ARTICLES

BIG BROTHER ON THE BEAT: THE EXPANDING FEDERALIZATION OF CRIME

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I. INTRODUCTION

In recent years, two tragic events have fundamentally changed the way many Americans view federal law-enforcement agencies, and these events have jeopardized public confidence in the federal government itself. In August 1992, U.S. Marshals sought to arrest white separatist Randy Weaver at his remote mountain cabin in Ruby Ridge, Idaho. A confrontation resulted in the death of a federal marshal and

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Weaver's fourteen-year-old son. Special FBI teams were called, and during the siege that followed, Weaver's wife was killed also. It is estimated that the government spent approximately $10 million to apprehend Weaver on federal gun charges. At the subsequent trial, Weaver was acquitted on all but the most minor offenses.

Since the Ruby Ridge incident, federal law enforcement as a whole has been under intense congressional and media scrutiny. Even those normally supportive of the police have asked: Should the federal government have risked this loss of life and expended $10 million to capture a hermit whose only alleged crime was selling two sawed-off shotguns to an undercover federal agent?

Six months later, a fifty-one day siege erupted when agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) sought to arrest the leaders of the Branch Davidians cult at their compound in Waco, Texas for federal gun violations. Four BATF agents lost their lives in the initial foray, and the entire situation resulted in the deaths of eighty-five cult members who were killed either by gunfire or a suicidal fire that was set inside the compound when FBI agents attempted to end the siege. Again, conflicting versions of this tragedy led to Congressional hearings amidst public and media criticism.

Without attempting to resolve the controversies or assign the blame, one conclusion can be drawn from both tragedies: each one was the direct result of increased federal involvement in crimes that were once considered wholly within the province of state and local police agencies. In neither incident did the underlying crime involve interstate activity or pose a threat to the federal government. Without the federalization of laws regulating firearms, a matter left to the states during most of our country's history, neither the BATF nor FBI would have had jurisdiction at Ruby Ridge and Waco, and any law-enforcement actions would have been handled locally, if at all.

II. THE EXPANDING FEDERALIZATION OF CRIME

"We federalize everything that walks, talks, and moves," said Senator Joseph R. Biden, Jr., Chairman of the Senate Judi-

ciary Committee from 1986-1994.[1] Unfortunately, this is not much of an exaggeration; there are well over 3,000 federal crimes today.[2] And this number does not include the 10,000 regulatory requirements that carry criminal penalties.[3] Few crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction. For example, the following is a representative sample of serious, but purely local, crimes that have been duplicated in the federal code: virtually all drug crimes,[4] carjacking,[5] blocking an abortion clinic,[6] failure to pay child support,[7] drive-by shootings,[8] possession of a handgun near a school,[9] possession of a handgun by a juvenile,[10] embezzlement from an insurance company,[11] and murder of a state official assisting a federal law enforcement agent.[12] While most of these crimes pose real threats to public safety, they are outlawed by the states already and need not be duplicated in the federal criminal code.

The federalization of crime also includes trivial crimes that further clog the federal code. The following is a sampling of actual federal crimes: damaging a livestock facility,[13] unauthorized reproduction of the "Smokey the Bear" image,[14] transporting artificial teeth into a state without permission,[15] theft of a major artwork,[16] writing checks for less than a dollar,[17] and falsely impersonating a 4-H member.[18]

1. Daniel Friedman, *FBI Criticizes Trend Toward Federalizing*, HOUSTON CHRON., Dec. 19, 1993, at A2.
2. *See* Stephen J. Markman, *Criminalizing Business Law*, CORPORATE BOARD, Sept. 1994, at 6.
3. *Id.* In 1993 alone, 135 defendants were convicted and sentenced to 943 months of prison for federal environmental crimes. *See* James V. DeLong, *New Crimes, High Fines: The Criminalization of Nearly Everything*, CURRENT, Sept. 1994, at 21.
4. *See generally* 21 U.S.C. § 801 (1996).
5. *See* 18 U.S.C. § 2119 (1996).
6. *See* 18 U.S.C. § 248 (1996).
7. *See* 18 U.S.C. § 228 (1996).
8. *See* 18 U.S.C. § 36 (1996).
9. *See* 18 U.S.C. § 922(q)(2)(A) (1996).
10. *See* 18 U.S.C. § 922 (1996).
11. *See* 18 U.S.C. § 657 (1996).
12. *See* 18 U.S.C. § 1114 (1996).
13. *See* 18 U.S.C. § 43 (1996).
14. *See* 18 U.S.C. § 711 (1996).
15. *See* 18 U.S.C. § 1821 (1996).
16. *See* 18 U.S.C. § 668 (1996).
17. *See* 18 U.S.C. § 336 (1996).
18. *See* 18 U.S.C. § 916 (1996).

Unfortunately, the federalization of criminal offenses is on the rise. President Clinton may go down as the greatest supporter of an expansive federal criminal jurisdiction in history. Not only did his 1994 crime bill create dozens of new federal crimes, but the Clinton health care plan also proposed several dozen additional federal crimes.[19]

Two recently enacted federal crimes best exemplify the ineffective and partisan nature of the federalization of crime. The first is the "Church Arson Prevention Act of 1996."[20] In response to the approximately 150 church burnings in the South since 1995, many of which involved predominantly African-American congregations, Congress made it a federal crime to burn or otherwise damage church property "because of the religious, racial, or ethnic character of that property . . . ."[21] To say that this federal law is unnecessary is a gross understatement. Arson is a major felony in every state, and as the bill report from the House Judiciary Committee concedes, the church burning suspects "are being prosecuted in state court under arson charges."[22] Why should the federal government become involved when these crimes are being successfully prosecuted by the states? Further, despite the recent rash, church burnings and vandalism have decreased sharply since 1980, when there were more than 1,400 church fires,[23] a fact which further suggests that arson is being handled effectively at the state level. Also, as a secondary matter, why should the bill be aimed specifically at racially motivated arsons when over half of the church burnings involved white churches? Mary Francis Berry, chair of the U.S. Commission on Civil Rights that investigated this issue, acknowledged that only twenty percent of the African-American church burnings

19. The following were proposed federal crimes in Mrs. Clinton's heath care plan: concealing material facts in any manner involving a health care plan, failure to provide drug research and development information to the proper authorities, offering financial incentives to join a health care plan, the use of improper forms and the failure of an HMO or self-insured employer to pay claims promptly. *See* Stephen J. Markman, *Criminalizing Business Law*, CORPORATE BOARD, Sept. 1994, at 6. *See generally* Mathew P. Harnington, *Health Care Crimes: Avoiding Overenforcement*, 26 RUTGERS L.J. 111 (1994); H.R. 3600, 103d Cong., 1st Sess. (1993) (the Clinton health care reform bill).
20. Pub. L. 104-155, 110 Stat. 1392 (codified at 18 U.S.C. § 247 (1996)).
21. 18 U.S.C. § 247(c) (1996).
22. H.R. REP. NO. 104-621, at 3 (1996).
23. *See* Thomas Sowell, *Church Burnings: The Facts are at Odds with the Rhetoric*, THE TIMES UNION, Aug. 3, 1996, at A7.

solved thus far appeared to have been racially motivated.[24]

The second frivolous federal crime came into being when Congress again passed the Gun-Free School Zones Act,[25] which made it a federal crime to possess a firearm within a "school zone."[26] This act is the same one that the Supreme Court ruled unconstitutional in the landmark 1995 decision, *United States v. Lopez*.[27] For the first time in sixty years, the Supreme Court ruled that Congress exceeded its power under the Commerce Clause. The Court ruled that the Gun-Free School Zones Act exceeded Congress's power to regulate interstate commerce because it "is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms."[28] Not to be deterred by Supreme Court precedent, Congress overwhelmingly repassed the Gun-Free School Zones Act on September 12, 1996,[29] with the mere added requirement that the prosecutor prove the gun had crossed state lines or otherwise affected interstate commerce.[30]

If the states want to outlaw gun possession near a school, they can do so themselves without federal involvement.[31] Education and law enforcement have been the issues most within the province of state and local governments, and the Gun-Free School Zones Act increases federal involvement in both of these areas. If Congress federalizes these classic state and local issues, in spite of contrary Supreme Court precedent, the outlook for federalism is not good.

24. *See Commission Finds Racial Hatred a Cause in Church Fires* (National Public Radio (NPR) broadcast, Oct. 9, 1996).

25. Pub. L. 101-647, 104 Stat. 4789, 4844-46 (codified at 19 U.S.C. § 922(1)(A) (1990)). 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 922 (1996)).

26. 18 U.S.C. § 922(q)(1)(A) (1990) (current version at 18 U.S.C. § 922(q)(2)(A) (1996)).

27. 115 S.Ct. 1624 (1995).

28. *Id.* at 1630-31.

29. *See* Pub. L. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 922(q)(2)(A)).

30. *See* 18 U.S.C. § 922(q)(2)(A) ("It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.").

31. Ironically, in *Lopez*, the defendant was first charged under a Texas law that prohibited firearm possession on school premises. 115 S.Ct. at. 1630-31. The next day, however, the state charges were dismissed when federal agents charged the defendant with violating the Gun-Free School Zones Act. *Id.*

III. Reasons Against the Federalization of Crime

One obvious reason to oppose federalizing crime is that it contradicts America's constitutional framework. The drafters of the Constitution clearly intended crime to be within the province of the states. The Constitution itself gives Congress jurisdiction over only a few crimes: treason,[32] counterfeiting,[33] and piracy on the high seas and offenses against the law of nations.[34] As his famous quote in *The Federalist No. 45* demonstrates, James Madison envisioned little or no role for the federal government in law enforcement:

> 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. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement and prosperity of the state.[35]

Even Alexander Hamilton, the greatest proponent of a strong federal government in his day, wanted law enforcement to be a state and local concern. If Hamilton were alive today, he would be appalled at the use of the police power by federal agencies. In *The Federalist No. 17*, Hamilton, in an attempt to assure the states that the federal government would not usurp state sovereignty, wrote that law enforcement would be the responsibility of the states:

> There is one transcendent advantage belonging to the province of the state governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice . . . .[36]

Unfortunately, the damage caused by the federalization of crime is not merely abstract or academic. The more crime is federalized, the more the potential exists for an oppressive and burdensome federal police state. As early as the 1930s, FBI Di-

32. *See* U.S. Const. art. III, § 3, cl. 2.

33. *See* U.S. Const. art. I, § 8, cl. 6.

34. *See* U.S. Const. art. I, § 8, cl. 10.

35. The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

36. The Federalist No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

rector J. Edgar Hoover warned of the dangers of an oppressive "national police force."[37] In fact, Hoover was so fearful of an expansive federal role in law enforcement that he resisted efforts by his allies in Congress to make the FBI independent of the Justice Department and to expand the Bureau's jurisdiction over additional crimes.[38] As an alternative to a federal police force, Hoover created the National Academy as an adjunct to the FBI's own training facilities, where local law enforcement officers could be trained and then return to lead their own forces. This greatly enhanced the quality of law enforcement nationwide without creating the federal police force that Hoover so feared.

Modern state authorities are not unfamiliar with Hoover's fears. Charles Meeks, executive director of the National Sheriffs Association, argues that, with every additional federal crime, "we're getting closer to a federal police state. That's what we fought against 200 years ago—this massive federal government involved in the lives of people on the local level."[39] And far from being appreciative of federal prosecutorial support, one of the leading opponents of the federalization of crime is the National District Attorneys Association.

Another negative consequence of the federalization of crime is that federal law enforcement authorities are not as attuned to the priorities and mores of local communities as state and local law enforcement. In the Ruby Ridge tragedy, for example, would the local Idaho authorities have tried to apprehend Weaver in such an aggressive fashion? Would they have spent $10 million on a relatively minor case, as did the federal agencies? More fundamentally, would Idaho officials have even cared about two sawed-off shotguns? In the Waco disaster, would the local sheriff's department have stormed the compound as the BATF did or instead have waited for David Koresh to venture into town for supplies, which he frequently did, to arrest him? This is not meant to question the character

37. *See* Sam Francis, *Leviathan's Hunger for a National Police Force*, WASHINGTON TIMES, Aug. 27, 1993, at F1; *see generally* Edwin Meese III and Rhett DeHart, *How Washington Subverts Your Local Sheriff*, POLICY REVIEW 48, Jan.-Feb. 1996.

38. *See* Henry J. Reske, *Alphabet Soup: Gore Calls for Merger of FBI, DEA, and BATF*, A.B.A. J., Nov. 1993, at 38 (discussing Hoover's efforts to keep the FBI out of drug enforcement).

39. David Masci, *Crossing State Lines: Criminal Law and the Federal Government*, CONG. Q., Nov. 21 1992, at 3676.

or competency of federal agents, the vast majority of whom are honorable and dedicated public servants. But it is important to remember that both of these tragedies resulted in part from the federalization of state gun laws. If the regulation of firearms had remained with the states, where it was traditionally handled, these tragedies may never have occurred.

One of the most pernicious aspects of the federalization of crime is the opportunity it creates to circumvent our constitutional double jeopardy protections. The purpose of this Article is to examine how the federalization of crime, coupled with the dual sovereign doctrine discussed below, endangers our double jeopardy protections.

IV. THE DEMISE OF DOUBLE JEOPARDY PROTECTION

> *"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."*[40]

Federalization of criminal laws often creates concurrent state and federal jurisdiction over the same offense. This concurrent jurisdiction grants both state and federal prosecutors the opportunity to prosecute the same case successively. As the following explains, the rules of double jeopardy do not apply when state and federal courts, or different state courts, are involved because these courts represent different sovereign governments. Nevertheless, the spirit of double jeopardy is violated when a defendant can be acquitted in state court and retried for the exact same crime in federal court, or vice versa. The purpose of the Fifth Amendment's guarantee that no individual be twice put in jeopardy was described vividly by the Supreme Court in *Green v. United States*:

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[41]

Probably the most well-known recent example of this ordeal was the federal trial of the officers involved in the Rodney

40. U.S. CONST. amend. V.

41. 355 U.S. 184, 187-88 (1957).

King case after they were acquitted in the state trial. Reporters from *The American Lawyer*, a generally liberal magazine, monitored the first Rodney King trial and concluded that the verdict was not only reasonable but largely justified.[42] Nevertheless, the federal government retried the acquitted officers on federal charges.[43] In the second trial, what juror would not have been affected by the fear of additional riots and violence had he acquitted the officers? Would anyone argue this second trial was fair?

V. THE UNFAIRNESS OF THE DUAL SOVEREIGN DOCTRINE

While the Double Jeopardy Clause of the Fifth Amendment states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," the Supreme Court has repeatedly held that criminal prosecutions brought by different sovereigns are not the "same offence" and thus do not constitute double jeopardy. This principle is referred to as the "dual sovereign doctrine."[44] The first case to address this issue directly was *United States v. Lanza*.[45] In *Lanza*, the Defendant was convicted in state court of bootlegging liquor during Prohibition. Federal prosecutors subsequently brought federal charges for the same offense. In rejecting a defense based on the Double Jeopardy Clause, the unanimous Court ruled 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 . . . . *The defendants thus committed two different offenses by the same act* . . . ."[46] Thus, the Court held that the prior state conviction did not bar the federal prosecution. Four years later, a unanimous Court reached the same holding in another prohibition case, *Herbert v. Louisiana*.[47]

The Supreme Court relied on *Lanza* in *Abbate v. United States*[48] and *Bartkus v. Illinois*.[49] The *Abbate* case involved a federal conviction for conspiring to destroy telephone facilities after a state conviction for conspiring to destroy the property of another.[50] The same property and criminal behavior were the basis for both convictions.[51] Based on *United States v. Lanza*, the Court held it was a well-established principle that "a federal prosecution is not barred by a prior state prosecution of the same person for the same acts."[52]

The facts of *Abbate* underscore the potential unfairness of successive prosecutions. The petitioners in *Abbate*, having initially conspired to destroy telephone facilities, soon changed their minds and told another conspirator that they would not commit the crime.[53] Moreover, they reported the plot to the telephone company and the police before it was carried out, thereby preventing the destruction of the property.[54] After pleading guilty to the state conspiracy charges, the petitioners were sentenced to three-month prison terms, a sentence that likely reflected their efforts to prevent the plot.[55] However, after being retried and convicted in federal court under federal conspiracy charges, the petitioners faced a maximum sentence of five years.[56] Nevertheless, the Court upheld the successive prosecutions, reasoning that federal law enforcement would suffer if the Double Jeopardy Clause barred successive state and federal prosecutions because the defendants' conduct "could impinge more seriously on a federal interest than a state interest."[57]

In the *Bartkus* case, the reverse situation occurred: the first trial, an acquittal, was in federal court, while the subsequent conviction occurred in state court. The defendant was tried and acquitted of bank robbery in federal district court. Less than three weeks later, he was retried for the same bank robbery in state court under the state robbery statute.[58] After being acquitted in federal court, the defendant was convicted

42. *See generally* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause*, 41 U.C.L.A. L. REV. 693 (1994).
43. *Id.*
44. *Id.*
45. 260 U.S. 377 (1922).
46. *Id.* at 382 (emphasis added).
47. 272 U.S. 312, 314 (1926); *see also* Westfall v. United States, 274 U.S. 256 (1927) (upholding successive prosecutions in non-prohibition context).
48. 359 U.S. 187 (1959).
49. 359 U.S. 121 (1959).
50. *See* 359 U.S. at 188-89.
51. *Id.*
52. *Id.* at 194.
53. *Id.* at 188.
54. *Id.*
55. *Id.*
56. *Id.* at 195.
57. *Id.*
58. "The facts recited in the Illinois indictment were substantially identical to those contained in the prior federal indictment." Bartkus v. Illinois, 359 U.S. 121, 122.

and sentenced to life imprisonment in state court for the same offense.

In *Bartkus*, the federal and state officials cooperated closely in the successive prosecutions. For example, the FBI agent who conducted the federal investigation turned over to Illinois prosecutors all the evidence he had gathered against the defendant—including evidence gathered after the federal acquittal for the purpose of strengthening the State's case. In addition, the federal sentencing of the accomplices who testified against the defendant in both trials did not occur until after they testified in the subsequent state trial. During the oral argument before the Supreme Court in *Bartkus*, the Illinois state attorney conceded "that the federal officers did instigate and guide this state prosecution" and "actually prepared this case."[59] This close cooperation led to charges that the Illinois prosecution was merely a cover to evade double jeopardy and, in reality, to avoid another federal prosecution for the same offense.

Nevertheless, the Court again held that successive state and federal prosecutions do not violate the Fifth Amendment's prohibition against double jeopardy. The Court stated:

> Every citizen of the United States is also a citizen of a State or territory. . . . 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 offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.[60]

The modern Supreme Court has also upheld the dual sovereign doctrine—even when the defendant received the death penalty in the second prosecution. In *Heath v. Alabama*,[61] the defendant pled guilty to murder in Georgia in exchange for a life sentence.[62] Subsequently, in Alabama, the same defendant

59. *Id.* at 165.

60. *Id.* at 131-32 (quoting Moore v. Illinois, 55 U.S. (14 How.) 13 (1852)). In *Moore*, the issue did not involve successive prosecutions. Instead, the Court merely permitted the federal government and a state government to criminalize the same offense.

61. 474 U.S. 82 (1985).

62. *Id.* at 84-85.

was convicted for the same murder and sentenced to death.[63] For the first time, the Court considered the applicability of the dual sovereign doctrine to successive prosecutions by different states.[64]

The Court ruled that the "dual sovereignty doctrine . . . compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."[65] The Court reasoned that when a defendant in a single act violates the laws of two different sovereigns, he has committed two separate "offences" for double jeopardy purposes.[66] Apparently, the Court was not bothered by the fact that Georgia law enforcement officials played "leading roles as prosecution witnesses" in the subsequent Alabama prosecution.[67]

The Court stated that the crucial determination in applying the dual sovereign doctrine is whether the prosecuting entities are separate sovereigns.[68] This determination, the Court added, turns on whether the entities draw their powers to prosecute from independent sources of authority.[69] The Court held that the states derive the power to prosecute from the authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.[70] Thus, the Court reasoned that the states are no less sovereign with respect to each other than they are with respect to the fed-

63. *Id.* Both states had jurisdiction because the kidnapping began in Alabama and the murder occurred in Georgia.

64. *Id.* at 86. In all, the Supreme Court has permitted successive prosecutions between every combination of "sovereigns" possible in our federal system of government. *See* Abbate v. United States, 359 U.S. 187 (1959) and Bartkus v. Illinois, 359 U.S. 121 (1959) (holding state and federal governments are separate sovereigns for double jeopardy purposes); *Heath*, 474 U.S. at 82 (holding two states are sovereigns for double jeopardy purposes); United States v. Wheeler, 435 U.S. 313 (1978) (holding federal government and Native American tribe are two sovereigns for double jeopardy purposes).

65. *Heath*, 474 U.S. at 88.

66. The Double Jeopardy Clause states: "[N]or shall any person be subject for the *same offence* to be twice put in jeopardy of life or limb." U.S. CONST. amend. V (emphasis added).

67. *Heath*, 474 U.S. at 102-03. In his dissent in *Heath*, Justice Marshall made the astute observation that it is doubtful that the defendant would have pled guilty to murder in Georgia had he known that these same Georgia officials "would merely continue their efforts to secure his death in another jurisdiction." *Id.* at 103.

68. *Id.* at 89.

69. *Id.*

70. *Id.* at 92.

eral government.[71] With commendable candor, the Court accurately described the gist of the dual sovereign fiction: "This Court has plainly and repeatedly stated that two identical offenses are not the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."[72]

VI. JUDICIAL CRITICISM

Perhaps the best judicial criticism of the dual sovereign doctrine is Justice Black's dissent in *Bartkus*.[73] Justice Black severely criticized successive prosecutions and the dual sovereign doctrine.

In *Bartkus*, 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.[74] 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.[75]

Justice Black argued that successive prosecutions for the same offense are so contrary to due process that the practice has been rejected throughout Western Civilization:

> Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers.[76]

According to Justice Black, successive prosecutions for the same offense were prohibited even by the Church canons, which contained the maxim, "[N]ot even God judges twice for the same act."[77]

71. *Id.*
72. *Id.*
73. Bartkus v. Illinois, 359 U.S. 121 (1959).
74. *Id.*
75. *Id.* at 155.
76. *Id.*

VII. THE DUAL SOVEREIGN DOCTRINE AFTER INCORPORATION

In the landmark *Barron v. Baltimore*[78] decision, the Supreme Court held that the federal Bill of Rights, including the Double Jeopardy Clause, did not bind the states but only the federal government. This rule supported the dual sovereign exception to the Double Jeopardy Clause for the following reason: If the Double Jeopardy Clause did not apply to the states, and a state could repeatedly prosecute a defendant for the same offense,[79] why could a state and the federal government together, not successively prosecute a defendant for the same offense? Consequently, the reasoning behind *Barron* "loomed large for double jeopardy dual sovereignty."[80]

However, in *Benton v. Maryland*,[81] the Supreme Court held that the Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment. And in two later cases, the Supreme Court abolished rules of criminal procedure that were based on the dual sovereign theory, partly because of the incorporation of the Bill of Rights. In *Murphy v. Waterfront Commission of New York Harbor*,[82] the Court decided a related issue: whether one sovereign in our federal structure may compel a witness, whom it has given immunity under its law, to give testimony that could then be used to convict him of a crime in another sovereign's jurisdiction. Under prior precedents, one sovereign (e.g., the federal government) could, through a grant of immunity effective only in that jurisdiction, compel a witness to give testimony that could incriminate him under the laws of another sovereign jurisdiction (e.g., a state).[83]

77. *Id.* (quoting BROOKE, THE ENGLISH CHURCH AND THE PAPACY, 205).
78. 32 U.S. 242 (1833).
79. Of course, in order to repeatedly prosecute a defendant for the same offense, a state court would have to ignore the common law double jeopardy rule.
80. Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 COLUM. L. REV. 1 (1995).
81. 395 U.S. 784 (1969).
82. 378 U.S. 52 (1964).
83. *See, e.g.*, United States v. Murdock, 284 U.S. 141 (1931) (ruling that the federal government could compel, by a grant of immunity for federal crimes, a witness to give testimony that could incriminate him under state law); Feldman v. United States, 322

The Court overruled these precedents and held that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[84]

In reaching this result, the *Murphy* Court rejected the "separate sovereignty theory of self-incrimination."[85] On the same day *Murphy* was decided, the Court held that the Fifth Amendment's privilege against self-incrimination is applicable to the States through the Fourteenth Amendment in *Malloy v. Hogan*.[86] Based in part on this incorporation of the self-incrimination clause, the Court stated: "[T]here is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction."[87]

The Court reasoned that the purposes of the self-incrimination clause are frustrated by the dual sovereign doctrine, which allowed a witness to "'be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each."[88] This is particularly true, the Court noted, "in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity."[89]

Another decision in which the Court abolished a rule of criminal procedure that rested on the dual sovereign theory was *Elkins v. United States*.[90] In *Elkins*, the Court discarded the "silver platter doctrine."[91] This doctrine allowed evidence obtained by state officials in an unreasonable search and seizure to be introduced in federal court, even though the same evi-

U.S. 487 (1944) (holding that testimony compelled by a state could be introduced as incriminating evidence in federal court). *Murphy* explicitly overruled these cases. *See Murphy*, 378 U.S. at 52.

84. *Id.* at 77-78.

85. *Id.* at 78-79

86. 378 U.S. 1 (1964).

87. *Murphy*, 378 U.S. at 55-56.

88. *Id.* at 55 (quoting Knapp v. Schweitzer, 357 U.S. 371, 385 (1958) (Black, J., dissenting)).

89. Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55-56 (1964).

90. 364 U.S. 206 (1960).

91. *Id.*

dence would not be admissible if seized by federal agents.[92] The silver platter doctrine was created in *Weeks v. United States*.[93] In *Weeks*, the Court allowed the admission of evidence unlawfully seized by state officials, while rejecting evidence unlawfully seized by a federal marshal, because the "Fourth Amendment is not directed to individual misconduct of [state and local] officials. Its limitations reach the Federal Government and its agencies."[94]

However, this changed in 1949 with *Wolf v. Colorado*.[95] In *Wolf*, a unanimous Court held that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to the states.[96] The *Elkins* Court abandoned the dual sovereign approach to unreasonable searches and seizures largely because of the incorporation of the Fourth Amendment to apply to the states: "The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949."[97] Using an argument that closely resembles Justice Black's attack on successive prosecutions in his dissent in *Bartkus v. Illinois*, the Court abolished the silver platter doctrine, stating that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."[98]

As *Murphy* and *Elkins* show, once the self-incrimination and unreasonable search and seizure provisions were incorporated into the Fourteenth Amendment to apply to the states, the Court abolished the dual sovereign doctrine in these areas. However, the Double Jeopardy Clause was incorporated in *Benton*,[99] but the Court has not abandoned the dual sovereign doctrine for successive prosecutions. If the Court rejects the "separate sovereignty theory" for self-incrimination and unreasonable search and seizures, why does it maintain this fiction for successive prosecutions? The *Murphy* and *Elkins*

92. *Id.*

93. 232 U.S. 383, 398 (1914). Ironically, *Weeks* is best known for requiring the exclusionary rule in federal criminal prosecutions.

94. 232 U.S. at 398.

95. 338 U.S. 25 (1949).

96. *Id.*

97. Elkins v. United States, 364 U.S. 206, 213 (1960).

98. *Id.* at 215.

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

decisions severely undercut the rationale of the dual sovereign doctrine for successive prosecutions.[100] In fact, in his dissent in *Heath v. Alabama*,[101] Justice Marshall cited both *Murphy* and *Elkins* as undermining the dual sovereign exception to the Double Jeopardy Clause. Despite the obvious inconsistency between *Murphy* and *Elkins* and the dual sovereign doctrine for successive prosecutions, the Court has allowed the dual sovereign doctrine to survive in the double jeopardy context, even though it has rejected it elsewhere.

Although legal commentators are almost entirely critical of the dual sovereign doctrine, they acknowledge that the precedent is well-established.[102] "So long as different sovereigns bring the two prosecutions of the same offense, the Double Jeopardy Clause is not offended."[103] Nevertheless, the Supreme Court has interpreted too narrowly the protections of the Double Jeopardy Clause. It is worth repeating that the text of the Fifth Amendment does not limit our double jeopardy protections to prosecutions brought by the same sovereign. The Court has, in effect, rewritten the Double Jeopardy Clause to read that no person shall be put "twice in jeopardy by the same sovereign."

100. For a thorough discussion of how *Murphy* and *Elkins* undercut the dual sovereign doctrine of successive prosecutions, *see* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 47-51 (1992).

101. 474 U.S. 82, 102 (1985). Ironically, Justice Marshall also criticized the Court for not considering the original intent of the Framers regarding the Double Jeopardy Clause. *Id.* at 98.

102. The following is a sample of articles that are highly critical of the doctrine: Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994); Braun, *supra* note 100, at 1; Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609 (1994); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Walter L. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metro. Transit Auth., 22 NEW ENG. L. REV. 31 (1987); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. REV. 252 (1961); Amar and Marcus, *supra* note 80, at 4.

103. Cassell, *supra* note 42, at 695. *See also* Braun, *supra* note 100, at 1 ("One can no longer credibly question whether the rule permitting successive federal-state prosecutions has been 'firmly established.'").

VIII. THE DUAL SOVEREIGN DOCTRINE VIOLATES THE SPIRIT OF THE DOUBLE JEOPARDY CLAUSE

A. *The English Common Law Prohibited Reprosecution*

Despite the Supreme Court precedents, the Dual Sovereign Doctrine violates the spirit of the Double Jeopardy Clause, especially when one considers the original intent of our Constitutional Framers. Professor Paul G. Cassell has presented a persuasive case that the Framers of the Double Jeopardy Clause did not intend to permit two sovereigns to separately prosecute a defendant for the same offense.[104] When the Framers adopted the Bill of Rights, English common law prohibited the reprosecution of a defendant acquitted or convicted of the same offense in a court of competent jurisdiction—even if the prosecution occurred in a foreign country.[105] This rule was termed *autrefois acquit* ("formerly acquitted") or *autrefois convict* ("formerly convicted").[106]

Perhaps the leading expert on the Dual Sovereign Doctrine was Professor J.A.C. Grant. Grant examined the decisions of the English courts throughout the British empire.[107] After this examination, Grant concluded that "[o]ne searches the British Empire in vain for support for the 'dual sovereignty' theory of successive prosecutions . . . ."[108] In fact, Grant found that the common law rule was "diametrically opposed" to successive prosecutions for the same offense:

> The common law doctrine that an acquittal or conviction by a court of competent jurisdiction abroad is a bar to a prosecution for the same offense in England had been definitely settled by three clearcut decisions rendered prior to the American revolution. . . . These cases are widely cited and universally accepted.[109]

The early English legal treatises also show that common law did not permit successive prosecutions by separate sovereigns. Blackstone's influential *Commentaries* reported that "when a

104. *See generally* Cassell, *supra* note 42.

105. *See id.* at 710-12.

106. *Id.* at 712.

107. Grant, *supra* note 102.

108. *Id.* at 34.

109. *Id.* at 8-9. The decisions to which Grant refers include: R. v. Thomas, 82 Eng. Rep. 1043 (K.B. 1662); R. v. Roche, 168 Eng. Rep. 169 (K.B. 1775).

man is once fairly found not guilty upon any indictment, or other prosecution, before *any court* having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime."[110] Leonard MacNally's 1802 treatise *Rules of Evidence on Pleas of the Crown* states that "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England."[111] Moreover, as the following modern treatise reveals, England still follows this common law rule today: "A person who has been tried and convicted or acquitted by a court of competent jurisdiction in a foreign country may not be tried again in England in respect of the same offence."[112] Ironically, due to the dual sovereign doctrine, in the United States, a state and the federal government, or two state governments, are more foreign to each other than England is to Spain or any other foreign country.[113]

B. *Did the Framers Incorporate the English Common Law Rule into the Fifth Amendment?*

Obviously, the English common law is irrelevant if it was not incorporated into the Fifth Amendment's Double Jeopardy Clause. Would the Double Jeopardy Clause have permitted successive prosecutions by different sovereigns for the same offense when adopted in 1791? Cassell and others contend that the drafting history of the Double Jeopardy Clause indicates that it was designed to incorporate the English common law rule of *autrefois acquit* and *autrefois convict*.[114] For example, during the First Congress, Representative Livermore, in describing the Double Jeopardy Clause, referred to "the universal practice in Great Britain, and in this country, that persons shall

110. 4 WILLIAM BLACKSTONE, COMMENTARIES *335 (emphasis added).

111. 2 MACNALLY, RULES OF EVIDENCE OF PLEAS OF THE CROWN 427-28 (2d Amer. ed. 1811).

112. 2 HALSBURY, LAWS OF ENGLAND 473 (1990).

113. One early American court observed that if the English common law rule honored acquittals and convictions in foreign courts, then American courts would honor judgments from other American courts. For example, in State v. Antonio, 2 Tread. 776, 781 (S.C. 1816), the court stated that "[i]f this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties?"

114. *See* Cassell, *supra* note 42, at 712; U.S. Dept. of Justice, Office of Legal Policy, *Report to the Attorney General: Double Jeopardy and Government Appeals of Acquittals*, 19-20 (1987), *reprinted in* 22 U. MICH. J.L. REF. 831, 854-55 (1989).

not be brought to a second trial for the same offence."[115] More recently, Justice Scalia, in discussing the separate issue of the definition of "same offence" in the Double Jeopardy Clause, stated that the "[Double Jeopardy] Clause was based on the English common law pleas of *autrefois acquit* and *autrefois convict* . . . ."[116]

The early American legal treatises also show that the Framers intended to incorporate the common law rule into the Double Jeopardy Clause. For example, Justice Story's *Commentaries on the Constitution* state that the Double Jeopardy Clause "is another great privilege secured by the common law."[117] Chancellor James Kent's *Commentaries on American Law* state that "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other . . . ."[118] Wharton's *Treatise on the Criminal Law* is even more probative: "The constitutional provision, it has been held, is nothing more than a solemn asservation of the common law maxim [of *autrefois acquit*]."[119]

Although *The Federalist Papers* do not specifically address the common law double jeopardy rule, they too indicate that the Framers would not have approved of the dual sovereign doctrine. For example, in *The Federalist No. 82*, Alexander Hamilton described the relationship between the federal and state governments in a way that undercuts the dual sovereign theory when he wrote that the federal and state governments are "parts of ONE WHOLE . . . ."[120] If the Framers believed that the federal and state governments were parts of "ONE WHOLE," then the theoretical basis for the dual sovereign doctrine is weakened. Under Hamilton's view, it seems that successive prosecutions by a state and the federal government would be tantamount to repeated prosecutions by the same "whole" government, and thus would be barred by the Double

115. 1 ANNALS OF CONG. 782 (Joseph Gales ed., 1789).

116. Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting on other grounds) (citing 4 W. BLACKSTONE, COMMENTARIES 330 (1769)).

117. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 662 (1833).

118. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 374 (1826).

119. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 147 (1846).

120. THE FEDERALIST NO. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Jeopardy Clause. Moreover, whenever *The Federalist Papers* describe the relationship between the federal and state governments in a manner that supports the dual sovereign theory, it is clear that its authors viewed this structure as a means to protect individual liberties from overreaching government, a goal inconsistent with successive prosecutions. For example, in *The Federalist No. 51*, Madison wrote:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. *Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.*[121]

Although this passage supports the dual sovereign theory when it refers to "two distinct governments," it is clear that Madison viewed our separate sovereign governments as rivals that would protect citizens from overzealous government, as opposed to cooperating prosecutors successively trying a defendant for the same offense. Ironically, the Framers rejected an amendment to the Double Jeopardy Clause that would have weakened double jeopardy protections in much the same way as the dual sovereign doctrine. While the Bill of Rights was being considered in the First Congress, a proposed amendment to the Double Jeopardy Clause was rejected. At the time the amendment was offered, the Double Jeopardy Clause under discussion read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."[122] The rejected amendment would have added the following: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence *by any law of the United States.*"[123] Apparently, this amendment would have barred double prosecutions for the same offense *only* if brought under "any law of the United States."[124] In other words, it seems that this proposed amendment would not have provided double jeopardy protection if

121. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

122. 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

123. *Id.* (emphasis added).

124. *Id.*

one of the prosecutions were under state or foreign law, just as the dual sovereign doctrine operates today. This rejected amendment was different from and narrower than the common law rule. The fact that the Framers rejected an amendment narrower than the common law rule indicates that they intended to incorporate the common law rule in its entirety into the Fifth Amendment. Justice Black commented on this rejected amendment in his dissent in *Abbate*: "I fear that this limitation on the scope of the Double Jeopardy Clause, which Congress refused to accept, is about to be firmly established as the constitutional rule by the Court's holding in this case and in *Bartkus v. Illinois*."[125]

IX. CONCLUSION

By ignoring the common law rule and the original intent of the Constitutional Framers, the Supreme Court has misconstrued and weakened one of America's most important constitutional protections. In the previous era of separate and distinct roles for the federal and state governments in law enforcement, the dual sovereign exception to double jeopardy protection was unfortunate but tolerable. However, in an era of the federalization of crime, there is little difference between the federal government and state governments in law enforcement because the federal government has duplicated virtually every major state crime. Just as the federal judiciary has ignored the intent of the Framers regarding the Double Jeopardy Clause, Congress has ignored the intent of the Framers regarding the proper role for the federal government in law enforcement.

As the federalization of crime increases and the criminal codes of the states and the federal government outlaw the same conduct, the rule of successive prosecutions becomes an increasingly important feature of federal and state criminal law. The federalization of crime has profound implications for double jeopardy protections for the simple reason that it creates more opportunities for successive prosecutions. As the federalization of crime increases, as a matter of prosecutorial policy, the federal government should not prosecute any crime arising from the same conduct or transaction that has been

125. Abbate v. United States, 359 U.S. 187, 204 (1959).

prosecuted previously. More importantly, the Supreme Court should abolish the dual sovereign exception to the Double Jeopardy Clause. As one commentator asked over sixty years ago, "[S]hall we fritter away our liberties upon a metaphysical subtlety, two sovereignties?"[126] This question has become even more valid today.

126. Grant, *supra* note 102, at 1331.