinion) (arguing that Court has moved toward treating state court decisions deferentially).

240. Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion). The issue in *Teague* concerned whether a court could retroactively apply a new rule requiring a fair cross section of jurors in a petit jury to the case before the Supreme Court. *Id.* at 300–01 (plurality opinion). The Court adopted the standard that Justice Harlan described in *Mackey v. United States*, 401 U.S. 667 (1971). *Teague*, 489 U.S. at 305–06 (plurality opinion). Justice Harlan believed that courts should not apply new constitutional rules of criminal procedure to cases on collateral review unless they fell within two enumerated exceptions. *Id.* at 306 (plurality opinion). First, a court should apply a new rule retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 307 (plurality opinion). Second, a court should apply a new rule retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* (plurality opinion). The *Teague* Court reasoned that it must also consider concerns of comity and finality in determining the proper scope of habeas review. *Id.* at 308 (plurality opinion). Applying the new standard, the Court then found that it could not address petitioner's substantive claim because a court could not retroactively apply this new rule to all defendants on collateral review through one of the two enumerated exceptions. *Id.* at 316 (plurality opinion).

241. *See id.* at 310 (plurality opinion) (announcing that new constitutional rules of criminal procedure will not apply to those cases that have become final before Court announces new

state courts by prohibiting federal courts from overturning state convictions based on new constitutional rules.[242] Thus, the Supreme Court's habeas jurisprudence against which Congress enacted AEDPA demonstrates that Congress intended the broad deference interpretation elucidated by the *Williams* Court.[243] This shift in the Supreme Court's jurisprudence, which placed much more emphasis on concerns for federalism and comity, is an important component of the overall shift in power back to the states in the habeas context, and perhaps in other contexts.

C. Summary

As Professor Larry Yackle notes, "concerns about federalism, comity, and parity figure mightily in the habeas context, just as they do in most other contexts in which federal law orchestrates the competition between state and federal courts for adjudicative authority regarding federal questions."[244] With the passage of AEDPA, the balance of power between state and federal government in criminal law enforcement has shifted back to the states in a powerful fashion.[245] This shift demonstrates Congress's "renewed respect for state courts and their judgments . . . recogniz[ing] their role as 'coequal parts of our national judicial system.'"[246]

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rules). The *Teague* doctrine has been the subject of much criticism, and the impact of AEDPA on the doctrine remains uncertain. *Compare* Yackle, *supra* note 166, at 415–21 (arguing that observers reading statute to codify *Teague* are incorrect because § 2254(d) does not mention exceptions to *Teague*) *with The Law of Prisons*, *supra* note 214, at 1860 (noting that AEDPA codifies *Teague* in some respects).

242. *See The Supreme Court*, *supra* note 200, at 325 (recognizing limited deference of *Teague*); *see also* Burdine v. Johnson, 262 F.3d 336, 375 (5th Cir. 2001) (Barksdale, J., dissenting) (noting that AEDPA reflects strong interests in finality and comity served by *Teague* doctrine).

243. *See The Supreme Court*, *supra* note 200, at 325 (noting how background of federal habeas interpretation against which Congress enacted deference foreshadowed *Williams* Court's interpretation of deference provisions); *see also The Law of Prisons*, *supra* note 214, at 1860 (noting that Congress, with passage of AEDPA, "allied itself with the Supreme Court's recent habeas jurisprudence in its belief in parity and concern for federalism interests").

244. Yackle, *supra* note 189, at 1759.

245. *See* Hartman & Nyden, *supra* note 217, at 352 (noting shift in balance of power between state and federal governments since passage of AEDPA).

246. Scheidegger, *supra* note 120, at 953 (quoting Sawyer v. Smith, 497 U.S. 227, 241 (1990)). *But see* FREEDMAN, *supra* note 115, at 152 (discussing jurisprudence in which Supreme Court invoked federalism as justification for restrictions on habeas corpus and arguing that "[t]o invoke federalism to justify such results is untenable . . . the view of federalism that animated the framers supports careful federal review of state court criminal convictions, not deference to the sovereign rights of states to deprive citizens of Constitutionally protected liberty").

The Supreme Court's decision in *Williams v. Taylor* underscores this shift in power.[247] Although anchored in habeas corpus law, *Williams* is also very much a piece of the Rehnquist Court's federalism jurisprudence.[248] The Court's decision, while not definitive in all respects, illustrates how federal courts should review state court decisions in the habeas context. Federal courts must give complete deference to state court findings of fact, substantial deference to findings on mixed questions of law and fact, and some deference to findings on questions of law.[249]

This increased deference is central to this Note's proposal. If federal courts must defer to state courts in collateral proceedings in the habeas context, then they should defer to state courts in collateral proceedings in the dual sovereignty context. AEDPA mandates such deference. Both the legislative history of AEDPA and the Supreme Court's renewed concern for federalism demonstrate that such deference is necessary out of respect for the role of state courts in the American judicial system. As Senator Hatch stated, "there is simply no reason that Federal courts should have the ability to virtually retry

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247. *See supra* Part V.B.2 (analyzing *Williams* decision); *see also* Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731, 732 (2002) (noting that *Williams* Court "determined that § 2254(d)'s 'unreasonable application' clause jettisons more than half a century's worth of habeas jurisprudence relating to state courts' applications of federal law to fact").

248. *See The Law of Prisons*, *supra* note 214, at 1846 (noting that, with AEDPA, Congress "has come down firmly in the camp of the Rehnquist Court, which has been attempting to curtail the Warren Court's legacy of federal district court involvement in state institutional reform").

249. *See supra* Part V.B.2 (analyzing *Williams* decision). The *Williams* Court's analysis of the standard of review under § 2254 provides the background for this Note's proposal in cases in which the questions involved are clearly ones of fact, law, or the application of law to fact. But courts and commentators have proposed methods that federal habeas courts should employ in cases in which no clear delineation exists among questions of law, fact, and mixed law/fact. *See* Yackle, *supra* note 189, at 1754 (proposing two-step process for federal habeas courts post-*Williams*). Yackle proposes that federal courts should first determine whether a state court reached an erroneous judgment in light of "clearly established Federal law as determined by the Supreme Court." *Id.* Then, if the state court reached an erroneous judgment, the federal court must determine whether the resulting state court decision constituted an "unreasonable application" of those holdings. *Id.* The availability of federal habeas relief then depends on whether a state court decision diverges unreasonably from the result that the Supreme Court itself would have reached at the time. *Id.*; *see also* Werts v. Vaugh, 228 F.3d 178, 197–98 (3d Cir. 2000) (describing different two-step analysis post-*Williams*).

Courts will likely need to revamp their various two-step processes for federal habeas review after the Supreme Court's recent decision in *Lockyer v. Andrade*, 538 U.S. ___, 123 S. Ct. 1166 (2003). In *Lockyer*, the Court rejected the Ninth Circuit's formulation of a two-step process whereby the Ninth Circuit first determined whether a state court decision was "contrary to clearly established Federal Law" before moving to the "unreasonable application" prong. *See supra* note 214 (describing *Lockyer* Court's decision).

cases that have been properly adjudicated by our State courts."[250] If Senator Hatch was correct, then this concern likely was the central motivating force behind AEDPA, and one can make a strong argument that this deference extends beyond the habeas context. In fact, AEDPA is the latest congressional statement on the rule of comity as it applies to evidentiary matters and, as such, applies to other collateral proceedings, specifically those under the dual sovereignty exception.

VI. A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context

This Note explores two distinct areas of criminal law: the dual sovereignty exception to the Double Jeopardy Clause and the writ of habeas corpus. This Note seeks to demonstrate, using recent legislation by the United States Congress and historical material, that these two areas of law are not quite so distinct. In fact, notions of fairness, justice, and uniformity of criminal law should govern each area similarly. Previous Parts have sought to lay the groundwork to support this Note's proposal.[251] This Part functions to solidify these ideas into a working analysis. First, by exploring the rule of comity and then by illustrating how this Note's proposal would work in practice, this Part outlines how federal courts should apply AEDPA's rule of comity in the dual sovereignty context. This Part concludes by addressing the potential criticisms of this Note's proposal.

A. The Rule of Comity

Both the dual sovereignty doctrine and AEDPA's deference provisions rest upon notions of judicial comity. *Black's Law Dictionary* defines judicial comity as "[t]he respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions."[252] The rule of comity is an enduring and essential component of the United States' system of government.[253] While the doctrine of comity is one

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250. 142 CONG. REC. S3447 (daily ed. April 17, 1996) (statement of Sen. Hatch).

251. *See supra* Parts II–V (discussing dual sovereignty, history of habeas corpus, nature of collateral proceedings, and AEDPA).

252. BLACK'S LAW DICTIONARY 262 (7th ed. 1999); *see also* Younger v. Harris, 401 U.S. 37, 44 (1971) (defining comity). In *Younger*, the Supreme Court defined comity as:

> [A] proper respect for state court functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id.

253. *See* Darr v. Burford, 339 U.S. 200, 204 (1950) (describing need for comity between

of policy and not an absolute rule,[254] the Supreme Court has spoken of the doctrine with the highest regard, noting:

> The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.[255]

Many have argued that the endurance of comity is essential to the strength of the United States' system of federalism, and because federal and state powers overlap to some degree, comity acts as a necessary buffer to the friction resulting from this overlap.[256]

The dual sovereignty exception to the Double Jeopardy Clause is itself a judicially crafted doctrine used as a rule of comity. The rationales that courts repeatedly employ to justify the dual sovereignty exception invoke this concern for comity.[257] The idea that a single act is an offense against the peace and dignity of both the federal and state governments and that each sovereign should have the ability to punish the wrongdoer demonstrates this concern for comity.

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federal and state courts), *overruled in part by* Fay v. Noia, 372 U.S. 391 (1963). The *Darr* Court spoke of the need for comity in the habeas context. *Id.* It described the emergence of the rule of comity as a solution for the problems that could occur if a federal district court could upset a state court conviction without an opportunity for a state court to correct the constitutional violation. *Id.* The *Darr* Court noted that the doctrine "teaches that one court should defer action on cases properly within its jurisdiction until the courts of another sovereignty with concurrent powers . . . have had an opportunity to pass upon the matter." *Id*; *see also Ex parte* Royall, 117 U.S. 241, 251 (1886) ("[P]ublic good requires that those relations [between state and federal courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.").

254. *See* Norlynn Blocker, Comment, *An Exercise in Comity: Exhaustion of State Remedies in Federal Habeas Corpus Proceedings*, 35 BAYLOR L. REV. 497, 506 (1983) (acknowledging that body of law has never explicitly codified doctrine of comity as wooden rule, but "because of its great importance in maintaining harmony within the law of nations, its principles are tacitly presumed and adopted by all courts of justice").

255. Covell v. Heyman, 111 U.S. 176, 182 (1884).

256. *See Younger*, 401 U.S. at 44–45 (discussing comity and noting that "[i]t should never be forgotten that [the] slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future"); *see also* Blocker, *supra* note 254, at 506 (noting that "[i]deals of comity have earned domestic significance as an indispensible facet of American federalism").

257. *See supra* Part II.C (discussing rationale of dual sovereignty doctrine).

First, one concern of the federal courts is that one sovereign will be able to exercise greater power than the other unless federal and state governments can each independently punish the wrongdoer. Consequently, not only would disallowing successive state-federal prosecutions deprive the people of each sovereign the ability to punish the wrongdoer adequately, but the system of federalism could also break down.[258] Therefore, each sovereign allows the other to prosecute the wrongdoer for the same conduct. A second concern of federal courts is that prohibiting successive prosecutions would cause a race to the courthouse of the sovereign with the more lenient penalties.[259] Whatever truth this concern may have in the criminal justice system's current climate of cooperative federalism, underlying its repeated assertion is the idea that comity directs each sovereign to respect the control exercised by the other sovereign within its confines.[260] Thus, the principle of comity is integral to the dual sovereignty doctrine.

Comity also weighs heavily in the habeas corpus context. The restrictions surrounding the federal writ of habeas corpus for state prisoners stem from comity concerns.[261] If federal courts overrule a state court judgment because they believe that they are better at deciding federal constitutional issues or that they should enforce their policies in all matters before them, then this appropriation could endanger the federalist system.[262] Courts, commentators, and legislators have repeatedly invoked principles of federalism and comity in any discussion of habeas corpus, and they invoked these principles in conjunction with AEDPA.[263] In one of the first cases concerning

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258. *See supra* Part II.C (discussing rationale of dual sovereignty doctrine).

259. *See* Heath v. Alabama, 474 U.S. 82, 93 (1985) (stating that to deny state its power to enforce its criminal laws because another state wins race to courthouse "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines" (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959))).

260. *Id.*

261. *See* Blocker, *supra* note 254, at 500 (discussing comity's role in history of habeas corpus and stating that "the Great Writ has, for over a hundred years, been the object of heated criticism by states' rights advocates as a serious threat to our system of dual sovereignty").

262. *See* 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch) ("I know there are people here who believe that only the Federal courts tell the truth. That just is not true. State courts, in many respects, are just as good, if not better, than the Federal courts—in these areas . . . ."); *see also* Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814 (1981) (writing on importance of nation's bifurcated system and noting that "[s]tate courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution . . . . It is a step in the right direction to defer to the state courts and give finality to their judgments . . . .").

263. *See* Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federal-

AEDPA, the Supreme Court stated that "AEDPA's purpose [is] comity, finality, and federalism."[264] Courts deciding cases under AEDPA's regime have continued to invoke this concern for federalism in their interpretation of the statute.[265] Thus, comity is also integral to habeas corpus.

Although notions of comity underlie both the dual sovereignty doctrine and the writ of habeas corpus, these notions diverge in one key respect. Whereas in the dual sovereignty arena, comity preserves independent prosecutions by state and federal governments, in the habeas context, comity deters federal courts from reviewing the judgments of state courts. Therefore, in the habeas realm, comity prevents the independent review of facts and law expressly mandated by comity in the dual sovereignty doctrine. But as noted in Part II.C, one can make a strong case that comity in the dual sovereignty context should encourage federal courts to defer to state court determinations.[266] Because comity necessitates respecting the co-equal role of state and

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ism."). This statement opens the Court's opinion in a case regarding the respect that federal habeas courts owe states when reviewing claims of state prisoners. *Id.*; *see also Crime Bill Issues: Hearing on S.735 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Daniel E. Lungren, Attorney General of California) ("[I]n our system of government, state courts are coequal institutions with their federal counterparts and have the same responsibility to uphold the U.S. Constitution. To permit federal intrusion and independent relitigation of matters properly and reasonably in state court is to relegate state courts to mere fact finding panels . . . .").

264. (Michael) Williams v. Taylor, 529 U.S. 420, 436 (2000). The Court went on to state the following:

> There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings.

Id. This *Williams* decision, released on the same day as *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000), involved petitioner Michael Williams, and the issue concerned the circumstances under which federal courts must hold evidentiary hearings per AEDPA. *(Michael) Williams*, 529 U.S. at 424.

265. *See* Wright v. Sec'y of the Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) (noting that Congress plainly intended amendments to 28 U.S.C. § 2254 to require greater federal court deference to state court decisions and to promote more federal-state judicial comity); Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000) (noting that requirements in AEDPA are predicated on comity, ensuring that state courts have first opportunity to review federal constitutional challenges to state convictions, thus preserving role of state courts in protecting federally guaranteed rights).

266. *See supra* Part II.C (discussing criticisms of dual sovereignty doctrine and arguing that notion of federalism given by Supreme Court to justify dual sovereignty exception is erroneous).

federal sovereigns within the system of federalism, the correct notion of comity would prevent federal courts from relitigating issues upon which a state court has previously ruled. In fact, Congress recognized this correct notion of comity when it drafted and passed AEDPA.

This correct notion of comity, the one underlying AEDPA and this Note, is the one that should govern in the dual sovereignty context. Thus, federal courts in successive prosecutions under dual sovereignty should defer to prior state court suppression rulings just as federal courts must now defer to state court rulings under AEDPA. Relitigating these issues denies state courts the respect that they deserve as equal sovereigns within the federal system and undermines the power of state courts to decide issues of federal law within their province.[267]

B. The Proposal in Practice

As discussed, 28 U.S.C. § 2254 codifies the correct standard for federal court review of state court decisions in the habeas context.[268] Under this standard, which this Note refers to as "AEDPA's rule of comity," federal courts must give complete deference to state court findings of fact, substantial deference to findings on mixed questions of law and fact, and some deference to findings of law.[269] This Note proposes that federal courts should use this rule of comity in successive federal prosecutions under the dual sovereignty exception when considering suppression of evidence issues previously litigated in state court.

This subpart outlines how federal courts should apply AEDPA's rule of comity in these situations. Initially, the federal court in such a proceeding should determine whether the state court suppression ruling concerned a question of fact, question of law, or mixed question of law and fact.[270] Fourth

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267. *See* Taryn A. Merkl, Note, *The Federalization of Criminal Law and Double Jeopardy*, 31 COLUM. HUM. RTS. L. REV. 175, 196 (1999) (stating that "[a]llowing one sovereign in a federal system to disrupt the judgments of another sovereign may result in undesirable consequences—one sovereign could significantly undermine the first sovereign's strength and legitimacy").

268. *See supra* Part V.B.2 (discussing standards of review under § 2254(d)).

269. *See supra* Part V.B.2 (discussing standards of review under § 2254(d)).

270. Considering the steps that a trial court takes in resolving a Fourth Amendment motion to suppress is helpful in this situation. First, the court establishes the "basic, primary, or historical facts." LAFAVE, *supra* note 77, § 11.7(c) (quoting United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984)). Next, the court selects the applicable rule of law. *Id.* Finally, the court determines "whether the rule of law as applied to the established facts is or is not violated." *Id.* This final step is the most troublesome for standard of review purposes. *Id.* Also note that AEDPA's deferential standard of review applies only to cases actually adjudicated before the state court. *See* 28 U.S.C. § 2254(d) (2000) (limiting deference to claims

Amendment cases can involve each of these categories of review, but the most frequent standard used for reviewing a suppression ruling is that of mixed law and fact.[271] Then, the federal court, acting in a fashion similar to its role as a habeas court, should review the previous state court suppression ruling under the standards dictated by Congress in AEDPA.[272]

If the federal court determines that the suppression issue in the earlier state proceeding involved a factual determination, such as "who, when, what, and where," the comity accorded to the earlier state suppression ruling per AEDPA should be one of complete deference.[273] An example of a question of fact would be a state court's determination of whether the police made threats to a defendant prior to the defendant's purported consent.[274] Thus, in the dual sovereignty context, if a state court suppressed evidence because it determined that an invalid search occurred under these facts, the federal court in a subsequent federal prosecution should give complete deference to this factual finding.[275]

If the federal court determines that the suppression issue in the earlier state proceeding involved a purely legal determination,[276] such as whether the

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that were "adjudicated on the merits in State court proceedings"). Thus, in deciding whether to defer to the state court suppression ruling, the federal court must assess if the state court actually adjudicated the specific Fourth Amendment issue before the federal court. However, because this Note's proposal applies only to situations in which the state court suppressed the evidence on federal constitutional grounds, this requirement will invariably be met.

271. *See* LAFAVE, *supra* note 77, § 11.7(c) (noting that appellate review of Fourth Amendment cases involves review of facts, law, and mixed questions of law and fact). These are the standards that courts traditionally use on direct review. *Id.* However, state prisoners are rarely able to obtain an adjudication of their Fourth Amendment claims on collateral review in federal habeas courts. *Id.* at § 11.7(g) (citing Stone v. Powell, 428 U.S. 465 (1976)). Under *Stone*, federal habeas courts may only review Fourth Amendment claims if the state failed to "provide[] an opportunity for full and fair litigation of a Fourth Amendment claim." *Stone*, 428 U.S. at 494. The limited availability of federal habeas remedies for state prisoners on the basis of Fourth Amendment claims further supports this Note's proposal—that federal courts should give deferential review to state court findings on Fourth Amendment claims in the dual sovereignty context.

272. Thus, federal courts will be familiar with these proposed standards because they are the same standards that federal courts currently apply to habeas petitions per AEDPA.

273. *See* LAFAVE, *supra* note 77, § 11.7(c) (identifying common types of questions involved in reviewing factual determinations).

274. *See id.* (giving example of question of fact review from *State v. Jones*, 475 A.2d 1087 (Conn. 1984)). In this example, police threats prior to consent would invalidate the search. *Id.*

275. *See supra* notes 215–18 and accompanying text (discussing question of fact review under AEDPA).

276. Situations involving the review of pure legal determinations will be rare and difficult to identify. *See supra* Part V.B.2 (noting inherent difficulty in separating question of law from mixed question of law and fact).

invalid portions of a warrant are severable from the valid portions, the comity accorded to the earlier state suppression ruling per AEDPA should be a small degree of deference under the "contrary to . . . clearly established Federal law" standard.[277] The legal determinations that the court must make in this case are whether the valid portions of the warrant are sufficiently particularized, whether the valid portions are distinguishable from the invalid portions, and whether the valid portions make up the greater part of the warrant.[278] If the warrant satisfies this legal standard, then the court will uphold the warrant.[279] Thus, in the dual sovereignty context, if a state court suppressed evidence because it determined that the warrant was invalid under this legal standard, then the federal court in a subsequent federal prosecution must review the state court's suppression ruling under the "contrary to . . . clearly established Federal law" standard.[280] As discussed in Part V.B.2, per AEDPA, a decision is only "contrary" if the Supreme Court has specifically ruled on the issue and the state court misapplies this law.[281] In this situation, if the federal court finds the state court ruling "contrary" to Supreme Court jurisprudence, then the federal court should represent its sovereign interests by independently relitigating the suppression issue.[282]

Finally, if, as will most often be the case, the federal court determines that the suppression issue in the earlier state proceeding involved a mixed question of law and fact, such as whether or the not the police conducted a "search" under the Fourth Amendment, then the comity accorded to the earlier state

277. *See* LAFAVE, *supra* note 77, § 11.7(c) (giving example of question of law review). Under the warrant requirement of the Fourth Amendment, a warrant must be based on sufficiently particularized information; but, as in this example, situations arise in which a warrant contains both valid and invalid components. *See* United States v. George, 975 F.2d 72, 79 (2d Cir. 1992) (discussing severability doctrine). Under the severability doctrine, if the valid portions of the warrant are severable from the invalid portions, the warrant is valid and thus the search was proper. *Id.*

278. *See* United States v. Naugle, 997 F.2d 819, 822 (10th Cir. 1993) (applying severability doctrine as review of question of law).

279. *Id.*

280. *See* 28 U.S.C. § 2254(d)(1) (2000) (codifying "contrary to . . . clearly established Federal law" standard).

281. *See supra* Part V.B.2 (discussing standard of review under AEDPA).

282. Interestingly, in this randomly chosen example, the "severability doctrine" does not appear to be "clearly established Federal law." *See* United States v. George, 975 F.2d 72, 79 (2d Cir. 1992) (noting that while "never explicitly considering the appropriateness of severance, as such, we have long accepted the underpinning of that doctrine"). Thus, if a federal court found that a state court misapplied the severability doctrine, then the federal court should give deference to the state court's finding because, per a strict reading of 28 U.S.C. § 2254, the Supreme Court has not specifically established the severability doctrine. *See* 28 U.S.C. § 2254 (2000) (codifying AEDPA's deference provisions).

suppression ruling per AEDPA should be substantial deference under the "unreasonableness" standard.[283] In this mixed law/fact example, in order to decide whether or not a search occurred, the state court must determine whether the defendant had an expectation of privacy that was reasonable under societal standards.[284] A court must consider factual issues such as the defendant's own privacy expectation and legal issues such as what type of expectation case law demonstrates is reasonable. Thus, in the dual sovereignty context, if a state court suppressed evidence because it determined that the defendant had an expectation of privacy that was reasonable under societal standards, then the federal court in a subsequent federal prosecution must review this determination under an "unreasonableness" standard.[285] Per the Supreme Court's decision in *Williams*, even if the federal court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly," it may not relitigate the issue.[286] Rather, the federal court can only relitigate the issue if the state court's application was "unreasonable."[287] If the federal court, after this deferential review, determines that the previous state court suppression ruling was in fact "unreasonable," then and only then should the federal court allow the relitigation of the suppression issue.

Indeed, only in those situations in which the state court decision is truly "unreasonable" will the federal court have a significant interest in acting in its sovereign capacity to relitigate the issue.[288] In these rare cases, the societal

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283. *See* LAFAVE, *supra* note 77, § 11.7(c) (describing one commonly appealed mixed question of law and fact).

284. *Id.* Under Fourth Amendment jurisprudence, if the police search an area in which the defendant had an expectation of privacy that society recognizes as reasonable, then a search occurred. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (outlining test for search per Fourth Amendment). Unless the police previously obtained a warrant to conduct a search, the court must suppress the evidence that the police obtained. *Id.* at 362 (Harlan, J., concurring).

285. *See* 28 U.S.C. § 2254 (d)(1) (2000) (codifying "unreasonable" standard).

286. Williams v. Taylor, 529 U.S. 362, 411 (2000).

287. *Id.* Admittedly, federal courts are having difficulty distinguishing between reasonably and unreasonably erroneous applications of federal law. *See* Lainfiesta v. Artuz, 253 F.3d 151, 155 (2d Cir. 2001) ("The Supreme Court has thus far offered little guidance as to the meaning of the term 'unreasonable application,' tautologically instructing federal *habeas* courts to ask whether the state court's application was objectively unreasonable."). However, the Court recently explained that "unreasonable application" must be more than "clear error." Lockyer v. Andrade, 588 U.S. ___, ___, 123 S. Ct. 1166, 1174–75 (2003).

A division among courts also exists on whether a federal habeas court must determine whether the state court's analysis of the habeas claim was unreasonable or rather should just determine whether the outcome selected by the state court was unreasonable. *See* Pettys, *supra* note 247, at 754 (noting disagreements among lower federal courts after *Williams*).

288. *See* Brittany Glidden, *When the State is Silent: An Analysis of AEDPA's Adjudication*

interests of deterrence, retribution, and restoration of the public confidence are so important that the federal court should exercise its sovereign power to vindicate the interests of its people. But when the state court decision is not "unreasonable," which in the majority of cases it likely will not be, the rule of comity behind AEDPA should apply, and the federal court should defer to the state court's suppression ruling. Therefore, this Note proposes that these outlined standards are the appropriate rules of comity that federal courts should afford state court suppression rulings in the dual sovereignty context.

C. Potential Criticisms of the Proposal

Admittedly, this Note's proposal is a novel one. No research indicates that it has been written about or proposed. Several possible criticisms of this Note, then, are readily apparent.

The most widely cited rationale for the dual sovereignty doctrine—that prohibiting successive prosecutions would undermine the ability of a sovereign to vindicate its interests in the enforcement of its own laws—conflicts with this Note's proposal.[289] If federal courts did defer to previous state court suppression rulings in successive federal prosecutions under dual sovereignty, as this Note proposes, then this deference might seriously hamper the subsequent federal prosecution. In fact, in many situations the federal government would lose a key piece of evidence likely necessary for the conviction of the criminal defendant. If the federal government thus lost the ability to prosecute the defendant, it could not represent its sovereign interests effectively. Given modern Supreme Court jurisprudence reaffirming the dual sovereignty doctrine,[290] critics would argue that deference to state courts in these situations would undermine federalism. While such a criticism does have facial appeal, the logic behind this argument is faulty, much like the logic behind the dual sovereignty exception itself.

First, unlike the time of the inception of the dual sovereignty doctrine, federal and state governments today often cooperate with one another in investigating and prosecuting crimes.[291] They cooperate with one another because they share the problems of a common constituency, the people of the United States, and therefore believe that they can fight crime more effectively by working together rather than by functioning as separate sovereigns.[292]

Requirement, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 183 (2001) (noting that AEDPA's standard "limits the situations where federal courts may reverse a state decision to those with the most egregious state court errors").

289. *See supra* Part II.C (discussing rationale of dual sovereignty doctrine).

290. *See supra* Part II.B (discussing modern extension of dual sovereignty doctrine).

291. *See supra* notes 67–69 and accompanying text (discussing "cooperative federalism").

292. *See supra* notes 67–69 and accompanying text (discussing "cooperative federalism").

Second, dual sovereignty conflicts with comity. Principles of federalism and comity require respecting the judgments of the other sovereign; in the dual sovereignty context, however, sovereigns give no such respect to one another. Instead, they actively reprosecute a defendant that another sovereign has already prosecuted and refuse to give any deference to the earlier sovereign's judgment.

Finally, the interests of individuals—which are at the heart of federalism—are at stake in these dual prosecutions.[293] The interests of the federal government in such reprosecutions are small in relation to the interests of the individual whom the state government has already subjected to the harassment, embarrassment, and expense of one prosecution—a prosecution that, concededly, has already served the criminal law justifications of deterrence and retribution just as well as could a subsequent federal prosecution. Thus, these concerns do not support the application of the dual sovereignty doctrine; rather, these concerns demonstrate that current principles of comity and federalism should prevent the federal relitigation of these suppression issues in most cases.

But, as noted in Part VI.B, situations will exist in which the federal government is justified in relitigating such suppression issues. These will be the situations in which AEDPA would mandate that no deference be given to the state court judgment because it was "unreasonable" or "contrary to . . . clearly established Federal law."[294] In fact, these will be the cases that most implicate the federal government's interest as sovereign. In these cases, the state court has behaved so irrationally that it has not served the interests of deterrence, retribution, and restoration of the public confidence. In these cases, the federal government will be justified in representing its sovereign interest by relitigating the matter because only these cases strongly implicate the sovereign's interest in enforcing its own laws.

It is also problematic that this Note seeks to analogize the congressional intent behind a very specific statute to another area of law. AEDPA concerns the law of habeas corpus, an extremely complex and controversial body of law that has historical roots predating this country. Critics could argue that habeas is simply "exceptional."[295] Professor Steiker presents the very interesting argument that habeas corpus law, because of its unusual historical status and the Supreme Court's own distinctive treatment of it, is not a promising vehicle for elaborating general constitutional principles.[296] One cannot easily dismiss

293. *See* Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

294. *See* 28 U.S.C. § 2254(d) (2000) (codifying AEDPA).

295. *See* Steiker, *supra* note 123, at 1707 (arguing "habeas exceptionalism").

296. *Id.* at 1730.

such an argument. Habeas corpus is different. The origin and history of habeas corpus is both unusual and distinct.[297] Its status as the "Great Writ of Liberty" and its use by various branches of government as a tool in their repeated struggle for power makes it a difficult vehicle for analogy.

But, as previously discussed, several compelling reasons establish why habeas is a good vehicle in this analysis. First, as its history shows, habeas corpus and federalism are innately intertwined.[298] Because "habeas corpus [is a] medium [for] the dialogue of federalism between the federal and state courts,"[299] it is the most appropriate and useful vehicle for studying the current congressional view on the rule of comity. Second, AEDPA concerns the correct standard for federal court collateral review of state court actions. Because successive federal prosecutions that occur under dual sovereignty are similar to those that occur under federal habeas review, the standard of review should also be similar.[300] The motives of Congress in enacting AEDPA and the Supreme Court's *Williams* decision demonstrate their concern that federal courts should respect the proper role of state courts as equal arbiters of questions of federal law. This concern is especially relevant when a federal court proceeding is collateral to a state court action. In these situations, to permit federal courts independently to relitigate a matter that was properly before a state court undermines the system of federalism, whether that relitigation occurs in a federal habeas proceeding or in a successive federal prosecution under dual sovereignty. Therefore, although the argument that habeas is "exceptional" has ample force, habeas is still a good vehicle for studying federal-state relations, and habeas corpus proceedings are so similar to collateral proceedings under dual sovereignty that the congressional intent behind AEDPA should weigh heavily on the actions of federal courts in the dual sovereignty context.

Finally, critics may argue that this Note's interpretation of the legislative intent behind AEDPA, mandating deference to state courts, ignores Congress's interest in reforming federal habeas corpus for federal prisoners.[301] AEDPA

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297. *See supra* Part IV.A.1 (discussing origin and history of writ of habeas corpus).

298. *See supra* Part IV.A.1 (discussing habeas corpus and federalism).

299. DUKER, *supra* note 115, at 156.

300. *See Powers of Congress*, *supra* note 193, at 1569–72 (going further by proposing that AEDPA's standard of review can apply to direct review of state court actions by federal courts).

301. Another possible criticism of this Note's proposal is that deference to state courts would take away from the federal courts' Article III power to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see supra* note 193 (discussing views of scholars who argue that AEDPA is unconstitutional). Exploration of this issue is beyond the scope of this Note. However, the Supreme Court has thus far rejected claims that AEDPA is unconstitutional. *See generally* Williams v. Taylor, 529 U.S. 362 (2000); Felker v. Turpin, 518 U.S. 651 (1996). The legislative history behind AEDPA also suggests that Congress rejected

did significantly reform 28 U.S.C. § 2255, the federal statute governing postconviction remedies for federal prisoners.[302] Congress, in reforming the habeas corpus process for both federal and state prisoners, clearly manifested an interest in bringing finality to the criminal justice process.[303] But the great bulk of debate and controversy over AEDPA concerned the deference provisions to state courts.[304] Preventing federal court religitation of issues properly before state courts was indeed the "crown jewel" of the reforms.[305] Members of Congress felt that deference to state courts could best bring finality to the collateral appeal process.[306] Thus, although AEDPA undoubtedly reflected other goals, the principal idea behind the reforms centered on reducing the federal courts' micromanagement of state court decisions.[307]

D. Summary

The endurance of comity is essential to maintaining the federalist nature of the United States' system of government by insuring that federal and state courts each respect the role of the other in the American judiciary.[308] However, when federal courts allow the admission of evidence that a state court previously suppressed on federal constitutional grounds, this relitigation denies state courts the respect that they deserve as equal arbiters of questions

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such criticisms. *See Federal Habeas Corpus Reform: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 59 (1995) (statement of Gale Norton, Attorney General of Colorado) (stating that critics who claim that reform violates United States Constitution ignore critical fact that "[i]t was Congress that made the most major expansion of habeas review. Accordingly, it is uniquely within the province of this body to make changes to the habeas statutes that will preserve the States' role as the principal enforcer of our nation's criminal laws").

302. *See* 28 U.S.C. § 2255 (2000) (governing remedies on motions attacking sentences for those in federal custody).

303. *See* 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch) ("The resulting lack of finality [from the state and federal collateral appeal process] saps public confidence in our criminal justice system and undermines the proper roles of the State and Federal Government.").

304. *See supra* notes 222–26 and accompanying text (discussing debate over deference provisions in AEDPA).

305. *See* 142 CONG. REC. H3607 (daily ed. April 18, 1996) (statement of Rep. Barr) (calling deference in habeas reform "crown jewel").

306. *See* 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch) ("Meaningful reform will stop repeated assaults upon fair and valid State convictions through spurious petitions filed in the Federal courts. We cannot stop the spurious petitions without changing the standard under which these petitions are reviewed.").

307. *See* 141 CONG. REC. S7835 (daily ed. June 7, 1995) (statement of Sen. Hatch) (discussing frustration with federal courts' micromanagement of state court decisions).

308. *See supra* Part VI.A (discussing importance of comity in maintaining federalist system).

of federal law. To remedy this incongruity, this Note proposes that federal courts should apply AEDPA's rule of comity to suppression rulings in successive prosecutions under dual sovereignty. This Part outlined how federal courts should treat questions of law, fact, and mixed law and fact when considering evidence that a state court previously suppressed on Fourth Amendment grounds. In most cases, deference to the state court suppression ruling will be most appropriate. However, this Note does concede that federal courts should represent their sovereign interests by relitigating the evidentiary issue in cases in which the state court has acted irrationally. This Part also explored the possible criticisms of this Note's proposal. While each has merit, this Part made strong arguments to rebut these criticisms, thus reinforcing the feasibility and significance of this Note's proposal.

VII. Conclusion

In 1959, Justice Black wrote in his dissent in *Abbate v. United States*: "I am . . . not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."[309] Over forty years later, Justice Black's concern remains true. It is a concern that scholars, courts, and legal practitioners continue to invoke when criticizing the dual sovereignty doctrine, and it is a concern that is even more poignant in this day of "cooperative federalism."[310]

Currently, in successive federal prosecutions occurring under the dual sovereignty exception, federal courts allow the introduction of evidence that a state court suppressed on federal constitutional grounds without considering the previous state court suppression ruling.[311] To justify the relitigation of these evidentiary matters, federal courts invoke the dual sovereignty doctrine coupled with principles of collateral estoppel.[312] However, since the passage of the Antiterrorism and Effective Death Penalty Act of 1996, federal courts no longer can ignore the inconsistency in the application of a notion of comity that expressly mandates independent relitigation of issues in the dual sovereignty context, but expressly prevents such relitigation in the habeas context.[313]

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309. Abbate v. United States, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

310. *See supra* Part II.C (discussing criticisms of dual sovereignty doctrine).

311. *See supra* Part III.B (discussing cases in which federal courts allowed admission of evidence that state court previously suppressed).

312. *See supra* Part III.B (discussing reasoning of federal courts that did not give previous state court suppression rulings collateral estoppel effect).

313. *See supra* Part V (discussing AEDPA's rule of comity).

Ultimately, this Note's purpose is to make federal courts consider how they review the decisions of state courts in the dual sovereignty context. Instead of blindly adhering to the dual sovereignty doctrine, federal courts should respect recent congressional action in the habeas context, a context so similar to dual sovereignty that AEDPA's reforms should weigh heavily on federal judicial treatment of previous state court suppression rulings. Thus, this Note proposes that a federal court considering evidence that a state court previously suppressed in the dual sovereignty context should follow AEDPA's rule of comity by giving complete deference to findings on questions of fact, substantial deference to findings on mixed questions of law and fact, and some deference to findings on questions of federal law.[314]

This Note does not merely advocate that these notions of federalism and comity should govern simply out of respect for the federalist system; this Note advocates that these notions should govern out of respect for the individual rights that the system of federalism protects. As the Supreme Court has noted:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[315]

In particular, the prohibition against double jeopardy is of such fundamental importance that the dual sovereignty exception should be limited and narrowly tailored to serve those societal interests that take precedence over the interests of an individual.[316] This Note's proposal would help to ensure that these individual liberties are protected while enabling the federal government to protect society's interest in the enforcement of criminal laws in situations in which the state court has acted truly irrationally.[317] Anything short of this deferential approach will continue to undermine the federalist nature of the American judicial system, as federal courts exhibit deference and respect to state court judgments in some areas but not in others. Anything short of this

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314. *See supra* Part VI.B (outlining proposal for federal court deference to state court suppression rulings in dual sovereignty context).

315. New York v. United States, 505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

316. *See supra* notes 12–13 and accompanying text (discussing fundamental nature of double jeopardy protection).

317. *See supra* Part VI.B (outlining proposal for federal court deference to state court suppression rulings in dual sovereignty context).

approach will also continue to undermine the individual rights and freedoms guaranteed by the United States Constitution.