Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments

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DOCTRINE BY FEDERAL AND STATE GOVERNMENTS

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ABSTRACT

Because the dual sovereignty doctrine permits multiple prosecutions of an individual by state and federal governments for essentially the same conduct, the increasing federalization of criminal law has marginalized much of the double jeopardy protection afforded by the Constitution. The Supreme Court’s admonitions to the federal government to judiciously exercise the ability to conduct subsequent prosecutions under federal law following state prosecutions led to the Justice Department’s 1959 creation of the Petite doctrine which limits and prioritizes prosecutions if overlapping jurisdiction exists. Over half of the states, at one time, limited or prohibited subsequent prosecutions and half still do. This article examines (1) the jurisprudential bases of the dual sovereignty doctrine as well as two recent practical applications, (2) whether the doctrine continues to be constitutionally viable in light of the increasing amount of federal criminal law in areas traditionally regarded as matters of state primacy and the rise in intergovernmental law enforcement efforts, and (3) the extent and enforceability of limitations placed upon the dual sovereignty exception to double jeopardy by the federal and state governments.
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In 1959 the United States Supreme Court held in *Bartkus v. Illinois* that prosecutions for essentially the same conduct may be conducted by separate sovereigns with accompanying punishments imposed upon those convicted of violating the laws of each.¹ This seeming violation of the 5th Amendment prohibition against double jeopardy is made possible by a judicial sleight of hand known as the “dual sovereignty” doctrine, which allows multiple prosecutions as long as they are conducted by wholly separate governmental entities. However, as Justice Hugo Black so aptly put the issue in his dissent in *Bartkus*, that a different sovereign is conducting the second prosecution doesn’t matter to the person charged—the defendant only cares that he or she is being made to stand trial twice for the same offense.² Justice Black’s observation has since underscored much of the criticism of the dual sovereignty doctrine.

To ameliorate some of the unfairness inherent in the potential for multiple prosecutions by different sovereigns, the federal government and many states have established limitations or, even, prohibitions on subsequent prosecutions after an initial prosecution in which jeopardy has attached.³ Part I of this inquiry discusses the dual sovereignty doctrine, focusing on its relationship to the 5th Amendment prohibition of multiple prosecutions and punishments. Part II addresses the greater potential for multiple prosecutions occasioned by the increasing “federalization” of criminal law. Next, parts III and IV, respectively, examine how the federal and state governments have addressed (or failed to address) the prospect of multiple prosecutions under the dual sovereignty doctrine. Part V concludes with suggestions for how to resolve the issues of jeopardy and dual sovereignty.

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² *Id.* at 155 (Black, J., dissenting).
³ See Parts III and IV, infra.
I.

The Doctrine of Dual Sovereignty

The theoretical justification for allowing different sovereigns to simultaneously pursue criminal prosecutions premised upon the commission of the same or similar acts is grounded in the notions that (1) each sovereign has a right to enforce its own laws and (2) each sovereign’s laws address different interests. The central inquiry in determining whether multiple prosecutions may constitutionally be pursued is the source of each prosecution’s power and whether it is, indeed, sovereign.

In the case of state prosecutions, the Supreme Court recognizes that states possessed sovereign authority to enforce criminal laws well before the creation of the United States and, in the American federal system, the states continue to be sovereign. Similarly, the Constitution of the United States affords the federal government sovereignty where the Constitution implicitly or explicitly grants national authority. Thus, each state government and the United States government are independent sovereigns.

6 Lanza, 260 U.S. at 381.
7 JACQUELINE R. KANOVITZ AND MICHAEL I. KANOVITZ, CONSTITUTIONAL LAW § 1.8 (11th ed. 2008) (hereafter Kanovitz & Kanovitz) (explaining that the federal government is one of enumerated and limited powers, exercising only those powers which have been delegated it by the Constitution but being “supreme within its sphere of operation”). In United States v. Lopez, 514 U.S. 549 (1995), one of the few recent cases to hold that Congress had overreached its powers under the Constitution discussed in greater detail in note 112 and accompanying text, the Court’s majority opinion began:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See art. I, § 8. As James Madison wrote [in The Federalist No. 45], "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

514 U.S. at 552.
8 Lanza, 260 U.S. at 382.
The Supreme Court had no reason to address the issue of subsequent prosecutions by state governments prior to 1969, because the 5th Amendment provisions concerning double jeopardy had yet to be incorporated and applied to the states. In 1937, the Court held in *Palko v. Connecticut* that 5th Amendment protections against double jeopardy, while no doubt important, did not rise to such a level of fundamental fairness as to require incorporation and application to the states under the 14th Amendment’s due process clause.9 Frank Palko was initially convicted of second degree murder and sentenced to life after crucial state’s evidence was ruled inadmissible at trial.10 The state appealed the suppression ruling which resulted in a reversal of the conviction and remand for retrial.11 The ensuing trial resulted in a conviction for murder in the first degree and a sentence of death.12

Employing traditional double jeopardy analysis, Palko argued that a conviction for second degree murder implicitly acquitted him of any greater offense. In an opinion by Justice Benjamin Cardozo, the Supreme Court disagreed that the 5th Amendment guarantee against being twice put in jeopardy for the same offense should be applied to the states by virtue of the 14th Amendment.13 This classic Cardozo opinion established the principle of “selective incorporation” under which only those matters in the Bill of Rights “necessary to a scheme of ordered liberty” would be incorporated under the 14th Amendment’s due process clause and applied to the states.14

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10 *Id. at* 320.
11 *Id. at* 321.
12 *Id. at* 321-22.
13 *Id. at* 28.
14 *Id. at* 324-25. Discussing Palko’s contention that double jeopardy should be applied to the states through the due process clause of the 14th Amendment, Cardozo concluded:
Because *Palko* refused to extend double jeopardy protections to the states, the dual sovereignty doctrine was created and applied to the federal government by the Supreme Court long before the Court’s subsequent incorporation of the protection against multiple prosecutions and application to the states in *Benton v. Maryland* in 1969. The Court first recognized the possibility of overlapping state and federal jurisdiction in 1820 in *Houston v. Moore* and concluded some 25 years later in *Fox v. Ohio* and *United States v. Marigold* that, if the same act violated both federal and state law, it could be prosecuted by either. In 1852, two years after *Marigold*, the Court for the first time held in *Moore v. Illinois* that federal prosecutions subsequent to state prosecutions were not

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See also Kanovitz and Kanovitz, note 7 supra at § 1.13 (discussing the due process clause of the 14th Amendment and its relation to the Bill of Rights and the inclusion and application to the states of rights deemed fundamental to the American justice conception of justice through the process of selective incorporation).

16 In *Houston v. Moore*, 18 U.S. 1, 34 (1820), a state militiamen was prosecuted for failing to report with his detachment when ordered to do so by the President of the United States. The defendant maintained that a Pennsylvania statute providing for a state court martial sanctioning such behavior was unconstitutional because the offense was one against the United States. The United States Supreme Court held that the conduct could be punished under the laws of either the state or the United States since Congress had not statutorily exercised an exclusive right to punish an offender that would preclude state prosecution.
17 In *Fox v. Ohio*, 46 U.S. 410, 435 (1847), the defendant’s conviction for passing and uttering a counterfeit coin under the laws of Ohio was affirmed despite the defendant’s contention that the U.S. Constitution’s express provision of authority to Congress to coin money under Article I, Section 8, clauses 5 and 6, made an Ohio law prohibiting counterfeiting beyond the purview of the state since a conviction for counterfeiting in the state court would bar a federal prosecution under the 5th Amendment. The Court held that there was no jeopardy protection since the 5th Amendment protected only against the federal government (citing the Court’s earlier decision in *Barron v. City of Baltimore*, 32 U.S. 243, 250-51 (1833) which refused to apply the Bill of Rights protections to the states under the due process clause of the 14th Amendment). The Court’s subsequent enunciation of the doctrine of selective incorporation in *Palko v. Connecticut* undermined the rationale of the Court’s decision in *Fox*.
18 *United States v. Marigold*, 50 U.S. 560, 568-69 (1850). Another counterfeiting case in which the defendant contested the ability of the United States to make it illegal for a person to import counterfeit coinage. The Court held against the defendant stating that the authority of Congress to outlaw counterfeiting was given Congress pursuant to its power to coin money under Article I, Section 8 and “the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation.”
barred by the Double Jeopardy Clause of the 5th Amendment. Significantly for dual sovereignty purposes, the Court observed in Moore v. Illinois:

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other . . .

Although the philosophical concept of dual sovereignty was thus recognized early on, it was not used to permit multiple prosecutions until the 1920’s when a unanimous Supreme Court held in United States v. Lanza that a federal prosecution for violation of the Prohibition Era Volstead Act following a successful prosecution under state liquor laws was not barred by the 5th Amendment’s Double Jeopardy Clause since both Congress and the states had the power to enact liquor laws under the 18th Amendment (Prohibition). The Court held that while state and federal laws may vary, this is an inseparable incident of independent legislative action in distinct jurisdictions. . . . We have here two sovereignties, deriving power from

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19 Moore v. Illinois, 55 U.S. 13, 18-19 (1852). Moore involved a defendant charged with harboring and secreting a slave in violation of state law. The Court held that the Illinois statute which had as its purpose the prohibition of introducing fugitive slaves into Illinois was not inconsistent with the provisions of a federal law which prohibited similar conduct if detrimental to the owner of the fugitive slave. The Court noted, while the statutes addressed different purposes (the federal statute addressing interference with recapture and reclamation of fugitive slaves by their owners and the Illinois statute preventing the immigration of certain classes of persons, including fugitive slaves, to the state without regard to an owner’s interest in reclaiming them), the statutes were not inconsistent and a state had a right not surrendered by the states or restrained by Congress to control the introduction of “paupers, criminals, or fugitive slaves, within their borders, and punish those who thwart this policy by harboring, concealing or secreting such persons.”

20 Id. at 20.

21 See Michael J. Hagburg, Statutory Bars to Dual Sovereignty Prosecutions: The Minnesota and North Dakota Approaches, 72 North Dakota L. Rev. 583 (1996) (hereafter Hagburg) (noting that while the Supreme Court recognized the potential for multiple prosecutions under dual sovereignty, the doctrine “existed as a mere philosophical concept” until the 1920’s).


23 U.S. v. Lanza, 260 U.S. 377, 381 (1922). The 18th Amendment provided in Section 2 “[t]he Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.”
different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other . . . 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.24

The holding in *Lanza* was explicitly reaffirmed in 1959 in *Abbate v. United States* (decided the same day as *Bartkus v. Illinois*) as was the reasoning in *Lanza* that, were an accused able to escape federal prosecution by pleading to a lesser state charge, violence would be done to the interests of the federal government, especially if the accused’s actions impose more seriously upon federal interests.25 Justice Black also dissented in *Abbate* joined by Chief Justice Earl Warren and Justice William O. Douglas, both of whom joined in his dissent in *Bartkus*. Black added a new wrinkle to the argument he advanced in *Bartkus* by asserting in his *Abbate* dissent that the federal and state governments could not properly be regarded as two separate sovereigns similar to the relationship of actual foreign regimes.26

Application of 5th Amendment double jeopardy protections to the states would not occur until 1969 in *Benton v. Maryland*,27 32 years after the Court’s decision in *Palko*. In *Benton*, the Supreme Court finally determined that the guarantees against being twice placed in jeopardy or twice punished for the same offense were of such constitutional magnitude that they should be incorporated and applied to the states under the 14th Amendment’s due process clause.28 By this time, only Connecticut, Maryland,

26 Id. at 203 (Black, J., dissenting).
28 Id. at 794-95. Justice Thurgood Marshall wrote in the majority opinion:
Massachusetts, North Carolina and Vermont did not have some state constitutional or statutory provisions prohibiting placing a defendant twice in jeopardy. As Tables 1 and 3 in Part IV evidence, none of these states have since provided constitutional protections although Connecticut, Massachusetts and Vermont have since enacted statutory protections and the courts in all 5 states have held jeopardy protections to exist under these statutes or other provisions of their state constitutions or at common law.

Prior to the Court’s application of double jeopardy protections to the states in 

Benton, the Supreme Court had occasion in 1959 to determine whether a state prosecution following an unsuccessful federal prosecution was violative of due process

In an increasing number of cases, the Court "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . ." (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)) . . . For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, Palko v. Connecticut is overruled.

29 See Hagburg, note 21, supra at 587.
30 Section 54-200 of the Connecticut Code of Criminal Procedure (1949) addresses double jeopardy by implication when it states that “[n]o acquittal or conviction for any criminal offense, had upon any complaint issued by the procurement or at the solicitation of the person committing it, shall be a bar to another complaint or information for the same offense.” Section 7 of Chapter 263 of the Annotated Laws of Massachusetts (1902) provides that “a person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits . . . .” 13 Vermont Code § 6556 (1947) provides double jeopardy protection for offenses if the accused “was acquitted by a jury upon the merits on a former trial.” Section 6557 of the Vermont Code further limits the protection to instances in which a former acquittal is not based on a variance between the charging instrument and the proof or upon a sustained exception to the form of the charging instrument.

31 See State v. Rawls, 198 Conn. 111, 502 A.2d 374, n. 3 (1985) (“[a]lthough the Connecticut constitution contains no specific double jeopardy provision, the due process guarantees of article first, § 8, [of the Connecticut Constitution] have been held to include such a protection”); Commonwealth v. Vanetzjian, 350 Mass. 491; 215 N.E.2d 658, 660 (1966) (“[b]oth the common law and our statutes provide that a person may not be twice put in jeopardy for the same offence”); Apostledes v. State, 83 Md. App. 519; 575 A.2d 792, 794 (1990) (“[t]he Fifth Amendment to the United States Constitution and the Maryland common law provide that no person should be put in jeopardy twice for the same offense”); State v. Crocker, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954) (“[i]t is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. . . . While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the ‘law of the land’ within the meaning of art. I, sec. 17 [of the North Carolina Constitution]”); State v. Deso, 110 Vt. 1, 1 A.2d 710, 715 (1938) (“[w]here one offense is a necessary element in, and constitutes a part of, another, and both are in fact but one transaction, an acquittal or conviction of one is a bar to a prosecution for the other”).
generally in *Bartkus v. Illinois*. The Supreme Court ruled in a 5-4 decision authored by Justice Felix Frankfurter that it did not. After being acquitted for bank robbery under federal law, Bartkus was convicted for the same conduct under applicable state law and given a life sentence as a habitual felony offender. While the Court acknowledged that (1) the Federal Bureau of Investigation shared the fruits of its investigation with state prosecutors and (2) the sentencing of Bartkus’ co-defendants in federal court was delayed until after they testified against Bartkus in the state court proceedings, the Court concluded that each prosecution was, for all intents and purposes, separately conducted.

The majority opinion observed that, of the 28 state courts that had addressed the issue of state prosecution following federal prosecution, 27 concluded that a prior federal prosecution was not a bar to subsequent proceedings for the same act under state law. The Court agreed with the overwhelming majority of state courts and held that subsequent state prosecutions were not generally barred under the due process clause of the 14th Amendment. The Court recognized the unfairness that could conceivably be visited on states and their interests in enforcing their own criminal laws if prosecution for a major state offense were precluded on jeopardy grounds by a former prosecution for a comparatively minor federal offense.

Justice Black, joined by Chief Justice Warren and Justice Douglas (the more liberal bastions of the Court even then) strongly dissented, arguing that, since there was

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33 Id. at 122.
34 Id. at 122-23.
35 Id. at 135-36. Only Florida was cited by the Court as a state not permitting state prosecution following a federal prosecution but, even here, the Court noted that this restriction might be limited to the Florida court’s interpretation of the 18th Amendment instituting Prohibition.
36 Id. at 136.
37 Id. at 137. The Court previously inverted this argument for the protection of federal interests in *Lanza* and *Abbate*. See note 25 and accompanying text.
nothing superficially wrong with the initial federal prosecution, the due process clause of the 14th Amendment should preclude a subsequent state prosecution just as the 5th Amendment would prevent a second federal prosecution.\(^{38}\) Black contended that to hold otherwise “limits our already weakened constitutional guarantees against double prosecution.”\(^{39}\) Black concluded his dissent with an argument that has resonated throughout the ensuing debate on the constitutional viability of the dual sovereignty doctrine:

> 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 ‘Sovereigns’ to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these ‘Sovereigns’ proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.\(^{40}\)

Justice Black’s words have been quoted frequently in criticisms of the dual sovereignty doctrine over the ensuing 50 years.\(^{41}\)

A. Other Sovereigns Included Under the Doctrine.

The Supreme Court has expanded the dual sovereignty doctrine to encompass sovereign relations other than those existing between the federal and state governments. In 1985 in *Heath v. Alabama*\(^{42}\) a slightly divided Court (7-2) found the application of the dual sovereignty doctrine to successive state prosecutions “inescapable” where a husband hired contract killers to abduct his wife from their Alabama home along the Alabama-

\(^{38}\) *Id* at 150 (dissenting opinion).
\(^{39}\) *Id*.
\(^{40}\) *Id.* at 155.
Georgia border and kill and discard the body in Georgia.\(^{43}\) The Court decided that Heath’s guilty plea and life sentence under Georgia law did not preclude the state of Alabama from prosecuting Heath for capital murder since the states are no less sovereign with respect to each other than they are with respect to the federal government.\(^{44}\) Using a similar rationale, the Court held in 1978 in *United States v. Wheeler*\(^{45}\) that prosecution of a Native American for statutory rape under federal law was not barred by Wheeler’s earlier conviction for a lesser included offense by a Navajo tribal court. The Court reasoned that, since American Indian tribes have not given up full sovereignty and retain the attributes of sovereignty as to their people and their territory, Native American tribes are a separate sovereign until Congress acts to remove their sovereignty.\(^{46}\)

Although many European countries regard prosecutions by one nation as prohibitive of a subsequent prosecution by another for the same conduct under the doctrine of *non bis in idem*,\(^{47}\) the doctrine of dual sovereignty has been invoked in subsequent prosecutions by the United States and many of the states to preclude the assertion of jeopardy protections following prosecutions in foreign jurisdictions.\(^{48}\) The

\(^{43}\) *Id.* at 88.

\(^{44}\) *Id.* at 89.


\(^{46}\) *Id.* at 322-30; see also William Bradford, *Tribal Sovereignty and United States v. Lara: “Another Such Victory and We Are Undone”: A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 84 (2004) (characterizing the Court’s decision as recognizing the “primeval sovereignty” of the Navajo nation “at least with regard to their own memberships”); *but see United States v. Enas*, 255 F.3d 662, 664, 667 (9th Cir. 2001) *cert. den.* 534 U.S. 1115 (2002) (excepting delegated power to Indian tribes by Congress from dual sovereignty exception because of same source of power).

\(^{47}\) The international law equivalent of double jeopardy. *see BLACK’S LAW DICTIONARY* 948 (5th ed. 1979) (translated as “[n]ot twice for the same” which Black’s describes as the same principle as “put in jeopardy”).

\(^{48}\) *See Dax Eric Lopez, Note, Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem*, 33 VANDERBILT J. TRANSNATIONAL LAW 1263, 1271-74 (2000) (discussing the evolution and treatment of the concept “non bis in idem”); *see Chua Han Mow v. United States*, 730 F.2d 1308, 1313 (9th Cir. 1983) (Malaysian citizen’s prosecution and conviction for importation and distribution of a controlled substance under federal law was not barred by his conviction in Malaysia for the same offense).
importance of the doctrine of dual sovereignty to American jurisprudence is underscored by the fact that the United States successfully preserved the doctrine as a specifically recognized exception to double jeopardy in the International Covenant on Civil and Political Rights, a United Nations treaty authored in 1966 pursuant to the Universal Declaration of Human Rights.

B. Exceptions to the Doctrine.

The exceptions the Supreme Court has recognized to the dual sovereignty doctrine are extremely narrow in scope, one involving governments collusively acting to maintain multiple prosecutions that was alluded to in the Court’s opinion in Bartkus, and two others involving issues of sovereignty. In Puerto Rico v. Shell Co., the Court held that the doctrine had no application where the federal government and a territory of the United States engaged in dual prosecutions because territories, unlike states, are not separate sovereigns with respect to the United States government. The D.C. Circuit of Appeals prohibited prosecutions by the District of Columbia following federal prosecutions based on the same rationale because the district is a federal territory.

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53 Id. at 264; see Grafton v. United States, 206 U.S. 333, 352 (1907) (an earlier case prohibiting prosecution by the Philippines following acquittal of the defendant in a U.S. military courts martial); see also United States v. Enas, 255 F.3d 667 (excepting delegated power to Indian tribes by Congress from dual sovereignty because derived from same source of power).

In *Nielsen v. Oregon* (1909), a peculiar case in which the alleged crime was committed in a river that comprised the boundary between two states, the Court held that both states had concurrent jurisdiction over the river and that one state could not prosecute a citizen of the second for doing something condoned by the other. Specifically, Oregon could not prosecute Nielsen for operation of a “purse net” (a fishing net, the mouth of which may be closed or drawn together like a purse) when Nielsen held a valid license to use the net from the state of Washington. Because of the unusual fact situation, the Supreme Court would later limit its holding in *Nielsen* to the specific facts of the case in its opinion in *Heath v. Alabama*, the opinion that held that states are separate sovereigns with respect to each other.

A third limitation to the dual sovereignty doctrine exists where state and federal prosecutors conspire to re prosecute a defendant following an unsuccessful prosecution, the possibility of which was alluded to by the Supreme Court in *dicta* in *Bartkus*. While state and federal officials are free to cooperate, they may not manipulate the system to get a second bite at the apple. To date, the Supreme Court has not reversed a conviction on this basis. The Court did not address in *Bartkus* the level of intergovernmental collusion or cooperation necessary to sustain such a claim nor has it since done so. *United States v. Belcher* is the only lower court finding of a jeopardy bar to a subsequent prosecution based on intergovernmental collusion that was not reversed on appeal. *Belcher* is unique because the state’s attorney who un successfully prosecuted the defendants in state court

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56 Id. at 321.
57 Id.
was appointed a special prosecutor in the federal case and because the ruling in the defendants’ favor was never appealed.

C. Recent Applications of the Dual Sovereignty Doctrine I—The Rodney King Case

One of the most prominent recent examples of the effects of the dual sovereignty doctrine surrounded Rodney King’s beating at the hands of law enforcement in Los Angeles in 1991. Even with a videotape of the officers beating Mr. King in evidence, a state trial jury acquitted the officers of any criminal wrongdoing under California law. The United States then prosecuted the officers for the exact same conduct, alleging the police violated Mr. King’s federally protected civil rights. The officers’ conviction in federal court renewed interest in the dual sovereignty doctrine, especially as applied to civil rights statutes.

Remarkably, the 9th Circuit Court of Appeals gave the defendants’ argument that they had been subjected to Bartkus-like collusion by state and federal prosecutors short shrift, as did the United States Supreme Court which refused to accept certiorari on the

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62 Id. at 668.
63 See Michael Dawson, Note, Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, 102 Yale L. J. 281, n. 113 (1992) (hereafter Dawson) (noting that the Belcher decision was never appealed in the context of a delineation of a number of other citations that rejected sham prosecution claims).
64 See United States v. Koon, 34 F.3d 1416, 1424-25 (9th Cir. 1994) (reciting the factual and legal background of the state case leading to the filing of civil rights charges in federal court. A much more detailed recitation of the videotape depiction of the injuries inflicted on Mr. King is contained in the district court’s Sentencing Memorandum, United States v. Koon, 833 F. Supp. 769, 774-80 (C.D. Cal. 1993)).
66 See United States v. Koon, 34 F.3d 1416, 1438-39 (9th Cir. 1994). While the 9th Circuit noted that the trial court denied petitioners’ requested evidentiary hearing concerning the issue of Bartkus-like collusion between California and federal authorities, the appellate court dismissed petitioners’ assertion of error concerning the issue finding that petitioners’ allegations showed little more than intergovernmental cooperation in the second prosecution which failed to rise to the level of a “sham” prosecution, particularly in light of the federal government’s independent investigation of the case.
The only issue accepted by the Supreme Court for *certiorari* review was the propriety of a substantial downward departure under the federal sentencing guidelines in assessing punishment against the convicted officers.68

**D. Recent Applications of the Dual Sovereignty Doctrine II—United States vs. Robert Angleton**

A high profile Texas case that was denied *certiorari* by the United States Supreme Court69 provides a much better example of the current debate. Robert Angleton, a Houston bookie and police informant, was indicted for capital murder in 1997 for allegedly paying his brother to kill Angleton’s wife.70 When Angleton’s brother committed suicide in jail in 1998, he left a note claiming sole responsibility for the murder.71 At the state trial, Angleton was acquitted by a jury of all charges.72 At the time, Angleton was the only person tried for capital murder in state court in Harris County to be acquitted since the reinstatement of capital punishment in Texas in 1976.73

Six months after his acquittal, federal law enforcement agents began investigating Angleton for potential Racketeer Influenced and Corrupt Organization Act (“RICO”) charges related to his gambling activities and income tax invasion, but did not instigate an investigation into the murder of Angleton’s wife until the Harris County District Attorney’s Office sought assistance from the U.S. Attorney’s Office.74 In 2000, the U.S.

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67 *Koon v. United States*, 515 U.S. 1190 (1995). The Court limited the grant of certiorari to only Question 1, the sentencing departure question, that was decided in *Koon v. United States*, 518 U.S. 81, 115-14 (1996).

68 *Id.* The Court approved a downward departure under the federal sentencing guidelines based on Mr. King’s provocative conduct but found that the sentencing court used inappropriate factors such as the defendant’s low likelihood of recidivism and career loss in reducing the sentencing range three additional levels. The Supreme Court remanded the case for further proceedings consistent with the opinion.


71 *Id.* at 699.

72 *Id.* at 700.

73 *Id.*

74 *Id.*
Attorney’s Office requested that the Federal Bureau of Investigation (“FBI”) expand its investigation to include the murder. The request resulted in the creation of an “ad hoc task force” of FBI agents and the Houston Police Department (“HPD”) officers who originally investigated the homicide. The HPD officers were sworn in as U.S. Deputy Marshals to allow them access to FBI files. The joint task force was (1) allowed access to all of the evidence used to prosecute Angleton in the state trial, (2) provided assistance by the state assistant district attorneys who had prosecuted the capital murder case, and (3) allowed to interview the state jurors who served on the capital murder jury to determine why they acquitted Angleton.

Although the investigation resulted in no RICO or tax evasion charges, in 2002 a grand jury indicted Angleton under a federal murder-for-hire statute that required the jurisdictional element of some involvement in interstate commerce. At the hearing on Angleton’s motion to dismiss the federal indictment on jeopardy grounds, both the government and the defense agreed the federal prosecution would rely upon much of the same evidence utilized in the state prosecution. In its opinion denying Angleton’s motion, the trial court acknowledged that the state and federal crimes were identical for purposes of determining jeopardy under United States v. Blockburger, the United States Supreme Court opinion that established the test for determining whether offenses are the

75 Id.
76 Id.
77 Id.
78 Id. at 701. Angleton was indicted under 18 U.S.C. § 1958 (1996), “Use of interstate commerce facilities in the commission of murder-for-hire,” which carries a punishment of death or life imprisonment, or a fine not to exceed $250,000.00, or both. The interstate commerce allegation contended that Angleton caused his brother to travel in interstate commerce from California to Texas to murder Angleton’s wife.
80 Id. at 706.
same for 5th Amendment double jeopardy purposes when prosecuted by a single sovereign.\textsuperscript{81}

Angleton’s lawyer, noted Houston criminal defense lawyer Mike Ramsey, contended there was Bartkus-like collusion between the state of Texas and the federal government following the state’s unsuccessful prosecution. In support, Ramsey cited the extensive involvement of state officials in the federal prosecutorial efforts.\textsuperscript{82} The trial court responded that the facts of Bartkus and many other subsequent prosecution cases considered by the federal courts indicated there could be extensive involvement between governments without such cooperation rising to the level of a collusive prosecution.\textsuperscript{83} Among the examples cited by the trial court were prosecutions in which (1) state sovereigns requested federal prosecution, (2) the initial sovereign turned over all of its evidence to the second, and (3) cross designations of state officials as federal officials were made.\textsuperscript{84} Based on the foregoing, the court concluded that it could find no collusion on the record before it.\textsuperscript{85}

The trial court also ruled against Angleton’s arguments that the findings by the state jury barred any inconsistent findings in a retrial under the doctrine of collateral

\textsuperscript{81} United States v. Blockburger, 284 U.S. 299, 304 (1932). Since the double jeopardy clause protects against multiple prosecutions by the same sovereign for the same offense, the Court in Blockburger faced the task of defining what constitutes the same offense since the Constitution does not. The Court responded that

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

\textsuperscript{82} Angleton, 221 F.Supp.2d at 713
\textsuperscript{83} Id. at 713-14.
\textsuperscript{84} Id. at 713, 715, 720.
\textsuperscript{85} Id. at 722.
estoppel\textsuperscript{86} because (1) the federal government was not a party to the initial prosecution and (2) collateral estoppel normally does not apply to successive prosecutions by state and federal governments under controlling authority in jurisdictions under the domain of the U.S. Fifth Circuit Court of Appeals, which encompasses Texas.\textsuperscript{87} Ramsey responded to the local press, “[t]he federal system is arrogant to the extent it believes only it can do justice. If a state jury is not to be believed when it acquits, how can it be believed when it convicts?”\textsuperscript{88} The question was rendered moot when Angleton subsequently fled to the Netherlands using a fraudulent passport.\textsuperscript{89}

Angleton was detained by Dutch authorities who refused to extradite him to the United States to be retried for the murder-for-hire offense or the related failure to appear

\textsuperscript{86} In \textit{Ashe v. Swenson}, 397 U.S. 436, 443-44 (1970), the Court described the concept and application of “collateral estoppel” as follows:

”Collateral estoppel” is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice (footnote citations omitted). It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in \textit{United States v. Oppenheimer}, 242 U.S. 85.

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality (footnote citations omitted). Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration" (footnote citations omitted). The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." \textit{Sealfon v. United States}, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

\textsuperscript{87} \textit{Angleton}, 221 F.Supp.2d at 726-729.

\textsuperscript{88} Rosanna Ruiz and Susan Bardwell, \textit{Angleton Arrested, This Time by Feds, Indictment Lists Murder for Hire}, \textit{Houston Chronicle}, January 26, 2002, at 1A. For a well written discussion of the facts underlying the Angleton case see Owsley, note 41 supra at 768-70.

\textsuperscript{89} \textit{United States v. Angleton}, Cause No. 05-20408, *2 (5th Cir. September 28, 2006) (unpublished pursuant to 5th Cir. R. 47.5)(available at 5th Circuit Web Site under “opinions”) (pagination reflects the Adobe document).
Dutch authorities did, however, agree to extradite Angleton on three charges related to passport fraud. Under the extradition treaty between the United States and the Netherlands, a person extradited on some charges, but not others, can only be prosecuted for those charges for which he or she is extradited. Upon his return, Angleton pleaded guilty to the federal passport charges and was assessed a 60 month prison sentence that was affirmed by the 5th Circuit in an unpublished opinion.

II. Problems Occasioned by the Federalization of Criminal Law

Although seemingly at odds with the 5th Amendment protections against double jeopardy, the topic of dual sovereignty was not particularly contentious until the latter part of the Twentieth Century when federal criminal statutes increasingly made conduct already criminalized under state law illegal under federal law as well. In the American conception of federalism, matters pertaining to health and safety have traditionally been considered matters of state primacy. Consequently, states historically have determined what conduct should be criminalized together with the appropriate sanctions for each

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90 Id.
91 Id.
92 Id. at 9-10; see Art. XV, Netherland Extradition Treaty, 35 U.S.T. 1334, 1342 (June 24, 1980).
93 U.S. v. Angleton (September 28, 2006) supra at *4. See 5th Cir. R. 47.5 “Publication of Opinions” (limiting publication of opinions that merely decide particular cases on the basis of well-settled principles of law of little interest to persons other than the parties).
94 See generally Merkl, note 5 supra at 175.
95 Id.; see also James A. Strazella, Reporter to the Task Force on Federalization of Criminal Law, American Bar Association Criminal Justice Section, THE FEDERALIZATION OF CRIMINAL LAW (1998) (hereafter Strazella) at 24-25:

Constitutional law recognizes that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . ." (quoting Patterson v. New York, 432 U.S. 197, 201 (1977)). In practice, most criminal conduct in America has always been, and still is, defined by state legislatures, investigated by state agents, prosecuted by state prosecutors, tried in state courts, and punished in state prisons. This accords with the historical American principle that the general police power lies with the states and not with the federal government, although there clearly is an appropriate sphere for federal criminal legislation.
crime. The Supreme Court ruled in *Champion v. Ames* in 1903 that the Commerce Clause was an appropriate vehicle for Congress to use to supplement state criminal law. Following *Champion v. Ames*, Congress passed an increasing number of criminal laws dealing with conduct customarily falling within the purview of state law. In the latter half of the 20th Century, particularly the last quarter, a marked expansion of federal criminal law occurred.

Given the increasing overlap between state and federal criminal laws, many scholars argue that, even though dual sovereignty may have once served a useful purpose when federal criminal law was limited to conduct pertaining distinctly to the national government, this is no longer the case with the increasing federalization of criminal law. Instances abound in which federal criminal statutes overlap already existing state law. For example, the federal government now has statutes addressing failure to pay child

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96 In *Champion v. Ames*, 188 U.S. 321 (1903) the Supreme Court upheld Charles Champion’s conviction for transporting Paraguayan lottery tickets from Texas to California via the Wells Fargo Company under a federal statute that prohibited sending lottery tickets in interstate or foreign commerce. The Court held:

> We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

188 U.S. at 363-64.


98 See, e.g. Owsley, note 41 *supra* at 765, 779, ns.83-85 (citing a variety of articles critical of the dual sovereignty doctrine).
support (The Child Support Recovery Act), murder and robbery (The Hobbs Act), and auto theft/carjacking (The Anti-Car Theft Act).

The American Bar Association (“ABA”) has bemoaned the increase in federal criminal laws. A task force created by the ABA in 1998 chaired by former U.S. Attorney General Edwin Meese III revealed that federal criminal law had increased in astonishing proportions in recent decades, resulting in there being no clear-cut demarcation of what constitutes a “federal crime.” The task force found that over 40% of the federal criminal law enacted since the American Civil War was enacted after 1970 with an estimated 1000 bills addressing criminal acts being introduced in the 105th

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99 18 U.S.C. § 228 (1994) applies to children living in a different state from the payor and only to delinquent amounts in excess of $5000. See Harry Litman and Mark D. Greenberg, *Legislating Federal Crime and Its Consequences: Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 72, 80-81 (1996) (hereafter Litman and Greenberg) (maintaining that the Act’s purpose was to prosecute only the most egregious child support violators who take advantage of state jurisdictional limitations to escape state prosecution—Litman and Greenberg note that only 28 such prosecutions were instituted in the year preceding their article.)

100 18 U.S.C. § 1951 (1994) makes a federal offense of conduct interfering with interstate commerce by threat of violence. See James S. Gorlick and Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 973 (1995) (claiming that the statute “potentially federalizes any convenience store hold-up”) see also Litman and Greenberg, note 99 supra at 83 (recognizing that without federal prosecutorial discretion, Hobbs Act prosecutions could “result in federal prosecution of most convenience store holdups, duplicating and or supplanting state prosecutions and expanding the business of the federal criminal justice system exponentially”).

101 18 U.S.C. § 2119 (1994) makes carjacking a federal offense if a person, while possessing a firearm, "takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so. The statute has been described as “making almost any theft of an automobile a federal offense, intrud[ing] on a traditionally local area of law enforcement without lowering the crime rate.” Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 479 (1994).

102 The Task Force on the Federalization of Criminal Law remonstrated that:

The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification, is moving the nation rapidly toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it.

Strazella, note 95 supra at 9.

103 *Id.*
Congress through July 31, 1998 alone. The Task Force characterized the trend toward federalization as troubling and expressed deep concern that local values would be lost in the following passage:

Local crimes involve local values and should be handled by state law. . . . Community views also differ from state to state on related issues . . . In the participatory democracy of our large nation, with varying local values, citizen views about such matters are more likely to be felt and acted upon through representatives at the local level rather than at the federal level where most of those in power are removed from affected local values and more preoccupied with issues of national and international concern.

The First Congress initially established only 17 federal crimes when it passed the Crimes Act of 1790. All seventeen offenses directly implicated federal interests. Federal criminal law increased incrementally thereafter until a significant federalization of criminal law began with the passage of the 13th, 14th and 15th Amendments following the Civil War. The expansion continued during Prohibition with the passage of the Volstead Act. More recent federal laws have addressed such problems as organized crime and drug and illegal alien trafficking. Today, there are in excess of 3000 criminal federal laws throughout the United States Code.

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104 Id. at 7, 10-11, n.15; see also Merkl note 5 supra at 177-78; Laura G. Dooley, The Dilution Effect: Federalization, Fair Cross-Sections and the Concept of Community, 54 DePaul L. Rev. 79, 102 (2004) (hereafter Dooley) (both discussing the findings of the task force).
105 Strazella, note 95 supra at 44.
106 1 Stat. 112 (1790).
107 See Beale, note 97 supra at 40 (describing the pre-Civil War crimes as involving treason, bribery of federal officials, perjury in federal court, theft of federal government property, and revenue fraud).
108 Commonly referred to as “the Civil War Amendments.” The last sections of the 13th, 14th, and 15th Amendments specifically authorize Congress to enforce the amendments by appropriate legislation.
110 For example, the Racketeering Influenced and Corrupt Organizations Act (RICO) was enacted as Title IX of the Organized Crime Act of 1970 and codified as 18 U.S.C. §§ 1961-1963. The Drug Abuse and Prevention Control Act of 1970, more commonly known as the “Controlled Substances Act,” is codified at 21 U.S.C. § 801, et seq. The Anti-Drug Abuse Act of 1988 which created and placed the Office of National Drug Control Policy (ONDCP) in the Executive Office under the control of its director, who is often referred to as the “Drug Czar,” is codified at 8 U.S.C. § 1227 et seq. Congress has created a number of
Not until the late 20th Century in cases such as *United States v. Lopez*112 and *United States v. Morrison*113 which addressed the constitutional bases for the Gun Free School Zones Act and the Violence Against Women Act, respectively, has the Supreme Court shown any inclination to invalidate federal statutes because the bases for federal jurisdiction under the Commerce Clause were so tenuous as to not support federal legislation under the Constitution. With the expansion of federal criminal law and the rise of cooperative federalism in law enforcement, many have argued that the concept of dual sovereignty is at odds with the original intent of the Founders.114

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111 See Dooley, note 104 supra at 101 n.32; Beale, note 97 supra at 44 (both approximate the number at more than 3000). The ABA Task Force on Federalization of Criminal Law was of the opinion, based on its findings, that the actual number of federal crimes was “unquestionably larger” than the frequently cited 3000 figure and growing. Strazella, note 95 supra at 9-11 n.11.

112 *Lopez*, 514 U.S. at 557, 563-68. The Court observed that, although the Court had greatly expanded its interpretation of the Commerce Clause, Congress had gone too far in enacting the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q). The Court concluded that the government’s arguments in its brief on appeal (Congress made no explicit findings regarding how gun possession in public schools affected interstate commerce) that possession of firearms in a school zone affects the national economy because (1) of the costs of increasing violent crime are passed on to the entire population, (2) violent crime in certain areas decreases the willingness of citizens to travel to these areas, and (3) possession of guns in schools threatens the learning environment in ways that will result in a less productive citizenry, were too remotely connected to interstate commerce, 514 U.S. at 561-64. The Court observed that, were it to accept the government’s reasoning:

> It is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate . . . .

514 U.S. at 564.

113 *United States v. Morrison*, 529 U.S. 598, 614-19 (2000). One of Morrison’s victims, Christy Brzonkala, appealed a ruling by the 4th Circuit Court of Appeals holding unconstitutional the Violence Against Women Act, 42 U.S.C. § 13981 (1994), which created a federal civil remedy for victims of gender-based violence. Writing for the majority, Chief Justice Rehnquist stated that Congress had overstepped its authority under the Commerce Clause and that the legislation could not be premised upon the enforcement provisions of the 14th Amendment because the 14th Amendment protected only against actions by state rather than private actors.

114 See, e.g. Paul G. Cassell, *The Rodney King Trial and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU’s Schizophrenic Views of the Dual Sovereignty Doctrine*, 41 U.C.L.A. L. REV. 693, 709-15 (1994) (asserting that, although not free from doubt, a cogent argument can be made that the Framers intended to adopt double jeopardy as it existed under English Common Law which allowed an accused to raise the defense of autrefois acquit, loosely translated as “formerly acquitted,” if he
The increase in the number of overlapping federal laws also comes at a time when jurisdictional disputes concerning the province of the national and state governments have increased. While some judges cite cooperative federalism in law enforcement as a reason the dual sovereignty doctrine is outmoded, a festering of tensions also exists in other areas where the federal government has entered realms traditionally left to the states. Often these intrusions, particularly in the area of civil and regulatory law, preempt rather than coexist with state law addressing the same issue.\textsuperscript{115} Some scholars have gone so far as to question whether increased federal involvement in traditional areas of state primacy threatens the structure of American federalism.\textsuperscript{116}

In order for Congress to criminalize conduct, there must be a constitutional basis\textsuperscript{117} Notwithstanding the Supreme Court’s opinions in \textit{Lopez} and \textit{Morrison}, the Court’s increasing willingness over the past 30 years to find federal jurisdiction under the

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\textsuperscript{116} See Bradley Scott Shannon, \textit{The Jurisdictional Limits of Federal Child Pornography Law}, 21 \textit{HAWAI\i L. REV.} 73, 125, n. 185 (1999) (listing a substantial number of articles and scholarly works critical of the overfederalization of criminal law and its intrusion upon areas traditionally regarded as matters of state concern); Note, \textit{Mens Rea in Federal Criminal Law}, 111 \textit{HARVARD L. REV.} 2402, 2416-19 (1998) (one of the works cited by Shannon which expresses concerns that the federalization of crime (1) is contrary to the presumption that states are in a better position to address criminal matters, (2) opens the door to selective federal prosecution, (3) overcrowds the dockets of the federal courts, and (4) threatens the balance of power between the states and the federal government. In the 1998 \textit{Year-End Report on the Federal Judiciary}, Chief Justice Rehnquist expressed the following concerns regarding the increased federalization of crime:

> The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary’s resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system . . . . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems.

\end{footnotesize}
Commerce and Necessary & Proper Clauses and the enforcement provisions of the 14th Amendment has resulted in a massive increase in the number of topics now deemed appropriate subjects of federal criminal legislation and regulation. As a result, many have been critical of the dual sovereignty doctrine\textsuperscript{118} and especially critical of its continuation in mundane cases where it serves no useful purpose.\textsuperscript{119} The concern expressed by these scholars that the increasing federalization of criminal law and the resulting overlap with state laws addressing the same subject matter vitiates much of the double jeopardy protection an accused would otherwise be afforded under the 5th Amendment when coupled with the Supreme Court’s continuing recognition of the dual sovereignty doctrine. Some claim the dual sovereign doctrine constitutes little more than a form of prosecutorial appeal from an adverse result not permitted at law.\textsuperscript{120}

In his 1998 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist abjured what he described as Congress’ increasing tendency to federalize crimes.\textsuperscript{121} Noting that federal criminal cases had tripled since 1997, Rehnquist saw Congress’ actions as taxing the limited resources of the federal judiciary and related agencies such as pre-trial services and the prosecutorial arm of the Department of Justice.\textsuperscript{122} Rehnquist also perceived this tendency as threatening to alter the nature of the entire federal system

\textsuperscript{118} \textit{See generally} sources cited in Herman, note 65, 618, n. 32 (1994) (listing over 10 scholarly works generally critical of the dual sovereignty doctrine). A note by Yale law student Michael Dawson maintained that the dual sovereignty doctrine undermined the concept of popular sovereignty by taking the final word away from juries. Dawson, note 63 \textit{supra} at 282, 299-302.


\textsuperscript{120} \textit{See} Merkl, note 5 \textit{supra} at 175, 176, 193.

\textsuperscript{121} Rehnquist, note 116 \textit{supra} (no pagination available).

\textsuperscript{122} \textit{Id.}
in the United States.\textsuperscript{123} Invoking Abraham Lincoln and Dwight D. Eisenhower, Rehnquist argued that matters that could be adequately handled by the state courts should be left to those courts.\textsuperscript{124}

In the report, Rehnquist points to a 1995 recommendation by the Judicial Conference that advocated making the federal courts a distinctive judicial forum of limited jurisdiction exercising criminal jurisdiction “only to further clearly defined and justified national interests . . .” Rehnquist endorsed the Conference’s recommendation that federal criminal jurisdiction should only extend to five types of cases:

(1) offenses against the federal government or its inherent interests,

(2) criminal activity with substantial multi-state or international aspects,

(3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources and expertise,

(4) serious high level or widespread state or local government corruption, and

(5) criminal cases raising highly sensitive local issues.\textsuperscript{125}

The American Bar Association Special Task Force on the Federalization of Criminal Law echoed Rehnquist’s concerns.\textsuperscript{126} Others have made similar suggestions but often argue

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\item causes serious problems to the administration of justice by threatening fundamental allocations of state and federal responsibility and disrupting the constitutional balance between state and federal systems;
\item has a detrimental impact on state criminal justice actors who bear the brunt of criminal law enforcement;
\item potentially relegates the less glamorous prosecutions to the state system which may have adverse effects on citizen perception, power, and confidence in state and local mechanisms;
\end{itemize}

\textsuperscript{123} \textit{Id.} See Rehnquist quote regarding threats to the federal system in note 116 \textit{supra}.
\textsuperscript{124} \textit{Id.} Rehnquist attributed to both the principle “matters that can be handled adequately by the states should be left to them; matters that cannot be so handled should be undertaken by the federal government.”
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} Strazella, note 95 \textit{supra at} 49-50. The ABA Task Force also concluded, among other things, that inappropriate federalization of criminal law:
for the inclusion in federal criminal statutes of areas where there has been “demonstrated state failure,” such as enforcement of civil rights.\textsuperscript{127}

The federalization of criminal law may also affect a defendant’s ability to obtain a fair trial. At least one law professor argues that the federalization of crime results in the dilution of minority representation in jury pools in urban communities.\textsuperscript{128} Laura Dooley maintains that when jurisdiction is moved from state to federal court, the eligible jurors are usually selected from a much larger geographic area than would be the case with a state venire that would normally be limited to the confines of the city or, more typically, the county or parish.\textsuperscript{129} The resulting federal jury pool includes potential jurors from the surrounding “collar counties” and bedroom communities in addition to the urban

4. creates an unhealthy concentration of policing power at the federal level, increases unreviewable prosecutorial discretion, and may cause an adverse impact on the federal judicial system;
5. leads to inappropriately disparate results for similarly situated defendants depending on the system in which they are prosecuted;
6. accumulates a large body of law that Congress must continually update and address to the detriment of matters that would be more appropriate for federal prosecutorial action; and
7. represents and unwise allocation of scarce resources needed to address the genuine issues of crime.

\textit{Id. at 50.}
\textsuperscript{127} See George D. Brown, \textit{Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA}, 2001 U. ILL. L. REV. 983, 989 (2003) (hereafter Brown) (noting that federal prosecutorial efforts may sometimes be superior to state prosecutions and that the federal government may be able to address areas of “demonstrated state failure”); Rory K. Little, \textit{Myths and Principles of Federalization}, 46 HASTINGS L.J. 1029, 1077-81 (1995) (hereafter Little) (an article cited by Brown regarding superior federal prosecutorial resources which utilizes the term “demonstrated state failure” to refer to both failures occasioned by inadequate resources and those related to unwillingness to pursue prosecutions such as was experienced in some areas of the South during the Civil Rights Era); Geraldine Szott-Moohr, \textit{The Federal Interest in Criminal Laws}, 47 SYRACUSE L. REV. 1127, 1142-43 (1997) (hereafter Szott-Moohr) (also an article cited by Brown concerning areas of “demonstrated state failure” which proposes creating rebuttable presumptions against expanding federal jurisdiction conditioned upon a showing that state prosecutions are “demonstrably inadequate.” Like Little’s article, Szott-Moohr recognizes areas of failure occasioned by both inability and unwillingness to prosecute). \textit{See also} Herman, note 118 \textit{supra} at 611-12, n.24 (explaining that within the ACLU a few years before the Rodney King beating “there was little disagreement among the members of the National Board of Directors that the ACLU should oppose the dual sovereignty doctrine as a harmful, misconceived, unsustainable legal fiction” but also noting a reluctance of the Board to abandon dual sovereignty in the area of civil rights violations. Herman notes that in 1989, the ACLU’s Due Process Committee recommended that the ACLU oppose dual sovereignty).

\textsuperscript{128} Dooley, note 104 \textit{supra}.
\textsuperscript{129} \textit{Id. at 81}. 

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community. Dooley maintains these suburban areas dilute minority representation because they are likely to have fewer minorities in their populations.\footnote{Id. at 88-90.}

III. The Petite Policy—The United States Response to Dual Sovereignty and Prioritization of Prosecutions

The dual sovereign doctrine and the growing tendency to federalize much of the criminal law have been much maligned.\footnote{See sources cited in Beale note 119 supra at 770 n.117 and Herman, note 118 supra at 618, n.32.} British Common Law and the law in most other common-law heritage countries\footnote{See Merkl, note 5 supra at 186, ns.52 and 53 (quoting William Blackstone for the English Common Law principle that, if “a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal at bar of any subsequent accusation for the same crime” (emphasis supplied in Merkl article) and noting that the English practice of using writs of autrefois acquit and autrefois convict continues today in Australia).} as well as the law of the American states identified in Table 3 in Part IV regard a previous prosecution in which jeopardy attaches as a limitation or bar to a subsequent prosecution. In response to concerns expressed by the United States Supreme Court regarding the dual sovereignty doctrine in \textit{Bartkus v. United States} and \textit{Abbate v. United States},\footnote{\textit{Bartkus v Illinois}, 359 U.S. 121 (1959) is most commonly cited as the impetus for the Petite policy. The language of the majority opinion in \textit{Bartkus} expressly cited the need for restraint, \textit{Bartkus} at 139. In \textit{Abbate}, the Supreme Court refused to overrule the dual sovereignty doctrine because there was a possibility federal law enforcement efforts would be hindered if they were barred by state prosecutions when a defendant’s conduct impinged more heavily on federal interests, \textit{Abbate v. U.S.}, 359 U.S. at 195.} the federal government took steps beginning in the 1950’s to curtail potential abuses of the dual sovereignty doctrine.

A. The Petite Policy—

The Department of Justice (DOJ) first promulgated guidelines concerning subsequent prosecutions during the Eisenhower Administration.\footnote{Ellen S. Podgor, \textit{Department of Justice Guidelines: Balancing ‘Discretionary Justice}, 13 \textit{CORNELL J. OF LAW & PUBLIC POLICY} 167, 179 (2004).} The guidelines addressed when the federal government should prosecute after a state prosecution and

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\footnote{Id. at 88-90.}
\footnote{See sources cited in Beale note 119 supra at 770 n.117 and Herman, note 118 supra at 618, n.32.}
\footnote{See Merkl, note 5 supra at 186, ns.52 and 53 (quoting William Blackstone for the English Common Law principle that, if “a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal at bar of any subsequent accusation for the same crime” (emphasis supplied in Merkl article) and noting that the English practice of using writs of autrefois acquit and autrefois convict continues today in Australia).}
\footnote{\textit{Bartkus v Illinois}, 359 U.S. 121 (1959) is most commonly cited as the impetus for the Petite policy. The language of the majority opinion in \textit{Bartkus} expressly cited the need for restraint, \textit{Bartkus} at 139. In \textit{Abbate}, the Supreme Court refused to overrule the dual sovereignty doctrine because there was a possibility federal law enforcement efforts would be hindered if they were barred by state prosecutions when a defendant’s conduct impinged more heavily on federal interests, \textit{Abbate v. U.S.}, 359 U.S. at 195.}
which sovereignty should have priority in conducting prosecutions. The multiple prosecution aspect of the guidelines came to be known as the *Petite* policy after the 1960 Supreme Court *per curiam* opinion that acknowledged its existence. In *Petite*, the Supreme Court granted the government’s motion to vacate Petite’s second conviction in federal court following a conviction on related charges in the Eastern District of Pennsylvania. The Court’s action rendered it unnecessary for the Court to reach the double jeopardy issue raised by the defendant. However, Justice William Brennan, joined by Justices Black and Douglas, concurred to opine that the case should have been reversed outright on double jeopardy grounds.

The DOJ policy regarding successive prosecutions was actually initiated the year before the *Petite* decision by U.S. Attorney General William Rogers in a memorandum addressed to U.S. Attorneys’ Offices nationwide (hereafter the *Roger’s Memo*). The Supreme Court acknowledged in *Rinaldi v. United States* that the policy was specifically formulated to address concerns regarding multiple prosecutions the Court expressed in *Bartkus* and *Abbate*. *Bartkus*, in particular, admonished both state and

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135 See excerpts of the text of Memorandum of Attorney General William Rogers establishing the policy is quoted in *United States v. Mechanic*, 454 F.2d 849, 855-56, n. 5 (8th Cir. 1971) which is set forth verbatim infra at note 144.
137 *Id.* Although the *Petite* case involved two federal charges, the government urged the Supreme Court to vacate the second conviction under the general policy that several offenses arising out of a single transaction should be alleged and tried together rather than constitute the basis for multiple prosecutions under the dictates of fairness to the accused and of official and orderly law enforcement; see also see 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 (1981) § 2(a), n. 4 (explaining that *Petite v. United States* involved federal charges and its relation to federal-state successive prosecutions.
138 *Petite* at 531.
139 *Id. at 533* (Brennan, J., concurring).
140 See Podgor, note 134 *supra* at 179 (discussing the history of the *Petite* Policy).
142 *Id* at 27-28. The Court’s *per curiam* opinion included the following language:
federal governments to utilize self-restraint in pursuing multiple prosecutions. The Rogers memorandum recognized that, while federal prosecutors might constitutionally

What has come to be known as the *Petite* policy was formulated by the Justice Department in direct response to this Court's opinions in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), holding that the Constitution does not deny the State and Federal Governments the power to prosecute for the same act. As these decisions recognize, in our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both. These cases reflect the concern that if the Double Jeopardy Clause were applied when the sovereign with the greater interest is not the first to proceed, the administration of criminal justice may suffer. *Bartkus v. Illinois*, supra, at 137; *Abbate v. United States*, supra, at 195. Yet mindful of the potential for abuse in a rule permitting duplicate prosecutions, the Court noted that "[t]he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy." *Bartkus v. Illinois*, supra, at 138.

In response to the Court's continuing sensitivity to the fairness implications of the multiple prosecution power, the Justice Department adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement (footnote reference to Rogers Memorandum omitted). The *Petite* policy was designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power.

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144 In *United States v. Mechanic*, 454 F.2d 849, 855-56, n. 5 (8th Cir. 1971), the opinion quotes the following parts of the memorandum:

**MEMORANDUM TO THE UNITED STATES ATTORNEYS**

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

In *Abbate v. United States* and *Bartkus v. Illinois* the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

This ruling reaffirmed the holding in *United States v. Lanza*, 260 U.S. 377 decided by the Supreme Court in 1922. * * *

* * *

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. * * *

* * *
pursue successive prosecutions in federal court under Supreme Court decisions such as 
*Bartkus* and *Abbatte*, the practice might prove unwise in many instances and should be
formally controlled by the Department of Justice.  

Today, the *Petite* Policy has been formalized as § 9-2.031 of the *United States
Attorneys’ Manual* ("the Manual"), a DOJ publication composed of departmental policy
statements that can be found online.\footnote{www.usdoj.gov/usoao/eousa/foia_reading_room/usam/title9/title9.htm.} The policy acts in concert with the more general
“Principles of Federal Prosecution” found in Chapter 9-27 of the *Manual* but specifically

The Court held then that precedent, experience and reason supported the conclusion of
separate federal and state offenses.

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as
well. In effect, the Court said that although the rule of the *Lanza* case is sound law,
enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment it, like most rules of law, could cause
considerable hardship. Applied wisely it is a rule that is in the public interest.
Consequently -- as the Court clearly indicated -- those of us charged with law
enforcement responsibilities have a particular duty to act wisely and with self-restraint in
this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the
federal and state systems are to mesh properly. We should continue to make every effort
to cooperate with state and local authorities to the end that the trial occur in the
jurisdiction, whether it be state or federal, where the public interest is best served. If this
be determined accurately, and is followed by efficient and intelligent cooperation of state
and federal law enforcement authorities, then consideration of a second prosecution very
seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to
deal with the complex situation which might develop, particularly because a series of
related acts are often involved. However, no federal case should be tried when there has
already been a state prosecution for substantially the same act or acts without the United
States Attorney first submitting a recommendation to the appropriate Assistant Attorney
General in the Department. No such recommendation should be approved by the
Assistant Attorney General in charge of the Division without having it first brought to my
attention.

/s/ William P. Rogers

Attorney General.

\footnote{Id.; see also Podgor, note 134 supra at 179 (discussing the relationship between the Court’s decision in *Abbatte* and the Rogers Memo).}
addresses the issue of subsequent prosecutions. The policy statements in the *Manual* are intended to serve as guidelines that promote consistency in prosecutions, educate neophyte federal prosecutors, and act as some constraint on prosecutorial discretion.\(^{147}\)

By its own terms, the “Principles of Federal Prosecution” preface states that the principles “should promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the Federal criminal laws.”\(^{148}\)

The *Petite* Policy applies to any situation where a state or federal prosecution has resulted in a decision on the merits, whether conviction or otherwise, after jeopardy has attached.\(^{149}\) The *Petite* Policy applies only if a trial has actually commenced against a defendant in state court and does not apply to cases where state charges have been dismissed.\(^{150}\) It also does not apply to circumstances where double jeopardy would normally not attach such as a hung jury, the declaration of a mistrial, or a reversal of a conviction on appeal.\(^{151}\)

Under the policy, prosecutors presume that any prior trial vindicated federal interests.\(^{152}\) However, this presumption can be overcome if there are factors suggesting an unvindicated federal interest including:

1. a failure to convict resulting from incompetence, corruption, intimidation or undue influence,

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\(^{147}\) See Podgor, note 134 *supra* at 169 (discussing the purposes and limitations of DOJ internal guidelines).

\(^{148}\) Section 9-27.001 *U.S. Attorneys’ Manual*.

\(^{149}\) Section 9-2.031(C) *U.S. Attorneys’ Manual* states that the *Petite* Policy “applies whenever there has been a prior state or federal prosecution resulting in acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits after jeopardy has attached.”

\(^{150}\) See *United States v. Gomez*, 776 F.2d 542, 550 (5th Cir. 1985) (in response to the defendants’ argument that a federal prosecution after state charges were dismissed violated the *Petite* Policy, the court replied “the government assures us that this policy is not implicated in this case, and this assurance suffices for our purposes”); see also Annual Review of Criminal Procedure, note 60 *supra* at 452, n. 1465 (“The *Petite* policy applies only if the defendant is actually brought to trial in state court,” citing *United States v. Gomez* as an example).


\(^{152}\) Section 9-2.031(D) *U.S. Attorneys’ Manual*. 

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(2) court or jury nullification in clear disregard of the law or evidence,

(3) unavailability of significant evidence not timely discovered by or known to the prosecution or kept from consideration by an erroneous ruling of law,

(4) failure to prove an element of a state offense that is not required under federal law, or

(5) exclusion of federal charges in a prior federal prosecution resulting from fairness considerations relating to other defendants or based on resource considerations.\(^{153}\)

The presumption may also be overcome where the violation of federal law (1) involves a compelling federal interest, (2) the offense involves egregious conduct, or (3) where any prior prosecution is regarded as “manifestly inadequate” in light of the federal interest at issue.\(^{154}\)

The underlying rationale for subsequent federal prosecutions under the Petite Policy is expressed in the Manual as:

(1) vindicating substantial federal interests with appropriate prosecutions (emphasis supplied),

(2) protecting accuseds from multiple prosecutions for substantially the same offense,

(3) promoting effective use of DOJ resources, and

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\(^{153}\) Id.

\(^{154}\) Id. Whether a substantial federal interest exists is determined under the general principles of federal prosecution found in § 9-27.230(A) U.S. Attorneys’ Manual which lists the following non-exclusive considerations:

1. federal law enforcement priorities,
2. the nature and seriousness of the offense,
3. the deterrent effect of prosecution,
4. the defendant’s culpability in connection with the offense,
5. the defendant’s history with respect to criminal activity,
6. the defendant’s willingness to cooperate in the investigation or prosecution of others, and
7. the probable sentence or other consequences if the defendant is convicted.

The comments contained in § 9-27.230(B) further refine the considerations set forth in § 9-27.230(A).
(4) encouraging state and federal prosecutorial cooperation.\textsuperscript{155}

As the Court observed in \textit{Rinaldi}, the policy seeks to limit subsequent federal prosecutions to situations in which a significant federal interest truly exists.\textsuperscript{156}

Even if the policy criteria are satisfied, the \textit{Petite} Policy requires one additional hurdle before a subsequent federal prosecution may be initiated—approval by an appropriate higher level U.S. Assistant Attorney General,\textsuperscript{157} usually the assistant attorney general for the Criminal Division,\textsuperscript{158} unless the state charge is only a minor part of the federal charges under consideration as in a RICO prosecution.\textsuperscript{159} In a 1996 article, two attorneys with the DOJ’s Office of Policy Development claimed that statistics indicated that the DOJ typically pursued fewer than 150 dual prosecutions each year, representing only a tiny fraction of the total number of cases with overlapping state and federal jurisdiction and an even smaller percentage of the approximately 65,000 federal prosecutions, annually.\textsuperscript{160}

\begin{footnotesize}
\begin{enumerate}
\item Section 9-2.031 \textit{U.S. Attorneys’ Manual}.
\item \textit{Rinaldi}, 434 U.S. at 28-29.
\item Section 9-2.031 \textit{U.S. Attorneys’ Manual}.
\item See Litman and Greenberg, note 99 \textit{supra} at 77, n. 15 (Litman and Greenberg note that the Civil Rights, Antitrust, and Environmental Divisions may have cases involving the \textit{Petite} Policy that would require the approval of a different assistant attorney general but the number of such cases would be much smaller in volume). A recent article by an attorney formerly with the DOJ Witness Immunity Unit (WIU) of the Office of Enforcement Operations in the Criminal Division reveals the process has changed somewhat with the WIU reviewing initial requests for \textit{Petite} Policy waiver and sending its recommendation to the Assistant Attorney General who makes the ultimate decision on waiver. Kathleen N. Coleman, 55 THE UNITED STATES ATTORNEY BULLETIN 10, 12-13 (January 2007) (an internal publication by the DOJ available at www.justice.gov/usao/eousa/foia_reading_room/usab5501.pdf).
\item Section 9-2.031(B) \textit{U.S. Attorneys’ Manual} makes specific reference to RICO cases in which acts previously prosecuted under state law are exempted from the policy to the extent the acts constitute “only a minor part of the contemplated federal charges” and “as long as those acts or offenses do not represent substantially the whole of the contemplated charge and, in a RICO prosecution, as long as there are a sufficient number of predicate offenses to sustain the RICO charge if the previously prosecuted offenses were excluded.”
\item Litman and Greenberg, note 99 \textit{supra} at 77.
\end{enumerate}
\end{footnotesize}
Although considerations of state prosecution are addressed elsewhere in the Manual, Section 9-2.031 requires that federal prosecutors consult with state prosecutors to determine the most appropriate single forum in which to bring charges against a defendant when the two jurisdictions overlap. One of the major areas of concern involving “substantial federal interests” is civil rights violations. During the Carter Administration, Attorney General Griffin Bell required federal prosecutors to more strictly adhere to the Petite Policy before initiating civil rights cases. Nonetheless, civil rights violations are still regarded as one of the more appropriate usages of the dual sovereignty doctrine because of inadequate past treatment of such abuses by some states.

B. Problems with the Petite Policy—

Because the Petite Policy is a creation of the Department of Justice rather than constitutionally or statutorily mandated, the policy vests no rights in an accused subject to multiple prosecution other than what the federal government elects to provide. In essence, the policy is no more than an instance of prosecutorial discretion that

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161 Section 9-27.240 DOJ Manual; see Part III(C), infra.
162 Section 9-2.031(A) U.S. Attorneys’ Manual provides:

In order to insure the most efficient use of law enforcement resources, whenever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.

164 See Brown, note 127 supra at 989; Little, note 127 supra at 1077-81; Szott-Moohr, note 127 supra at 1142-43.
165 Hagburg, note 21 supra at 589 (noting that the Petite Policy is not “constitutionally mandated” resulting in criminal defendants having no right to protections under the policy “unless the government chooses to invoke it”); see e.g. United States v. Jackson, 327 F.3d 273, 294-95 (4th Cir. 2003); United States v. Kriens, 270 F.3d 597, 603 (8th Cir. 2001).
incorporates written guidelines. The Manual’s “Principles of Federal Prosecution” (“Principles”) preface states as much when it clarifies that the principles “have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility.”166 Should prosecutors ignore the DOJ’s Petite Policy, courts have routinely treated the guidelines as strictly internal and not enforceable by outside parties, including criminal defendants.167 In fact, the Principles expressly provide that none of the expressions of policy are intended or relied upon to create a right or benefit, whether substantive or procedural, to any party in litigation with the United States.168 The Petite Policy itself contains a similar recitation.169

A study of federal criminal cases performed by Ellen S. Podgor that was published in 2004 reveals that, unless other constitutional violations are included or unless the federal government seeks reversal, defendants’ arguments that a prosecution violated the Petite or any other DOJ policy falls on deaf ears.170 Not surprisingly, the Petite Policy has been described as little more than a “wait and see” approach that is significantly flawed because it is subject to manipulation and political pressure.171 Many

167 See e.g. United States v. Jackson, 327 F.3d 294-95; United States v. Kriens, 270 F.3d 603); see also cases cited in Podgor, note 134 supra at 169-70.
168 Section 9-27.150 U.S. Attorneys’ Manual
169 Section 9-2.031(A) U.S. Attorneys’ Manual provides that the Petite Policy:

has been promulgated solely for the purpose of internal Department of Justice guidance. It is not intended, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party in any matter, civil or criminal, nor does it place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

170 Podgor, note 134 supra at 177, 179, 181.
171 Merkl, note 5 supra at 200.
judges have argued the right to policy adherence under DOJ policies should be enforceable as a matter of due process.  

See for example Judge Oliver Seth’s dissent in United States v. Thompson, 579 F.2d 1184, 1191-92 (10th Cir. 1978) in which Thompson’s federal prosecution subsequent to state prosecution had not been approved by an appropriate higher level attorney general until after Thompson’s prosecution and sentencing because the Assistant U.S. Attorney prosecuting Thompson was not aware of the requirement. After surveying numerous other agency regulations that are enforced by the courts, Judge Seth dissented:

From the variety of situations in which the courts have held that agencies must follow their statements of policy and directives, it is apparent that if the statements are applicable, are made known, and are of guidance for the execution of the agency policies, it makes no difference what they are called nor how they are adopted. The public has a right to rely on them as against some inconsistent case by case subjective determination by a public official. The cases further demonstrate that it makes no difference whether the agency has express statutory authority to adopt the policy. The agency has to run its business, it has to function. This is done by regulations and policy statements, and it makes no difference whether Congress has expressly directed them or not if they are within the general objectives of the agency, and especially if they represent some self-restraint on its authority or discretion as in the case before us.

The Petite policy against dual prosecutions contains an exception to permit dual prosecution when necessary to advance “compelling interests of law enforcement.” . . . Thus I would hold that the postconviction attempt to authorize the prosecution of defendant Thompson in the federal court came too late to be effective as he had been convicted and sentenced some nine months before.

Sentiments against the Petite Policy were also expressed by Judge Ruggero J. Aldisert in his dissent in United States v. Wilson, 413 F.3d 382, 391-92 (3rd Cir. 2005) in which Wilson was prosecuted for a drug offense in federal court after a motion to suppress was granted in state court. In response to the government’s position at oral argument that it could refile in federal court when the government felt an injustice was done in state court, Judge Aldisert referred to the government’s conduct “as a blatant exercise of judge shopping” and further continued:

I believe this policy generates serious problems. It increases the caseload in federal courts, runs counter to modern concepts of federalism, denigrates the quality of the state-court system, trial and appellate, demeans the professionalism of state-court judges who have more experience, indeed much more experience, in deciding federal constitutional questions in criminal proceedings than federal judges . . . . The very admission in open court that the federal government will initiate a new prosecution in cases where state courts suppress evidence has a pernicious effect on the rights of state-court defendants seeking to vindicate Fourth Amendment rights. The federal government’s message to state judges is clear: “Do not suppress evidence. If you do, we’ll institute a new federal prosecution on the same facts even though the investigation and arrest were made by state authorities and the state conducted the prosecution.” This policy allows the United States, in effect, to use federal courts to review any state judge’s federal constitutionally-based decision on a motion to dismiss.

To me, this is appalling.

The majority was sympathetic to Judge Aldisert’s concerns and expressed its own concerning the Petite Policy and dual sovereignty but felt it was not in a position to overrule Supreme Court precedent. Wilson, 413 F.3d at 388-89.
A somewhat surprising problem that has arisen in recent years is the ability of the government to avail itself of the Petite Policy after a federal prosecution has commenced. Despite language in Rinaldi that defendants should receive the benefits of the policy when the government urges it\(^{173}\) and statements by lower courts concerning the rights of the federal government under the policy,\(^ {174}\) some Supreme Court justices and other courts have expressed reluctance to vacate or dismiss prosecutions already concluded, or well under way, solely on the government’s motion under the policy indicating that the government’s right to secure a dismissal under Petite may be more limited than one might think.

In Watts v. United States,\(^ {175}\) a memorandum opinion granting certiorari and vacating a conviction at the government’s request, Chief Justice Warren Burger dissented, joined by Justices Byron White and William Rehnquist. Burger questioned the Court’s complicity in reversing a conviction under the policy following a substantial commitment of prosecutorial and court resources to secure a conviction.\(^ {176}\)

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\(^{173}\) In Rinaldi the Court noted

The Petite policy was designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power. Although not constitutionally mandated, this Executive policy serves to protect interests which, but for the “dual sovereignty” principle inherent in our federal system, would be embraced by the Double Jeopardy Clause. In light of the parallel purposes of the Government’s Petite policy and the fundamental constitutional guarantee against double jeopardy, the federal courts should be receptive, not circumspect, when the Government seeks leave to implement that policy.

\(^{174}\) See e.g. United States v. Booth, 673 F.2d 27, 30 (1st Cir. 1982) cert denied 456 U.S. 978 (1982) (“[t]he Petite policy and cases construing it stand only for the proposition that the government’s motion to dismiss should be granted when the government decides it is conducting separate prosecution for same offense.”); United States v. Snell, 592 F.2d 1083, 1087-88 (9th Cir. 1979) cert. denied 442 U.S. 944 (1979) (noting that the Supreme Court remands cases based on the Petite Policy only at the request of the DOJ).

\(^{175}\) 422 U.S. 1032 (1975).

\(^{176}\) In his dissent, the Chief Justice noted that failure to adhere to DOJ policies is a matter for the department and not for the courts, particularly after a defendant has been convicted and there is no error in the trial. The Chief Justice wrote:
In denying the prosecutor’s motion to dismiss under the policy, a federal judge in Texas gave what can only be described as a scathing rebuke of the prosecution’s conduct. The court chided the prosecution for its lack of candor in informing the court of the circumstances of the case including the lack of certainty concerning the overlap of state and federal charges, before making specific findings as to why dismissal under the policy was inappropriate and concluding that “[t]he contention of the government that the Petite policy applies is frivolous, irrational, and devoid of any basis in fact.”

The court took the position that, even in the case of the Petite Policy, it is incumbent upon the government to demonstrate that dismissal is in the public interest and a court has an obligation to deny a motion to dismiss “when the prosecutor’s actions clearly implicate a betrayal of the public interest.”

The federal government subsequently petitioned the 5th Circuit during Cockrell’s trial to mandamus the trial court to dismiss the indictment as requested which the 5th Circuit did after the trial court rejected the circuit court’s invitation to dismiss the indictment within 3 days of its initial order. However, the 5th Circuit’s failure to

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Id. at 135-36 (dissenting opinion).


178 Id. at 766-75.

179 Id. at 774.

180 Id. at 775.

181 Id. at 768-69 quoting U.S. v. Hamm, 659 F.2d 624, 629 (5th Cir. 1981).

182 The District Court provides its version of what transpired in its order dismissing the case, United States v. Cockrell, 353 F.Supp.2d 776 (N.D. Tex. 2005), including the trial court’s declination to dismiss the case to assess the validity of judgments duly entered. Surely it is not our function either to approve or disapprove internal prosecutorial policies and even less so their implementation.
elaborate, other than the trial court abused its discretion, leaves it unclear whether the appellate court regarded the entry of an order of dismissal under the policy as a ministerial act with which the trial court could not refuse to comply.

A final “problem” with the policy is its continued viability as an internal DOJ policy. In May 2008, the Criminal Division of the DOJ circulated a memorandum soliciting input for possible changes to the policy. The memo notes “the policy was adopted . . . during a time when there was little, if any, official coordination on criminal matters between U.S. Attorney’s Offices and their state and local prosecuting counterparts” and that increased coordination “has triggered Petite issues that may not have been contemplated when the policy was adopted.” The memo cites concerns expressed by DOJ lawyers “about the need for Petite waivers in cases where there has been close federal/state coordination of prosecutive responses” and observes “it has been suggested that the policy is over-inclusive and that prior convictions for minor, unrelated state charges should not trigger the waiver requirement.” A January 29, 2010 exchange of emails between the author and the contact person at the Office of Enforcement Operations designated as the contact for responsive information revealed that, while the solicitation of input generated many suggestions, DOJ felt there was no pressing need to make substantive changes to the policy.

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183 Memorandum dated May 22, 2008, from Maureen H. Killion, Director, Office of Enforcement Operations of the Criminal Division to Kenneth Melson, Director, Executive Office of the United States Attorney that was subsequently distributed by Melson on June 2, 2008 to all United States Attorneys, First Assistant United States Attorneys, and Chiefs of Criminal Divisions in United States Attorney’s Offices.
184 Id.
185 Id.
186 Thomas C. Taylor, the Associate Director for Policy, was listed as the contact person to whom responses should be sent in the June distribution. In an email to the author dated January 28, 2009, Mr. Taylor indicated that the survey had generated suggestions but demonstrated no pressing need for change. Mr.
C. Determining Priority in Prosecution—

Even though the dual sovereignty doctrine would normally permit a subsequent prosecution, many states limit or prohibit subsequent state prosecutions when a defendant has previously been prosecuted by the federal government or, in some instances, any government.\textsuperscript{187} It is a fundamental tenet of constitutional law that, while states cannot fall below the baseline of constitutional protections applied to the states under the 14\textsuperscript{th} Amendment, states are free to provide greater protections as a matter of state law.\textsuperscript{188} This maxim is commonly referred to as the “new judicial federalism.”\textsuperscript{189} For states that limit or bar subsequent prosecutions, determining which sovereign gets the first opportunity to prosecute a defendant in cases involving overlapping state and federal jurisdiction may often mean the difference between a state being able to vindicate its interests under the state’s criminal law and no state prosecution of any kind. Even in states that do not limit the dual sovereignty doctrine, primacy of prosecution may affect state interests in ways that impact the availability and usage of state resources.\textsuperscript{190}

The Principles set forth the DOJ criteria for initiating or declining prosecution when the possibility for prosecution in another jurisdiction exists.\textsuperscript{191} The section requires federal prosecutors to weigh all relevant considerations including three which are expressly set forth:

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\textsuperscript{187} See Part IV.
\textsuperscript{188} See Kanovitz and Kanovitz, note 7 \textit{supra} at § 1.13.
\textsuperscript{189} See Staci L. Beavers and Jeffrey S. Walz, \textit{Modeling Judicial Federalism: Predictors of Defendants’ Rights Under State Constitutions, 1969-1989}, 28 \textit{PUBLIUS} 43, 43-44 (1998) (examining the increasing role state courts play in maintaining or expanding constitutional rights with the decreasing amount of constitutional protections afforded by the Burger and Rehnquist Courts noting that “[t]his development of state civil liberties law has been often referred to as a new era of ‘judicial federalism’”).
\textsuperscript{190} Possible collateral effects could entail the time in which a case went to trial, availability of witnesses, stale memories or evidence, etc.
\textsuperscript{191} Section 9-27.240 \textit{U.S. Attorneys’ Manual}. 
1. the strength of the other jurisdiction's interest in prosecution,
2. the other jurisdiction’s ability and willingness to prosecute effectively, and
3. the probable sentence or other consequences if the person is convicted in the other jurisdiction.\textsuperscript{192}

A search of all federal and state cases in the \textit{WestLaw ALLFEDS} and \textit{ALLSTATES} data bases revealed that no court has referred to this provision by title\textsuperscript{193} or section number.\textsuperscript{194}

As is the case with all policies in the \textit{United States Attorneys’ Manual}, no vested rights are created to the accused’s benefit for violation of the policy regarding declining prosecution when the criteria specified are satisfied by another jurisdiction.\textsuperscript{195} For the same reasons, one would surmise that states also have no rights to initial prosecution if the policy is violated, even if all of the requisite conditions are satisfied.

\textbf{IV. State Responses to the Issue of Subsequent Prosecutions}

Many states have limited the dual sovereignty doctrine. As previously noted, where the United States Supreme Court has made provisions of the Bill of Rights applicable to the states through the doctrine of selective incorporation, states are bound to provide no less protection than that afforded by the United States Constitution but states are free to provide greater protections, including jeopardy protections.\textsuperscript{196} Conversely, states are free to not limit subsequent prosecutions as long as they comply with 5\textsuperscript{th}

\textsuperscript{192} \textit{Id.}
\textsuperscript{193} The section is entitled “Initiating and Declining Charges—Prosecution in Another Jurisdiction.”
\textsuperscript{194} Five searches were run in the federal and state case data bases constructed as follows:
Search 1—9-27.240
Search 2—“Initiating and Declining Charges—Prosecution in Another Jurisdiction”
Search 3—“Initiating and Declining Charges” and “Prosecution in Another Jurisdiction”
Search 4—initiating /3 declining /3 charges /3 prosecution /5 jurisdiction
Search 5—initiating /3 declining /3 charges and prosecution /5 jurisdiction

All five searches indicated there were no cases fitting the search criteria.
\textsuperscript{195} \textit{See} notes 165-72, \textit{supra}, and accompanying text.
\textsuperscript{196} \textit{See} notes 187 and 188, \textit{supra}, and accompanying text.
Amendment double jeopardy protections and the decisions by the United States Supreme Court interpreting those protections.\textsuperscript{197}

States address the issues of double jeopardy and dual sovereignty in a variety of ways.\textsuperscript{198} As Table 1 indicates, most state constitutions expressly provide general protections against double jeopardy. While some state constitutions are explicit in what does and does not constitute jeopardy,\textsuperscript{199} most approximate the guarantees contained in the 5\textsuperscript{th} Amendment.\textsuperscript{200} The Declaration of Rights in the Constitution of Maryland merely adopts the rights guaranteed by the U.S. Constitution.\textsuperscript{201} Montana actually incorporates protections against dual sovereignty into its constitution.\textsuperscript{202}

The constitutions of some states, such as North Carolina, provide no explicit double jeopardy protection. The state supreme courts of this and other jurisdictions have held that double jeopardy protections exist under the state’s due process clause, other constitutional language, or under the state’s common law.\textsuperscript{203} Regardless of constitutional, statutory or court opinion language, all states are required to afford protections against double jeopardy since the United States Supreme Court’s 1969 holding in \textit{Benton v.}

\textsuperscript{198} For a general discussion of state prosecutions following federal prosecutions \textit{see} Carolyn Kelly MacWilliam, \textit{Annotation, Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts—Modern View}, 97 A.L.R.5\textsuperscript{th} 201 (2002).
\textsuperscript{199} \textit{See, e.g.} MO. CONST. art. I, § 19 and GA. CONST. art. I, § I, ¶ XVIII both of which exclude matters such as mistrials, new trials and reversals on appeal from double jeopardy protection.
\textsuperscript{200} Most state constitutions employ some variant of a barebones guarantee against being twice placed in jeopardy. \textit{See, e.g.} DEL. CONST. art. I, § 8 (“no person shall be for the same offense twice put in jeopardy of life or limb”); ILL. CONST. § 10 (“[n]o person shall . . . be twice put in jeopardy for the same offense”).
\textsuperscript{201} MD. CONST. § 2
\textsuperscript{202} MONT. CONST. art. II, § 25 provides “[n]o person . . . shall be again put in jeopardy for the same offense previously tried in any jurisdiction” (emphasis supplied).
\textsuperscript{203} \textit{See, e.g. State v. Nugent}, 243 N.C. 100, 89 S.E.2d 781, 783 (1955) (in discussing a defendant’s right to sufficient language in a charging instrument, the court stated in \textit{dicta} that the right to be informed of the charges against a defendant was “a substantial redeclaration of the common law rule requiring the charge against the defendant to be set out in the warrant or indictment with such exactness that the defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and can enable the court, on conviction, to pronounce sentence according to law” (emphasis supplied)).
Maryland which incorporated and applied the 5th Amendment’s double jeopardy protections to the states through the due process clause of the 14th Amendment. 204

Table One—State Constitution Double Jeopardy Provisions—

<table>
<thead>
<tr>
<th>State</th>
<th>Constitution</th>
<th>Manner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Art. 1, Sec. 9</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Alaska</td>
<td>Art. I, Sec. 9</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Art. 2, Sec. 8</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Arizona</td>
<td>Art. II, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>California</td>
<td>Art. I, Sec. 15</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Colorado</td>
<td>Art. II, Sec. 18</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Delaware</td>
<td>Art. I, Sec. 8</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Florida</td>
<td>Art. I, Sec. 9</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Georgia</td>
<td>Art. I, Sec. 1</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Art. I, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Idaho</td>
<td>Art. I, Sec. 13</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Illinois</td>
<td>Art. I, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Indiana</td>
<td>Art. I, Sec. 14</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Iowa</td>
<td>Art. I, Sec. 12</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Kansas</td>
<td>BOR, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Kentucky</td>
<td>BOR, Sec. 13</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Maine</td>
<td>Art. I, Sec. 8</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Maryland</td>
<td>Art. 2</td>
<td>Adoption of U.S. Constitution</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>None</td>
<td>Statutory and Common Law Protections, Commonwealth v. Burke (1961) 205</td>
</tr>
<tr>
<td>Michigan</td>
<td>Art. I, Sec. 15</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Art., I, Sec. 7</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Art. 3, Sec. 22</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Missouri</td>
<td>Art. I, Sec. 19</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Montana</td>
<td>Art. II, Sec. 25</td>
<td>Dual Sovereignty Protection</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Art. I, Sec. 12</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Nevada</td>
<td>Art. 1, Sec. 8</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Pt. I, Art. 16</td>
<td>Standard Jeopardy Protections</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Article/Section(s)</th>
<th>Protection Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>Art. I, Sec. 11</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Art. II, Sec. 15</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>New York</td>
<td>Art. I, Sec. 6</td>
<td>Dual Sovereignty Protection</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Art. I, Sec. 12</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Ohio</td>
<td>Art. I, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Art. II, Sec. 21</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Oregon</td>
<td>Art. I, Sec. 12</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Art. I, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Art. I, Sec. 7</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Art. I, Sec. 12</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Art. VI, Sec. 9</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Art. I, Sec. 10</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Texas</td>
<td>Art. I, Sec. 14</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Utah</td>
<td>Art. I, Sec. 12</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Vermont</td>
<td>None</td>
<td>Statutory and Common Law Protections, State v. O'Brien (1934) 206</td>
</tr>
<tr>
<td>Virginia</td>
<td>Art. I, Sec. 8</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Washington</td>
<td>Art. I, Sec. 9</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Art. III, Sec. 5</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Art. I, Sec. 8</td>
<td>Standard Jeopardy Protections</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Art. I, Sec. 11</td>
<td>Standard Jeopardy Protections</td>
</tr>
</tbody>
</table>

The states in Table 2 limit, or have limited in the past, the dual sovereignty doctrine by court decision. The Supreme Courts of Michigan207 and New Hampshire208 found unstated protections against the dual sovereignty doctrine under their state constitutions. Before the decisions by the Michigan and New Hampshire supreme courts, the Pennsylvania Supreme Court decided in Commonwealth v. Mimms that the United

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207 In People v. Cooper, 398 Mich. 450, 247 N.W.2d 866, 870 (Mich. 1976), the Michigan Supreme Court held that Art. 1, Sec. 15 of the Michigan Constitution prohibits state prosecutions following a federal prosecution unless the interests of Michigan and the original prosecuting authority are substantially different which is to be determined on a case by case basis.
208 In State v. Hogg, 118 N.H. 262, 385 A.2d 844, 845-46 (1978), the New Hampshire Supreme Court was much more emphatic about the wrongheadedness of the dual sovereignty doctrine holding “[i]t is fundamentally and morally wrong to try a man for a crime of which he has already been tried and found not guilty” even if an initial acquittal is ill-founded. The Court also reasoned that the New Hampshire Constitution existed before New Hampshire’s ratification of the United States Constitution and, therefore, the drafters could not possibly have contemplated the doctrine of dual sovereignty in granting double jeopardy protections.
States Supreme Court had erroneously interpreted the double jeopardy protections afforded by the 5th Amendment in Bartkus. The court’s opinion chastised the United States Supreme Court for being overly deferential to the prosecutorial rights of the federal and state governments at the expense of those of the individual that the Bill of Rights was created to protect. The Pennsylvania Supreme Court, without any reference to state law, declared that Pennsylvanians did, in fact, possess protections against dual sovereignty unless the interests of the two sovereigns were “substantially different.” As Table 3 indicates, the Pennsylvania legislature subsequently adopted statutory limitations on the dual sovereignty doctrine, as well. Following the United States Supreme Court’s decision in Benton v. Maryland, an Ohio intermediate appellate court decreed dual sovereignty protections to exist in Ohio. The decision was subsequently reversed by a

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209 Commonwealth v. Mimms, 447 Pa. 163, 286 A.2d 638, 640-41 (1971). The Pennsylvania Supreme Court argued that the majority in Bartkus failed to recognize that the interests of both sovereigns might be the same.

210 Id. at 641. The Pennsylvania Supreme Court railed against the majority in Bartkus arguing:

More important, [the Bartkus majority opinion] failed to really examine the interest of the individual. . . . It is wrong to retry a man for a crime of which he previously has been found innocent, wrong to harass him with vexatious prosecution, and wrong to punish him twice for the same offense. . . . The striking feature of the aforementioned rules and policies is that the focus is always on the individual, on a person’s basic and fundamental rights. This feature is the common thread that runs across all of the provisions of the [United States] Bill of Rights, and we believe this is the element the Supreme Court failed to adequately consider in Bartkus.

Mr. Justice Frankfurter, not once in his majority opinion in Bartkus refers to the interest of the individual, he consistently focused on the interests of the Federal and State governments, and, for the purpose of double jeopardy, transformed one act into two. . . . We are talking about the two governments protecting their interests, when we really should be talking about the individual, since by focusing on the individual we see that it matters little where he is confined—in a federal or state prison—the fact is that his liberty is taken away twice for the same offense.

211 Id. at 642. Having only discussed the United States Supreme Court opinion in Bartkus, the Pennsylvania Supreme Court, without discussing any Pennsylvania authority for the proposition, held “[h]enceforth in Pennsylvania, a second prosecution and imposition of punishment for the same offense will not be permitted unless it appears from the record that the interests of the Commonwealth of Pennsylvania and the jurisdiction which initially prosecuted and imposed punishment are substantially different.”

212 18 Pa.C.S. § 111.

213 State v. Fletcher, 22 Ohio App. 2d 83; 259 N.E.2d 146, 156-57 (Ohio App. 8th Dist. 1970).
state supreme court decision that determined the lower court had misinterpreted *Benton* to require such protection.\textsuperscript{214} Ohio presently provides no dual sovereignty limitations.\textsuperscript{215}


\textbf{Table Two—States Limiting Dual Sovereignty by Court Opinion}

<table>
<thead>
<tr>
<th>State</th>
<th>Opinion</th>
<th>Basis for Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio</td>
<td><em>State v. Fletcher</em> (1970)</td>
<td>by trial and intermediate \ncourt of appeals (reversed)</td>
</tr>
</tbody>
</table>

Both the Pennsylvania and Michigan decisions limited protections against dual sovereignty to situations in which the state’s interest was vindicated by the prior prosecution.\textsuperscript{217}

In 1996, three judges of the Michigan Supreme Court voted to overrule *Cooper* as wrongly decided because it failed to adhere to a Michigan tenet of statutory construction that Michigan law will provide no greater protection than federal law absent a compelling reason.\textsuperscript{218} Since three judges also voted against overruling *Cooper*, the case is still law in Michigan, however weakened it may be.\textsuperscript{219} In 1998, the Michigan Supreme Court refused to address the continuing viability of *Cooper* in an *en banc* opinion in *People v. Childers*

\textsuperscript{214} *State v. Fletcher*, 26 Ohio St. 2d 221; 271 N.E.2d 567, 568-69 (Ohio 1971).
\textsuperscript{215} See Table 4.
\textsuperscript{216} See citations in notes 206-208 and 212-213, supra.
\textsuperscript{218} *People v. Mezy*, 453 Mich. 269, 551 N.W.2d 389, 393-94 (1996).
\textsuperscript{219} See *People v. Childers*, 459 Mich. 216, 587 N.W.2d 17, n. 3 (1998) (footnote 3 states “[i]n *People v. Mezy* (citation omitted), a majority of this Court held that there was no need to address the merits of *Cooper*, while three justices voted to overrule *Cooper*”).
on grounds that it was unnecessary to sustain Childers’ conviction because the military prosecution of Childers failed to vindicate the state’s interests.\(^{220}\)

Like Pennsylvania, many states adopted statutory limitations, and sometimes even bars, to the application of the dual sovereignty doctrine.\(^{221}\) Some bar subsequent state prosecutions for the same “offense,”\(^{222}\) while others prohibit prosecutions for the same “act,” “behavior,” or “conduct,”\(^{223}\) often with the state’s courts later equating these terms with “same offense.”\(^{224}\)

A common requirement for the prohibition against successive prosecution in states with a statutory limitation is the standard jeopardy jurisprudence requirement that jeopardy attach in the prior prosecution either by conviction, acquittal, or improper termination.\(^{225}\) Other common statutory exceptions to state protections from the application of the dual sovereignty doctrine include the following:

\(^{220}\) Id. at 18-19.

\(^{221}\) See Table 3

\(^{222}\) See § 16-1-8(c) GA. CODE (1982); § 720 ILL. COMP. STAT. 5/3-4(c) (1961); § 505.050 KEN. REV. STAT. (1975); § 99-11-27 MISS. CODE. (1942); § 76-1-404 UTAH CODE (1973).

\(^{223}\) See ARK. CODE § 5-1-114 (1975); CAL. PENAL CODE § 656 (2004); COLO. REV. STAT. § 18-1-303(1) (1963); 11 DEL. CODE § 209 (1953); § 701-112 HI. CODE (1972); 19 IDAHO. CODE § 315 (1986); § 35-41-4-5 IND. CODE (1977); § 609.045 MINN. ANN. STAT. (1983); § 46-11-504 MONT. CODE (1997); § 171.070 NEV. REV. STAT. (1929); 22 OKLA. STAT. § 130 (1910); 18 PENN. CONS. STAT. § 111(1) (2007); § 10.43.040 WASH. CODE CRIM. PRO. (1999); § 939.71 WISC. STAT. (1995).


\(^{225}\) See ARK. CODE § 5-1-114 (1975); CAL. PEN. CODE § 793 (2004); COLO. REV. STAT. § 18-1-303(1)(a) (1963); 11 DEL. CODE § 209(1) (1953); § 701-112 HI. CODE (1972); § 19-315; 19 IDAHO. CODE § 315 (1986); ILL. COMP. STAT. 5/3-4 (2010) (the 2010 amendments made one change not affecting the dual sovereignty protections and other changes described as “non-substantive”); § 35-41-4-5 IND. CODE (1977); § 21-3108(3) KAN. ANN. STAT. (1977); § 505.050 KEN. REV. STAT. (1975); § 609.045 MINN. ANN. STAT. (1983); § 99-11-27 MISS. CODE (1942); § 46-11-504 MONT. CODE (1997); § 171.070 NEV. REV. STAT. (1929); § 2C:1-11 N.J. ANN. STAT. (1978); § 40.30 N.Y. CODE CRIM. PRO (1974); 22 OKLA. STAT. § 130 (1910); 18 PENN. CONS. STAT. § 111(1) (2007); § 76-1-404 UTAH CODE (1973); § 10.43.040 WASH. CODE CRIM. PRO. (1999).
(1) where the initial prosecution requires proof of different facts or elements not required in the state prosecution,226

(2) where the state statute addresses different harms or evils than the offense originally prosecuted,227 and

(3) where the state offense was not consummated at the time of the first prosecution.228

States also differ as to initial prosecutions by which sovereignties are given protections against. Many statutes provide expansive protections incorporating prior prosecutions in another “jurisdiction.”229 Others extend protection following prosecutions in another state, territory or country;230 or just another state or country.231 Still others limit the initial jurisdiction to only state and federal courts,232 or only an initial prosecution by the United States government.233 The Mississippi Supreme Court held in 1997 that the statutory language “another state, territory or country” (emphasis supplied) in its dual sovereignty statute did not encompass the United States government thereby allowing the state government to pursue state charges for capital murder.


following a federal conviction for kidnapping.\textsuperscript{234} Most states addressing the issue include
Native American tribal nations within their dual sovereignty bars\textsuperscript{235} but the Supreme
Court of Washington recently held that Native American tribes do not fall within the
state’s statutory dual sovereignty bar that specifies prosecution in “another state or
country” because such tribes are not expressly included in the statute.\textsuperscript{236}

\begin{table}[h]
\centering
\caption{State Statutory Limitations}
\begin{tabular}{ll}
\textbf{State} & \textbf{Statute} \\
Arkansas & § 5-1-114 Ark. Code \\
California & §§ 656, 793 Cal. Pen. Code \\
Colorado & § 18-1-303 Col. Code \\
Delaware & 11 Del. C. § 209 \\
Georgia & § 16-1-8(c) Ga. Code \\
Hawaii & § 701-112 Haw. Code \\
Idaho & § 19-315 Idaho Code \\
Illinois & 720 ILCS 5/3-4 \\
Indiana & § 35-41-4-5 Ind. Code \\
Kentucky & § 505.050 Ken. Pen. Code \\
Minnesota & § 609.045 Minn. Crim. Code \\
Montana & § 46-11-504 Mont. Code Crim. Pro. \\
Nevada & § 171.070 Nev. Code \\
New Jersey & § 2C:1-11 N.J. Code \\
New York & NY CSL CPL § 40.20(2)(f) \\
North Dakota & § 29-03-13 N.D. Cent. Code \\
Oklahoma & 22 Okla. Stat. § 130 \\
Pennsylvania & 18 Pa.C.S. § 111 \\
Utah & § 76-1-404 Utah Crim. Code \\
Virginia & § 19.2-294 Va. Code \\
Wisconsin & § 939.71 Wisc. Crim. Code \\
\end{tabular}
\end{table}

\textsuperscript{234} Evans v. State, 725 So.2d 613, 658-59 (Miss. 1997) cert denied 525 U.S. 1133 (1999). The court held
under Mississippi law, resort to statutory construction is unnecessary where there is no ambiguity in the
statute. Without explaining why the statute was unambiguous and even while acknowledging the
defendant’s argument that other states had reached different results, the court declared that the statute
unambiguously excluded prosecutions by the United States.

\textsuperscript{235} See cases cited in John E. Theuman, \textit{Validity of State Prosecution Subsequent to Tribal Court
Prosecution}, 116 A.L.R.5\textsuperscript{th} 313, 321-23 (2008).

The remaining states listed in Table 4 have not adopted a limitation on subsequent state prosecutions. Many have done so explicitly in the legislation or state court holdings cited in Table 4. Others have not had occasion to address the issue as indicated in Table 4. Alaska and South Dakota at one time had dual sovereignty bars but both have since repealed the protections.

Table Four—States That Have Not Limited Dual Sovereignty

<table>
<thead>
<tr>
<th>State</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ex Parte Heath (1984)</td>
</tr>
<tr>
<td>Alaska</td>
<td>Dual sovereignty protections repealed in 2008</td>
</tr>
<tr>
<td>Connecticutt</td>
<td>State v. Moeller (1979)</td>
</tr>
</tbody>
</table>

237 Only state court decisions affirming the dual sovereignty doctrine after the Supreme Court’s application of double jeopardy protections to the states in Benton v. Maryland (1969) are included. Otherwise the state is considered not to have addressed the issue even though prior state decisions may have approved the notion of subsequent state prosecutions. See, e.g. State v. Mosely, 122. S.C. 62, 66-68, 114 S.E. 866 (1922); State v. O’Brien, 106 Vt. 97, 170 A. 98, 104-106 (1934); State v. Henson, 91 W.Va. 701, 114 S.E. 273 274-75 (1923) (all three cases involve state alcohol related prosecutions following federal convictions under the Volstead Act during Prohibition with all three courts finding no jeopardy since alcohol could be regulated under both state and federal law after the ratification of the 18th Amendment).

238 Sec. 12.20.010 ALAS. CODE (Repealed, § 40 ch. 75 SLA 2008).

239 Sections 22-5-8 and 23-2-12 S.D. CODE (Repealed by SL 1978, ch 178, § 577) were repealed in 1978 following a decision by the state supreme court in State v. West, 260 N.W.2d 215 (S.D. 1977), holding the owner of a multi-million dollar meat packing enterprise who had fallen on hard times could not be prosecuted in state court after being convicted of several counts in federal court and acquitted of others. According to the opinion, although the statutes had been law since South Dakota was a territory, the West decision was the first opportunity a court had to interpret them, 260 N.W.2d at 219. The statutes were repealed the year following the court’s opinion. See State v. Chavez, 668 N.W.2d at 99-100.

240 Ex Parte Heath, 455 So.2d 905, 906 (Ala. 1984) aff’d Heath v. Alabama, 474 U.S. 82 (1985); see notes 42-44 supra and accompanying text.

241 See note 237, supra.


Drug cases comprise a special category for many states. The states listed in Table 5 have specific statutes that afford limitations on the dual sovereignty doctrine in drug cases. Two states that provide no comprehensive dual sovereignty limitations, Alabama and Arizona, at one time afforded specific statutory protection for drug offenses but both statutes have since been repealed.

244 Booth v. State, 436 So. 2d 36, 37-38 (Fla. 1983).
250 State v. Kirksey, 647 S.W.2d 799, 804-05 (Mo. 1983).
254 State v. Fletcher, 26 Ohio St. 2d 221; 271 N.E.2d 567, 568-70 (Ohio 1971).
256 See note 238, supra.
Table Five—State Statutory Limitations for Drug Cases

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>§ 20-2-77 Ala. Code (Repealed)&lt;sup&gt;260&lt;/sup&gt;</td>
</tr>
<tr>
<td>Arizona</td>
<td>§ 36-2532, &lt;i&gt;et seq.&lt;/i&gt; Ariz. Code (Repealed)&lt;sup&gt;261&lt;/sup&gt;</td>
</tr>
<tr>
<td>Arkansas</td>
<td>§ 5-64-418 Ark. Code (2001)</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>63 Okla. Stat. § 2-413 (1971)</td>
</tr>
</tbody>
</table>

V. A More Just and Reasonable Approach

While the dual sovereignty remains a constitutionally viable doctrine, it clearly has its detractors. The United States Supreme Court has emphasized the need for restraint even while affirming the constitutionality of the doctrine. In response, the United States Department of Justice has adopted internal policies, albeit unenforceable ones, intended to circumscribe the use of dual sovereignty to only instances in which demonstrable federal interests are at stake.

At least two state supreme courts, New Hampshire and Pennsylvania, have not been nearly so kind in expressing their opinions concerning the doctrine. Additionally, nearly half the states have limited the doctrine by constitution or statute. All tolled, half the states<sup>262</sup> and the federal government affirmatively limit subsequent prosecutions in some manner if double jeopardy attaches in an initial prosecution by a different sovereign.

<sup>260</sup> Acts 1987, No. 87-603, § 12.
<sup>261</sup> Laws 1981, Ch. 264, § 38.
<sup>262</sup> Possibly more, if the position of Michigan could be ascertained in light of recent court holdings. See notes 193 and 204-206 and accompanying text.
Many judges, lawyers, and scholars have condemned the dual sovereignty doctrine as having outlived its usefulness, particularly in light of the increasing federalization of criminal law. Some maintain the dual sovereignty doctrine may even discourage cooperation among sovereigns in pursuing criminal charges and engender distrust among them, particularly between the states and the federal government.263 Other critics advocate the application of the doctrine only in areas states demonstrably fail to adequately address issues, such as civil rights violations.264 Concerns expressed by judges and scholars do little more than beg the question whether the dual sovereignty doctrine in its current manifestation is truly compatible with double jeopardy protections and, if not, can it be reformulated so as to address recurrent questions about the relationship.

Given that there must be a constitutional bases for the exercise of federal criminal jurisdiction, the problem might best be approached on a federal preemption basis. In areas of federal jurisdiction where the United States believes the states may be more lax than federal interests warrant, Congress could preempt state law and make such issues solely matters of federal concern under the Supremacy Clause of the United States Constitution.265 Such an action would bar states from initiating any prosecution thereby obviating the need for the dual sovereignty doctrine. Such an approach would undoubtedly strain an already overtaxed federal criminal justice system, but it would also force the federal government to identify those crimes it regards as truly matters of

263 Merkl, note 5 supra at 196.
264 Id. at 199; see note 127 and accompanying text.
265 The power to preempt in Article VI, might be particularly useful in areas such as Civil Rights violations. U.S. CONST. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
national concern that the Supreme Court envisioned when it discussed the *Petite* Policy in *Rinaldi*.

Another approach would be to make the requirements of the *Petite* Policy, both substantive and procedural, inure to the benefit of criminal defendants and also put the onus on defendants to raise the issue pre-trial much as jeopardy objections are. This would ensure the policy objectives of the policy would be achieved before resources are invested in a trial. It would also have the benefit of calling technical violations, such as failure to obtain a waiver of the policy from the appropriate DOJ authority, to the attention of prosecutors so they can be remedied, if possible. As for the substantive issues addressed by the policy such as vindication of federal interests or an inadequate or incompetent prior prosecution, such matters could be addressed in a pre-trial hearing using a preponderance of the evidence standard.

Yet another approach might be to make only an acquittal an absolute bar to reprosecution by the federal government. However, while this might solve the problem of defendants who plead guilty to another sovereign’s offense to escape harsher punishment under a federal statute, it would not address the issue of jury nullification of unpopular laws such as existed in the South during the Civil Rights Era. In the 21st Century, one would hope such problems do not exist to the extent they did before the Civil Rights Movement. However, instances of racial prejudice continue to exist and new biases based on sect, ethnicity and sexual orientation have arisen.

This approach also fails to address the equally dogmatic issue of subsequent prosecutions by state governments. While a ban on reprosecution by the federal government would require only an appropriate statute or regulation, prohibiting

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subsequent prosecutions by the states under longstanding dual sovereignty jurisprudence would require either a constitutional amendment or an abrupt, wholesale change of heart by the United States Supreme Court regarding the constitutionality of the dual sovereignty doctrine, neither of which is likely.

There does, however, remain the possibility that, in an era that has witnessed an enormous increase in federal criminal law that often duplicates or overlaps state and local law, the Supreme Court may come to the realization that its prior pronouncements relating to the need for vindication of federal and state interests are overstated in light of intervening circumstances. The Court might well conclude that the cure of dual sovereignty may well have become worse than the disease of unvindicated sovereign interests.