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The Double Jeopardy Clause, Constitutional Interpretation and the Limits of Formal Logic

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THE DOUBLE JEOPARDY CLAUSE, CONSTITUTIONAL INTERPRETATION AND THE LIMITS OF FORMAL LOGIC

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Like much of the Bill of Rights, the Double Jeopardy Clause of the Fifth Amendment is beguilingly simple: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[1] Unlike many of its companion phrases in the Fifth Amendment, and many other provisions in the first ten amendments, the policy animating the Double Jeopardy Clause is clear and obvious. Without a double jeopardy prohibition, the state would possess almost limitless power to disrupt the lives and fortune of the citizenry. A citizen could be subjected to perpetual prosecution for any act whatsoever, leading at best to the squandering of a person's assets and at worst to multiple punishments for the same offense. Without a double jeopardy prohibition, in short, a citizen could have no clear and settled expectation concerning liability to criminal prosecution and punishment. The Double Jeopardy Clause provides the basis for just that expectation.

Given the simplicity of the language and the specificity of its animating force, the interpretive history of the Double Jeopardy Clause perhaps should be a model of logical and conceptual clarity. It is anything but that. Individual opinions certainly purport to be logical derivations from the language and policy of the clause, or the precedent interpreting it, and many opinions are characterized in prototypical logical language, such as providing "bright line rules"[2] or discovering "absolute" rights.[3] Notwithstanding the possibly impeccable internal logic of any particular case, however, double jeopardy jurisprudence as a whole, as even the Supreme Court admits,[4] is just about as far removed from a model of logical and conceptual clarity as it is possible to

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1. U.S. CONST. amend. V.

2. *See, e.g.*, Chief Justice Rehnquist's appraisal of Jenkins v. United States, 420 U.S. 358 (1975), in Lee v. United States, 432 U.S. 23, 36 (1977).

3. Burks v. United States, 437 U.S. 1, 6 n.6 (1978).

4. *Id.*

be.[5]

The conceptual muddle of the Double Jeopardy Clause generates a willingness on the part of the Court periodically to rethink its jurisprudence, presumably for the purpose of replacing one failed logical scheme with a better one, and similarly stimulates scholarly calls for the adoption of general theories that presumably are designed to replace the chaos with logical orderliness.[6] We, by contrast, have a different view of the nature of the problem. We think the conceptual muddle comes largely from unrealistic expectations for the power of logic to resolve (or dissolve) constitutional questions.[7] If we are right, then ironically it is just the attempt to use, and the faith invested in, the power of logic that generates the appearance of chaos. But, again if we are right, the solution lies less in ever more rigorous applications of logic but instead in changing the tools of analysis. A secondary consequence of doing so may be to modify the conception of the task of constitutional interpretation.

These, at any rate, are the issues that we intend to investigate in this article, in an admittedly preliminary manner. We do not presume to be able to resolve profound questions concerning the nature of thought here, but we do hope to raise interesting questions and to pose suggestively intriguing avenues for further inquiry. We will do so using as our focus a very simple, and logical, double jeopardy opinion, *Heath v. Alabama*.[8] We first discuss its tightly controlled logical structure. To show that the problem we are addressing is not confined to double jeopardy clause jurisprudence, we also give a few examples of similar interpretive methodologies employed by Justice Scalia -- the foremost proponent of logic[9] on the Court -- in other fields of constitutional law. We then demonstrate that the logic of the *Heath* opinion, while superficially appealing, is unconvincing. We explain why we attribute this phenomenon to the great but often overlooked distance between logic and persuasion, and in doing so explore briefly certain fundamental implications of logic that seem to be overlooked by its practitioners on the Court and elsewhere. We conclude by suggesting an alternative. Constitutional interpretation should not be viewed as predominantly a logical matter but instead as involving the reasoned revision of belief.[10]

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5. For a discussion, see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 [hereinafter Westen & Drubel].

6. *See, e.g.*, George C. Thomas III, *An Element Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827 (1988); Westen & Drubel, *supra* note 4.

7. *See also* Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

8. 474 U.S. 82 (1985).

9. "Logic" and its derivatives henceforth means "formal logic." Thus, when we express doubts about "logic" we should not be taken as favoring its opposite, "illogic." Rather, we are focusing on the narrow issue of the implications of formal logic.

10. *See* GILBERT HARMAN, CHANGE IN VIEW (1989) [hereinafter HARMAN].

Logic Driven Constitutional Cases and Theories

Theories, and theorists, of constitutional interpretation can be sorted into two groups based on the degree to which a theory is logic driven or judgment driven. We mean by "logic" first order predicate logic ("formal logic"), because we suspect that this is what is implicit in those theories that emphasize the logical nature of their enterprises.[11] We must rely on our suspicions in this regard because very few theorists articulate carefully the nature of the reasoning processes they believe they are employing or wish to employ, although claims that one outcome or another, or one argument or another, is "illogical" are frequent,[12] as are claims of the form "logic requires . . . ."[13]

The alternative to the emphasis on formal logic is an emphasis on judgment. We mean by "judgment" reasoned revisions of belief that are not, or not mainly, a consequence of the application of formal logic.[14] This is not equivalent to a call for ad hoc decision making, as some of the formal logic enthusiasts assert.[15] Reasoned revision of belief can and does occur, and is a more significant component of natural reasoning processes, including constitutional interpretation, than is formal logic.

The hallmark of logic driven theories is the specification of a closed set of premises that are used deductively to derive answers to particular questions. By "deduction" we mean merely the determination of tautological truth by means of a truth table, or by the use of elementary rules of inference provable by truth tables.[16] We do not suggest that any constitutional theorist explicitly realizes that this is a test of the validity of the arguments advanced, but it is perhaps the most basic test that can be applied to test the validity of arguments. If the arguments do not pass this test, or have curious implications, little in their favor can be found, at least so far as formal logic is concerned. The paradigm case of a logic driven theory of constitutional interpretation is textual analysis in which, explicitly or implicitly, the interpretive process amounts to deducing conclusions from the text of the Constitution. Certain theories focusing on the intent of the framers are also logic driven theories. The key variable here is

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11. Everyone uses other tools as well, but the theorists that we will note rely on formal logic relatively more than other tools. In any event, our study is limited to the curious consequences of relying on formal logic in constitutional interpretation.

12. *See, e.g.*, Scalia's dissent in Morrison v. Olson, 487 U.S. 654, at 705-06 (1988).

13. *See, e.g., id.* at 705-08. *See also* Erwin Chemerinsky, *The Seduction of Deduction: The Allure of and Problems with a Deductive Approach to Federal Court Jurisdiction*, 86 NW. U.L. REV. 96 (1991).

14. *See generally* HARMAN, *supra* note 10, to whom we are indebted.

15. *See, e.g.*, Scalia's concurrence in Walton v. Arizona, 110 S. Ct. 3047 (1990).

16. For a discussion, see IRVING M. COPI, INTRODUCTION TO LOGIC, 277-325 (6th ed. 1982) [hereinafter COPI].

how intent is determined. If the sources for determining intent are a closed set, the theory is almost surely logic driven. This kind of theory would involve consulting the closed set for the meaning of language, and then deductively determining the implications of the meaning. If the sources of meaning are essentially open-ended, the theory is possibly judgment driven. We can think of no case in which it would not be, but we need not answer that question for our purposes. A third form of a logic driven theory is one that focuses on extracting the rule from a prior case and applying it deductively to the problem at hand.

The opinion in *Heath v. Alabama*[17] on its surface appears to be a good example of a logic driven analysis of the meaning of the double jeopardy prohibition. On August 31, 1981, the body of Rebecca Heath, a resident of Alabama, was discovered in Georgia. She had been killed by a gunshot wound to the head.[18] Her husband, Larry Heath, pleaded guilty to a Georgia indictment for capital murder for having planned his wife's murder,[19] and was sentenced to life imprisonment.[20] Shortly thereafter, Heath was called to testify at the trial of his alleged confederates in Georgia.[21] He refused to testify on the ground that he might be subject to a kidnapping charge in Alabama, and thus any testimony he would give might tend to incriminate himself. One week later, he was indicted by a grand jury in Alabama, but not for kidnapping; rather, he was indicted for the same murder for which he already had been convicted and sentenced in Georgia.[22]

Heath was tried in Alabama, convicted, and sentenced to die.[23] He argued on appeal that his trial and sentence violated the double jeopardy prohibition because he was twice convicted and sentenced for the murder of the same individual.[24] The State asserted that the dual sovereignty exception to the double jeopardy prohibition should apply to successive state prosecutions, as it

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17. Heath v. Alabama, 474 U.S. 82 (1985). Professor Allen was Heath's counsel before the Supreme Court.

18. *Id.* at 84.

19. *Id.*

20. *Id.*

21. Brief for Petitioner at 3, in *Heath*.

22. Petitioner was indicted for "murder during a kidnapping." ALA. CODE § 13A-5-40(a)(1) (1981). Respondent did not deny petitioner's contention that the Georgia and Alabama offenses were the same offense for double jeopardy purposes. Heath v. Alabama 474 U.S. 82, 84-85 (1985).

23. *Heath*, 474 U.S. at 85-86.

24. In the lower courts, Heath's former counsel also raised the question of Alabama's jurisdiction over those events that had occurred in Georgia. His counsel failed to raise the jurisdictional question before the Alabama Supreme Court, and consequently the Supreme Court refused to consider the jurisdictional question. *Id.* at 86-87.

does to separate prosecutions by a state and the federal government[25] and to separate prosecutions by the federal government and an Indian tribe.[26]

The Supreme Court affirmed the death sentence in an opinion that purports to be an easy, logical, application of the settled dual sovereignty exception. According to the Court: "The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive state prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."[27] To reach this conclusion, the Court first asserted that the "dual sovereignty doctrine is founded on the common law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'"[28] Thus, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns."[29] According to the Court, states are sovereign from each other, and thus this test was satisfied.[30] In support of this conclusion, the Court asserted that each State has separate interests in the enforcement of its own laws which "by definition can never be satisfied by another State's enforcement of *its* own laws."[31] Thus, each state is justified *a priori* in prosecuting an individual for an offense no matter how many prosecutions already have been brought for the same conduct in the courts of other governments.

The sense of the irresistible force of logic compelling an outcome that infuses *Heath* is often found in Supreme Court opinions. Many of Justice Scalia's opinions reflect an enchantment with logic, and thus well exemplify one side of our dichotomy. Two majority opinions make the point particularly well, *Coy v. Iowa*[32] and *Michael H. v. Gerald D.*[33] The issue in *Coy* was the constitutionality of an Iowa statute permitting a screen to be placed between complaining child witnesses and their alleged sexual abusers in order to protect the children from trauma and intimidation. Scalia's opinion is a pristine case of logical simplicity. He asserts the English meaning of the Confrontation Clause,

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25. Bartkus v. Illinois, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959); Abbate v. United States, 359 U.S. 187 (1959).

26. United States v. Wheeler, 435 U.S. 313 (1978).

27. Heath v. Alabama, 474 U.S. 82, 88 (1985).

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

29. *Id.*

30. *Id.*

31. *Id.* at 93 (emphasis added).

32. 487 U.S. 1012 (1988).

33. 491 U.S. 110 (1989).

supports it with a brief etymology,[34] takes a brief detour through the Clause's policy,[35] and concludes by announcing that only logic matters:

> The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit . . . To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: "a right to meet face to face all those who appear and give evidence at trial."[36]

The issue in *Michael H. v. Gerald D.*[37] was the constitutionality of a California statute that created a presumption of legitimacy of a child born to a married woman living with her husband, a presumption that could be rebutted only in quite narrow circumstances. The outcome of the case is of little consequence for our purposes, but Scalia's defense of the Court's methodology is quite enlightening.[38] Responding to Justice Brennan's dissent, he had this to say:

> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general -- perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such

34. Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

35. *Id.* at 1017-20.

36. *Id.* at 1020-21 (quoting California v. Green, 399 U.S. 149, 175 (Harlan, J., concurring)).

37. 491 U.S. 110 (1988).

38. Interestingly, this defense did not command a majority of the Court, which demonstrates good sense, in our view.

> a more specific tradition, and it unqualifiedly denies protection to such a parent.
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> One would think that Justice Brennan would appreciate the value of consulting the most specific tradition available, since he acknowledges that "[e]ven if we can agree . . . that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do." Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference -- or at least to announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted -- is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion, which disapproves this footnote, *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by an particular identifiable tradition, is no rule of law at all.[39]

Two separate opinions by Scalia powerfully confirm his commitment to logic. The first is his opinion in *Morrison v. Olson*,[40] the case upholding the constitutionality of the special prosecutor law. His opinion is a marvel of logical analysis that reduces to the following propositional argument:

1) The Constitution vests all executive power in the Presidency;
2) Prosecution is an executive power;
3) The challenged statute creates an office of special prosecutor, which exercises prosecutorial power;
4) The office of special prosecutor is not a part of the executive branch;
5) Therefore, the statute is unconstitutional.

In this opinion, textualism gives way to some form of originalism. He relies, for example, on *The Federalist Papers* to discover the policies behind the relevant constitutional language,[41] which apparently is designed to control or support in some undefined way his reading of the language, and he asserts that

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39. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1988).
40. 487 U.S. 654 (1988).
41. *Id.* at 698-99 (Scalia, J., dissenting).

no one disputes that prosecution is an executive power.[42] Nevertheless, the method is virtually identical to that in *Coy*.[43] The clear meaning of the Constitution is specified, with the implications derived deductively. Scalia does have an extended policy discussion that disputes the significance attached by the majority to the controls retained over the special prosecutor, but in the end he concludes that his own discussion is beside the point, because "it is ultimately irrelevant *how much* the statute reduces Presidential control."[44] It is only relevant that the statue does it at all.

The second separate opinion we will mention is to the judgment in *Walton v. Arizona*.[45] Walton claimed that the Arizona statute under which he was sentenced to death was unconstitutional in its requirement that the defendant establish mitigating circumstances by a preponderance of the evidence. The Court rejected the claim, concluding that the Constitution forbids excluding from consideration "any particular type of mitigating evidence," but does not forbid a state "from specifying how mitigating circumstances are to be proved,"[46] except in one instance. A jury may not be instructed that it must unanimously find a mitigating factor before the factor may influence the decision, but a state can instruct that an individual juror must be convinced by a preponderance of the evidence of the existence of a mitigating circumstance before the juror may rely on it.[47]

Scalia concurred in the result, but announced that the Court's death penalty jurisprudence is so illogical that he no longer will be bound by the holdings of *Woodson v. North Carolina*[48] and *Lockett v. Ohio*[49]: "The ultimate choice in capital sentencing . . . is a unitary one -- the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion to select the other."[50] He continues:

> This second doctrine [of mercy] -- counter-doctrine would be a better word -- has completely exploded whatever coherence the notion of 'guided discretion' once had. . . .[51]

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42. *Id.* at 705-06 (Scalia, J., dissenting).
43. Coy v. Iowa, 487 U.S. 1012 (1988).
44. *Id.* at 708 (Scalia, J., dissenting)(emphasis added).
45. 110 S. Ct. 3047 (1990).
46. *Id.* at 3055.
47. *See* Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990).
48. 428 U.S. 280 (1976).
49. 438 U.S. 586 (1978).
50. Walton v. Arizona, 110 S. Ct. at 3058-59 (Scalia, J., concurring).
51. *Id.* at 3061 (Scalia, J. concurring).

> Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record or *any* circumstance surrounding the crime: [for example] that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood. . . . The . . . requirement [of mitigation] destroys whatever rationality and predictability the . . . requirement [of aggravation] was designed to achieve.[52]

> The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not -- whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard. . . . It is impossible to understand why [the Constitution demands categories for aggravation and none for mitigation, and thus] it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say 'yes.'[53]

These passages may not on first glance appear to be analogous to Scalia's other opinions, but we think they are. His superficially appealing call for rationality and standards is a call for decision by rule. To be sensible in his view, a particular fact must either be or not be mitigating. This is determined by deducing the meaning of specific standards and applying that meaning to the facts before the decision maker.

The examples that we have given are not particularly unique. There are many other Supreme Court opinions written by various justices that purport to be primarily logical exercises,[54] and various constitutional scholars rely heavily on the role of logic in constitutional interpretation.[55] This is hardly surprising,

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52. *Id.* at 3062 (Scalia, J., concurring).

53. *Id.* at 3064 (Scalia, J., concurring).

54. From the last four terms, see, e.g., McNeil v. Wisconsin, 111 S. Ct. 2204 (1991); Perpich v. Dep't of Defense, 110 S. Ct. 2418 (1990); Grady v. Corbin, 110 S. Ct. 2084 (1990); Employment Div., Dep't of Human Resources of Or. v. Smith, 492 U.S. 872 (1990); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Dowling v. United States, 110 S. Ct. 668 (1990); City of Richmond v. J.A. Croson Co., 493 U.S. 342 (1989); Braswell v. United States, 487 U.S. 99 (1988).

55. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 7 (1977) (original intent of the framers is essentially written into its text); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 162-63 (1990):

> In short, all that a judge committed to original understanding requires is that the text,

given the valued role of logic in our culture. With these examples in mind, we turn now to an examination of some of the overlooked and surprising implications of logic.

Persuasion and the Limits of Logic

The proponents of formal logic as a dominant methodology of constitutional interpretation have overlooked that the application of logic rarely leads to reasoned revision of belief, which is why logic driven arguments about constitutional interpretation (and just about everything else outside of mathematics) are often unpersuasive. The proponents of formal logic have also overlooked that it operates satisfactorily for any enterprise, including constitutional interpretation, only under very tight conditions, in particular the condition of consistency of premises. The requirement of consistency is apparently not satisfied by the Constitution, which leads directly to quite regrettable consequences.

The only persuasive power of logic comes from its ability to demonstrate that certain relationships exist among the premises of an argument (such that some proposition follows deductively from the premises), or that premises are inconsistent through the demonstration of a contradiction. Once an inconsistency is demonstrated, however, it cannot be accommodated within the logical system. The system itself must change, through a change in either the premises or the logical rules, but logic cannot prescribe what those changes should be. Consequently, the implications of logic are always at the mercy of even mundane facts that are not within the argument and that raise new considerations or contradictions. Another feature of logic that diminishes its power to persuade is that the implications of premises always unfold in a single direction. What is found to be true once must be true for all times, at least until a contradiction is found resulting in the whole process being scrapped. Logical results, in short, always accumulate, and thus beliefs cannot be revised.[56] Propositions can only be validated and never reconsidered. To be sure, one can revise one's premises, but that is not a logic driven enterprise. It may be driven by an unease over the results of logical operations, but that unease will have a source

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structure and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach of application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.

56. HARMAN, *supra* note 10, at 4.

external to the logical operations themselves.

The second limitation on formal logic is the requirement of the consistency of premises. Consistency in premises is highly prized because absent it, anything at all may be proved. Taking Irving Copi's example,[57] if we start with the inconsistent premises that 1) Today is Sunday (S), and 2) Today is not Sunday (not-S), we can prove anything like, perhaps, 3) Therefore the moon is made of green cheese (M). The proof is really quite simple:

1. S (by our premises)
2. S or M (step 1 and the addition rule)
3. not-S (by our premises)
4. M (steps 2 and 3, and the disjunctive syllogism).[58]

Gilbert Harman has vividly demonstrated the consequences of these various properties of logic in his story of Mary, a story that, in our view, deserves a place of honor with those other vivid images from epistemological musings such as Plato's metaphor of the cave[59] and Descartes sitting alone by the fire wondering if knowledge is possible:[60]

> Intending to have Cheerios for breakfast, Mary goes to the cupboard. But she can't find any Cheerios. She decides that Elizabeth must have finished off the Cheerios the day before. So, she settles for Rice Krispies. In the process, Mary has modified her original intentions and beliefs.[61]

But she has not modified her original intentions and beliefs as a result of the implications of formal logic:

> [R]ules of deduction are rules of deductive argument; they are not rules of inference or reasoning. They are not rules saying how to change one's view. Nor . . . are they easily matched to such rules. Consider modus ponens. This principle does not say that, if one believes *P* and also believes *if P then Q*, then one can infer *Q*, because that is not always so. Sometimes one should give up *P* or *if P then Q* instead.
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> Even if some sort of principle of belief revision corresponded to this

57. *See* COPI, *supra* note 16, at 348-49.
58. *See id.* at 324-25.
59. PLATO, THE REPUBLIC, Book VII.
60. RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY, FIRST MEDITATION (1961 ed.).
61. HARMAN, *supra* note 10, at 1.

> logical principle, the principle of belief revision would have to be a different principle. For one thing, the logical principle holds without exception, whereas there would be exceptions to the corresponding principle of belief revision. Mary believes that if she looks in the cupboard, she will see a box of Cheerios. She comes to believe that she is looking in the cupboard and that she does not see a box of Cheerios. At this point, Mary's beliefs are jointly inconsistent and therefore *imply* any proposition whatsoever. This does not authorize Mary to *infer* any proposition whatsoever. Nor does Mary infer whatever she might wish to infer. Instead she abandons her first belief, concluding that it is false after all.
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> Furthermore, even before Mary fails to find any Cheerios in the cupboard, it would be silly for her to clutter her mind with vast numbers of useless logical implications of her beliefs, such as *either she will have Cheerios for breakfast or the moon is made of green cheese.*[62]

Reasoned revisions of belief such as Mary's do occur, about the meaning of the Constitution and many other things, even though the dominant methodology is not typically the application of formal logic. The process is not one of deducing the implications of propositions; it is instead drawing an inference to the best explanation.[63] The operant principles are such things as coherence and conservatism. The relevant questions do not center on what is logically derivable from a fixed set of propositions, but on such matters as what best explains what has been observed, and what is the cost of a change in view, what and how much must be given up? In Harman's words, "Belief revision is like a game in which one tries to make minimal changes that improve one's position. One loses points for every change and gains points for every increase in coherence."[64] Logic plays an instrumental role by facilitating the ordering of beliefs and by helping to uncover inconsistencies and tensions, but the most that can be said is that logical inconsistencies should be avoided if possible. This is quite a distance from the implications of formal logic, in which logical inconsistencies mean either that the premises have to be revised, and thus the whole chain of deduction leading to the inconsistency must be scrapped, or the rules of deduction themselves must be revised.

Mathematics and a Taste for Cheerios

The central question of this paper may now be posed: is constitutional

62. *Id.* at 5-6.
63. *Id.* at 67.
64. *Id.* at 68.

interpretation more like formal logic (more like Euclidian geometry, for example),[65] or more like Mary's determination of what breakfast will be? As the cases we have noted demonstrate, often the Supreme Court implicitly asserts the process to be more like logic or Euclidian geometry than like Mary's culinary selection. We think to the contrary.

We believe that constitutional interpretation is more like Mary's thinking patterns than the cases we have discussed precisely because we believe a critical purpose of constitutional interpretation is to persuade, and we believe that all of the Justices would agree with us. We thus suspect that the use of logic in cases such as *Heath* is a result of a badly misplaced faith in the power of logic to persuade rather than based upon a rejection of the significance of persuasion. These are claims that we cannot prove, as their answers reside in the minds of the justices and the rest of society. We can, however, demonstrate in the context of the *Heath* case the limited capacity of its logical structure to persuade, and we can further demonstrate the remarkable consequences that a strong commitment to logic as a dominant tool of interpretation entails for constitutional interpretation. Perhaps this will assist others in determining their view of the proper tools to bring to the task of constitutional interpretation.

The unpersuasiveness of the *Heath* opinion is evident from the very start. According to the Court, in its prototypical logical fashion, governmental entities are sovereign when "the ultimate source of the power under which the respective prosecutions were undertaken"[66] is different in each case. The Court found this to be an easy to apply principle, because state "powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."[67] The Court asserted that its conclusion was compelled by *Wheeler v. United States*,[68] where it held that Indian tribes and the federal government were separate sovereigns for double jeopardy purposes because Indian tribes derived their authority to prosecute violations of their own laws from their "primeval sovereignty" rather than from "a delegation of federal authority."[69]

Note how corrigible this argument is by the mere citation of unaccounted for facts that rob the argument of power. Rather obviously, states lack any

65. The complex relationship between logic and mathematics does not, we think, undercut the usefulness of Euclidian geometry as an exemplar.

66. Heath v. Alabama, 474 U.S. 82, 90 (1985)(quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)).

67. *Id.* at 89.

68. 435 U.S. 313 (1978).

69. *Id.* at 328.

"ultimate source of power" to prosecute criminal offenses, for their power to prosecute can be removed at any time through constitutional amendment. Indeed, although one would never know it from the Court's opinion in *Heath*, each of the dual sovereignty cases in which the Court upheld separate prosecutions are clearly ones where Congress, if it chose to do so, could preempt state authority over the acts in question.[70] In fact, whenever an act violates both federal and state law, presumably Congress has the power to preempt state authority to prosecute the act as a result of federal supremacy.[71]

The unpersuasiveness of the Court's argument concerning the implications of its concept of "ultimate sources of power" is strikingly evident in the Court's citation of *Wheeler*. That phrase is contained in *Wheeler*, but it is immediately followed by a recognition that congressional authority over the Indian tribes is plenary,[72] a power Congress had employed to limit the power of the tribes to prosecute offenses to those with a maximum penalty of six months imprisonment.[73] The problem now is obvious: apparently Indian tribes both possesses an "ultimate source of power" to try criminal offenses (and thus are a separate sovereign for double jeopardy purposes), and at the same time are completely under congressional authority.[74]

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70. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959); Abbate v. United States, 359 U.S. 187 (1959).

71. U.S. CONST. art. VI. For examples of preemption, see Pennsylvania v. Nelson, 350 U.S. 497 (1956); Easton v. Iowa, 188 U.S. 220 (1903); *In re* Lorey, 134 U.S. 372 (1890).

72. Wheeler v. United States, 425 U.S. 313, 327-28 (1978).

73. *Id.*

74. The Supreme Court in *Wheeler* noted:

> By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon. 435 U.S. at 328 n.28.

This suggestion of a "light bulb" theory of sovereignty illustrates the problems that logic removed from reasoned revisions of belief gets one into. There are other problems with the Court's political science. For example, thirty-seven of the fifty states were admitted to the Union by Act of Congress. But while the dual sovereignty theory does not apply to the federal government and a territory, Puerto Rico v. Shell Co., 302 U.S. 253 (1937), it is the "universal practice" to permit newly created states to prosecute crimes committed in the territory before the state existed. Higgins v. Brown, 1 Okla. Crim. 33, 69, 94 P. 703, 717 (Okla. 1908); *Ex Parte* Barber, 87 Okla. Crim. 201, 204-10, 196 P.2d 695, 697-700 (Okla. Crim. App.), *cert. denied*, 335 U.S. 847 (1948). This is yet another situation where the outcome cannot be reconciled with an analysis of "sovereignty" in the Court's syllogistic way. Similarly, in Waller v. Florida, 397 U.S. 387 (1970), the Court ruled that Florida could not prosecute an individual for what was assumed to be the same offense for which he already had been prosecuted in a city court because cities and states are not separate sovereigns. *Id.* at 392-93. However, cities are often not creatures of state government. *See, e.g.*, City of New Orleans v. Harrison, 244 So. 2d 834 (La. 1971); State *ex. rel.* Swart v. Molitor, 621 P. 2d 1100, 1102 (Mont. 1981). Some cities were created by royal charter and have continuously exercised "sovereignty." MARK I. GELFAND, NATION OF CITIES, 4-5 (1975). How such cities are

Our argument so far simply rests upon the truism that, in syllogistic arguments, all the action lies in the premises. If one casts into doubt any of the premises, the syllogism is of little consequence. Persuasive constitutional interpretation, then, must entail a defense of the premises rather than simply a manipulation of them. In the *Heath* case, the premises are essentially indefensible for obvious reasons. To accept the Court's argument requires accepting the very odd notion that the concept of sovereignty has some meaning independent of the complex set of relationships that comprise the political structure of this country; it requires accepting that there is a definition of sovereignty somewhere "out there" that can be used as the major premise in the Court's argument. This is crucial to the Court's logical approach, and it also is what makes that approach so unpersuasive. "Sovereignty" in our culture is an end result of the political choice to allocate certain powers in certain ways, rather than being the reason powers are so distributed. A generalization that states are or are not sovereign in the abstract is therefore misleading at best, and in any event essentially meaningless.[75] It thus falls before the first skeptical question, as the *Heath* opinion so aptly demonstrates.

The Court's second defense of its conclusion suffers precisely the same fate. According to the Court, remember, 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."[76] The first thought that begins to corrode this assertion is, where did this definition come from? Without an answer to that, which the Court does not supply, why should this definition control constitutional interpretation? Again, there is no answer, and we suggest that is so precisely because these questions come from outside the Court's syllogism. Accordingly, the syllogism is unaffected by them, and leaves them unanswered to do their corrosive work.

A second question comes to mind: is it really the case, as this proposition asserts, that state's define their own interests? Suppose the people of California concluded that a murder anywhere in the United States (or just anywhere, for that matter), so upset the state's delicate population that the state felt obliged to make murders anywhere capital crimes in California. This is ludicrous, of course, but the constitutional power to do so follows deductively from the

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distinguishable from Indian tribes based upon a purely historical sovereignty analysis is unclear. What is clear is that logical manipulations of empty generalizations about sovereignty should not determine the scope of the double jeopardy prohibition, and certainly do not persuade us in any meaningful sense.

75. As is the Court's reliance on the equally uninformative argument that the states are "different" and that their "history" is not the same as that of the federal government. In both cases the question should be why any difference is of significance. Such matters are simply ignored in the Court's simplistic approach to "sovereignty."

76. Heath v. Alabama, 474 U.S. 82, 93 (1985).

Court's logical argument. The moral is that the Court's argument is not very persuasive just because its logical structure has no capacity to respond to considerations extraneous to its premises.

Moreover, were the Court truly wedded to logical methodologies, it could not deny the validity of California's hypothetical law just because logical implications always unfold in a single direction. Logic never counsels reconsideration, absent the demonstration of a contradiction. It thus never counsels revisions of belief that permit accommodations to new facts or new perspectives. Thus, to accept logic as the dominant constitutional interpretive methodology requires accepting a process that is static rather than dynamic, one in which there is no capacity to make the slightest accommodation to unforeseen developments or new knowledge.[77] In the face of such matters, all one can do is scrap what has come before, to switch, as it were, from Euclidian to non-Euclidian geometries. But ironically, that move would not be made under the pressure of logic. It would be made instead under the felt need to bring one's methodologies into line with one's beliefs, which merely underlines that at the deepest levels of constitutional interpretation something other than logic is controlling decision.

Consider now the second general limitation on formal logic, the requirement of consistency of premises. Part of the seductive attraction of logic is the suggestion that logic confines decision making and makes it more rigorous. A logical process is the antipathy of ad hoc decision making in its careful specification of premises and rules of reasoning. This is probably why, at least in part, the Court often purports to employ deductive approaches, and it may explain why the Court approached the *Heath* case as it did. It surely is what Scalia had in mind when he said "a rule of law that binds neither by text nor by any particular identifiable tradition, is no rule of law at all."[78] There is an element of truth in this faith in the confining power of logic, but there is no truth to it in the context of constitutional interpretation precisely because ineradicable consistencies abound. Recur to our earlier discussion of the

77. To be clear, logic does not forbid reconsideration; it is merely indifferent to it. But if one is free to disregard one's syllogisms or premises at will, logic has no power to confine decision making, which appears to be one of its most attractive features to its judicial proponents. Perhaps, then, we should be seen as criticizing what is often referred to as formalism rather than the use of logic. *See, e.g.*, Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?* 12 CARDOZO L. REV. 1717 (1991). We chose to the contrary in order to highlight the implications of formal logic that seem to be at the heart of formalism. Moreover, if reconsideration is permitted within the jurisprudence of the logic mavens on the Court, then merely to label an opponent's views as "illogical" is to say virtually nothing at all. The important question would be why one syllogism instead of another better captures the relevant reality. This requires explanation, which surely will have a logical aspect, but equally surely will not be syllogistic in form.

78. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1988).

implication of inconsistent premises -- with inconsistent premises, any proposition at all may be proved. The *Heath* case obviously contains inconsistent premises, and even if it did not, the Constitution does. Thus, logic applied here has no capacity to cabin decision making, and there is no way out of this box. Logic, rather than being confining as many of the justices apparently believe and Scalia explicitly asserts, is completely liberating. Anything and everything may be proven.

Take a very obvious inconsistency in *Heath*. The Court asserts that the states are sovereign, yet we know, as the Court does, that at the same time the states are not sovereign. The Civil War settled that question, as have many of the Court's own cases.[79] Thus, the tools that the Court has available to it include both the premise of sovereignty (S) and its negation of lack of sovereignty (not-S). But, as we earlier described, starting from both S and not-S, any proposition at all can be proved. Suppose, for example, one wishes to prove that the dual sovereignty exception applies to the states (M):

1. S or M
2. not-S
3. Therefore M.

Now, M can be any proposition whatsoever. It can be that there is a dual sovereignty exception that applies to separate state prosecutions; it can be that there is not a dual sovereignty exception. It can be that the moon is made of green cheese; or it can be that Mary ate an entire elephant for breakfast (not finding Rice Krispies, either, and being made quite hungry by her efforts). Ironically, then, the desire to limit and confine decision making that may be at the heart of commitments to logic has just the opposite effect. This is yet another reason why logical exercises such as *Heath* are often so unpersuasive.

The *Heath* case is not somehow peculiar in its possessing inconsistent premises. All constitutional interpretation does. The preamble to the Constitution says that: "We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution."[80] Slavery, however, was not only tolerated but encouraged by Article V's restrictions on the amendment process. Perhaps slaves are not "People." They are explicitly persons in Article I, Section 2, and it would be a remarkable exercise to show that persons are not people. If persons are people, then the Constitution was ordained and established to secure

79. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
80. U.S. CONST. pmbl.

liberty and slavery, which is the negation of liberty.[81] Accordingly, applying formal logic to the text of the Constitution allows any proposition whatsoever to be proved.

At the very beginning of the Constitution, then, we find a logical contradiction, and the general view is that the Constitution contains many other logical contradictions as well.[82] The *Heath* case is typical in this regard, for the Court is correct that we think of states as both sovereign and not sovereign, which is a logical contradiction. The implications of this contradiction cannot be worked out logically. Some other intellectual tool must be employed. We, at any rate, have been unable to think of a way out of the liberating consequences of these contradictions. To demonstrate that the task is more arduous than it may appear, we will briefly discuss some of the possibilities.

One possibility is to deny the relevance of the contradictions that we have identified in the Constitution to any particular phrase or principle, such as the Double Jeopardy Clause. After all, even if the preamble and Article I are part of the constitutional text, what do they have to do with double jeopardy? The problem, though, is justifying the limited focus. One possibility is to assert that each case raising a constitutional issue is to be decided by reference to one constitutional principle alone. This will not work, of course, since some cases involve competing constitutional principles, but put that aside. The idea still will not work. Were there a principle that says consider only one constitutional principle at a time, there would have to be another constitutional principle that says consider at least two: consider what is deemed to be the relevant constitutional language or principle (like the Double Jeopardy Clause) and consider the second principle that says do not consider any other principle. This is obviously another contradiction, and off we go proving that Mary ate an elephant for breakfast and that there both is and is not a dual sovereignty exception to the Double Jeopardy Clause.

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81. Moving from text to intent does not answer objections. The "intent" must be perfectly consistent, too, and therefore must accommodate without violence freedom and slavery.

82. Which is why for our purposes we need not worry about the logical status of the Thirteenth Amendment. It may have resolved the contradiction, or it may have simply repeated it. If it resolved it, presumably that means that all constitutional reasoning prior to the Thirteenth Amendment would have to be scrapped. That is a rather high price to pay. On the other hand, if the Thirteenth Amendment merely repeats the contradiction, we are, logically, no better off. Thus, adopting that position is rather costly, too. A more sensible approach would be to doubt the centrality, if not the power, of formal logic in constitutional interpretation. Other examples of contradictions that have been mentioned to us include: the federal government as a government of limited powers and the Supremacy Clause; conflict between powers reserved to the states and to the people; conflict between the sovereignty of states and the Commerce Clause. *See generally* John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987).

Perhaps the answer is that something extraneous to the Constitution limits the logical analysis to particular bits and pieces of the Constitution in deciding cases. Nothing will suffice to fill the bill, however. Suppose the suggestion is that the common law, or social expectations, determine the relevant language to focus on. What makes those determinative? Some other principle must be articulated. More troublesome still, looking outside the Constitution for what is authoritative in it requires the contradiction that only the language of the text is binding, and that the language of the text is not the only thing that is binding. Off we go again.

Ah, the thought arises, isn't this ridiculous? One just knows what the relevant constitutional language is; one knows it when one sees it, so to speak. The problem here is that this assertion is probably correct, but it negates rather than supports the notion that formal logic is at the heart of constitutional interpretation. One may very well know what matters in constitutional interpretation, but one does because of a complex belief set that is constantly undergoing revision under the pressure of new facts, circumstances and insights. One does not know it when one sees it because of the logical attributes of constitutional interpretation.

Indeed, the growing frustration with our argument that we suspect our readers may now be feeling is evidence in our favor. The frustration results from the conflict between the (false) belief that logic must be central to constitutional interpretation with our demonstration that it cannot be. If one associates logic with rationality, this demonstration could be interpreted to be a demonstration of irrationality in constitutional interpretation. But as we earlier argued, logic and rationality are not synonymous. One can and does order and revise one's beliefs all the time in the face of complexity and contradictions; and unless we all live highly irrational lives, this is done in a rational way. It just is not done in a way much informed by formal logic.

It is precisely the limits of the persuasive power of logic that informs demands for explanation in constitutional cases. Syllogisms are not explanations. They are at best simplified summaries of explanations. Explanations call for discussions of the reasons for actions or for changing one's beliefs. Explanations embed reasons in larger sets of beliefs, and demonstrate the relative compatibility of some new belief with a larger structure. Tensions and contradictions do not cause the process to shut down, however. Rather, they are the occasion to revisit the larger set or for a decision that the costs of revisitation do not seem justified given the likely outcome, and thus for a

decision to tolerate the tension.[83]

The alternative to the syllogistic approach of the *Heath* case is a discussion of reasons for decision, and some obvious possibilities come to mind. We present these not as the correct approach to the issues in *Heath*, but merely as an example of the kind of reasoning we are referring to. This, hopefully, will facilitate a comparative judgment of the two contrasting approaches.[84]

The first thing that might reasonably inform a decision about the dual sovereignty exception to the Double Jeopardy Clause is information about the Double Jeopardy Clause to which dual sovereignty is an exception. Moreover, that the original purpose of language -- as ambiguous a concept as that is -- should inform even if not control its interpretation is a plausible working hypothesis. The history of the Double Jeopardy Clause suggests that it was not conceived to be a limitation on successive prosecutions brought by a particular prosecuting authority. Rather, it was prompted by individual interests that are implicated by repeated criminal proceedings that are independent of the prosecuting authority. We will briefly review this history to see what persuasive power it may possess.

"Of all procedural guarantees in the Bill of Rights, the principle of double jeopardy is the most ancient. It is 'one of the oldest ideas found in western civilization,' with roots in Greek, Roman, and Canon law."[85] At its inception the concept of double jeopardy barred an individual from being subjected to repeated accusations of the same crime regardless of the accuser. In Roman law, the principle of double jeopardy was stated in the *Digest of Justinian* to be that "the governor should not permit the same person to be again accused of a crime of which he had been acquitted."[86] Following on the heels of Roman Law, Canon law early accepted the maxim that no man ought to be punished

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83. An unconstrained requirement of consistency seems wholly impossible to implement, anyway. The liar's paradox demonstrates a logical paradox resting on inconsistent premises that we simply tolerate. The statement "This is a lie," cannot be true. Therefore it is false. But it cannot be false. Therefore it is true. If logical inconsistency sufficed to shut down a reasoning process, we would all have to shut our minds down. Instead, we take evasive action, which is perfectly sensible but not driven by formal logic in any fashion. Take another example. It must be true that the universe had a beginning, for everything does, but it must also be true that it has always existed, for something must have brought it into existence. So, we believe inconsistent premises, but we do not stop reasoning as a result of it.

84. For an analogous effort to move an aspect of double jeopardy jurisprudence from logic to reasons, see Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977).

85. Westen & Drubel, *supra* note 5 (footnotes omitted).

86. JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 2 (1969) [hereinafter SIGLER]. Criminal prosecutions were brought not by the state but by aggrieved citizens under Roman law. *Id.*

twice for the same offense.[87] In the twelfth century a major element of the conflict between Thomas Becket and Henry II was the King's desire to have clerics who had been convicted in ecclesiastical courts turned over to civil tribunals for further prosecution.[88] Henry conceded the point in 1176 following Becket's martyrdom,[89] even though royal and ecclesiastical courts obviously did not draw their power from the same sovereign. The application of the double jeopardy bar to successive religious and secular prosecutions demonstrates that the focus of the prohibition was the individual, not the prosecutor.

The foundations of the modern understanding of double jeopardy emerged in the seventeenth century.[90] Sir Edmund Coke's *Second Institutes* articulated the double jeopardy prohibition as a maxim of the common law.[91] Coke recognized the present double jeopardy categories of *autrefois acquit* (former acquittal), *autrefois convict* (former conviction) and former pardon, and, although he seems to have used the term "jeopardy" to refer to the possibility of capital punishment, "[b]y the time the *First Institute* was completed, the double jeopardy doctrine was clearly defined as . . . a protection against the state even for relatively minor offenses."[92] Sir William Blackstone, who wrote one hundred years after Coke, used the word "jeopardy" to describe the doctrine itself, and he rested his rules of *autrefois convict* and *autrefois acquit* upon a single principle of common law.[93]

Coke and Blackstone had a significant influence on the American understanding of the common law. The civil courts of Massachusetts were forbidden to sentence a defendant twice for the same offense by the *Body of Liberties* of 1641.[94] The laws of Massachusetts influenced the development of the laws of many other colonies,[95] and contributed to the eventual inclusion of the Double Jeopardy Clause in the Bill of Rights.[96] Although a number of the

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87. MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 5 (1969)[hereinafter FRIEDLAND].

88. For somewhat different descriptions of the controversy, compare FRIEDLAND, *supra* note 87, at 5, with SIGLER, *supra* note 86, at 3.

89. FRIEDLAND, *supra* note 87, at 5.

90. "The last half of the seventeenth century was a period of increasing consciousness of the importance of double jeopardy. Perhaps this was due partly to the writing of Lord Coke and partly as a reaction against the lawlessness in the first half of the century." *Id.* at 11-14.

91. SIGLER, *supra* note 86, at 16-19.

92. *Id.* at 18-19.

93. *Id.* at 20.

94. "The *Body of Liberties* was less a code of existing laws than it was a compilation of constitutional provisions . . . ." GEORGE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 129 (1960).

95. SIGLER, *supra* note 86, at 22.

96. *Id.* at 22-23.

early state constitutions did not bar double jeopardy,[97] this is because the plea was recognized by statute and the common law.[98] During this period, American law mirrored English developments by extending double jeopardy principles to non-capital offenses.[99]

A double jeopardy provision of "no second trial after acquittal" was among the proposals for a bill of rights following the ratification of the Constitution.[100] In the House of Representatives James Madison proposed amending the language to read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[101] The House rejected the amendment and other proposed formulations of the prohibition, including one which added the phrase "by any law of the United States" after the words "same offense."[102] The rejection of the latter implies "by negative inference that the Double Jeopardy Clause may have been intended to apply to the states and the federal government alike."[103] At the very least, its rejection clearly suggests that federal courts were not to try an individual for a crime for which that individual already had been prosecuted by another sovereign.[104]

While the House was deliberating, the Senate adopted a proposed amendment providing that "no person shall be subject, except in cases of impeachment to more than one trial, or be twice put in jeopardy of life or limb by any public prosecution,"[105] which demonstrates a sensitivity to the individual interests at stake in successive prosecutions by different governments. The present form of the Bill of Rights was drafted in conference,[106] and there

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97. *Id.* at 23.

98. *Id.* at 18-19, 24-27.

99. *Id.* at 19, 23-24.

100. JONATHAN ELLIOTT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836). *See also* SIGLER, *supra* note 86, at 28, 32.

101. SIGLER, *supra* note 86, at 28.

102. *Id.* at 30.

103. *Id.* *See* State v. Moor, 1 Miss. 134 (1823). *Cf.* Phillips v. McCauley, 92 F.2d 790 (2d Cir. 1937) (where the court apparently rejected this conclusion). In Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), the Court stated that the first eight amendments were inapplicable to the states.

104. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820) (discussing when prosecution by another nation of a crime in international waters will bar criminal proceedings in federal courts). The history of double jeopardy principles in international law and in the domestic law of other nations casts even further doubt upon the dual sovereignty theory. *See* FRIEDLAND, *supra* note 87, at 357-403; SIGLER, *supra* note 86, at 118-54. *See also* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956); Jeffrey S. Raynes, *Federalism v. Double Jeopardy: A Comparative Analysis of Successive Prosecutions in the United States, Canada, and Australia*, 5 CAL. W. INT'L L.J. 399 (1975).

105. SIGLER, *supra* note 85, at 31.

106. *Id.* at 31-32.

was little floor debate on its meaning.[107] The debate that did occur indicates that the clause incorporated the common law of Great Britain and the former colonies,[108] which was understood to apply the double jeopardy bar to successive prosecutions by different sovereigns.[109]

The most plausible view from history, then, is that the double jeopardy prohibition was intended to protect the individual from repeatedly being subjected to criminal proceedings arising out of the same charges, no matter who the prosecuting authority is.[110] Of course, the relevant history is not limited to that preceding the Double Jeopardy Clause, for it also includes the creation of the dual sovereignty exception, to which we now turn.

In the middle of the nineteenth century, dicta in three cases questioned the application of the Double Jeopardy Clause to successive prosecutions by the federal government and a state.[111] Prior to these cases, the Clause's applicability had been assumed.[112] The most significant of the doubting cases was *Moore v. Illinois*,[113] where the Court first directly discussed state and federal prosecutions for the same crime. Moore was convicted under an Illinois statute proscribing the harboring or secreting of fugitive slaves.[114] Moore's principal argument was preemption of the state law by the federal Fugitive Slave Act, but he also objected to the possible double jeopardy problem of prosecution under both the state and federal statutes.[115] The Supreme Court found that the Illinois and federal statutes were dissimilar in their essential underlying purpose, in their definition of the offense, and in the nature of the punishment which they

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107. 1 ANNALS OF CONG. 753 (Joseph Gales ed., 1789). The only issue thoroughly discussed was the concern that the clause not bar appeals by convicted defendants and retrials where those appeals succeeded if appropriate. *Id.*

108. *Id.*

109. Bartkus v. Illinois, 359 U.S. 121, 156 n.15 (1959) (Black, J., dissenting); Grant, *supra* note 104, at 8-11; *See* Note, *Double Jeopardy and Dual Sovereigns*, 35 IND. L.J. 444-54 (1960). Justice Frankfurter found the English precedents "dubious." *Bartkus*, 359 U.S. at 128 n.9. However, it appears that at the time our Constitution was framed these cases were understood, rightly or wrongly, as rejecting the dual sovereignty theory.

110. There is certainly no evidence that the states intended to preserve any right of successive prosecution. Such prosecutions were not considered possible because the common law greatly restricted the territorial scope of state criminal jurisdiction.

111. The first two cases were Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), and United States v. Marigold, 50 U.S. (9 How.) 560 (1850).

112. *Cf.* Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (discussing federal supremacy); U.S. v. Furlong, 18 U.S. (5 Wheat.) 184 (1820) (discussing when foreign prosecution of a crime on the high seas will bar prosecution in the United States).

113. 55 U.S. (14 How.) 13 (1852).

114. *Id.* at 17.

115. The reporter's notes of counsel's arguments do not include this point, but there is reference in the opinion to the argument having been made. *Id.* at 16.

authorized.[116] The purpose of the federal government was protection of the property interests of slave owners; the state's goal was to bar black persons, whether slave or free, from the state's territory.[117]

Despite these differences, the Court nevertheless articulated the dual sovereignty theory in an effort to diffuse the growing civil turmoil over slavery. The statute reviewed in the case was at the heart of a dispute over the scope of states' rights, a dispute so serious that it would lead to the Civil War. Complicating matters was the Court's growing realization that state and federal criminal statutes were going to overlap and intersect in unpredictable ways. From the Court's perspective, none of the alternatives available were feasible, except for the creation of a dual sovereignty exception to the double jeopardy prohibition.

One possibility would have been to require the prosecuting states to demonstrate in each case of a substantial risk of multiple prosecutions that the interests served by distinct state and federal prosecutions were sufficiently different to justify the risk, a position adopted by the United States later both in its brief and oral argument in *Abbate*[118] and essentially in its *Petite* policy.[119] This was not an attractive possibility, for it would have been an affront to the very dignity of the states that was at the heart of the tumultuous political controversy the nation was then undergoing. Alternatively, the Court could have affronted the dignity of the federal government by concluding that state prosecution barred federal prosecution for the same act, which would have resulted in a significant infringement upon federal supremacy (as would a requirement that the federal government demonstrate a separate interest justifying a second prosecution). Instead of taking either path, the Court created the dual sovereignty exception more or less out of whole cloth in an attempt to accommodate the competing interests of the state and national governments,[120]

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116. *Id.* at 18-19.

117. *Id.*

118. Abbate v. United States, 359 U.S. 187, 196 (1959) (Brennan, J., separate opinion).

119. The *Petite* policy bars federal prosecution of an individual already subjected to state prosecution where both prosecutions arise out of the same acts unless a compelling federal interest would be served by the second prosecution. The policy is named after Petite v. United States, 361 U.S. 529 (1960), where the Court granted the Justice Department's motion to vacate a federal conviction and remand the case for dismissal where a prior state conviction involving the same acts already had been obtained.

120. *See* LEONARD MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 33 (1968) ("The Court wanted to chart a sane course between . . . eroding national supremacy and . . . denigrating the law enforcing responsibilities of the States."). Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 313 (1963).

an accommodation all the sweeter because it was dicta.[121]

"Dual Sovereignty," in short, arose as an exception to the normal rules of double jeopardy for certain quite understandable reasons related to the structure of American government. Difficult coordination problems could and did arise where two governmental entities pursuing quite diverse interests share substantially overlapping territorial jurisdictions, where there is a substantial risk of interference by one governmental entity in the affairs of another, and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit. None of these factors are present when the question is, as it was in *Heath*, whether two states should be allowed to prosecute an individual for the same act. Thus, the history of both the Double Jeopardy Clause and its dual sovereignty exception provide good reasons for the opposite conclusion that the Court reached, and stand in stark contrast to the unpersuasive syllogistic reasoning the Court employed.

A consideration of the personal interests of the citizen confirms this view. The conventional list of personal interests includes the following: (1) an individual should not repeatedly be subjected to the "embarrassment, expense and ordeal" of defending against a particular criminal charge; (2) an individual should not live "in a continuing state of anxiety and insecurity" not knowing if that individual again will be prosecuted for the same offense; (3) the state should not increase the probability of conviction of the innocent by repeated prosecution of the same charges;[122] and (4) an individual should not undergo multiple punishments for the same offense.[123] From the perspective of the individual,

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121. No "dual sovereignty" case involved two actual prosecutions until United States v. Lanza, 260 U.S. 377 (1922). *Lanza* involved the unique circumstance of the explicit "concurrent" power of the federal government and the states under the Eighteenth Amendment. U.S. CONST. amend. XVIII (repealed). It was not until 1959 that the Court upheld a second prosecution outside that context. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Both these cases preceded the incorporation of the double jeopardy prohibition into the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784 (1969). Elkins v. United States, 364 U.S. 206 (1960) and Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), also create doubts about the continuing vitality of the dual sovereignty theory by their holdings that different "sovereigns" could violate constitutional rights by their concerted action.

122. Benton v. Maryland, 395 U.S. 784, 795-96 (1969).

123. *See* Ohio v. Johnson, 467 U.S. 493, 498 (1984); Brown v. Ohio, 432 U.S. 161, 165 (1977); North Carolina v. Pearce, 395 U.S. 784, 795 (1969). A related principle is due process "vindictiveness" analysis, which limits the ability of the government to raise a defendant's punishment upon retrial or remand where a vindictive purpose, such as a desire to punish exercise of an appeal right, may be the motivation behind the harsher sanction. *See* Wasman v. United States, 468 U.S. 559 (1984); Thigpen v. Roberts 468 U.S. 27 (1984); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982); United States v. Goodwin, 457 U.S. 368 (1982); Blackledge v. Perry, 417 U.S. 21 (1974); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Colten v. Kentucky, 407 U.S. 104 (1972); North Carolina v. Pearce, 395 U.S. 711 (1969). Under certain circumstances the prosecution may take an appeal solely to increase a defendant's punishment. United States v.

it obviously matters little whether a second proceeding is brought in the courts of a different state, for that impinges just as directly (and usually more harshly) upon the person's interests as would successive prosecutions in the same state. The Court's ruling in *Heath* places no limits on the number of states which could claim the right to prosecute an individual for the same act, despite the fact that most states have highly similar criminal laws serving virtually identical interests. Again, this provides a substantial reason for an outcome different from that which the Court reached, and at a minimum casts into doubt the Court's methodology.

Substantial reasons thus exist for a decision opposite that of the Court's, and the Court's syllogism gives very little to offset the reasons that we have marshalled in opposition to it. Its syllogism hides rather than highlights any possibly persuasive reasoning. To be fair to the Court, it did stretch beyond its syllogistic approach in one respect to identify a policy interest that it felt was well accommodated by its decision. The Court's discussion of this one matter highlights how unpersuasive the Court's opinion in general is. The argument is that disallowing successive state prosecutions will result in an unseemly competition between states in the prosecution of offenses.[124] However, many cases have arisen involving allegedly criminal interstate activity, and there is virtually no evidence of states competing with one another to be the first to prosecute a particular criminal act even though prosecution in one state often will bar prosecution for the same offense in another state. In addition, there is no evidence to suggest that the normal relationship of prosecuting offices is one of competition rather than cooperation.

Ironically, *Heath* seems to be the paradigm case in this respect. The Georgia and Alabama officials cooperated closely in the investigation of the crime.[125] Georgia did not rush to an indictment, and after the indictment was filed did not "race" to a trial. Heath was arrested on September 4, 1981, indicted in November, 1981, and pleaded guilty on February 10, 1982.[126] Nor

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DiFrancesco, 449 U.S. 117 (1980). The limitation on multiple punishments is itself limited by the notion that the question of "whether punishments are 'multiple' is essentially one of legislative intent." Ohio v. Johnson, 467 U.S. 493, 498 (1984). *See also* Missouri v. Hunter, 459 U.S. 359, 368 (1983). The Constitution does not prescribe any particular method of determining the purpose of a statute. The Supreme Court has indicated that in the case of federal criminal law, it will be presumed absent clear legislative intent to the contrary that Congress did not intend to authorize multiple punishment for a single offense. Whalen v. United States, 445 U.S. 684, 692 (1980); *cf.* Missouri v. Hunter, 459 U.S. 359 (1983) (regarding state statutes); People v. Robideau, 355 N.W. 2d 592 (Mich. 1984) (rejecting deviation from normal means of determining legislative intent in double jeopardy questions).

124. Heath v. Alabama, 474 U.S. 82, 93 (1985).

125. Trial Record at 361-63, 366-67, 372, 381, 383-85, 386-90 and 398-99, *Heath*.

126. *Heath*, 474 U.S. at 84.

did Alabama officials show an interest in slowing down the Georgia proceedings or in requesting extradition of Mr. Heath. Only after Heath refused to testify at his alleged confederates' trial did Alabama officials begin the process leading to his trial in Alabama. If anything, the application of the dual sovereignty exception to successive state prosecutions may create interstate interference. Plea bargaining is far more problematic now that the defendant must take into account that prosecutions based upon the same acts may follow elsewhere.[127] Perhaps if the Court had a more accurate conception of the limits of its syllogistic approach, it would have spent more time and energy on constructing more persuasive explanations than it did.

The limits of logic are equally clear in the other four cases that we cited at the beginning of his article. In brief:

1. In *Coy* the Court's fascination with logic leads it to say ridiculous things such as "the irreducible literal meaning of the [confrontation] clause [is] a right to meet face to face all those who appear and give evidence at trial."[128] That is ridiculous both in its confusion of interpretation and literalism, and because of its odd message that someone without a face is not within the Confrontation Clause.

2. In *Michael H.*,[129] what does the phrase "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" mean? What are the criteria of specificity and relevancy?

3. In Scalia's dissent in *Morrison*[130] he asserts that all the executive power is vested in the Presidency, relying on the Article II Vestment Clause. But, the Vestment Clause actually says "the executive power shall vest . . ." By contrast, the vestment clause of Article I says "All legislative powers, herein granted. . ." In a purportedly "literal" reading, Scalia has introduced the word "all" where it does not exist, and Article I makes clear that the drafters

127. Another pragmatic problem the Court overlooked is that the lower federal courts will have to work out the implications of the vindictiveness cases in a new context, as the facts in *Heath* vividly demonstrate. Alabama showed no interest in prosecuting Heath until he exercised his Fifth Amendment privilege in the Georgia proceedings against his alleged confederates. *Cf.* United States v. Oliver 787 F.2d 124, 125 (3d Cir. 1986) (rejecting a claim of prosecutorial vindictiveness based on an allegation that a federal firearms charge was brought because the defendant failed to cooperate with state authorities in his pending state firearms prosecution).

128. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting California v. Green, 399 U.S. 149, 175 (Harlan, J., concurring)).

129. Michael H. v. Gerald D., 491 U.S. 110 (1989).

130. Morrison v. Olson, 487 U.S. 654, 708 (1988) (Scalia J., dissenting)

knew how to use the word when they so desired.

4. The dissent in *Walton*[131] overlooks that aggravation and mitigation may be designed to do different things, and thus need not be symmetrical.[132]

Logic as a Means of Expression and other Matters

Perhaps cases such as *Heath* that seem to be animated by a great affection for formal logic instead just use that form as a means of expression. Once all the relevant issues have been sorted out, and all the analysis done, the syllogistic form is a quite acceptable means of relating the results of the analysis. If this is how the lovers of logic language view what they are up to, we have no quarrel with them. We must say, however, that it is difficult to interpret in this manner what one observes in the cases. If syllogisms were just the means of expression, claims of "logic requires" or "your views are illogical" would be absent from the cases, but they are not.

Another symptom of formal logic being more than just the means of expressing efficiently the skin of complex thought is the oft heard claims that a particular field of law is a "mess" or in need of "rethinking," claims of the sort about double jeopardy jurisprudence that we noted at the start of this article. Claims of this type are generated by the intersection of the view that a field of law ought to be like Euclidian geometry, possessing clear premises subject to logical manipulations, with the refusal of subsequent opinions to adopt previously employed syllogisms. In a scheme where syllogisms are supposed to control, cases that cannot be deduced from their predecessors are good evidence of conceptual chaos. Suppose, however, that the factors relevant to any particular field are more complex than can be expressed easily in syllogistic form, or suppose further that a particular case was not informed by some variable subsequently believed to be relevant. In either situation, one would not suppose that a subsequent case would follow deductively from its predecessors. One so persuaded would then refuse to adopt the previous syllogism. If the refusal is embodied in the next decided case in yet another syllogism, but one different from the first, the appearance of chaos emerges.

There are thus two visions of constitutional interpretation competing here. In one, constitutional law is, or ought to be, like Euclidian geometry. Its premises should be clear and consistent, and its implications should relentlessly

131. Walton v. Arizona, 110 S. Ct. 3047 (1990).

132. *See* Ronald J. Allen, *Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona*, 81 J. CRIM. L. & CRIMINOLOGY 727 (1991).

unfold in a single direction. In this vision, there are no extraneous considerations, and no room for new knowledge beyond the accumulation of deductively validated propositions. In the other, constitutional law is, or ought to be, like Mary deciding what to have for breakfast. That surely is not an illogical process, but it equally surely is deductive only in a very limited sense. In this vision, views are held provisionally, and are always subject to revision in light of new knowledge. This does not equate to tolerating wide and erratic swings of views. Reasons for revision of belief have to be provided, and it would be astounding if knowledge often accumulated in any but a quite incremental fashion. Another way to characterize this dichotomy is between a vision in which everything that matters is known already and one in which knowledge emerges over time.

Our biases with respect to this dichotomy are clear, but there are grounds for reservation. Scalia is right that syllogistic approaches do limit the discretion of judges, and we share his vision of judges as a disfavored source of law in our political structure. However, if the judges may make up the premises of their argument, as we have tried to show they apparently do from time to time, the rigidity of syllogistic approaches is lost, as it is if there are inconsistent premises from which to work.

More troublesome, moves away from syllogisms requires a move toward clinical judgment. Clinical judgment requires expertise.[133] Regrettably, the justices of the Supreme Court are not experts in many fields of law, and it could not be otherwise. Perhaps, then, we should encourage the Court in its syllogistic tendencies just because we can think of no worse metaphor for constitutional interpretation than, say, asking a lawyer to perform neurosurgery; any way of keeping the lawyer out of the operating room is to be favored. And any syllogism that the Court pronounces can be digested by those expert in the relevant field, adjustments can be made, and life can go on. This perspective, though, far from being driven by the value of logic is driven instead by something akin to Tony Amsterdam's vivid metaphor of the Supreme Court as the Delphic Priestess who

> was periodically lashed to a tripod above a noisome abyss, where her god dwelt and from which nauseating odors rose and assaulted her. There, the god entered her body and soul, so that she thrashed madly and uttered inspired, incomprehensible cries. The cries were interpreted by the corps of professional priests of the Oracle, and their interpretations were, of course, for mere mortals the words of the god. The [priestess] experienced incalculable ecstasy and degradation; she

133. *See generally* MICHELENE T.H. CHI, ET AL., THE NATURE OF EXPERTISE (1988).

> was viewed with utmost reverence and abhorrence; to her every utterance, enormous importance attached; but from the practical point of view, what she said did not matter much.[134]

Notwithstanding the Court's limited expertise, we prefer the metaphor of constitutional interpretation as clinical judgment just because of its emphasis on both the meaningfulness and the corrigibility of views. An emphasis on meaningfulness and corrigibility, in turn, highlights that the decision making process of the Court can look forward and backwards rather than just forward. A call for formal logic in decision, as we understand it, is a call for a forward looking decision making process, which is sensible only if all the relevant considerations are known in advance. We think that is not the case in constitutional decision making, and we cannot think of an adequate reason to behave to the contrary.

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134. Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786 (1970). For double jeopardy cases quite consistent with Amsterdam's description of constitutional decision making, see Dowling v. United States, 493 U.S. 342 (1990), and Grady v. Corbin, 110 S. Ct. 2084 (1990).