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*Robert Matz**

Introduction

On August 10, 1994, the United States indicted Lemrick Nelson for violating the civil rights of Yankel Rosenbaum, an Australian rabbinical student.[1] Two years earlier, however, a New York State jury acquitted Nelson of Rosenbaum's murder.[2] Did the federal indictment serve justice[3] or did it violate Nelson's Fifth Amend-

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1. Riots erupted in the Crown Heights section of New York City following the tragic death of Gavin Cato, a seven year old black boy who was struck by a car in the motorcade carrying Lubavitcher Grand Rabbi Menachem Schneerson. Tensions between blacks and Hasidic Jews were raised by stories that the first ambulance to arrive on the scene, which was owned and operated by members of the Hasidic community, attended to the elderly couple responsible for the accident rather than treat the child. On August 19, 1991, Yankel Rosenbaum was stabbed during the ensuing riots a mere three blocks from the scene of the car accident. Bob Liff & Jennifer Preston, *Mayor Acts Swiftly to Quell Trouble*, NEWSDAY, Aug. 21, 1991 (City Home Edition), at 29.

Nelson was charged with violating 18 U.S.C. § 245(b)(2)(B) (1994) "which imposes criminal penalties for civil rights violations involving interference with federally protected activities." United States v. Nelson, 921 F. Supp. 105, 107-08 (E.D.N.Y. 1996). Nelson's alleged conduct constituted a federal offense because the act precluded Rosenbaum from walking on the public streets of New York. *See* Abraham Abramovsky, *An Adult in State Court; a Juvenile in Federal Court*, N.Y. L.J., June 2, 1995, at 3. On February 19, 1997, a Federal jury convicted Nelson of depriving Yankel Rosenbaum of his civil rights. Joseph P. Fried, *2 Guilty in Fatal Crown Hts. Violence*, N.Y. TIMES, Feb. 11, 1997, at A1.

2. Patricia Hurtado, *Lawyer Calls Crown Heights Case Vindictive*, NEWSDAY, Nov. 18, 1995 (Queens Edition), at A18. Evidence suggests that Rosenbaum's death may have been prevented had he received adequate medical assistance while in the emergency room of Kings County Hospital Center. Jim Dwyer, *Obscure Justice Better Than None*, NEWSDAY, Sept. 9, 1994, at A2.

3. Following Nelson's acquittal, a key defense witness recanted testimony he gave at trial, thereby implicating Nelson's guilt. *See* Abramovsky, *supra* note 1, at 3. However, despite the defense witness's admission that he committed perjury, the Constitution of the State of New York's prohibition against double jeopardy precluded the State from retrying Nelson for Rosenbaum's murder. *Id.*; N.Y. CONST. art. I, § 6 ("No person shall be subject to be twice put in jeopardy for the same offense.").

ment right under the Double Jeopardy Clause to be free from being tried more than once for the same offense? [4]

The Fifth Amendment guarantee against double jeopardy protects an individual from being tried after he or she has been acquitted by a jury.[5] The ban on double jeopardy, however, is contradicted by the doctrine of dual sovereignty, which provides that each sovereign is free to vindicate its own rights within its respective sphere of influence, unencumbered by the actions of other distinct sovereigns.[6] As a result, when a criminal defendant's conduct violates the laws of two independent sovereigns with overlapping jurisdictions, a criminal prosecution regarding that conduct may be brought by either or both sovereigns despite previous acquittal. The application of the dual sovereignty doctrine in this context highlights the conflict that results when an individual's right to be free from double jeopardy is trumped by concurrent federal and state jurisdiction.

This Note argues that the application of the dual sovereignty doctrine to cases involving successive state and federal prosecutions, where the initial prosecution resulted in an acquittal, violates the Double Jeopardy Clause of the Fifth Amendment. Part I discusses the rationale for the prohibition against double jeopardy and the principle of dual sovereignty. Part II outlines the Supreme Court jurisprudence regarding successive prosecutions brought by

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4. U.S. CONST. amend. V. In order to successfully prosecute Nelson for violating Rosenbaum's civil rights, the United States must prove that Nelson committed the murder, a crime he was previously acquitted of by a New York jury. *See* Mordecai Rosenfeld, Essay, *Kewpie Dolls and the Constitution*, N.Y. L.J., Sept. 22, 1994, at 2 (1994).

5. The Supreme Court has held that the "'constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" Burks v. United States, 437 U.S. 1, 11 (1978) (citations omitted). Commentators maintain that the purpose of the Double Jeopardy Clause is to give prosecutors one chance, and one chance only, to convict. *See, e.g.,* Rosenfeld, *supra* note 4.

6. *See* United States v. Lanza, 260 U.S. 377, 381-84 (1922). The Supreme Court, applying the principle of dual sovereignty for the first time, discussed the relationship between the national government and the several States under the framework of federalism as follows:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

Id. at 382.

independent sovereigns. Part III reviews the arguments against applying the dual sovereignty doctrine in the context of successive prosecutions where the initial prosecution resulted in an acquittal and proposes that the Supreme Court reconsider the doctrine and confine its application strictly to cases involving persons acting under the color of state authority. This Note concludes that the present application of the principle of dual sovereignty violates the Constitution and derogates the integrity of the American criminal justice system.

I. Rationale For The Double Jeopardy Clause And The Principle Of Dual Sovereignty

A. The Double Jeopardy Clause

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[7] The prohibition against double jeopardy insulates individuals from being subject to a subsequent prosecution for the same offense arising either after acquittal or after conviction, and prohibits multiple punishments arising out of the same offense.[8] The Double Jeopardy Clause guarantees that when a jury acquits a defendant, the government shall not be permitted to make repeated, or successive, attempts to convict him or her.[9]

The Double Jeopardy Clause of the Fifth Amendment applies to the federal government and to the states through the Fourteenth Amendment.[10] The prohibition against double jeopardy is also found in the constitution or jurisprudence of every state in the

7. U.S. CONST. amend. V.

8. The Supreme Court has stated "that the Double Jeopardy Clause provides for three related protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" United States v. Wilson, 420 U.S. 332, 343 (1975) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

The prohibition against multiple prosecutions has been regarded as so important by the Supreme Court "that exceptions to the principle have been only grudgingly allowed." *Id.* Moreover, the Court noted that it "has granted the Government the right to retry a defendant after a mistrial only where 'there is a manifest necessity for the act or the ends of public justice would otherwise be defeated.'" *Id.* at 344 (quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)).

9. *Id.* at 343.

10. Benton v. Maryland, 395 U.S. 784, 794 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

Union and the common law tradition of the colonies.[11] Several states augment the United States Constitution's double jeopardy protection by barring state prosecutions in cases where defendants have previously been tried by an independent prosecuting authority, such as the United States or another state.[12]

1. Policy Rationale for the Double Jeopardy Clause

The Fifth Amendment bar on successive prosecutions protects an individual's interests that are implicated when that individual is subjected to repeated criminal proceedings arising from the same underlying conduct.[13] The Supreme Court justices and legal scholars suggest that the prohibition against double jeopardy protects the integrity of jury acquittals,[14] the finality interest of defendants,[15] prevents excessive and oppressive prosecutorial discretion,[16]

11. *See* Bartkus v. Illinois, 359 U.S. 121, 154 (1959) (Black, J., dissenting).

12. *See* State v. Fletcher, 259 N.E.2d 146, 158 (Ohio Ct. App. 1970), *rev'd*, 271 N.E.2d 507 (1971), *cert. denied sub nom* Walker v. Ohio, 404 U.S. 1024 (1972) (Appendix A) (listing statutory enactments prohibiting double jeopardy where there has been a conviction or acquittal under the laws of another jurisdiction in a prior proceeding) (citing ARIZ. REV. STAT. ANN. § 13-146 (1956); CAL. PENAL CODE § 656 (Deering 1961); IDAHO CODE § 19-315 (1948); ILL. REV. STAT. ch. 38 para. 3-4 (Smith-Hurd 1964); IND. CODE ANN. § 9-215 (Burns 1956); MONT. CODE ANN. § 94-4703 (1947); NEV. REV. STAT. § 208.020 (1967); N.Y. CRIM. PROC. § 139 (McKinney 1958); N.D. CENT. CODE § 12-05-05 (1961); OKL. STAT. tit. 22, § 25 (1969); OR. REV. STAT. § 131.240(1) (1968); S.D. CODIFIED LAWS ANN. § 22-5-8 (1967); UTAH CODE ANN. § 76-1-25 (1953); WASH. REV. CODE ANN. § 10.43.040 (West 1956); WIS. STAT. § 939.74 (1967)).

The Supreme Court of New Hampshire construes the double jeopardy prohibition of the state's constitution to bar successive trials regardless of the identity of the initial prosecuting authority. State v. Hogg, 385 A.2d 844, 847 (N.H. 1978). The New Hampshire Constitution provides that "[N]o subject shall be liable to be tried, after an acquittal, for the same crime or offense." N.H. CONST. pt. I, art. 16 (1784).

13. *See* United States v. Wheeler, 435 U.S. 313, 320-23 (1978) (finding that the Double Jeopardy Clause bars successive prosecutions brought by the national government, the states and Native American tribal nations); 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, 806 (1985).

14. Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 805 (1988); Peter Westen, *The Three Faces of Double Jeopardy*, 78 MICH. L. REV. 1001, 1002 (1980); Robert C. Gorman, Note, *The Second Rodney King Trial: Justice in Jeopardy?*, 27 AKRON L. REV. 57, 87 n.30 (1993); *see also* United States v. Scott, 437 U.S. 82, 92 (1978) (observing that "the primary purpose of the double jeopardy clause was to protect the integrity of a final judgment").

15. Burton, *supra* note 14, at 805; Gorman, *supra* note 14, at 87 n.30; *see* United States v. Wilson, 420 U.S. 332, 343 (1975) (finding that the "principles of fairness and finality require that [the defendant] not be subjected to the possibility of further punishment by being again tried for the same offense") (citations omitted).

16. Burton, *supra* note 14, at 805; Gorman, *supra* note 14, at 87 n.30.

and ensures that defendants will not be forced to endure the anxiety, expense, and increased likelihood of conviction resulting from repeated prosecutions.[17]

2. *History of the Double Jeopardy Clause*

Early common law of the several States and Great Britain barred successive prosecutions by foreign sovereigns.[18] During the

17. *See Wilson*, 420 U.S. at 343 (finding that successive attempts by the government to convict subjects a defendant to "'embarrassment, expense and ordeal . . . compelling him [or her] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he [or she] may be found guilty'") (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

18. Allen & Ratnaswamy, *supra* note 13, at 810; *see* George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 W. RES. L. REV. 700, 704-5 (1963); *see, e.g.*, The King v. Roche, 168 Eng. Rep. 169 (Cr. Cas. 1775).

The concept of barring multiple trials and punishments has ancient roots. Bartkus v. Illinois, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization."); Allen & Ratnaswamy, *supra* note 13, at 807. The prohibition may be traced back to Greek and Roman times, *Bartkus*, 359 U.S. at 151-52 (Black, J., dissenting) (observing that the "principle of double jeopardy . . . was formulated in the Digest of Justinian as the precept that 'the governor should not permit the same person to be again accused of a crime of which he had been acquitted'") (citations omitted), and remained a guiding principle of justice throughout the Dark Ages. *Id.* at 152 n.30. The church canons as early as 847 A.D. proclaimed that "'[n]ot even God judges twice for the same act.'" *Id.* at 155 n.4 (citations omitted).

The bar on successive prosecutions for the same conduct has been firmly established in England since the thirteenth century. *Id.* at 152. The plea of *autrefois acquit*, or former acquittal, is a "universal maxim of the English common law [which provides] that no person may be 'brought into jeopardy of his life more than once for the same offense.'" Raymond C. Hurley, Note, *Criminal Law - The Continued Validity of Successive Prosecutions by State and Federal Governments for the Same Criminal Conduct*, 14 WAKE FOREST L. REV. 823, 823 n.3 (1978) (quoting 4 W. BLACKSTONE, COMMENTARIES 335); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 307 (1963). For a brief synopsis of seminal English double jeopardy case law, see J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1318-20 (1932). Moreover, the prohibition established that a prior foreign prosecution for the same offense barred a subsequent prosecution for that offense in England. Pontikes, *supra*, at 704-5; *see* Regina v Azzopardi, 169 Eng. Rep. 115 (Cr. Cas. 1843); The King v. Roche, 168 Eng. Rep. 169 (Cr. Cas. 1775).

During the colonial period, American law generally followed earlier developments in the English common law by extending the principles of double jeopardy to non-capital offenses. Allen & Ratnaswamy, *supra* note 13, at 808-09 (citing J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 2, at 19, 23-24 (1969)). However, at the time of the First Congress, only New Hampshire had a constitutional provision prohibiting double jeopardy. *See Wilson*, 420 U.S. at 340; *see also* State v. Hogg, 385 A.2d 844, 845 (N.H. 1978). "[T]wo other states suggested that a double jeopardy clause be included among the first amendments to the Federal Constitution." *Wilson*, 420 U.S. at 340. In order to accommodate these requests,

deliberations that ensued regarding the proposed amendment, the record of the debate indicates that the framers intended to implement their understanding of English common law,[19] and did not intend to abandon a unitary concept of a single and supreme sovereign when they embraced federalism.[20]

The report of the debate over the language of the proposed amendment illustrates that there was a general agreement that while a defendant could have a second trial after conviction, the government was not entitled to have a new trial following an acquittal.[21] Additionally, the House of Representatives rejected versions of the proposed Fifth Amendment which added the phrase "'by any law of the United States' after the words 'same offense.'"[22]

James Madison appended a prohibition against double jeopardy to the proposed version of the Bill of Rights he submitted to the House of Representatives. *Id.* at 340-41.

19. Allen & Ratnaswamy, *supra* note 13, at 809-10; *see* I ANNALS OF CONG. 753 (J. Gales ed. 1789).

20. THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("the national and State [judicial] systems are to be regarded as *one whole*"); Gorman, *supra* note 14, at 70 (citing THE FEDERALIST NO. 82, at 516 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961)).

Commentators have advocated that principles of federalism, as embodied in the dual sovereignty doctrine, could not have been in the minds of the founding fathers. *See, e.g., Hogg*, 385 A.2d at 845. Alexander Hamilton, one of the framers of the Federal Constitution, interpreted Article III as granting Congress the authority to establish inferior federal courts with the authority to exercise appellate powers over state tribunals. THE FEDERALIST NO. 82, at 493-94 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

Hamilton's writings suggest that opposition to the judicial powers of the United States under the Constitution stemmed from the concern that local tribunals would not have the authority to hear cases implicating federal jurisdiction and that certain procedural guarantees and substantive rights which were not contained in the Constitution could be denied. *See* THE FEDERALIST NO. 82 (Alexander Hamilton); THE FEDERALIST NO. 83 (Alexander Hamilton). The predilection favoring concurrent jurisdiction, *see* THE FEDERALIST NO. 82, at 491-92 (Alexander Hamilton) (Clinton Rossiter ed. 1961), and the integration of national and state tribunals stands in stark contrast to the current conception of federalism and dual sovereignty.

21. *See Wilson*, 420 U.S. at 342 n.9. During the debate, Representative Sherman remarked that a defendant should not be retried following an acquittal. Representative Sherman commented, "if the (defendant) was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitle to second, which was certainly favorable to him." I ANNALS OF CONG. 753 (J. Gales ed. 1789); *see Wilson*, 420 U.S. at 342 n.9.

22. Allen & Ratnaswamy, *supra* note 13, at 809; *see* Pontikes, *supra* note 18, at 704 n.32.

B. The Dual Sovereignty Doctrine

The dual sovereignty doctrine is the only exception to the Double Jeopardy Clause.[23] It provides that two sovereigns, which derive their power from different sources,[24] may individually or both prosecute an offender for an infraction arising from the same conduct which violates the laws of each.[25] The principle of dual sovereignty does not expressly appear in the United States Constitution, any state constitution or in Black's Law Dictionary.[26] Rather, the dual sovereignty doctrine is a creation of judicial crafting.[27] In 1852, the principle of dual sovereignty was first articulated in *dicta* in *Moore v. Illinois*.[28] The Supreme Court did not apply the doctrine, however, until 1922 in *United States v. Lanza*.[29]

The dual sovereignty doctrine has foundations in the common law premise that a crime is an offense against the sovereignty of the government.[30] As a result, when a single act by an offender trans-

23. *See* Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922).

24. *Lanza*, 260 U.S. at 381-84.

25. *See id.*; Kevin J. Hellmann, Note, *The Fallacy of Dueling Sovereignties: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL'Y 149, 150 (1994).

26. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

27. *See* United States v. Lanza, 260 U.S. 377 (1922).

28. 55 U.S. 13, 19-20 (1852). The Court stated that:

> An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.

Id.; *see* Allen & Ratnaswamy, *supra* note 13, at 812.

Moore was the executor of the estate of Richard Eels, *Moore*, 55 U.S. at 13, who had been convicted of violating an Illinois statute which proscribed the harboring of fugitive slaves. *Id.* at 17. The petitioner argued that the Illinois statute was preempted by the Fugitive Slave Act and that Eels was potentially subject to double jeopardy as he could have faced prosecution under both the state and federal statutes. *Id.* at 13-16.

The Court found that the essential nature of the statutes were dissimilar, distinguishing the statutes on the grounds that the underlying purpose of the federal statute was to protect property interests of slave owners, whereas the Illinois statute's goal was to bar black persons from the state, and that the definitions of, and punishments for, violating the respective statutes were dissimilar. *Id.* at 18-19. Although the question of double jeopardy was thus rendered moot, the Court proceeded to formulate the doctrine of dual sovereignty. *Id.* at 19-20.

29. 260 U.S. 377 (1922); *See* Allen & Ratnaswamy, *supra* note 13, at 810.

30. Heath v. Alabama, 474 U.S. 82, 88-89 (1985).

gresses the laws of two sovereigns, he or she has committed two distinct criminal offenses.[31] Consequently, when applying the dual sovereignty doctrine, courts must determine whether the two prosecuting authorities are independent sovereigns.[32]

The dual sovereignty doctrine has been described as a by-product of the United States' system of federalism.[33] Federalism refers to a system of government where power is divided between a central government which regulates national affairs and local governments which regulate local affairs.[34] Under the federalist system, the central and local governments are distinct entities drawing their respective sovereign powers from different sources.[35] Accordingly, in a federalist system of justice, a federal prosecution does not bar a subsequent state prosecution, and a state prosecution does not bar subsequent federal prosecution, even where the same underlying conduct is the basis for both prosecutions.[36] This principle also applies to successive prosecutions brought by two or more different states.[37] Federalism permits reprosecutions regardless of whether or not the initial prosecution resulted in acquittal.[38]

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31. *Id.* (citing *Lanza*, 260 U.S. at 382).

32. *Id.* (finding that in order to apply the doctrine of dual sovereignty "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") (citing *Moore*, 55 U.S. at 18-20).

33. United States v. Davis, 906 F.2d 829, 832 (2d Cir. 1990) (holding that the doctrine of dual sovereignty does not bar successive state and federal prosecutions).

34. Federalism has been defined as:

> [A] system of government wherein power is divided by a constitution between a central government and local governments, the local governments maintaining control over local affairs and the central government being accorded sufficient authority to deal with the national needs and affairs. Since the United States is a federal "republic," considerations of federalism play a major role in the interpretation of the Constitution.

BARRON'S LAW DICTIONARY 182 (2d ed. 1990).

35. *Davis*, 906 F.2d at 832 (observing that under the federalist system, "the state and national government are distinct political communities, drawing their separate sovereign power from different sources, each from the organic law that established it").

36. *Id.* (finding that under the United States' federalist system of justice, each sovereign "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses. When a single act violates the laws of two sovereigns, the wrongdoer has committed two distinct offenses."); *see generally* United States v. Wheeler, 435 U.S. 313, 316-20 (1978) (holding that both the United States and Indian Tribal Nations are independent sovereigns and may each prosecute a defendant for offenses arising out of the same conduct).

37. *Davis*, 906 F.2d at 832; *see* Heath v. Alabama, 474 U.S. 82, 91-93 (1985).

38. Hellmann, *supra* note 25, at 151. For example, in *United States v. Koon*, the court held that a Los Angeles police officer who was acquitted of beating motorist Rodney King in the state trial, could be prosecuted by the United States for violating

The dual sovereignty doctrine is limited only by the sham exception.[39] It provides that a prosecution by one sovereign may not be used as a "cover and a tool"[40] of another sovereign seeking to prosecute a defendant.[41] Where a subsequent prosecution brought by a second sovereign is pursued merely on behalf of the first sovereign's interest in the successful prosecution of an individual defendant rather than to vindicate its own interest, the subsequent prosecution may be subject to a successful double jeopardy challenge.[42] The sham exception, however, is construed narrowly and seldom pursued successfully.[43]

In recent years, the proliferation of federal legislation criminalizing conduct already proscribed by the states has increased the opportunity for state and federal authorities to bring successive prosecutions.[44] In particular, following the passage of the Civil

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King's civil rights arising out of the same incident. 833 F. Supp 769, 790 (C.D. Cal. 1993), *aff'd in relevant part*, 34 F.3d 1416 (9th Cir. 1994), *cert. granted to review sentencing only*, 116 S. Ct. 39 (1995). On April 17, 1993, a Federal jury convicted Sergeant Stacey C. Koon and Officer Laurence M. Powell of the Los Angeles Police Department of violating motorist Rodney King's civil rights. *Id.* at 774. A California jury had acquitted Koon on all state charges on April 29, 1992 stemming from the March 3, 1991 beating of Rodney King that was captured on videotape by a passing motorist. *See* Chronicle Wire Services, *Winning and Losing Tactics in the Case: Jurors Wouldn't Say, 'Enough Is Enough'*, S.F. CHRON., April 30, 1992, at A10.

39. *Davis*, 906 F.2d at 832 (citing *Bartkus*, 359 U.S. at 123-24); United States v. Coonan, 938 F.2d 1553, 1563 (2d Cir. 1991); United States v. Russotti, 717 F.2d 27, 31 (2d Cir. 1983); United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

40. *Russotti*, 717 F.2d at 31 (quoting *Aleman*, 609 F.2d at 309).

41. *Id.*

42. United States v. Koon, 34 F.3d 1416, 1438 (9th Cir. 1994), *cert. granted to review sentencing only*, 116 S. Ct. 39 (1995).

43. *Id.* at 1439 n.19; *see, e.g.*, United States v. Figueroa-Soto, 938 F.2d 1015, 1018-19 (9th Cir. 1991), *cert. denied*, 502 U.S. 1098 (1992) (holding that the "sham" exception did not apply where the state prosecuted the defendant at the request of the federal authorities, and federal authorities sat at the prosecutor's table, testified as witnesses, collected evidence for use by the state in the state prosecution, postponed sentencing a prosecution witness until after he testified for the state, prepared witnesses for the state, delayed a forfeiture proceeding to avoid prejudicing the state prosecution, and the state prosecutor was appointed as a special assistant to the U.S. Attorney for the subsequent federal prosecution); United States v. Paiz, 905 F.2d 1014, 1024 (7th Cir. 1990), *cert. denied*, 499 U.S. 924 (1991) (compiling a list of cases where a "sham" prosecution was alleged).

44. Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 8-9 (1992). The Supreme Court has permitted Congress to "federalize" state crimes by rationalizing that virtually every act affects interstate commerce. However, in United States v. Lopez, 115 S. Ct. 1624 (1995), the vitality of the Dormant Commerce Clause was brought into question as the Court invalidated the Gun-Free School Zone Act, 18 U.S.C. § 922(q)(1)(A) (1994), finding that the possession of a gun in a local school

Rights Act of 1964,[45] federal prosecutions for civil rights violations have comprised a large number of cases involving successive state and federal prosecutions.[46]

Successive prosecutions, however, are not the norm.[47] One sovereign usually defers to the other in the normal exercise of prosecutorial discretion.[48] Under the Petite policy, a long-standing guideline adopted by the United States Department of Justice,[49] the United States voluntarily abstains from bringing a federal action following a state prosecution unless the reasons are "compelling" and authorization is obtained from an appropriate Assistant Attorney General.[50] The United States rarely pursues successive prosecutions under the Petite policy[51] and several states have declined to invoke the dual sovereignty doctrine.[52]

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zone was not an economic activity that substantially affected interstate commerce. *Lopez*, 115 S.Ct. at 1630-31. If the wake of *Lopez*, however, the Courts of Appeal have sustained the vast majority of federal criminal statutes that contain a jurisdictional element where there is a minimal nexus to interstate commerce. *See, e.g.*, United States v. Chesney, 86 F.3d 564, 569-71 (6th Cir. 1996) (affirming the conviction for the federal offense for the possession of a firearm by a felon where the minimal nexus requirement was met by virtue of the fact that at some point prior to the possession of the gun by the appellant, it had traveled in interstate commerce). *But see* United States v. Pappadopoulos, 64 F.3d 522, 526-28 (9th Cir. 1995) (reversing a conviction under federal arson statute finding an insufficient nexus to interstate commerce where the only link between the personal residence that was set ablaze and interstate commerce was the receipt of natural gas from out-of-state sources).

45. 42 U.S.C.A. § 2000a to h-6 (West 1997).

46. *See generally* Michal A. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 EMORY L.J. 93 (1984); Michal A. Belknap, *The Legacy of Lemuel Penn*, 25 HOW. L.J. 467 (1982).

The outrage over the murder of Col. Lemuel Penn and the acquittal of his confessed murderers by a jury in Georgia ultimately resulted in the broad application of the dual sovereignty doctrine to enforce the civil rights laws. Justice Thurgood Marshall, who at the time was the United States Solicitor General, prosecuted the case. The facts of the case involving the murder of Lemuel Penn appear in Myers v. United States, 377 F.2d 412 (5th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968) (the appeal involved evidentiary matters unrelated to issues concerning double jeopardy and dual sovereignty).

47. United States v. Davis, 906 F.2d 829, 833 (2d Cir. 1990).

48. *Id.*; *see* UNITED STATES ATTORNEYS' MANUAL § 2.142, *reprinted in* 7 THE DEPARTMENT OF JUSTICE MANUAL (P-H) § 9-2.142 (1987 & Supp. 1996-1); Petite v. United States, 361 U.S. 529 (1960) (per curiam).

49. Rinaldi v. United States, 434 U.S. 22, 24 and 25 n.5 (1977) (citing *Petite*, 361 U.S. at 530-31).

50. *Id.* at 25 n.5 (citing *Petite*, 361 U.S. at 530-31 (citation omitted)).

51. *Id.* at 24-25.

52. *See supra* note 12; *see, e.g.*, State v. Hogg, 385 A.2d 844 (N.H. 1978).

II. The Supreme Court's Dual Sovereignty Jurisprudence Regarding Successive Prosecutions Brought By Independent Sovereigns

The Supreme Court consistently holds that the dual sovereignty doctrine is virtually beyond reproach regarding successive prosecutions brought by independent sovereigns.[53] The Court's reasons for upholding the doctrine's constitutional validity, however, has undergone significant changes.[54] An examination of the evolution of the Court's dual sovereignty jurisprudence is essential to understanding the present application of the doctrine.

The Court first applied the dual sovereignty exception to the Double Jeopardy Clause in *United States v. Lanza*.[55] In *Lanza*, the defendants were convicted by the State of Washington for illegally manufacturing, transporting, and possessing alcohol.[56] Subsequently, the United States sought to prosecute the defendants for contravening the National Prohibition Act.[57]

The Supreme Court held that since the Fifth Amendment applies only to the federal government, the Double Jeopardy Clause did not bar a single prosecution brought by the United States where the initial prosecution was brought by a state.[58] The Court concluded that if the federal government could prosecute a defendant once, and a state government could prosecute a defendant as many times as it so desired, that there was no impediment to the two

53. *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 89-90 (1985) (discussing prior cases where the Court ruled that successive prosecutions brought by independent sovereigns were permissible under the dual sovereignty doctrine).

54. *Compare* United States v. Lanza, 260 U.S. 377 (1922) (finding that successive prosecutions were permissible under the dual sovereignty doctrine because the Double Jeopardy Clause of the Fifth Amendment did not apply to the states) *with* United States v. Wheeler, 435 U.S. 313 (1978) (upholding the dual sovereignty doctrine based upon principles of federalism and past Supreme Court precedents despite the incorporation of the Fifth Amendment's double jeopardy protection to the states).

55. 260 U.S. 377 (1922); *see* Bartkus v. Illinois, 359 U.S. 121, 129 (1959) (observing that *Lanza* was the first case in which the Supreme Court applied the doctrine of dual sovereignty).

56. *Lanza*, 260 U.S. at 379.

57. *Id.*

58. *Id.* at 380-81. The holding in *Lanza* was based upon the precedent set by the Court in Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833) (holding that the Takings Clause of the Fifth Amendment was not binding on the states), which found that the rights guaranteed in the first eight amendments did not apply to the states. *Id.* at 250. The landmark decision in *Barron* served as the basis for denying double jeopardy protection for successive state and federal prosecutions until 1969 although *Barron* did not explicitly address the Double Jeopardy Clause or issues concerning combinations of state and federal action. *See* Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 4 (1995).

governments doing in tandem what each was allowed to do alone.[59] Moreover, the Court found that the dual sovereignty exception furthered the policy objective of avoiding a race by defendants to enter guilty pleas in the courts of those states that imposed only nominal penalties for the offense, allowing them to secure immunity from subsequent federal prosecution and undermining the federal statute's deterrent effect.[60]

The Supreme Court first upheld the constitutionality of the principle of dual sovereignty, in the context of successive prosecutions by independent sovereigns where the first prosecution resulted in acquittal, in *Bartkus v. Illinois*.[61] In *Bartkus*, the petitioner was acquitted of federal charges for bank robbery.[62] Illinois subsequently tried and convicted the petitioner for violating a state robbery statute and sentenced him to life imprisonment under the Illinois Habitual Criminal Statute.[63] The Court, following its reasoning in *Lanza*, affirmed the state conviction based upon the inapplicability of the Double Jeopardy Clause of the Fifth Amendment to the states.[64] The majority stated that the principle of dual sovereignty must be applied to ensure that the reserved powers of states to promulgate and enforce state criminal offenses would not be displaced in derogation of the federal system of government.[65]

Abbate v. United States,[66] although it did not involve successive prosecutions following an acquittal,[67] is significant because it pro-

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

60. *Id.*

61. 359 U.S. 121 (1959).

62. *Id.* at 121-22.

63. *Id.* at 122.

64. *Id.* at 128-29. The Court based its decision upon the holding in Palko v. Connecticut, 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969). In *Palko*, the Court held that the Double Jeopardy Clause did not apply to the states because immunity from successive prosecutions was not "implicit in the concept of ordered liberty," and thus was not valid as against the states through the Fourteenth Amendment. *Id.* at 324-25. Like *Barron*, *Palko* provided the basis for upholding the dual sovereignty doctrine on the grounds that the states were not bound by the strictures of the Double Jeopardy Clause. *See Bartkus*, 359 U.S. at 127. The majority in *Bartkus* was comprised of five justices as four justices dissented.

65. *Bartkus*, 359 U.S. at 137. The majority noted that to hold otherwise would result in "a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines." *Id.*

66. 359 U.S. 187 (1959) (holding that a subsequent federal prosecution is not barred by a prior state prosecution of the same defendant for the same underlying conduct). *Bartkus* and *Abbate* were both decided on March 30, 1959.

67. In *Abbate*, the defendants were initially convicted of conspiracy under an Illinois statute and were subsequently convicted in a federal prosecution for conspiracy based upon the same underlying conduct. 359 U.S. at 188-89.

vided the Court's policy-based arguments supporting the dual sovereignty doctrine.[68] In *Abbate*, the Court found that the application of the dual sovereignty doctrine furthered the interest of promoting the efficiency of federal law enforcement and noted the impracticality of requiring federal authorities to keep informed of all state prosecutions that might have some bearing on federal offenses.[69]

In 1969, the constitutionality of the Supreme Court's dual sovereignty doctrine was called into question following the Court's decision in *Benton v. Maryland*[70] that Fifth Amendment double jeopardy protection was binding upon the states.[71] Nine years earlier in *Elkins v. United States*,[72] an analogous case involving the incorporation of the Fourth Amendment to the states, the Supreme Court held that evidence seized by state officials in violation of the Fourth Amendment is inadmissible in a federal prosecution.[73] *Elkins* overruled prior precedents which found such evidence to be admissible in the absence of the Fourth Amendment's protection against illegal searches and seizures.[74] Since the constitutionality of the dual sovereignty doctrine at that time was predicated upon

68. The reasoning in *Abbate* has served as the foundation for the dual sovereignty doctrine's continued validity following incorporation of Fifth Amendment double jeopardy protection to the states. *See* United States v. Wheeler, 435 U.S. 313, 316-20 (1978); Heath v. Alabama, 474 U.S. 82, 88 (1985). Incorporation refers to the application of the first eight amendments to the states through the Due Process Clause of the Fourteenth Amendment. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 777-86 (2d ed. 1991) (providing cases and commentary on the incorporation controversy). The Supreme Court held that the Fifth Amendment applied to the states in Benton v. Maryland, 395 U.S. 784, 794 (1969). The Court, in the cases following *Benton*, upheld the doctrine of dual sovereignty based upon the principles of federalism. *See Wheeler*, 435 U.S. at 316-20; *Heath*, 474 U.S. at 88.

69. *Abbate*, 359 U.S. at 195.

70. 395 U.S. 784 (1969) (finding that retrial of defendant by the State of Maryland for larceny, a crime he had previously been acquitted of in state court, violated the constitutional prohibition against double jeopardy). In *Benton*, the defendant had initially been convicted of burglary and acquitted of larceny. *Id.* at 785. When the defendant appealed his burglary conviction, the Maryland Court of Appeals set aside the conviction and remanded his case to a trial court for reindictment and new trial on both the burglary and larceny counts. *Id.* at 785-86. The defendant was convicted of both crimes in the subsequent trial. *Id.* at 786.

71. *Id.* at 794.

72. 364 U.S. 206 (1960) (reversing convictions of defendants who had been found guilty of violating the Communications Act and conspiring to violate the Communications Act by illegally intercepting, recording and divulging wired communications).

73. *Id.* at 214-15; *see also* United States v. Pforzheimer, 826 F.2d 200, 203 (2d Cir. 1987) (noting that the Supreme Court in *Elkins* "held that evidence seized by state officials in violation of the United States Constitution is subject to the federal exclusionary rule").

74. *See Elkins*, 364 U.S. at 214-15.

the inapplicability of the Fifth Amendment to the states, *Benton* appeared to signal an end to the doctrine's validity. In 1978, in *United States v. Wheeler*,[75] the Supreme Court faced the first post-*Benton* challenge to the constitutionality of the dual sovereignty doctrine. In *Wheeler*, the Court reaffirmed the validity of the doctrine based on the weight of authority established by *Lanza*, *Bartkus* and *Abbate*,[76] and on the principles of federalism.[77] Since *Benton*, the Supreme Court has addressed the constitutionality of the dual sovereignty doctrine on only two occasions[78] and has not granted certiorari to hear a constitutional challenge to the doctrine since 1985.[79]

75. 435 U.S. 313 (1978). In *Wheeler*, the respondent, a Navajo tribal member, pleaded guilty in a tribal court for contributing to the delinquency of a minor. More than one year later, a federal grand jury indicted him for statutory rape arising out of the same incident. The district court then dismissed the indictment finding a violation of the Double Jeopardy Clause, and the Ninth Circuit affirmed. *Id.* at 314-16. The Supreme Court, determining that Native American tribal nations are sovereigns, reversed the dismissal of the indictment reasoning that the dual sovereignty doctrine shielded the subsequent federal prosecution from violating the prohibition against double jeopardy. *Id.* at 319-20.

76. *Id.* at 316-20 (finding that precedents themselves which upheld the constitutionality of the dual sovereignty doctrine served as a basis for the doctrine's continued validity).

77. *Id.* at 320 (observing that in a federalist system each independent sovereign has the right to determine what constitutes an offense against its sovereignty and the authority to punish those persons committing such offenses).

78. *See* Heath v. Alabama, 474 U.S. 82 (1985) (holding that the Double Jeopardy Clause does not bar successive prosecutions brought by different states); United States v. Wheeler, 435 U.S. 313 (1978) (finding that Native American tribal nations are distinct sovereigns from the United States and that successive federal and tribal prosecutions are protected from double jeopardy challenges by the dual sovereignty doctrine).

79. Heath v. Alabama, 474 U.S. 82 (1985), marked the last time the Court granted certiorari to hear a challenge to the dual sovereignty doctrine. In *Heath*, the second post-*Benton* constitutional challenge to the principle of dual sovereignty, the Court upheld the validity of the doctrine in the context of successive prosecutions brought by two states. *Heath*, 474 U.S. at 93. Heath pleaded guilty to the charges of committing kidnapping and murder in Georgia in exchange for a sentence of life imprisonment. *Id.* at 84. Subsequently, Alabama indicted, convicted and sentenced Heath to death for the same acts. *Id.* at 84-85. The Supreme Court premised its affirmation of the subsequent conviction on two main grounds: that dual sovereignty is supported by the concept of federalism, *id.* at 89-90, and that a State is entitled to decide whether a prosecution by another State has vindicated its own sovereign powers. *Id.* at 92-93.

III. Criticisms Of The Application Of The Dual Sovereignty Doctrine Regarding Successive State And Federal Prosecutions Where The Initial Prosecution Resulted In Acquittal

The continued validity and scope of the dual sovereignty doctrine must be assessed in light of its relation to the constitutional mandate prohibiting double jeopardy and the protection of individual interests conferred by the Constitution. In the more than one decade since the Court last heard a challenge to the dual sovereignty doctrine,[80] much has changed regarding technology employed by, and the cooperation existing between, law enforcement agencies,[81] the proliferation of federal criminal legislation[82] and the Court's own views on federalism.[83] The policy justifications for the doctrine are no longer as compelling as they once were. In the absence of historical, structural or textual support for the application of the dual sovereignty doctrine,[84] the question concerning its constitutionality should be revisited.

A. Criticisms of the Dual Sovereignty Exception to the Double Jeopardy Clause

1. Constitutional Interpretation of the Double Jeopardy Clause

The text of the Double Jeopardy Clause of the Fifth Amendment provides no exceptions.[85] Its language expressly extends the double jeopardy prohibition to all persons[86] and does not qualify the identity of the prosecuting authority.[87] Moreover, incorpora-

80. The Court last addressed the validity of the dual sovereignty doctrine in 1985. *See* Heath v. Alabama, 474 U.S. 82 (1985).

81. *See* People v. Cooper, 247 N.W.2d 866, 870 (Mich. 1976).

82. *See supra* note 44 and accompanying text.

83. *See generally* United States v. Lopez, 115 S. Ct. 1624 (1995) (invalidating the Gun-Free School Zones Act under the Commerce Clause as an impermissible intrusion by the federal government on the police powers of the state in derogation of the nation's federalist system).

States' rights proponents can argue that allowing the federal government to reprosecute a criminal defendant acquitted previously by the state infringes upon the sovereignty of the state and thus violates the principle of federalism.

84. *See infra* Part III.A.1.

85. U.S. CONST. amend. V. For an interesting discussion on the issue of statutory interpretation, see Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93 (1995). *See generally* Lynn M. Boughey, *A Judge's Guide to Constitutional Interpretation*, 66 TEMP. L. REV. 1269 (1993).

86. U.S. CONST. amend. V ("Nor shall *any person* be subject to . . . .") (emphasis added).

87. *Id.* The identity of the prosecuting authority to which the prohibition applies does not appear in the text, only the words "same offence." *Id.*

tion of the Double Jeopardy Clause to the states through the Fourteenth Amendment undermines the foundation for permitting successive prosecutions based upon the sovereignty of the prosecuting authorities.

The Supreme Court has conspicuously failed to premise its interpretation of the Fifth Amendment's prohibition against double jeopardy upon the original intent of its framers and ratifiers.[88] The legislative history of the Double Jeopardy Clause suggests that the framers did not intend to provide for an exception.[89] The omission of the phrase qualifying the identity of the prosecuting authority as the 'United States' in the proposed language of the clause[90] suggests by negative inference that the framers and ratifiers of the Double Jeopardy Clause intended the prohibition to apply to both state and federal governments alike.[91] Consequently, the framers

88. Justice Thurgood Marshall commented that:

> It is curious . . . how reluctant the Court has always been to ascertain the intent of the Framers in this area. The furthest the Court has ever progressed on such an inquiry was to note: "It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English Courts to try charges arising out of the same conduct."

Heath v. Alabama, 474 U.S. 82, 98 n.1 (1985) (Marshall, J., dissenting) (quoting Bartkus v. Illinois, 359 U.S. 121, 128 n.9 (1959)).

89. "The best [available] evidence of the intent of the framers indicates that the double jeopardy clause was intended to apply to prosecutions by different sovereigns, and that there was no exception for separate federal and state prosecutions for the same act, let alone separate state prosecutions." Allen & Ratnaswamy, *supra* note 13, at 816; *see supra* notes 18-22 and accompanying text.

90. *See supra* note 22 and accompanying text.

91. The final version of the Double Jeopardy Clause does not indicate which sovereign or sovereigns are prohibited from bringing multiple prosecutions. U.S. CONST. amend. V. The elimination of the qualifying phrase which would have limited application of the Clause to successive federal prosecutions leads to the conclusion that double jeopardy protection under the Fifth Amendment was intended to extend to both state and federal prosecutions.

There was little debate by Congress regarding the meaning of the Double Jeopardy Clause. The debated focused primarily on the concern that the clause not bar appeals by convicted defendants and retrials resulting therefrom. The debates did not disclose an intention to limit double jeopardy protection to bar only multiple federal prosecutions. Rather, what debate that did occur suggested that the protection of individual rights was at the core of the Constitutional guarantee. *See* I ANNALS OF CONG. 753 (J. Gales ed. 1789); Allen & Ratnaswamy, *supra* note 13, at 809-10.

Justice Black stated he believed that "the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying . . . a man a second time after acquittal or conviction in any court." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

The framers of the Federal Constitution did not intend for the Constitution to abolish rights guaranteed by the states merely due to the fact that many safeguards were not incorporated in the Constitution prior to the ratification of the Bill of Rights. *See*

and ratifiers of the Fifth Amendment most likely understood the prohibition against double jeopardy as precluding successive prosecutions brought by either the federal or state governments, regardless of the identity or sovereignty of the prosecuting authority in the initial prosecution.

The structure of the Bill of Rights counsels against the employment of an exception to the Double Jeopardy Clause. The Bill of Rights, by establishing the prerequisites for a minimally fair criminal proceeding, does not invite the courts to balance the rights of the individual against those of the government.[92] Rather, its dictates are absolute: while the Fourth Amendment invites balancing due to its employment of a "reasonableness" standard,[93] the rules of criminal procedure set forth in the Bill of Rights are more absolute in their language.[94] Therefore, the rules of criminal procedure are less susceptible to arguments that their relinquishment are necessary to prevent an injustice from occurring.[95] The objective of procedural guarantees is that in order to ensure fairness, society must assume the risk of harm that will inure from allowing a culpable defendant to escape punishment.[96] By contrast, the dual sovereignty doctrine which has at its heart the vindication of the right of sovereigns to independently pursue the successful prosecution of defendants, disregards the rights of defendants to be free from

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THE FEDERALIST NO. 84 (Alexander Hamilton) (allaying fears of those who object to the Constitution because it contained no Bill of Rights); THE FEDERALIST NO. 83 (Alexander Hamilton) (maintaining that the Constitution would not serve to abolish the right to jury trials). Therefore, it would be difficult to imagine that the federal system established by the Constitution could have been seen by the ratifiers of the Fifth Amendment as a vehicle by which rights conferred on individuals by the states could be circumvented and the protection offered by the Double Jeopardy Clause extremely limited. This is especially unlikely because the states were to retain their pre-existing jurisdiction, *see* THE FEDERALIST NO. 82, at 492 (Alexander Hamilton) (Clinton Rossiter ed. 1961), which included jurisdiction over criminal law.

92. Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 COLUM. L. REV. 1090, 1105 (1995).

93. *Id.*; *see* U.S. CONST. amend. IV ("The right of people to be secure . . . shall not be violated, . . . *but upon probable cause.* . . .") (emphasis added). The Fourth Amendment's provision that rights may be abridged "upon probable cause" invites courts to engage in balancing the interests of justice against interests defendants have in the preservation of their rights.

94. The Fifth and Sixth Amendments, in contrast to the Fourth Amendment, do not provide a basis for the court to engage in a balancing test. Herman, *supra* note 92, at 1105; *see* U.S. CONST. amend. V; U.S. CONST. amend. VI.

95. Herman, *supra* note 92, at 1105; *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (erecting safeguards to effectuate the Fifth Amendment privilege against self-incrimination); Duncan v. Louisiana, 391 U.S. 145 (1968) (holding the Sixth Amendment right of trial by jury applicable to the states).

96. Herman, *supra* note 92, at 1105-6.

multiple prosecutions guaranteed to the Fifth Amendment. In addition, the Bill of Rights enumerates certain rights and protections for the individual. It would be highly incongruous to conclude, as the Supreme Court did in upholding the dual sovereignty doctrine, that "individual rights deemed essential by both the State and Nation were to be lost through the combined operations of the two governments,"[97] especially in light of the incorporation of the Fifth Amendment's double jeopardy protection to the states.

2. *Distinguishable Case Law*

The Supreme Court's dual sovereignty jurisprudence has provides a basis for repudiating the continued validity of the doctrine as presently applied. It is instructive to note the historical context of the conception of the doctrine. When *Moore v. Illinois* was decided in 1852,[98] the dispute over states' rights threatened to engulf the nation in civil war. In deference to the political climate, the *Moore* Court sought to accommodate the competing interests of the federal government and the states while being careful not to exacerbate the conflict that existed in the nation.[99] Consequently, the conception of the principle of dual sovereignty arose from the realm of the body politic. Notwithstanding, the *Lanza* Court's application of the dual sovereignty doctrine rested heavily upon the "precedent" set in the *dicta* of *Moore*.[100]

In both *Lanza* and *Bartkus*, the Court premised the constitutionality of the dual sovereignty doctrine on the inapplicability of the Fifth Amendment's double jeopardy protection to the states.[101] Accordingly, the Court's holding in *Benton* that the Double Jeopardy Clause was binding upon the states[102] should have dealt the doctrine a death knell as it undercut the very foundation of the principle of dual sovereignty.[103]

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97. Bartkus v. Illinois, 359 U.S. 121, 155-56 (1959) (Black, J., dissenting).

98. 55 U.S. 13 (1852); *see supra* note 28.

99. Allen & Ratnaswamy, *supra* note 13, at 812-14; Harrison, *supra* note 18, at 313.

100. *See* United States v. Lanza, 260 U.S. 377, 382 (1922).

101. *Id.* at 380; *Bartkus*, 359 U.S. at 128-29.

102. Benton v. Maryland, 395 U.S. 784, 794 (1969).

103. *Benton* overruled Palko v. Connecticut, 302 U.S. 319 (1937) (and Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833)) by the incorporation of the Double Jeopardy Clause, which the *Bartkus* Court relied on in upholding the viability of the dual sovereignty doctrine. Therefore, the extension of double jeopardy protection to the states should have rendered successive prosecutions for the same act constitutionally impermissible. *See* People v. Cooper, 247 N.W.2d 866, 869 (Mich. 1976);

The Supreme Court's reasoning in *Elkins* supporting incorporation of the Fourth Amendment's protections against illegal searches and seizures to the states,[104] likewise should apply to Fifth Amendment double jeopardy protection. The logic of the *Elkins* Court illustrates that to the individual, there is little difference whether his or her "constitutional right has been invaded by a federal agent or by a state officer."[105] As a result, allowing the courts to permit an abrogation of the constitutional guarantee prohibiting double jeopardy based solely upon the identity of the prosecuting authority "would be a curiously ambivalent rule."[106] However, by permitting successive prosecutions, the dual sovereignty doctrine deprive individuals of their right to be free from double jeopardy.

3. *Policy Concerns*

Despite the fact that the precedents the Court relied upon[107] are themselves based upon precedents the Court has expressly overruled,[108] the Court continued to uphold the validity of the dual sovereignty doctrine in the post-*Benton* era.[109] Therefore, the validity of the dual sovereignty doctrine rests on the Court's interpretation of the concept of federalism and its efficient administration of justice justifications.[110]

The Double Jeopardy Clause prohibition was conceived specifically to protect the individual from repeatedly having to suffer the hardships of trial for the same alleged offense.[111] There is no foundation for the premise that an individual who was acquitted in an initial prosecution is more endangered by a subsequent prosecution brought by the same sovereign than he or she would be if the

State v. Fletcher, 259 N.E.2d 146 (Ohio Ct. App. 1970), *rev'd*, 271 N.E.2d 507 (1971), *cert. denied sub nom.* Walker v. Ohio, 404 U.S. 1024 (1972); Rosenfeld, *supra* note 4.

104. *See supra* notes 72-74 and accompanying text.

105. *Elkins*, 364 U.S. at 215.

106. *Id.* (finding that it "would be a curiously ambivalent rule that would require the courts of the United States to differentiate between . . . [violations of the Constitution] upon so arbitrary a basis" as whether the authorities responsible for the violations were state or federal agents).

107. The Court relied upon the precedents set in United States v. Lanza, 260 U.S. 377 (1922), Bartkus v. Illinois, 359 U.S. 121 (1959) and Abbate v. United States, 359 U.S. 187 (1959). *See* United States v. Wheeler, 435 U.S. 313, 316-20 (1978).

108. *See supra* note 103.

109. *See* Heath v. Alabama, 474 U.S. 82 (1985); United States v. Wheeler, 435 U.S. 313 (1978).

110. *See Heath*, 474 U.S. at 89-90; *Wheeler*, 435 U.S. at 320.

111. *See supra* note 5.

second prosecution was brought by a different sovereign.[112] As a result, the individual's interests, rather than the sovereign's, should be considered when determining the circumstances under which successive prosecutions may occur.[113]

The Court's current application of the dual sovereignty doctrine as a broad exercise of federalism offends defendants' interests in finality[114] and subjects them to arbitrary prosecutorial discretion.[115] The federal prosecution of Lemrick Nelson is illustrative of potential abuses that arise in the context of successive state and federal prosecutions. The United States began its investigation nearly fifteen months after Nelson was acquitted by a New York jury and almost three years after the alleged crime occurred.[116] Moreover, as the case of Lemrick Nelson suggests, public outrage generated by a jury verdict may constitute a "compelling" reason under the Petite policy, paving the way for the United States to pursue a subsequent prosecution.[117] What the Nelson case undoubtedly teaches us is that allowing authorities two bites at the apple virtually guarantees conviction. Federal prosecutors not only benefited from the powers of hindsight concerning prosecution strategies, but were able to gain insight from interviews conducted with jurors from Nelson's state trial,[118] had more resources and evidence at their

112. People v. Cooper, 247 N.W.2d 866, 869 (Mich. 1976); State v. Hogg, 385 A.2d 844, 847 (N.H. 1978).

113. *Cooper*, 247 N.W.2d at 869; *Hogg*, 385 A.2d at 847.

114. *See supra* note 15 and accompanying text.

115. *See* Joseph P. Fried, *Judge Asked to Dismiss Charges in Crown Heights Stabbing Case*, N.Y. TIMES, Nov. 18, 1995, at 27.

116. *Id.*

117. Attorney General Janet Reno succumbed to pressure brought by the Hasidic community, politicians and the District Attorney of Kings County, Charles Hynes, who lost the case. *See* Fried, *supra* note 115, at 27. Among the luminaries agitating for Federal intervention included Mario Cuomo, who at the time was the Governor of New York, United States Senator Alfonse D'Amato and Representative Charles Schumer of Brooklyn and Queens. Jan Hoffman, *Prosecution Errors in Earlier Trial May Have Paved Way for Guilty Verdict*, N.Y. TIMES, Feb. 11, 1997, at B4.

Zachary W. Carter, the United States Attorney in Brooklyn whose office prosecuted the Federal case, following the announcement of the guilty verdict declared that this prosecution brought the people most responsible for Yankel Rosenbaum's death to justice. Nowhere in his statement did he mention the matter of civil rights. Fried, *supra* note 1, at B4. This begs the question as to the "compelling" nature of the prosecution. Whose rights are being vindicated? New York's in bringing murderers to justice or the United States' in bringing civil rights violators to justice?

118. Hoffman, *supra* note 117, at B4. Governor Cuomo authorized an extensive review of the state trial against Nelson, which came to be known as the "Girgenti report." This report included interviews with jurors about what they saw as problems in the trial and the report served Federal prosecutors as the "ultimate focus group." *Id.*

disposal,[119] and were able to select a more 'favorable' panel from a larger jury pool.[120]

Perhaps the most troublesome aspect of the dual sovereignty doctrine is that is employed as a means of correcting aberrant jury verdicts.[121] Additionally, some legal scholars suggest that the dual sovereignty doctrine should be maintained as a means of ensuring against verdicts based upon racist jury selection practices[122] and tainted acquittals that result from affirmative illegal acts by the defendant designed to affect the outcome of the trial.[123] 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.[124] However, as the Supreme Court has held in other contexts, protections guaranteed by the Constitution cannot be abridged in order to mollify public disquiet.[125]

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119. *Id.* The Federal prosecutors had amateur videotapes and news services photographs and video at their disposal. Further, as years passed, Nelson spoke about the events that occurred in Crown Heights with a trusted few, including a former girlfriend who testified against him at his second trial. *Id.*

120. *Id.* The jury pool available to federal prosecutors was much broader than that of Nelson's first trial where the state prosecutors were limited to residents of Brooklyn. By contrast, the second trial saw potential jurors being drawn from the Eastern District of New York which includes Brooklyn, Queens, Staten Island and Long Island. The composition of the juries differed greatly between the first and second trials. In the state trial, six of the jurors were black, four were Hispanic, two were white and none were Jewish. In the Federal trial, five jurors were white, two of whom were Jewish, four were Hispanic, and three were black. Whether the makeup of the two juries can explain the different verdicts is unknown. *Id.*

121. *See* Dwyer, *supra* note 2, at A2; Rosenfeld, *supra* note 4, at 2.

122. *See* Amar and Marcus, *supra* note 58, at 50-51 (observing that the practice of racist jury selection, which is illegal, can lead to acquittals of guilty defendants. The authors used the example of the change in venue attained by counsel for the officers videotaped beating Rodney King. As a result of the change in venue to Simi Valley, California, the jury was mostly white and acquitted the defendants.).

123. *Id.* at 54-56 (discussing the suggestion that those defendants who are acquitted by virtue of bribery, jury tampering or other illegal acts, be subject to a successive prosecution as they illegally obtained their acquittals and because they do not possess the requisite clean hands to come to a court of equity so that future proceedings against them may be estopped or enjoined).

124. *See* Dwyer, *supra* note 2, at A2.

The prosecutions of Lemrick Nelson and Stacey Koon for federal civil rights violations are the most recent and well-publicized examples of attempts by the federal government to correct aberrant state jury verdicts. Stacey Koon was one of the Los Angeles police officers captured on videotape beating motorist Rodney King. After a California jury failed to convict any of the police officers responsible for beating King, violent rioting ensued in Los Angeles. Koon was subsequently convicted by the United States for violating Rodney King's civil rights. *See supra* note 38 and accompanying text.

125. For example, in Miranda v. Arizona, 384 U.S. 436 (1966), the Court barred the admissibility of statements made by a defendant where it was not demonstrated that

The usurpation of the nullification power of juries undermines the "sovereignty of the people," who, in their capacities as jurors, have the option to nullify the law[126] to prevent the state from perpetrating miscarriages of justice. Some legal commentators argue that the usurpation of the nullification power alone renders the principle of dual sovereignty unconstitutional.[127] Several states, including Illinois in the wake of the Supreme Court's decision in *Bartkus*,[128] have refused to apply the doctrine.[129]

In an age of "cooperative federalism,"[130] law enforcement agencies cannot be considered separate and independent.[131] Cooperation among state and federal authorities is commonplace and their interests in prosecuting criminal acts frequently coincide.[132] There is no reason to believe that the spirit of cooperation that exists between federal and state authorities would be adversely affected by enforcing the Double Jeopardy Clause.[133] In fact, the present doctrine often results in the complication of the plea bargaining process as agreements not to extradite threaten to disrupt the efficient administration of law enforcement.[134] Modern telecommunications technology and computer applications make coordination among federal and state law enforcement authorities both feasible

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procedural safeguards were used to effectively secure the privilege against self-incrimination guaranteed by the Fifth Amendment. *Id.* at 444.

126. Gorman, *supra* note 14, at 72.

127. *Id.* It has been argued that the principle of dual sovereignty is unconstitutional because it impermissibly infringes upon the jury's right to nullify the law and:

> denigrates the principle of popular sovereignty underlying the Double Jeopardy Clause. An exercise of popular sovereignty is final and unappealable. . . . Having invited the popular will to check its authority, government may not simply disregard it and try again.

Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 287 (1992).

128. *See* State v. Fletcher, 259 N.E.2d 146, 158-59 (Ohio Ct. App. 1970), *rev'd*, 271 N.E.2d 507 (1971), *cert. denied sub nom.* Walker v. Ohio, 404 U.S. 1024 (1972) (Appendix A) (observing that after *Bartkus*, Illinois passed a statute which would have barred the subsequent state prosecution); ILL. ANN. STAT. ch. 38, para. 3-4 (Smith-Hurd 1964).

129. *See supra* note 12.

130. "Cooperative Federalism" is a term used by the Supreme Court to describe the united front waged by federal and state governments against many types of criminal activities. *See* Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 56 (1964) (finding that a witness who was immune from prosecution under state law could not be prosecuted under federal law on the basis of the incriminating testimony the witness was thus compelled to propound under the Fifth Amendment as applied to the states through the Fourteenth Amendment).

131. *See* People v. Cooper, 247 N.W.2d 866, 870 (Mich. 1976).

132. *Id.*

133. Allen & Ratnaswamy, *supra* note 13, at 821.

134. *Id.* at 821-22.

and desirable. Moreover, the federalist system which limits and defines the powers of the national government, does not provide a foundation for the proposition that the national government may eschew its constitutional limitations merely by virtue of its relationship to the states.

When the federal government seeks to prosecute a defendant following an acquittal in a state prosecution, the interests and rights of the defendant are often compromised or completely obviated by the dual sovereignty doctrine. Due to the cooperation among the prosecuting authorities, the "sham" exception to the dual sovereignty doctrine is invariably implicated, though virtually never vindicated.[135]

In situations where the government's delay in bringing the federal charges is excessive, the defendant's Sixth Amendment Right to a speedy trial,[136] the protections conferred on a defendant under the Speedy Trial Act[137] and the discretion the Federal Rules of Criminal Procedure grants the court[138] likewise are implicated. These claims, however, are usually summarily dismissed.[139]

In addition, in cases where a civil rights prosecution is brought following a state acquittal for the predicate offense, the issue of collateral estoppel arises.[140] Courts often fail to find that state and federal authorities are parties in interest, regardless of their level of cooperation.[141] Correspondingly, although the Fifth Amendment forbids successive prosecutions for greater and lesser included of-

135. *See supra* notes 39-43 and accompanying text for a discussion on the sham exception.

136. U.S. CONST. amend. VI; *see* Barker v. Wingo, 407 U.S. 514 (1972).

137. 18 U.S.C. § 3161 *et seq.* (1994).

138. A court may dismiss an indictment when there has been unnecessary delay in presenting the charge to a grand jury. FED. R. CRIM. P. 48(b).

139. *See, e.g.,* United States v. Ng, 699 F.2d 63 (2d Cir. 1983). The Second Circuit held that a reasonable belief by the government that the state would continue to prosecute the defendants was a permissible reason for the delay in bringing federal charges where there was no evidence of prejudice or that defendants actively pursued their right to a speedy federal trial. *Id.* at 70.

140. Collateral estoppel simply means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a future proceeding. Ashe v. Swenson, 397 U.S. 436, 443 (1970). In *Ashe*, the Supreme Court held that collateral estoppel could be applied by defendants in criminal cases. *Id.* at 444.

141. "Collateral estoppel does not apply to successive prosecutions by the state and federal governments because the party that the first defendant seeks to estop in the second prosecution was not a party to the first trial." United States v. Hayes, 589 F.2d 811, 819 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979).

fenses,[142] that defense is not available under the dual sovereignty doctrine.[143]

B. A Proposal for Application of the Dual Sovereignty Doctrine

The Supreme Court should reconsider the constitutionality of its dual sovereignty jurisprudence. Policy considerations which ignore the realities of modern law enforcement practices and the blurring of the distinction between federal and state criminal jurisdictions cannot serve as the basis for denying constitutionally guaranteed rights. Application of the doctrine must not infringe on individual rights guaranteed by the Double Jeopardy Clause and should rely on an independent source of constitutional authority which trumps the Fifth Amendment's absolute prohibition against successive prosecutions.

Some commentators suggest that the vitality of dual sovereignty doctrine should be preserved as a civil rights exception to the Double Jeopardy Clause.[144] However, the civil rights laws provide the federal government with the opportunity to vindicate the rights of its citizens.[145] The inertia of the federal government to pursue civil rights violations is a political issue that should not be resolved by disregarding protections guaranteed by the Constitution.

Congress has the authority to reserve to the federal government the determination as to whether the United States will execute its prosecutorial jurisdiction. Federal criminal legislation may preempt state criminal statutes towards that end. Additionally, Congress can enact criminal statutes containing waiver and notification provisions to ensure that the United States will have the opportunity to vindicate its interests where it deems necessary. Employment of legislation with a waiver and notification provision permits the United States to allow the states to prosecute all offenses over which they share concurrent jurisdiction. As a result, the en-

142. Brown v. Ohio, 432 U.S. 161, 169 (1977).

143. Generally, prosecutions for civil rights violations require that the defendant not only be guilty of the state crime, but that he or she additionally acted with the intent to deprive another of his or her civil rights. Therefore an acquittal on the state charge, the lesser included offense, should preclude conviction on the federal charge.

For example, in the case of Lemrick Nelson, the United States will have to prove the predicate act of murder, a charge he was acquitted of in state court. *See* Rosenfeld, *supra* note 5, at 2.

144. *See generally* Belknap, *The Legacy of Lemuel Penn*, *supra* note 46; *see, e.g.*, Jim Dwyer, *supra* note 2, at A2.

145. *See, e.g.*, United States v. Nelson, 921 F. Supp. 105 (E.D.N.Y. 1996) (prosecuting Nelson under 18 U.S.C. § 245(b)(2)).

croachment of the federal government on the police powers of the state would be minimal.

The Supreme Court must specifically address the tension arising from a rule of law that permits the United States to do in tandem with the states what neither it nor the states are allowed to do individually: to subject an individual who has been acquitted of a criminal offense to reprosecution for the same offense.[146] This paradox must be reconciled with cases, such as *Elkins*, which directly contradict such a logical premise.[147] As an alternative to invalidating the dual sovereignty doctrine, the Court should strictly confine its application to cases where the defendant in the initial state proceeding committed a federal offense while acting under the color of state authority. Under this "color of state authority" exception, only the federal government would have the opportunity to seek a subsequent prosecution.

A person acting under the color of state authority is arguably not acting in his or her own individual capacity. Therefore, because the Double Jeopardy Clause of the Fifth Amendment was designed to protect the individual from abuses perpetrated by the national government, such an exception is constitutionally permissible. The color of state authority exception, if qualified and narrowly construed, may be consistent with the spirit of the Fourteenth Amendment, which safeguards the interest of the individual against abuses perpetrated by the state and *Benton*. In order to ensure that this exception will be strictly confined, a finding would be necessary to determine that the state, or agents thereof, acted in such a way as to ensure that the defendant would not be convicted in the initial state prosecution. Such a showing might entail proving that the state did not vigorously prosecute the defendant. As a result, the state never truly subjected the defendant to jeopardy in the first instance. Antithetically, an aberrant jury verdict, by itself, would not constitute a sufficient basis for applying the color of authority exception.[148]

Conclusion

The dual sovereignty doctrine regarding successive state and federal prosecutions as presently applied is repugnant to the spirit of

146. *See supra* note 97 and accompanying text.

147. *See supra* notes 97-106 and accompanying text.

148. The color of authority exception would deny the United States the authority to prosecute either Lemrick Nelson or Stacey Koon as evidence suggests that New York and California, respectively, vigorously prosecuted the defendants.

the constitutional protections guaranteed by the Double Jeopardy Clause. The principle of dual sovereignty lacks foundation in the text, history and structure of the Bill of Rights. Moreover, the policy rationale and the precedents upon which the Court has upheld the doctrine have been undermined.

The Supreme Court should reconsider the validity of the dual sovereignty doctrine and determine whether or not a narrower application of the doctrine would be constitutionally permissible. The proposed color of state authority exception may be a viable alternative to the present application of the dual sovereignty doctrine to cases involving federal prosecutions following an acquittal by a state jury for the same underlying conduct.