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THE SECOND RODNEY KING TRIAL: JUSTICE IN JEOPARDY?

INTRODUCTION

"Shall we allow federal government, our greatest contribution to political science, to undermine the rights of the individual, and thus destroy its very *raison d'être*? Shall we fritter away our liberties upon a metaphysical subtlety, two sovereignties?"¹

When a Simi Valley, California, jury acquitted four Los Angeles police officers of criminal charges in the beating of Rodney King, reaction was swift and violent.² The verdict led to the nation's deadliest rioting in a quarter of a century³ and created a sense of outrage in millions of Americans who had viewed the famous videotape in which police officers struck King fifty-six times.⁴ A presidential election was just six months away, and the federal Administration sprung into action within hours of the acquittals.⁵ An intense federal investigation led to indictments of the four police officers on federal charges,⁶ followed by a trial in federal district court and conviction of two of the officers.⁷

¹ J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1331 (1932).

² See generally Tom Mathews, *The Siege of L.A.*, NEWSWEEK, May 11, 1992, at 30 (detailed reporting on the Los Angeles riots).

³ See *id.*

⁴ According to a Newsweek Magazine / Gallup poll conducted between one and two days after the acquittals, 73 percent of white Americans and 92 percent of African-Americans believed the verdicts were wrong. *Id.*

⁵ Henry Weinstein & Ronald J. Ostrow, *Justice Dept. Resumes Its Review of King Beating*, L.A. TIMES, May 1, 1992, at B1. A federal investigation into the incident, placed on hold pending the state proceedings, resumed the day after the jury verdict. *Id.* "It's important for people to remember that the verdicts on state charges are not the end of the process," said United States Attorney General William P. Barr. *Id.*

⁶ *Four Indicted by Federal Government for Civil Rights Law Violations In King Case*, U.S. Newswire, Aug. 5, 1992, available in LEXIS, Nexis Library, News File. Officers Laurence M. Powell, Timothy E. Wind and Theodore J. Briseno were charged with violations of 18 U.S.C. § 2 and § 242 by depriving King of his civil rights by the intentional use of unreasonable force while making an arrest under color of law. *Id.* Sergeant Stacey C. Koon was charged with violation of 18 U.S.C. § 242 by willfully permitting officers under his supervision to deprive King of his right to be kept free from harm while in official custody. *Id.* For the full text of the grand jury charges, see *id.*

⁷ Jim Newton, *2 Officers Guilty, 2 Acquitted; Guarded Calm Follows Verdicts in King Case*, L.A. TIMES, Apr. 18, 1993, at A1.

Observers praised the federal jury for what appeared to be a Solomon-like decision.⁸ However, even those who supported the convictions confessed concern about the potential double jeopardy implications of the second trial.⁹ The Justice Department defended its prosecution as an application of the dual sovereignty doctrine, created by the Supreme Court in 1922¹⁰ and reaffirmed several times in subsequent decades.¹¹ Under the doctrine, because the state of California and the United States are considered separate sovereigns, each can prosecute the same defendant.¹²

The police officers in the King case actually faced different charges in state and federal courts, even though the charges arose from the same incident.¹³ The state charged each officer with two types of assault.¹⁴ The United States charged each officer with civil rights violations.¹⁵ In relying on the dual sovereignty doctrine, the

⁸ This commentary by influential African-American columnist William Raspberry indicates what many Americans were expecting from the federal jury and, at the same time, calls into question the legal integrity of the verdict:

The verdicts were close to perfect: legally sound and civically wise; reasonable, calming and healing. I don't know if the jurors had all these things in mind when they convicted two Los Angeles policemen for violating the civil rights of Rodney King and acquitted two others. *Surely they must have given some thought to the fact that last year's acquittal of these same officers of state charges of police brutality had triggered deadly rioting. How could they not have wondered whether, in a close case, their duty involved justice as well as peace?*

William Raspberry, *L.A. Verdicts Should Satisfy Most Americans*, ATL. J. & CONST., Apr. 21, 1993, at A16 (emphasis added).

⁹ Raspberry confessed in the same column that he found it "troubling" that he could not "get past the sense that trying people again for offenses of which they've already been acquitted—even if you give the offense a new name—amounts to double jeopardy." *Id.*

Others were more critical. *See, e.g.,* Bruce J. Terris, *Corruption of Justice in L.A.*, LEGAL TIMES, Apr. 26, 1993, at 22. "There is nothing more basic to the American system of justice than these two propositions: that the jury makes the final decision on the guilt of defendants and that the prosecution gets only one opportunity to convince a jury that a defendant is guilty." *Id.*

Not surprisingly, Administration officials expressed no qualms about the propriety of a second trial. *See* Sam Fulwood III, *Clinton Praises Judgment of Jury, Urges Healing, Harmony Across U.S.*, L.A. TIMES, Apr. 18, 1993, at A21.

¹⁰ *United States v. Lanza*, 260 U.S. 377 (1922).

¹¹ *See* *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). Attorney General Janet Reno deflected questions about double jeopardy by citing the dual sovereignty doctrine. Paul Craig Roberts, *Justice Takes a Double Jeopardy Hit*, WASH. TIMES, May 3, 1993, at E3.

¹² *See* *Bartkus*, 359 U.S. at 131-32.

¹³ *See infra* notes 14-15.

¹⁴ Howard Mintz, *Can the Feds Rescue the King Case?*, RECORDER, June 9, 1992, at 1, available in LEXIS, Nexis Library, Lglnew File.

¹⁵ *See supra* note 6.

United States did not attempt to justify its prosecution on a theory that the two sets of charges constituted different offenses.¹⁶ Such a theory, if valid, would have rendered inapplicable the Double Jeopardy Clause, which prohibits second trials only for the “same offense.”¹⁷ Whether the state and federal charges did in fact constitute different offenses justifying a second trial is beyond the scope of this Comment, which focuses on the dual sovereignty rationale.¹⁸

The dual sovereignty doctrine, a “stunningly counterintuitive” concept,¹⁹ has encountered strong and sustained attack from the legal community, ranging from dissenting justices²⁰ to respected academics.²¹ Nonetheless, the doctrine has withstood criticism and, after being called into question by the Warren Court,²² has gathered strength in recent years.²³

This Comment will trace the roots of the Double Jeopardy Clause of the U.S. Constitution and provide a detailed look at the development of the dual sovereignty doctrine. After this overview, it will analyze the historical, legal and policy arguments advanced by supporters and opponents of the doctrine. It will examine proposals for altering or abolishing the doctrine. Finally, in light of the underlying analysis, it will revisit the Rodney King case and examine whether the defendants’ second trial — or any successive prosecution — is justified.

¹⁶ See *supra* note 11.

¹⁷ U.S. CONST. amend. V.

¹⁸ For articulation of the “same offense” test which is generally used today, see *Blockburger v. United States*, 284 U.S. 299 (1932). The *Blockburger* test is explained concisely in Note, *Double Jeopardy and Federal Prosecution after State Jury Acquittal*, 80 MICH. L. REV. 1073, 1091-92 (1982).

¹⁹ Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia v. San Antonio Metropolitan Transit Authority*, 22 NEW ENG. L. REV. 31, 31 (1987).

²⁰ See *Bartkus v. Illinois*, 359 U.S. 121, 150 (Black, J., dissenting) (doctrine is “contrary to the spirit of our free country”). Justice Black was joined by Chief Justice Warren and Justice Douglas. *Id.*

²¹ See, e.g., Grant, *supra* note 1, at 1318-19 (doctrine lacks roots in common law); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 77 (1992) (doctrine is “a fiction that now utterly fails to resemble reality”); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 425 (1986) (doctrine “has remained after the reasons that originally prompted it have long since disappeared”). These and other criticisms are articulated in detail *infra* notes 98-128.

²² See Murchison, *supra* note 21, at 417.

²³ *Heath v. Alabama*, 474 U.S. 82 (1985) (doctrine applies when neighboring states each try a defendant for the same murder); *United States v. Wheeler*, 435 U.S. 313 (1978) (doctrine applies for successive prosecutions by a Native American tribe and the federal government).

DOUBLE JEOPARDY AND THE DUAL SOVEREIGNTY DOCTRINE

Foundation of the Double Jeopardy Clause

The Fifth Amendment of the U.S. Constitution provides that "no person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."²⁴ In providing such protection for the accused, the authors of the amendment continued a legal tradition that appears to predate the common law.²⁵ The principle "has been declared by many jurists to be a part of the universal law of reason, justice and conscience."²⁶ Ancient Romans believed that even God followed such a rule.²⁷ After brief discussion on the actual wording,²⁸ the clause was adopted by the First Congress of the United States with little debate.²⁹

The Double Jeopardy Clause is rooted in the belief that protecting individual liberty requires some restriction of the government's vast prosecutorial power:

The underlying idea [behind double jeopardy protection] . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.³⁰

²⁴ U.S. CONST. amend. V.

The Supreme Court has written that the Double Jeopardy Clause consists of three separate constitutional protections. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). "It protects against a second prosecution for the same offense after an acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.*

²⁵ Francine Ward, *The Double Jeopardy Clause of the Fifth Amendment*, 26 AM. CRIM. L. REV. 1477, 1477 (1989).

²⁶ JAY A. SIGLER, DOUBLE JEOPARDY at 1 (1969). See also MARTIN L. FRIEDLAND, DOUBLE JEOPARDY at 3 (1969). "No other procedural doctrine is more fundamental or all-pervasive." *Id.*

For an excellent overview of the history of double jeopardy protection, see Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 283-309 (1963).

²⁷ Ward, *supra* note 25, at 1477. Canon law prohibited a "double affliction" and taught that God did not make one suffer twice for the same offense. *Id.*

²⁸ SIGLER, *supra* note 26, at 28-32.

²⁹ *Id.* at 32.

³⁰ *Green v. United States*, 355 U.S. 184, 187-88 (1957).

Commentators provide varying interpretations of the clause's underlying values. Professor Peter Westen of the University of Michigan believes the clause is a "tritych" of three independent values: the integrity of jury verdicts, the lawful administration of prescribed sentences and the defendant's interest in finality. Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1002 (1980).

The Dual Sovereignty Doctrine

For more than a century, the Supreme Court did not adjudicate a case involving successive prosecutions in which a defendant claimed a violation of the Double Jeopardy Clause. However, it addressed the possibility of such an occurrence in dicta in several nineteenth-century cases, including two in 1820.³¹ In *United States v. Furlong*,³² the Court upheld piracy convictions but added that if the defendants had been acquitted in another country with jurisdiction, the United States would have respected the verdict.³³ In *Houston v. Moore*,³⁴ the Court harshly criticized the potential repercussions of successive prosecutions: "To subject the people to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is . . . something very much like oppression, if not worse."³⁵

Later in the nineteenth century, the Supreme Court disagreed with such dicta. In *Fox v. Ohio*,³⁶ the defendant argued that the state lacked jurisdiction to convict her under a state statute banning the uttering of forged coins.³⁷ She argued that because the Constitution gave Congress power to coin money and regulate its value, only the federal government could punish alleged wrongdoers.³⁸ Otherwise she could be subjected to double jeopardy by prosecution under both state and federal law, she said.³⁹ The Court rejected the double jeopardy argument and held that both the state

Another analysis identified five functions of the clause: "1) protecting the defendant's finality interest; 2) preventing the state from 'wearing down' an innocent defendant; 3) protecting the integrity of jury acquittals; 4) preventing judges from imposing punishments not authorized by the legislature; and 5) preventing excessive prosecutorial discretion." Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 805 (1988).

The Supreme Court acknowledges the jury's power to nullify the law by acquitting in the face of overwhelming evidence against a defendant. See *Standefer v. United States*, 447 U.S. 10, 22 (1980) (criminal juries can "acquit out of compassion or compromise"). The dual sovereignty doctrine fails to protect this nullification power. See Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 287 (1992).

³¹ *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

³² 18 U.S. (5 Wheat.) at 184.

³³ *Id.* at 197. "[T]here can be no doubt that the plea of *autrefois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Id.* The court based this conclusion on its reasoning that robbery on the seas is an offense within the criminal jurisdiction of all nations. *Id.* Murder, on the other hand, has no such international jurisdiction, so a plea of *autrefois acquit* in another country would not necessarily be respected if the first court lacked jurisdiction. See *id.*

³⁴ 18 U.S. (5 Wheat.) at 1.

³⁵ *Id.* at 23. After affirming a state military tribunal's conviction of the defendant, the Court added its belief, long since rejected, that federal legislation in a subject area precludes states from acting in that area. *Id.* at 22. It based its belief in the dangers of double jeopardy that would arise from dual application of laws. *Id.* at 23.

³⁶ 46 U.S. (5 How.) 410 (1847).

³⁷ *Id.* at 411.

³⁸ *Id.* at 424.

³⁹ *Id.* at 431.

and federal governments could regulate the activity.⁴⁰ However, the Court downplayed the possibility that a person actually would be subjected to dual prosecutions.⁴¹

*Moore v. Illinois*⁴² involved state and federal laws prohibiting harboring of runaway slaves.⁴³ The defendant challenged the state law, pointing out that concurrent laws could subject him to dual prosecutions.⁴⁴ The Court found no problem with that possibility, rejecting the argument that the Double Jeopardy Clause would be violated.⁴⁵ Because each citizen “owe[s] allegiance to two sovereigns, . . . by one act he [can commit] two offences, for each of which he is justly punishable.”⁴⁶ By construing a single act as two offenses, the Court avoided any conflict with the “same offense” language of the Double Jeopardy Clause.⁴⁷

In a later case, *Nielsen v. Oregon*,⁴⁸ the Court reached a different conclusion when considering whether two states, rather than a state and the federal government, could prosecute a defendant for the same conduct.⁴⁹ “[T]he first one acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one State cannot

⁴⁰ *Id.* at 434.

⁴¹ *Id.* at 435. The Court expressed its view that dual prosecutions would be unlikely:

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.

Id.

The decision provoked a strong dissent from Justice McLean: “[T]o punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. . . . [T]wo punishments for the same act . . . would be a mockery of justice and a reproach to civilization.” *Id.* at 439, 440.

⁴² 55 U.S. (14 How.) 13 (1852).

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 19.

⁴⁵ *Id.*

⁴⁶ *Id.* at 20 (emphasis added).

⁴⁷ U.S. CONST. amend. V. Justice McLean, consistent with his position in *Fox v. Ohio*, 46 U.S. (5 How.) 410, 439 (1847), dissented: “It is contrary to the nature and genius of our government, to punish an individual twice for the same offence. . . . It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people” *Moore*, 55 U.S. (14 How.) at 21-22.

⁴⁸ 212 U.S. 315 (1909).

⁴⁹ *Id.* at 320. The defendant, a Washington resident, was convicted in Oregon of maintaining and operating a purse net on the Washington side of the Columbia River. *Id.* at 316. By act of Congress, the river was under the jurisdiction of both Oregon and Washington. *Id.* Using a purse net was legal under Washington law but illegal under Oregon law. *See id.* at 321. The Court reversed the Oregon conviction, holding that Oregon, by virtue of its concurrent jurisdiction on the river, could not “override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specifically authorized him to do[.]” *Id.*

be prosecuted for the same offense in the courts of the other," wrote the Court, again in dicta.⁵⁰

After more than a century of dicta, the Supreme Court finally met the issue head-on in *United States v. Lanza*.⁵¹ Because previous opinions had expressed both support and opposition for successive prosecutions, the Court's options were open. However, the Court decided forcefully in favor of successive prosecutions and in so doing created the dual sovereignty doctrine.⁵² "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory," wrote Chief Justice Taft for the majority.⁵³ "It follows that an 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."⁵⁴

In the generation after *Lanza*, federal courts rarely revisited the dual sovereignty issue.⁵⁵ In 1959, however, the Supreme Court issued a pair of decisions that reaffirmed the doctrine in strong terms.⁵⁶ *Bartkus v. Illinois*⁵⁷ involved a defendant who was convicted of bank robbery in state court after acquittal on federal bank robbery charges.⁵⁸ The Court focused on *Lanza* and the nineteenth-century dicta

⁵⁰ *Id.* at 320.

⁵¹ 260 U.S. 377 (1922). The defendant had been convicted in state court of manufacturing liquor in violation of a prohibition statute. *Id.* at 379. When charged on the federal level with essentially the same offense, he argued that the Double Jeopardy Clause barred another prosecution. *See id.* at 382.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The Court appeared to ignore the legislative history of the Eighteenth Amendment in making this decision. *See* Murchison, *supra* note 21, at 389-90. The Eighteenth Amendment gave federal and state governments concurrent enforcement power. U.S. CONST. amend. XVIII, § 2 (repealed 1933). House Judiciary Committee Chairman Webb, author of the "concurrent power" language, said he believed that the language meant "the Federal Government cannot do it if the State government does it, and vice versa. . . . [T]he first getting jurisdiction would enforce it." 56 CONG. REC. 424 (1917). Even the leaders of the dry lobbies agreed that the amendment would not allow successive prosecutions. Grant, *supra* note 1, at 1311.

The Court took its strong constitutional stand despite the fact that the issue of successive prosecutions had neither been briefed nor argued by the parties. Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1541 (1967) [hereinafter *Double Prosecution*].

⁵⁵ With the exception of *Hebert v. Louisiana*, 272 U.S. 312 (1926), a prohibition case in which a state's power to prosecute following a federal trial was recognized, the Supreme Court did not address dual sovereignty again throughout the prohibition era. Murchison, *supra* note 21, at 395.

⁵⁶ *See infra* notes 57-65 and accompanying text.

⁵⁷ 359 U.S. 121 (1959).

⁵⁸ *Id.* at 121-22.

cases in favor of the dual sovereignty doctrine.⁵⁹ Justice Frankfurter wrote that a “long, unbroken, unquestioned course of impressive adjudication” compelled the conclusion that the second trial was constitutional.⁶⁰ *Abbate v. United States*⁶¹ involved a defendant who had pleaded guilty to state charges of conspiracy to destroy communications equipment.⁶² The federal government then convicted the defendant of conspiracy to destroy systems involved in interstate commerce.⁶³ The Court again cited the dicta in the century-old *Moore* case as the underlying support for the dual sovereignty doctrine.⁶⁴ The doctrine prevailed over the strong dissent of Justice Black, joined by Chief Justice Warren and Justice Douglas, who believed that successive prosecutions are “contrary to the spirit of our free country.”⁶⁵

⁵⁹ *Id.* at 128-32.

⁶⁰ *Id.* at 136. For a critique of Frankfurter’s reasoning, see Braun, *supra* note 21, at 14. “The course of adjudication was not ‘long,’ ‘unbroken,’ or ‘unquestioned’; frankly, it was not that ‘impressive.’” *Id.*

Justice Frankfurter rejected arguments that common law precedents compelled the second court to respect the judgment of the first. *Bartkus*, 359 U.S. at 128 n.9. He deemed comparisons with the common law irrelevant because of “confused and inadequate” reporting on key precedent and the “power of discretion vested in English judges not relevant to the constitutional law of our federalism.” *Id.* For a rebuke of Frankfurter’s dismissal of centuries of common law on successive prosecutions, see Braun, *supra* note 21, at 22 n.122.

⁶¹ 359 U.S. 187 (1959).

⁶² *Id.* at 188.

⁶³ *Id.* at 188-89.

⁶⁴ *Id.* at 191-92.

⁶⁵ *Bartkus v. Illinois*, 359 U.S. 121, 150 (1959). Justice Brennan also dissented in *Bartkus* but did not reject the dual sovereignty doctrine. *See id.* at 164-70. His dissent was based in his belief that the federal government’s extensive role in the state trial made the trial a de facto second federal prosecution. *Id.* at 165-66.

Within a week of the *Bartkus* and *Abbate* decisions, the Justice Department announced an internal policy, followed to this day, which restricts the conditions under which the federal government will prosecute following a state trial. Ophelia S. Camina, *Selective Preemption: A Preferential Solution to the Bartkus-Abbate Rule in Successive Federal-State Prosecutions*, 57 NOTRE DAME LAW. 340, 347 (1981). The policy has been incorporated into the United States Attorneys’ Manual and reads today:

The Department of Justice’s Policy on dual prosecution and successive federal prosecution precludes the initiation or continuation of a federal prosecution following a state prosecution or a prior federal prosecution based on substantially the same act, acts or transaction unless there is compelling federal interest supporting the dual or successive federal prosecution. The policy is intended to regulate prosecutorial discretion in order to promote efficient utilization of the Department’s resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts. . . .

[T]he policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to initiating or continuing the federal prosecution. . .

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-2.142 (1988).

The policy is known as the Petite Policy because its existence was first acknowledged by the Supreme Court in *Petite v. United States*, 361 U.S. 529 (1960). Its purpose is to protect the individual from needless multiple prosecutions. *Rinaldi v. United States*, 434 U.S. 22, 31 (1977). However, it gives no substantive rights to defendants, and prosecutions conducted in violation of the policy are not subject to dismissal as a result. *United States v. Mitchell*, 778 F.2d 1271, 1277 (7th Cir. 1985); Jean F. Rydstrom, Annotation, *Effect on Federal Criminal Prosecution or Conviction of Prosecutor’s Noncompliance with Petite Policy Requiring Prior Authorization of Attorney General for Federal Trial Where Accused Has Been Previously Prosecuted for Same Acts in State Court*, 51 A.L.R. FED. 852, 854 (1981).

The Warren Court expanded criminal rights significantly in areas involving the relationship between state and federal governments.⁶⁶ This expansion prompted speculation that successive prosecutions would be abolished or modified.⁶⁷ However, the Court failed to reject the dual sovereignty doctrine.⁶⁸ Less sympathetic to criminal defendants, the Burger Court rejuvenated the doctrine and extended it to two new contexts.⁶⁹ *United States v. Wheeler*⁷⁰ held that successive prosecutions by a Native American tribe and the federal government did not violate the Double Jeopardy Clause.⁷¹ *Heath v. Alabama*⁷² applied the doctrine to successive trials by different states, holding that one state could prosecute a defendant for murder — and sentence him to death — even after he had pleaded guilty to the same murder in another state and was serving a life sentence.⁷³

⁶⁶ In *Elkins v. United States*, 364 U.S. 206 (1960), the Court, recognizing the blurred lines between state and federal criminal investigation, abolished the “silver platter doctrine,” which had allowed evidence illegally seized by state officials to be used in federal prosecutions. *Id.* at 208. The doctrine “engender[s] practical difficulties in an era of expanding federal criminal jurisdiction.” *Id.* at 210. “To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.” *Id.* at 215.

In *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52 (1964), the Court held that a witness granted immunity from prosecution under state law could not be compelled to give testimony that might incriminate him in a federal investigation. *Id.* at 79. The Court noted that the nation was in an “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.

These cases, allowing a defendant in one jurisdiction to assert rights based on actions of officials in another jurisdiction, “seriously erode the doctrinal basis of *Bartkus* and *Abbate*.” *Double Prosecution*, *supra* note 54, at 1546.

⁶⁷ *Double Prosecution*, *supra* note 54, at 1565. Justice Harlan in a later case described the *Murphy* decision as having “abolished the two sovereignties’ rule.” *Stevens v. Marks*, 383 U.S. 234, 250 (1966) (Harlan, J., concurring in part and dissenting in part).

⁶⁸ The Warren Court’s motivation for maintaining the rule might have been concern that a bar on successive prosecutions could conflict with the Court’s emphasis on civil rights protection for African-Americans. Murchison, *supra* note 21, at 433-34.

⁶⁹ See *infra* notes 70-73 and accompanying text.

⁷⁰ 435 U.S. 313 (1978).

⁷¹ *Id.* at 329-30. The Court held that Native American tribes have “inherent powers of a limited sovereignty.” *Id.* at 322. Therefore, the tribe in its prosecution was not acting as an arm of the federal government. *Id.* at 328.

⁷² 474 U.S. 82 (1985).

⁷³ *Id.* at 88. The defendant, an Alabama resident, hired two men to kidnap and murder his wife. *Id.* at 83. The body was found in Georgia. *Id.* at 84. After he confessed and pleaded guilty in Georgia, he was prosecuted in Alabama. *Id.* at 84-85.

The Court distinguished the case from conflicting dicta in *Nielsen v. Oregon*, 212 U.S. 315 (1909): “We find that *Nielsen* is limited to its unusual facts and has continuing relevance, if at all, only to questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority.” *Heath*, 474 U.S. at 91.

For a criticism of the Court’s decision to extend the dual sovereignty doctrine to successive prosecutions by different states, see Martin D. Caprow, Comment, *Heath v. Alabama: Double Jeopardy in Jeopardy: Dual Sovereignty or Due Process*, 9 CRIM. JUST. J. 147 (1986). “Abhorrent is Heath’s crime of murder, yet decencies of fairness and of a civilized state find a tacit repeal of double jeopardy standards even more so.” *Id.* at 161.

The Court has recognized situations in which the dual sovereignty doctrine does not apply. Both a state and a subdivision of the state cannot prosecute an accused for the same offense.⁷⁴ There is no dual sovereignty in such circumstances because both jurisdictions derive their power from the same sovereign — the state.⁷⁵ The Court also has implicitly recognized an exception to the doctrine when the second prosecution is merely a tool for the sovereignty in the first trial to make another effort to convict the defendant.⁷⁶ Many federal courts acknowledge this exception in theory.⁷⁷ Apparently no defendant, however, has won reversal of a conviction on these grounds.⁷⁸

The Supreme Court has ruled that the Double Jeopardy Clause of the Constitution applies fully to state governments as well as the federal government, rendering it irrelevant from a federal constitutional standpoint whether the state or federal government is conducting the second prosecution.⁷⁹ Nearly half the states statutorily prohibit or restrict state prosecution after federal action, rendering it much more likely that the second prosecution will be conducted by the federal government.⁸⁰

⁷⁴ *Waller v. Florida*, 397 U.S. 387, 394-95 (1970).

⁷⁵ *See id.* at 392. This principle would preclude the federal government and the District of Columbia from conducting successive prosecutions for the same offense. *United States v. Knight*, 509 F.2d 354, 361 (D.C. Cir. 1974) (dicta).

⁷⁶ *See Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959). Such a situation presumably would arise if, for example, the federal government lost a trial and provided the impetus, including investigatory resources and personnel, for a second trial in state court. *See Braun, supra* note 21, at 60-64. The majority in *Bartkus* did not believe the federal government overreached into the state's case. *Bartkus*, 359 U.S. at 123-24. However, Justice Brennan dissented because he felt the state prosecution was a de facto second federal trial. *Bartkus*, 359 U.S. at 165-66 (Brennan, J., dissenting).

⁷⁷ *See, e.g., United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976).

⁷⁸ *Braun, supra* note 21, at 60.

The existence of the "sham" exception is called into question by *United States v. Bernhardt*, 831 F.2d 181 (9th Cir. 1987). After charges were dismissed in state court, the state's deputy attorney general contacted federal prosecutors, who had no knowledge of the case. *See id.* at 181. The U.S. Attorney agreed to prosecute the case only on the condition that the state attorney, continuing to be paid by the state, would be the lead attorney for the federal case. *Id.* at 181-82. The district court, invoking the "sham" exception, dismissed the subsequent conviction. *Id.* at 182. However, the appeals court, although admitting the "troubling" nature of state involvement, reinstated the conviction, holding that the circumstances did not fit into the "narrow exception to the 'dual sovereignty doctrine.'" *Id.* at 183.

One commentator said *Bernhardt* showed "the impotence of the existing exception." *Braun, supra* note 21, at 63. "[H]ad the exception meant anything at all, it would have protected the defendants from a second trial." *Id.* ⁷⁹ *Benton v. Maryland*, 395 U.S. 784 (1969). Prior to this case, the Double Jeopardy Clause would not apply if the state government was the sovereignty conducting the second prosecution. *See Bartkus*, 359 U.S. at 124.

⁸⁰ *See* ALA. CODE § 15-3-8 (1982); ALASKA STAT. § 12.20.010 (1962); ARK. CODE ANN. § 5-1-114 (Michie 1987); CAL. PENAL CODE § 656 (West 1988); COLO. REV. STAT. ANN. § 18-1-303 (West 1990); DEL. CODE ANN. tit. 11, § 209 (1987); GA. CODE ANN. § 16-1-8 (1992); HAW. REV. STAT. § 701-112 (1985); IDAHO CODE § 19-315 (1987); ILL. ANN. STAT. ch. 720, para. 5/3-4 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-4-5 (West 1986); KAN. STAT. ANN. § 21-3108(3) (1981); KY. REV. STAT. ANN. § 505.050 (Baldwin 1984); MINN. STAT. ANN. § 609.045 (West 1987); MISS. CODE ANN. § 99-11-27 (1972); MONT. CODE ANN. § 46-11-504 (1991); N.Y. CRIM. PROC. LAW § 40.20(2) (McKinney 1992); N.D. CENT. CODE § 29-03-13 (1991); OKLA. STAT. ANN. tit. 22, § 130 (West 1992); 18 PA. CONS. STAT. ANN. § 111 (1983); UTAH CODE ANN. § 76-1-404 (1990); VA. CODE ANN. § 19.2-294 (Michie 1990); WASH. REV. CODE ANN. § 10.43.040 (West 1990); WIS. STAT. ANN. § 939.71 (West 1982).

ANALYSIS OF THE DUAL SOVEREIGNTY DOCTRINE

Support for the Doctrine

Justice Grier in 1852 articulated the rationale for the dual sovereignty doctrine in oft-quoted language:⁸¹

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 to the laws of both. . . . 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.⁸²

Under this theory, an act which violates the laws of both governments is not a single offense, but two.⁸³ By its terms, the Double Jeopardy Clause is applicable only when a person faces two prosecutions for the *same offense*.⁸⁴ Therefore, it is not implicated when *two offenses* are involved.⁸⁵

Proponents support the dual sovereignty doctrine with public policy arguments related to the authority of the state and federal governments. Justice Frankfurter said a rule barring state prosecutions after a federal trial would be a "shocking and untoward deprivation of the historic right and obligation of the States to maintain

Statutes vary in scope and effect. Braun, *supra* note 21, at 5 n.15. For example, Minnesota prohibits a second prosecution only for crimes having "identical elements of law and fact." MINN. STAT. ANN. § 609.045 (West 1987). Wisconsin bars a subsequent prosecution "unless each [statutory] provision requires proof of a fact for conviction which the other does not require." WIS. STAT. ANN. § 939.71 (West 1982). California, on the other hand, prohibits a subsequent trial whenever it would involve the same "act or omission" as the first trial. CAL. PENAL CODE § 656 (West 1988).

Some states without legislative measures prohibiting successive prosecutions are apt to limit such prosecutions as a matter of policy, given the general ambivalence toward prosecuting a defendant twice. Caprow, *supra* note 73, at 156.

⁸¹ Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852) (dicta). This passage is quoted at length in Heath v. Alabama, 474 U.S. 82, 88 (1985); Abbate v. United States, 359 U.S. 187, 192 (1959); and Bartkus, 359 U.S. at 131-32.

⁸² Moore, 55 U.S. (14 How.) at 19-20.

⁸³ See *id.*

⁸⁴ U.S. CONST. amend. V.

⁸⁵ Moore, 55 U.S. (14 How.) at 20.

peace and order within their confines.”⁸⁶ Similarly, Justice Brennan wrote in *Abbate v. United States*, a rule barring federal prosecutions after a state trial would “necessarily . . . hinder” federal law enforcement efforts.⁸⁷ The dual sovereignty doctrine, therefore, protects the interests of each distinct sovereign — interests that are not always protected by the other sovereign.⁸⁸

Supporters of the doctrine also argue that a rule barring successive prosecutions could lead to an unseemly “race to the courthouse.”⁸⁹ Fearing that their counterparts in the other sovereignty could preclude them from taking action, prosecutors would seek indictments hastily.⁹⁰ Ill-supported indictments could stigmatize innocent defendants who would benefit from a full investigation before charges are levied.⁹¹ Such haste also could lead to procedural defects that might exonerate guilty defendants on technicalities.⁹²

⁸⁶ *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). Justice Frankfurter cited *Screws v. United States*, 325 U.S. 91 (1945), in which defendants, southern law enforcement officers, arrested a young black man and beat him to death with a solid-bar blackjack. *Id.* at 92. They were convicted in federal court of depriving the victim of his constitutional rights without due process of law. *Id.* at 94. However, the maximum sentence under the federal statutes at the time was two years. *Id.* at 139 (Roberts, J., dissenting). Justice Frankfurter wrote in *Bartkus* that the state’s interest was not vindicated by a maximum two-year federal sentence when a state trial could result in the death penalty. *See Bartkus*, 359 U.S. at 137.

⁸⁷ *Abbate v. United States*, 359 U.S. 186, 195 (1959). Justice Brennan pointed out that in *Abbate*, the defendants pleaded guilty to state charges and were sentenced to three months in prison. *Id.* at 188. Because the federal statute carried a potential five-year sentence, the comparatively lenient state sentence did not vindicate the federal government’s interest. *See id.* at 195.

⁸⁸ *See Note, supra* note 18, at 1077. The federal government has a special concern that federal civil rights interests will not be protected by the states. *Id.* at 1077 n.20.

An example of the federal government vindicating its civil rights interest is *United States v. Bledsoe*, 728 F.2d 1094 (5th Cir. 1984), *cert. denied*, 469 U.S. 838 (1984). The defendant had been acquitted in state court of murdering an African-American man in a city park. *Id.* at 1096. He then was charged under a federal statute prohibiting interference with a person’s use of a state facility because of his race. *Id.* He was convicted and sentenced to life in prison. *Id.*

See also United States v. Patterson, 809 F.2d 244 (5th Cir. 1987), where facts are similar to the King defendants’ case. A police officer directing traffic at the scene of an accident became involved in a dispute with a driver and shot him. *Id.* at 245. A state court acquitted the officer of attempted murder after the defendant claimed the driver had attempted to run him down. *Id.* A federal jury convicted the officer of willfully depriving the victim of liberty without due process of law. *Id.* at 246. The appeals court refused to address the defendant’s double jeopardy argument “because this court is without authority to disregard applicable Supreme Court precedent.” *Id.* at 247 (citing *Abbate* and *Lanza*).

The importance of the dual sovereignty doctrine to state interests is articulated in *Double Prosecution, supra* note 54, at 1557 (without doctrine, state would lose opportunity to vindicate its interest whenever federal authorities insist on prosecuting the accused).

⁸⁹ *See Lee, supra* note 19, at 52-53.

⁹⁰ *Id.*

⁹¹ *See id.*; *see also Braun, supra* note 21, at 57.

⁹² *Braun, supra*, note 21, at 57. “In some instances, an individual would be unfairly and undeservedly implicated; in others, a guilty defendant might go free because of procedural defects caused by the prosecutor’s haste in bringing the charges.” *Id.*

Allowing successive prosecutions avoids possible injustices which could result from imperfect coordination between state and federal prosecutors.⁹³ There likely would be occasions when a jurisdiction with a perceived lesser interest will initiate a prosecution, thereby precluding prosecution by the sovereignty with the stronger interest.⁹⁴

In summary, proponents of the dual sovereignty doctrine base their theory on a formalistic interpretation of sovereignty⁹⁵ which includes the right of each sovereign to vindicate its interests without interference.⁹⁶ Proponents support their theory by forecasting what they consider unacceptable results if the doctrine yielded to the Double Jeopardy Clause.⁹⁷

Opposition to the Doctrine

Critics argue that the dual sovereignty doctrine values a formalistic notion of federalism at the expense of individual rights.⁹⁸ The doctrine is attacked as theoretically flawed⁹⁹ and constitutionally deficient.¹⁰⁰

Critics dispute the doctrine's foundational premise that the state and federal government are separate sovereigns.¹⁰¹ They argue that the Framers of the Constitution conceived of sovereignty as residing in members of the governed society, rather than residing in the government.¹⁰² Moreover, the concept that a single nation

⁹³ See *Lee*, *supra* note 19, at 53; *Braun*, *supra* note 21, at 57.

⁹⁴ *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959).

⁹⁵ *Braun*, *supra* note 21, at 9.

⁹⁶ See *Bartkus*, 359 U.S. at 137.

⁹⁷ See *supra* text accompanying notes 86-94.

⁹⁸ See *Braun*, *supra* note 21, at 9.

⁹⁹ See *Braun*, *supra* note 21, at 39 (doctrine is "a theoretical failure"); *Double Prosecution*, *supra* note 54, at 1542 (doctrine "seems conceptually imprecise").

¹⁰⁰ *Dawson*, *supra* note 30, at 299.

¹⁰¹ "Every citizen . . . may be said to owe allegiance to two sovereigns." *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19 (1852).

¹⁰² See THE FEDERALIST NO. 39, at 280-81 (James Madison) (Benjamin Fletcher Wright ed., 1961); see also *Double Prosecution*, *supra* note 54, at 1542. "[A]n act which transgresses the 'peace and dignity of the sovereign' may more satisfactorily be regarded as an act against the 'peace and dignity' of one society, which may be vindicated by either its local or national government." *Id.* (emphasis added).

can contain more than one sovereign appears to be inconsistent with the common law understanding of the word "sovereignty":

The conventional British position understood "sovereignty" as that indivisible, final, and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail. . . .¹⁰³

It appears the Framers did not abandon a unitary concept when they embraced federalism; Hamilton emphasized that "the [s]tate governments and the national governments . . . are . . . kindred systems, . . . parts of ONE WHOLE."¹⁰⁴

Furthermore, assuming that the concept of two sovereigns was legitimate at the time of *Moore v. Illinois*¹⁰⁵ and *United States v. Lanza*,¹⁰⁶ critics argue that the theory does not comport with today's brand of federalism, which involves direct and substantial cooperation between federal and state governments, particularly in law enforcement.¹⁰⁷ Justice Goldberg acknowledged as much when writing for the majority in *Murphy v. Waterfront Commission of New York Harbor*.¹⁰⁸ The case held that a witness granted immunity from state prosecution may not be compelled to give testimony which might incriminate him under federal law.¹⁰⁹ Justice Goldberg recognized the reality of "'cooperative federalism,' where the Federal and State Governments wage a united front against many types of criminal activity."¹¹⁰

¹⁰³ Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430 (1987).

¹⁰⁴ THE FEDERALIST NO. 82 at 516 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). In contrast to the Framers, the Supreme Court seems to believe "that polities, not people, possess sovereign power in this country." Braun, *supra* note 21, at 9.

Madison believed that the two distinct governments would act as a check on each other. "[A] double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961). The two governments working together in criminal prosecutions seem to remove any such check. See Braun, *supra* note 21, at 72.

¹⁰⁵ 55 U.S. (14 How.) at 13.

¹⁰⁶ 260 U.S. 377 (1922).

¹⁰⁷ See Braun, *supra* note 21, at 7. "Reality (in the time of *Lanza*) seemed to support the dual sovereignty doctrine's description of two independent sovereigns protecting their respective orders. However, that reality has changed." *Id.* The federal government is far more involved in criminal law than it was at the time of *Lanza*. See *id.* at 5.

¹⁰⁸ 378 U.S. 52 (1964).

¹⁰⁹ *Id.* at 79-80.

¹¹⁰ *Id.* at 55-56. Justice Harlan, concurring in the judgment, also wrote approvingly of the "increasing interaction between the State and Federal Governments." *Id.* at 91 (Harlan, J., concurring in the judgment). Justice Harlan later wrote of *Murphy* as having "abolished the two sovereignties' rule." *Stevens v. Marks*, 383 U.S. 234, 250 (1966) (Harlan, J., concurring in part and dissenting in part.) The District of Columbia Circuit of the Court of Appeals seemed to agree, saying "[t]here is a serious question whether the doctrinal line from *Fox* to *Bartkus* has not been eroded by *Murphy*." *United States v. Knight*, 509 F.2d 354, 360 (D.C. Cir. 1974).

Justice Stewart also acknowledged the blurred lines between state and federal governments when writing for the Court in *Elkins v. United States*.¹¹¹ In *Elkins*, the Court abolished the “silver platter doctrine” which had allowed evidence seized illegally by state officials to be used in federal trials.¹¹² Justice Stewart rejected the silver platter doctrine because it “engender[s] practical difficulties . . . [in light of] the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity.”¹¹³

Critics of the doctrine also chide Justice Frankfurter for casting aside centuries of common law on successive prosecutions.¹¹⁴ The common law has held that a defendant’s proof of acquittal or conviction in another court bars a subsequent prosecution.¹¹⁵ “One searches the British Empire in vain for support for the ‘dual sovereignty’ theory of successive prosecutions,” wrote Professor J.A.C. Grant of the University of California at Los Angeles at the conclusion of an exhaustive study.¹¹⁶

¹¹¹ 364 U.S. 206 (1960).

¹¹² *Id.* at 223.

¹¹³ *Id.* at 211.

The Court established the silver platter doctrine in *Weeks v. United States*, 232 U.S. 383 (1914), decided in the same era as *Lanza*. The Warren Court in 1960 rejected that doctrine because of the evolving relationship between state and federal law enforcement officials. See *Elkins*, 364 U.S. at 208. However, just one year before, the Court had refused to reconsider the dual sovereignty doctrine, established in the same era as the silver platter doctrine. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

“Modern decisions have consistently rejected the nineteenth century view that federalism created distinct and mutually exclusive spheres of federal and state authority for a more dynamic view that recognizes the need for changing limits and acknowledges the possibility of overlapping powers.” Murchison, *supra* note 21, at 427.

In light of such modern decisions, how has the dual sovereignty doctrine survived? Professor Kenneth Murchison of Louisiana State University has two explanations. First, *Abbate* and *Bartkus* arose near the beginning of the Warren Court’s expansion of rights of the accused. *Id.* at 433. The Court had not yet held that many of the criminal procedure protections in the Bill of Rights—including the Double Jeopardy Clause—were applicable to the states. *Id.* Second, abolishing the dual sovereignty doctrine—thereby allowing state prosecutions to preclude federal action—might have conflicted with the Court’s protection of the civil rights of black Americans. *Id.* at 433-34. When the Warren Court yielded to the Burger Court, extending additional protections to criminal defendants was no longer a priority. *Id.* at 434.

¹¹⁴ See *supra* note 60.

¹¹⁵ See J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 1-2 (1956). The leading common law example was *Rex v. Hutchinson*, 3 Keb. 785, 84 Eng. Rep. 1011 (K.B. 1678), a sketchily reported case which was discussed in greater detail in many subsequent cases. Grant, *supra*, at 9. Hutchinson allegedly committed a murder in Portugal but was acquitted in a trial there. *Id.* However, England attempted to convict him for the same act. *Id.* The Judges of the King’s Bench all agreed that his acquittal in Portugal barred a subsequent trial in England. *Id.*

See also *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (dicta) (“[T]here can be no doubt that the plea of *autrefois acquit* would be good in any civilized state”); FRIEDLAND, *supra* note 26, at 364 (An English court will recognize an acquittal by a foreign court having territorial jurisdiction over the offense).

¹¹⁶ Grant, *supra* note 115, at 34. “[T]he vast majority of the courts throughout the British Empire have taken it for granted that common law rights do not stop with sovereign boundaries.” *Id.* at 35.

Given our nation's common law roots, it is anomalous that "the nation and the states are now more foreign to each other than England is to France."¹¹⁷

The dual sovereignty doctrine also is criticized for undermining the sovereignty of the people, who, acting through a jury, have the right to nullify the law.¹¹⁸ This nullification power, it is argued, renders the dual sovereignty doctrine unconstitutional because the doctrine "denigrates the principle of popular sovereignty underlying the Double Jeopardy Clause. An exercise of popular sovereignty is final and unappealable. . . . Having invited the popular will to check its authority, government may not simply disregard it and try again."¹¹⁹

The dual sovereignty doctrine receives strong criticism for its failure to consider the liberty interests of the accused.¹²⁰ The Supreme Court, in adhering to its formalistic theory that federalism creates two distinct sovereigns, does not weigh the burden on the individual facing successive prosecutions.¹²¹ Justice Black, joined by

¹¹⁷ Grant, *supra* note 1, at 1312. Justice Black, citing Grant in his dissent in *Abbate*, wrote, "I cannot conceive that our States are more distinct from the Federal Government than are foreign nations from each other." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

Added another critic, "It is a strange breed of federalism which demands such results." FRIEDLAND, *supra* note 26, at 426. "Ironically, the majority decision in *Bartkus* cites the statement of Brandeis J. that the separation of powers was adopted in the constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Unfortunately, the result of *Bartkus* is to encourage this result." *Id.*

¹¹⁸ Dawson, *supra* note 30, at 282. The Supreme Court has acknowledged this right. See *Jackson v. Virginia*, 443 U.S. 307, 317 n. 10 (1979) ("the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty'"); *Standefor v. United States*, 447 U.S. 10, 22 (1980) (criminal juries can "acquit out of compassion or compromise").

¹¹⁹ Dawson, *supra* note 30, at 299. See also *supra* note 118; Susan Warren, *2nd King Trial Raises Double Jeopardy Flag*, CHI. TRIB., May 15, 1992, at 23. "It just seems in political cases that the attitude is, 'We will try you until we get you.' And I don't know that that's what justice is all about." *Id.* (quoting a Texas judge).

Two dozen states have enacted legislation limiting successive prosecutions by the state. See *supra* note 80. Some critics argue that federal pursuit of a second trial in a state where the legislature has expressed the people's will against successive prosecutions is an affront to state sovereignty. See *Murchison*, *supra* note 21, at 428. "The practical effect of such federal prosecutions is to override the state's determination that multiple prosecutions are not necessary to vindicate the policies of its criminal law." *Id.* See also Dawson, *supra* note 30, at 282. "The dual sovereignty doctrine allow[s] government to ignore [the first] verdict . . . and undermine the sovereignty of the people." *Id.*

¹²⁰ See Mark E. Lewis, Recent Decision, *Heath v. Alabama: The Conflict Between Dual Sovereignty and Double Jeopardy*, 38 ALA. L. REV. 153 (1986). "Rather than seeing federalism as a means to protect individual interests and to provide insurance against an arbitrary government, the Court viewed federalism as an end in itself to be achieved at the expense of individual rights." *Id.* at 159. See also *Conflicts in Court*, 191 ECONOMIST 233 (1959). "Justice Frankfurter's opinion . . . seemed sometimes to view federalism as an end in itself, not as a means to a better life for individuals." *Id.*, quoted in SIGLER, *supra* note 26, at 59.

¹²¹ See *supra* note 120.

The Court in *Heath v. Alabama*, 474 U.S. 82 (1985), extending the dual sovereignty doctrine to successive prosecutions by neighboring states, explicitly rejected a balancing test which would consider the liberty interest of the accused. "[The] balancing of interests approach . . . cannot be reconciled with the dual sovereignty principle," wrote Justice O'Connor for the Court. *Id.* at 92. "If the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant . . . [T]he dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases." *Id.* The case

Chief Justice Warren and Justice Douglas, wrote in his *Bartkus* dissent, “Our Federal Union was conceived and created ‘to establish [j]ustice’ and to ‘secure the [b]lessings of [l]iberty,’ not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed ‘requirements’ of ‘federalism’ which result in obliterating ancient safeguards.”¹²² Prosecuting twice for the same conduct is “contrary to the spirit of our free country,” wrote Justice Black.¹²³

Justice Black and others have criticized the “metaphysical subtlety”¹²⁴ of dual sovereignty that casts aside a universal maxim of the common law—protection against repeat prosecutions:¹²⁵

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two ‘[s]overeigns’ to inflict it than for one.¹²⁶

The doctrine seems out of step with the customary broad interpretations of individual rights in this country.¹²⁷ “It has been repeatedly decided that [the Bill of Rights]

shows the Court’s commitment to the doctrine and its refusal to reconsider the possibly erroneous foundation—a definition of “sovereign” that is inconsistent with common law traditions. See *supra* text accompanying notes 101-04.

At least one state has disagreed with the Supreme Court and considered a balancing test appropriate. See *Commonwealth v. Mills*, 286 A. 2d 638 (Pa. 1971):

When one examines the ‘dual sovereignty doctrine’ as it applies to the double jeopardy clause, we are really involved in a *balancing process*, whereby we place the interests of the two sovereigns on one side of the judicial scale, and on the other side we place the interest of the individual to be free from twice being prosecuted and punished for the same offense. The basic problem with *Bartkus* is that the majority . . . failed to really examine the interest of the individual.

Id. at 640-41 (emphasis added).

¹²² *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

¹²³ *Id.* at 150.

¹²⁴ Grant, *supra* note 1, at 1331 (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 64 n.125 (1820) (Story, J., dissenting)).

¹²⁵ *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

¹²⁶ *Id.*

¹²⁷ See Grant, *supra* note 1, at 1329.

The Warren Court applied double jeopardy protection broadly in *Ashe v. Swenson*, 397 U.S. 436 (1970), in which collateral estoppel was held to be a component of the Double Jeopardy Clause. *Id.* at 445. The case arose out of the armed robbery of six poker players. *Id.* at 437. The defendant was charged with robbing one of the players, and was acquitted. *Id.* at 439. He then was charged with robbing another of the players, and he was convicted and sentenced to 35 years in jail. *Id.* at 440. The Supreme Court reversed, stating that the Double Jeopardy Clause “surely protects a man who has been acquitted from having to ‘run the gantlet’ a second time.” *Id.* at 446.

should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights," wrote the Court in 1921—just a year before *Lanza*.¹²⁸

Proposed Alternatives to the Dual Sovereignty Doctrine

Critics of the dual sovereignty doctrine generally acknowledge that a prophylactic rule eliminating all successive prosecutions would be unwise.¹²⁹ A wide range of proposed alternatives to the dual sovereignty doctrine address the practical concerns of Justice Frankfurter and others.

The Model Penal Code, published by the American Law Institute in 1962, takes the following approach:

When conduct constitutes an offense within the concurrent jurisdiction of [the] 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 acquittal or in a conviction. . . and the subsequent prosecution is based on the same conduct, *unless* (a) [each prosecution] requires proof of a fact not required by the other *and* the law defining each [offense] is intended to prevent a substantially different harm . . . or

(2) The [first prosecution resulted in an acquittal]. . . which. . . necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.¹³⁰

¹²⁸ *Gouled v. United States*, 255 U.S. 298, 303-04 (1921).

In response to the argument that abolishing the doctrine would hinder federal interests, critics point out that the federal government can protect its interests by taking exclusive jurisdiction over a particular crime or setting minimum penalties which would be applicable in both state and federal courts. *Abbate v. United States*, 359 U.S. 187, 202 n.2 (1959) (Black, J., dissenting). However, such pre-emption power is not available to states, rendering abolition of the doctrine potentially more harmful to state interests than to federal interests. See *Double Prosecution*, *supra* note 54, at 1558.

¹²⁹ See *Double Prosecution*, *supra* note 54, at 1565; Dominic T. Holzhaus, Note, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697, 1711 (1986); Braun, *supra* note 21, at 73.

¹³⁰ MODEL PENAL CODE § 1.10 (Proposed Official Draft 1962) (emphasis added).

Under this test, prosecution by federal and state governments on identical charges would be precluded.¹³¹ Even if the charges were different, a second trial would be barred if federal and state interests were essentially the same or if conviction in the second trial would require a factual determination at odds with the first trial.¹³²

State legislatures have taken it upon themselves to limit state prosecutions following a federal trial.¹³³ The legislation varies widely in scope and effect.¹³⁴ In two states without such legislation, courts have adopted a rule that a second prosecution is allowed only if the state's interest is "substantially different" from the interest of the federal government in the first prosecution.¹³⁵

Scholars have offered several tests of varying complexity for when successive prosecutions should be barred. One proposal, recognizing the frequent collaboration between levels of government, would prohibit a second prosecution 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."¹³⁶ Another proposal suggests a focus on incremental culpability: a second prosecution would be permitted when it is for a degree of wrongfulness or culpability not vindicated in the first prosecution.¹³⁷ Under this theory, the successive prosecution in *Abbate v. United States*¹³⁸ would be permitted, because the federal government was pursuing a degree of wrongfulness—disruption of federal communications—over and above the state's charge of destruction of property.¹³⁹ On the other hand, the second trial

¹³¹ See *id.*

¹³² See Camina, *supra* note 65, at 355. A 1971 proposed federal criminal code, drafted by a commission established by Congress, included a section on successive prosecutions nearly identical to the Model Penal Code approach. See *id.* at 356-60.

¹³³ See *supra* note 80 for a listing of states which have adopted legislation limiting successive prosecutions.

¹³⁴ See *supra* note 80.

¹³⁵ See *Commonwealth v. Mills*, 286 A.2d 638, 642 (Pa. 1971); see also *People v. Cooper*, 247 N.W.2d 866, 870 (Mich. 1976). In *Cooper*, Michigan's Supreme Court refined the "substantially different" test by articulating a series of guidelines. *Id.* at 870-71. State interests are substantially different from federal interests when the maximum penalties of the statutes involved vary greatly, when the federal court cannot adequately vindicate the state's interest in obtaining a conviction, and when the difference in the statutes is substantive rather than jurisdictional. See *id.* For elaboration on Michigan's treatment of successive federal-state prosecutions, see Laura A. Marshall, Note, *Criminal Procedure—Double Jeopardy—Successive Federal—State Prosecutions are Barred by the Michigan Double Jeopardy Clause*, 59 U. DET. J. URB. L.99 (1981).

¹³⁶ Braun, *supra* note 21, at 73. "When law enforcement efforts attest to the emergence of the 'cooperative conception of Federalism' . . . the Constitution should not be read to cling to the unconvincing illusion that 'we live in the jurisdiction of two sovereignties.'" *Id.*

The rule, while simple, is vague, but Braun is undaunted by such criticism: "I am not too troubled by the vagueness of this statement. Court have often been satisfied to formulate new rules of law in general terms, leaving the often difficult task of line-drawing for future decisions." *Id.* at 74.

¹³⁷ See Holzhaus, *supra* note 129, at 1706.

¹³⁸ 359 U.S. 187 (1959).

¹³⁹ Holzhaus, *supra* note 129, at 1707.

in *Bartkus v. Illinois*¹⁴⁰ would not have been allowed because the state was prosecuting for the same crime—bank robbery—for which the federal government had prosecuted and lost.¹⁴¹

Another proposal would allow the federal government to pre-empt state prosecutions if a federal trial is necessary to protect national interests.¹⁴² This suggestion would keep primary control of criminal conduct in the hands of states while allowing the federal government to vindicate its interests on a case-by-case basis.¹⁴³ Other proposals include codifying the Justice Department's Petite Policy¹⁴⁴ to give substantive rights to the accused if the government fails to follow the policy¹⁴⁵ and precluding successive federal trials in states which bar second prosecutions by the state.¹⁴⁶

A minority of critics advocate a nearly complete bar of successive prosecutions, with a second trial permitted only in the event of collusive or fraudulent first trials. Justice Black took this relatively hard line,¹⁴⁷ as did Professor J.A.C. Grant of the University of California at Los Angeles.¹⁴⁸ It may be noteworthy that both of these critics of the doctrine wrote prior to the civil rights movement of the 1960s, in which

¹⁴⁰ 359 U.S. 121 (1959).

¹⁴¹ Holzhaus, *supra* note 129, at 1707. Nor would the second trial have been allowed in *Lanza*, in which the state was prosecuting for the same wrong—violating prohibition—for which the federal government had prosecuted. *Id.* at 1708. Under this theory, a federal civil rights charge “generally involves an additional increment in culpability and thus a separate offense” justifying a successive prosecution. *Id.* at 1711.

¹⁴² See, e.g., Camina, *supra* note 65, at 362; *Double Prosecution*, *supra* note 54, at 1554-55.

¹⁴³ See sources cited *supra* note 142. The practicality of such a rule is questionable; it is unlikely that the federal government can monitor all state dockets to ensure its involvement in a timely manner.

A variation on this rule has been proposed by Harland Braun, the Los Angeles attorney who represented officer Theodore Briseno in the federal King defendants' trial. Darlene Ricker, *Double Exposure: Did the Second Rodney King Trial Violate Double Jeopardy?* A.B.A. J., Aug. 1993, at 66, 67. He proposes that an accused who may face federal prosecution could notify federal authorities of the state action. *Id.* at 67. Federal prosecutors would have up to 60 days to decide whether to take over the case. *Id.* Such a proposal would eliminate “tag team” prosecutions, Braun said. *Id.* at 68.

¹⁴⁴ See *supra* note 65.

¹⁴⁵ See Murchison, *supra* note 21, at 431. “[T]he Court should recognize the [Petite] rule as a substantive policy designed to implement an important constitutional value.” *Id.*

¹⁴⁶ *Id.* at 435.

¹⁴⁷ See *Bartkus v. Illinois*, 359 U.S. 121, 150 (1959) (Black, J., dissenting). “I would hold that a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment.” *Id.*

¹⁴⁸ See Grant, *supra* note 115, at 36. “In surrendering the doctrine of successive prosecutions we would not be giving up anything that has proved of value.” *Id.*

the federal interest in vindicating the civil rights of African-Americans and other minorities became a priority for the Supreme Court.¹⁴⁹

SHOULD THERE HAVE BEEN A SECOND KING TRIAL?

The Dual Sovereignty Doctrine is Fatally Flawed

Under existing case law, the dual sovereignty doctrine is alive and well, and there is no question that the federal government had the legal authority to prosecute the Los Angeles police officers despite their acquittal in state court.¹⁵⁰ Any argument that the second prosecution was wrong, therefore, must challenge the correctness of the doctrine. This Comment argues that the dual sovereignty doctrine is a flawed theory that has outlived any legitimacy it once might have had.

The foundation of the doctrine is not nearly as impressive as Justice Frankfurter insists.¹⁵¹ *United States v. Lanza*,¹⁵² the case which articulated the doctrine, based its holding on dicta in several nineteenth-century cases and ignored conflicting dicta.¹⁵³ “*Lanza* was not simply an unexceptional case in which the Supreme Court applied existing doctrine. Rather, the Court chose between competing authorities,” wrote one critic.¹⁵⁴

¹⁴⁹ See Murchison, *supra* note 21, at 433-34. A writer in 1992 who advocated a near-blanket rule against successive prosecutions acknowledged the “troubling” repercussions if federal civil rights interests could not be vindicated. Dawson, *supra* note 30, at 300. However, “[t]his rationale cannot cure the constitutional defect in the dual sovereignty doctrine.” *Id.* In addressing the King case, Dawson criticized the change of venue to a suburban community “stocked with potential jurors ignorant of the racial hatred and brutal police practices that charge some urban environments.” *Id.* at 302. Changes of venue must fully implement “the principle of popular sovereignty by ensuring that the power of a jury be wielded by people close to the facts and familiar with the context in which the alleged crime occurred.” *Id.* at 303. However, he maintained his position that, despite the “apparently lawless” verdict, a federal prosecution following state acquittal is a violation of popular sovereignty. See *id.* at 302-03.

¹⁵⁰ See *supra* text accompanying notes 51-65.

¹⁵¹ *Bartkus*, 359 U.S. at 136. Frankfurter wrote of a “long, unbroken, unquestioned course of impressive adjudication” compelling his conclusions. *Id.*

¹⁵² 260 U.S. 377 (1922).

¹⁵³ Cases relied on in *Lanza* included: *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). These cases “were not concerned with successive prosecutions by state and federal authorities. Rather, they concerned shared state and federal legislative authority to criminalize certain conduct.” Dawson, *supra* note 30, at 290 (emphasis in original).

The *Lanza* Court failed to acknowledge the conflicting dicta contained in: *Nielsen v. Oregon*, 212 U.S. 315 (1909); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820); and *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). In particular, *Furlong* and *Nielsen* gave the Court the conceptual basis it would have needed to disallow successive prosecutions had it been so inclined. Murchison, *supra* note 21, at 385. “[N]o irrefutable logic dictated the *Lanza* result. . . . [T]he pre-prohibition heritage contained contrary authority that could have been used to forbid successive prosecutions. . . . [T]hose authorities could easily have been combined into a conceptual framework forbidding successive prosecution.” *Id.* at 398.

¹⁵⁴ Murchinson, *supra* note 21, at 401.

The historical context of the mid-nineteenth century cases that were the basis for the *Lanza* decision provides an explanation for the early development of the dual sovereignty doctrine.¹⁵⁵ At the same time, this historical context shows why the doctrine is no longer valid.¹⁵⁶ The cases were decided at a time when the most prominent political issue was states' rights, with slavery often lurking beneath the surface.¹⁵⁷ In fact, *Moore v. Illinois*,¹⁵⁸ which produced the definitive statement on the dual sovereignty doctrine,¹⁵⁹ concerned the validity of state fugitive slave legislation, an issue bathed in political ramifications.¹⁶⁰ Moreover, states and the federal government actually were operating in essentially different spheres of criminal law during that time, a reality that has changed with the twentieth century expansion of federal criminal jurisdiction.¹⁶¹

Similarly, *Lanza's* historical context provides insight into why the Court chose to follow the dual sovereignty dicta rather than opposing dicta.¹⁶² Congress had recently passed the Volstead Act¹⁶³ as its method of enforcing the Eighteenth

¹⁵⁵ See Lewis, *supra* note 120, at 160.

¹⁵⁶ See Braun, *supra* note 21, at 36.

¹⁵⁷ Lewis, *supra* note 120, at 160. See also Holzhaus, *supra* note 129, at 1705. "The dual sovereignty doctrine was introduced and developed during eras of federalist sentiment characterized by strident assertions of state sovereignty." *Id.*

¹⁵⁸ 55 U.S. (14 How.) 13 (1852).

¹⁵⁹ *Id.* at 19-20. See *supra* text accompanying note 82 for the statement.

¹⁶⁰ *Double Prosecution*, *supra* note 54, at 1542. "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 interest of the defendant." *Id.*

See also Lewis, *supra* note 120, at 160. "Any decision restricting the right of states to punish criminal offenses by denying their concurrent jurisdiction with the federal government would probably have produced violent opposition in the southern states." *Id.*

Moore v. Illinois, which provides the foundation of the dual sovereignty doctrine, upheld state legislation punishing the harboring of fugitive slaves. *Moore*, 55 U.S. (14 How.) at 21. The case was decided by a Court with an apparent lack of sympathy to slaves. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). It is ironic that the while the dual sovereignty doctrine was rooted in a Court which might have been motivated by hostility to African-Americans, the doctrine was preserved by a 1959 Court which might have feared that reversal would harm the civil rights of African-Americans. See *supra* note 113.

¹⁶¹ See Braun, *supra* note 21, at 35. Today's relationship between state governments and the federal government often does not reflect distinct sovereignties:

[A]s federal involvement in areas that had traditionally been perceived as state concerns has greatly increased, the states' and nation's 'different spheres of jurisdiction' have grown increasingly similar. Governments undertaking cooperative efforts to solve the common problems of a common constituency simply do not resemble the 'sovereigns' of independent polities described by the proponents of the dual sovereignty doctrine.

Id.

¹⁶² See *supra* note 153 and accompanying text.

¹⁶³ Volstead Act, 41 Stat. 305 (1919), repealed by U.S. CONST. amend. XXI (1933).

Amendment authorizing prohibition.¹⁶⁴ The Court had at least three options in *Lanza*,¹⁶⁵ which involved a defendant who had been convicted in both state and federal courts of violating prohibition laws.¹⁶⁶ It could have ruled that successive prosecutions were barred by the Double Jeopardy Clause. It could have issued a narrow ruling that the unique “concurrent power” language of the Eighteenth Amendment permitted dual prosecutions in prohibition cases.¹⁶⁷ Or it could have embraced the dual sovereignty doctrine broadly. It chose the last option.¹⁶⁸

The Supreme Court made its ruling despite contrary common law tradition¹⁶⁹ and legislative history indicating Congress did not condone dual prosecutions.¹⁷⁰ The ruling reflects the broad support courts accorded prohibition in the early years after passage of the Eighteenth Amendment.¹⁷¹ The allegiance to dual sovereignty also appears to be a product of a pre-New Deal perspective on the proper roles of the state and federal governments in the American system, in which the federal government was relatively small and overlapping spheres of jurisdiction were the exception rather than the rule.¹⁷²

Assuming for a moment that the dual sovereignty doctrine was justified at an earlier part of our history when there were clearer lines of jurisdiction between state and federal governments, the doctrine fails to reflect the realities of today’s cooperative federalism.¹⁷³ As the Court conceded in *Elkins*¹⁷⁴ and *Murphy*,¹⁷⁵ that cooperation often no longer makes a distinction between federal and state criminal investigations meaningful.¹⁷⁶ Despite the evolving nature of today’s federalism,

¹⁶⁴ The Eighteenth Amendment, ratified January 16, 1919, barred the manufacture, sale or transportation of intoxicating liquors in the United States. U.S. CONST. amend. XVII, § 1 (repealed 1933). The amendment gave Congress and the states “concurrent power” of enforcement. *Id.* at § 2.

¹⁶⁵ *United States v. Lanza*, 260 U.S. 377 (1922).

¹⁶⁶ See *supra* note 51.

¹⁶⁷ The Eighteenth Amendment is the only provision in the Constitution explicitly giving states and the federal government “concurrent” enforcement power. U.S. CONST. amend. XVIII, §2 (repealed 1933).

¹⁶⁸ *Lanza*, 260 U.S. at 382. The Court rejected the middle argument, saying that the state government did not derive its prosecutorial power from the Eighteenth Amendment’s “concurrent power” language, but rather from the Tenth Amendment, which reserves to the states all powers not delegated to the federal government. *Id.*

¹⁶⁹ See *Grant*, *supra* note 115, at 34-35.

¹⁷⁰ See *supra* note 54.

¹⁷¹ *Murchison*, *supra* note 21, at 398-401. The Supreme Court in the early years of prohibition favored those responsible for enforcing prohibition but later developed new doctrines substantially more favorable to the rights of individuals. *Id.* at 400-01. For a listing of some of the major prohibition decisions, see *Murchison, Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 476-77, 479-80 (1982).

¹⁷² See *Murchison*, *supra* note 21, at 398.

¹⁷³ See *supra* notes 107-13 and accompanying text.

¹⁷⁴ *Elkins v. United States*, 364 U.S. 206 (1960).

¹⁷⁵ *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52 (1964).

¹⁷⁶ See generally *Braun*, *supra* note 21.

however, the Court fails to acknowledge any weakness in the doctrine.¹⁷⁷ In retaining the doctrine, the Court needlessly adheres to a flawed principle and ignores the reality of today's federalism.¹⁷⁸ The doctrine is "a rule that has remained after the reasons that originally prompted it have long since disappeared."¹⁷⁹

The dual sovereignty doctrine fails to consider the individual's liberty interest.¹⁸⁰ In embracing the formalistic notion of separate sovereignties, the Court has expressly rejected suggestions to balance the government's legitimate interest in prosecution with the individual's interest in avoiding successive trials.¹⁸¹ A failure to at least consider the individual's interest in avoiding successive prosecutions contradicts the spirit of the Fifth Amendment and centuries of common law.¹⁸²

Repercussions for the Second Rodney King Trial

Proposing that the dual sovereignty doctrine should be abolished is not tantamount to saying that the King defendants' second trial violated the Double Jeopardy Clause. The constitutionality of the second trial depends on which policy on successive prosecutions should be adopted in the absence of the dual sovereignty doctrine.¹⁸³

¹⁷⁷ See *Heath v. Alabama*, 474 U.S. 82 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978). The cases are discussed *supra* notes 70-73 and accompanying text.

¹⁷⁸ See Braun, *supra* note 21, at 10.

¹⁷⁹ Murchison, *supra* note 21, at 425. Murchison also quotes Oliver Wendell Holmes.

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters [into] a new career.

Id. at 425 n.121 (quoting O. HOLMES, *THE COMMON LAW* 5 (1881)).

In contrast to the wave of strong academic criticism of the dual sovereignty doctrine, one author defended it as a necessary political tip of the cap to the states, who otherwise might fear being overrun by federal jurisdiction:

The feelings of state courts are as important as the reality of the situation. In such a circumstance it is not surprising that concern with federalism would prevail over the right to plead double jeopardy. Justice Frankfurter [in *Bartkus*] was faced with a conflict between the fifth and tenth amendments and sensitively preferred the latter, an act of judicial statesmanship

SIGLER, *supra* note 26, at 59.

¹⁸⁰ See *supra* note 120 and accompanying text.

¹⁸¹ *Heath*, 474 U.S. at 92.

¹⁸² See *supra* text accompanying notes 124-28.

¹⁸³ See *supra* text accompanying notes 130-48 for a sampling of proposals to replace the dual sovereignty doctrine.

Any legitimate policy must focus on two factors: the individual's constitutionally recognized interest in avoiding a second prosecution and the government's legitimate interest in vindicating the interests of the people through the criminal law.¹⁸⁴ Whether consideration of these factors would bar a successive prosecution depends upon the weight of each factor in a given situation. In the King defendants' case, careful consideration of the factors leads to the conclusion that the second trial was unconstitutional.¹⁸⁵

Any defendant who has been acquitted has a strong interest in avoiding a second prosecution. It is worthwhile to revisit the Court's explanation of the purpose of the Double Jeopardy Clause:

The underlying idea [behind the Double Jeopardy Clause] . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.¹⁸⁶

The federal government unquestionably used "all its resources and power" in the King defendants' case. It assembled what the Justice Department called "one of the most formidable prosecution teams ever assembled."¹⁸⁷ Federal prosecutors learned from the state's mistakes in the first trial and presented a more coherent and forceful case.¹⁸⁸ The Double Jeopardy Clause was meant to protect defendants from such improved second efforts.¹⁸⁹

¹⁸⁴ See *Commonwealth v. Mills*, 286 A.2d 638 (Pa. 1971). Evaluating the propriety of a successive prosecution requires "a balancing process, whereby we place the interests of the two sovereigns on one side of the judicial scale, and on the other side we place the interest of the individual to be free from twice being prosecuted for the same offense." *Id.* at 640-41.

¹⁸⁵ Whether the trial was justified constitutionally on a theory that the state and federal charges constituted different offenses is beyond the scope of this Comment. See *supra* note 18 and accompanying text. The federal government's stated justification for the successive prosecution was not a "different offense" theory but the dual sovereignty doctrine. See *supra* note 11.

¹⁸⁶ *Green v. United States*, 355 U.S. 184, 187-88 (1957).

¹⁸⁷ Jim Newton, *2 Officers Guilty, 2 Acquitted; Guarded Calm Follows Verdicts in King Case*, L.A. TIMES, Apr. 18, 1993, at A1. Up to 17 FBI agents worked on the case at one time, "an extraordinary commitment of staff to a single investigation." *Id.* The trial team was headed by Barry F. Kowalski, arguably the nation's most experienced civil rights prosecutor, who was sent from his Washington office to Los Angeles immediately after the riots. *Key Figures in the Trial*, L.A. TIMES, Apr. 18, 1993, at A25.

¹⁸⁸ Seth Mydans, *Verdict in Los Angeles; Assessing the Outcome; Points of Evidence, Not Emotion*, N.Y. TIMES, Apr. 18, 1993, § 1 at page 33; Seth Mydans, *2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, Apr. 18, 1993, § 1 at page 1.

¹⁸⁹ See, e.g., Paul R. Robinson, Comment, *Grady v. Corbin: Solidifying the Analysis of Double Jeopardy*, 17 CRIM. & CIV. CONF. 395, 407 (1991). "While the defendant is being both economically and psychologically worn down, the government is improving and honing its trial strategy during each successive conviction attempt." *Id.*

Perhaps more unsettling is the likelihood the defendants could not have received a fair second trial in light of the public's reaction to the first acquittal.¹⁹⁰ It is difficult to believe a jury could have ignored the potential fallout of another acquittal.¹⁹¹ Even some who praised the guilty verdicts acknowledged that the jurors likely had public peace as well as individual justice in mind.¹⁹² In the King case, therefore, the government's unsparing use of resources and the probability of a tainted second verdict made the defendants' interest in avoiding a successive prosecution unusually strong.¹⁹³

However, the federal government likewise had strong interests in pursuing the second trial. First, the federal interest in protecting the civil rights of its citizens dates back to legislation passed just after the Civil War.¹⁹⁴ Vindicating that interest through a successive prosecution is uncommon but by no means unprecedented.¹⁹⁵ The

¹⁹⁰ Both sides took unusually meticulous precautions to obtain an impartial jury. Seth Mydans, *A Jury's Trials: Will Memories of Riots Influence a Verdict?* N.Y. TIMES, Feb. 7, 1993, at § 4, page 7. Approximately 6,000 potential jurors were contacted, and those willing to serve were required to complete a 53-page questionnaire. *Id.*

¹⁹¹ Bruce J. Terris, *Corruption of Justice in L.A.*, LEGAL TIMES, Apr. 26, 1993, at 22. "It is impossible to believe that the jurors in the second trial did not consider the possibility that dozens of people would lose their lives and part of Los Angeles would be destroyed if all the officers were found innocent." *Id.*

The likelihood that a jury has prejudged the case in light of the first trial is not unique to the King defendants' case. In *Heath v. Alabama*, 474 U.S. 82 (1985), the defendant was convicted and sentenced to death in Alabama for murdering his wife after having pleaded guilty to the same crime in Georgia in exchange for a life sentence. *Id.* at 84-85. Of the 82 prospective jurors for the second trial, 75 stated that they were aware of the defendant's guilty plea. *Id.* at 96 (Marshall, J., dissenting). Yet most of them said they could put the guilty plea out of their minds as jurors in the Alabama trial. *Id.* "With such a well-informed jury, the outcome of the trial was surely but a foregone conclusion." *Id.* at 97 (Marshall, J., dissenting).

¹⁹² See Raspberry, *supra* note 8.

¹⁹³ See *supra* notes 187-92 and accompanying text.

¹⁹⁴ The roots of the statute under which the officers were charged, 18 U.S.C. § 242, can be traced to the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. See *United States v. Williams*, 341 U.S. 70, 83 (1951).

"The government has a special responsibility to vindicate federal interests protected by the civil rights statutes," said the legal director of the American Civil Liberties Union of Southern California, which favored the second trial. Ricker, *supra* note 143, at 66.

The Southern California ACLU chapter broke with its national organization on the issue of successive prosecutions. The ACLU's national board of directors, in response to the acquittals in the first trial, voted 32-31 in July 1992 to reassess its opposition to successive prosecutions. Peter H. Stone & John Murawski, *Board Vote Puts ACLU Policy in Jeopardy*, LEGAL TIMES, July 13, 1992, at 5. However, after further debate the national organization reaffirmed its view that successive prosecutions, even in the King defendants' case, violated the Double Jeopardy Clause. Renee Tawa, *ACLU Takes Position at Odds with L.A. Board*, L.A. TIMES, Apr. 5, 1993, at A20.

¹⁹⁵ See Weinstein & Ostrow, *supra* note 5. The Justice Department had pursued six dual prosecutions on civil rights charges in the two years preceding the indictments in the King defendants' case. See *id.*

For an example of a factual situation similar to the King defendants' case, in which police officers were prosecuted by the Justice Department after acquittal on serious state charges, see *United States v. Patterson* 809 F.2d 244 (5th Cir. 1987). But such cases are rare. Warren, *supra* note 119. Between 1988 and 1992, there were only five civil rights cases involving police officers prosecuted following state acquittals. *Id.* Three were in the South and two were in Puerto Rico. *Id.*

federal interest in vindicating civil rights is so strong that many who criticize the dual sovereignty doctrine nevertheless recommend allowing successive prosecutions in civil rights cases.¹⁹⁶

Second, the federal government actually began its investigation in the King case prior to the first trial but deferred action while the state completed its criminal case.¹⁹⁷ It could have pre-empted the state prosecution by obtaining an early federal trial date,¹⁹⁸ but it opted to see whether the state would vindicate the federal interest.¹⁹⁹ The Justice Department would argue that its pragmatic decision not to “race the state to the courthouse” should not prevent it from vindicating its interest when the state failed to do so.²⁰⁰

¹⁹⁶ See e.g., Dawson, *supra* note 30, at 300-01; Holzhaus, *supra* note 129, at 1711; Lee, *supra* note 19, at 54.

However, a factor normally justifying a successive prosecution in civil rights cases is not present in the King defendants' case. Support for a federal civil rights trial often lies in the suspicion that state officials let offenders off the hook either by a sham prosecution or by failure to devote adequate resources to trials against those who are accused of harming minorities. See, e.g., Dawson, *supra* note 30, at 300. No one has accused the state prosecutors in the King defendants' case of giving anything less than their best, albeit unsuccessful, effort. See Weinstein & Ostrow, *supra* note 5.

The Southern California ACLU branch argues that a fundamental judicial error justified a second trial. See Ricker, *supra* note 143, at 66-67. The decision to change venue to a suburban area which failed to reflect the racial composition of the people of Los Angeles “undermined the fairness of the first prosecution,” according to the ACLU of Southern California. See *id.* at 66. The national ACLU, in contrast to its southern California branch, opposes all successive prosecutions, including the second King trial. See *supra* note 194.

Another commentator agreed with the southern California ACLU that the venue change to a suburban area was erroneous but did not support a successive prosecution. See Dawson, *supra* note 30, at 302-03.

¹⁹⁷ Weinstein & Ostrow, *supra* note 5.

¹⁹⁸ See CAL. PENAL CODE § 656 (West 1988). California law precludes the state from prosecuting if another jurisdiction already has prosecuted for the same “act or omission.” *Id.* The single charge unresolved at the first trial—one count of police brutality against Officer Laurence M. Powell which resulted in a hung jury—was dismissed because of the federal trial. *Key Figures in the Trial, supra* note 187.

¹⁹⁹ See Weinstein & Ostrow, *supra* note 5. Several factors are considered in determining whether the federal interest has been vindicated, according to a former Justice Department civil rights chief. See *id.* Those factors include whether there has been a bona fide prosecution by local officials, whether the outcome of a case is clearly at odds with the evidence, and the nature of the offense. *Id.* While there clearly was a bona fide prosecution in the state case, the other two criteria apparently weighed in favor of a second trial. See *id.*

²⁰⁰ The Justice Department followed its Petite Policy, see *supra* note 65, and proceeded only upon the authorization of the appropriate assistant Attorney General. See John C. Coffee Jr., *The Race to Try Clark Clifford*, TEX. LAW., Aug. 17, 1992, at 8.

The Clark Clifford case provides an illustration of an unsightly “race to the courthouse.” See *id.* Both the state of New York and the federal government indicted Clifford and Robert Altman, executives in the collapsed Bank of Credit & Commerce International, for various fraud, bribery and conspiracy charges. See *id.* New York has a statute, however, which generally bars a state trial if a defendant has been prosecuted for the same act by the federal government. N.Y. CRIM. PROC. LAW § 40.20(2) (McKinney 1992). Believing they stood a better chance on the less specific federal charges, Clifford's attorneys sought an early trial date in federal court. Coffee, *supra*. New York prosecutors then obtained an even earlier state trial date. *Id.* The 86-year-old Clifford has yet to stand trial because

Finally, the federal government has an interest in preserving the credibility of its justice system. Government officials did not expressly acknowledge such an interest in the King case, but it is implicit in their reactions in the aftermath of the two trials.²⁰¹ The initial federal response to the rioting was to assure the public that the defendants were not off the hook.²⁰² The commitment of extraordinary amounts of federal resources²⁰³ and the Administration's strong praise of the guilty verdicts of the second trial²⁰⁴ indicate that this was more than a case about Rodney King's civil rights; it also was the government's attempt to show the public that the system can work.²⁰⁵

After analyzing the interests of the government and the defendants, it is clear that both sides have compelling arguments. The police officers' argument is rooted in the Double Jeopardy Clause and centuries of common law prohibiting a second trial after acquittal in a court with jurisdiction.²⁰⁶ The government's argument is based

of serious health problems, but Altman was acquitted of all state charges in a New York trial. Wade Lambert & Jonathan M. Moses, *Collapse of the Case Against Altman Moves BCCI Focus Overseas*, WALL ST. J., Aug. 16, 1993, at A1. In light of Altman's acquittal in state court, the Justice Department is not likely to resume its case against either Clifford or Altman. Sharon Walsh, *The Case That Bit Back*, WASH. POST, Aug. 18, 1993, at C1.

"Over the long run, if prosecutors cannot cooperate they will compete, and races to the courthouse become likely. Indeed, the case's practical message to state prosecutors may be not to share witnesses and evidence with federal authorities—until they are on the eve of a state trial." Coffee, *supra*.

The "race to the courthouse" could be avoided, however, if Congress would pass legislation allowing the federal government to pre-empt state prosecutions under certain circumstances. See *Double Prosecution*, *supra* note 54, at 1555; Camina, *supra* note 65, at 361-62. *But see* Justice Frankfurter's majority opinion in *Bartkus*: "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of [federal prosecution]." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959).

²⁰¹ See *infra* notes 202-05 and accompanying text.

²⁰² In an apparent attempt to restore calm to Los Angeles, the United States Attorney General announced less than 24 hours after the acquittals, "It's important for people to remember that the verdicts on state charges are not the end of the process. The Department of Justice is responsible for enforcing the civil rights laws of the United States and it will do so vigorously." Weinstein & Ostrow, *supra* note 5.

Congress expressed outrage to the verdict and called for quick federal action. See *Congress Reacts to King Verdict*, N.P.R. Morning Edition, May 1, 1992, available in LEXIS, Nexis Library, News File. Senator Patrick Leahy called the verdict "outrageous" and "obscene," while Senator Bill Bradley called for federal charges to be filed: "If a crime is done and the system doesn't work, that's what the civil rights laws are all about." *Id.*

²⁰³ See *supra* note 187 and accompanying text.

²⁰⁴ "Justice was done," said Attorney General Janet Reno in response to the guilty verdicts. Sam Fulwood III, *Clinton Praises Judgment of Jury, Urges Healing, Harmony Across U.S.*, L.A. TIMES, Apr. 18, 1993, at A21. Added Commerce Secretary Ron Brown, who was the Clinton Administration's point person in Los Angeles in the wake of the riots, "This trial should be viewed as a great step in a long march to justice." *Id.*

²⁰⁵ President Clinton said the guilty verdicts served as "a reminder that our courts are the proper forum for the resolution of even our deepest legal disputes." *Id.*

²⁰⁶ See generally Grant, *supra* note 115 (study of common law shows virtually no support for successive prosecutions).

in its long-recognized responsibility to vindicate the civil rights of its citizens²⁰⁷ and in its desire to enhance social stability by restoring confidence in the justice system.²⁰⁸

As unsettling as it is to reach a conclusion which would allow the guilty police officers to go unpunished, certain facts cannot be ignored. California's prosecution in the first trial, despite its failure, was a bona fide effort.²⁰⁹ The same conduct of the police officers was the basis of both trials.²¹⁰ The aggressive pursuit of the second trial stemmed from public outrage and political pressure.²¹¹ And, this Comment argues, a federal interest in social stability *does not* justify successive prosecutions in a nation with a Double Jeopardy Clause and a long tradition of respect for individual rights and liberties.²¹² This is especially true because a successive prosecution in the interest of social stability is likely to take place in a highly charged atmosphere in which jurors would be hard-pressed to ignore the social effect of their verdict.²¹³

Such a conclusion does not mean that all successive prosecutions, even in the federal civil rights context, are unwarranted. When a federal civil rights interest is not vindicated by a state trial, a second trial should be permitted when there is evidence that the state did not put forth a bona fide effort²¹⁴ or when the federal charge is based on conduct not addressed in a state proceeding.²¹⁵ Nor does such a rule preclude the federal government from enforcing its civil rights statutes. First, it may

²⁰⁷ See *supra* note 194 and accompanying text.

²⁰⁸ See *supra* notes 201-05 and accompanying text.

²⁰⁹ See *supra* note 196.

²¹⁰ Terris, *supra* note 191. "While clever lawyers can show us that the first and second trials were for different crimes, no one really believes this. Common sense tells us that the defendants were tried twice for the same crime; use of excessive force." *Id.*

An analysis of whether the federal and state charges could be considered different "offenses," thereby rendering the Double Jeopardy Clause inapplicable, is beyond the scope of this Comment, which focuses on the dual sovereignty doctrine. See *supra* note 185. However, proponents of a successive prosecution in the King case did not rely on a theory that the second trial was based on a different offense. See *id.*

²¹¹ See *supra* notes 2-5 and accompanying text; see also *supra* note 202 (congressional pressure).

²¹² U.S. CONST. amend. V; See Terris, *supra* note 191. "[T]he American justice system operates on the principles . . . that prosecutors get only one chance to persuade a jury to convict. This is a hard rule. It means that defendants about whose guilt we are virtually certain sometimes go free . . ." *Id.*

²¹³ See Terris, *supra* note 191. "It is impossible to believe that the jurors in the second trial did not consider the possibility that dozens of people would lose their lives and part of Los Angeles would be destroyed if all the officers were found innocent." *Id.* See also Raspberry, *supra* note 8. "Surely [the jurors] must have given some thought to the fact that last year's acquittal . . . had triggered deadly rioting." *Id.*

²¹⁴ See *supra* note 199. See also Steven Chapman, *In the King Case, One Injustice May Lead to Another*, CHI. TRIB., May 14, 1992, at 27. "When the state courts habitually engage in outrageous abuses of their authority, an exception to the double-jeopardy ban is justified. But that isn't what produced [the King defendants'] verdict." *Id.*

²¹⁵ In such a scenario, the Double Jeopardy Clause would not be implicated because the defendant would not be prosecuted twice for the "same offense." See U.S. CONST. amend. V.

do so when states fail to prosecute. Second, the federal government can exercise its supremacy²¹⁶ by enacting legislation authorizing the Justice Department to pre-empt state action when it feels a compelling need to initiate a civil rights prosecution.²¹⁷

CONCLUSION

When the Supreme Court embraced the dual sovereignty doctrine in 1922, it relied on dicta from pre-Civil War cases that may have been tainted by the political turmoil of that era.²¹⁸ Ignoring centuries of contrary common law,²¹⁹ the Court chose a brand of federalism which dodged the Double Jeopardy Clause by allowing a single wrongful act to be treated as two offenses.²²⁰ Such a foundation made the doctrine suspect from the time it was announced.

However, the doctrine could be defended in an age when the state and federal governments operated in essentially different spheres and therefore arguably resembled two different sovereignties.²²¹ Today is not such an age, particularly in the field of criminal law, where state and federal officials often cooperate and statutes overlap.²²² These developments serve the public interest.²²³ But they also refute any argument that, in the words of Chief Justice Taft, "we have here two sovereignties."²²⁴

The Supreme Court has acknowledged the reality of cooperative federalism²²⁵ but has failed to consider its effect on the dual sovereignty doctrine. It has relied instead on a formalistic mantra that each level of government must be allowed to vindicate its interests fully.²²⁶ Such logic ignores the purpose of the Double Jeopardy Clause, and it does so unnecessarily: the legitimate interests of the states and the federal government could be preserved by adopting a new theory which would balance the interests of the government and the individual.²²⁷

²¹⁶ U.S. CONST. art. VI, cl. 2.

²¹⁷ See *Double Prosecution*, *supra* note 54, at 1555; *Camina*, *supra* note 65, at 361-62.

²¹⁸ *United States v. Lanza*, 260 U.S. 377 (1922); see *supra* notes 157-60 and accompanying text.

²¹⁹ See *supra* notes 114-17 and accompanying text.

²²⁰ See text accompanying *supra* note 82.

²²¹ See *Braun*, *supra* note 21, at 10.

²²² See *id.* at 5.

²²³ *Elkins v. United States*, 364 U.S. 206, 211(1960).

²²⁴ *United States v. Lanza*, 260 U.S. 377, 382 (1922).

²²⁵ See *supra* text accompanying notes 108-13.

²²⁶ *Heath v. Alabama*, 474 U.S. 82, 89 (1985); *Bartkus v. Illinois*, 357 U.S. 121, 137 (1959).

²²⁷ See *supra* text accompanying notes 130-48 for a sampling of proposed alternatives to the dual sovereignty doctrine.

In the Rodney King case, the defendants' interest in avoiding a second prosecution was unusually strong because of the extraordinary effort of the federal government in the second trial and the likelihood that conviction would be obtained in part because of outside pressures on the jury.²²⁸ The federal government had an interest in vindicating King's civil rights.²²⁹ It also had an interest in maintaining social stability by restoring people's faith in the justice system.²³⁰ However, given the Double Jeopardy Clause and our nation's respect for individual liberties, an interest in social stability does not justify a successive prosecution following a bona fide trial.²³¹ The unusually strong liberty interest of the King defendants, therefore, outweighs the government's legitimate interests and should have precluded the second King trial.²³²

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²²⁸ See *supra* notes 187-92 and accompanying text.

²²⁹ See *supra* notes 194-96 and accompanying text.

²³⁰ See *supra* notes 201-05 and accompanying text.

²³¹ See *supra* note 212 and accompanying text.

²³² A Gallup poll of 401 federal and state judges nationwide in June 1993 indicated that 27 percent believed the second King trial constituted double jeopardy. Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, A.B.A. J., Aug. 1993, at 71. The poll's margin of error was plus or minus 4.9 percent. *Id.*

District Judge John Davies, who presided over the federal trial, sentenced the guilty officers to only 30 months in prison, considerably less than the six to seven years recommended in federal sentencing guidelines. Jim Newton, *Koon, Powell get 2 1/2 Years in Prison*, L.A. TIMES, Aug. 5, 1993, at A1. Among the reasons he cited for the lighter sentences was the fact the defendants endured two trials. *Id.* "The second prosecution has the specter of unfairness," Judge Davies said. *Id.* The Justice Department disagreed with Judge Davies' criticism of the dual prosecutions and announced it would appeal the sentence. Henry Weinstein, *Justice Dept. to Appeal Powell, Koon Sentences*, L.A. TIMES, Aug. 28, 1993, at A1.

