sion, and enter a judgment of conviction.[99] Previously, under the Due Process Clause, there was no barrier to state provision for prosecutorial appeals from acquittals.[100] But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rulings,[101] but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the Double Jeopardy Clause prohibits further prosecution.[102] In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

Acquittal by Jury.—Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecution, place the defendant on trial again.[103] Thus, the Court early held that, when the results of a trial are set aside because the first

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[99] In dissent, Justice Holmes, joined by three other Justices, propounded a theory of "continuing jeopardy," so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. 195 U.S. at 134. The Court has numerous times rejected any concept of "continuing jeopardy." *E.g.*, Green v. United States, 355 U.S. 184, 192 (1957); United States v. Wilson, 420 U.S. 332, 351–53 (1975); Breed v. Jones, 421 U.S. 519, 533–35 (1975).

[100] Palko v. Connecticut, 302 U.S. 319 (1937). *Palko* is no longer viable. *Cf.* Greene v. Massey, 437 U.S. 19 (1978).

[101] The Criminal Appeals Act of 1907, 34 Stat. 1246, was "a failure . . . , a most unruly child that has not improved with age." United States v. Sisson, 399 U.S. 267, 307 (1970). *See also* United States v. Oppenheimer, 242 U.S. 85 (1916); Fong Foo v. United States, 369 U.S. 141 (1962).

[102] Title III of the Omnibus Crime Control Act, Pub. L. 91–644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statute requires constitutional interpretation as well. United States v. Wilson, 420 U.S. 332, 337 (1974). *See* Sanabria v. United States, 437 U.S. 54, 69 n.23 (1978), and id. at 78 (Justice Stevens concurring).

[103] What constitutes a jury acquittal may occasionally be uncertain. In Blueford v. Arkansas, 566 U.S. ___, No. 10–1320, slip op. (2012), the defendant was charged with capital murder in an "acquittal-first" jurisdiction, in which the jury must unanimously agree that a defendant is not guilty of a greater offense before it may begin to consider a lesser included offense. After several hours of deliberations, the foreperson of the jury stated in open court that the jury was unanimously against conviction for capital murder and the lesser included offense of first degree murder, but was deadlocked on manslaughter, the next lesser included offense. After further deliberations, the judge declared a mistrial because of a hung jury. Six Justices of the Court subsequently held that the foreperson's statement on capital murder and first de-