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# THE FALLACY OF DUELING SOVEREIGNTIES: WHY THE SUPREME COURT REFUSES TO ELIMINATE THE DUAL SOVEREIGNTY DOCTRINE

*Kevin J. Hellmann\**

## I. INTRODUCTION

In 1993, Sergeant Stacey Koon of the Los Angeles Police Department was convicted of federal civil rights violations for his involvement in the brutal beating of Rodney King.<sup>1</sup> Sergeant Koon's conviction occurred one year after he had been acquitted of state charges for police misconduct based on the same beating.<sup>2</sup> The conviction of Sergeant Koon vividly demonstrates how the dual sovereignty doctrine can subject criminal defendants to successive prosecutions for the same act.

The text of the Constitution indicates that successive prosecutions such as these violate the double jeopardy clause of the Fifth Amendment.<sup>3</sup> On its face, the double jeopardy clause protects individuals from being twice put in jeopardy of life and limb for the same offense.<sup>4</sup> Yet the Supreme Court continues to allow

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\* BLS Class of 1995. The author wishes to thank BLS Professor Susan N. Herman for her assistance in conceiving and preparing this article.

<sup>1</sup> *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993).

<sup>2</sup> Seth Mydans, *Verdict In Los Angeles; Points of Evidence, Not Emotion*, N.Y. TIMES, Apr. 18, 1993, § 1, at 33; Jim Newton, *2 Officers Guilty, 2 Acquitted; Guarded Calm Follows Verdicts in King Case*, L.A. TIMES, Apr. 18, 1993, at A1.

<sup>3</sup> "[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.

<sup>4</sup> *Id.*

successive prosecutions under the dual sovereignty doctrine<sup>5</sup> as an exception to this constitutional protection.

As a constitutional guarantee, double jeopardy protection has never been absolute.<sup>6</sup> Among the exceptions to the double jeopardy clause, the dual sovereignty doctrine is arguably the most criticized.<sup>7</sup> Under the dual sovereignty doctrine, a defendant may be prosecuted twice for the same act when that act violates both state and federal law.<sup>8</sup>

The dual sovereignty doctrine applies to a wide variety of reprosecutions.<sup>9</sup> According to the Supreme Court, the government

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<sup>5</sup> "The dual sovereignty doctrine provides that when a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences' for double jeopardy purposes." *Heath v. Alabama*, 474 U.S. 82 (1985) (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)). Such an act is not protected by the double jeopardy clause and, therefore, can be prosecuted successively by both federal and state governments. *Lanza*, 260 U.S. at 382.

<sup>6</sup> WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 1063-65 (2d ed. 1992).

<sup>7</sup> See generally Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Dominic T. Holzhaus, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697 (1986); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); George C. Pontikes, *Dual Sovereignty and Double Jeopardy*, 14 CASE W. RES. L. REV. 700 (1963); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution*, 34 S. CAL. L. REV. 252 (1961); see also LAFAVE, *supra* note 6, at 1058 ("It . . . is not surprising that the [Supreme] Court has been led on more than one occasion to 'rethink' and revise seemingly settled aspects of its double jeopardy jurisprudence, and it would not be surprising if that process of rethinking and revision were continued in the future.").

<sup>8</sup> LAFAVE, *supra* note 6, at 1063.

<sup>9</sup> This Note will use the terms "successive prosecutions" and "reprosecutions" interchangeably to refer to the situation involving consecutive prosecutions conducted by federal and state governments against the same defendant for committing the same act.

may re prosecute a defendant whose act has violated both federal and state law irrespective of which level of government has conducted the initial prosecution and regardless of the result of that initial prosecution.<sup>10</sup> Every re prosecution allowed by the dual sovereignty doctrine, however, is based on a single act committed by the defendant.<sup>11</sup>

Several Supreme Court decisions illustrate the effects of the dual sovereignty doctrine.<sup>12</sup> The Supreme Court allows re prosecutions regardless of whether the state government or the federal government prosecutes initially. For example, unlike *United States v. Koon*,<sup>13</sup> in which the state prosecuted first, the defendant in *Bartkus v. Illinois*<sup>14</sup> was convicted on state robbery charges after he had been acquitted of violating the Federal Bank Robbery Statute.

Additionally, the Supreme Court allows re prosecutions regardless of whether the initial prosecution results in an acquittal or not. Unlike *Koon*,<sup>15</sup> in which the defendant was acquitted in the first

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<sup>10</sup> LAFAVE, *supra* note 6, at 1056-58.

<sup>11</sup> LAFAVE, *supra* note 6, at 1063.

<sup>12</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985) (defendant was convicted by two separate states for the same act); *Abbate v. United States*, 359 U.S. 187 (1959) (defendants were convicted in federal court for conspiring to damage a means of communication operated by the United States after being convicted for the same act on a state charge of conspiring to damage property of telephone companies); *Bartkus v. Illinois*, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959) (defendant was convicted on a state robbery charge after being acquitted of violating the Federal Bank Robbery Statute in federal court for the same act); *United States v. Lanza*, 260 U.S. 377 (1922) (defendants were convicted in federal court for violating the National Prohibition Act after being convicted for the same act under a state law that prohibited making, transporting, and selling intoxicating liquors).

<sup>13</sup> 833 F. Supp. 769 (C.D. Cal. 1993).

<sup>14</sup> 359 U.S. 121.

<sup>15</sup> 833 F. Supp. 769.

prosecution, the defendants in *Abbate v. United States*<sup>16</sup> had already been convicted of violating an Illinois statute, which prohibited conspiracy to damage property of telephone companies, when they were charged and convicted of conspiring to damage a means of communication controlled or operated by the United States. Subsequent sections of this Note will fully explore variations of reprosecutions.

The dual sovereignty doctrine permits reprosecutions based upon the same act committed by the same defendant.<sup>17</sup> Among reprosecutions, the similarity of the charges often underscores the fact that the defendant is being reprosecuted for the same act. The defendant in *United States v. Aboumoussallem*,<sup>18</sup> for example, was convicted on drug charges in federal court after he had been acquitted of identical charges in state court. Similarly, the defendant in *Williams v. Carlson*<sup>19</sup> was convicted in federal court for Interstate Transportation of a Stolen Automobile after he had been convicted in the District of Columbia for Unauthorized Use of an Automobile.

The Supreme Court has upheld the dual sovereignty doctrine based on public policy concerns.<sup>20</sup> The Court's primary concern is that the elimination of the dual sovereignty doctrine would destroy federalism by jeopardizing the distinct separation of powers

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<sup>16</sup> 359 U.S. 187.

<sup>17</sup> LAFAVE, *supra* note 6, at 1063.

<sup>18</sup> 726 F.2d 906 (2d Cir. 1984).

<sup>19</sup> 826 F.2d 129 (D.C. Cir. 1987).

<sup>20</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985) (Court protected states' power to enforce their own criminal laws); *Abbate v. United States*, 359 U.S. 187 (1959) (Court protected the efficiency of federal law enforcement); *Bartkus v. Illinois*, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959) (Court protected balance of prosecutorial powers between federal and state governments); *United States v. Lanza*, 260 U.S. 377 (1922) (Court protected government's power to fully prosecute an offense that violates both federal and state law).

between federal and state governments.<sup>21</sup> The Court fears that without the dual sovereignty doctrine, federal and state governments would compete for the opportunity to exclusively prosecute defendants whose single act violates both federal and state law.<sup>22</sup> The Court anticipates that, in a single-prosecution system,<sup>23</sup> this intergovernmental competition would inevitably deny one level of government its chance to prosecute a dual sovereignty offense.

The Supreme Court, however, relies on a traditional concept of federalism which no longer applies in the modern prosecutorial system. The modern system features a substantial overlap rather than a distinct separation between state and federal criminal jurisdictions.<sup>24</sup> This Note's evaluation of the dual sovereignty doctrine as it is applied within the current prosecutorial system reveals that, contrary to the Court's concerns, the elimination of the dual sovereignty doctrine would not destroy federalism.

By evaluating the dual sovereignty doctrine, this Note also reveals that the continuation of the doctrine is bad public policy. First, the dual sovereignty doctrine does not help to achieve the goals of criminal justice, since it encourages vindictive prosecutions at the expense of defendants' rights. Preservation of defendants' individual rights far outweighs the continuation of the dual sovereignty doctrine, especially when the sacrifice of individual rights fails to remedy the conduct which the government seeks to deter. For instance, the reprosecution of Sergeant Koon for beating Rodney King has not helped resolve the real social problems of

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<sup>21</sup> Franz L. Neumann, *Federalism and Freedom: A Critique*, in *FEDERALISM: MATURE AND EMERGENT* 44, 52-53 (Arthur W. Macmahon ed., 1955).

<sup>22</sup> See *Heath*, 474 U.S. at 93 (O'Connor, J.) (different criminal jurisdictions would compete in a "race to the courthouse" to conduct initial prosecution).

<sup>23</sup> This note will use the term "single-prosecution system" to refer to the system of criminal prosecution that would exist in the absence of the dual sovereignty doctrine.

<sup>24</sup> See generally Murchison, *supra* note 7.

racism and police misconduct.<sup>25</sup>

Second, the continued application of the dual sovereignty doctrine runs the risk of diminishing public faith in the judicial system. In the event that a defendant is prosecuted twice for the same act and each prosecution reaches a different verdict, our system of justice appears unpredictable, if not unfair. The dual sovereignty doctrine further tarnishes the integrity of the judicial system by permitting reprosecutions in response to political or public pressure.<sup>26</sup> For instance, the reprosecution of Sergeant Koon and his fellow police officers was conducted in the wake of widespread rioting in Los Angeles.<sup>27</sup> The reprosecution seemed to be the courts' reaction to public unrest and gave the impression that our judicial system's objective goals of truth and justice are

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<sup>25</sup> Joseph Berger, *The Nation*; *A Badge Is Less a Shield When Police Go Too Far*, N.Y. TIMES, May 9, 1993, § 4, at 3; Halford H. Fairchild, *Perspectives On Justice In Los Angeles; Drip By Drip, The Indignities Go On*, L.A. TIMES, Apr. 19, 1993, at B7.

<sup>26</sup> See, e.g., Stephen Labaton, *A Plea To Reno For Prosecution On Crown Heights*, N.Y. TIMES, Jan. 11, 1994, at A1 [hereinafter Labaton, *A Plea to Reno*]; Stephen Labaton, *Reno To Take Over Inquiry In Slaying In Crown Heights*, N.Y. TIMES, Jan. 26, 1994, at A1 [hereinafter Labaton, *Reno To Take Over*]. In November 1992, Brooklyn District Attorney Charles J. Hynes unsuccessfully prosecuted Lemrick Nelson, an African-American indicted for murdering Yankel Rosenbaum, an Hasidic Jew, in the Crown Heights section of Brooklyn, New York, on August 18, 1991. Subsequently, Hynes requested that Janet Reno, United States Attorney General, reprosecute Lemrick Nelson for the Rosenbaum murder as a violation of federal civil rights law (Rosenbaum's murder occurred on the same night that another Hasidic Jew was involved in a car accident in Crown Heights, killing Gavin Cato, a 7-year old African-American, which led to violent rioting). The racial tension involved in this case has heightened public pressure to reprosecute Nelson. Statements from elected officials and community leaders have also increased the outcry for reprosecution. In addition, the perception that political pressure has driven the efforts to reprosecute Nelson was compounded when District Attorney Hynes announced his candidacy for New York State Attorney General in January 1994, raising suspicion about his motive to persuade United States Attorney General Reno to conduct a federal prosecution after he unsuccessfully prosecuted in state court.

<sup>27</sup> Joseph Kelner, *Rodney King II: Civil Rights On Trial*, N.Y. L.J., Feb. 23, 1993, at 3.

partial to public outcry and political influence.<sup>28</sup>

Finally, the elimination of the dual sovereignty doctrine would present an opportunity to better manage the conflict between the government's interest in law enforcement and defendants' interest in protecting their constitutional rights. The probable impact of eliminating the dual sovereignty doctrine and instituting a single-prosecution system would restore defendants' rights without jeopardizing the government's prosecutorial authority.

This Note analyzes the impact of a single-prosecution system on federalism by exploring how criminal prosecution can be effective without applying the dual sovereignty doctrine. Section II evaluates the Supreme Court's rationale that historical precedent and *stare decisis* support the continuation of the dual sovereignty doctrine. Section III argues that the courts should cease to apply the dual sovereignty doctrine. It questions the Court's application of the doctrine as legal fiction, dicta, and a tool for promoting an obsolete model of federalism. Section IV evaluates the Supreme Court's reluctance to eliminate the dual sovereignty doctrine. By projecting the impact of a single-prosecution system, this section discusses the many benefits a single-prosecution system would produce, including: maintaining the balance of prosecutorial power between federal and state governments; increasing the quality of prosecution; deterring sham prosecutions; preserving federal civil rights; and enhancing the efficiency of the judicial system. In addition, this section discusses how the expansion of federal and state prosecutorial jurisdictions for dual sovereignty offenses would enable a single-prosecution system to increase the quality of prosecution while prosecuting both offenses. Finally, this Note concludes that the elimination of the dual sovereignty doctrine to create a single-prosecution system would not destroy federalism.

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<sup>28</sup> Seth Mydans, *The Nation*; *Looking To Courts for Catharsis*, N.Y. TIMES, Oct. 3, 1993, § 4, at 3.



## II. THE SUPREME COURT'S RATIONALE FOR UPHOLDING THE DUAL SOVEREIGNTY DOCTRINE

### A. *Historical Background of the Dual Sovereignty Doctrine*

The dual sovereignty doctrine was conscripted into the American legal system from English common law as a rule designed to recognize the distinct sources of authority between separate nations.<sup>29</sup> Originally, under the dual sovereignty doctrine, a criminal defendant whose actions violated the criminal laws of two separate nations could be prosecuted by both sovereigns. For example, in the case of *R. v. Thomas*,<sup>30</sup> the defendant's single act violated both Welsh and English law. Since, under the dual sovereignty doctrine, both sovereigns could enforce their respective laws, the jurisdiction of neither sovereign was compromised by the defendant, whose single act violated the laws of these separate sovereigns.<sup>31</sup>

The Supreme Court has often emphasized that citizens in a system of federalism owe allegiance to separate sovereigns, which exist in the form of federal and state governments.<sup>32</sup> Therefore, the Court has concluded that "dual citizens" are subject to the penalties of both sovereigns when their actions violate both federal

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<sup>29</sup> LEONARD G. MILLER, *DOUBLE JEOPARDY IN THE FEDERAL SYSTEM* 2-3 (1968).

<sup>30</sup> 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662), *cited with approval* in J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8 n.29 ("All three reports must be used to secure a full account of the case.").

<sup>31</sup> Grant, *supra* note 30, at 8.

<sup>32</sup> See, e.g., *Abbate v. United States*, 359 U.S. 187 (1959) (defendants were convicted of federal violation after state conviction for same act); *Bartkus v. Illinois*, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959) (defendant was convicted of state violation after federal acquittal for same act); *Lanza v. United States*, 260 U.S. 377 (1922) (defendants were convicted of state violation after federal conviction for same act).

and state laws.<sup>33</sup> By preserving the dual authority of the federal and state governments to successively prosecute a defendant for the same act when that act violates both federal and state law, the dual sovereignty doctrine reinforces a traditional concept of federalism. Without the dual sovereignty doctrine, the Court fears that either the federal government or the state governments would surrender their respective power to prosecute violations of their own criminal laws.

*B. Stare Decisis Promotes Continuation of the Dual Sovereignty Doctrine*

The dual sovereignty doctrine has existed in American case law since the middle of the nineteenth century.<sup>34</sup> In 1922, the Supreme Court decided the leading case supporting the dual sovereignty doctrine, *United States v. Lanza*.<sup>35</sup> In *Lanza*, Chief Justice Taft concluded 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."<sup>36</sup> The Court reaffirmed *Lanza* in 1959 when the Court held, in *Abbate v. United States*,<sup>37</sup> that the double jeopardy clause does not protect a criminal defendant from successive prosecutions by federal and state governments. That same year, in *Bartkus v. Illinois*,<sup>38</sup> Justice Frankfurter referred to the previous cases upholding the dual sovereignty doctrine as an "unbroken, unquestioned course of impressive adjudication."<sup>39</sup> More recently, the Court has expanded

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<sup>33</sup> *Lanza*, 260 U.S. at 382.

<sup>34</sup> *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

<sup>35</sup> 260 U.S. 377.

<sup>36</sup> *Id.* at 382.

<sup>37</sup> 359 U.S. 187 (1959).

<sup>38</sup> 359 U.S. 121 (1959).

<sup>39</sup> *Id.* at 136.

the dual sovereignty doctrine in its 1985 decision, *Heath v. Alabama*.<sup>40</sup> The defendant in *Heath* was convicted of "malice murder" for arranging the kidnapping and murder of his wife and was sentenced to life imprisonment in Georgia, where the body was found. He was subsequently convicted of committing murder during kidnapping, for the same act, and was sentenced to death in Alabama, where his wife had resided. The Court in *Heath* held that separate states are both permitted to prosecute a defendant for the same act.<sup>41</sup> The Court relies upon this long-standing precedent to continue upholding the dual sovereignty doctrine.

### III. THE DUAL SOVEREIGNTY DOCTRINE SHOULD BE ELIMINATED

Despite the Supreme Court's continued allowance of successive prosecutions under the dual sovereignty doctrine, opponents of the doctrine decry it as a fundamentally flawed legal principle. They contend that the dual sovereignty doctrine is based on legal fiction.<sup>42</sup> Commentators also deride the Court's "devoted servitude"<sup>43</sup> to the dual sovereignty doctrine, which they criticize as merely a loophole through which the government deprives defendants of their constitutional protection against double jeopardy.<sup>44</sup> They question the Court's promotion of a misguided interpretation of *stare decisis* as a rationale for maintaining the dual sovereignty doctrine.<sup>45</sup> Commentators argue that the Court fails to

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<sup>40</sup> 474 U.S. 82 (1985).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 290-92 (1992); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. LAW 1, 36 (1992).

<sup>43</sup> Braun, *supra* note 42, at 11.

<sup>44</sup> See, e.g., Braun, *supra* note 42, at 36-37.

<sup>45</sup> *Id.* at 14-23.

promote the goals of *stare decisis* because it relies on weak precedent and because it has inconsistently applied the doctrine.<sup>46</sup> Finally, critics refute the Court's preservation of an outdated notion of federalism, which, in effect, the dual sovereignty doctrine promotes.<sup>47</sup>

A. *Legal Fiction as a Basis for the Dual Sovereignty Doctrine*

The application of the dual sovereignty doctrine to allow successive prosecutions by federal and state governments is based on legal fiction.<sup>48</sup> At common law, the dual sovereignty doctrine only allowed federal governments to re prosecute offenses that had already been tried in competent jurisdictions abroad.<sup>49</sup> Therefore, the dual sovereignty doctrine did not apply to federal and state governments within one nation. The dual sovereignty doctrine was designed primarily to prevent conflict between different nations which both wished to prosecute a defendant whose single act violated the laws of both nations.<sup>50</sup> For the purpose of avoiding international conflict over which nation would conduct the prosecution, the dual sovereignty doctrine enabled different federal governments to conduct successive prosecutions under these circumstances.<sup>51</sup> The dual sovereignty doctrine, however, was not contemplated as a means of enabling re prosecutions within a single

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<sup>46</sup> See Braun, *supra* note 42, at 22-23 (Court relies on weak precedent); Susan N. Herman, *Double Jeopardy, Dual Sovereignty, and the ACLU*, 41 UCLA L. REV. (forthcoming 1994) (manuscript at 2-3, on file with author) (Court has altered the application of the dual sovereignty doctrine by redefining the scope of the term "offense").

<sup>47</sup> See generally Braun, *supra* note 42; Murchison, *supra* note 7.

<sup>48</sup> Braun, *supra* note 42, at 67-71.

<sup>49</sup> Grant, *supra* note 30, at 8.

<sup>50</sup> MILLER, *supra* note 29, at 3.

<sup>51</sup> *Id.*

nation.<sup>52</sup>

The Supreme Court has mistakenly extended the dual sovereignty doctrine, originally intended to be applied to different *nations*, to allow the reprosecution of defendants whose acts violated the laws of both the federal government and a state government.<sup>53</sup> The Supreme Court fails to distinguish the separation of powers that exists between two nations from the separation of powers that exists between federal and state governments within the same nation.<sup>54</sup> Therefore, the Court has erroneously concluded that the dual sovereignty doctrine applies equally to successive prosecutions by the federal and state governments of the United States.

### B. *The Dual Sovereignty Doctrine Originated as Dicta*

Despite the Supreme Court's strong support of the dual sovereignty doctrine, the doctrine first appeared in United States case law in 1847 as mere dicta.<sup>55</sup> At that time, few offenses were outlawed by the Constitution or Congress.<sup>56</sup> Therefore, it was unlikely that a single offense would violate the laws of both federal and state governments. As a result, the earliest Supreme Court opinions discussing the dual sovereignty doctrine could barely speculate about how the doctrine would actually be applied, much

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<sup>52</sup> Braun, *supra* note 42, at 25-30; see also Martin Conboy, *Federal Criminal Law*, in 1 LAW: A CENTURY OF PROGRESS 295, 305 (1937) (although the Framers intended states to be sovereign-like, they did not fully consider them to be separate sovereigns).

<sup>53</sup> See cases cited *supra* note 32.

<sup>54</sup> See, e.g., *Abbate v. United States*, 359 U.S. 187, 203 (1959); Braun, *supra* note 42, at 25.

<sup>55</sup> *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

<sup>56</sup> In 1790, the federal government had jurisdiction over the following offenses: treason, piracy, counterfeiting, perjury, bribery of federal judges, murder and other crimes on the high seas, and infractions of the law of nations. Braun, *supra* note 42, at 4; Conboy, *supra* note 52, at 301.

less support it as strong legal principle.<sup>57</sup> Despite the impertinent inclusion of the dual sovereignty doctrine in these early opinions, subsequent Supreme Court Justices mistakenly relied on these cases to reinforce the origin of the doctrine and, surprisingly, to uphold the doctrine's application in contemporary cases.<sup>58</sup>

*C. The Supreme Court Has Applied the Dual Sovereignty Doctrine Inconsistently*

Although the Supreme Court has consistently defended the dual sovereignty doctrine for the sake of upholding precedent, the Court's application of the doctrine has been erratic. By adopting varied interpretations of the double jeopardy clause, the Court has often modified the circumstances to which the dual sovereignty doctrine applies.<sup>59</sup> In interpreting the double jeopardy clause, the Court's variation of what constitutes the "same offense,"<sup>60</sup> for example, has changed the scope of the double jeopardy clause significantly. Since the dual sovereignty doctrine is invoked only when a defendant is prosecuted twice for the same offense, the variation of the dual sovereignty doctrine's scope has led to its inconsistent application. Moreover, the Court's inconsistent interpretation contradicts its emphasis on *stare decisis* as a reason for upholding the dual sovereignty doctrine.

In its application of the dual sovereignty doctrine after 1932, the Supreme Court defined "same offense" narrowly, allowing reprosecution of a defendant's single act as long as each charge

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<sup>57</sup> See *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Fox*, 46 U.S. (5 How.) 410. In these cases, the Court discussed, as dicta, a hypothetical situation in which a defendant's single act violated both federal and state law.

<sup>58</sup> See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 136, *reh'g denied*, 360 U.S. 907 (1959) (Justice Frankfurter considered the preceding cases involving the dual sovereignty doctrine as "a long, unbroken, unquestioned course of impressive adjudication").

<sup>59</sup> See Herman, *supra* note 46 and accompanying text.

<sup>60</sup> See U.S. CONST. amend. V, *supra* note 3.

required proof of an element that had not been proved in prosecuting the other charge.<sup>61</sup> In *Blockburger v. United States*,<sup>62</sup> the defendant was arrested for separate sales of morphine hydrochloride to the same purchaser on successive days and charged for each sale as separate offenses. In a 1990 case, however, the Court broadly defined "same offense" as the "same conduct."<sup>63</sup> To illustrate, under this standard, the defendant in *Bartkus* could not have been successively prosecuted for violating both the Federal Bank Robbery Statute and the Illinois state robbery statute because both prosecutions were based on essentially the same conduct.<sup>64</sup> However, this standard was short-lived and, in 1993, the Court overruled the "same conduct" test in *United States v. Dixon*.<sup>65</sup> In *Dixon*, the Court returned to the *Blockburger* standard by narrowly defining "same offense" and allowing reprosecution whenever one charge required proof of merely a single element unnecessary for proving the second charge.<sup>66</sup> Consequently, the determination of whether a defendant's single act could be reprosecuted varied greatly, based upon the Court's definition of "same offense" at the time of the prosecution.

D. *The Supreme Court Upholds the Dual Sovereignty Doctrine to Promote an Obsolete Model of Federalism*

The Supreme Court continues to uphold the dual sovereignty doctrine in a futile attempt to preserve a traditional concept of federalism that has already become obsolete. The goal of federalism is to afford a balance of powers between federal and state

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<sup>61</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>62</sup> *Id.*

<sup>63</sup> *Grady v. Corbin*, 495 U.S. 508 (1990).

<sup>64</sup> *Bartkus v. Illinois*, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959).

<sup>65</sup> 113 S. Ct. 2849 (1993).

<sup>66</sup> *Id.*

governments.<sup>67</sup> The Constitution achieved this balance of powers "by specifying those powers Congress might exercise . . . and by emphasizing (in the Tenth Amendment) that undelegated powers were 'reserved to the states respectively, or to the people.'"<sup>68</sup> The Court's traditional concept of federalism features a strict separation of powers between federal and state governments.<sup>69</sup> More recently, the Court has mistakenly concluded that the survival of its traditional model of federalism depends upon the continuation of the dual sovereignty doctrine.<sup>70</sup> Yet the reconfiguration of criminal jurisdictions has eliminated the distinction between the prosecutorial authority of federal and state governments.<sup>71</sup> Therefore, the traditional concept of federalism is no longer applicable in this area.

The Supreme Court has upheld the dual sovereignty doctrine because the doctrine satisfies both factions of the federalism debate. On one hand, the dual sovereignty doctrine is credited as promoting a strong central government because it preserves the federal government's authority to prosecute a defendant even if the state also wants to prosecute the defendant for the same act. In this way, the federal government can maintain its power to "promote the general welfare."<sup>72</sup> On the other hand, the dual sovereignty doctrine is credited as preserving the states' power to prosecute

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<sup>67</sup> GERALD GUNTHER, CONSTITUTIONAL LAW 65 (12th ed. 1991).

<sup>68</sup> *Id.*

<sup>69</sup> *See, e.g.,* United States v. Lanza, 260 U.S. 382 (1922) (an act violating both federal and state law is an offense against both sovereigns and may be punished by each).

<sup>70</sup> *See* Braun, *supra* note 42, at 31-36 (the traditional model of federalism is not the only workable model for maintaining a balance of powers between federal and state governments).

<sup>71</sup> Conboy, *supra* note 52, at 304-05.

<sup>72</sup> Hoke v. United States, 227 U.S. 308, 322 (1913).



crime, which has been historically considered a localized issue.<sup>73</sup> The doctrine achieves this goal by preserving the states' authority to prosecute a criminal offense without being barred by a federal prosecution.

Ironically, despite the Court's devoted continuation of the dual sovereignty doctrine, the traditional concept of federalism has become obsolete.<sup>74</sup> Congress's modification of prosecutorial jurisdictions<sup>75</sup> has already irreversibly impacted federalism by redefining the boundaries of criminal authority among federal and state governments. Although crime has traditionally been considered a local issue,<sup>76</sup> Congress began federalizing crime when it passed the original mail fraud statute<sup>77</sup> in 1872.<sup>78</sup> The gradual convergence of federal and state criminal jurisdictions has increasingly blurred the distinction between federal and state prosecutorial authority.<sup>79</sup> Even if the present application of the dual sovereignty doctrine perpetuates, it cannot preserve the traditional model of federalism. In adhering to its vision of traditional federalism, the Court has miscalculated the effects of eliminating the dual sovereignty doctrine and, therefore, has postulated false concerns about a single-prosecution system.

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<sup>73</sup> See GUNTHER, *supra* note 67, at 137 ("Criminal laws are among the clearest examples of . . . regulation of 'traditionally local' concerns.").

<sup>74</sup> Braun, *supra* note 42, at 31-36.

<sup>75</sup> Conboy, *supra* note 52, at 342.

<sup>76</sup> See MILLER, *supra* note 29, at 34 ("The original Constitution generally reserved to the states the tasks of crime control and criminal law enforcement.").

<sup>77</sup> 18 U.S.C. § 1341.

<sup>78</sup> Braun, *supra* note 42, at 4.

<sup>79</sup> See Braun, *supra* 42, at 70-72. The author expresses concern about cooperative federalism eventually giving rise to collusion between federal and state prosecutors against criminal defendants. The possibility of this scenario further demonstrates the changing parameters of modern criminal prosecution from those that were in place when the dual sovereignty doctrine was originally conscripted into United States law.

IV. EVALUATING THE SUPREME COURT'S CONCERNS  
ABOUT ELIMINATING THE DUAL SOVEREIGNTY  
DOCTRINE

The Supreme Court mistakenly anticipates that the elimination of the dual sovereignty doctrine would cause the fall of federalism.<sup>80</sup> The Court errs in its assumption that without the dual sovereignty doctrine, federal and state prosecutors would compete for the exclusive opportunity to prosecute a defendant whose single act has violated both federal and state laws.<sup>81</sup> In actual practice, federal and state prosecutors have become increasingly cooperative with one another because many state and federal criminal laws prohibit the same behavior.<sup>82</sup> Moreover, an analysis of the prosecution of dual sovereignty offenses under the alternative single-prosecution system demonstrates how the elimination of the dual sovereignty doctrine would enhance this cooperation between federal and state prosecutors.<sup>83</sup> Furthermore, the Court misapprehends the destructive effect of a single-prosecution system on federalism.

A. *Elimination of the Dual Sovereignty Doctrine Would  
Not Jeopardize the Federal Government's Prosecutorial  
Power*

One rationale for the Supreme Court's erroneous continuation of the dual sovereignty doctrine is that the doctrine preserves the federal government's power to prosecute violations of federal law, namely, violations of the Constitution and Congressional Acts. This view, known as the "federalist" view, centers around the main-

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<sup>80</sup> See cases cited *supra* note 20 and accompanying text.

<sup>81</sup> See *Heath v. Alabama*, 474 U.S. 82 (1985); see also *supra* note 22 and accompanying text.

<sup>82</sup> Braun, *supra* note 42; Conboy, *supra* note 52, at 300.

<sup>83</sup> See Braun, *supra* note 42, at 67-70 (describing the high level of cooperation between federal and state prosecutors under the existing prosecutorial system).

tenance of a strong centralized government.<sup>84</sup> Federalists are generally concerned that if the dual sovereignty doctrine were eliminated, the states would be granted exclusive authority over crime<sup>85</sup> since crime traditionally has been considered a local issue.<sup>86</sup> However, history refutes this concern because federal criminal jurisdiction has steadily expanded into what has been traditionally considered state criminal jurisdiction.<sup>87</sup> Federalists on the Court have erroneously contended that the elimination of the dual sovereignty doctrine would preclude the federal government from prosecuting federal criminal offenses.<sup>88</sup>

Further, the federalist rationale is flawed because, in a single-prosecution system,<sup>89</sup> the federal prosecutor would nevertheless

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<sup>84</sup> MILLER, *supra* note 29, at 1.

<sup>85</sup> See *Heath*, 474 U.S. at 99 (Marshall, J., dissenting) ("Yet were a prosecution by a State, however zealously pursued, allowed to preclude further prosecution by the Federal Government for the same crime, an entire range of national interests could be frustrated."); see also *Abbate v. United States*, 359 U.S. 187, 195 (1985) (Brennan, J.) ("the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions").

<sup>86</sup> See MILLER, *supra* note 76 and accompanying text.

<sup>87</sup> See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (holding that the Consumer Credit Protection Act, which provides for federal prosecution of "loansharking," is a permissible exercise by Congress of its powers under the Commerce Clause).

<sup>88</sup> See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959) (Court protected balance of prosecutorial powers between federal and state governments); *United States v. Lanza*, 260 U.S. 377 (1922) (Court protected government's power to fully prosecute an offense that violates both federal and state law).

<sup>89</sup> See *supra* note 23 ("single-prosecution system" refers to the system of criminal prosecution that would exist in the absence of the dual sovereignty doctrine).

participate in the prosecution of dual sovereignty offenses.<sup>90</sup> First, both federal and state prosecutors would determine which jurisdiction stood a better chance of convicting the defendant. Indeed, without the option of reprosecuting, federal and state prosecutors would tend to be more rigorous in accurately determining which jurisdiction best responds to the public interest. Second, even if the respective prosecutors were to decide that the state is the preferred jurisdiction, the federal prosecutor would still be able to facilitate the state prosecution.<sup>91</sup> Under a single-prosecution system, it would be in the federal prosecutor's best interest to cooperate with the state to maximize their shared objective of convicting.

In *United States v. Aboumoussalem*,<sup>92</sup> for example, the federal government prosecuted Yagih Aboumoussalem on drug charges after the state had acquitted him for identical charges.<sup>93</sup> Under a single-prosecution system, the federal and state prosecutors in *Aboumoussalem*<sup>94</sup> would conceivably have made a pre-trial determination that there was a better chance of convicting the

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<sup>90</sup> This note will use the term "dual sovereignty offense" to describe the situation when a criminal defendant's single act has violated both federal and state laws.

<sup>91</sup> See *Bartkus v. Illinois*, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959) (Court held that one exception to the dual sovereignty doctrine's general allowance of successive prosecutions is when one prosecutor is merely acting as an agent of the other prosecutor. However, the Court has generally permitted substantial cooperation between federal and state prosecutors on any specific case). See, e.g., *United States v. Aboumoussalem*, 726 F.2d 906 (2d Cir. 1984) (Second Circuit did not consider a joint investigation of criminal activity by federal and state governments to constitute one sovereign acting as a "tool" of the other).

The Court, in general, has encouraged cooperative law enforcement efforts. Therefore, the Court has rarely found that one prosecutor has acted as an agent of the other prosecutor. See Braun, *supra* note 42, at 67-71 (Court has encouraged cooperation between federal and state prosecutors).

<sup>92</sup> 726 F.2d 906.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

defendant on the federal charge. After such a determination, the federal government would have conducted the sole prosecution with the cooperation of the state prosecutor and successfully convicted the defendant, as it eventually did, without putting the defendant twice in jeopardy and without wasting the time and expense of the state court. The elimination of the dual sovereignty doctrine would change the roles of the federal and state prosecutors without excluding either one from participating in the prosecution.

*B. Elimination of the Dual Sovereignty Doctrine Would Not Jeopardize State Governments' Prosecutorial Powers*

Contrary to the federalist view, an alternative rationale for the Court's continuation of the dual sovereignty doctrine is that the doctrine's elimination would deprive the states of their traditional power to prosecute crime.<sup>95</sup> This "states' rights" position centers around a belief in upholding the states' residual constitutional powers.<sup>96</sup> Even without the dual sovereignty doctrine, Congress would not be able to expand its authority over criminal prosecution indefinitely by asserting its Constitutional powers. In 1993, for instance, the Supreme Court limited Congress' expansion of federal prosecutorial power under the Commerce Clause.<sup>97</sup> Even if Congress could expand federal authority to encompass all criminal offenses, it would conceivably lack the resources with which to

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<sup>95</sup> See *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (O'Connor, J.) ("To deny a State its power to enforce its criminal laws . . . 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.'") (quoting *Bartkus*, 359 U.S. at 137); see also *Ashe v. Swenson*, 397 U.S. 436, 450 (1970) (Brennan, J.) ("For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.") (quoting *Hoag v. New Jersey*, 356 U.S. 464, 468, *reh'g denied*, 357 U.S. 933 (1958)).

<sup>96</sup> See *Heath*, 474 U.S. at 93.

<sup>97</sup> *United States v. Lopez*, 2 F.3d 1342, *reh'g denied*, 9 F.3d 105 (5th Cir. 1993).

exclusively prosecute all criminal offenses.<sup>98</sup> At present, the federal prosecutor does not re prosecute every criminal offense over which it has concurrent jurisdiction with the states.<sup>99</sup>

The elimination of the dual sovereignty doctrine would not preclude the states from prosecuting violators of state criminal statutes. Similar to the federal prosecutor, under a single-prosecution system, the state prosecutor would participate in the prosecution of dual sovereignty offenses. In *Bartkus*<sup>100</sup> for example, the state prosecuted the defendant for violating a state robbery statute<sup>101</sup> after he had been acquitted of a federal charge for violating the Federal Bank Robbery Statute.<sup>102</sup> These successive prosecutions were both based on the same act of robbing a federally insured savings and loan association. Under a single-prosecution system, the state and federal prosecutors would conceivably have made a pre-trial determination that the state had a better chance of convicting the defendant. The state prosecutor

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<sup>98</sup> See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. (forthcoming 1994) (manuscript at 35, on file with author) (commenting on how the deficiency of resources prevents federal law enforcement from usurping the role of prosecuting local police misconduct).

<sup>99</sup> See EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-2.142 (1980). In 1959, the Department of Justice instituted the "*Petite* policy," which only allows federal re prosecutions when there are compelling reasons and when the Assistant Attorney General approves. Statistically, it is difficult to determine the number of federal re prosecutions conducted because the Department of Justice compiles an annual total of prosecutions it conducts, but does not indicate how many of these are re prosecutions. *But see* YALE KAMISAR, WAYNE R. LAFAYE & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE 2 (7th ed. 1990) ("Of the roughly 1.5 million felony prosecutions brought in this country each year, over 95% are state prosecutions." Deductively, this indicates that since federal prosecutions comprise a small percentage of total prosecutions, the number of federal re prosecutions is also relatively low.).

<sup>100</sup> 359 U.S. 121 (1959).

<sup>101</sup> ILL. REV. STAT. ch. 38, para. 601.1 (1951).

<sup>102</sup> 18 U.S.C. § 2113 (1988).

then would have conducted the sole prosecution, with the cooperation of the federal prosecutor, and could have convicted the defendant without unconstitutionally reprosecuting the defendant or wasting the time and expense of the federal court.<sup>103</sup> This arrangement would have been the inverse of the *Aboumoussallem*<sup>104</sup> scenario in which the federal prosecutor apparently had a better chance of convicting the defendant.<sup>105</sup> In each case, both the state and federal prosecutor would have been involved in the prosecution, one playing the lead and the other facilitating. Here, the elimination of the dual sovereignty doctrine would merely change the roles of the federal and state prosecutors without excluding either from participating in the prosecution altogether.

The elimination of the dual sovereignty doctrine would, in effect, reduce competition between prosecutors to conduct the initial prosecution. Several states already prohibit state reprosecution after an initial federal prosecution has been conducted.<sup>106</sup> Realizing the unfairness of successive prosecutions, these states

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<sup>103</sup> See Braun, *supra* note 42, at 73-77 (proposed alternative to dual sovereignty doctrine addresses the motivation promoted by cooperative federalism).

<sup>104</sup> 726 F.2d 906 (2d Cir. 1984).

<sup>105</sup> See Section IV (A) *supra*.

<sup>106</sup> See Braun, *supra* note 42, at 5 n.15 (ALA. CODE. § 12.20.010 (1984); ARIZ. REV. STAT. ANN. § 13-112 (1978); ARK. CODE ANN. § 43-1224.1 (Michie 1977); CAL. PENAL CODE § 656 (West 1988); COLO. REV. STAT. § 18-1-303 (1990); DEL. CODE ANN. tit. 11, § 209 (1987); GA. CODE ANN. § 16-1-8 (Michie 1992); HAW. REV. STAT. § 701-112 (1985); IDAHO CODE § 19-315 (1987); ILL. ANN. STAT. ch. 38, para. 3-4 (Smith-Hurd 1989); IND. CODE ANN. § 35-41-4-5 (West 1986); KAN. STAT. ANN. § 21-3108(3) (1988); MINN. STAT. ANN. § 609.045 (West 1987); MISS. CODE ANN. § 99-11-27 (1972); MONT. CODE ANN. § 46-11-504 (1991); N.J. STAT. ANN. § 2C: 1-11 (West 1982); N.Y. CRIM. PROC. LAW § 40.20 (McKinney's 1992); N.D. CENT. CODE § 29-03-13 (1991); OKLA. STAT. tit. 22, § 130 (1991); 18 PA. CONST. STAT. ANN. § 111 (Purdon 1983); UTAH CODE ANN. § 76-1-404 (1990); VA. CODE ANN. § 19.2-294 (Michie 1990); WASH. REV. CODE ANN. § 10.43.040 (West 1990); WIS. STAT. ANN. § 939.71 (West 1982)).

have passed legislation to prohibit state reprosecutions.<sup>107</sup> Despite the intent of these statutes to prevent successive prosecutions, prosecutors in those states can avoid the impact of the law by simply conducting the initial prosecution. If the state prosecutes first, the federal government is then able to conduct a second prosecution, regardless of whether the defendant has been convicted or acquitted of the state charges.

Alternatively, a single-prosecution system would not reward those states for conducting the initial prosecution of a dual sovereignty offense by then allowing the federal government to reprosecute. For example, California, under its own state law, in *United States v. Koon*,<sup>108</sup> would have lost the opportunity to prosecute the police officers accused of beating Rodney King had it not prosecuted the state charge of police misconduct before the federal government prosecuted the federal civil rights violation.<sup>109</sup> Under a single-prosecution system, however, California would only be interested in prosecuting ahead of the federal government if the state had a better chance of convicting. Since the elimination of the dual sovereignty doctrine would allow only one prosecution, federal and state prosecutors would naturally want to maximize their one opportunity to convict.

Under a single-prosecution system, rather than "race to the courthouse"<sup>110</sup> for the sake of maximizing the *quantity* of prosecutions, California's incentive for initiating prosecution would be to maximize the *quality* of prosecution. Consequently, if the *Koon* case had been tried under a single-prosecution system, the govern-

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<sup>107</sup> See Paul Hoffman, *Double Jeopardy Wars: The Case For A Civil Rights Exception*, 41 UCLA L. REV. (forthcoming 1994) (manuscript at 5 n.16, on file with author) ("The Illinois legislature, in response to *Bartkus*'s affirmation of its authority to reprosecute after a federal court, changed its laws a few months after the decision to prohibit such reprosecutions.").

<sup>108</sup> 833 F. Supp. 769 (C.D. Cal. 1993).

<sup>109</sup> CAL. PENAL CODE § 656 (West 1992) (California statute prohibits state prosecution of a criminal offense after the federal government has prosecuted for the "same act or omission").

<sup>110</sup> *Heath v. Alabama*, 474 U.S. 82, 101 (1985).



ment could have conducted an effective prosecution of the defendant and saved the time and expense of reprosecuting, while the defendant could have avoided the deprivation of his constitutional rights. Therefore, in states that already prohibit reprosecution, a single-prosecution system would eliminate the state prosecutor's ulterior motive for prosecuting a dual sovereignty offense first, since an unsuccessful state prosecution could not be salvaged by a subsequent federal reprosecution.<sup>111</sup>

C. *Elimination of the Dual Sovereignty Doctrine Would Not Prevent Adequate Prosecution of Criminal Offenses*

The Supreme Court permits successive prosecutions, emphasizing that a defendant accused of violating federal and state laws is not adequately prosecuted unless both offenses have been tried.<sup>112</sup> The Court has stated that an act violating the laws of two sovereigns is subject to separate punishment by each respective sovereign.<sup>113</sup> The Court contends that by discontinuing successive prosecutions, the elimination of the dual sovereignty doctrine would allow defendants to evade one sovereign's charges when the other sovereign conducted the prosecution.

The Supreme Court fears that if a case like *Bartkus* were tried by the state under a single-prosecution system, the defendant would be prosecuted for violating the state robbery statute, but would evade prosecution for violating the Federal Bank Robbery Statute.<sup>114</sup> But the Court has assumed that a single-prosecution system would fail to adequately prosecute defendants simply because it would reduce the quantity of prosecutions. In making this assumption, the Court has ignored the substance of the

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<sup>111</sup> See Bill Girdner, *Different Results in New Cop Trial*, A.B.A. J., June 1993, at 16 (the federal prosecutor of Sergeant Koon and his fellow police officers learned from the mistakes made by the state prosecutor in the previous state trial).

<sup>112</sup> *United States v. Lanza*, 260 U.S. 377, 382 (1922).

<sup>113</sup> *Id.*

<sup>114</sup> MILLER, *supra* note 29, at 60-61.

prosecution as well as the punitive effect of the prosecution on the defendant.

Contrary to the Supreme Court's fears, the elimination of the dual sovereignty doctrine would not prevent the adequate prosecution of criminal offenses. By prohibiting successive prosecutions, the elimination of the dual sovereignty doctrine would increase the fairness of the government's law enforcement authority, not render it inadequate. In essence, a single-prosecution system would eliminate the duplicative and unconstitutional reprosecution of defendants like Alphonse Bartkus, whose liberty was twice jeopardized by unsuccessful prosecutors who unfairly enjoyed the luxury of a second chance.<sup>115</sup>

In the interest of fundamental fairness, our government was not designed to conduct successive prosecutions. The government's reprosecution of a defendant is precisely what the first Congress intended to prevent<sup>116</sup> when it amended the Constitution to guarantee protection from double jeopardy.<sup>117</sup> Although the Framers of the Constitution may not have specifically envisioned dual sovereignty reprosecutions, they seem to have recognized the importance of protecting defendants from being prosecuted twice.<sup>118</sup>

In addition to its departure from the Framers' intent, the dual sovereignty doctrine is bad policy. The deprivation of defendants' double jeopardy protection outweighs the benefits that might inure to the public by conducting successive prosecutions. Since the elimination of the dual sovereignty doctrine would merely limit the

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<sup>115</sup> See Girdner, *supra* note 111 and accompanying text.

<sup>116</sup> See *Green v. United States*, 355 U.S. 184, 201 (1957) (Frankfurter, J., dissenting) (in drafting the Bill of Rights, the first Congress recognized the undisputed need for the general protection of the double jeopardy clause).

<sup>117</sup> U.S. CONST. amend. V.

<sup>118</sup> See *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) (conceivably, the first Congress contemplated successive prosecutions by federal and state governments when it rejected a proposed amendment to the double jeopardy clause, which would have prohibited the reprosecution of the same offense only if brought under federal law).

quantity of prosecutions and not prevent prosecutions per se, a single-prosecution system would not foster inadequate law enforcement. A single-prosecution system offers an alternative that would accommodate adequate criminal prosecution without depriving defendants of their constitutional protection against re prosecution.

Even if the Supreme Court insists that adequate prosecution of a dual sovereignty offense is only achieved when both federal and state violations are prosecuted, a single-prosecution system could be structured to accommodate the prosecution of both violations in one trial. A single-prosecution system could be designed to enable federal and state courts to each prosecute both federal and state violations. In effect, a defendant whose act violated both federal and state law could then be prosecuted for both violations in a single trial. Therefore, in addition to protecting defendants' constitutional protection from double jeopardy, a single-prosecution system could satisfy the Court's demand for prosecuting both offenses against dual sovereigns.

Even with only one opportunity to prosecute under a single-prosecution system, the government could prosecute an offense against two sovereigns in a single trial if both federal and state criminal jurisdictions were allowed to prosecute violations against each sovereign. In *United States v. Grimes*,<sup>119</sup> for example, the defendant pleaded guilty to New Jersey's robbery charge after he had been convicted on a federal charge of bank robbery stemming from the same act. Under a single-prosecution system that allowed the prosecution of both federal and state violations in one trial, the federal government could have prosecuted both the state and federal charges at the same federal trial. Similarly, dual sovereignty offenses could be prosecuted exclusively in state criminal courts under such a system. Consequently, in cases like *Abbate v. United States*,<sup>120</sup> where the defendants were convicted of a federal charge after being convicted of a state charge, the state government could have prosecuted both the state and federal charges at the same state trial.

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<sup>119</sup> 641 F.2d 96 (3d Cir. 1981).

<sup>120</sup> 359 U.S. 187 (1959).

Allowing the prosecution of both federal and state violations at one trial would require significant procedural changes.<sup>121</sup> Currently, federal and state criminal courts are only allowed to prosecute violations of their respective criminal codes.<sup>122</sup> Nevertheless, Congress could resolve this predicament by changing the Federal Rules of Criminal Procedure to allow federal courts to prosecute state violations and state criminal courts to prosecute federal violations when the same offense has violated both federal and state law.<sup>123</sup> In civil cases, federal courts have supplemental jurisdiction over state claims, allowing the federal courts to hear

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<sup>121</sup> Allowing the prosecution of both federal and state violations at one trial would probably also require the instatement of a "gatekeeper" to determine whether the federal or the state prosecutor would try a specific dual sovereignty offense. This would alleviate the anticipated dilemma of federal and state prosecutors competing to prosecute a case or, alternatively, seeking to avoid prosecuting a case. *See, e.g.,* Labaton, *A Plea To Reno*, *supra* note 26; Labaton, *Reno To Take Over*, *supra* note 26 (federal and state prosecutors are both wary of prosecuting the politically charged murder of Yankel Rosenbaum in Crown Heights).

<sup>122</sup> FED. R. CRIM. P. 54 (the jurisdictional limitation on state courts to prosecute only state violations is implicit in this federal rule).

<sup>123</sup> This note briefly discusses the possibility of allowing federal courts to prosecute state offenses and state courts to prosecute federal offenses when an offense has violated both sovereigns. For a thorough analysis of jurisdictional boundaries, *see* EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS*, 78-136, 215-16 (2d ed. 1992).

Also, for a discussion regarding an alternative proposal of creating a multi-jurisdictional court to prosecute dual sovereignty offenses, *see* Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252, 266 (1961).

Another proposal, made by Alphonse Bartkus's court-appointed counsel, is to enact a federal statute that would allow defendants to choose the initial prosecutor -- federal or state. That way, in states like Illinois, which prohibit reprosecution after an initial federal prosecution, the federal government could reprosecute if a defendant chose the state to prosecute first, whereas the decision would be final if a defendant chose the federal government to prosecute first. *See* Walter T. Fisher, *Double Jeopardy and Federalism*, 50 U. MINN. L. REV. 607, 611 (1966).

state claims that are components of valid federal claims.<sup>124</sup> Similarly, state civil courts have jurisdiction over federal civil claims, allowing state courts to resolve federal issues when they are part and parcel of state civil claims. By changing the Federal Rules of Criminal Procedure, federal and state criminal jurisdictions would resemble current civil jurisdictions when prosecuting dual sovereignty offenses.<sup>125</sup>

Although the expansion of jurisdictional boundaries would substantially impact criminal prosecution, it would enhance the prospect of eliminating the dual sovereignty doctrine. By allowing both federal and state courts to prosecute violations against each sovereign, expanded jurisdictional boundaries would allow the prosecution of both violations without putting the defendant twice in jeopardy. Although a jurisdictional expansion would require federal courts to apply state criminal statutes and state criminal courts to prosecute violations of critical federal laws, this interchange of prosecutorial power between federal and state courts would only apply when a defendant was being prosecuted for a dual sovereignty offense. In effect, the jurisdictional expansion would consolidate two trials into one. Furthermore, the proposed rule change seems politically viable given the recent Congressional movement toward developing concurrent criminal jurisdictions between federal and state governments.<sup>126</sup>

Since the Supreme Court ultimately determines the constitution-

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<sup>124</sup> 28 U.S.C. § 1367.

<sup>125</sup> See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* 65-81 (1985).

<sup>126</sup> The countervailing argument is that Congress has been creating concurrent criminal jurisdictions in the interest of enhancing the federal government's law enforcement authority rather than establishing an equitable distribution of prosecutorial power among the two levels of government.

But Congress's modification of criminal jurisdictions, while expanding federal prosecutorial authority, has not usurped states' prosecutorial power. See, e.g., *Lopez*, 2 F.3d 1342 (5th Cir. 1993) (Court limited Congress's expansion of federal prosecutorial power under the Commerce Clause).

ality of federal legislation,<sup>127</sup> Congressional alterations of judicial rules commonly become the subject of Supreme Court cases. When evaluating Congressional changes to judicial rules, the Court has traditionally allowed modifications of procedural rights as long as they do not affect parties' substantive rights.<sup>128</sup> For example, in its analysis of the Rules Enabling Act as applied to civil cases, the Court decided to follow the Choice of Law rules authorized by the Federal Rules of Civil Procedure rather than the applicable state rules by determining whether the federal rules would affect a party's substantive rights.<sup>129</sup> If the rules only alter procedural rights, then the Court grants the requested application of those rules. Similarly, when the Supreme Court determines whether a law applies retroactively, it denies retroactivity if such application alters parties' *substantive* rights, such as stating a cause of action. However, the Court allows retroactivity if such application only alters parties' *procedural* rights, such as the amount of damages.<sup>130</sup>

By comparison, expanding prosecutorial jurisdictions to allow federal prosecution of state violations and state prosecution of federal violations under a single-prosecution system would change only the procedural rules that govern prosecution and would not affect the government's substantive interest in enforcing public safety. Upon passing constitutional muster, Congressional expansion of prosecutorial jurisdictions would enable both federal and state governments to equally prosecute violations against both sovereigns. This would permit the prosecution of both violations

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<sup>127</sup> JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 117-20 (3d ed. 1986).

<sup>128</sup> See SCOLES, *supra* note 123, at 115-17.

<sup>129</sup> *Hanna v. Plumer*, 380 U.S. 460 (1965).

<sup>130</sup> See, e.g., *Bennett v. New Jersey*, 470 U.S. 632 (1985) (Court refused to apply an amendment to Title I of the Elementary and Secondary Education Act of 1965 to pending claims because it would affect the vested rights and expectations of the parties).

comprising dual sovereignty offenses without threatening defendants' constitutional protection from double jeopardy. For example, in *United States v. Koon*,<sup>131</sup> the state court or the federal court could have prosecuted Sergeant Koon for both police misconduct (state offense) and civil rights violations (federal offense) at the same trial rather than conduct successive prosecutions.

The expansion of prosecutorial jurisdictions would satisfy the Supreme Court's concerns about adequate prosecution under a single-prosecution system even though it would not make state and federal governments equally powerful. Contrary to the Court's concerns, by expanding jurisdictional boundaries, a single-prosecution system could prosecute both violations of a dual sovereignty offense.<sup>132</sup> Although federal and state prosecutorial jurisdictions would be expanded equally, a single-prosecution system ultimately requires a decision on whether the federal or state prosecutor would prosecute a specific dual sovereignty offense. Regardless of whether prosecutorial jurisdictions were expanded, the Supremacy Clause<sup>133</sup> would enable the federal government to preempt a state prosecution of a dual sovereignty offense if it chose to do so. In *United States v. Koon*,<sup>134</sup> for example, where the defendant was charged with police misconduct and federal civil rights violations, the federal government could have preempted the state from prosecuting the dual sovereignty offense. Although the Supremacy Clause prevents an *equal* distribution of prosecutorial powers between federal and state governments, it would not prevent a single-prosecution system from maintaining a *balance* of powers between the different levels of government, which is vital to our federalist system of government.

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<sup>131</sup> 833 F. Supp. 769 (C.D. Cal. 1993).

<sup>132</sup> See *United States v. Lanza*, 260 U.S. 377, 385 (1922) (Court was concerned that without the dual sovereignty doctrine, dual offenders could evade the prosecution of one sovereignty, since only one prosecution would be allowed).

<sup>133</sup> U.S. CONST. art VI.

<sup>134</sup> 833 F. Supp. 769, 790.

Our federalist system of government does not require an equal distribution of powers to maintain a balance of powers between the different levels of government. The Constitution's Supremacy Clause binds the states by the authority of federal law, ultimately giving the federal government supremacy over the states.<sup>135</sup> Although the Tenth Amendment assigns the residual constitutional powers to the states, it does not offset the Supremacy Clause, but merely compensates for it by proportionally empowering the states.<sup>136</sup>

The Supreme Court's insistence on establishing parity between federal and state prosecutors by affording each level of government an equal opportunity to prosecute the same defendant departs from the goal of federalism. The purpose of establishing and maintaining a balance of powers between federal and state governments is to ultimately ensure individual democratic power.<sup>137</sup> The concept of federalism is designed to maximize individual rights by balancing smaller state governments, which ideally are more responsive to individual and local interests, against a strong federal government.<sup>138</sup>

Successive prosecutions dangerously allow the government to broaden its prosecutorial authority at the expense of individual rights, particularly defendants' constitutional right to be free from double jeopardy. By allowing successive prosecutions, the Court purports to protect public welfare and safety at the expense of the individual defendant's liberty rights. However, a single-prosecution system would not deny the state's interest in prosecuting crimes on behalf of the general public. On the contrary, a single-prosecution system would protect the defendant's rights without jeopardizing the public's interest in welfare and safety.

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<sup>135</sup> U.S. CONST. art VI.

<sup>136</sup> U.S. CONST. amend. X. If the residual powers assigned to the states by the Tenth Amendment were intended to offset the powers granted to the federal government by the Sixth Amendment, the title "Supremacy Clause" would be a misnomer, since the federal and state powers would, in effect, be equal.

<sup>137</sup> Newman, *supra* note 7, at 256.

<sup>138</sup> Neumann, *supra* note 21, at 45-47.



Consider the effects of a single-prosecution system on a case like *United States v. Koon*.<sup>139</sup> Sergeant Koon was charged with police misconduct by the state prosecutor and with civil rights violations by the federal prosecutor.<sup>140</sup> Since the offense involved a serious violation of federal civil rights law, the federal government would have conceivably preempted the state from prosecuting the excessive force charge under a single-prosecution system. In that case, Officer Koon would still have been successfully convicted, in the interest of the public, yet his liberty would not have been twice put in jeopardy. Although the federal prosecutor exercised the authority to preempt the state prosecutor, the state's interest in prosecuting the defendant would have been served without depriving the defendant's own constitutional right. Therefore, a single-prosecution system would provide a better means for achieving federalism's ultimate objective of increasing individual democratic power.

The federal government's prosecutorial authority under a single-prosecution system would not be disproportionate to the states' authority. Even if the states were preempted from prosecuting certain dual sovereignty offenses, the federal government could still represent the states' interest in prosecuting violations of their own criminal statutes. The single opportunity to prosecute a defendant whose act violates both federal and state law, which is inherent in a single-prosecution system, would discourage the federal government from prosecuting any dual sovereignty offense in which the state had a better chance of convicting. Additionally, the federal government's resources would be freed from the burden of

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<sup>139</sup> 833 F. Supp. 769.

<sup>140</sup> In this case, as with many re prosecutions, the federal prosecutor had not decided to charge Sergeant Koon with civil rights charges until after the state trial. *Id.* However, prohibiting successive prosecutions under a single-prosecution system would eliminate this predicament. A single-prosecution system would encourage federal and state prosecutors to conduct more thorough pre-trial investigations to determine any possible charges, since there would be only one opportunity to prosecute the defendant for any violations stemming from the single act. For the same reason, a single-prosecution system would simultaneously discourage a hasty decision about which level of government would conduct the prosecution.

prosecuting offenses that could adequately be performed by the state. Alternatively, when a dual sovereignty offense involves a violation of a critical federal law such as civil rights law, the federal government's power to preempt could remove the prosecution to the federal courts.

*D. Elimination of the Dual Sovereignty Doctrine Would Deter Sham Prosecutions*

Aside from fearing the destruction of federalism, the Supreme Court is concerned that if the dual sovereignty doctrine were eliminated, sham prosecutions would proliferate. Prosecutors conduct sham prosecutions by colluding with the defendant to prevent a conviction.<sup>141</sup> Sham prosecutions were reported as common practice in the southeastern states during the civil rights movement when white prosecutors cooperated with white defendants to acquit the defendants of charges filed by black victims.<sup>142</sup> Although sham prosecutions may not be as pervasive as they were in the 1960's, the danger of such practice does persist.<sup>143</sup>

But the Supreme Court misapplies the dual sovereignty doctrine as a remedy for sham prosecutions. Currently, when a sham prosecution is discovered, the defendant is reprosecuted, but the prosecutor is not sanctioned. Presumably, while no prosecutors would want their cases to be retried because of prosecutorial misconduct, the threat of reprosecution does not sufficiently deter sham prosecutions. Furthermore, it is unjust to subject the defendant to a second trial, in violation of his or her guaranteed protection from double jeopardy, while the prosecutor, who shared responsibility for the sham, goes unpunished.

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<sup>141</sup> See Braun *supra* note 42, at 71-72.

<sup>142</sup> Hoffman, *supra* note 107, manuscript at 12-14.

<sup>143</sup> See Herman, *supra* note 46, manuscript at 22-23 (the ACLU has considered the danger of sham prosecutions to formulate its policy position on successive prosecutions of a criminal defendant for a single act under the dual sovereignty doctrine).

The elimination of the dual sovereignty doctrine would actually deter sham prosecutions. Under a single-prosecution system, federal and state prosecutors would be more accountable to one another. Indeed, if the federal government agreed for the state to conduct the sole prosecution of a criminal defendant who had violated both state and federal law, it would be in the federal prosecutor's best interest to ensure that the state prosecutor was successful. For example, in *Aboumoussallem*,<sup>144</sup> under a single-prosecution system, the acquittal in state court would have barred reprosecution in federal court. Therefore, it would have been in the best interest of the federal prosecutor to vigilantly help the state prosecutor conduct the best prosecution possible, knowing that there was only one chance to convict. Consequently, such prosecutorial cooperation would reduce the chance of a prosecutor conducting a sham prosecution.

Although the elimination of the dual sovereignty doctrine would contribute to the deterrence of sham prosecutions, the courts need a more effective means of eliminating such practices. One approach might be for the courts to allow separate civil sanctions to be brought against a prosecutor who conducts a sham prosecution.<sup>145</sup> A more drastic option would be to apply criminal penalties to prosecutors for conducting sham prosecutions. Contrary to the Supreme Court's concern that the elimination of the dual sovereignty doctrine would increase the occurrence of sham prosecutions, a single-prosecution system would deter shams by increasing prosecutorial accountability. Nevertheless, any deterrence would be minimal unless the elimination of the dual sovereignty doctrine were supplemented by directly penalizing prosecutors who conduct sham prosecutions.

*E. Elimination of the Dual Sovereignty Doctrine Would Not Diminish Federal Civil Rights*

The Supreme Court misapplies the dual sovereignty doctrine as a means of prosecuting federal civil rights violations. Generally, the

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<sup>144</sup> 726 F.2d 906 (2d Cir. 1984).

<sup>145</sup> Herman, *supra* note 46, manuscript at 23.

civil rights movement has benefitted from reprosecution because it provides a means for convicting defendants of federal civil rights violations who have been acquitted of state charges due to sham prosecutions or racist juries and judges.<sup>146</sup> Civil rights advocates have debated the preferred route for which to advocate: (1) keep the dual sovereignty doctrine intact, (2) eliminate the dual sovereignty doctrine altogether, or (3) modify the doctrine so that it still allows reprosecution for a violation of federal civil rights law.<sup>147</sup>

Under a single-prosecution system, dual sovereignty offenders could not evade charges for violating federal civil rights law. Since federal and state prosecutors would coordinate with each other to determine the more appropriate jurisdiction to prosecute, the federal government would most likely preempt the state from prosecuting. Consequently, it would be in the state prosecutor's best interest to assist and monitor the federal prosecutor to ensure a conviction of such a serious violation. If, on the other hand, the state were in a better position to convict, it could prosecute both the state and federal violation while the federal prosecutor assisted and monitored the state's prosecution.

Since the states are currently prohibited from prosecuting federal violations,<sup>148</sup> some states have passed bias-crime legislation to proscribe civil rights violations in the state.<sup>149</sup> Such

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<sup>146</sup> Under these circumstances, reprosecution has achieved the important goal of protecting equality. However, reprosecution is an unacceptable means of achieving that goal because it deprives defendants of their constitutional protection from double jeopardy. For further analysis of this issue, see Herman, *supra* note 46, manuscript at 4-5.

<sup>147</sup> See generally Herman, *supra* note 46; Hoffman, *supra* note 107.

<sup>148</sup> FED. R. CRIM. P. 54, *supra* note 122 and accompanying text.

<sup>149</sup> Proposed "bias crime" bills aim to enforce stricter penalties against criminal defendants if their criminal act was bias-motivated against a member of a protected class, e.g., on the basis of race, gender, religion, age, physical handicap, and sometimes sexual orientation. The Senate and Assembly of the New York State Legislature have each proposed different versions of a "bias crime" bill. The Assembly bill increases the penalty for a bias-motivated crime that was committed on the basis of the victim's sexual orientation. (N.Y.A. 2103, 216th Sess. 1993). On the contrary, the Senate version excludes sexual

legislation enables state prosecutors to try dual sovereignty offenders for both the violation of state law and the violation of the victim's civil rights. Therefore, under state bias-crime law, Sergeant Koon, for example, could have been prosecuted at one trial in California for the police misconduct charge and for committing a bias-crime against Rodney King.<sup>150</sup>

However, bias-crime laws dangerously arm state prosecutors with broad discretion to enforce them.<sup>151</sup> Bias-crime laws enable state prosecutors to add another charge of bias-crime against defendants who are arrested for committing a crime of violence if the victim is a member of a protected class.<sup>152</sup> Although increased punishment for bias-motivated crime may be popular, bias-crime laws are ripe for abuse by overzealous prosecutors. Additionally, since a defendant's motivation is difficult to prove, bias-crime laws are prone to arbitrary enforcement. This approach is as unfair as the government's present method of arbitrarily reprosecuting a defendant after an unpopular acquittal at the initial prosecution.<sup>153</sup>

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orientation from among the protected class distinctions. (N.Y.S. 1424, 216th Sess. 1993). For an analysis of bias crime statutes, see generally Marc Fleisher, *Hate Crimes*, 2 J.L. & POL'Y 1 (1994).

<sup>150</sup> United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993).

<sup>151</sup> See generally Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); Fleisher, *supra* note 149.

<sup>152</sup> See *supra* note 151. Although prosecutors would need to show a basis for alleging that the defendant committed a bias crime, such legislation runs the same danger of prosecutorial abuse that is inherent in the dual sovereignty doctrine.

<sup>153</sup> See, e.g., *Koon*, 833 F. Supp. 769 (Koon was reprosecuted in the wake of violent rioting in Los Angeles -- an apparent response to the state acquittal of Koon and his fellow officers).

*F. Elimination of the Dual Sovereignty Doctrine Would Enhance the Efficiency of the Judicial System*

While efficiency alone is not a sufficient reason to restructure the criminal prosecution system, it is a significant factor in considering the elimination of the dual sovereignty doctrine. By prohibiting reprosecution of defendants whose single act violates federal and state law, the Supreme Court would reduce the number of criminal trials by the number of reprosecutions that would have otherwise been conducted under the dual sovereignty doctrine. Although this number may not be substantial, the reduction would, nonetheless, ease the burden of the courts' caseload. The elimination of the dual sovereignty doctrine would, therefore, enhance the efficiency of the judicial system.

V. CONCLUSION

Contrary to the Supreme Court's concerns, the elimination of the dual sovereignty doctrine would not destroy federalism. In fact, the institution of a single-prosecution system would maintain the balance of powers between federal and state governments that is vital to our system of federalism. The elimination of the dual sovereignty doctrine would appropriately restore defendants' constitutional protection from double jeopardy without jeopardizing the government's interest in prosecuting criminal defendants. Furthermore, by expanding prosecutorial jurisdictions for dual sovereignty offenses, a single-prosecution system could increase the quality of prosecution while continuing to allow the prosecution of both federal and state violations. In addition, a single-prosecution system would deter sham prosecutions and preserve federal civil rights by limiting the opportunity to prosecute a defendant whose act violates both federal and state law. Such limitation would demand greater accountability from federal and state prosecutors and enhance the efficiency of the judicial system by reducing its caseload. Finally, elimination of the dual sovereignty doctrine would revive public faith in the judiciary by abolishing the unpredictable practice of conducting successive prosecutions.

