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# RECONSTRUCTING THE BILL OF RIGHTS: A REPLY TO AMAR AND MARCUS'S TRIPLE PLAY ON DOUBLE JEOPARDY

*Susan N. Herman\**

Call me absolutist. To me, Stacey Koon,<sup>1</sup> Lemrick Nelson,<sup>2</sup> and Paul Hill<sup>3</sup> look alike. Each of these men was twice put in jeopardy for the same offense, something the Double Jeopardy Clause<sup>4</sup> plainly prohibits. The Supreme Court agrees that these cases are alike. The Court's dual sovereignty doctrine, which holds that prosecutions by two different "sovereigns"—either state or federal governments—can never be for the "same offense," would permit reprosecution in all three cases.<sup>5</sup>

Akhil Amar and Jonathan Marcus, rethinking double jeopardy "in the wake of the Rodney King affair"<sup>6</sup> seek to mediate between the Supreme Court's fiction-based approach and my Hugo Black-like insis-

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1. Stacey Koon, a Los Angeles police sergeant, was, as we all still vividly recall, acquitted by a jury in state court on a charge of using excessive force during the arrest of Rodney King, and then charged in federal court with willfully violating Rodney King's constitutional right to be free from the use of unreasonable force during arrest and to be free from harm while in custody. Koon was actually convicted of failure to prevent Laurence Powell's unlawful assault on King, see *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993) (Sentencing Memorandum), *aff'd in part, vacated in part and remanded for resentencing*, 34 F.3d 1416 (9th Cir. 1994), and was sentenced (like Powell) to thirty months imprisonment, see *id.* at 792.

2. Lemrick Nelson was acquitted by a state court jury of murdering Yankel Rosenbaum. See Stephen Labaton, *Reno to Take Over Inquiry in Slaying in Crown Heights*, N.Y. Times, Jan. 26, 1994, at A1. He is now the subject of a pending federal prosecution for violating Rosenbaum's civil rights under 18 U.S.C. § 245(b)(2)(B) by killing him. See *United States v. Nelson*, Cr. No. 94-823 (E.D.N.Y. 1994) (Juvenile Information).

3. In a reversal of the typical order of dual prosecutions, Paul Hill was convicted by a federal court jury of violating the new Freedom of Access to Clinic Entrances [FACE] statute, 18 U.S.C.A. § 248 (West 1994), by killing Dr. John Britton, a doctor at the Pensacola Ladies Center, and his escort. See Ronald Smothers, *Abortion Protester Is Guilty Under Clinic Access Law*, N.Y. Times, Oct. 6, 1994, at A18. He was then convicted by a state court jury of murdering Dr. Britton, see *Jury Favors Execution of Abortion Foe*, L.A. Times, Nov. 4, 1994, at A24, and subsequently sentenced in federal court to two concurrent terms of life imprisonment, see *Hill Gets 2 Life Terms for Clinic Slayings*, L.A. Times, Dec. 3, 1994, at A31.

4. The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

5. For a recent exposition of the Court's theory, see *Heath v. Alabama*, 474 U.S. 82 (1985).

6. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1 (1995).

tence on analyzing criminal procedure from the perspective of the defendant. First, like the vast majority of legal academicians who have rethought the dual sovereignty doctrine, they would abrogate it,<sup>7</sup> although with one novel exception. They would allow re prosecution, at least by the federal government, of civil rights defendants who, like Koon but not Nelson or Hill, are state officials.<sup>8</sup> Second, Amar and Marcus rethink the entire definition of "same offense" in a way that provides a second, not unrelated, basis for allowing re prosecution of Koon, Nelson, or Hill.<sup>9</sup> Finally, they consider whether re prosecution of Stacey Koon should be permitted for yet a third reason—that Koon should bear responsibility for moving for a change of venue that, when granted, yielded a jury that reached an unreliable verdict because the jury itself was unrepresentative.<sup>10</sup>

I am particularly troubled by the two proposed exceptions to the finality of jury verdicts, especially verdicts of acquittal: the state official exception in our hypothetical dual-sovereignty-less world, and the notion that defendants might forfeit double jeopardy protection by participating in the selection of venue or jurors. I do understand why Amar and Marcus are anxious to permit a retrial of Stacey Koon. I have already expressed my own concern about the reliability of jury verdicts in cases involving the interests of minorities, whether as defendants or victims.<sup>11</sup> Both of these problematic exceptions attempt to serve the goals of the Reconstruction Era by allowing second prosecutions in those cases where the state criminal process might seem untrustworthy. Amar and Marcus find in the Fourteenth Amendment a convenient path around the Double Jeopardy Clause in two categories of cases; at every turn of the maze, I keep finding the Double Jeopardy Clause.

In this essay, I will discuss why I think Amar and Marcus are wrong in characterizing their dual sovereignty exception as a natural byproduct of the refined incorporation process previously expounded by Amar.<sup>12</sup> Neither the federal interests protected by the Fourteenth Amendment nor the Fourteenth Amendment's recalibration of the workings of federalism require even the limited dual sovereignty exception proposed. In

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7. See *id.* at 4–15. I am already on record as one of those commentators who agrees. See Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty*, Rodney King, and the ACLU, 41 UCLA L. Rev. 609, 625 (1994). For a substantial list of other commentators who have critiqued or wholly rejected the dual sovereignty doctrine, see *id.* at 618–19 n.32.

8. See Amar & Marcus, *supra* note 6, at 16–26.

9. See *id.* at 27–48 (on defining "same offense" generally). Their definition of "same offense" would permit re prosecution of Koon, see *id.* at 44–46, as well as of the overlapping but not identical state and federal offenses in the Nelson and Hill cases, see *supra* notes 2–3.

10. See Amar & Marcus, *supra* note 6, at 48–58.

11. See Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 Tul. L. Rev. 1807, 1842–46 (1993).

12. See Akhil Reed Amar, *The Bill of Rights and The Fourteenth Amendment*, 101 Yale L.J. 1193 (1992).

addition, I will comment on their suggestion that we might attack the problem of unrepresentative juries by scapegoating defendants who take advantage of the adversary process by participating in the selection of juries or venue. Both of these proposals would sacrifice an essential component of fair criminal procedure in hopes of buying a quick fix to problems we have inherited from the Reconstruction Era. Both also reflect an unwillingness to accept the flaws of the jury system along with its benefits.

## I. REFINING DUAL SOVEREIGNTY

### A. *The Case for a Refined Dual Sovereignty Exception*

Amar, Marcus, and I all agree that the dual sovereignty doctrine should be abolished, and we even seem to agree on the reasons. First, the purpose of the Double Jeopardy Clause is to prohibit the government from repeatedly prosecuting an individual "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."<sup>13</sup> As Justice Black observed when adoption of the dual sovereignty doctrine was still a close question for the Supreme Court, a criminal defendant who is being reprosecuted for the same offense suffers the same harms regardless of how many governments are behind the multiple prosecutions.<sup>14</sup> The Court's acceptance of the dual sovereignty doctrine rests heavily on an analysis preoccupied with the imperatives of federalism,<sup>15</sup> and blind to the perspective of the defendant.<sup>16</sup> Amar and Marcus firmly reintroduce the defendant's point of view.<sup>17</sup>

Amar and Marcus also reintroduce the point of view of the Fourteenth Amendment. The Supreme Court itself has recognized the advent of a post-incorporation "new age of cooperative federalism" in

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13. *Green v. United States*, 355 U.S. 184, 187-88 (1957). Another justification is that the double jeopardy ban invigorates the right to trial by jury by protecting the jury's nullification power. See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 122-32.

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

15. See *Heath v. Alabama*, 474 U.S. 82, 88-91 (1985) (describing federalism as a regime in which distinct sovereigns have distinct interests which can best be served by permitting them to pursue separate prosecutions).

16. The *Heath* majority, for example, rejected petitioner's argument that his double jeopardy interests should at least be weighed against the needs of two different states to try him for precisely the same homicide. The Court declared that, under the dual sovereignty doctrine, the two offenses were definitionally not the "same" within the meaning of the Double Jeopardy Clause. Therefore, the defendant's interests were irrelevant and any balancing by the Court was inappropriate. See *id.* at 92.

17. See Amar & Marcus, *supra* note 6, at 5-6, 9-10, 21 (emphasizing defendant's perspective and criticizing Supreme Court's one-sided views).

cases applying other Bill of Rights guarantees across jurisdictional lines.<sup>18</sup> In interpreting the Double Jeopardy Clause, however, the Court woefully adheres to an outmoded dual sovereignty model. Amar and Marcus urge consistency. In addition, the doctrine is at odds with any reasonable interpretation of the Constitution's view of sovereignty,<sup>19</sup> and with pre-constitutional history.<sup>20</sup>

However, Amar and Marcus also find that the dual sovereignty doctrine "still has a narrow but crucial role to play in enforcing the Reconstruction values of [the Fourteenth.] Amendment against state officials."<sup>21</sup> Amar's earlier work projects an appealing vision of neo-federalism that provides an incentive to read the Fourteenth Amendment as permitting multiple prosecutions of state officials who have violated individuals' federal civil rights. The state and federal governments, in this reading of the Constitution, stand in tandem to check and balance one another and to engage in a dialogue in order to provide expansive protection for the rights of We the People.<sup>22</sup> If a state is, or might be an inadequate guardian of federally protected rights, the federal government can intervene.<sup>23</sup> Amar and Marcus's treatment of the dual sover-

18. See *id.* at 12–15. Amar and Marcus discuss *Elkins v. United States*, 364 U.S. 206 (1960) (rejecting Fourth Amendment silver platter doctrine) and *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (holding that state witness cannot be compelled to provide evidence that could be used against him in federal prosecution).

In *Murphy*, the Court considered the argument that a dual sovereignty approach to the privilege against self-incrimination was warranted because the privilege acts as a limitation on government rather than as a protection of individual dignity. See 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2258 (John T. McNaughton rev., 1961). The Court rejected this characterization, declaring the privilege to be an individual right. See *Murphy*, 378 U.S. at 55–56 & n.5; Amar & Marcus, *supra* note 6, at 13–15.

19. Recent commentators have stressed that the dual sovereignty doctrine flagrantly misrepresents the Constitution's theory of who our "sovereign" is. 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, 30 (1992); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 *Yale L.J.* 281 (1992). Under our Constitution, there is only one sovereign: "We the People." See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1429–66 (1987) (reading Constitution as espousing unitary theory of sovereignty.)

20. See Amar & Marcus, *supra* note 6, at 6; Herman, *supra* note 7, at 625 n.61. For a fuller originalist account of why the Double Jeopardy Clause should not be read as authorizing successive prosecutions by dual sovereigns, mostly based on cases from England (source of the Double Jeopardy Clause), see Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 *UCLA L. Rev.* 693, 709–19 (1994), and sources cited therein. Amar and Marcus do note that the doctrine might more appropriately be applied to federal/state dual prosecutions than to state/state prosecutions. See Amar & Marcus, *supra* note 6, at 7 n.42.

21. Amar & Marcus, *supra* note 6, at 19.

22. See Amar, *supra* note 19, at 1449–50.

23. In Amar's account, the states would also be empowered to protect the people against the overreaching of federal officials in more instances than current Supreme Court law would allow. See *id.* at 1509–10. Amar's vision of reciprocity need not go so far as to permit states to re prosecute federal officials who have escaped liability for violation of

eighty problem rests on this foundation. The framers of the Fourteenth Amendment wished to invoke the power of the federal government against state officials where necessary; they also wanted to allow the states to punish their own miscreants where possible. Interpreting the Double Jeopardy Clause to preclude federal prosecution of those state officials who have been prosecuted by the states themselves—and perhaps given sweetheart deals, whether purposely or not<sup>24</sup>—could thwart the federal government's efforts at criminal prosecution. Thus, Section Five of the Fourteenth Amendment, whose paradigm case is said to have been criminal prosecution of state officials,<sup>25</sup> scrapes against the Double Jeopardy Clause and allows adherence to the dual sovereignty model in this one instance where the federal and state interests are inherently adverse.

This is a sensible policy argument, but it is not a revelation of constitutional structure. Permission to re prosecute in such cases is not a fair inference from the Fourteenth Amendment, but a choice among models of how the federal and state governments might interact in promoting federal civil rights under the Fourteenth Amendment. In making their choice, Amar and Marcus open themselves to precisely the criticisms they have leveled at the Court: They turn away from the defendant's point of view and do so under the yoke of a selective definition of federalism.<sup>26</sup>

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federal civil rights, since Section Five of the Fourteenth Amendment confers its special implementation powers only on Congress.

24. Amar and Marcus do not limit their proposed exception to cases where there has actually been collusion or a sham prosecution, perhaps in part because they are also interested in preventing what they may regard as unconscious collaboration among state actors. For example, they criticize the judge in the first Rodney King trial who granted defendants' motion for change of venue, regarding his ruling as a questionable advantage conferred on his fellow state employees; they do not accuse him of bad faith. See Amar & Marcus, *supra* note 6, at 23 & n.123. Another reason for not limiting the exception is that collusion is difficult to prove. See *infra* note 40.

25. See Amar & Marcus, *supra* note 6, at 117–118 & n.105. Because “paradigmatic” is not the same as “only,” see *id.* at 26 n.140, Amar and Marcus need not commit themselves here to a position on the much mooted question of whether the Fourteenth Amendment should be read to cover private action as well. Compare, e.g., Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 *Const. Commentary* 123, 141–44 (1986) (arguing that private action was intended to be covered) with Earl M. Maltz, *Civil Rights, the Constitution, and Congress 1863–1869*, at 75–78 (1990) (arguing that scope was intended to be limited to state action) and Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835–1875*, at 387 (1982) (suggesting that the history of the Fourteenth Amendment and its surrounding debates is simply too messy to permit drawing any answer). Nevertheless, Amar and Marcus recapitulate the state/private action dichotomy with their state official exception, leaving the problem of private violations of rights to the alternative sanctions I describe later in this section. See Amar & Marcus, *supra* note 6, at 18 & n.105, 26 & n.140.

26. They even adopt the same technique the Supreme Court has used to embed its dual sovereignty doctrine in the Fifth Amendment: defining re prosecution of state officials as categorically not the “same offense.” See Amar & Marcus, *supra* note 6, at 19–20.

I am sympathetic to Amar's idea of refined incorporation—if the Fourteenth Amendment is the conduit by which provisions of the Bill of Rights are to be applied to the states, any relevant messages embedded in the Fourteenth Amendment itself should be heeded, even if they appear to contradict the original Bill of Rights. But this particular application leads me to believe that the theory itself is not yet sufficiently refined. Although I know that Amar and Marcus would resist the characterization, at bottom they are simply bartering the “narrow double jeopardy rights”<sup>27</sup> of a few individuals for what they hope will be the seeds of equality.

### B. *Two Models of Federalism*

1. *A Cooperative Choice of Forum Model.* — To demonstrate that Amar and Marcus's state official exception is a choice rather than an inference, I offer an alternative program for serving the federal and federalism goals of the Fourteenth Amendment: a cooperative choice of forum model. Consider the problem in the Rodney King case itself: police brutality. Without resorting to reprosecution, Congress could use its power under Section Five of the Fourteenth Amendment to enact legislation creating an integrated federal program for uncovering and redressing police misconduct. First, potent removal provisions could allow federal prosecutors to remove or supersede state criminal prosecutions of state law enforcement officials who have abused their positions, particularly if the abuse involved minorities.<sup>28</sup> While the relitigation model serves federalism interests by allowing the states to prosecute first in every case, the choice of forum model would serve federalism interests in a different way—by respecting the finality of state court decisions in those cases where states were allowed to prosecute.<sup>29</sup> If state employees are truly in a unique and

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27. “The narrow double jeopardy rights of a handful of officials would undermine the Fourteenth Amendment's global scheme of protecting ordinary citizens against a wide range of state abuse.” *Id.* at 18.

28. The removal statute actually enacted by Congress in 1866 was construed quite narrowly. See *infra* note 49.

Congress has given broad federal removal powers to state actor defendants in federal civil rights actions commenced in state court, see 28 U.S.C. § 1441(a) (1988), and to federal official defendants in state civil or criminal proceedings, see 28 U.S.C. § 1442(a)(1) (1988). In both of these contexts, defendants are guaranteed the right to a federal forum, in order to avoid local prejudices or to promote uniform interpretation of federal defenses. The Supreme Court has consistently upheld the constitutionality of allowing federal officials to remove the trial of state criminal offenses. See, e.g., *Willingham v. Morgan*, 395 U.S. 402, 405–06 (1969); *Tennessee v. Davis*, 100 U.S. 257, 263–65 (1879).

29. Each of these models has been adopted in other areas involving alleged federal civil rights violations by state actors. In the habeas corpus statutes, Congress has endorsed relitigation as a suitable form of jurisdictional redundancy. If an individual in state custody wishes to complain that he is in custody in violation of the federal Constitution, he must first present his claim to the state courts. See 28 U.S.C. § 2254(b) (1988). As a result, state and federal courts achieve the relationship Amar and Marcus wish to establish with respect to criminal prosecution of state official rights violators: The state courts have the first chance to remedy the constitutional missteps of their employees, while the federal courts hover in the background to provide an incentive for the state courts to render reasonable

conflict-ridden position, as Amar and Marcus maintain, it would not be an insult to allow the federal government the option of prosecuting these defendants initially.<sup>30</sup>

The federal interest in promoting equality might well be better served by this model. The dual sovereignty doctrine has made such removal statutes seem unnecessary because the federal government has been allowed to make decisions after, rather than before or during, state prosecutions. This sequential approach to federal jurisdiction has led both Congress and prosecutors to regard the federal role as peripheral. Prosecutions are few;<sup>31</sup> punishments often seem incongruously light. The celebrated case of *Screws v. United States*,<sup>32</sup> for example, involved the federal civil rights prosecution of a sheriff implicated in the fatal beating of a black man against whom he bore a grudge.<sup>33</sup> An admiring account of the case would stress that the Supreme Court labored mightily to uphold a federal conviction of an abusive state official who otherwise might not have been punished at all. But the maximum statutory penalty under the federal statute, as originally written and at the time of *Screws*, was one year and \$1000.<sup>34</sup> To the extent that the federal courts are empowered

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decisions, or, if necessary, to overrule unreasonable decisions. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *Yale L.J.* 1035, 1045-54 (1977) (describing how the dialogue between state and federal courts created by the structure of habeas corpus review serves the Warren Court's values of equality).

Habeas corpus, however, is not the only current model of federalist dialogue about state actors who violate federal rights. Civil rights plaintiffs who wish to bring civil actions against state officials who have allegedly violated their federal constitutional rights are offered a choice of a state or federal court forum. See Stephen Steinglass, *Section 1983 Litigation in the State Courts* (1988); Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 *Brook. L. Rev.* 1057, 1059 (1989). Federal courts are treated as privileged arbiters of federal constitutional claims in that defendants may remove to federal court. See *supra* note 28. But once the choice of forum has been finalized, the plaintiff is subject to collateral estoppel rules, see *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984), even if the plaintiff did not voluntarily choose a state court forum, see *Allen v. McCurry*, 449 U.S. 90, 103-05 (1980) (holding Fourth Amendment claim in federal court estopped by litigation of motion to suppress in state criminal proceeding). Each model promotes a robust federalist dialogue in its own way. Cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *Wm. & Mary L. Rev.* 639, 646-48 (1981) (describing models of strategic choice of forum and of sequential redundancy as both serving functions of jurisdictional redundancy).

30. The Department of Justice could still decide, on a case by case basis, to allow the states to prosecute any case if that seemed a better strategy in that particular context.

31. During 1991, the year of Rodney King's beating, the Department of Justice prosecuted only 64 cases of police misconduct throughout the nation. See Amy Stevens, *Split Decision: Verdict in King Case Owes Much to Lessons of State-Court Trial*, *Wall St. J.*, Apr. 19, 1993, at A1, A4.

32. 325 U.S. 91 (1945).

33. See *id.* at 92-93.

34. See *id.* at 93. The dissent complained that the federal prosecution, for a civil rights violation rather than for homicide, might have deflected state prosecution for the crime of murder. See *id.* at 138 (Roberts, J., dissenting).



to try the actual conduct constituting the relevant state offense<sup>35</sup>—assault in the Rodney King case, homicide in the Lemrick Nelson case—and to provide an appropriate punishment, we can avoid anomalies like the *Screws* case. Full federal attention is less likely in a sequential model.

Second, statutes, or perhaps even administrative regulations, could authorize federal investigators and prosecutors to cooperate in state criminal investigations and prosecutions.<sup>36</sup> The dual sovereignty doctrine actively discourages cooperation. Under current law, the federal government loses its power to re prosecute only if it cooperates in the first prosecution, so that the two prosecutions can no longer truly be deemed “dual.”<sup>37</sup> Encouraging collaboration while providing a federal option to remove in appropriate circumstances would promote a more cooperative federalism than retaining a shred of the dual sovereignty doctrine.<sup>38</sup>

Amar and Marcus are reluctant to cede finality to state court prosecutions where defendants’ official status might lead to collusion, or to the immunizing shelter of half-hearted prosecutions or pardons. Congress could address this concern directly with a statute criminalizing the use of judicial process or even the pardon power to obstruct federal civil rights prosecutions.<sup>39</sup> Such a statute would provide a disincentive to the prosecutors, judges, or governors who thwart federal interests, rather than punishing defendants with re prosecution, regardless of whether they have

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35. Donald Zeigler intriguingly suggests the creation of pendent or ancillary criminal jurisdiction, a counterpart to pendent jurisdiction in civil cases, to allow overlapping or related state and federal crimes arising out of the same conduct to be tried together in one forum. See Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 *Vt. L. Rev.* 673, 765–80 (1995).

36. For a description of advantages enjoyed by federal investigators and prosecutors, many of which could be transferred to a state forum, see Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 *UCLA L. Rev.* 509, 542 (1994); see also Braun, *supra* note 19, at 68–69 & nn.344–45 (giving examples of federal-state cooperation in various areas of law enforcement, including drug crime).

37. The notion of dual sovereigns prosecuting their own cases is then said to be a “sham.” See *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959).

38. The Court’s dual sovereignty doctrine, like Amar and Marcus’s narrower exception, fails to take adequate account of the increasingly overlapping state and federal efforts at defining and controlling crime. See Braun, *supra* note 19, at 7–10, 67–72; cf. *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55–56 (1964) (describing emerging “united front” in state and federal law enforcement efforts). Promoting cooperation is not only likely to produce better results, it also reflects reality better than the idea of distinct federal and state spheres of authority.

39. Cf. 18 U.S.C.A. §§ 1501–13 (West Supp. 1995) (criminalizing obstruction of justice in general). In *Ex parte Virginia*, 100 U.S. 339 (1879), the Court upheld the conviction of a state court judge for violating the Act of March 1, 1875 § 4, 18 Stat. § 336, by excluding or failing to summon grand and petit jurors on the basis of race. The Court found the Act to be authorized by Section Five of the Fourteenth Amendment, ruling that such federal enforcement statutes may properly be directed against state executive, legislative, or judicial officers. See *id.* at 344–46.

colluded with the obstructionist state officials.<sup>40</sup> Finally, statutes could authorize the Department of Justice to seek civil remedies, particularly injunctive relief, against individual law enforcement officials, their supervisors, or even police departments.<sup>41</sup>

Both of these models—the relitigation model favored by Amar and Marcus as to state officials, and the cooperative choice of forum model I propose—serve the Fourteenth Amendment’s goals of equality and cooperative federalism; neither was selected by the framers of the Fourteenth Amendment or by Congress,<sup>42</sup> either before or after the ratification of the Fourteenth Amendment. How should we choose between them? If I were making an unfettered policy choice, I might have some difficulty deciding which model would be more effective. Each has advantages and disadvantages. For me, however, the Double Jeopardy Clause makes the choice easy. Amar and Marcus can reach their choice only because they omit any consideration of the values underlying the Double Jeopardy Clause and then make some unexamined assumptions that lead them to prefer relitigation. It is the purpose of the next section to examine those assumptions and to bring double jeopardy values back into the picture.

## 2. *Choosing a Model*

a. *The Problem of Self-Dealing.* — In defending their choice of model, Amar and Marcus declare that allowing the states the opportunity to immunize their own officials “would” undermine the goals of Section Five of the Fourteenth Amendment, whose paradigm case they define as federal

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40. Amar and Marcus are appropriately concerned that the factual predicate for such a charge would be difficult to establish, see Amar & Marcus, *supra* note 6, at 24 & n.128, but this concern does not warrant taking a categorical approach. The blunt weapon of permission to re prosecute is directed at all defendants, even if they are innocent of any collusion, and not at the state officials who have actually obstructed the federal interest.

41. Some have argued that a federal program of civil litigation could be more effective in controlling police misconduct than criminal prosecution. See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 *Yale L.J.* 447, 449–55 (1978); see also Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 *S. Cal. L. Rev.* 1453 (1993).

Criminal prosecution focuses only on particular abuses of power after they have occurred. Civil litigation by private individuals is also abused by its focus on the individual plaintiff, even in a class action. Under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), for example, individual plaintiffs are denied standing to seek injunctive relief against questionable police practices unless they can meet the onerous burden of showing that they personally are likely to be subjected to that practice again. See *id.* at 102. Although the Los Angeles police had allegedly subjected Lyons to a dangerous chokehold authorized by departmental policy, Lyons could not meet the Court’s prerequisite to injunctive relief because he could not show that he personally was likely to be arrested and subjected to a chokehold again. See *id.* at 105. The Department of Justice could easily be given statutory authority to seek injunctive relief to protect the class of people who might be subjected to chokeholds.

42. Congress has made this choice in other areas, such as in the habeas corpus context described *supra* note 29.

criminal prosecution of state officials.<sup>43</sup> Why do they assume that this is true? There is no history to suggest that such self-dealing has ever been a real problem. In the voluminous history of the Reconstruction Era, it is difficult to find any evidence of prosecutors abusing state process in this manner on behalf of state employees or private actors. The predominant problem of the Reconstruction Era was that state prosecutors simply failed or refused to prosecute at all.<sup>44</sup> It is possible that state prosecutors could have learned to offer sweetheart plea bargains to state officials, just as state court judges might have meted out indulgent sentences after conviction, and governors might have become overly generous with their pardon power. The usual political checks on abuse of the power to prosecute or pardon might be ineffective if the defendants' acts were popular. But if there is widespread local support for defendants, there is no need for prosecutors, judges, or governors to take a visible dive and risk political consequences. If defendants are as popular as the Klan was in some localities during Reconstruction, juries are unlikely to convict. The greatest obstacle to using the criminal justice system to protect civil rights during Reconstruction was that there was not yet a sufficient consensus in the southern states that the purportedly criminal actions should be punished.<sup>45</sup> Juries often did refuse to convict.<sup>46</sup> For the same reason, even when prosecutions were successful, convictions not infrequently resulted in light sentences and pardons.<sup>47</sup> The true advantages of federal prose-

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43. See Amar & Marcus, *supra* note 6, at 18.

44. See, e.g., Hyman & Wiecek, *supra* note 25, at 425 (discussing nonenforcement of criminal law where whites perpetrated offenses against blacks); Donald G. Nieman, *To Set the Law in Motion: The Freedman's Bureau and the Legal Rights of Blacks: 1865-1868*, at 132-34 (1979) (describing reluctance of justices of the peace to issue warrants against whites charged with assaulting freedmen); Howard N. Rabinowitz, *The Conflict Between Blacks and the Police in the Urban South, 1865-1900*, in *Black Southerners and the Law 1865-1900*, at 291 (Donald G. Nieman ed., 1994).

45. See, e.g., Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*, at 28 (1985) ("Local peace officers usually failed to bring terrorists to justice, either because of fear for their personal safety or because of their support for the terrorists."); Nieman, *supra* note 44, at 125-28, 134 (describing failure of law enforcement officials to prosecute white perpetrators as unsurprising result of public approval of anti-black violence); see also Rabinowitz, *supra* note 44, at 291-92 (noting that even victims believed that lack of public sympathy made it futile to bring charges).

46. See, e.g., Nieman, *supra* note 44, at 129-30 (quoting one Freedman's Bureau agent as saying, "The great enemy of the colored race is the trial by jury which should be his greatest protection."); see also Michael K. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 136, 158 (1986); Kaczorowski, *supra* note 45, at 28.

47. See, e.g., Nieman, *supra* note 44, at 130 (describing case in which one judge sentenced to sixty days leader of group of white defendants convicted of beating and torturing freedmen); Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 416-17 (1971) (recounting generous use of presidential as well as gubernatorial pardons during Klan prosecutions in early 1870s).

cution seem to have been, first, that it happened at all, and second, that federal prosecutors were willing and able to stack their juries.<sup>48</sup>

Amar and Marcus do not rest their argument on empirical claims about the problem of self-dealing, but on an inherent tension in the state's role. However, even if we assume that self-dealing is a serious potential danger, without insisting on some past or present evidence of that danger manifesting itself, allowing reprosecution of all state officials is an overreaction. Although some officials might benefit from their positions, others would not but would nonetheless be subjected to multiple prosecution.

b. *Defining the Goals of the Fourteenth Amendment.* — My next concern is that the goals that "would" be undermined are too narrowly defined. Amar and Marcus take Section Five to embody the relevant goals and, because they describe that Section's paradigm case as being criminal prosecution of state officials who violate civil rights, meaningful criminal prosecutions of state officials who violate civil rights become definitionally necessary to serve that goal. But Section Five authorized criminal prosecution in order to serve the Fourteenth Amendment's broader goals, including the general goal of promoting equality. Amar and Marcus, by treating criminal prosecution as the end rather than as the means, put their own answer into the hat. I would not read Section Five to establish criminal prosecution as the ultimate goal. If there are other effective ways to serve the broader goal of reducing police misconduct—such as injunctive relief and the rest of the legislative program described above—then the allegedly structural need for removing potential obstacles to successful criminal prosecution disappears.

c. *Text, History, and Intent.* — Neither the language of Section Five of the Fourteenth Amendment nor the acts of Congress implementing it reveal whether the framers wished to adopt a relitigation model or a choice of forum model. The Reconstruction Era Congress did use Section Five to provide a basis for federal prosecution in instances where the states were not prosecuting—at least with respect to state official defendants. The same Congress gave federal prosecutors some power to

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48. Federal juries, drawn from a broader vicinage, avoided some of the problems of local sympathies and fear of retaliation. See, e.g., Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872*, 33 *Emory L.J.* 921, 937–39 (1984) (juries drawn from state-wide pool). The Klan Act caused white jurors to default by providing that anyone who supported the Klan was excluded from jury service, requiring an oath to that effect, and threatening with perjury charges anyone who lied to get on a jury. See *id.*; see also Eric Foner, *A Short History of Reconstruction: 1863–1877*, at 195 (1990); Kaczorowski, *supra* note 45, at 63 (federal prosecutors ensured "impartial" juries by restricting juries in Klan prosecutions to Republicans—who, in the Reconstruction South, were almost entirely black); Trelease, *supra* note 47, at 388 (effect of the oath), 410 (noting that prosecutors had difficulties in Georgia, where jury selection process favored appointment of Democrats, generally white, to juries).

remove state prosecutions.<sup>49</sup> Congress did not, however, say anything to prescribe the relationship between the state and federal governments in cases where the states did prosecute and the prosecution was not removed.<sup>50</sup>

The history of the Fourteenth Amendment on this issue is characteristically unhelpful. The question of whether federal criminal prosecution under Section Five should follow a relitigation or choice of forum model does not seem to have come up during the debates.<sup>51</sup> No one seems to have discussed whether the double jeopardy ban posed an obstacle to reprosecution. It is not even clear what the framers would have understood preexisting double jeopardy law to be.<sup>52</sup> Even if the framers be-

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49. Section Fourteen of the Freedman's Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176-77, was interpreted to give federal officials power to remove cases in which state officials enforced facially discriminatory laws against freedmen. See Kaczorowski, *supra* note 45, at 38-39 (arguing that this removal power should have been read more broadly to apply wherever there was a possibility of prejudice).

50. Amar and Marcus base their conclusion that state courts should always be allowed the first opportunity to prosecute on the rationale that this model would "minimize Section Five's disruption of traditional principles of federalism." Amar & Marcus, *supra* note 6, at 23. This, as I have been arguing, is a choice and not an inference. They also cite one tidbit of legislative history: John Bingham's comment on the desirability of allowing primary enforcement to rest with the state. See *id.* at 23 & n.125. This is not enough basis for an inference that the framers and ratifiers believed that the Fourteenth Amendment endorsed this idea, particularly if the notion of primary enforcement must be understood to include relitigation.

51. See *id.* at 25. With an unaccustomed disdain for intent, Amar and Marcus chide me for my interest in whether the Reconstruction Era Congress intended to authorize federal reprosecution rather than just federal prosecution. See *id.* For a nonoriginalist like myself, the charge that I am overly dependent on historical soundbites is disconcerting.

Amar and Marcus limit their own interpretation of the goals of the Fourteenth Amendment to what they believe the framers intended, and then, in the absence of any reliable indication of how the framers intended those goals to be implemented, assist by drawing their own inferences from what they perceive to be the structure the framers built. In this case, I do not believe that we can tell what was built without more information and, therefore, I have continued to search fruitlessly for any indications that the framers might have understood their structure to incorporate one model rather than the other. I do not insist that we know the framers' specific ideas about double jeopardy; I merely believe that knowing those views might provide some basis for reading into the Fourteenth Amendment the model Amar and Marcus prefer.

52. Several Supreme Court cases decided before the drafting of the Fourteenth Amendment endorsed a dual sovereignty concept, but only in dicta. In *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), the Court refused to overturn a conviction under an Ohio state counterfeiting statute, rejecting an argument that the law was unconstitutional because it created a possibility of dual punishment by state and federal government. See *id.* at 434. The Court expressed doubt that any offender would be subjected to multiple punishment for essentially the same act "unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 435. The defendant was not prosecuted by the federal government. For other examples, see *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852); *United States v. Marigold*, 50 U.S. (9 How.) 560, 569-70 (1850). It was not until the Prohibition Era that the Supreme Court actually interpreted the Double Jeopardy Clause to permit the federal government to reprosecute

lieved that, prior to the Fourteenth Amendment, the Double Jeopardy Clause would have permitted some dual prosecutions, Amar and Marcus agree that the Fourteenth Amendment created a new regime. By their own account, the federal government should no longer have been permitted to re prosecute a defendant for an offense previously prosecuted in state court, even if the federal interest were critical and even if the state were inclined to thwart that federal interest. For example, imagine a presidential assassin in a state hostile to the assassinated President or perhaps to the federal government generally. If that state were to immunize the assassin from further prosecution by pardon or a sham proceeding, Amar and Marcus, having rejected the dual sovereignty doctrine, could not advocate federal re prosecution.<sup>53</sup> Amar and Marcus's reading of Section Five of the Fourteenth Amendment privileges civil rights claims above all other federal interests, whatever their constitutional origins,

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after a state court prosecution. See *United States v. Lanza*, 260 U.S. 377, 382 (1922). Even after *Lanza*, the Court did not view the Double Jeopardy Clause as implicit in the concept of ordered liberty, see *Palko v. Connecticut*, 302 U.S. 319 (1937), until 1969, see *Benton v. Maryland*, 395 U.S. 784 (1969).

Even if we take the mid-nineteenth century dicta seriously, we would have scant basis for inferring the intent underlying the Fourteenth Amendment. Amar and Marcus are noncommittal on the issue of whether the Supreme Court was wrong about dual sovereignty all along, or only became wrong with the ratification of the Fourteenth Amendment. See Amar & Marcus, *supra* note 6, at 7 n.42. They treat history as allowing either conclusion. See *id.* at 4 n.16, 7 n.42.

Their theory is easier to maintain if history is viewed as sustaining the Court's pre-Fourteenth Amendment interpretations. The framers of the Fourteenth Amendment could then rely on the Court's earlier pronouncements, even if in dicta, and could reasonably believe that re prosecution by the federal government would not constitute double jeopardy. At the same time, however, the framers of the Fourteenth Amendment, according to Amar and Marcus, were eviscerating the premises of the dual sovereignty concept as to everyone other than state officials. Under this scenario, Amar and Marcus only need to explain why state officials should be treated differently, but do not need to explain why state officials should lose a protection they previously would have enjoyed.

If, on the other hand, history is taken to mean that the Court was always wrong in its dicta, Amar and Marcus have an additional obstacle to surmount. If the federal government never should have been permitted to re prosecute a defendant previously prosecuted by a state, what in the Fourteenth Amendment can possibly be read as freeing the federal government itself from that constraint, even in a small category of cases? Under usual principles of statutory construction, an ambiguous statute is interpreted as maintaining the status quo, absent a clear showing that the legislature meant to change the law. See, e.g., *Morissette v. United States*, 342 U.S. 246 (1952) (holding that omission of mention of intent in criminal statute should not be construed as eliminating that element from the crime as previously defined). The same canon should hold true in constitutional interpretation. The Fourteenth Amendment is far from clear, and an incorrect Supreme Court dictum is a particularly flimsy basis on which to base an inference that the framers intended to endorse a dual sovereignty doctrine in some areas but not in others.

53. Any federal interest could be at stake: preventing insurrection, controlling immigration policy, furthering foreign relations, preventing counterfeiting, governing commerce. Under Amar and Marcus's proposal, the federal government could not vindicate these interests through re prosecution (unless the defendant were a state official), even though each interest has its own constitutional basis.

simply because the equality provisions are located in the Fourteenth Amendment itself. It is possible to imagine reasons why the framers of the Fourteenth Amendment might or might not have endorsed this result. Nothing in the Fourteenth Amendment or its history tells us whether they actually did.

Finally, I have previously suggested the possibility that federal prosecutions during the Reconstruction Era might be taken as some evidence of intent to adopt a relitigation model. If the prevalent assumption before and after the framing of the Fourteenth Amendment was that reprosecution was permissible, that might be taken as one piece of evidence that the framers of the Fourteenth Amendment shared that belief. I have never found any evidence that reprosecution took place at all during the Reconstruction Era. In fact, some federal officials of the day are said to have regarded the Double Jeopardy Clause as a limitation on their ability to reprosecute.<sup>54</sup>

d. *On Balance: Including the Defendant's Perspective.* — My discussion so far has centered on whether Amar and Marcus's position is consistent and ineluctable. If they were to accept some of these criticisms, they could be driven to broaden their exception, perhaps endorsing the federal/state dual sovereignty concept favored by Thurgood Marshall.<sup>55</sup> So far, I have not presented any decisive argument for selecting the choice of forum model over the relitigation model, but have criticized the manner in which Amar and Marcus reach their own choice. My most serious criticism of Amar and Marcus's refined incorporation approach is that in their refining process, they completely ignore the interests served by the Double Jeopardy Clause. If there are two rival models of federalist process possible and the Fourteenth Amendment does not compel either, the fact that the Bill of Rights defines reprosecution as inherently unfair should make the choice easy.

It is not clear how Amar and Marcus's refined incorporation process takes account of the values of Bill of Rights provisions that are at risk of being refined away by the Fourteenth Amendment. A central tenet of refined incorporation is that the Fourteenth Amendment incorporates the core of individual rights in the Bill of Rights and sloughs off inconsistent or outmoded structural protections.<sup>56</sup> The Double Jeopardy Clause, once the Supreme Court's current dual sovereignty lens is discarded, is a protection of individual rights. It protects individuals against the anxiety and expense of a second trial, recognizing that prosecutorial practice

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54. See Kaczorowski, *supra* note 45, at 29 (claiming that double jeopardy considerations limited federal efforts at prosecution); Nieman, *supra* note 44, at 114 (stating that federal judges would have assumed that double jeopardy applied). Federal officials regarded martial law as offering a welcome escape from such constitutional constraints. See *id.* at 115.

55. See *Heath v. Alabama*, 474 U.S. 82, 98–101 (1985) (Marshall, J., dissenting) (arguing that dual sovereignty fiction is appropriate in federal-state but not state-state contexts).

56. See Amar, *supra* note 12, at 1260–71.

often makes perfect, and requires that the right to trial by jury be taken seriously. Except in the Supreme Court's account, which Amar and Marcus properly reject, the Clause is not only, or even primarily, about the attributes of sovereignty or limitations on sovereign powers.

If it is thus possible to sacrifice even part of the core of a Bill of Rights provision because later amendments might be construed to prefer a particular federalist structure, then other protections might also be endangered. For example, if we conclude that the majoritarian character of juries was one of the principal obstacles to criminal convictions of Klan members,<sup>57</sup> and perhaps in the Rodney King case as well, could we read the Fourteenth Amendment as abolishing the right to trial by jury in cases involving minority rights? If Koon and Powell's defense attorneys misled the state court jurors and thereby jeopardized equality interests, could we infer a small exception to the right to counsel?

Like the Supreme Court in *Heath*,<sup>58</sup> Amar and Marcus present their reasoning as structurally compelled and therefore impervious to balancing. But before we conclude that the combined goals of the Fourteenth Amendment require us to pare down the Double Jeopardy Clause, we should question the assumptions on which that conclusion is based as rigorously as we question other decisions that put fundamental rights at risk. Under standard constitutional analysis, courts consider whether a fundamental individual right may be abrogated in the interest of a greater good by asking whether infringement of that right is necessary and narrowly tailored to serve a legitimate and compelling state interest. The trimming of the Double Jeopardy Clause here is attributed to the Constitution itself rather than to legislative or executive action. Any part of the Constitution may, of course, be amended, and the constitutional amendment will, by definition, be constitutional. If the Fourteenth Amendment truly showed a clear intent to define double jeopardy as Amar and Marcus propose, they would be right in saying that further balancing would be inappropriate. However, we should demand a very clear showing that a later amendment actually does abandon what otherwise would be viewed as an element of a minimally fair criminal proceeding. Giving the benefit of a presumption to the Double Jeopardy Clause reintroduces the defendant's perspective, and also puts an appropriate thumb on the scale in deciding between two otherwise equally plausible implementations of the Fourteenth Amendment.

Amar and Marcus cannot support their interpretation as a necessary implication of the structure of the Fourteenth Amendment any more than they can claim the support of a showing of intent. I therefore characterize their "interpretation" as a choice that cannot be based on anything other than covert balancing of the "narrow" procedural rights of the few and the equality rights of the many. Because they do not ac-

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57. See *supra* text accompanying notes 45-48.

58. 474 U.S. 82 (1985). See *supra* note 15 and accompanying text.



knowledge that they are balancing, they do not respond to my claim that such balancing is inappropriate. What if Amar and Marcus were to accept my characterization of their argument? Could they then defend their position by contending that their balance is correct?

One prominent constitutional scholar, Erwin Chemerinsky, has argued to me that the retrial of Stacey Koon should have been permitted, even without the excuse of the dual sovereignty doctrine, because this was a case where the equality rights at stake should indeed take precedence over the narrow procedural rights of the few.<sup>59</sup> Why, Chemerinsky argues, should this Fifth Amendment protection not be subject to being outweighed by a compelling countervailing interest when other constitutional guarantees, like the First Amendment's freedom of expression or the Fourth Amendment's guarantee of privacy, can be outweighed in cases of great societal need? To this more candid balancing argument, I have two responses. First, Bill of Rights provisions defining what constitutes a fair criminal proceeding may not be overridden even for the most compelling reasons. I am more than happy to agree that the goals of the Fourteenth Amendment, including the enforcement goals of Section Five, are compelling. The same might be said, however, of the state's interest in any criminal proceeding. The safety of the many could always seem to outweigh the "narrow" procedural interests of the few, particularly the wicked few.<sup>60</sup> The Bill of Rights does not invite us to balance the rights required for a minimally fair criminal proceeding; it has already drawn the appropriate balance. The Fourth Amendment's protections are subject to balancing because that provision's key guarantee is that individuals should not be subjected to "unreasonable" searches and seizures. Under such a subjective standard, judicial balancing is inevitable and invited. The language of the First Amendment appears to be more absolute, but has been interpreted by the court as allowing some flexibility to prevent harm in cases of emergency.<sup>61</sup> The rules of criminal procedure laid down in the Bill of Rights are more absolute in their language than the Fourth Amendment, and less susceptible to arguments that their relinquishment is necessary to prevent harm. The only "harm" we would prevent by allowing a defendant's right to counsel or right to trial by jury to be outweighed would be the harm of allowing a defendant

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59. See also Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 *UCLA L. Rev.* 649 (1994).

60. See Amar & Marcus, *supra* note 6, at 22 ("On individual liberty grounds, ordinary citizens will be worse off if any state can thwart federal criminal prosecution of that state's abusive officials.").

61. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that First Amendment does not protect "'fighting' words—which by their very utterance inflict injury or tend to incite an immediate breach of peace."); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2547 (1992) (modern application of fighting words doctrine); see generally Michael J. Mannheim, Note, *The Fighting Words Doctrine*, 93 *Colum. L. Rev.* 1527 (1993) (describing governmental power to prevent harm from fighting words as coextensive with power to prevent harm caused by incitement to imminent lawlessness).

to escape punishment. The very point of the procedural guarantees is that we must sometimes risk that harm in order to be fair. I cannot imagine the circumstances under which Chemerinsky would be willing to suspend the right to trial by jury or right to counsel because of an alleged need to convict a particular defendant. The only reason that Chemerinsky or the Supreme Court can take a different view of the right not to be put twice in jeopardy for the same offense is that, as Justice Black once predicted,<sup>62</sup> we have become inured to those violations by the tenure of dual sovereignty doctrine.

Furthermore, even if it were appropriate to balance the double jeopardy interests against the equality interests at stake in civil rights prosecutions, relinquishing double jeopardy protection is not necessary to serve the goals of equality. Allowing reprosecution of all state officials is certainly not a narrowly tailored response to the problem of self-dealing, or the interests of equality generally. As I have already explained, I do not agree with Amar and Marcus that successive prosecutions are necessary because alternative means may be as effective in promoting equality without sacrificing a value protected in the Bill of Rights. Even if we were to speculate that those alternatives might be somewhat less effective than reprosecution,<sup>63</sup> it is arguable that, on balance, we should be willing to tolerate some diminution in effectiveness in order to be fair. What is more effective is not always what is necessary.<sup>64</sup>

It is easy for Amar and Marcus to slight the interest in fairness because their poster child is Stacey Koon, a defendant whose videotaped presumptive guilt soothes any discomfort we might otherwise feel in allowing his reprosecution. In his case, we know that the first jury erred and that a wrongdoer would have escaped if not for the federal prosecution. If we imagine an innocent defendant, however, who is being harassed by multiple prosecutions, double jeopardy values begin to seem more attractive. Imagine one of the first black police officers, falsely charged by Klan sympathizers with acts of misconduct. If a state court jury was courageous enough to acquit, or a governor to pardon our presumptively innocent defendant in the face of a jury conviction, would

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62. See *Bartkus v. Illinois*, 359 U.S. 121, 162-63 (Black, J., dissenting).

63. For such speculation, see Amar & Marcus, *supra* note 6, at 22-24.

64. Another question I have about refined incorporation is whether expanding the time frame of constitutional interpretation to two points in time—the framing of the Bill of Rights and of the Fourteenth Amendment—goes far enough. If we are to know, rather than speculate, about how federal interests, or federalist structural concerns, would actually be affected were reprosecution not allowed, why should we not also look at how our interpretations would operate in the context of current developments in constitutional law? Why determine whether reprosecution was necessary to promote equality interests in 1870 rather than whether it is necessary today? If the key to successful criminal convictions of state official civil rights violators is jury selection, for example, see *supra* note 48, the fact that the Supreme Court has recently imposed upon the states an increasingly intricate system of bulwarks against unrepresentative juries seems relevant to deciding whether it is still necessary to afford the federal government a second shot at convicting civil rights violators.

Amar and Marcus be so willing to allow a zealous federal official to prosecute again? Double jeopardy is a double-edged shield.

e. *Forfeiting Rights Seriously*. — At one point, Amar and Marcus argue that it may not be unfair to subject state officials to dual prosecution because state employees, as a function of their employment and access to power, should not be deemed to share double jeopardy protection.<sup>65</sup> This argument is not even tempting. State employees are as likely as private individuals to suffer anxiety and expense on being re-prosecuted,<sup>66</sup> and, as the re-prosecution of Stacey Koon shows, confront the same increased probability of conviction by prosecutors who have observed a dress rehearsal. Is it fair to demand that state officials tolerate risks we are unwilling to impose on others? In *Garrity v. New Jersey*,<sup>67</sup> the Supreme Court rejected the analogous argument that government employees may be required to forfeit the protection of the privilege against self-incrimination as a condition of their employment.<sup>68</sup>

Why do Amar and Marcus grasp at such a frail support? Their desire to define away the problem of unfairness suggests that they do have a lurking concern that, as they argued in rejecting the whole dual sovereignty package, re-prosecution for the same offense is simply unfair.

## II. REFINING THE FINALITY OF JURY VERDICTS

In the final section of their article, Amar and Marcus float a more tentative proposal: to regard jury verdicts, even acquittals, as open to re-litigation if the jury itself was not representative. The combined effect of the proposals made or examined in their article would be to deprive defendants of some of their rights,<sup>69</sup> and to deprive juries of some of their

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65. See Amar & Marcus, *supra* note 6, at 20–21.

66. The hypothetical state official who has colluded with other state actors in a blatantly sham prosecution might avoid all anxiety and thus provide an occasional exception. Some state employees will be provided with attorneys by the state, and thus avoid some of the expense private actors would bear. I am nevertheless confident that Stacey Koon, like Lemrick Nelson and Paul Hill, suffered some of the harms the Double Jeopardy Clause aims to prevent (including the danger of being convicted although innocent).

67. 385 U.S. 493 (1967).

68. Amar and Marcus suggest that they might be willing to forge a state official exception to the privilege against self-incrimination as well. See Amar & Marcus, *supra* note 6, at 27 n.143. This suggestion comes to fruition in a forthcoming article, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. (forthcoming March 1995).

69. In Part II, Amar and Marcus read the Double Jeopardy Clause's "same offense" language more generously than the Court does in some respects, and more restrictively in others, although they then rechannel some protection through the more amorphous Due Process Clause. See Amar & Marcus, *supra* note 6, at 36. The differences between the Court's definition and theirs are not great. Here, I side with neither the Court nor Amar and Marcus. Like Justices Brennan and Souter, I would define "same offense" by focusing on the defendant's conduct rather than the whims and vagaries of legislative definition. See *United States v. Dixon*, 113 S. Ct. 2849, 2881 (1993) (Souter, J., concurring in part, dissenting in part); *Grady v. Corbin*, 495 U.S. 508, 510 (1990) (Brennan, J.); *Ashe v.*

power of finality. The finality of jury verdicts might be compromised in two areas—certainly where state official defendants are tried for federal civil rights violations, and possibly also where the jury is “unrepresentative.” In arriving at these results, Amar and Marcus seek to blame everyone other than the jury. Their primary target is the defendant. If retrial is necessary in the Rodney King case, it is Stacey Koon’s fault for “inducing” a non-representative jury by moving for a change of venue.<sup>70</sup> Once again, casting blame on the defendant helps to alleviate any concern about fairness.

However, blaming the defendant for inducing an unrepresentative jury overstates the defense counsel’s role in jury and venue selection. The Supreme Court has theorized that jury selection is a form of state action because it occurs under the aegis of the court.<sup>71</sup> The same may, of course, be said for change of venue motions. Another branch of state government, the legislature, controls venue rules as well as the mechanisms by which jury pools are created, the number of peremptory challenges allowed, and the extent of participation permitted defense counsel on voir dire. The third branch, represented by the prosecutor, usually has participation rights equal to the defense in selecting juries. Prosecutors make the original choice of venue and can then participate equally in any argument about a possible change of venue.

The idea that a trial by non-representative jury is not really a trial, or that a defendant has not really been in jeopardy if the jury was not representative, is not based on fault, but rather on a notion that the Supreme Court has properly rejected in an analogous context. The Court has steadfastly refused to allow an acquitted defendant to be retried in deference to the government’s (or the people’s) claimed right to one fair trial, rejecting along the way the idea that whether the defendant has been placed in jeopardy depends on what happens during the course of the trial.<sup>72</sup> If the government does not have a countervailing right to a fair trial of its own, why should the government’s demand for one trial before a representative jury be given greater weight? The government actually has more control over jury selection and venue than it does over the fair-

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Swenson, 397 U.S. 436, 449 (1970) (Brennan, J., concurring). I doubt that Stacey Koon breathed a sigh of relief on learning that the federal statute at issue in his second trial could be parsed into different elements.

70. See Amar & Marcus, *supra* note 6, at 52, 56.

71. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2354–57 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622–24 (1991).

72. See *Kepner v. United States*, 195 U.S. 100, 133 (1904) (holding that government appeal from acquittal would be double jeopardy). In *Benton v. Maryland*, 395 U.S. 784 (1969), the case that incorporated the double jeopardy guarantee, Benton was convicted and had just lodged his appeal when the state’s high court invalidated a provision of the state constitution that required jurors to swear to their belief in God. The Supreme Court upheld Benton’s right not to be retried for a count on which he had been acquitted, despite the fact that both the grand and petit jurors had operated under unconstitutional procedures. See *id.* at 796.

For a host of other possible justifications, see Amar & Marcus, *supra* note 6, at 54–57.

ness of a trial. Defendants *can* unilaterally disrupt or infect a trial; they cannot unilaterally select a jury or venue.

If we are rethinking double jeopardy law in light of the Rodney King case, let us think more carefully about whether the lessons of that case really warrant the radical reformation of criminal procedure that Amar and Marcus entertain in their final section. If we blame the defendants for the first jury's verdict, we are really blaming the adversary system. In moving for a change of venue, in deconstructing the videotape for the jury, the defendants and their counsel only availed themselves of the procedures the adversary system offers.<sup>73</sup> There was little in that first trial that we can point to as evidence of self-dealing. The state prosecutor's skill and judgment were widely debated, but few serious observers thought that the prosecution was taking a dive, or overempathizing with state employees. Amar and Marcus do suggest that the judge may have been favoring fellow state officials in his ruling on the venue motion,<sup>74</sup> even if subconsciously. The ruling may have seemed tenable at the time, however, as a response to the strength of the community reaction in Los Angeles itself, the extraordinary pretrial publicity, and the need for a venue that was close and convenient. Perhaps with the benefit of hindsight the judge would have changed his ruling, since it was this case that taught us to give more serious consideration to how choice of venue is likely to affect jury composition.<sup>75</sup> In any event, had Rodney King been beaten in Simi Valley, procedural complaints about the change of venue would be excised, but we would still be uncomfortable with the verdict.

If anyone got it wrong in the state trial, in most observers' accounts it was the jury. In judging the rights of minorities, juries are unlikely to do any better than the community they represent. If the state court jurors identified with the defendants more than the victim, that may not be because they were nonrepresentative, but because they *were* representative of the majority of people in the county, state, and country. Legislatures, the other focal point of representative democracy, are not much more zealous in responding to police brutality than that first jury. We cannot judge the effectiveness of the federal legislative program I outlined above because there has never been the political will in Congress to try it.<sup>76</sup>

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73. If the grounds for changing venue in California pose a problem, the legislature can change them, as observers of the trial have since proposed. See, e.g., Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. Cal. L. Rev. 1533, 1538-39, 1559 (1993); Note, *Out of the Frying Pan or Into the Fire? Race and Choice of Venue after Rodney King*, 106 Harv. L. Rev. 705, 708 (1993).

74. See *supra* note 24.

75. See Hoffman, *supra* note 59, at 681-86, for some incisive hindsight.

76. Consider the recent prosecutions of Paul Hill, see *supra* note 3, as one example of how the law operates when it is the terrorists, rather than the victims, who are in the minority. Hill attempted to terrorize those who wished to exercise a federally protected right just as surely as the Ku Klux Klan terrorized freedmen. Congress responded quickly with a statute that clearly applied to private individuals and provided far more substantial penalties than the early civil rights laws did—life imprisonment as opposed to one year. See

According to one classic account,<sup>77</sup> the chief purpose of the Double Jeopardy Clause is to preserve the jury's power to nullify the law. Amar and Marcus suggest simply removing this power of finality in cases where they suspect that juries are apt to abuse their nullification power. There does indeed seem to be a pattern to the cases where juries abuse their powers. The May Day stories we tell in praise of juries focus on triumphs of popular will over corrupt or arbitrary government—like the nullifying juries that acquitted John Peter Zenger and William Penn.<sup>78</sup> The horror stories, the notorious failures of justice, usually involve minorities: the Scottsboro case and its fictionalized counterpart, *To Kill a Mockingbird*, Emmet Till, and now Rodney King.

Our most popular contemporary teller of stories, John Grisham, seeks a happy synthesis of these disparate traditions in his bestselling novel, *A Time to Kill*. The book begins as a thriller about jury selection and gradually becomes a fairy tale about an all-white jury with the empathy to judge a black defendant as they would have judged a white defendant. In this fictional world, jurors become representative, not in the narrow sense of representing the views of their racial or ethnic groups, but in the best sense of representative democracy, by putting aside bias and reasoning together.<sup>79</sup> It no longer matters who is in the majority and who in the minority.

Reexamining our norms of fair procedure will not bring about that ideal world. The failures of the jury system are part of the system too. When jurors err, sometimes the fault is not in the laws, but in ourselves.

#### CONCLUSION

As Akhil Amar continues his march through the Bill of Rights, sometimes alone and sometimes with cohorts, he challenges us to reexamine even our most firmly rooted ideas about constitutional criminal procedure. Radical reconstruction always has its pros and cons. The penetrating gaze of a scholar who prefers principle to stare decisis can help to expose the hollowness of constructs—like the dual sovereignty doctrine—

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supra note 34 and accompanying text. It was not until 1968 that Congress provided for a life sentence if violation of 18 U.S.C. § 242 resulted in death. See Act of Apr. 11, 1968, Pub. L. No. 90-284, § 103(b), 82 Stat. 73, 75, 1968 U.S.C.C.A.N. 92. And it was not until 1988 that Congress added the ten year penalty for violation of § 242 where bodily injury results. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7019, 1988 U.S.C.C.A.N. (102 Stat.) 4181, 4396. In addition, the federal government was willing to prosecute Hill first; both federal and state juries convicted quickly; the heaviest sentences were imposed. Contrast the Koon case, in which the federal government did not prosecute first, in which the federal penalty imposed was relatively slight, and in which the state jury acquitted.

77. See Westen & Drubel, *supra* note 13.

78. The cases mentioned here are all described in Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 68-73, 73-75 (1994), which also provides bibliographical information on where to obtain fuller accounts.

79. See *id.* at 10-11 (arguing for a deliberative rather than a representative role for jurors).

based on assumptions that are no longer true, if indeed they ever were. But the danger is that the sparkle of new proposals might distract us from dusty old truths.

Constitutional criminal procedure is still largely dominated by the interpretive constructs of the Warren Court which took personal liberty and equality rights as categorical imperatives. Any radical reconstruction of the Bill of Rights, starting from this point, is therefore likely to promote countervailing goals, such as federalism, crime control, and efficiency. Amar's general opposition to the dual sovereignty doctrine shows, if evidence were necessary, that his own efforts at reconstruction are not those of an ideologue determined to exalt those competing goals at any cost. But his acceptance of dual prosecutions of state actors shows, as if we needed any more proof, that the pull of those competing goals can distort constitutional analysis if we do not keep our eyes firmly on the values of the Bill of Rights itself.

Double Jeopardy law after Rodney King should be precisely what it should have been before Rodney King. That case taught us that we still have far to go in our quest for racial equality, but it gave us no reason to start reconsidering what we long ago defined as necessary to make a criminal prosecution fair.