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Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study

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ACCEPTING THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY: A HARD CASE STUDY

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I. INTRODUCTION

Intergovernmental cooperation and coordination are indelible facets of modern law enforcement in this country, with federal, state, and local

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officials pooling resources, sharing information, lending manpower, and coordinating prosecutorial strategy.[1] Contentious issues of jurisdiction and investigatory control often give way to the common objectives of pursuing and successfully prosecuting suspected criminals.[2] However, when these common objectives compel state legislatures and Congress to criminalize the same conduct, the possibility arises for multiple or successive prosecutions of a defendant for the same criminal act.[3]

What, if any, protection does the Constitution afford suspected criminals in our system of concurrent jurisdiction? Longstanding interpretation of the Fifth Amendment's Double Jeopardy Clause[4] allows successive prosecutions by *separate* governments for the same conduct, prohibiting only successive prosecutions by the *same* government.[5] This

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1. *See* Harry Litman & Mark D. Greenberg, *Reporters' Draft for the Working Group on Federal-State Cooperation*, 46 HASTINGS L.J. 1319, 1322 (1995) (discussing, among other mechanisms of cooperation, the Justice Department's Law Enforcement Coordination Committee program, which requires every U.S. Attorney's office to establish a committee consisting of state, local, and federal law enforcement officials within the office's territorial jurisdiction for purposes of communication, resource sharing, and cooperation).

Calls for increased intergovernmental cooperation are on the rise as post-September 11th legislation begins to take effect. *See, e.g.*, MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON (2002).

2. Litman, *supra* note 1, at 1324. A recent example is the investigation, and race to prosecute, the D.C. sniper suspects. Virginia, Maryland, and federal authorities wrangled over which jurisdiction would be the first to prosecute the defendants, with the likelihood of obtaining death sentences playing a central role in the debate. Carol Morello & Katherine Shaver, *Prosecutor Initiates Sniper Case Charges: Gansler to Seek Death for Muhammad*, WASH. POST, Oct. 27, 2002, at A1. Virginia convinced federal prosecutors not to file charges until the debate was resolved, wishing to avoid a Virginia law that would have barred a Virginia prosecution had the federal government filed first. *Id*. Such laws are discussed *infra* note 202.

3. For a discussion of the constitutional underpinnings of concurrent state/federal criminal jurisdiction and the lack of federal preemption of state criminal law, see Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 82-94 (1996), and Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553-54 (2002) (noting only one Supreme Court decision has ever held a state criminal law to be preempted by a federal criminal statute).

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

Generally, the Double Jeopardy Clause protects criminal defendants from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishment for the same offense. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). The rationale behind the protection is:

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

Benton v. Maryland, 395 U.S. 784, 796 (1969).

5. *See*, *e.g.*, Heath v. Alabama, 474 U.S. 82, 88-91 (1985) (upholding an Alabama murder conviction of a defendant that had already secured a plea agreement with Georgia prosecutors for the

interpretation, the *dual sovereign doctrine*, declares that laws enacted by separate sovereigns criminalizing the same conduct are necessarily separate *offenses* and therefore are not subject to a double-jeopardy bar when prosecuted successively.[6]

The legitimacy of the dual sovereign doctrine was at one time a source of heated debate in the Court[7] and remains almost uniformly criticized by commentators.[8] Nevertheless, it has been entrenched in American law since the late 1950s.[9] The overriding complaint is best summarized by Justice Black's observation that from the defendant's point of view, he or she is being tried twice for the same offense irrespective of who is doing the prosecuting.[10] An alternative perspective, the one embraced by the Court, shifts the focus to the encroachment on sovereign power that would result if a government were barred from enforcing its own criminal laws because bound by the adjudication of another government.[11] Any satisfactory resolution of the debate must reconcile the protection of a basic civil liberty with due respect for the independent powers of separate governments in our federal system.[12]

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same murder).

6. *Id*. at 89 (citing United States v. Lanza, 260 U.S. 377, 382 (1922)).

7. *Abbate v. United States*, 359 U.S. 187 (1959) (upholding a federal conviction that followed a state conviction) and *Bartkus v. Illinois*, 359 U.S. 121 (1959) (upholding a state conviction after a federal acquittal) solidified the doctrine in American case law, though both were narrow majorities, with Justice Black writing strong dissents in both.

8. *See* Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801 (1985); Akil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995) (criticizing successive prosecutions in cases involving multi-jurisdictional drug task forces); Special Issue, The Rodney King Trials: Civil Rights and Double Jeopardy, 41 UCLA L. REV. 509 (1994); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 388-90 (1986) (exploring the role of the Eighteenth Amendment in the dual sovereign debate); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967) [hereinafter *Another Exercise*].

9. *See supra* note 7; *see generally* ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS at xxvi (2001) (noting that the dual sovereign doctrine is "unlikely to be altered by the Supreme Court in the foreseeable future" despite repeated proposals for reform; surveying the current state of American law with regard to successive prosecutions).

10. *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

11. *See, e.g.*, *Heath*, 474 U.S. at 99 (Marshall, J., dissenting).

12. *McCulloch v. Maryland* defined sovereignty in our federal system: "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the

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Cautiously, this Note attempts to justify the status quo, exploring many of the criticisms of the doctrine[13] while seeking possible explanations for its continuing vitality that go beyond textual plausibility and judicial inertia. Furthermore, this Note attempts to explain how the doctrine might, in its practical application, effectuate a satisfactory, if not necessary, balancing act, acknowledging criminal defendants' interest in repose without upsetting the requisite etiquette of federalism.[14] Giving context to the criticisms, and making their rebuttal challenging, this Note considers the peculiar case of a defendant acquitted of state murder charges who is then reprosecuted on federal murder charges predicated upon, by specific reference, violation of the very same state crime of which he was already acquitted.[15]

II. THE PROSECUTIONS OF ROBERT ANGLETON[16]

Robert Angleton was acquitted of capital murder in state court in Houston, Texas in 1998.[17] Texas alleged that he hired his brother Roger to kill his wife Doris.[18] Roger was also charged with murder in a separate indictment, but killed himself before either trial, leaving behind a suicide note saying he acted alone.[19] Robert was then acquitted by a state jury.[20]

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objects committed to the other." 17 U.S. (4 Wheat.) 316, 410 (1819), *cited in Heath*, 474 U.S. at 92.

13. *See infra* text accompanying notes 83-88.

14. This Note seeks contemporary relevance of the dual sovereign doctrine's federalism rationale.

15. United States v. Angleton, 221 F. Supp.2d 696 (S.D. Tex. 2002) (denying motion to dismiss, but granting leave for interlocutory appeal), *aff'd* 314 F.3d 767 (5th Cir. 2002), *cert. denied* 123 S. Ct. 1649 (2003).

16. In July of 2002, the United States District Court for the Southern District of Texas, Lee H. Rosenthal, J., denied Angleton's motion to dismiss federal murder charges that followed state acquittal for the same murder, citing extensive dual sovereign precedent. *Angleton*, 221 F. Supp.2d at 698. Nevertheless, Judge Rosenthal's opinion (over 100 pages in its original format) offered extensive discussion of Angleton's challenge, finding it nonfrivolous so as to entitle Angleton to an expedited interlocutory appeal. *Id*. In December of 2002, the Fifth Circuit rejected Angleton's challenges, relying heavily on *Heath*, 474 U.S. 82, and remanded the case for trial. *Angleton*, 314 F.3d 767 (5th Cir. 2002). In March of 2003, the Supreme Court refused to hear Angleton's challenge to the dual sovereign doctrine. Angleton v. United States, 123 S. Ct. 1649 (2003). After the unsuccessful appeal, Angelton's federal trial was set to begin in June of 2003. However, Angleton fled to Amsterdam the day before his trial and was arrested there with a fake passport. Mike Tolson, *Biding Time in Dutch Jail*, *Angleton pins hopes on double-jeopardy rule*, HOUS. CHRON., Oct. 26, 2003. As of the date of this Note's publication, Angleton is in Dutch custody and is fighting extradition in Dutch courts on the grounds that our dual sovereignty exception to double jeopardy is a violation of international law. *Id.*

17. *Angleton*, 221 F. Supp.2d at 700.

18. *Id*. at 699.

19. *Id*.

20. *Id*. at 700. Doris Angleton was seeking a divorce prior to her murder. *Id.* at 699. Robert Angleton was a Houston bookmaker who, ironically, often cooperated with both state and federal law

Some time after the acquittal, state prosecutors contacted the United States Attorney's Office in the Southern District of Texas, which was investigating Angleton for federal RICO and money laundering violations.[21] State prosecutors asked that the federal investigation be expanded to prosecute Angleton for the killing of his wife under federal law.[22] State and federal law enforcement agents formed an unofficial joint task force to look into the matter.[23] The task force included the Houston police officers who originally investigated Doris Angleton's murder.[24] These officers were deputized as United States Deputy Marshals so as to be permitted access to FBI files relating to the federal investigation.[25] Two state prosecutors who participated in the state acquittal were personal friends of the FBI agent conducting the federal investigation and cooperated with the joint task force.[26] The task force acquired all information utilized in the state prosecution.[27] In the course of the federal investigation, the FBI interviewed members of the jury that acquitted Angleton, questioning them as to what evidence and aspects of Texas's case led them to return the not-guilty verdict.[28]

In January 2002, U.S. Attorneys indicted Angleton on federal murder-for-hire charges.[29] The murder-for-hire statute makes it a crime to: (1) travel or use facilities in interstate commerce; (2) "with intent that a

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enforcement as an informant. *Id*. State prosecutors argued that the millions Robert earned as a bookie were at stake in the divorce and offered an audiotape taken from Roger's possessions, which allegedly recorded a conversation between Roger and Robert, discussing the details of the murder and how to get past the security in the house where Doris was killed. Steve Brewer et al., *Jury Hands an Acquittal to Angleton/Wealthy Ex-Bookie Cleared of Role in Wife's '97 slaying*, HOUS. CHRON., Aug. 13, 1998, at A. To the surprise of the prosecution, its own expert witness submitted a report saying he could not conclude that it was Robert's voice on the tape. *Id*. Angleton's acquittal sparked national attention, and was the focus of an episode of *48 Hours* (CBS television broadcast, June 10, 2002).

21. *Angleton*, 221 F. Supp.2d 696, 700.

22. *Id*.

23. *Id*.

24. *Id*. The officers remained on the payroll of the Houston Police Department throughout the federal investigation. *Id*.

25. *Id*.

26. *Id*. The only witness to give testimony in front of the federal grand jury, the FBI agent who led the joint task force, is married to the Harris County District Attorney who oversaw the state prosecution. *Id*. at 717.

27. *Id*. The joint task force has worked to enhance the tape recording discredited in the state trial. *Id*. at 700-01 n.7. Additionally, federal prosecutors obtained evidence of an interview of Roger conducted by journalist Vanessa Leggett, before his suicide. *Id*. Leggett's refusal to turn over her notes of the interview to the federal grand jury led to her five month jailing and became a high profile First Amendment case, ending with the Supreme Court's denial of certiorari to decide her journalist privilege claim. Leggett v. United States, 122 S. Ct. 1593 (2002).

28. *Angleton*, 221 F. Supp.2d at 700.

29. *Id*. at 701. Although the federal investigation originally focused on RICO and money laundering, these charges where not pursued. *Id*.

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murder be committed in violation of *the laws of any State* or the United States"; (3) for money or other compensation.[30] With regard to the second element, the indictment alleged the murder of Doris Angleton was committed "in violation of the laws of the State of Texas and the United States."[31] The federal crime, like the state crime, can carry the death penalty.[32]

Under current law, the state acquittal does not bar a federal prosecution for the same murder.[33] Angleton's case provides an interesting backdrop to explore the criticisms and justifications of the dual sovereign doctrine.[34]

III. HISTORY AND CRITICISM

A. Nineteenth Century Dual Sovereign Debate

The dual sovereign debate first surfaced as *dicta* in Supreme Court cases of the early nineteenth century. In 1820, *Houston v. Moore* considered the constitutionality of a state statute purporting to grant state military courts authority to impose federal sanctions on militiamen who failed to report for federal duty.[35] The defendant argued that the state statute was invalid because it created the possibility that a delinquent militiaman, if subjected to both state and federal court martials, would be *twice punished* for the same proscribed offense.[36] To this, Justice Washington suggested that if jurisdiction were proper in both state and

30. 18 U.S.C. § 1958(a) (2000) (emphasis added).

31. *Angleton*, 221 F. Supp.2d at 701. The indictment further alleges that an agreement existed between the Angleton brothers to the effect that should Roger be caught, he would exonerate Robert. *Id*. In the federal trial, federal prosecutors will have to prove the elements of the Texas murder statute under which Angleton was acquitted in the state trial, in addition to the federal jurisdictional element under 18 U.S.C. § 1958.

32. 18 U.S.C. § 1958(a) (2000). Michael Ramsey, Angleton's attorney, is quick to point out the harshness of the dual sovereign doctrine as applied in capital cases such as his client's, "It is unfair that state verdicts are good enough to execute people but not good enough to exonerate." *Appeals Court Rules Man not in Double Jeopardy in Murder-For-Hire Case*, Associated Press Newswires, Dec. 12, 2002, *available at* WESTLAW, APWIRESPLUS.

33. *Angleton*, 314 F.3d 767 (5th Cir. 2002), *cert. denied* 123 S. Ct. 1649 (2003); *See also* United States v. Basile, 109 F.3d 1304 (8th Cir. 1997) (allowing a federal murder-for-hire prosecution that followed a state acquittal for the same murder), *cert. denied*, 522 U.S. 873 (1997).

34. For Angleton's challenges, see *infra* Part III.F.

35. 18 U.S. (5 Wheat.) 1 (1820). The defendant in Houston was a militiaman who had failed to report for national service as ordered by presidential decree. *Id*. at 3. Congress had criminalized such delinquency by statute. *Id*. at 13-14. The Pennsylvania statute incorporated the federal penalties, by reference, and purported to authorize its military courts to enforce the federal law. *Id*. at 2.

36. *Id*. at 31.

federal military courts, then final adjudication in one would bar prosecution in the other, and thus the state law was constitutional.[37]

In 1847, the defendant in *Fox v. Ohio* argued an Ohio anti-counterfeiting law was invalid because concurrent congressional criminalization might result in duplicative prosecutions for the same act of counterfeiting in violation of the Fifth Amendment's double jeopardy prohibition.[38] Entertaining the defendant's hypothetical, the Court condoned the possibility of concurrent criminal jurisdiction, and dismissed the double jeopardy argument, noting that the Bill of Rights did not restrict the power of state governments.[39] However, the Court went on to suggest that discretionary administration of law enforcement in areas of concurrent state and federal jurisdiction would remedy problems of duplicative prosecutions.[40] Dissenting, Justice McLean saw concurrent criminal jurisdiction without double jeopardy protection as "a great defect in our

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37. *Id*. at 32. The Court's exact holding, and its role in the dual sovereign debate, is far from clear. *Angleton*, 221 F. Supp.2d at 725 n.26 (quoting Braun, *supra* note 8, at 9). Relevant in Justice Washington's conclusion that a state court martial would bar a federal court martial was the fact that the federal law in question did not grant exclusive jurisdiction to federal courts (as was usually the case in federal criminal legislation), thus allowing room for binding state enforcement of the federal law in state courts, irrespective of the state statute incorporating the federal penalties. *Houston*, 18 U.S. (5 Wheat.) at 29. In a separate opinion, Justice Johnson asked, "Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States." *Id*. at 33 (Johnson, J., concurring). Justice Johnson suggested that a government might *consent* to being bound to another's adjudication noting, "[C]rimes against a government are only cognizable in its own Courts, or in those which derive their right of holding jurisdiction from the offended government." *Id*. at 35. Whatever historical relevance the *Houston* debate might have, *Bartkus* interpreted *Houston* as only barring a successive prosecution when, "the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government *empowered* to try that question." 359 U.S. at 130 (emphasis added).

38. 46 U.S. (5 How.) 410, 434 (1847).

39. *Id*. at 434-435 (relying on its holding in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

40. *Id*. at 435. In a famous passage:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.

Id.

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system," and concluded that the Supremacy Clause mandated invalidation of the state law.[41]

Five years later in *Moore v. Illinois*, a defendant argued that the coexistence of an Illinois fugitive slave law and a similar federal law could result in duplicative punishment.[42] Again, the Court found concurrent jurisdiction and the possibility of duplicative punishment unobjectionable, broadly reasoning that citizens in a federalist system are obligated to conform their conduct to both state and federal law, a breach of one government's laws being a distinct offense from a breach of the other's law.[43] Justice McLean again argued that the federal law should preempt the state's.[44]

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41. *Id*. at 439-40 (McLean, J., dissenting). In Justice McLean's view, there were only two permissible solutions to the defendant's hypothetical: either criminal jurisdiction must be mutually exclusive as between the states and the federal government, or if concurrent jurisdiction exists, then double jeopardy protection must extend to successive prosecutions by state and federal governments. *Id*. at 439. Although "common principles of humanity" and the "spirit" of double jeopardy protection compel its application across concurrent jurisdictions, this latter alternative was clearly foreclosed by *Barron*, as well as by considerations of sovereignty in a federal system: "There can be no greater mistake than to suppose that the federal government, in carrying out any of its supreme functions, is made dependent on the State governments." *Id*. Therefore, Justice McLean called for exclusive federal jurisdiction in the area of counterfeiting and an invalidation of the state law under the Supremacy Clause. *Id*. at 440.

42. 55 U.S. (14 How.) 13, 17 (1852).

43. *Id*. at 20. In a passage later relied upon in *Bartkus*, 359 U.S. 121, and *Abbate*, 359 U.S. 187:

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

Id.

44. *Id*. at 22 (McLean, J., dissenting). Furthermore Justice McLean recognized the common interests for which Congress and states legislate:

> It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the Federal Government, though sovereign within the limitation of its powers, may, in some sense, be considered as the *agent of the States*, to provide for the general welfare, by punishing offences under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.

Id. (emphasis added). Focusing on the perspective of the individual defendant, Justice McLean saw successive prosecutions as "contrary to the nature and genius of our government," which divided

B. Modern Doctrine

United States v. Lanza is the Supreme Court's first application of the dual sovereign doctrine, allowing federal enforcement of national prohibition laws under the Eighteenth Amendment against defendants already punished under state law for the same acts.[45] The Court held that "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[46] The Court again noted that the Fifth Amendment was not a limitation on the states.[47] Furthermore, binding the federal government to state adjudication in a state with lesser fines or punishments would result in a "race of offenders" to state courts in order to admit guilt and secure immunity from the harsher federal law, and would thus undermine the efficacy of the national prohibition.[48]

The Court solidified the doctrine in *Bartkus v. Illinois*[49] and *Abbate v. United States*,[50] both decided on the same day in 1959. *Bartkus* upheld a state conviction for bank robbery that followed a federal acquittal on essentially identical charges (robbery of a federally insured bank.)[51] Conversely, *Abbate* upheld a federal conviction that followed a state conviction.[52]

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governmental power so as to preserve personal liberty. *Id*. at 21.

45. 260 U.S. 377, 382 (1922). Although *Lanza* was the Court's first application of the doctrine, Justice Taft stated that it was "supported by a long line of decisions." *Id*. at 382, 384 (citing *Fox* and *Moore*).

46. *Id*. at 382. The Court invoked the dual sovereign rationale:

> 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. The Court gave the formal/textual basis for the doctrine: "The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States, and so is not double jeopardy." *Id*.

47. *Id*. Justice Taft addressed the problem of successive prosecutions to Congress, stating "If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision . . . ." *Id*. at 385.

48. *Id*.

49. 359 U.S. 121 (1959).

50. 359 U.S. 187 (1959).

51. 359 U.S. at 122.

52. 359 U.S. at 187. Both convictions concerned a union conspiracy to destroy facilities of a telephone company during a labor strike. *Id*.

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Bartkus relied on *Lanza*, the nineteenth century dicta, and a selection of state cases.[53] Again, the Court noted that the Fourteenth Amendment did not incorporate the Fifth Amendment Double Jeopardy bar to apply to the states, but then went on to discuss the effects of abandoning the doctrine.[54] The Court noted that state and federal offenses criminalizing the same conduct often carry drastically different penalties, and that to bar a government from enforcing its laws because of adjudication by another would be an affront to the division of powers in our federal system.[55] Furthermore such a bar would be, as a practical matter, difficult for courts to apply.[56] Ultimately, the Court deferred to the states and Congress to solve the problem of successive prosecutions through explicit legislation, rather than to construct a judicial solution via the Fourteenth Amendment.[57] *Abbate* repeated many of the same concerns.[58]

The *Bartkus* Court suggested an exception to the dual sovereign doctrine—a state prosecution following a federal acquittal would be barred with a showing that the federal government orchestrated and used the state prosecution to bypass the double jeopardy prohibition.[59] A group of

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53. 359 U.S. at 129-37. Consequently:

> With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar.

Id. at 136.

54. *Id*. at 129.

55. *Id*. at 137. Concerned with the preservation of state power: "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Id*. Justice Frankfurter then abdicated the Court's role in refereeing successive prosecutions, acquiescing to what he perceived to be the prudential demands of the Constitution's vertical as well as horizontal divisions of power:

> [S]eparation of powers was adopted in the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power." Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy.

Id. at 137-38.

56. *Id*. at 138. The difficult inquiry would be into the degree of similarity between the state and federal offense needed to trigger a bar. *Id*.

57. *Id*. Several states had already enacted statutes to bar or limit their governments' ability to initiate second prosecutions. *Id*. Congress could tailor federal legislation on the matter to specific offenses, or across the criminal code. *Id*. at 138-39.

58. 359 U.S. at 195. The Court recognized that disparity of sentences between state and federal offenses is inevitable because some acts "impinge more seriously on a federal interest than on a state interest." *Id*. Consequently, if "state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Id*.

59. 359 U.S. 121, 123-24. The Majority refused to apply such an exception, holding that the degree of intergovernmental cooperation in the facts of Bartkus's second prosecution

> [did] not support the claim that the State of Illinois in bringing its prosecution was merely a

dissenters argued that the facts of *Bartkus* warranted application of this "sham prosecution" exception.[60]

Justice Black wrote strong dissents in both cases, unwilling to accept the Court's invocation of federalism.[61] He doubted that lifting the doctrine would impair either state or federal law enforcement.[62] Furthermore, he rejected the notion that two governments might do in tandem what neither could do alone.[63] Justice Black repeatedly asserted that from the perspective of the accused, multiple prosecutions violate a fundamental protection embodied in the Constitution and common law.[64]

> tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a *sham and a cover for a federal prosecution*, and thereby in essential fact another federal prosecution.

Id. (emphasis added).

60. *Id*. at 168 (Brennan, J., dissenting). In *Bartkus*, federal authorities, displeased with a federal jury acquittal, solicited state prosecutors to press charges. *Id*. at 165. After the federal acquittal, federal officers collected evidence and ensured witness availability for the state trial. *Id*. The state conceded during oral arguments that the federal officers instigated, guided, and prepared the state case. *Id*. The dissenters felt the Court's role was to determine how much federal participation can be allowed before a double jeopardy bar should apply. *Id*. at 167-68. The dissenters doubted, given the circumstances surrounding Bartkus's second prosecution, that judicial invalidation would "do violence to the principles of federalism." *Id*. at 168. Nonetheless, the dissenters were wary of disruption of intergovernmental cooperation in law enforcement, recognizing that such cooperation is to be "desired and encouraged." *Id*. at 168-69. However, the dissenters suggested that "normal and healthy" cooperation is best exemplified by joint investigation and prosecution in a single trial. *Id*. at 169.

61. *Bartkus*, 359 U.S. at 150; *Abbate*, 359 U.S. at 201. Justice Black attacked the federalism rationale:

> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of "federalism." This, it seems to me, is a misuse and desecration of the concept. . . . We should . . . be suspicious of any supposed "requirements" of "federalism" which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.

Bartkus, 359 U.S. at 155-56.

62. *Id*. at 156-57. Justice Black took issue with the majority's premise that an intergovernmental double jeopardy bar would impair law enforcement, arguing such logic "relies on the unwarranted assumption that State and Nation will seek to subvert each other's laws." *Id*. at 156.

63. *Abbate*, 359 U.S. at 203. Reminiscent of Justice McLean's dissents in *Moore* and *Fox*, Justice Black argued that Congress could avoid frustration of federal interests by preempting coexisting state criminal law. *Bartkus*, 359 U.S. at 157.

64. *Bartkus*, 359 U.S. at 155. Justice Black prophesized abuse of the dual sovereign doctrine:

> Inevitably, the victims of such double prosecutions will most often be the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again. The power to try a second time will be used . . . to make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform and who resist tyranny.

Id. at 163.

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C. The Doctrine's Survival of Incorporation

The twentieth century saw the piecemeal incorporation of much of the Bill of Rights, via the Due Process clause of the Fourteenth Amendment, to apply to exercises of state power, in effect, departing from the line of precedent of *Barron v. Baltimore*.[65] Among the limitations made applicable to the states were the Fifth Amendment's protection against self-incrimination[66] and the Fourth Amendment's protection against unreasonable searches and seizures.[67]

Post-incorporation, the Court abandoned facsimiles of the dual sovereign doctrine in the context of intergovernmental cooperation transgressing the above two protections.[68] No longer could evidence unlawfully seized by federal authorities be used in state trials and vice versa.[69] No longer could federal authorities compel testimony that would incriminate a witness under state law and vice versa.[70]

In 1969, *Benton v. Maryland* incorporated the Double Jeopardy Clause to apply to states.[71] Though inapplicability of the Double Jeopardy Clause to the States was a consideration in dual sovereign precedent, the doctrine

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65. 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights was not a limitation on the power of the states). For a discussion of Justice Frankfurter's role in the incorporation debate, see *Richard L. Aynes, Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995). For a discussion of the substantive effect of the Fourteenth Amendment on the Bill of Rights, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

66. Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the Self-Incrimination Clause to apply to the states).

67. Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the Fourth Amendment protection from unreasonable searches and seizures).

68. Elkins v. United States, 364 U.S. 206 (1960) (abandoning the "silver platter doctrine"); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (abandoning a dual sovereign exception in the context of the Self-Incrimination Clause).

69. *Elkins*, 364 U.S. at 208. The Court focused on the rights of the individual criminal defendant: "To the victim [of an unlawful seizure] it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id*. at 215. Summarizing its rationale, the Court stated, "[N]o distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case." *Id*.

70. *Murphy*, 378 U.S. at 77. The Court stated that incorporation of the Self-Incrimination Clause to apply to the states in *Malloy*, decided on the same day, gave reason to reconsider the rule that allowed prosecutors to compel testimony incriminating the witness under another sovereign's laws. *Id*. at 76. The Court looked to the policy behind the clause, protection of individuals from compelled self-incrimination, and concluded that a dual sovereignty exception would contravene that policy. *Id*. at 55. Furthermore, the Court was wary of the potential for abrogation of the privilege if the separate sovereign exception were allowed "in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." *Id*. at 55-56.

71. 395 U.S. 784 (1969). *Benton* cited a portion of Justice Black's dissent in *Bartkus*, which detailed the origin of double jeopardy protection as a fundamental principle of justice and a universal maxim of common law. *Id*. at 795 (citing *Bartkus*, 359 U.S. at 151-56).

has not been abandoned post-incorporation in the double jeopardy context.[72]

In a 1985 case, *Heath v. Alabama*, the Court refused to abandon the doctrine, despite the particularly harsh results of its application.[73] Heath hired men to kill his wife, who was subsequently kidnapped from her home in Alabama and killed, with her body dumped in Georgia.[74] Heath pled guilty to malice murder under Georgia law in exchange for a life sentence.[75] Shortly thereafter, Alabama prosecuted and convicted Heath for the same murder and sentenced him to death.[76] The Supreme Court held that the Alabama prosecution was not barred by double jeopardy as Georgia and Alabama were separate sovereigns, each deriving its power from an independent source. Therefore the murder constituted two separate offenses under the dual sovereign doctrine.[77] The Court refused to address whether jurisdiction was improper in Alabama because the

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72. Justice Douglas, sitting as a circuit justice, suggested that *Benton* might "cast doubt upon the continuing vitality of *Bartkus*" and the dual sovereign doctrine. Smith v. United States, 423 U.S. 1303, 1307 (1975). However, three years later, without discussion of *Benton*, *United States v. Wheeler* applied *Bartkus* and the doctrine to allow federal prosecution of a Navajo tribe member accused of statutory rape who had already been prosecuted under Navajo tribal law, deeming the tribe to be a separate sovereign. 435 U.S. 313, 328 (1978). Justice Brennan did not participate in *Wheeler* and Justice Douglas left the Court shortly after *Smith*; thus none of the original *Bartkus* dissenters participated in *Wheeler*.

73. 474 U.S. 82 (1985).

74. *Heath*, 474 U.S. at 84. Forensic evidence suggested that the actual killing took place in Georgia. *Id*.

75. *Id*.

76. *Id*. at 85-86. Prior to Heath's Georgia confession, Alabama and Georgia officials had cooperated in investigating the murder. *Id*.

77. *Id*. at 88. The Court relied, almost entirely, on the textual basis of the doctrine and applied it to successive prosecutions between states:

> "[A]n offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."

Id. at 88 (citing *Moore*, 55 U.S. (14 How.) 13, 19-20). Completing its analysis, the Court noted:

> The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their 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.

Id. at 89. The Court rejected Heath's request to limit the dual sovereign doctrine to cases in which "allowing only one entity to exercise jurisdiction over the defendant will interfere with the unvindicated interests of the second entity and that multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities." *Id*. at 92. The Court soundly rejected this balancing approach as uncertain and difficult, as well as irreconcilable with the dual sovereignty principle: "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." *Id*. at 93. The majority made no mention of *Benton*.

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defendant did not raise the issue on appeal in Alabama courts.[78] Dissenting, Justice Marshall argued that the true rationale behind the dual sovereign doctrine did not warrant its application to successive state prosecutions.[79]

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78. *Id*. at 87. Alabama had a statute giving the state criminal jurisdiction over any crime that was commenced in Alabama, regardless of where it consummated. *Id*. at 85. Heath's counsel objected to jurisdiction at trial, but did not raise the issue on state appeal. *Id*. The Supreme Court refused to hear this issue, further noting that Heath made no due process objections (perhaps referring either to an ineffective counsel argument or Justice Marshall's dissent). *Id*. at 86. Heath's subsequent attempts to have his Alabama conviction set aside because of ineffective counsel and lack of jurisdiction failed and he was executed in 1992. *Ex parte* Heath, 601 So. 2d 217 (Ala. 1992) (setting date of execution).

79. 474 U.S. at 103 (Marshall, J., dissenting). Justice Marshall did not contest the validity of the dual sovereign doctrine in the context of successive state and federal prosecutions, but saw its justification as more than a narrow interpretation of the "offence" language that the majority offered in its holding: "This strained reading of the Double Jeopardy Clause has survived and indeed flourished in this Court's cases not because of any inherent plausibility, but because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system." *Id.* at 98. Justice Marshall then explained this accommodation, offering perhaps the most cogent analytical framing of the dual sovereign debate:

> Under the constitutional scheme, the Federal Government has been given the exclusive power to vindicate certain of our Nation's sovereign interests, leaving the States to exercise complementary authority over matters of more local concern. The respective spheres of the Federal Government and the States may overlap at times, and even where they do not, different interests may be implicated by a single act. . . . Yet were a prosecution by a State, however zealously pursued, allowed to preclude further prosecution by the Federal Government for the same crime, an entire range of national interests could be frustrated. The importance of those federal interests has thus quite properly been permitted to trump a defendant's interest in avoiding successive prosecutions or multiple punishments for the same crime . . . . Conversely, because "the States under our federal system have the principal responsibility for defining and prosecuting crimes," it would be inappropriate—in the absence of a specific congressional intent to pre-empt state action pursuant to the Supremacy Clause—to allow a federal prosecution to preclude state authorities from vindicating "the historic right and obligation of the States to maintain peace and order within their confines." . . . The complementary nature of the sovereignty exercised by the Federal Government and the States places upon a defendant *burdens commensurate with concomitant privileges*. Past cases have recognized that the special ordeal suffered by a defendant prosecuted by both federal and state authorities is the price of living in a federal system, the cost of dual citizenship. Every citizen, the Court has noted, "owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."

Id. at 99-100 (citations omitted) (emphasis added). Justice Marshall concluded that these justifications did not warrant extension of the doctrine to the successive state prosecutions. *Id*. at 101. Justice Marshall noted the abandonment of dual sovereign exceptions in *Murphy* and *Elkins*, but saw it distinguishable from the double jeopardy context: "It is one thing to bar a sovereign from using certain evidence and quite another to bar it from prosecuting altogether." *Id*. at 102 n.3. However, he read those cases to suggest that "courts should not be blind to the impact of combined federal-state law enforcement on an accused's constitutional rights," and argued that due process guarantees of fundamental fairness demand constitutional invalidation of Heath's Alabama conviction, given that Georgia law enforcement officials were leading prosecution witnesses in the Alabama trial. *Id*. at 102 n.3, 103.

D. The Petite Policy

In response to *Bartkus*, the Justice Department instituted what is known as the Petite Policy[80] to deal with the issue of successive prosecutions.[81] Under the policy in its current form, federal prosecutors wishing to bring a federal prosecution following a state prosecution based on the same conduct must obtain approval from an Assistant Attorney General after showing that the prior prosecution has left a substantial federal interest demonstrably unvindicated.[82]

E. Criticisms of the Doctrine and Questions Raised

1. Is the Invocation of Federalism Sufficient to Justify the Doctrine, and are such Justifications Outdated?

Critics of the dual sovereign doctrine have seen the Court's invocation of federalism as misguided,[83] overly formalistic,[84] outdated given the expansion of federal criminal law and the rise of cooperative federalism,[85]

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80. Named after *Petite v. United States*, 361 U.S. 529 (1960) (vacating a judgment at the request of the Justice Department made in accordance with its new policy).

81. The purpose of the policy is threefold: (1) to protect defendants from multiple punishment or prosecution for the same criminal act; (2) to ensure efficient use of department resources; and (3) to "promote coordination and cooperation between federal and state prosecutors." 3 DOJ Manual tit. 9-2.031(A) (2003), *available at* http://www.doj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031.

82. *Id*. Under the policy, there is a presumption that the prior prosecution vindicated the federal interest, but this presumption can be overcome upon considerations such as:

> [F]irst, incompetence, corruption, intimidation, or undue influence; second, court or jury nullification in clear disregard of the evidence or the law; third, the unavailability of significant evidence, either because it was not timely discovered or known by the prosecution, or because it was kept from the trier of fact's consideration because of an erroneous interpretation of the law; fourth, the failure in a prior state prosecution to prove an element of a state offense that is not an element of the contemplated federal offense; and fifth, the exclusion of charges in a prior federal prosecution out of concern for fairness to other defendants, or for significant resource considerations that favored separate federal prosecutions.

Id. at (D) (detailing additional scenarios warranting a second prosecution).

For a detailed description of the workings of the Petite Policy, see KURLAND, *supra* note 9.

83. *See Bartkus*, 359 U.S. at 155-56 (Black, J., dissenting); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 618 n.32 (1994) (asserting that virtually all commentators have argued for abandonment or limitation of the dual sovereign doctrine).

84. *See, e.g.*, Allen & Ratnaswamy, *supra* note 8, at 817-19 (criticizing the Supreme Court's application of the dual sovereign doctrine rationale in *Heath* as a simplistic "rhetorical exercise" based entirely on an "unelaborated notion of sovereignty").

85. *See* Braun, *supra* note 8, at 8-9 ("The proliferation of federal criminal legislation and the increasingly commonplace interaction between federal and state law enforcement efforts are closely

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contrary to original intent,[86] denigrating the constitutionally-mandated finality of jury verdicts,[87] and insufficient to justify the abrogation of a fundamental right of criminal defendants, innocent or otherwise.[88] In stark contrast, Justice Holmes once stated that the doctrine was a proposition "too plain to need more than statement."[89] What exactly are the federalism concerns that mandate a dual sovereign doctrine?

2. *Why has the Dual Sovereign Doctrine Survived Incorporation?*

Does *Benton v. Maryland*'s incorporation of the Double Jeopardy Clause against the states emasculate the reasoning of *Lanza*, *Bartkus*, and *Abbate*?[90] The *Heath* majority did not expressly address this argument.[91] Critics have asserted that the post-incorporation survival of the dual sovereign doctrine in the double jeopardy context is not reconcilable with the post-incorporation abandonment of the doctrine in the context of self-incrimination and unreasonable searches and seizures.[92] What

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related parts of the same historical development. As the laws increase the incidence of successive prosecutions, the way in which the laws are enforced demonstrate a corresponding increase in the need to reexamine the rule and rationale that allow such prosecutions to occur.").

86. *See* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693, 709-12 (1994) (suggesting that in drafting the Double Jeopardy Clause, the Framers intended to import the English practice at the time, which allowed a defense of *autrefois acquit* to bar a prosecution when a defendant had already been acquitted by a competent court of a foreign government); *but see* KURLAND, *supra* note 9, at 2 ("The doctrine is almost certainly consistent with the original intent of the framers.").

In *Bartkus*, Justice Frankfurter dismissed the relevance of the English precedent: "Such precedents are dubious . . . because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." 359 U.S. at 128 n.9.

87. Dawson, *supra* note 8, at 282 (arguing that the Double Jeopardy Clause should be understood "as a structural provision implementing the principle of popular sovereignty" which secures the power of jury nullification).

88. *See Bartkus*, 359 U.S. at 150 (Black, J., dissenting); Amar, *supra* note 8, at 16 ("the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism"); *see generally* Akil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 (1987) (critical of Supreme Court decisions neglecting that "the Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights").

89. Westfall v. United States, 274 U.S. 256, 258 (1927), *quoted in Heath*, 474 U.S. at 89. In fact, the *Heath* majority has been criticized for giving the doctrine little more than statement. *See also* Allen & Ratnawamy, *supra* note 8, at 804 (asserting that *Heath* is a case that needs "to be studied to determine whether there is any justification for the Court's conclusions, despite the Court's failure to consider or articulate it").

90. *See supra* text accompanying notes 47, 54.

91. Justice Marshall, in dissent, acknowledges *Benton*'s incorporation of the Double Jeopardy Clause to apply to the states. *Heath*, 474 U.S. at 97.

92. Amar, *supra* note 8, at 11-16; Braun, *supra* note 8, at 42; Murchison, *supra* note 8, at 417-19.

distinguishes the dual sovereign rationale in the double jeopardy context from the contexts of the protections no longer limited by the dual sovereign doctrine?[93]

3. *Why Not Reform the Doctrine or Limit its Application?*

Critics and criminal defendants have suggested a wide array of alternatives to the current rigid dual sovereign approach.[94] Should the doctrine exist at all?[95] Should the doctrine be abandoned except in civil rights cases,[96] cases involving state actors,[97] or cases in which the first jury verdict was otherwise "flawed" or "tainted"?[98] Should successive prosecution be permissible only in cases where the prosecuting sovereign can demonstrate a substantial unvindicated interest?[99] Should courts force state and federal officials to prosecute a defendant in a single proceeding or otherwise coordinate their prosecutorial interests?[100] Should courts invoke a broader "sham prosecution" exception?[101] Are there any related

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93. *Another Exercise*, *supra* note 8, at 1544-49, posed this question in 1967, two years before *Benton*.

94. *See generally* NORMAN ABRAMS & SARAH SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 771-83 (2d ed. 1993) (surveying various unsuccessful attempts at reform made by criminal defendants and commentators).

95. *Bartkus*, 359 U.S. at 150 (Black, J., dissenting).

96. Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. REV. 649, 661 (1994) (arguing for an abandonment of the dual sovereign doctrine except in prosecutions for federal civil rights violations, noting that such prosecutions "play an essential role in the fulfillment of the federal government's responsibility to guarantee the constitutional rights of all citizens," and that "[t]his role could be frustrated if these prosecutions were barred where prior state court proceedings resulted in acquittals or insufficient sentences").

97. Amar, *supra* note 8, at 16-20 (calling for abandonment of the doctrine except when the federal government reprosecutes "tyrannical" state officials, thereby exercising authority vested by the enforcement provision, section 5, of the Fourteenth Amendment; recognizing that an "alleged constitutional offence committed by state officials will always uniquely implicate the federal government's authority").

98. *Id*. at 54, 57 (arguing for additional exceptions for prosecutions following acquittals by racially stacked or tainted juries).

99. *See, e.g.*, *Another Exercise*, *supra* note 8, at 1561 (proposing that "a satisfactory balance between considerations of federalism and the interests of the individual defendant" would be achieved with a "separate interest" test, whereby "If . . . the federal interest to be vindicated by prosecution were substantially different from the state interest involved in the initial trial, successive trials would be allowed").

100. *See* ABRAMS & BEALE, *supra* note 94, at 777 (discussing this approach); Taryn A. Merkl, Note, *The Federalization of Criminal Law and Double Jeopardy*, 31 COLUM. HUM. RTS. L. REV. 175, 203-07 (1999) (proposing joinder of state and federal claims in a single proceeding, as a partial solution to the dual sovereign debate).

101. *See* Braun, *supra* note 8, at 73 (suggesting that "The rule permitting successive prosecutions should be suspended when state and federal officials participating in the investigation or prosecution of criminal conduct have acted more like representatives of one government than of two").

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due process protections, such as collateral estoppel[102] or remedies against "vindictive" prosecutions[103] that should afford defendants protection that the doctrine otherwise denies? These questions demand a corollary inquiry—what implications might altering the doctrine have?

F. Angleton's Challenges

Angleton urges that the rise of cooperative federalism and *Benton's* incorporation of the Double Jeopardy Clause undermine the foundations of the dual sovereign doctrine.[104] Alternatively, Angleton argues that in light of the expansion of federal criminal law since *Bartkus* and *Abbate* and the Supreme Court's recent refinement of the scope of the Commerce Clause,[105] the murder-for-hire statute should be interpreted so as to require federal prosecutors to demonstrate a substantial federal interest before being allowed to proceed with the second trial.[106] Furthermore, Angleton argues that the dual sovereign doctrine is inapplicable in his case because: (1) the degree of intergovernmental cooperation evident in the federal prosecution triggers the *Bartkus* "sham prosecution" exception;[107] (2) incorporation of the Texas law into the federal statute bars federal prosecution after a failed prosecution of the derivative state offense;[108] and

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102. Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1742-45 (1996) (arguing a due process basis for reinvigoration of criminal collateral estoppel, and for application of the principle in certain dual sovereign contexts).

103. ABRAMS & BEALE, *supra* note 94, at 718-23, 777.

104. *Angleton*, 314 F.3d at 771.

105. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); United States v. Lopez, 514 U.S. 549 (1995) (invalidating, as beyond the scope of the Commerce Clause, the Gun-Free School Zones Act of 1990).

106. *Angleton*, 314 F.3d at 775-76. The Fifth Circuit saw this argument as tantamount to adoption of judicial enforcement of the Petite Policy and summarily rejected it. *Id*. Courts have invariably held that the Petite Policy does not confer defendants any judicially enforceable rights. *See, e.g.*, United States v. Jones, 808 F.2d 561 (7th Cir. 1986).

107. *Angleton*, 314 F.3d at 773. The Fifth Circuit relied on the facts of *Bartkus* to condone the degree of intergovernmental cooperation in Angleton's federal prosecution. *Id*. at 774.

108. *Id*. at 774. Angleton elaborated this argument in his petition for certiorari, "Where one sovereign is enforcing the second sovereign's laws by incorporating its criminal statute as the primary element of the indicted offense, it is not acting separately and the doctrine does not apply." United States v. Angleton, 314 F.3d 767 (5th Cir. 202), *petition for cert.* filed, 71 U.S.L.W. 3594 (U.S. Feb. 19, 2003) (No. 02-1233). The Fifth Circuit rejected Angleton's reliance on *Houston* for the proposition that "the attempt of the United States derivatively to enforce the state statute dictates the conclusion that the sovereigns do not have 'independent and separate interests.'" 314 F.3d at 775 (citing *Heath*'s rejection of any balance-of-interests test).

(3) collateral estoppel bars relitigation of the elements of the Texas statute.[109]

Angleton's arguments, and those of defendants in similar situations, have failed thus far.[110] Why should Angleton be subject to the second prosecution given the extent of intergovernmental cooperation and why should the specific incorporation of the Texas law in the federal statute not bind the federal government to the state adjudication?

IV. ANALYSIS: SEEKING JUSTIFICATION FOR THE DUAL SOVEREIGN DOCTRINE

A. A Closer Look at the Invocation of Federalism

Concurrent criminal jurisdiction in our federal system has forced courts to resolve an array of complex legal issues.[111] Justice McClean's quick and easy solution was that federal criminal law should preempt that of the states;[112] however, both Congress and the Court have been long unwilling to uproot an area of law traditionally reserved to the states.[113] When a defendant's alleged act transgresses both state and federal law, must one government forgo its ability to prosecute in favor of the other in order to protect the defendant's right to repose? The dual sovereign doctrine says *no*. This, perhaps, is why:

If a federal prosecution were to bar a state from enforcing that state's own criminal laws, the effect would be tantamount to that of preemption—an impermissible outcome.[114] Likewise, if a state prosecution were to bar the federal government from enforcing its own criminal laws, the effect would be analogous to the long dead doctrines of interposition and

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109. 314 F.3d at 776. The Fifth Circuit rejected Angleton's collateral estoppel claim on two grounds. *Id*. First, collateral estoppel only applies to issues decided by a prior final judgment between the *same parties* and because Texas and the United States are not interchangeable in this regard, collateral estoppel is inapplicable. *Id*. Second, the principle of collateral estoppel is embodied in the Double Jeopardy Clause and because a successive prosecution is allowed under the dual sovereign doctrine, a lesser collateral estoppel bar is inapplicable. *Id*. (citing Ashe v. Swinson, 397 U.S. 436 (1970)).

110. 314 F.3d at 776; *see also* United States v. Basile, 109 F.3d 1304 (8th Cir. 1997) (allowing a federal murder-for-fire prosecution that followed a state acquittal for the underlying murder), *cert. denied* 522 U.S. 873 (1997).

111. *See generally* ABRAMS & BEALE, *supra* note 94, at Part VI (devoting an entire chapter to the consequences of jurisdictional overlap).

112. *See supra* notes 41, 44, 63 and accompanying text.

113. *See supra* note 3.

114. *See Bartkus*, 359 U.S. at 137 ("the result [of barring a state prosecution] would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines"); *see also supra* note 55 and accompanying text.

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nullification—again impermissible outcomes.[115] In either scenario, sovereign interests are frustrated in a way inconsistent with the division of power in our federal system.[116]

But what, really, is at stake when "sovereign" interests are frustrated? Or in other words, what does sovereignty mean in our constitutional scheme? The dictionary defines *sovereignty* as the "supreme political authority of an independent state."[117] Under the American constitutional model, the supreme authority of separate sovereigns is not "inherent"—it is not vested in our governments by any higher being, although this was the premise of power in earlier times.[118] Rather, in our compartmentalized representative system, sovereign power is vested in and derived from the *People*, and is exercised by public servants acting as agents of whichever subset of the *People* they represent.[119] Entertaining the notion that the *People*, by dividing their sovereign power through state and federal constitutions, and in their perpetual role in overseeing exercises of that power, are acting as citizens in two capacities, the stakes of the preemption/nullification dilemma become acutely meaningful.[120] *All legislative choices made within the realm of concurrent criminal jurisdiction, and the interests underlying those choices, are at stake in the dual sovereign debate, whether those choices are made at the state or*

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115. *See supra* notes 41, 48, 55, 58, 79 and accompanying text; Amar, *supra* note 8, at 17 (acknowledging that were the doctrine abandoned, "[a] state in effect would be able to veto a federal prosecution"); Akhil Reed Amar, *Reconstructing Double Jeopardy*: *Some Thoughts on the Rodney King Case*, 26 CUMB. L. REV. 1, 9 (1995) (abandonment would allow states to "partially nullify federal criminal law"); *see generally* William H. Pryor, *Madison's Double Security: In Defense of Federalism, the Separation of Powers and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1172 (2002) ("The constitutional ideas of John Calhoun and George Wallace cannot provide a theoretical framework for a workable federalism for the twenty-first century."). It is not difficult to imagine John Calhoun or George Wallace finding a way to exploit the constitutional weakness that the dual sovereign doctrine seeks to avoid.

116. See Justice Marshall's rationale for the doctrine quoted *supra* note 79.

117. BLACK'S LAW DICTIONARY 1402 (7th ed. 1999).

118. *See* Amar, *Of Sovereignty and Federalism*, *supra* note 88, at 1429-66 (discussing the historical evolution of the understanding of sovereignty as it relates to our federal system of government).

119. *Id*. at 1437, 1449-50 (quoting THE FEDERALIST NO. 46 (James Madison), "The federal and State governments are in fact but different agents and trustees of the people, instituted with different powers, and designed for different purposes . . . . [T]he ultimate authority, wherever the derivative may be found, resides in the people alone. . . .").

120. Amar argues that the federal Constitution derives its power from the sovereignty of "one united People" rather than "thirteen distinct Peoples." *Id*. at 1450. That debate is beyond the scope of this Note. This Note's premise is far simpler: the *People*, by participating in the political processes at both the state and national level, are acting as citizens in two capacities. Our system of dual citizenship would seem explicitly reaffirmed in the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

national level.[121] The dual sovereign doctrine preserves the *People's* power of self-governance, whether exercised through state or national citizenship, to the full extent delegated to state and national governments in their respective constitutions, thus protecting the *People's* supreme political authority in this area of jurisdictional overlap.[122]

Some argue that, as a practical matter, local and national interests are sufficiently aligned in areas of criminal law, and thus there is little reason to fear that abandonment of the dual sovereign doctrine would frustrate the sovereign power of either electorate.[123] History refutes this argument, though, as the paradigmatic dual sovereign case is a federal civil rights prosecution following a state acquittal or slap on the wrist (e.g. Rodney King or Lemuel Penn).[124] However, the doctrine's justification transcends the need to safeguard federal civil rights prosecutions.[125] As *Lanza* noted, sovereign interests would be frustrated if state and federal laws were to carry disparate penalties, and yet adjudication of one government's law would bar enforcement of the other's law.[126] Implicit, perhaps, in *Lanza's* "race to the courthouse" rationale is recognition of disagreement between states and the national government as to whether, or to what extent, certain activity should be criminalized (and/or prosecuted).[127] Whenever community norms, as manifested by sectarian will, are at variance with national majoritarian will in a particular subject matter, and that subject matter finds its way into the criminal laws at both levels of government, the supreme political authority of a subset of the *People* is pitted against the supreme political authority of all of the *People*.[128] Examples of such subject matters (past, present, and perhaps future) include: slavery,[129] fugitive slave laws,[130] prohibition,[131] civil rights,[132] pornography,[133] sex

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121. "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *Lanza*, 260 U.S. at 382.

122. *See supra* notes 46, 79 and accompanying text.

123. *See supra* notes 44, 62, 85 and accompanying text.

124. *See infra* note 132; *see also* Hoffman, *supra* note 96, at 661 (recognizing that "Federal civil rights prosecutions play an essential role in the fulfillment of the federal government's responsibility to guarantee the constitutional rights of all citizens. This role could be frustrated if these prosecutions were barred where prior state court proceedings resulted in acquittals or insufficient sentences").

125. *See supra* note 7.

126. *See supra* text accompanying note 48.

127. *See supra* notes 55, 79.

128. In the extreme instance, a local law will explicitly permit that which is prohibited nationally. *See generally* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002) (assessing the desirability of these independent community norms, and the recent controversies regarding same-sex marriages, medical marijuana, and the terminally ill's right to die).

129. U.S. CONST. amend. XIII (resolving the most famous inter-sovereign dispute).

130. *Another Exercise* found it noteworthy that:

Moore v. Illinois, which provided the clearest formulation of the doctrine, concerned the

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crimes,[134] prostitution,[135] abortion,[136] environmental protection,[137] drug enforcement,[138] physician assisted suicide,[139] gun control,[140] white-collar crime,[141] anti-trust,[142] the death penalty,[143] and cloning.[144] Without the dual sovereign doctrine, courts might find themselves in the middle of any number of potentially volatile political debates.[145]

> validity of state fugitive slave legislation, one of the most politically explosive issues of the era. Given this setting, it is understandable that the Court relied on an approach which emphasized that the federal and state governments were distinct and independent entities and gave only slight consideration to the interests of the defendant.

Note, *supra* note 8, at 1542 (citing Moore v. Illinois, 55 U.S. at 20).

131. Addressed by U.S. CONST. amend. XVIII, XXI; *see* Murchison, *supra* note 8 (discussing the legacy of the Eighteenth Amendment in the dual sovereign debate).

132. *See, e.g.*, Koon v. United States, 34 F.3d 1416 (9th Cir. 1994) (federal prosecution of the officers involved in the Rodney King beating); Myers v. United States, 377 F.2d 412 (5th Cir. 1967) (affirming the federal civil rights convictions of the killers of Lemuel Penn, an African-American United States Army Reserve officer shot in Georgia in 1964; the defendants had previously been acquitted of murder in state court).

133. *See, e.g.*, United States v. Boone, No. 98-50217, 1999 9th Cir. WESTLAW 417886 (9th Cir. June 21, 1999) (affirming a federal conviction for production of child pornography that followed state indictment for similar conduct; noting that the defendant's "allegations of collusion even if true, would not support a claim under the *Bartkus* exception").

134. *See, e.g.*, People v. Esch, 786 P.2d 462 (Colo. Ct. App. 1989) (affirming state conviction for sexual exploitation of a child that followed federal conviction for sexual exploitation of a minor involving use of the mails).

135. *See* 18 U.S.C. §§ 1952, 2421-24 (2000) (federal criminal provisions relating to prostitution).

136. *See* United States v. Vazquez, 145 F.3d 74 (2d Cir. 1998) (allowing a joint state/federal prosecution of an anti-abortion protester under the Freedom of Access to Clinic Entrances Act).

137. *See, e.g.*, United States v. Louisville Edible Oil Products, Inc., 926 F.2d 584, 587 (6th Cir. 1991) (holding that "the Jefferson County Air Pollution Board and the United States, through the Environmental Protection Agency, may each pursue claims against Louisville Edible for the same conduct without subjecting the defendant to double jeopardy").

138. *See, e.g.*, United States v. Deitz, 991 F.2d 443 (8th Cir. 1993) (affirming a federal drug conviction of a defendant, that came after state prosecutors dismissed, with prejudice, state charges alleging the same drug trafficking conduct).

139. *See* Klein, *supra* note 3, at 1586-88 (discussing Attorney General Ashcroft's hostility towards Oregon's Death With Dignity Act, and the role of federal criminal law in the dispute).

140. *See, e.g.*, United States v. Collamore, 751 F. Supp. 1012 (D. Me. 1990) (denying motion to dismiss federal conviction under the Armed Career Criminal Act for possession of a firearm by a felon, which followed state conviction based on the same incident).

141. *See, e.g.*, United States v. Trammell, 133 F.3d 1343, (10th Cir. 1998) (federal conviction of an insurance agent for mail fraud, wire fraud, and money laundering not barred by prior state acquittal).

142. *See* KURLAND, *supra* note 9, at 18-20 (discussing the Department of Justice's policy for pursuing Sherman Act cases that follow state conviction or acquittal).

143. The availability of the death penalty can be the deciding factor in resolving jurisdictional disputes. *See supra* note 2. The death penalty may have been the impetus for the Alabama prosecution in *Heath*. *See supra* text accompanying note 76.

144. *See* John Charles Kunich, *The Naked Clone*, 91 KY. L.J. 1 (2002-2003) (discussing various government reactions to cloning, which include criminal prohibitions of experimentation).

145. Klein, *supra* note 12, at Part III (noting the overlap between independent norm and substantive due process controversies).

Furthermore, criminalization of certain conduct, and the vigor with which it is prosecuted, varies depending on the sovereign interest compelling its criminalization.[146] For example, while the federal government may intend to safeguard the federal treasury by making it a crime to rob any federally-insured bank, states criminalize bank robbery for a broader deterrent effect.[147] The dual sovereign doctrine saves courts from having to determine whether state and federal *interests* sufficiently overlap in a particular area so as to warrant a double jeopardy bar.[148]

Because of the politically variegated sovereign interests at play within the realm of concurrent criminal jurisdiction, and because a choice between either contravening powers undeniably reserved to the states or contravening the Supremacy Clause is not a choice reconcilable with the vertical division of powers in our federal system, the Court has refused to trump one government's prosecution for the sole reason that it comes after another government's.[149] In essence, a *judicially-mandated* intergovernmental double jeopardy bar is not possible in our federal system, and the dual sovereign doctrine is an incident of that impossibility.[150] Critics dissatisfied with the unelaborated invocation of sovereignty in dual sovereign precedent[151] may feel more comfortable with the Court's rationale if phrased, as this Note attempts, as preservation of the co-supremacy of the *People's* political authority in the overlap of state and national law enforcement.

Yet whatever benefit one derives from the above analysis, the doctrine is still difficult to accept when viewed from the perspective of the criminal defendant.[152] The Court has rationalized the potential harshness of the rule as the price of dual citizenship.[153] Nevertheless, the Court has noted that a defendant's right to repose should not be without protection, but that such protection must be dictated by non-judicial means.[154] Consistent with the doctrine's protection of political choice, the Court has repeatedly stated that Congress and state legislatures must address whether, and to what extent, they wish their respective governments to be bound by prior

146. *See* Justice Marshall's dual sovereign rationale, quoted *supra* note 7.
147. *Bartkus*, 359 U.S. 121 (1959).
148. *Heath*, 474 U.S. at 92.
149. *See supra* note 79.
150. *See supra* note 55.
151. *See supra* note 84.
152. *See supra* text accompanying note 10.
153. *See supra* notes 37, 40, 43, 79 and accompanying text.
154. *See supra* notes 47, 57 and accompanying text.

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prosecutions.[155] Furthermore, the Court has suggested that common sense exercise of prosecutorial discretion will limit application of the doctrine to rare circumstances.[156] These and other important protections, which mitigate the harshness of the doctrine, will be discussed below.[157]

B. Justifying the Doctrine's Survival of Incorporation

The dual sovereign doctrine has survived incorporation of the Double Jeopardy Clause because incorporation does not resolve the preemption/nullification dilemma facing the Judiciary if it is forced to referee, on a case by case basis, prosecutions within the overlap of criminal jurisdiction peculiar to our federal system of government.[158] The doctrine's institutional justifications, discussed above, are as animate now as they were prior to incorporation.[159]

Along these lines, it is not difficult to reconcile the continuing vitality of the doctrine in the double jeopardy context with its abandonment in the context of searches and seizures and self-incrimination.[160] It is but little encroachment on sovereign power to forbid use of evidence illegally seized by federal authorities in state trials and vice versa.[161] Likewise, the federal government can still enforce its own criminal laws even if unable to compel witnesses to incriminate themselves under state law and vice versa.[162] Sovereign power was not unduly sacrificed with the abandonment of the doctrine in those two contexts; in contrast, the ability to even initiate prosecution is at stake in the double jeopardy context.[163] Consequently, if federalism concerns are the continuing lifeblood of the doctrine, then incorporation is no catalyst for its abandonment in the double jeopardy context.[164]

Furthermore, when one government illegally seizes evidence to be used in the courts of another, or when one government compels testimony

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155. *Id*.

156. *See supra* note 40.

157. *See infra* Part IV.F.

158. *See supra* note 79.

159. Initial reliance on *Barron* (*see supra* text accompanying note 47, 54) may have been merely an alternative ground for the dual sovereign rationale.

160. *See Heath*, 474 U.S. at 102 n.3 (Marshall, J., dissenting) (noting that *Elkins* and *Murphy* "do not necessarily undermine the basis of the rule allowing successive state and federal prosecutions").

161. *Id*. ("It is one thing to bar a sovereign from using certain evidence and quite another to bar it from prosecuting altogether.").

162. *Id*.

163. *See Another Exercise*, *supra* note 8, at 1547-49 (discussing distinctions between *Elkins*, *Murphy*, and the successive prosecution debate).

164. *See supra* Part IV.A.

incriminating a witness under the laws of another (offering the witness up on a "silver platter"), suspicion of collusion is strong.[165] In these contexts, it may be correct to presume that the two governments are conspiring to do in tandem what neither could do alone, thus tipping the analysis in favor of protection of the criminal defendant.[166] However, this presumption of collusion and privity cannot be extended to the double jeopardy context because a government has a facially-legitimate interest in enforcing its own laws, irrespective of the actions of another government.[167]

C. Intergovernmental Cooperation and the "Sham Exception"

While a presumption of collusion is improper, *Bartkus* suggested in dictum that a successive prosecution might be barred in cases where the prosecuting state government "was merely a tool" of the federal government where the state prosecution was a "sham and a cover" for a second federal prosecution or vice versa.[168] However, distinguishing cooperation from collusion is difficult.[169] Although many courts have entertained a notion that the "sham exception" might exist, courts have not invoked it, setting an insurmountable bar for defendants to overcome.[170]

Practical considerations might support the conclusion that if the exception exists at all, its evidentiary burden must be nearly prohibitive. Intergovernmental cooperation is to be encouraged in law enforcement.[171]

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165. *See Another Exercise*, *supra* note 8, at 1548 ("[I]n both *Elkins* and *Murphy* the prosecuting jurisdiction was attempting to use the efforts of the other jurisdiction for its own purposes, whereas in the case of successive prosecutions the two governments, in accordance with the basic assumption of the dual sovereignties doctrine, may be acting independently of each other."); Michael Stokes Paulsen, *Double Jeopardy Law after Akhil Amar: Some Civil Procedure Analogies and Inquiries*, 26 CUMB. L. REV. 23, 29-30 (1995) (When "Government One generates evidence it is constitutionally barred from using and makes that evidence available to Government Two, which does not labor under such a constitutional disability," they are acting in privity, whereas this is not necessarily the case in the successive prosecution context.).

166. *See supra* notes 69, 70.

167. *Angleton*, 314 F.3d at 773 ("The dual sovereignty doctrine . . . exists independently of any interaction between sovereigns; either may prosecute independently to vindicate its own interests.").

168. *See supra* notes 59, 60 and accompanying text.

169. *See* United States v. Figueroa-Soto, 938 F.2d 1015, 1019 (9th Cir. 1991) ("[I]t is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government.").

170. *See Angleton*, 221 F. Supp. 2d at 715 (collecting unsuccessful "sham exception" challenges). *But see* United States v. G.P.S. Automotive Corp., 66 F.3d 483 (2d Cir. 1995) (remanding for further fact-finding to determine if the *Bartkus* exception should apply); United States v. Bernhardt, 831 F.2d 181 (9th Cir. 1987) (remanding for further fact-finding); United States v. Belcher, 762 F. Supp. 666 (W.D. Va. 1991) (dismissing federal indictment as a "sham or cover" for a failed state prosecution, where the state and federal prosecutors were the *same person*).

171. *See supra* note 60.

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Systemic deterrence or chilling of such cooperation would have grave public-safety ramifications.[172] Active judicial scrutiny of intergovernmental cooperation in a "sham prosecution" inquiry would no doubt make law enforcement officials wary of their communications with other jurisdictions.[173] The ease with which information, leads, resources, and evidence are shared would necessarily suffer.[174]

Furthermore, were the "sham prosecution" exception broadened and its viability as a defense increased, courts would find themselves regularly litigating details of law enforcement investigations before proceeding to the merits of the charges.[175] Because double jeopardy claims must be resolved before trial,[176] defendants are typically entitled to interlocutory appeals if their claims are non-frivolous.[177] Increased legal uncertainty in this area would result in an explosion of dilatory appeals,[178] and cast doubt on numerous standing convictions.[179] The above concerns may justify the defendant's burden to overcome a strong presumption that the prosecuting government is not a "merely a tool" of another government seeking to bypass the double jeopardy bar.[180]

D. Impracticality of Judicial Reform of the Doctrine

Any alteration of the dual sovereign doctrine would come at the expense of settled law and would necessarily create a host of problems,

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172. *See supra* note 1.

173. *See* United States v. Jordan, 870 F.2d 1310, 1313 (7th Cir. 1989) (refusing to entertain a sham exception noting that "cooperation between state and federal authorities is a welcome innovation" (citation omitted)).

174. Barriers to information flow conflict with the goals of resource sharing and coordination among law enforcement agencies. *See supra* notes 1, 81.

175. The facts of the intergovernmental cooperation in Angleton's case came from testimony of federal agents during pre-trial hearings. *Angleton*, 221 F. Supp.2d at 699 n.2.

176. Abney v. United States, 431 U.S. 651, 660 (1977) (holding that pre-trial denials of double jeopardy claims must be subject to immediate appeal, reasoning that double jeopardy's protection against the strain and expense of more than one criminal trial would be "significantly undermined if appellate review . . . were postponed until after conviction and sentence").

177. *See, e.g.*, United States v. Salerno, 868 F.2d 524, 539 (2d Cir. 1989) (collecting circuit court decisions adopting the standard whereby only non-frivolous double jeopardy claims will stay proceedings pending interlocutory appeal).

178. *Abney*, 431 U.S. at 662 n.8 (recognizing that the availability of an interlocutory appeal "may encourage some defendants to engage in dilatory" tactics).

179. Arguably, a change in the scope of double jeopardy protection in the dual sovereign context might open the door for retroactive invalidation of some dual sovereign convictions via federal habeas corpus proceedings. Teague v. Lane, 489 U.S. 288, 311 (1989) (suggesting the possibility of retroactive vindication of "*bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction" (citation omitted)).

180. *See supra* note 170.

making judicial reform difficult.[181] The Supreme Court's temporary, messy, and short-lived experimentation in other areas of double jeopardy jurisprudence justify judicial conservatism in this area.[182]

An unvindicated-interest test would prove unmanageable[183] and implicates separation-of-powers concerns.[184] If Congress legislates within its enumerated grants, it is traditionally the role of the Executive, not the Judiciary, to determine whether the federal interest at stake warrants enforcement of the statute.[185]

Requiring, as some critics would, state and federal officials to coordinate and consolidate their prosecutions in a single proceeding would likewise invite impermissible judicial supervision of the executive branch at both the state and national levels and would also create numerous complex procedural questions.[186]

Invoking any amorphous due process limitation, such as vindictive prosecution, which bars some successive prosecutions without entirely abandoning the doctrine, would be an end run around the Court's case law interpreting the Double Jeopardy Clause, which should alone be controlling of issues of successive prosecutions.[187] Likewise, collateral estoppel is foreclosed.[188] If a government can reprosecute without violating double

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181. *See supra* notes 9, 56, 77.

182. *See* Grady v. Corbin, 495 U.S. 508 (1990) (supplanting the Blockburger "same elements" test, used to determine whether two charged offenses implicate double jeopardy concerns, with a "same conduct" test), *overruled by* United States v. Dixon, 509 U.S. 688, 709-12 (1993) (recognizing the "same conduct" test to be unworkable, and returning to the "same elements" test); *see also* United States v. Halper, 490 U.S. 435 (1989) (holding that civil sanctions with "punitive" effect can implicate double jeopardy concerns), *abrogated by* Hudson v. United States, 522 U.S. 93, 98 (1997) (concerned with "the wide variety of novel double jeopardy claims spawned in the wake of *Halper*").

183. *See supra* note 77.

184. *See* Justice Frankfurter's admonition, quoted *supra* note 55.

185. The Court's Commerce Clause jurisprudence is dispositive on the issue of whether Congress can legislate to protect federal interests. *See* United States v. Lopez, 514 U.S. 549 (1995). It would be anomalous to superimpose a second test to determine whether there exist specific federal interests warranting enforcement of that legislation. *Angleton*, 314 F.3d at 775-76.

186. Amar, *supra* note 8, at 48 ("[A] hybrid system would require a major overhaul of traditional divisions between state and federal systems—and would raise knotty threshold questions of when different sovereigns' different laws were nevertheless close enough to require a single hybrid trial.").

187. *See* United States v. Ng, 699 F.2d 63 (2d Cir. 1983) ("[T]he fact that the prosecutions of the defendants are by two different sovereigns, each acting independently under its own laws and in its own interest without any control of or by the other, renders inapplicable the concept of prosecutorial vindictiveness."), *quoted in* ABRAMS & BEALE, *supra* note 94, at 723.

It is difficult to conceive, theoretically, how Government Two's successive prosecution can be a vindictive prosecution made on behalf of Government One, yet not fall within the *Bartkus* exception (if such an exception exists).

188. *See* Ashe v. Swenson, 397 U.S. 436 (1970) (holding that the principle of collateral estoppel is embodied in the Double Jeopardy Clause).

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jeopardy, it would be anomalous to deny the lesser power of relitigating the particular issues necessary to prove the offense.[189]

While judicial reform may be foreclosed, Part F discusses other avenues to mitigate the potential harshness of a system that allows successive prosecutions by separate governments.

E. Angleton's Derivative Enforcement, and Sham Prosecution Arguments

Angleton's argument that incorporation of Texas law as an element of the federal murder-for-hire statute amounts to an attempt by Congress to derivatively enforce the Texas law, thus dictating the conclusion that there is no independent federal interest justifying a successive federal prosecution, is flawed for several reasons.[190] While Congress is free to use incorporating language in drafting criminal statutes,[191] it is unlikely that in so doing it intends to effect derivative enforcement of state laws, nor is it likely that in so doing it intends to empower state courts to adjudicate the federal crime.[192] Such a drastic consequence should not hinge on the particular language Congress uses in drafting its criminal statutes when Congress can just as easily adopt by reference the provisions of some model code, or copy without reference the exact provisions of a state's code, as it can use the general incorporating language of the murder-for-hire statute.[193]

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189. United States v. Tirrell, 120 F.3d 670, 676-77 (7th Cir. 1997), *quoted in Angleton*, 314 F.3d at 776. Furthermore, because collateral estoppel requires that the prosecuting entity be the same party in both proceedings, it is inapplicable in the dual sovereign context. *See supra* note 109.

190. Both the district court and the Fifth Circuit rejected this argument. *See supra* note 105.

191. *Angleton*, 314 F.3d at 775.

192. As interpreted by *Bartkus*, *Houston* finds a bar when "the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government *empowered* to try that question." 359 U.S. at 130 (emphasis added); *see supra* note 37. Existing federal legislation binding the federal government to state adjudication of a federal crime does so explicitly:

> A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

18 U.S.C. § 659 (2000).

193. *See* United States v. Frumento, 563 F.2d 1083, 1099 (3d Cir. 1977) (refusing to find an exception to the dual sovereign doctrine that would bar a federal RICO prosecution even though "the defendants [had] previously been indicted, tried, and acquitted of the precise *state* crime assimilated into the federal crime by definition").

Angleton's sham prosecution claim is foreclosed by factual precedent where courts have refused, in spite of extensive intergovernmental interaction, to find one government to be acting as a tool of the other.[194]

F. Safeguards of the Status Quo

As mentioned at the outset, analysis of the dual sovereign debate involves reconciling a longstanding civil liberty with the division of power in our federal system in a context where the two are in tension.[195] Having discussed how the doctrine seeks to avoid frustration of the vertical division of powers of our constitutional scheme (the nullification/preemption dilemma),[196] it is necessary to accurately assess the countervailing concern for the rights of criminal defendants. Relevant in this assessment are factors that mitigate the harshness of the doctrine—factors that safeguard criminal defendants, as a practical matter, from successive prosecutions and duplicative punishment.

In response to the *Bartkus* decision, the Justice Department instituted the Petite Policy to deal with the issue of successive prosecutions.[197] While the policy does not create any judicially-enforceable rights,[198] it does place meaningful limits on the federal government's prosecutorial discretion, thereby assuaging fears of arbitrary successive prosecutions.[199] Furthermore, the executive branch's political accountability may serve as an additional check on arbitrary abuse of the power preserved by the dual sovereign doctrine.[200]

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194. *Angleton*, 221 F. Supp.2d at 713-22 (giving extensive discussion of the facts in federal cases where defendants have alleged a sham).

195. Justice Marshall framed the debate in this way in his *Heath* dissent, quoted *supra* note 79.

196. *See supra* Part IV.A.

197. *See supra* Part III.D.

198. *See, e.g.*, United States v. Frederick, 583 F.2d 273 (6th Cir. 1978) (holding that the Petite Policy does not confer rights to defendants), *cert. denied*, 444 U.S. 860 (1979).

199. See Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996), for discussion on how the Petite Policy serves as an effective check on successive prosecutions, thus alleviating some federalization concerns:

> Statistics on dual prosecutions reflect the selectivity that the Petite Policy has produced. Dual prosecutions are quite rare. The Justice Department's 94 U.S. Attorney's Offices and litigating divisions together typically bring fewer than 150 dual prosecutions each year. This represents a tiny fraction of the total number of state prosecutions that, because of overlapping federal and state jurisdiction, could be reprosecuted in the federal system, and a small fraction of the approximately 65,000 annual federal prosecutions.

Id. at 77 (citation omitted).

200. *See* KURLAND, *supra* note 9, at 26 n.50 (speculating as to the political effect of the Rodney King reprosecution: "As a political decision in the electoral sense of the term, the decision to prosecute the officers in the King case did not help President George Bush, who was defeated for reelection in

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Responding to the Court's explicit decision to leave the issue of successive prosecutions to legislative branches,[201] a majority of states have enacted statutes that either prohibit or limit their ability to prosecute a defendant already charged by another government for the same criminal act.[202] Again, these limitations are imposed by the legislative, rather than the judicial branch.[203]

A 1975 proposal for federal legislation dealing with successive prosecutions in the federal system failed because it was thought that the Petite Policy adequately dealt with the problem.[204] In 1994, an ABA task force studied the status of dual sovereign prosecutions.[205] Ultimately, the task force recommended that the Justice Department should annually publicize data on Petite prosecutions, but refused to pursue federal legislation that would strip the department of the power to bring successive prosecutions.[206]

Additionally, federal sentencing guidelines may protect a defendant from duplicative punishment even if convicted at both the state and federal level.[207] It is a general policy of the federal sentencing guidelines that

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1992 and lost California by a significant margin").

201. *See supra* notes 47, 57 and accompanying text.

202. *See* KURLAND, *supra* note 9, at Part II (giving a complete survey of the state approaches).

The Model Penal Code approach would substantially limit the power to bring successive prosecutions:

> § 1.10. Former Prosecution in Another Jurisdiction: When a Bar.
>
> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:
>
> (1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on the same conduct, unless
>
> (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or
>
> (b) the second offense was not consummated when the former trial began; or
>
> (2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

MODEL PENAL CODE § 1.10 (2002).

203. Such reforms do not upset the vertical and horizontal divisions of our institutions. *See supra* note 55.

204. ABRAMS & BEALE, *supra* note 94, at 772.

205. ABA, Criminal Justice Section, *Final Report of Ad Hoc Task Force on Double Jeopardy* (1994), *reprinted in* KURLAND, *supra* note 9, app. C, at 369.

206. *See* KURLAND, *supra* note 9, at 372 (concluding that the Petite Policy is generally sound).

207. *Id.* at ch. 2 (discussing how the federal sentencing guidelines might deal with dual sovereign

sentences for redundant counts or counts overlapping with prior undischarged sentences should run concurrently rather than consecutively.[208] In other words, sentencing guidelines can safeguard defendants from being twice *punished* for the same offense.[209] Under the current guidelines, judges are allowed, though not required, to have federal counts run concurrently with prior state sentences arising out of the same criminal conduct.[210] Although the guidelines do not specifically address the issue of federal sentences imposed after state acquittals, the Supreme Court has held that federal judges may consider prior acquittals for purposes of downward departures in federal sentencing.[211] The sentencing guidelines could be amended to further strengthen this safeguard.

In his *Bartkus* dissent, Justice Black noted that the doctrine had previously only been applied in rare instances explainable by anomalous circumstances.[212] Justice Black attributed this rarity to the inherent injustice of the doctrine.[213] However, in an age of burgeoning federal criminal law, that the doctrine is rarely applied,[214] and only in compelling circumstances, suggests that the "benignant spirit" of our federal system serves as a tangible check, just as the Court originally forecasted.[215]

In sum, the potential for abuse of the dual sovereign doctrine is checked by: (1) the Petite Policy; (2) the political accountability of the executive branch; (3) state legislation; (4) federal sentencing guidelines that can prevent duplicative punishment or mitigate the unfairness of a successive prosecution; and (5) continuing vigilance of state and national electorates who can consent at any time through legislation, generally or

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convictions).

208. U.S. SENTENCING GUIDELINES MANUAL § 5G1.3 (Nov. 2001).

209. *See generally* Jacqueline E. Ross, *Damned Under Many Headings: the Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245 (2002) (analyzing how the federal guidelines deal with multiple punishment in the federal system).

210. U.S. SENTENCING GUIDELINES MANUAL § 5G1.3, cmt. n.3 (in achieving "reasonable" punishment, courts should be cognizant of the fact that a "prior undischarged sentence may have been imposed in state court rather than federal court").

211. Koon v. United States, 518 U.S. 81, 112 (1996) (holding that the district court did not abuse its discretion in considering, for purposes of downward departure, prior state acquittal; nonetheless noting that "consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal system in some instances").

212. 359 U.S. 121, 162.

213. *Id*.

214. *See supra* note 199.

215. *See supra* note 40 and accompanying text.

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particularly tailored, to the adjudications of other jurisdictions. Safeguarding the criminal defendants' right to repose through any of the above means does not implicate the dual sovereign doctrine's federalism concerns as phrased earlier in this Note.[216]

G. Delicate Balance Achieved or the Lesser of Two Evils?

The obvious rebuttal to the argument that our current criminal justice system adequately safeguards defendants from successive prosecution, thus mitigating the harshness of the dual sovereign doctrine, is that successive prosecutions *do* occur.[217] Whatever safeguards exist, they did not help Angleton, and the extreme facts of his case strain the doctrine's federalism rationale to the limit.[218] However, systemic justifications for a rule, in the context of a difficult case of its application, are never as satisfying as they might otherwise be.[219] The Court's choice to recognize and strictly adhere to the dual sovereign doctrine in the double jeopardy context was a difficult one, traversing the multifarious intersection of state, federal, and individual sovereignty. Whether the Court's choice can be deemed an achievement of a delicate balance or an acceptance of the lesser of two evils, it is a choice not as unsubstantiated as most critics have suggested.[220]

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216. *See supra* Part IV.A.

217. *See supra* note 199.

218. In cases such as Angleton's, the federal interest is articulated as follows:

> While contract killing, standing alone, may not be a federal crime, it may become such when its perpetration involves the use of the mail or facilities in interstate commerce. The independence and importance of the federal interest in protecting the channels of interstate commerce from the taint of crime is unaffected by . . . previous acquittal[s] in state court; it remains just as important and worthy of vindication after the state trial as it was before. "[T]he federal government had an interest, independent of any state interest, to ensure that an individual who is believed to have violated a federal statute is prosecuted for that violation."

United States v. Basile, 109 F.3d 1304, 1307 (8th Cir. 1997).

219. "The Court's express rationale for the dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases." *Heath*, 474 U.S. at 92.

For the record, this Note disagrees with *Heath's* extension of the dual sovereign doctrine to successive state prosecutions. The original rationale for the doctrine, as this Note phrases it, and as Justice Marshall did in his *Heath* dissent, is accommodation of state/national power in the unavoidable jurisdictional overlap, not acquiescence to inherent notions of sovereignty. *See supra* note 79 and Part IV.A. Concurrent criminal jurisdiction betweens states is neither necessary under our federal scheme, nor is it desirable. *Heath*, 474 U.S. at 100-01.

220. *See supra* note 8.

V. PROPOSAL: ACCEPTING THE DUAL SOVEREIGN DOCTRINE

A. Accepting the Dual Sovereign Doctrine

Behind the dual sovereign debate is a conflict between two ancient legal principles: sovereignty and double jeopardy. Stripping sovereignty of its sacred inherency[221] and double jeopardy of its natural law gloss,[222] this Note has sought to explore the legitimacy of the Court's invocation of federalism in refusing to find a constitutional bar to successive prosecutions. As stated at the outset, any satisfactory resolution of the dual sovereign debate must reconcile the protection of a basic civil liberty and the due respect for the sovereign powers of separate governments in our federal system.[223] By phrasing the Court's protection of sovereign power as recognition of the co-supremacy of the *People's* political authority within the jurisdictional overlap of state-and-national law enforcement, this Note has attempted to substantiate the Court's federalism rationale.[224] In assessing the countervailing concern for the plight of criminal defendants within the jurisdictional overlap, this Note has explored ways in which our current system mitigates the potential harshness of the doctrine and safeguards against arbitrary abuse of the power to bring successive prosecutions.[225] Balancing the above considerations and finding justification for the continuing vitality of the doctrine, this Note suggests cautious acceptance of the status quo.

B. Supreme Political Authority and Dual Citizenship

In explicit effect, the dual sovereign doctrine provides that one government must consent to be bound to the adjudicative finality of another government's proceedings in an area where the two have concurrent criminal jurisdiction and that such consent should not be interpreted from the Double Jeopardy Clause as incorporated by the Fourteenth Amendment.[226] Many states have thus consented through acts of their legislatures.[227] That the Federal government has not likewise

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221. *See supra* note 118 and accompanying text.
222. *See supra* note 71 and text accompanying note 64.
223. *See supra* text accompanying note 12.
224. *See supra* Part IV.A.
225. *See supra* Part IV.F.
226. *See supra* Part II.B.
227. *See supra* note 202 and accompanying text.

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consented may not be surprising given the general interest at stake in national legislation[228] and the desire for uniform enforcement.[229]

The dual sovereign doctrine serves as a meaningful reminder that we live in a federal system of government.[230] In this regard, the doctrine may effectuate a cleaner division of exercised power within our federal system through political processes in that citizens, wary of the potential of successive prosecutions, might withdraw certain crimes from the federal political arena, thus limiting the scope of concurrent criminal jurisdiction.[231] Likewise, waves of public opinion, like those seen after Rodney King, might alter standards of prosecutorial discretion or compel Congress or the President to bar successive prosecutions at the federal level.[232] Then again, citizens wishing to ensure adequate protection from certain types of crime and also wishing to ensure potent intergovernmental cooperation might acquiesce to criminalization at both levels of government. Either scenario illustrates the incident of dual citizenship whereby duplicative protections and "commensurate obligations" can be created or limited.[233]

C. Non-judicial Reform and Vigilance in the Age of Cooperative Federalism

Judicial hostility toward Congress's expansion of federal criminal law under the Commerce Clause should not spill into the dual sovereign

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228. *See supra* note 205.

229. Is it reasonable to expect that Texas and Connecticut would equally vindicate national gun control policy if the national government were relegated to vicarious reliance on state prosecutions and penalties? Just as the national government cannot force its regulatory regime on the states, Printz v. United States, 521 U.S. 898 (1997) (invalidating federal law imposing an interim obligation on state law enforcement officials to perform background checks on hand-gun purchasers), the national government should not be forced to accept the product of the varying state policies.

230. Similarly, we are reminded of our dual sovereignty when our state constitutional provisions confer more rights than identical federal provisions. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding that a criminal statute proscribing consensual homosexual sodomy violates rights guaranteed under Kentucky's constitution, even though such rights were not protected by similar provisions of the federal Constitution; noting that "under our system of dual sovereignty, it is our responsibility to interpret and apply our state constitution independently").

231. *See* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 310 (1997) (arguing that the proper balance of state and national power in the area of law enforcement should be dictated by the "interests of electoral majorities, [and] are better left to the trial and error of the political process").

232. *See supra* note 200 and accompanying text; *see also* Timothy Lynch, *Dereliction Of Duty: The Constitutional Record Of President Clinton*, 27 CAP. U. L. REV. 783, 808-11 (1999) (criticizing President Clinton for failing to issue an executive order curtailing successive federal prosecutions during his terms).

233. *See* Justice Marshall's dual sovereign rationale, quoted *supra* note 79.

debate.[234] The dual sovereign doctrine preserves state power as much as federal power—the larger the jurisdictional overlap, the greater the stakes.[235] It would invite inappropriate and untenable judicial inquiry to decide case-by-case whether a sovereign's interests are sufficiently unvindicated so as to warrant a second prosecution.[236] That a government has criminalized behavior within the sphere of its constitutional power should be sufficient to demonstrate a justiciable interest in prosecuting violations of its own laws.[237] Whether or not this interest need be vindicated is a determination correctly left to the limited discretion of the executive branch of each government, which in turn is responsive to its citizens.[238]

While judicial reform may be untenable, the issue of dual sovereign prosecutions warrants continuing vigilance.[239] On the one hand, increases in intergovernmental cooperation in law enforcement may safeguard against successive prosecutions through coordination of prosecutorial interests and efficient use of resources in a single proceeding.[240] However, increased cooperation also raises the risk of coordinated efforts to get two bites at the same apple.[241] Consequently, the public should carefully scrutinize the use/abuse of the power to bring successive prosecutions and check that power as needed.[242] Additionally, strengthening the alternative protections discussed above would further safeguard against any injustice worked by the doctrine.[243]

VI. CONCLUSION

The dual sovereign doctrine exists to avoid a constitutional quagmire. Avoidance of the nullification/preemption dilemma comes at the expense of the "spirit" of double jeopardy protection. Critics correctly note the

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234. *See supra* notes 105, 106, 185 and accompanying text.
235. *See supra* Part IV.A.
236. *See supra* Part IV.D.
237. *See supra* notes 184-85 and accompanying text.
238. *See supra* note 231.
239. Justice Marshall, in his *Heath* dissent, cautiously accepted the Court's adherence to the dual sovereign doctrine in the context of state and federal prosecutions: "Mindful of the admonitions of Justice Black, we should recognize this exegesis of the [Double Jeopardy] Clause as, at best, a useful fiction and, at worst, a dangerous one." 474 U.S. at 98; *see also* KURLAND, *supra* note 9, at xxvi n.6 (emphasizing the constant need to scrutinize and reexamine double jeopardy law; noting the likely increase in successive prosecutions of criminal aliens in the September 11th aftermath).
240. See the purpose of the Petite Policy, *supra* note 81.
241. *See* Amar, *supra* note 8, at 33.
242. *See supra* Part V.B.
243. *See supra* Part IV.F.

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potential for abuse of the power to bring successive prosecutions in our age of cooperative federalism. However, the continuing vitality of the doctrine's rationale, the lack of manageable judicial alternatives, and the existence of safeguards limiting the doctrine's application to acceptable circumstances while mitigating its harshness counsel against any drastic deviation from the status quo.

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