

## DOUBLE JEOPARDY LAW AFTER RODNEY KING

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How should the legal community think about double jeopardy in the wake of the Rodney King affair?<sup>1</sup> The Double Jeopardy Clause of the Fifth Amendment commands that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>2</sup> At first blush, the federal civil rights trial of four Los Angeles police officers, following their acquittals in state court prosecutions, might seem a patent double jeopardy violation.<sup>3</sup> However, the Supreme Court’s dual sovereignty doctrine provides that two different governments’ laws by definition cannot describe the “same offence.”<sup>4</sup> This doctrine forecloses the police officers’ double jeopardy claim—the officers’ first trial was for state law crimes; the second, for federal law crimes.

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1. On April 17, 1993, a federal jury convicted Sergeant Stacey C. Koon and Officer Laurence M. Powell of violating Rodney King’s civil rights. Codefendants Timothy E. Wind and Theodore J. Briseno were acquitted. See *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993), *aff’d in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994). The federal trial followed a state trial that ended on April 29, 1992, in the acquittals of Koon, Wind, and Briseno on all charges. Powell was acquitted of assault with a deadly weapon and filing a false police report, but the jury was hung on the charge of unnecessary assault under the color of state authority. See *Chronicle Wire Services, Winning and Losing Tactics in the Case Jurors Wouldn’t Say, “Enough Is Enough”*, S.F. Chron., April 30, 1992, at A10. Massive rioting began shortly after the state trial verdicts were announced.

2. U.S. Const. amend. V.

3. According to the Supreme Court, double jeopardy was historically understood as embracing three common-law pleas—*autrefois acquit*, *autrefois convict*, and pardon—that barred any criminal prosecution for the same crime for which defendant had already been acquitted, convicted, or pardoned, respectively. See *United States v. Scott*, 437 U.S. 82, 87 (1978); *United States v. Wilson*, 420 U.S. 332, 340 (1975); see also 4 William Blackstone, *Commentaries* \*329–31 (discussing these pleas, and the now moot plea, *autrefois attainé*); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 368–99 (photo. reprint 1978) (1716–1721) (similar discussion of *autrefois acquit*, *autrefois convict*, and pardon).

4. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (upholding death sentence in Alabama after guilty plea in Georgia for same murder); *United States v. Lanza*, 260 U.S. 377 (1922) (upholding multiple prosecutions by the state and the federal government).

Yet even if the dual sovereignty doctrine were discarded wholesale, the officers would not be home free. The success of their claim would still depend on the interpretation of the "same offence" language under a different line of cases: Did the particular criminal statute at issue in the second trial describe the same offence as the statute in the first trial, or a different offence? The Court has struggled with the "same offence" issue for more than a century, recently (re)adopting an approach in *United States v. Dixon*<sup>5</sup> that supplants another approach set forth only three years before in *Grady v. Corbin*.<sup>6</sup>

And what are we to make of the racial composition of the first (Simi Valley) jury, which acquitted the Los Angeles officers? Rodney King is black, and the officers are white; but thanks in part to a defendant-induced venue transfer, no blacks served on the first jury. In recent cases, the Supreme Court has vigorously reaffirmed the rights of citizens to participate in juries free from race discrimination, and has stressed that juries must be democratically representative.<sup>7</sup> In light of this emerging vision, must a jury acquittal bar a fair retrial even if a defendant has unconstitutionally manipulated the jury's racial composition?

The three Parts of this Article address these three aspects of double jeopardy law. First, in Part I, we shall try to show that the Double Jeopardy Clause—like the rest of the Bill of Rights—must be read through the lens of the Fourteenth Amendment. After reviewing the Court's various applications of the dual sovereignty doctrine before and after the incorporation of the Bill of Rights against the states, we will reach a key riddle: Why does the dual sovereignty doctrine still apply to double jeopardy, but not to unreasonable searches and compelled self-incriminations? In light of the Court's 1969 decision that the Fourteenth Amendment incorporates the Double Jeopardy Clause against the states,<sup>8</sup> it seems anomalous that the federal and state governments, acting in tandem, can generally do what neither government can do alone—prosecute an ordinary citizen twice for the same offence. In response to this anomaly we shall offer a proposal, grounded in the Fourteenth Amendment, to abandon the general dual sovereignty doctrine in double jeopardy law. But our proposal exempts a key category of offences committed by state officials and implicating the federal government's unique role under Section 5 of the Fourteenth Amendment. In these cases, the dual sovereignty doctrine provides a vital federal check on state abuse of power, in keeping with the overall structure of the Fourteenth

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5. 113 S. Ct. 2849 (1993).

6. 495 U.S. 508 (1990), overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993).

7. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629–31 (1991); *Powers v. Ohio*, 499 U.S. 400, 415–16 (1991); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986); see also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994) (emphasizing need for democratically representative juries in a case involving gender discrimination in the jury selection process).

8. See *Benton v. Maryland*, 395 U.S. 784 (1969).

Amendment. In short, we will argue that current dual sovereignty doctrine still reflects odd vestiges of *Barron v. Baltimore*,<sup>9</sup> the landmark case that the Fourteenth Amendment was clearly designed to overrule.<sup>10</sup> By contrast, we will propose a "refined incorporation"<sup>11</sup> approach that rejects the dual sovereignty doctrine's Barronial logic, yet reaffirms its legitimacy in state-official cases like the one in Los Angeles.

Next, in Part II, we will expose some basic flaws in the Court's double jeopardy jurisprudence independent of dual sovereignty issues, flaws exemplified by the famous *Blockburger*<sup>12</sup> test and the more recent *Grady*<sup>13</sup> and *Dixon*<sup>14</sup> cases. Contrary to all these cases, and virtually all modern scholarship, we will claim that "same offence" means just what it says. An offence must be the "same" in both fact and law to fall within the plain meaning of the Double Jeopardy Clause. Under this plain meaning approach, even greater and lesser included offences are, strictly speaking, different and not the same; sometimes successive prosecution of these offences should be allowed. On the other hand, even where different offences are at issue, due process principles will sometimes bar successive prosecutions. In light of all this, we will propose a new "same offence" framework that respects the plain meaning of the Double Jeopardy Clause, yet highlights the important role of certain due process principles that supplement that plain meaning. And we will suggest how this same offence/due process framework can be made to work sensibly in light of certain special problems raised by successive prosecutions by different governments.

Finally, in Part III, we will offer some admittedly tentative and speculative thoughts on the unique role of jury acquittals in double jeopardy law, and the special double jeopardy problems therefore posed when a defendant manipulates a jury's democratic composition through race-based peremptory challenges or venue transfers. Where a defendant succeeds in racially stacking the jury, arguably the resulting body is not truly a "jury," constitutionally speaking, and thus its acquittal is not truly an "acquittal." Under this theory, the defendant was arguably not really "in jeopardy," and a new, constitutionally proper jury may perhaps be convened.

In a sense, this Article is really three essays in one. Each Part examines a different facet of double jeopardy doctrine visible in the Rodney

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9. 32 U.S. (7 Pet.) 243 (1833).

10. See generally Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986); Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1218-60 (1991).

11. See generally Amar, *supra* note 10, at 1260-84 (setting out "refined incorporation" theory whereby Fourteenth Amendment incorporates privileges and immunities of individual citizens, and at times redefines the contours of those privileges and immunities).

12. *Blockburger v. United States*, 284 U.S. 299 (1932).

13. *Grady v. Corbin*, 495 U.S. 508 (1990).

14. *United States v. Dixon*, 113 S. Ct. 2849 (1993).

King affair. In each Part our analysis calls into question a basic tenet of current double jeopardy jurisprudence; taken as a whole, this Article invites a substantial rethinking of double jeopardy law. And though some double jeopardy issues may at first seem dry and technical, they implicate fundamental issues of constitutional law and philosophy—about the nature of American federalism; the meaning of Reconstruction; divisions within the civil rights and civil liberties community; the role of plain meaning in constitutional interpretation; the status of race in America; the place of juries in democratic theory; and tensions among democracy, order, and individual liberty.

### I. THE DUAL SOVEREIGNTY DOCTRINE

In its 1833 landmark, *Barron v. Baltimore*,<sup>15</sup> the Supreme Court held that the Federal Bill of Rights did not bind the states. Although *Barron* did not explicitly address the Double Jeopardy Clause, or the knotty questions raised by combinations of state and federal action, its basic logic loomed large for double jeopardy dual sovereignty. If, under *Barron*, the federal government could prosecute John Doe once, and a state government could prosecute John Doe as many times as it wanted, why couldn't the two governments do in tandem what each was allowed to do alone? The only bar, under this extension of *Barron*, was that the federal government must not prosecute Doe twice for the same crime.<sup>16</sup>

But when the Court finally repudiated *Barron* in the 1960s—and held the Double Jeopardy Clause applicable to the states in the 1969 case, *Benton v. Maryland*<sup>17</sup>—this logic inverted. If the Constitution privileged Doe against double prosecution by each government alone, why shouldn't it also privilege him against double prosecution by both governments together?<sup>18</sup> As we shall see, the answer to this riddle lies in the structure of the Fourteenth Amendment, which was framed to overrule *Barron*.<sup>19</sup> And when we examine that structure more closely, we will see

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15. 32 U.S. (7 Pet.) 243 (1833).

16. We describe this logic as an "extension" of *Barron*, for it was not inevitable. Perhaps the *Barron* rule could have been read merely to allow state reprosecution after a federal trial, but not vice versa. Perhaps the common-law principle, discussed *infra* notes 29–32 and accompanying text, that an English court would not retry a defendant after a foreign prosecution on the same offence should have led federal courts to give similar comity to state prosecutions—though this, too, would have been an "extension" of earlier rules, see *infra* note 42.

17. 395 U.S. 784 (1969).

18. Here too, the logic is not airtight, cf. *supra* note 16. From the individual's perspective, successive prosecution by separate governments looks like double jeopardy; but from the perspective of each government, the defendant is only being held once in jeopardy by that government. This government's eye view, however, is in tension with the individual perspective implicit in postincorporation search and seizure and compelled self-incrimination cases. See *infra* text accompanying notes 61–96. It is also in tension with the Fourteenth Amendment's explicit accent on individual "privileges," see *infra* text accompanying notes 115–118.

19. See *supra* note 10.

both why the dual sovereignty doctrine should be abandoned for ordinary citizens, and why it must be retained for a principled<sup>20</sup> subcategory of cases involving abusive state action.

A. *The Current Doctrine*<sup>21</sup>

*Heath v. Alabama*,<sup>22</sup> the Court's most recent exposition of the dual sovereignty doctrine, illustrates its harshness. In this 1985 case, the Court let Alabama prosecute Heath for murder and punish him with death after Georgia had convicted him for the same murder and had imposed a life sentence.<sup>23</sup> Under the Court's logic, Alabama could have prosecuted Heath even if he had been *acquitted* at the first trial—the dual sovereignty doctrine “compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause.”<sup>24</sup> The Court relied on the notion that states derive their power from separate and independent sources of authority that existed prior to admission to the Union and that were preserved by the Tenth Amendment.<sup>25</sup> According to the Court, an offence defined under a given state's power is thus different from any offence defined under the power of any other state.<sup>26</sup>

*Heath's* version of the dual sovereignty doctrine seems wooden and one-sided, emphasizing the sovereign authority of government at the expense of an individual's interest in avoiding agonizing re prosecutions.

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20. Cf. Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty*, Rodney King, and the ACLU, 41 UCLA L. Rev. 609, 639 (1994) (“Had a narrowly drawn, principled exception appeared to be available for federal civil rights re prosecutions, the ACLU might have been tempted to adopt it”). The motif of “principle” runs throughout Herman's article. See *id.* at 615, 628, 632, 637–39, 647.

21. For other treatment of the dual sovereignty doctrine, 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 (1992); Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. Rev. 1096 (1959); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1 (1956) [hereinafter Grant, *British Empire Comparisons*]; J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309 (1932) [hereinafter Grant, *Successive Prosecutions*]; Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 Yale L.J. 281 (1992); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 Harv. L. Rev. 1538 (1967) [hereinafter *Double Prosecution*].

22. 474 U.S. 82 (1985).

23. Heath had hired two men who had apparently kidnapped his wife in Alabama, and killed her in Georgia. See *id.* at 83–84. No trial occurred in Georgia; Heath pled guilty. See *id.* at 84.

24. *Id.* at 88.

25. See *id.* at 89.

26. See *id.* at 92. Tribal governments are also seen as distinct for dual sovereignty purposes, see *United States v. Wheeler*, 435 U.S. 313, 332 (1978); but a state and its municipalities are not seen as distinct from each other, see *Waller v. Florida*, 397 U.S. 387, 395 (1970); nor is the federal government distinct from its territorial agent, see *Grafton v. United States*, 206 U.S. 333, 354–55 (1907).

From Larry Gene Heath's point of view, he certainly *was* being tried twice for the same offence. The most functional rationale behind the doctrine—that separate sovereigns will seek to protect distinct interests<sup>27</sup>—was arguably not even applicable in *Heath*: Both states were prosecuting Heath for murder. The Court addressed this problem with a kind of definitional formalism, reasoning that every state by definition has a separate interest in enforcing its laws.<sup>28</sup>

Constitutional history also undercuts the *Heath* Court's result. At the time of both the Founding and the Reconstruction,<sup>29</sup> English common law double jeopardy principles barred an English prosecution if the defendant had already been tried by a foreign government.<sup>30</sup> In both Founding and Reconstruction era editions of his widely read and oft-cited treatise, Sir William Blackstone explicitly stated that "*any court having competent jurisdiction of the offence*" could support a double jeopardy plea of *autrefois acquit*, citing a case reaffirming the English principle regarding foreign prosecutions.<sup>31</sup> In light of all this, *Heath's* result is odd indeed; though England must respect a Georgia prosecution, Alabama need not, despite an explicit double jeopardy provision based on English law.<sup>32</sup>

In dissent, Justice Marshall questioned the majority's extension of the dual sovereignty doctrine from earlier cases involving state and federal prosecutions to the state-state context of *Heath*.<sup>33</sup> Yet he did not suggest discarding the dual sovereignty doctrine wholesale because he supported its application to successive prosecutions by a state and the federal government. The availability of federal civil rights prosecutions clearly lay behind his argument that national interests would be frustrated if the

27. But cf. *United States v. Dixon*, 113 S. Ct. 2849, 2858 (1993) (Scalia, J., for the plurality) ("[T]he distinction [between the different interests two statutes arguably serve] is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the offenses are the same, not the interests that the offenses violate.").

28. See *Heath*, 474 U.S. at 93 ("A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws.").

29. We mention the Reconstruction, of course, since the double jeopardy principle became applicable against states, as a matter of federal constitutional law, because of the Fourteenth Amendment. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *supra* text accompanying notes 17–19.

30. 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, 710–15 (1994); Grant, *British Empire Comparisons*, *supra* note 21, at 9.

31. See 4 William Blackstone, *Commentaries* \*335 (emphasis added). This language and the accompanying citation first appeared in the 5th edition, published in 1773. See 4 William Blackstone, *Commentaries* 335 (Oxford, Clarendon 5th ed. 1773). On the case Blackstone cited, see Cassell, *supra* note 30, at 710 n.99, 711 & n.103, 715 n.126. On the influence of Blackstone's account of double jeopardy in America, see Jay A. Sigler, *Double Jeopardy* 16, 26 (1969).

32. See Cassell, *supra* note 30, at 711–12; *supra* notes 3, 31.

33. See *Heath v. Alabama*, 474 U.S. 82, 101 (1985) (Marshall, J., dissenting).

doctrine were abandoned altogether; indeed, he pointedly cited with approval the 1945 case of *Screws v. United States*,<sup>34</sup> a famous federal civil rights criminal prosecution of a Georgia sheriff who had killed a black man.

Yet the state-federal dual sovereignty doctrine initially arose in contexts rather far removed from civil rights. To trace the roots of *Heath*, we must work our way back towards the Founding, to the era of *Barron v. Baltimore*.<sup>35</sup>

### B. *The Barronial Roots of Current Doctrine*

Although the Court actually applied the dual sovereignty doctrine to a successive prosecution for the first time in 1922,<sup>36</sup> the doctrine had been enunciated in dicta three quarters of a century earlier. In the 1847 case of *Fox v. Ohio*,<sup>37</sup> the Court, citing *Barron*, opined that successive punishment by both state and federal governments would not violate the Fifth Amendment, since that prohibition was "exclusively [a] restriction [ ] upon federal power."<sup>38</sup> Five years later, in *Moore v. Illinois*,<sup>39</sup> the Court elaborated on the emerging idea of dual sovereignty:

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.<sup>40</sup>

Moore argued that the very possibility of successive prosecution by the federal government invalidated his conviction in state court, but the Court dismissed his double jeopardy claim by viewing the word "offence" from the government's perspective: "[I]t cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."<sup>41</sup> Justice McLean dissented in both *Fox* and *Moore*, arguing that this notion of separate offences was a legal fiction and that it was "contrary to the nature and genius of our government, to punish an individual twice for the same offence."<sup>42</sup>

34. 325 U.S. 91 (1945), cited in *Heath*, 474 U.S. at 99 (Marshall, J., dissenting). For further discussion of *Screws*, see *infra* notes 106–110 and accompanying text.

35. 32 U.S. (7 Pet.) 243 (1833).

36. See *United States v. Lanza*, 260 U.S. 377 (1922), discussed *infra* text accompanying notes 43–46.

37. 46 U.S. (5 How.) 410 (1847).

38. *Id.* at 434; see also *United States v. Marigold*, 50 U.S. (9 How.) 560, 569–70 (1850) (reaffirming *Fox*).

39. 55 U.S. (14 How.) 13 (1852).

40. *Id.* at 20.

41. *Id.*

42. *Id.* at 21 (McLean, J., dissenting); see also *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435–40 (1847) (McLean, J., dissenting). For a brief survey of arguments—from English law, international law, common-law treatises, and earlier Supreme Court dicta—that cut

In 1922, the Court in *United States v. Lanza*<sup>43</sup> relied on the *Fox/Moore* dual sovereignty principle to uphold a federal prosecution for violation of the National Prohibition Act after the state had convicted the defendant for violating state Prohibition laws. The Court reiterated that, under *Barron*, the Fifth Amendment's Double Jeopardy Clause applied only to proceedings by the federal government.<sup>44</sup> This logic left the door open to repudiating the dual sovereignty doctrine if *Barron* were overruled and the Double Jeopardy Clause were held applicable against the states. But the *Lanza* majority made one further argument that would later resonate strongly among those concerned about punishing violations of the federal civil rights laws, and would serve as a forceful reason to maintain the dual sovereignty doctrine. Raising the specter of federal justice evaded, the Court wrote:

If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.<sup>45</sup>

Without more, however, this specter cannot support the entire dual sovereignty doctrine. Federal supremacy cannot explain why, for example, two states may prosecute the same defendant for the same crime (as in *Heath*), or why a state must be allowed to prosecute a person after he has been acquitted in a federal prosecution. If anything, federal supremacy might seem to cut *against* state prosecution in the case of a federal acquittal. And in some cases where federal supremacy might be threatened, perhaps other doctrines short of dual sovereignty could be crafted.<sup>46</sup>

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against *Fox* and *Moore*, see Braun, *supra* note 21, at 14-22; see also Cassell, *supra* note 30, at 708-15. These materials, however, may not be utterly dispositive. Most of them focus on dual sovereignty in the international context and fail to focus on the unique state-federal issues raised by American federalism, with two governments regulating the same geographic territory and with one (the federal) supreme in its sphere over the other (the state). In the international domain, for example, only one government would typically have custody over the defendant at any given time. In the context of American federalism, however, a citizen would typically be within the jurisdiction of both governments simultaneously, creating unique race-to-the-courthouse and other problems.

Put differently, the English double jeopardy principles discussed in our analysis of *Heath*, see *supra* text accompanying notes 30-31, are far more illuminating for state-state dual sovereignty than for federal-state or state-federal dual sovereignty. In an otherwise excellent essay, Professor Cassell appears to downplay this distinction. See Cassell, *supra* note 30, at 708-15.

43. 260 U.S. 377 (1922).

44. See *id.* at 382.

45. *Id.* at 385; cf. *supra* note 42 (discussing unique race-to-courthouse issues raised in federal-state context).

46. See *Bartkus v. Illinois*, 359 U.S. 121, 157 (1959) (Black, J., dissenting) (discussing federal government's power to preempt state prosecution where federal interest

When the Court had the chance to reassess the constitutionality of cross-sovereign successive prosecutions in the 1959 cases of *Bartkus v. Illinois*<sup>47</sup> and *Abbate v. United States*,<sup>48</sup> it simply chose to follow *Barron*, *Fox*, *Moore* and *Lanza*. The *Bartkus* Court, per Justice Frankfurter, leaned heavily on the prevailing view that the Fourteenth Amendment did not incorporate the Double Jeopardy Clause or the rest of the Bill of Rights: "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."<sup>49</sup> The footnote buttressing this claim cited *Adamson v. California*,<sup>50</sup> the 1947 case in which the Court spurned Justice Black's plea for total incorporation. And just to rub it in, Frankfurter went on to insist—absurdly—that "the relevant historical materials . . . demonstrate conclusively" that the Fourteenth Amendment was not intended to incorporate the Bill of Rights against the states, pointedly citing Charles Fairman's famous attack on Black's *Adamson* dissent.<sup>51</sup>

*Bartkus's* categorical dual sovereignty rule simply sidestepped a defendant's rights; Alphonse Bartkus probably did not feel better off being doubly prosecuted by different governments rather than by the same one. In enforcing the Double Jeopardy Clause against reprosecution by the same government, the Court only two years before *Bartkus* had vividly painted the evils prevented by the Fifth Amendment. Government, said the Court, may not repeatedly prosecute 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>52</sup> Bartkus was subjected to precisely these harms when prosecuted by two different governments, but the Court ignored all this. And given the in-

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implicated); see also *infra* note 60 and text accompanying notes 59–60, 119–125 (discussing preemption and removal).

47. 359 U.S. 121 (1959). *Bartkus* held that the Constitution did not prohibit a state prosecution for bank robbery following a federal acquittal for robbing the same federally insured bank.

48. 359 U.S. 187 (1959). In *Abbate* federal authorities prosecuted the defendant for conspiracy to destroy federal communications facilities after he had already pleaded guilty to conspiracy to destroy property in state court. The Court, per Justice Brennan, upheld the second prosecution on the authority of *Lanza*.

49. *Bartkus*, 359 U.S. at 124.

50. 332 U.S. 46 (1947).

51. See *Bartkus*, 359 U.S. at 124 & n.3 (citing Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 *Stan. L. Rev.* 5 (1949)); see also 359 U.S. at 140–49 (Court appendix relying prominently on Fairman). On the unfairness of Fairman's article, and the absurdity of Frankfurter's claim, see Amar, *supra* note 10, at 1218–60.

52. *Green v. United States*, 355 U.S. 184, 187–88 (1957). *Green* barred the federal government from reprosecuting the defendant for first degree murder, reasoning that a conviction for second degree murder implicitly acquitted the defendant of first degree murder.

creased level of federal-state cooperation in enforcing criminal laws,<sup>53</sup> dual sovereign prosecutions also raised the traditional double jeopardy concern that successive prosecutions would give government an illegitimate dress rehearsal of its case and a cheat peek at the defense.

Justice Black saw successive prosecutions by separate sovereigns as unjust, and wrote strong dissents in both *Bartkus* and *Abbate*. Black, of course, had already squared off against Frankfurter on the incorporation issue, most famously in *Adamson v. California*.<sup>54</sup> And in *Bartkus* and *Abbate*, he refused to back away from his *Adamson* dissent or his commitment to total incorporation.<sup>55</sup> But even assuming the Fourteenth Amendment did not incorporate the Fifth, Justice Black argued that successive prosecutions violated a defendant's right to due process.<sup>56</sup> For him, the Court's approval of a second trial for the same crime if conducted by a different sovereign was "too subtle . . . to grasp."<sup>57</sup> Taking the defendant's perspective, Justice Black attacked the majority's invocation of federalism as misguided, and expressed suspicion "of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards."<sup>58</sup> In his view, a rule that prevented both governments from prosecuting an individual for the same offence would in no way undermine the federal system.

Appreciating that federal and state interests could diverge, Black suggested that the federal government could preempt the states in appropriate cases.<sup>59</sup> Although he did not elaborate on the preemption approach, one could imagine various systems allowing federal officials to block state prosecution of a defendant whose alleged conduct implicated paramount federal concerns.<sup>60</sup>

53. See Braun, *supra* note 21, at 7-9; Dawson, *supra* note 21, at 296-99.

54. 332 U.S. 46 (1947). Compare *id.* at 59-68 (Frankfurter, J., concurring) with *id.* at 68-123 (Black, J., dissenting).

55. See *Bartkus*, 359 U.S. at 150-51, 151 n.1 (Black, J., dissenting).

56. See *id.* at 150-51.

57. *Id.* at 155.

58. *Id.*; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) (challenging Burger Court's use of "federalism" to frustrate citizen rights and likening federalism to separation of powers insofar as federal system provides set of vertical checks and balances designed foremost to protect "the people" from arbitrary government).

59. See *Bartkus*, 359 U.S. at 157 (Black, J., dissenting).

60. See *Double Prosecution*, *supra* note 21, at 1554-57 (discussing advantages and drawbacks of various preemption alternatives). If the federal government believed state action could adequately protect the federal interest, it could choose to defer to the state. A problem arises, however, where the federal perspective before and after a state prosecution diverges. Consider, for example, the Rodney King affair. Initially, the federal government probably believed that the state trial would satisfy its concerns. Yet something happened during the state prosecution that threw the fairness of the process into question, namely, an unusual, almost unprecedented, change of venue that dramatically changed the possible racial composition of the jury. As a consequence, the federal government perceived a need to pursue a federal prosecution. See Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. Rev. 649, 681-86 (1994). For

*C. Incorporation and the Erosion of Dual Sovereignty*

As we have seen, the logic of *Barron v. Baltimore*<sup>61</sup> furnished an important justification for the early dual sovereignty doctrine: The states were not bound by the restraints on government enumerated in the Bill of Rights. This logic radiated beyond double jeopardy. Before 1960, immunized testimony compelled from a person by federal officials could be introduced against him in a state prosecution and vice versa, because the Fifth Amendment Incrimination Clause<sup>62</sup> applied only against purely federal conduct under *Barron* and its progeny.<sup>63</sup> Similarly, evidence unreasonably seized by state officials could constitutionally be introduced by federal prosecutors and vice versa,<sup>64</sup> since the Fourth Amendment exclusionary rule<sup>65</sup> likewise applied only to purely federal action. But in the 1960s the *Barron* pillar was toppled, as the Court construed the Fourteenth Amendment to apply the Fifth Amendment's incrimination and double jeopardy principles, and the Fourth Amendment's exclusionary rule, against the states.<sup>66</sup> Yet while the Court eventually recognized that the Barronial dual sovereignty doctrine was no longer defensible in the realms of unreasonable searches and compelled self-incriminations, it

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more discussion, see *infra* text accompanying notes 119–130. Under the so-called “Petite Policy” established in the wake of *Abbate*, the Justice Department will generally refrain from prosecuting an individual after a state prosecution for the same crime, unless there are compelling reasons for a second trial. The policy is largely reprinted in *United States v. Mechanic*, 454 F.2d 849, 856 n.5 (8th Cir. 1971).

61. 32 U.S. (7 Pet.) 243 (1833).

62. U.S. Const. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself”).

63. See *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958).

64. In *Elkins v. United States*, 364 U.S. 206, 220–21 (1960), the Court implied that state courts had the freedom to decide whether to admit or to exclude evidence illegally seized by federal officials when it noted that a majority of states that had decided to exclude evidence illegally obtained by state officials also excluded evidence unlawfully seized by federal officials. See, e.g., *State v. Arregui*, 254 P. 788 (Idaho 1927); *Walters v. Commonwealth*, 250 S.W. 839 (Ky. 1923); *Little v. State*, 159 So. 103 (Miss. 1935). But see *Rea v. United States*, 350 U.S. 214, 216–18 (1956) (explicitly avoiding constitutional issues, but enjoining, under Court's supervisory power, federal agents from giving testimony and evidence to state prosecutors). On the use of evidence illegally seized by state officers in federal courts, see *infra* text accompanying notes 68–75.

65. See U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); *Boyd v. United States*, 116 U.S. 616 (1886); *Weeks v. United States*, 232 U.S. 383 (1914). Actually, the exclusionary rule was originally rooted in a fusion of the Fourth and Fifth Amendments. See *infra* note 97.

66. See *Elkins*, 364 U.S. at 223–24 (Fourth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth and Fifth Amendments); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (self-incrimination); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy).

has thus far refused to dismantle the doctrine as applied to double jeopardy. This apparent doctrinal inconsistency merits close study.<sup>67</sup>

1. *The Silver Platter Doctrine*. — In the 1960 case, *Elkins v. United States*,<sup>68</sup> the Court reexamined the silver platter doctrine, a product of the dual sovereignty principle. For years, the doctrine permitted federal prosecutors in federal criminal trials to use evidence unlawfully seized by state officers and handed over to the feds on a silver platter.<sup>69</sup> Since, under the *Barron* regime, unreasonable state searches and seizures did not violate the Federal Constitution, the silver platter doctrine posited that using evidence obtained in those seizures in federal trials likewise did not infringe a defendant's constitutional rights. The exclusionary rule sought to deter and penalize overzealous behavior by federal officials and to enforce the Federal Constitution; excluding evidence obtained by state officials did not fit the rule's rationales.

But in 1949, *Wolf v. Colorado*<sup>70</sup> changed all this by holding that the Federal Constitution, via the Fourteenth Amendment, did indeed prohibit unreasonable searches and seizures by state officers. Unreasonable searches and seizures, whether perpetrated by federal or state officials, violated an individual's constitutional rights. To complicate matters, however, *Wolf* held that the Constitution did not require state courts to exclude evidence improperly seized by state officials.<sup>71</sup> Nonetheless, the *Elkins* Court squarely built on the rock of *Wolf*: "[N]othing could be of greater relevance to the present inquiry than the underlying constitutional doctrine which *Wolf* established. . . . The foundation [of the silver platter doctrine] . . . —that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949."<sup>72</sup> In light of *Wolf*, *Elkins* reasoned that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."<sup>73</sup> Viewing evidentiary exclusion as an apt response,<sup>74</sup> the *Elkins* Court mandated exclusion in federal court regardless of the source of the violation.<sup>75</sup>

67. For other comparisons, see Braun, *supra* note 21, at 47–51; Dawson, *supra* note 21, at 294–95; Double Prosecution, *supra* note 21, at 1544–49.

68. 364 U.S. 206 (1960).

69. See *Weeks v. United States*, 232 U.S. 383, 398 (1914).

70. 338 U.S. 25 (1949) (holding Fourth Amendment principle barring unreasonable searches and seizures applicable against the states via the Fourteenth Amendment).

71. See, e.g., *id.* at 33; see also *id.* at 39–40 (Black, J., concurring) ("[T]he federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence . . .").

72. *Elkins*, 364 U.S. at 213.

73. *Id.* at 215.

74. But see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 785–800 (1994) (suggesting that the exclusionary rule is not mandated by the Constitution and that civil remedies such as damage actions against state officials would better serve the Fourth Amendment's underlying principle protecting innocent people).

75. See *Elkins*, 364 U.S. at 223.

The Court abandoned the dual sovereign approach because it no longer seemed just in light of the individual's right against both governments to be immune from unreasonable searches and seizures. Almost immediately after *Elkins*, the Court reached out in *Mapp v. Ohio*<sup>76</sup> to extend the exclusionary rule to state courts as well. After *Mapp*, a dual sovereignty approach would have been even less justified than after *Wolf*—to employ it would have meant that the federal and state governments together could do what neither of them could do alone, namely, introduce evidence illegally seized by government officials. Such a rule would have been especially odd considering the increased incidence of cooperation between federal and state law enforcement officials.<sup>77</sup>

The tension between *Elkins*'s 1960 rejection of silver platter dual sovereignty and *Bartkus*'s 1959 embrace of double jeopardy dual sovereignty was obvious. Indeed, Justice Frankfurter, who authored the *Bartkus* majority opinion, vigorously dissented in *Elkins*, and three of the four justices who had joined Frankfurter's *Bartkus* majority opinion now joined his *Elkins* dissent.<sup>78</sup> As he had in *Bartkus*, Frankfurter in *Elkins* relied heavily on a Barronial, anti-incorporation vision of the Fourteenth Amendment: "[I]t is basic to the structure and functioning of our federal system to distinguish between the specifics of the Bill of Rights of the first eight Amendments and the generalities of the Due Process Clause . . . ."<sup>79</sup> And in a short companion dissent, Justice Harlan accused the Court of abandoning "sound constitutional doctrine under our federal scheme of things, doctrine which only as recently as last Term was reiterated by this Court. See *Abbate v. United States* . . . *Bartkus v. Illinois* . . . ."<sup>80</sup>

But with Frankfurter's departure from the Court soon after *Elkins*, the Barronial edifice that he had worked so long to prop up would soon come tumbling down—and with it, much of the logic of the dual sovereignty doctrine.

2. *Compelled Self-Incrimination*. — Four years after *Elkins*'s repudiation of Fourth Amendment dual sovereignty, the Court abandoned dual sovereignty in the compelled self-incrimination context. In the 1964 case, *Murphy v. Waterfront Commission*,<sup>81</sup> the defendant had been granted immunity under the laws of New Jersey and New York to induce him to testify about matters before the Waterfront Commission. *Murphy*

76. 367 U.S. 643 (1961).

77. See *Elkins*, 364 U.S. at 221–22; Braun, *supra* note 21, at 36 ("[T]his country's law and history confirm the existence of only one sovereign people who live under a cooperative federal system in which the distinction between state and federal authority has grown less apparent and less important."); see also Dawson, *supra* note 21, at 297–99 (discussing federal/state cooperation in enforcing drug laws).

78. The fourth was Justice Stewart, whose defection from Frankfurter spelled the difference between *Bartkus*'s 5–4 embrace of dual sovereignty and *Elkins*'s 5–4 rejection of it. Stewart authored the *Elkins* majority.

79. *Elkins*, 364 U.S. at 238 (Frankfurter, J., dissenting).

80. *Id.* at 252 (Harlan, J., dissenting).

81. 378 U.S. 52 (1964).

presented the question whether state officials could compel the defendant to give testimony which could be used to convict him for violations of federal law. Before 1964, the answer to this question was "yes," because federal Incrimination Clause principles did not apply against the states. But in 1964 *Malloy v. Hogan*<sup>82</sup> incorporated the Incrimination Clause, rejecting the notion that the Fourteenth Amendment applied to the states "only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"<sup>83</sup>

Decided on the same day as *Malloy*, *Murphy* leaned heavily on that case: "Our decision today in *Malloy v. Hogan* . . . necessitates reconsideration of this [dual sovereignty in self-incrimination] rule."<sup>84</sup> Especially in light of *Malloy*, "there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction . . . may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction."<sup>85</sup> The Court reasoned that the policies behind the privilege would be frustrated by the dual sovereignty doctrine, which allowed a defendant to be "whipsawed into incriminating himself under both state and federal law even though" the constitutional privilege against self-incrimination is applicable to each.<sup>86</sup> The expanding federal effort to fight crime had brought about a new age of cooperative federalism; this development made the Court's holding essential to protecting the privilege.<sup>87</sup> *Murphy* thus ruled that a state witness could not be compelled to testify unless the compelled testimony and its fruits<sup>88</sup> would not be used against him in any manner by federal prosecutors.<sup>89</sup>

82. 378 U.S. 1 (1964).

83. *Id.* at 10-11 (quoting *Eaton v. Price*, 364 U.S. 263, 275 (1960)).

84. *Murphy*, 378 U.S. at 57.

85. *Id.* at 77. The *Murphy* Court also prominently discussed *Elkins* as undermining the conceptual foundations of self-incrimination dual sovereignty. See *id.* at 74-75.

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

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

88. The Court cited *Counselman v. Hitchcock*, 142 U.S. 547 (1892), in support of its position, see *Murphy* 378 U.S. at 54, though it appeared to be reinterpreting *Counselman*, which had traditionally been cited for the rule that a witness properly invoking his Fifth Amendment privilege must be given "transactional" immunity barring all prosecution for any matters about which he testified. See Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure: Cases and Commentary* 484 (4th ed. 1992). *Murphy's* language appears to anticipate the Court's decision almost a decade later in *Kastigar v. United States*, 406 U.S. 441 (1972), where the Court narrowed the immunity available under *Counselman*, holding that the government could compel incriminating testimony from a witness if it granted a form of "use and use-fruits" immunity that ensured that neither the witness's testimony nor its "fruits" (i.e., what the testimony led investigators to discover) could be used against him in a criminal trial. See *id.* at 453. Under *Kastigar*, the government could successfully prosecute a witness on matters about which he testified, so long as it could prove that the incriminating evidence was discovered independently of his testimony. See *id.* at 460. For further discussion, see *Murphy*, 378 U.S. at 92-107 (White, J., concurring).

89. See *Murphy*, 378 U.S. at 78-79.

The *Murphy* decision in effect adopted the dissenting position Justice Black had taken twenty years before in *Feldman v. United States*.<sup>90</sup> *Feldman* held that a defendant's compelled testimony in a state proceeding, though not admissible in a state prosecution, could be used in federal court to convict the defendant of a federal crime. Authored by Justice Frankfurter, the *Feldman* majority opinion erected its dual sovereignty edifice on the foundation of *Barron*, invoking the landmark case as establishing "one of the settled principles of our Constitution."<sup>91</sup> And just as Justice Black would later challenge Frankfurter's *Barron* logic in *Adamson v. California*<sup>92</sup> and *Bartkus*,<sup>93</sup> so in his *Feldman* dissent, he offered up a different vision of federalism and the Bill of Rights:

Within its [the Fifth Amendment's] sweeping prohibition are found no exceptions based upon the persons who compel, their purpose in compelling, or their method of compelling . . . . Testimony is no less compelled because a state rather than a federal officer compels it, or because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law.<sup>94</sup>

Justice Black sounded the same theme in his double jeopardy dissents in *Bartkus* and *Abbate*; and his one-paragraph concurrence in the 1964 *Murphy* case<sup>95</sup> cited these dissents, as well as his *Adamson* and *Feldman* dissents. Yet the Court never reversed its double jeopardy dual sovereignty cases, even after it incorporated the Double Jeopardy Clause against the states in the 1969 case, *Benton v. Maryland*.<sup>96</sup>

Here, then, is the key puzzle: Whereas *Elkins* consciously built on *Wolf's* application of Fourth Amendment principles against states to overturn the silver platter doctrine, and *Murphy* explicitly built on *Malloy's* incorporation of the Incrimination Clause to overturn *Feldman*, the Court never chose to build on *Benton's* incorporation of the Double Jeopardy Clause to overturn *Bartkus* and *Abbate*. The Court has never explained—or even focused on—this anomaly.

90. 322 U.S. 487, 494–503 (1943) (Black, J., dissenting).

91. *Id.* at 490 (majority opinion).

92. 332 U.S. 46 (1947).

93. *Bartkus v. Illinois*, 359 U.S. 121 (1959). For a discussion of Black's position in *Adamson* and *Bartkus*, see *supra* text accompanying notes 54–58. Even before *Feldman*, Black had announced his belief that the Fourteenth Amendment was intended to incorporate the Bill of Rights against states, see *Betts v. Brady*, 316 U.S. 455, 474–75, 474 n.1 (1942) (Black, J., dissenting). For a still earlier hint of Black's maturing views on the Fourteenth Amendment, see *Chambers v. Florida*, 309 U.S. 227, 235 n.8 (1940).

94. *Feldman*, 322 U.S. at 497 (Black, J., dissenting). The Frankfurter-Black debate over dual sovereignty and self-incrimination was replayed in *Knapp v. Schweitzer*, 357 U.S. 371 (1958).

95. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 80 (1964) (Black, J., concurring).

96. 395 U.S. 784 (1969).

#### D. *Reconstructing Double Jeopardy*

The Supreme Court, in decisions such as *Elkins* and *Murphy*, appeared to be moving steadily towards Justice Black's position, but never took the final step of discarding the dual sovereignty doctrine altogether. As we have seen, incorporation undermined a central justification for the dual sovereignty doctrine. Indeed, *Elkins* and *Murphy* stand for the propositions that (1) the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and (2) the federal and state governments should not be allowed to do in tandem what neither could do alone. Yet the dual sovereignty doctrine is still alive and well in double jeopardy cases, in seeming violation of these propositions. Why?<sup>97</sup>

1. *The Section 5 Exception.* — Perhaps a practical and structural concern justifies the seemingly inconsistent deployment of the dual sovereignty doctrine: the fear that states might frustrate the federal government's ability to protect its interests. Although state officials could try to sabotage a federal prosecution by illegally seizing evidence or by promising a suspect immunity in exchange for testimony, a federal trial would still be possible, though perhaps more difficult.<sup>98</sup> But in the double jeop-

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97. It might be thought that the answer lies in the technical distinction between right and remedy: In the Fourth Amendment context, the first government's search and seizure undeniably violated a citizen's right, and the second government is barred from using the evidence uncovered as a remedial matter; but in the double jeopardy context, a citizen's right against dual prosecution by the same government was never violated. This technical distinction will not wash here. First, it cannot explain *Murphy*, which concerned the scope of the immunity to be promised a witness before he spoke. The *Murphy* Court explicitly rejected the technical argument that no constitutional violation would occur so long as one's compelled testimony would never be used by the same government that compelled it. See *Murphy*, 378 U.S. at 57 & n.6. Also, the technical distinction cannot make full sense of *Elkins*, which was decided at a time when exclusion of evidence was seen not merely as a Fourth Amendment remedy, but also as a prevention of a Fifth Amendment violation that would occur at trial. See Amar, *supra* note 74, at 787-91. For evidence of this Fourth-Fifth fusion, see, e.g., *Boyd v. United States*, 116 U.S. 616, 630, 633-35 (1886); *Weeks v. United States*, 232 U.S. 383, 393, 395 (1914); *Gouled v. United States*, 255 U.S. 298, 306, 311 (1921); *Amos v. United States*, 255 U.S. 313, 315-16 (1921); *Aguello v. United States*, 269 U.S. 20, 33-35 (1925); *Gambino v. United States*, 275 U.S. 310, 316 (1927); *Olmstead v. United States*, 277 U.S. 438, 477-78 (1928) (Brandeis, J., dissenting); *Feldman*, 322 U.S. at 489-90; *Mapp v. Ohio*, 367 U.S. 643, 646-47, 646 n.5, 656-57 (1961); *id.* at 661-66 (Black, J., concurring); *Malloy v. Hogan*, 378 U.S. 1, 8-9 (1964); *Murphy*, 378 U.S. at 74. Finally, this technical distinction cannot account for the language in *Elkins* and *Murphy* affirming propositions (1) and (2), and stressing cooperative federalism. See *supra* text accompanying notes 72-77 and 85-87.

98. On the current form of the "use and use-fruits" immunity now required by the Court in the *Kastigar* case, see *supra* note 88. The broader the immunity conferred upon the witness, the more difficult it is subsequently to prosecute. The Oliver North case provides a telling example. The Independent Counsel prosecuted North after he testified before Congress under a grant of use immunity. Although the prosecution succeeded in securing conviction on several counts, the D.C. Circuit reversed the convictions, ruling that the prosecution did not establish that the evidence and testimony it proffered were derived from a source independent of North's congressional testimony. See *United States v.*

ardy context, a defendant would claim that after a state acquittal, pardon, or handslapping conviction, he is wholly immune from federal prosecution for the same offence. Thus, discarding the dual sovereignty doctrine in double jeopardy cases would work a far bigger impairment of federal power: A state in effect would be able to veto a federal prosecution.

This practical and structural concern can be tightly repackaged as a Fourteenth Amendment argument. The Amendment was clearly designed to protect ordinary citizens from abusive action by state officials;<sup>99</sup> one way it did this was by empowering the federal government to prosecute abusive state officials. Indeed, the Amendment's Section 5<sup>100</sup> was paradigmatically about federal criminal law enforcement of Section 1.<sup>101</sup> Because Section 1 is largely self-executing on the civil side,<sup>102</sup> the biggest role for Section 5 exists in criminal law: since there is no self-executing federal common law of crimes,<sup>103</sup> Section 5 was necessary to provide for proper criminal enforcement of Section 1. More specifically, Congress designed Section 5 to support the Civil Rights Bill of 1866, which included a key criminal provision directed at abusive state officials

North, 920 F.2d 940, 942 (D.C. Cir. 1990) (*Kastigar* is violated "whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony"), cert. denied, 500 U.S. 941 (1991). With the hurdle raised so high, the Independent Counsel chose not to re prosecute.

It is far from clear that *Kastigar's* broad use and use-fruits immunity is constitutionally compelled; so long as the compelled testimony itself is not admitted, the Fifth Amendment is probably not violated. In fact, many state courts in the nineteenth century considered the "fruits" of compelled testimony admissible evidence. See *Ex parte Rowe*, 7 Cal. 184, 185-86 (1857) (upholding immunity statute that merely prevented direct use of compelled testimony itself in criminal trial); *Wilkins v. Malone*, 14 Ind. 153, 156-57 (1860) (facts revealed by immunized testimony may be proved against witness in his later criminal trial, "although the confessions are wholly inadmissible"); *People v. Kelly*, 24 N.Y. 74 (1861) (suspect can be obliged to lead officials to evidence they would otherwise be ignorant of, and that evidence may then be used against suspect in a criminal case); *LaFontaine v. Southern Underwriters Ass'n*, 83 N.C. 132 (1880) (witness not protected from furnishing means of procuring evidence against him); *Ex parte Buskett*, 17 S.W. 753 (Mo. 1891) (privilege does not prevent government from obliging suspect to identify other witnesses to crime, who may then testify against suspect). This also appears to be the view of Congress at the time it adopted the Fourteenth Amendment, reglossing the Bill of Rights. See Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (1862); Cong. Globe, 37th Cong., 2d Sess. 429 (1862) (remarks of Senator Benjamin Wade). Because the fruits of compelled testimony have independent indicia of reliability, they should not necessarily be treated the same as the testimony itself. See generally Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. (forthcoming 1995).

99. See generally Amar, *supra* note 10; Curtis, *supra* note 10, at 57-91.

100. Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

101. See *infra* notes 104-105.

102. Cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (persons may sue federal officials for damages directly under the Fourth Amendment).

103. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Pet.) 32 (1812).

(and only state officials).<sup>104</sup> In light of this clear history, it would be highly ironic if federal criminal prosecution of abusive state officials under the Act of 1866 could be blocked by—of all things—the Fourteenth Amendment itself.

Structurally, the Fourteenth Amendment must be viewed as both a shield and a sword. Section 1 serves as a shield insofar as it gives ordinary individuals rights against all government and enhanced protection against discrimination. And Section 5 provides the sword with which the federal government can combat state abuses against citizens.<sup>105</sup> Yet if a state could pardon or acquit or lightly punish its own abusive officials and thereby immunize them from federal prosecution, Section 5 could be thwarted. 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. This con-

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104. See Civil Rights Act, ch. 31, § 2, 14 Stat. 27, 27 (1866); see also Curtis, *supra* note 10, at 82 (quoting Representative John Bingham, drafter of the Fourteenth Amendment): I have advocated here an amendment which would *arm Congress* with the power to compel obedience to the oath [to support, protect, and defend the Constitution], and *punish* all violations *by State officers* of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.

(emphasis added). Bingham believed that Congress needed the Fourteenth Amendment's grant of authority to enact the Civil Rights Bill. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *Yale L.J.* 57, 72-73 (1993).

105. The paradigmatic case for a Section 5 prosecution in the 1860s would have involved state officials as criminal defendants. It is also possible that a widespread state failure to prosecute private parties, who, say, preyed on blacks, would at some point have been seen as a classic state failure to provide equal protection of the laws, thereby justifying direct federal prosecution of those private parties. See Jacobus tenBroek, *Equal Under Law* 51-54, 117-18, 201-29 (1965); Earl M. Maltz, *Civil Rights, the Constitution, and Congress 1863-1869*, at 102-06 (1990). This justification, however, might not be available in the case of an isolated acquittal, no matter how outrageous, as it would be difficult to prove an overall failure of protection. For such cases, we propose instead to focus on jury selection issues, see *infra* Part III—a focus in harmony with the Fifteenth Amendment's insistence that blacks be allowed to vote equally with whites, on juries and elsewhere. As Part III makes clear, the problem of skewed juries transcends issues of federalism and the dual sovereignty doctrine, and could perhaps justify a second prosecution by the same sovereign entitled to one fair trial and one fair jury.

The Citizenship Clause of the Fourteenth Amendment also invited direct congressional legislation over private persons; but it is not clear how much federal criminal legislation against private parties was initially envisioned to enforce the citizenship ideal. The Act of 1866 provided for black citizenship, but laid down no federal criminal law against private parties. The first congressional acts criminalizing private conduct under the Reconstruction Amendments, the Voting Rights Act of 1870, ch. CXIV, § 6, 16 Stat. 140, 141, and the Ku Klux Act of 1871, ch. XXII, § 2, 17 Stat. 13, 13-14, were not adopted until well *after* the Fourteenth Amendment had been proposed and ratified; and some of the key criminal provisions of the latter Act were soon struck down on "state action" grounds as beyond Congress's Section 5 power, see *United States v. Harris*, 106 U.S. 629, 638-39 (1882). More recently, the Court has upheld counterpart civil language of the Ku Klux Act, but by relying on congressional power under the Thirteenth, and not the Fourteenth, Amendment. See *Griffin v. Breckridge*, 403 U.S. 88, 104-07 (1971).

cern can be teased out of *Bartkus* and *Abbate*; in the course of upholding dual sovereign successive prosecutions, both of these key cases cited *Screws v. United States*,<sup>106</sup> a federal criminal civil rights prosecution, under 18 U.S.C. § 242, of a Georgia state sheriff who had beaten a black man to death. Section 242 is the modern-day incarnation of the criminal provision of the Civil Rights Bill of 1866—and was the key criminal statute at issue in the federal trial of the Los Angeles officers.<sup>107</sup>

Thus, where the federal government is exercising its power pursuant to Section 5 to prosecute tyrannical state officials, as in the prosecution of the Los Angeles police officers, the dual sovereignty doctrine retains validity: it makes structural sense even after the Fourteenth Amendment is added to the original Bill of Rights and *Barron* is generally repudiated. Under a “refined incorporation” approach, the Fourteenth Amendment, in the process of making certain “privileges” and “immunities” applicable against the states, also helps to shape (and reshape) the contours of those privileges and immunities.<sup>108</sup> On the dual sovereignty issue, as elsewhere, Justice Black’s approach to incorporation was largely right, but too mechanical, obscuring the ways in which Fourteenth Amendment values must influence the precise shape of Bill of Rights doctrines.<sup>109</sup> Read as a whole, the Fourteenth Amendment calls for the general demolition of dual sovereignty to protect ordinary citizens from being whipsawed (Justice Black’s insight), yet preserves the legitimacy of dual prosecutions against those state officials who themselves violate other citizens’ Fourteenth Amendment rights (the insight of *Screws* affirmed by Justice Marshall). In sum, the dual sovereignty doctrine, while rendered largely obsolete by the Fourteenth Amendment, still has a narrow but crucial role to play in enforcing the Reconstruction values of that same Amendment against state officials.<sup>110</sup>

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106. 325 U.S. 91 (1945); see *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (citing *Screws*); *Abbate v. United States*, 359 U.S. 187, 195 (1959) (citing *Screws*).

107. See *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993), aff’d in part, vacated in part, 34 F.3d 1416 (1994).

108. See generally Amar, *supra* note 10. In important respects, the Fourteenth Amendment’s declaration of “privileges” and “immunities” glossed the earlier declaration of rights in the federal Bill of Rights. Even when solely federal action is at stake, we must consult not only the Founding vision articulated in the original Bill of Rights, but also the Reconstruction vision enacted in the Fourteenth Amendment. This is the so-called “feedback effect” of the Fourteenth Amendment on the original Bill. See *id.* at 1281–82; Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in *Benchmarks: Great Constitutional Controversies in the Supreme Court* (Terry Eastland ed., forthcoming 1995) (manuscript at 14–20, on file with Columbia Law Review).

109. Cf. Amar, *supra* note 10, at 1275, 1282.

110. Indeed, according to a 1979 opinion, 28 out of 43 recent federal prosecutions after state trials involved civil rights offences. See *United States v. Hayes*, 589 F.2d 811, 819 (5th Cir.) (en banc), cert. denied, 444 U.S. 847 (1979). (The *Hayes* court, however, did not indicate whether any of these cases involved purely private action.)

In this sense, the alleged constitutional offence committed by state officials will always uniquely implicate the federal government's authority. The Fourteenth Amendment embodied a check on state abuse and Section 5 made clear that whatever the state could accomplish in the way of self-enforcement would not necessarily satisfy the federal government, which would function as the sole external check. Therefore any offence charged by the state against its own official cannot be interpreted to be the same offence as the Fourteenth Amendment violation charged by the federal government. It is only in this context that the dual sovereignty doctrine's definitional formalism serves an important federalism function by protecting the liberty and equality of the great mass of citizens.<sup>111</sup>

2. *A Separation of Powers Analogy.* — Like federalism, separation of powers is a scheme to divide government power and thereby protect citizen liberty.<sup>112</sup> The obvious separation of powers analogy to our proposed Section 5 exception is impeachment. In order to protect ordinary citizens from tyranny and government lawlessness, our Constitution allows a handful of federal officials to be subject to two prosecutions for their crimes—one in a quasi-criminal court of impeachment and a second in an ordinary criminal prosecution. Indeed, the Impeachment Clause of Article I, Section 3 plainly contemplates that ordinary double jeopardy principles should not apply so that liberty more generally will be protected:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall *nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment*, according to Law.<sup>113</sup>

Another way of viewing the problem is through the lens of waiver or forfeiture. Just as anyone who accepts a federal office effectively forfeits objection to successive impeachment and ordinary criminal prosecution, so too state officials forfeit the general protection granted by the Fourteenth Amendment against cross-jurisdictional prosecutions because

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111. Our claim is not that Section 5 allows Congress to repeal or restrict the rights proclaimed in Section 1. Cf. Cassell, *supra* note 30, at 707 (noting this possible reading of Section 5). For example, Congress could not authorize states to prosecute an ordinary citizen twice for the same crime. Nor could Congress itself prosecute a citizen twice, or violate any other command of the Bill of Rights, simply by pointing to Section 5. Rather, our argument is that when Section 1 is read in light of Section 5, Section 1 itself is best understood as not giving state officials the same immunity from dual sovereign double prosecution that it gives ordinary citizens. Nor did the Supreme Court's Fifth Amendment case law, against which the Reconstruction Congress acted, offer state officials any dual sovereignty immunity prior to 1866. See *supra* text accompanying notes 37–41. And on the "feedback effect" implications of Section 1 for federal rather than state action, see *supra* note 108.

112. For elaboration of this analogy and additional discussion of how both federalism and separation of powers protect citizen liberty, see Amar, *supra* note 58, at 1492–1520.

113. U.S. Const. art. 1, § 3, cl. 7 (emphasis added).

of the awesome monopoly of power they wield over others, and the unique constitutional strictures in place to prevent the abuse of that awesome power.

3. *Refined Incorporation and Its Critics.* — A refined incorporation approach to double jeopardy—eliminating dual sovereignty generally, yet retaining it for Section 5 prosecutions of state officials—can be criticized as protecting defendants (1) too much; (2) too little; or (3) in an unprincipled, ad hoc way. We take up these three possible criticisms in turn.

a. *Too Much Protection?* — From the defendant's perspective, two prosecutions look like double jeopardy, even if each prosecution comes from a different government. But from the governments' perspective, each has arguably complied with the double jeopardy mandate: Each government has prosecuted the defendant once and only once. Incorporation, it might be argued, should mean no more than this.<sup>114</sup>

But there are two problems with that approach.<sup>115</sup> First, it is inconsistent with the individual defendant perspective underlying the incorporation-driven repudiation of dual sovereignty in the Fourth Amendment and self-incrimination contexts.<sup>116</sup> Second, the letter and spirit of the Fourteenth Amendment seem to lean towards an individual perspective—to privilege "privileges." The text of the Amendment focuses not merely on the limits of government power, but the rights and freedoms—the "privileges and immunities"—of individuals. And the spirit of the Amendment was to affirm individual rights against all governments, state and federal.<sup>117</sup> Indeed, the broad history underlying the Amendment foreshadowed modern day cooperative federalism between state and federal governments. As one of us has observed elsewhere:

In some situations, the very line separating state and federal government began to blur. We have already seen in passing the tricky double jeopardy questions raised when both state and federal governments prosecuted a defendant for the same underlying conduct; but the free press clause posed an analogous puzzle that received far more public attention. In the 1830's, various states sought to ban "incendiary" publications and wanted federal officials to cooperate by closing the mails to such publications. Would such censorship constitute federal action violative of the First Amendment or state action beyond the Amendment's scope?

To an increasing number of friends of free speech, this knotty question, even if answerable, seemed to miss the point. Why should the right of citizens to publish controversial views

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114. Cf. *supra* note 18.

115. Professor Cassell has identified a third, in the English rule that foreign trials bar domestic reprosecutions. For our reasons for not finding this rule utterly dispositive for federal-state and state-federal successive prosecutions, see *supra* note 42.

116. See *supra* Part I.C.

117. See generally Amar, *supra* note 10.

turn on fine legal distinctions about which government's hands had really wielded the censor's red pen?<sup>118</sup>

In light of this, many framers of the Fourteenth Amendment, if asked, might have considered it wholly fair and reasonable that one government in a federal system could be barred from prosecuting an ordinary citizen because of the action of another government—especially in a world featuring strong cooperation between federal and state government in investigating and prosecuting crime.

But to see the logic of the general abolition of double jeopardy dual sovereignty is also to see the logic's limit: Section 5 prosecutions. On individual liberty grounds, ordinary citizens will be worse off if any state can thwart federal criminal prosecution of that state's abusive officials. And on cooperative federalism grounds, we should not presume identity or privity of interest between state and federal governments, where the feds are trying to put state officials behind bars. Section 5 of the Fourteenth Amendment suggests a special role for Congress in enforcing the Amendment's mandate against state officials; and state governments should not be allowed to thwart that role by immunizing their own officials.

b. *Too Little Protection?* — An opposite criticism would applaud the general abolition of dual sovereignty, but resist an exception for Section 5 defendants. Even government officials have constitutional rights. Why should the Los Angeles police officers be denied the same double jeopardy rights that everyone else enjoys?

Our answer, of course, is that in dealing with wrongdoing by its own state officials, a state government is categorically less trustworthy than elsewhere; the cooperative federalism logic driving our proposed abolition of general dual sovereignty breaks down here. In response, a critic might point to two alternative mechanisms short of a categorical Section 5 exemption—preemption and removal—to assure federal supremacy over possible state obstructionism. But neither works all that well.

Consider first total federal preemption. If Congress prevented states from enacting state criminal counterparts to federal civil rights laws like Section 242, the state obstruction problem would disappear. There would be no state crime leading to acquittal, handslapping conviction, or pardon; and thus no double jeopardy bar to federal prosecution. But this is like preventing high blood pressure by ripping out a person's heart. The Fourteenth Amendment did not always trust states to police their own officers, but it did want states to try.<sup>119</sup> Federal enforcement of the Fourteenth Amendment would be paramount, but not exclusive. Surely, states should also enforce the Amendment, and play an important (though not ultimate) role in punishing criminally abusive state offi-

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118. *Id.* at 1214.

119. See *infra* note 125 and accompanying text.

cials.<sup>120</sup> Federal prosecution would serve as a backstop, rather than a first resort.

Now consider removal. Under this model, states are welcome to criminalize abusive state action, but in any case where federal prosecutors anticipate whitewash or obstruction, they would be obliged to prosecute first—either by initiating a federal prosecution from scratch, or by removing a state prosecution from state court. Federal supremacy would be fully preserved, but defendant would undergo only one trial.

Wrong. So long as state criminal laws are on the books, removal cannot guarantee federal supremacy. A state governor may typically pardon an abusive state official at any time after the crime—even before trial.<sup>121</sup> And state pardon is nowadays just as good a double jeopardy plea as state acquittal or state conviction.<sup>122</sup> All three bar a federal prosecution for the same offence if dual sovereignty is abandoned across the board. And if we tinker with the dual sovereignty doctrine to allow a “Section 5 pardon” exception, the obvious elegance underlying the claim that “police officers should have the same double jeopardy rights as everyone else” is lost. Indeed, one good exception deserves another—and there are sound structural reasons to expand a Section 5 pardon exception into a more general Section 5 exception. For sometimes state obstruction or whitewash will emerge only during a state trial, not before.<sup>123</sup> To minimize Section 5’s disruption of traditional principles of federalism, the federal government should be allowed to give a state the first crack at putting its own house in order.<sup>124</sup> Only if and when that attempt has failed to vindicate Fourteenth Amendment values is federal prosecution of state officials indicated. Indeed, John Bingham, the father of the Fourteenth Amendment, rather clearly thought that its primary enforcement would rest with the states, with federal criminal punishment of “all violations by State officers of the bill of rights” as a backstop.<sup>125</sup> And so

120. 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, 586–99 (1994); cf. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 *Harv. L. Rev.* 124, 155 (1992) (suggesting role for both state and federal governments in enforcing Thirteenth Amendment).

121. For the sound policy reasons why pardons should be permissible any time after a crime occurs, see *The Federalist* No. 74 (Alexander Hamilton) (immediate pardon may be necessary to induce ongoing law-breakers to stop).

122. See *supra* note 3.

123. In the Rodney King case itself, for example, one group of state officials (state judges) ended up conferring a highly unusual and suspicious litigation benefit (a venue transfer from Los Angeles County to Ventura County) to another group of state officials (the four police officers). For an eyebrow-raising analysis, see Hoffman, *supra* note 60, at 681–86. For a discussion of possible justifications for the transfer, see *infra* text accompanying note 257.

124. See Levenson, *supra* note 120, at 586–99.

125. Quoted *supra* note 104. For broad historical support for a backstop federalism understanding of the Fourteenth Amendment, see Maltz, *supra* note 105, at 29–36, 102–06.

we are once again led back to our proposed Section 5 exception—for state court acquittals and handslapping convictions, as well as for state pardons.

But here too, we see an important limiting principle that should prohibit federal re prosecution outside the confines of Section 5. Our Section 5 exemption implicates possible government self-dealing: a state is applying criminal law against its own officials. But outside this self-dealing situation, states generally may be presumed trustworthy enforcers of criminal law. In the few areas where this may not be so, preemption or removal seem more workable—especially where supplemented by the unfettered ability to directly prosecute obstructionist state officials (an ability created by the Section 5 exception itself)<sup>126</sup>—and less likely to undermine vigorous enforcement of the Constitution itself.

To put the point another way, our proposal simply recasts two general double jeopardy principles in light of the unique federalism architecture of the Fourteenth Amendment. Even in *Bartkus* Justice Frankfurter allowed that if a state and the federal government were genuinely acting in collusive partnership—if the state prosecution were a “sham and a cover for a federal prosecution”—double jeopardy might bar retrial.<sup>127</sup> But proving this high degree of state/federal cooperation and collusion has become an almost insurmountable burden for ordinary defendants in later cases.<sup>128</sup> Our general proposed abolition of dual sovereignty relieves this case-specific burden by presuming extensive cooperation between the two governments, in keeping with the broad Fourteenth Amendment vision protecting “privileges” against all governments. But where state officials are the targets of prosecution, an opposing general double jeopardy principle becomes salient: an acquittal or handslapping conviction procured by fraud or collusion of defendant with the purpose of avoiding a fair and impartial trial does not bar re prosecution.<sup>129</sup> But once again, this is a very hard thing to prove in any given case. (Some of the pro-defendant rulings in the initial state prosecution of the L.A. police officers smell fishy,<sup>130</sup> but conclusive proof of collusion is hard to come by.) Our proposed Section 5 exception reads the Constitution it-

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126. See *infra* text accompanying notes 140–141. Without this exception, a governor could thwart a federal trial of a private citizen with a pardon, and if he himself were then charged with criminal obstruction by the feds, he could try to pardon himself, or (temporarily?) step down and be pardoned by his lieutenant governor, who could in turn be pardoned . . . and so on, with one state hand washing itself or the other.

127. See *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

128. Lower courts have read *Bartkus*'s language to create a “sham and a cover” exception to the dual sovereignty rule, but have almost never found the “exception” met on the facts of a given case. See Braun, *supra* note 21, at 59–60; but cf. *United States v. Belcher*, 762 F. Supp. 666, 670–71 (W.D. Va. 1991) (applying *Bartkus* “sham and cover” exception to bar federal prosecution after state acquittal), request for modification denied, 769 F. Supp. 201 (W.D. Va. 1991).

129. See 22 C.J.S. Criminal Law § 217 (1989). For much more discussion of this principle, see *infra* Part III.

130. See *supra* note 123.

self to presume possible state/defendant self-dealing when state officials are involved, thereby puncturing the Constitution's default presumption of cooperative federalism between a state and the feds.<sup>131</sup>

c. *Too Ad Hoc?* — Many academic and judicial critics of double jeopardy dual sovereignty have tended to stake out an intellectually pure, but extreme, position: The doctrine must be abandoned lock, stock, and barrel.<sup>132</sup> However, in a recent article elaborating and defending the position taken by the ACLU of Southern California in the Rodney King affair, Director Paul Hoffman has urged that dual sovereignty be abandoned subject to an exception for "civil rights" cases.<sup>133</sup> In response, Professor Susan Herman has defended the national ACLU's traditional position of total abolition of dual sovereignty.<sup>134</sup> She levels two main criticisms against Hoffman.

First, Herman finds in the framing of the Fourteenth Amendment no specific smoking gun historical evidence supporting a specific "civil rights" exception. Reconstruction Republicans plainly envisioned federal criminal prosecution of abusive state officials, she concedes; but, she asks, did the framers clearly approve of federal re prosecution after a state trial?<sup>135</sup> With due respect, this is the wrong question, and no answer is what the wrong question begets. The Fourteenth Amendment framers clearly did mean to apply the Bill of Rights generally against the states, but did not "carefully consider[ ] clause by clause exactly how the Bill could be sensibly incorporated."<sup>136</sup> Double jeopardy received little explicit attention, and the intricacies of double jeopardy dual sovereignty received none. At this level of historical specificity, Herman is hoist by her own petard; though the Fourteenth Amendment framers did intend to apply double jeopardy principles against states, there is no specific evidence that they clearly addressed dual sovereignty, much less that they clearly approved the modern ACLU line. Republicans explicitly meant to repudiate *Barron*, but did incorporators mean that each government could prosecute only once (dual sovereignty), or that all governments, collectively, could prosecute only once (the ACLU line)? The answer to this question is to be found in sensitive structural inferences rather than

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131. A case-by-case rather than categorical approach is imaginable, but the categorical approach more closely tracks both the impeachment analogy, and the reasons that support a rule-like, categorical approach to the "same offence" issue within a single jurisdiction, see *infra* text accompanying notes 192–193, 199–205.

132. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 150–64 (1959) (Black, J., dissenting); Cassell, *supra* note 30, at 708–19; Grant, *Successive Prosecutions*, *supra* note 21, at 1329–31; Herman, *supra* note 20, at 618–27.

133. See Hoffman, *supra* note 60, at 661–71. Hoffman's proposed exception is at times defended as a legislative proposal, and at other times as an interpretation of the Constitution itself. See *id.* at 670–71.

134. See Herman, *supra* note 20, at 632–39.

135. See *id.* at 633.

136. Amar, *supra* note 10, at 1243. See generally *id.* at 1260–84 ("The Hard Part of Incorporation").

smoking gun historical soundbites. And the same holds true for a Section 5 exception.<sup>137</sup>

Herman's second concern is more telling. What are the contours and limits of Hoffman's proposed "civil rights" exception? Hoffman has pointedly declined to limit his proposed exception to state officials, or even race cases;<sup>138</sup> at this point, Herman smells a rat. "Civil rights" might mean anything or everything, and an ill-defined exception could swallow the rule (at least in all state-federal multiple prosecutions).<sup>139</sup> Most criminal law, after all, is designed to protect victims in their "civil rights" to life, liberty, or property.

By contrast, our proposed Section 5 exception is limited to state officials. Several factors support this limitation. First, it creates a clean, easy-to-administer rule. Second, it reflects the structure and history of Section 5, which focused not merely on federal criminal prosecution, but paradigmatically on federal criminal prosecution of state officials.<sup>140</sup> The criminal provision of the Civil Rights Bill of 1866—the precursor of today's Section 242—was aimed only at state officials. (As to private crimes involving race and the like, cooperative federalism would enable good faith states to prosecute private crimes themselves; and in bad faith states, selective federal preemption and removal might well prove workable when combined with the ability of the federal government to prosecute any state official—like a governor with a too-quick pardon pen—who aids private criminals or helps them escape state punishment.) Finally, many of the arguments we have canvassed—about state self-dealing, the separation of powers (impeachment) analogy, the waiver claim, the unique and awesome power wielded by government officials, and so on—apply only or specially to state officials.

#### E. *Summary: Reconstructing Dual Sovereignty*

Let us now pause and take stock of the various dual sovereignty permutations touched on by the preceding analysis.

Category one involves a federal prosecution following a trial for the same offence in a foreign land. Even though two sovereigns are involved, the clear English rule on which the Fifth Amendment Double Jeopardy Clause was founded is dispositive here. If England would allow a French

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137. The broad history of the Fourteenth Amendment—its backstop federalism model and its special focus on federal criminal prosecution of abusive state officials—does support our approach. See *supra* text accompanying notes 97–111, 114–118.

138. See Hoffman, *supra* note 60, at 660, 662 n.57, 669–70.

139. See Herman, *supra* note 20, at 637–39; see also Cassell, *supra* note 30, at 706–07 (discussing the expansive implications of Hoffman's proposal). Even with a broad federal civil rights exception, dual sovereignty could still perhaps be abolished outside state-federal prosecutions—e.g., in federal-state, state-state, and foreign-domestic prosecutions.

140. We do not claim that Section 5 focused exclusively on federal criminal prosecution of state officials, only paradigmatically, see *supra* note 105. For our own approach to race cases involving private defendants, see *id.*; see also *infra* Part III.

judgment to bar retrial, so should America.<sup>141</sup> Category two involves the reverse situation. A federal trial precedes a foreign one for the same offence. Here, if a defendant is ultimately subject to two trials, it is only because America's writ does not rule the globe: The United States cannot compel other nations to respect our judgments, but America should try—through international agreements and the like—to do what it can.

Categories three and four involve foreign-state and state-foreign prosecutions respectively. And the results here should, post-incorporation, track those for categories one and two, respectively. After Fourteenth Amendment incorporation, and the repudiation of *Barron*, a state should generally be held to the same standard as the federal government.

Category five, the state-state situation in *Heath*, is also easy. *Heath* was wrongly decided, and should be overruled. If England would respect a Georgia judgment, so should Alabama a fortiori. If Alabama must treat a French judgment as preclusive (category three), it should, a fortiori, treat a Georgia judgment as preclusive. If, after incorporation, Georgia cannot try *Heath* twice, and Alabama cannot try *Heath* twice, then together the two governments should not try *Heath* twice.

All of these reasons likewise bar reprosecution in category six, when a federal trial has ended and a state wants to reprosecute. It would be odd if Alabama owed a federal judgment less respect than a Georgian one (category five) or a foreign one (category three); and federal supremacy affirmatively cuts against reprosecution. Nor is there any provision of our Constitution that is the precise mirror image of Section 5 authorizing state criminal prosecution of abusive federal officials in the teeth of explicit federal immunity.<sup>142</sup>

Finally, we come once again to our last dual sovereignty category, involving federal efforts to prosecute after a state prosecution. And here, we have of course proposed a general ban on such retrial, subject to a principled Section 5 exception for state officials.<sup>143</sup>

141. See *supra* notes 30–32 and accompanying text; see also *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820):

Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.

142. For a reading of the Tenth Amendment as inviting state civil suits authorizing compensatory damages against federal officials who violate the federal Constitution, see *Amar*, *supra* note 58, at 1492–1520.

143. As we have seen, *supra* text accompanying note 98, states have much less power to sabotage federal prosecutions in Fourth Amendment and self-incrimination contexts. Nevertheless, doctrinal symmetry might argue for a Section 5 exception to both *Elkins* and *Murphy*. An alternative approach would cure the sabotage problem by rethinking the substantive and remedial contours of the Fourth Amendment and the Self-Incrimination Clause. If the Fourth Amendment exclusionary rule were abandoned in favor of civil actions against the offending government, see *Amar*, *supra* note 74, at 811–16; and if only compelled testimony, but not fruits, were immunized from introduction in criminal cases,

## II. WHAT IS THE "SAME OFFENCE"?

If the Supreme Court were to abandon the general dual sovereignty doctrine, offences defined by different governments would not always be different by definition. How would the Court decide whether two crimes defined by different governments were indeed the "same offence"? Recently the Court reestablished the *Blockburger*<sup>144</sup> test as the primary standard for determining whether two offences within the same jurisdiction are the same for purposes of the Double Jeopardy Clause.<sup>145</sup> Yet if the Court were to modify the dual sovereignty doctrine in any meaningful way, it would need to adjust *Blockburger* as well. We shall explain why this is so in section B below; but first we must consider *Blockburger* in some detail and note some of its oddities wholly apart from dual sovereignty concerns.

### A. Greater, Lesser, and Same Offences

*Blockburger* requires a court to compare the language of the statutes (or common-law crimes) at issue in successive prosecutions to determine whether each includes an element that the other does not.<sup>146</sup> Thus, under this test, the phrase "same offence" encompasses more than identical provisions. If statute X requires an element or elements that statute Y does not, these statutes will still be treated as describing the "same" offence so long as X contains all of Y's elements—that is, so long as Y is a "lesser included" offence.

One justification for treating these statutes as the same is that the greater offence, X, typically carries a penalty that incorporates punishment for the lesser included offence, Y.<sup>147</sup> For example, armed robbery contains the lesser included offence of robbery. Assume that armed robbery carries a fifteen-year sentence and that robbery carries a five-year sentence. The armed robbery penalty presumably includes the five years for robbery and tacks on ten years for the use of a weapon. To convict an armed robber of both armed robbery and simple robbery and to punish him with twenty years (fifteen plus five) would presumably be double counting. The *Blockburger* test is therefore most appropriate in the context of double punishment: It prevents a defendant from being punished separately for two offences where the legislature can be presumed to have

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see Amar & Lettow, *supra* note 98, (manuscript at 48–55, on file with author), the intersovereign sabotage problem would disappear in the contexts of search, seizure, and self-incrimination.

144. *Blockburger v. United States*, 284 U.S. 299 (1932).

145. See *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993).

146. See *Blockburger*, 284 U.S. at 304.

147. See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 157–59 (reasoning that rule of lenity requires presumption that legislature did not intend multiple punishment for greater and lesser included offences).

provided a penalty for the greater offence that already includes punishment for the lesser included offence.<sup>148</sup>

Yet strictly speaking, double counting is not an issue unique to the Double Jeopardy Clause. Double counting is impermissible even if cumulative punishment for robbery and armed robbery were imposed in a single trial. *Blockburger's* core idea is a simple one rooted in the general rule of law—judges may not impose greater punishment than the legislature has authorized<sup>149</sup>—combined with a commonsensical presumption, bolstered by the Due Process Clause, that a legislature that intends to authorize double counting for lesser included offences must speak with special clarity.<sup>150</sup> The Court in the 1993 *Dixon* case, however, made clear that the *Blockburger* test also governs successive prosecutions under the Double Jeopardy Clause.<sup>151</sup>

*Yet this result cannot be squared with the text of the Double Jeopardy Clause.* If we look solely to the elements of offences (as does *Blockburger*),<sup>152</sup> a greater offence X is plainly not the same as its lesser included offence Y. By definition, X contains an element that Y does not; by definition, X and

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148. The Court ruled in *Missouri v. Hunter*, 459 U.S. 359, 366–67 (1983), that the presumption against the creation of separate offences can be overcome by express legislative intent, indicating that the test is one of statutory construction only. For example, lower courts have ruled that the presumption does not hold for RICO violations. Even though the predicate RICO offences (bribery, extortion, etc.) are lesser included offences of a RICO violation, courts have held that Congress intended to create separate penalties. See Karen J. Ciupak, Note, RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems, 58 *Notre Dame L. Rev.* 382, 391–93 (1982) (discussing *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982)). And the Supreme Court has already taken a similar view of the federal “continuing criminal enterprise” statute. See *Garrett v. United States*, 471 U.S. 773 (1985).

When a logical greater offence carries a smaller penalty than its lesser included offence, the presumption that the legislature intended to fold one sentence into the other should clearly be inapplicable. *United States v. Dixon*, 113 S. Ct. 2849 (1993), is one such case, see *infra* text accompanying notes 164–165, 177–182. See also *United States v. York*, 888 F.2d 1050, 1058–59 (5th Cir. 1989). The *York* court found that Congress intended to punish separately the crimes of lying on forms submitted to the government, 18 U.S.C. § 1001, and lying on forms specifically with intent to influence a financial institution, 18 U.S.C. § 1014. While 18 U.S.C. § 1001 was the logical lesser offence, it was the penal greater offence. If the statutes were held under *Blockburger* to be the same offence for purposes of punishment, 18 U.S.C. § 1014 would be rendered superfluous because it carried a lesser sentence yet was more difficult to prove. The *Blockburger* presumption therefore is only appropriate if the logical greater offence is also the penal greater offence. If not, it is awkward to presume that the legislature considered the larger penalty for the lesser when determining the smaller penalty for the greater offence.

149. Cf. U.S. Const. amend. VIII (prohibiting excessive punishment—plainly including punishment beyond that legislatively authorized).

150. For a similar view of the double counting issue, see *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1955–59 (1994) (Scalia, J., dissenting).

151. See *Dixon*, 113 S. Ct. at 2860.

152. For additional discussion of why we should focus on the legal elements of an offence, rather than the underlying factual conduct, see *infra* notes 192–193, 199–205 and accompanying text.

Y are different.<sup>153</sup> Surely if X is the "same" as Y and the "same" as Z, then Y and Z must also be the "same"; yet *Blockburger* flunks even this elementary test of sameness. Under *Blockburger*, a greater offence with elements (A) and (B) would be the "same" as lesser included offences (A) and (B), respectively, but these lesser included offences would not be the "same" as each other. So too, under *Blockburger*, a lesser offence (A) is the "same" as greater offence (A+B) and the "same" as greater offence (A+C), yet these greater offences are not the "same" as each other.

On the other hand, in order to enforce the principles underlying the Double Jeopardy Clause and its companion Due Process Clause—protecting innocent persons and checking government overreaching<sup>154</sup>—greater and lesser included offences, though not technically the same offence, should typically not be prosecuted successively. To see this more clearly, let us divide the universe of successive *Blockburger* prosecutions into four logical subcategories.

1. *Initial Acquittal of the Lesser Included Offence.* — First, assume that the government seeks to prosecute the defendant for armed robbery after he was acquitted of robbery. *Ashe v. Swenson*<sup>155</sup> provides the proper result. *Ashe* held that the Constitution protects a criminal defendant's right to invoke the collateral estoppel principle. Under this general principle, once an issue of ultimate fact has been resolved by a valid judgment, it typically cannot be relitigated between the parties.<sup>156</sup> After stating the general principle, the Court of course made clear that collateral estoppel protects the defendant only when the issue was decided in his favor: "For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been *acquitted* from having to 'run the gantlet' a second time."<sup>157</sup> Consistent with *Ashe*, because our defendant was acquit-

153. The Supreme Court has already noted this point in passing, see *Garrett v. United States*, 471 U.S. 773, 786 (1985), discussed *infra* text accompanying notes 186–191. *Contra Dixon*, 113 S. Ct. at 2884 n.4 (Souter, J., concurring in the judgment in part and dissenting in part) ("The *irrelevance of additional elements* can be seen in the fact that . . . the Double Jeopardy Clause does provide protection not merely against prosecution a second time for literally the same offense, but also against prosecution for greater offenses in which the first crime was lesser-included . . . ." (emphasis added)).

154. These principles are derived from *Green v. United States*, 355 U.S. 184, 187–88 (1957), discussed *supra* at note 52 and accompanying text.

155. 397 U.S. 436 (1970). In *Ashe*, the state sought to prosecute the defendant for robbery of a player in a poker game after he had been acquitted of robbing another player, Donald Knight. Because witnesses at the first trial were unable to conclusively identify the defendant, and because the judge instructed the jury to find the defendant guilty if it found him to be one of the robbers (though not necessarily the robber of Knight), the Court ruled that the issue of whether the defendant had been one of the robbers was resolved in the defendant's favor and could not be relitigated. See *id.* at 437–39, 445.

156. See *id.* at 443.

157. *Id.* at 445–46 (emphasis added) (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)). The Court has never held that the prosecution can apply the same principle to prevent the defendant from defending against a particular charge. Indeed, it has said that prosecutors may not use the principle offensively. See *id.* at 443; *Simpson v. Florida*, 403 U.S. 384, 386 (1971).

ted of robbing the victim, he cannot constitutionally be prosecuted for armed robbery—an essential element of proof (robbery) was already resolved in the defendant's favor. This rule thus serves the Constitution's dual purposes of protecting innocent citizens<sup>158</sup> and checking government abuse.

Although the *Ashe* result is right, its reasoning is faulty. *Ashe* rooted collateral estoppel in the Double Jeopardy Clause, but this is a mismatch. The true source of the *Ashe* idea is due process, not double jeopardy. Double jeopardy is explicitly limited to retrials for the "same offence," but the *Ashe* principle cannot be so limited. Even if we assume greater and lesser included offences are somehow the "same," surely robbery and kidnapping are different offences under *Blockburger's* test or any other. Yet if a judge acquitted a robbery defendant on the ground that the police had nabbed the wrong man in a plain case of mistaken identity, surely *Ashe* would bar retrial for kidnapping arising out of the same episode.<sup>159</sup> And this proves that the *Ashe* idea must be rooted outside the strict text of the Double Jeopardy Clause, in the more spacious—but also more flexible, less absolute—language of due process.<sup>160</sup> (Of course, the spirit of the Double Jeopardy Clause may help inform the more global due process principle.<sup>161</sup>)

And so in this subcategory at least, we reach the same result as *Blockburger* without having to claim that different offences are somehow the same.

2. *Initial Acquittal of the Greater Offence.* — Now assume that the defendant was acquitted of armed robbery and the government then seeks to prosecute him for robbery. At the armed robbery trial both the defense counsel and the prosecution would typically have had the right to request that the fact finder be instructed on all lesser included offences—

158. If you play with something long enough, you are likely to break it; and if the government is allowed to prosecute an innocent defendant enough times and disregard all acquittals, eventually it is likely to convict an innocent (by hypothesis) person.

159. If a jury acquitted our defendant, the basis for its acquittal might be unclear, submerged in a general verdict. For our suggestion to eliminate this uncertainty and help defendants take full advantage of *Ashe*, see *infra* note 166.

160. *Ashe* resisted this idea because its double jeopardy theory enabled the Court to sidestep an earlier case with virtually identical facts decided against the defendant under the Due Process Clause, see *Hoag v. New Jersey*, 356 U.S. 464 (1958). But the *Ashe* Court could have sidestepped *Hoag* simply by reinterpreting due process in light of later developments, including the incorporation of the Double Jeopardy Clause in *Benton v. Maryland*, 395 U.S. 784 (1969). *Ashe* instead tried to rely more directly on *Benton*, insisting that the Double Jeopardy Clause itself embodied collateral estoppel. See *Ashe*, 397 U.S. at 436, 442, 445.

161. For example, due process does not necessarily require that collateral estoppel rules in civil cases track those in criminal cases. The gravitational pull of the Double Jeopardy Clause is much weaker in civil cases; the dread, stigma, expense, and anxiety of the citizen in a typical civil case are much lower than in a typical criminal case. Forcing a person to run the gauntlet twice could thus be seen as less procedurally oppressive in civil cases. Cf. *In re Winship*, 397 U.S. 358 (1970) (due process requires proof beyond reasonable doubt in criminal but not civil cases).

e.g., robbery—that are supported by the evidence.<sup>162</sup> As a matter of trial strategy, however, each side may sometimes choose not to do so.<sup>163</sup> Whenever the prosecutor can request a jury instruction on lesser included offences, she should not be allowed to bring them as separate charges in a later prosecution.

To cast the point into a precise textual argument under the Double Jeopardy Clause, the prosecutor's power to seek a lesser included instruction means that defendant *was* in jeopardy at the first trial for all lesser included offences. Whenever a prosecutor can request a lesser included instruction, defendant's blanket acquittal is an implicit acquittal on each lesser included offence; and a later trial on any lesser included charge would put defendant twice in jeopardy for the same (lesser included) offence. Thus, our defendant was indeed acquitted of robbery in his armed robbery trial; and he may thus plead *autrefois acquit* to a subsequent robbery charge. And so here, too, our approach generally converges with *Blockburger's* result, but without the textual gymnastics.

Lest we be tempted to think that this result somehow suggests that armed robbery and robbery are really the "same" and that *Blockburger* might be right after all, consider armed robbery and bank robbery. Clearly these are different offences under *Blockburger*—only the first requires a weapon; only the second, a bank. Yet an acquittal on either would implicitly be an acquittal on robbery, and would thus bar retrial on the other, under the *Ashe* principle. But surely, this does not mean that armed robbery equals bank robbery.

However, there are some rare situations where the prosecution in the first case could not even request an instruction on logically lesser included offences. Consider, for example, the Court's recent double jeopardy case, *United States v. Dixon*.<sup>164</sup> When Dixon was prosecuted for criminal contempt for violating a court order not to commit other crimes (here, a drug crime), he could not have been convicted for the logically lesser included drug offence because he was prosecuted pursuant to a special provision that allows contempt convictions after expedited proceedings without a jury.<sup>165</sup> In this rare circumstance neither collateral estoppel nor the Double Jeopardy Clause should always bar a second prosecution for the lesser offence.

162. For the federal rule, see *Schmuck v. United States*, 489 U.S. 705, 717 & n.9 (1989) (construing Fed. R. Crim. P. 31(c)).

163. The recent Reginald Denny beating case illustrates such a tactic. Counsel for Damian Williams requested that the jury consider only the count of attempted murder, and not any lesser included counts. Nor did the prosecution seek an instruction on lesser included offences. See Bernard Grofman, *The Denny Beating Trial: Justice in the Balance*, Chi. Trib., Nov. 3, 1993, § 1, at 21.

164. 113 S. Ct. 2849 (1993).

165. See *id.* at 2853; see also *In re Nielsen*, 131 U.S. 176, 190 (1889) ("But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, . . . an acquittal would not or might not be a bar . . .").

To simplify things, let's assume that the basis for the verdict of acquittal is clear (either because a jury or judge supplies it, or because it is apparent from a review of the trial record).<sup>166</sup> Under the *Ashe* principle of due process collateral estoppel, the defendant cannot be prosecuted for the lesser included offence if the prosecution failed to prove *it* as an element of the greater offence; the risk of convicting an innocent defendant is too high,<sup>167</sup> and the government is not entitled to two bites at the apple.

On the other hand, if a prosecutor cannot seek a lesser included instruction at the first trial and if the acquittal on the greater charge rested only on the prosecutor's failure to prove an element or elements exclusive to the greater offence, then the *Ashe* collateral estoppel principle would not bar a second trial on other elements. Nor is due process offended simply by two trials, if the government can point to a neutral, nonvexatious reason for proceeding in two steps. And the Double Jeopardy Clause, we submit, is not violated by two trials for different offences. Thus in some atypical situations the defendant could be prosecuted for the lesser offence without violating the letter or spirit of either due process or double jeopardy. In these rare cases, our result diverges from *Blockburger's*—and, we think, makes more sense.

3. *Initial Conviction of the Lesser Included Offence.* — Next, consider the defendant who is convicted of attempted murder and is then prosecuted for murder. Although the *Blockburger* test treats attempted murder and murder as the same offence for purposes of successive prosecution, the Supreme Court, in a footnote in *Brown v. Ohio*,<sup>168</sup> has already acknowledged a possible exception to *Blockburger* "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."<sup>169</sup> The *Brown* footnote

166. In *Ashe*, although the jury delivered a general verdict, it had been instructed to find the defendant guilty if he was one of the robbers, even if he had not personally robbed Knight, the victim whom the defendant at the first trial was accused of robbing. See supra note 155. According to *Ashe*, in deciding the merits of a collateral estoppel claim, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). We would suggest that after an acquittal, defendant should be entitled to request a specific verdict from the trier of fact as to which specific elements or facts were resolved in defendant's favor. Such a special verdict would make *Ashe* much easier to administer, and would better protect defendants against the risks of erroneous conviction and abusive prosecution. A defendant of course would not be obliged to ask for such a special verdict; and a jury would not be obliged—only empowered—to answer; and so our proposal here would in no way "nullify" whatever "nullification power" juries now have.

167. See supra note 158.

168. 432 U.S. 161 (1977) (holding that conviction for auto theft violates Double Jeopardy Clause because defendant had already pled guilty to joyriding, a lesser included offence).

169. *Id.* at 169 n.7.

is rooted in a venerable Supreme Court precedent from 1912,<sup>170</sup> and Justices in many other cases have repeated its caveat.<sup>171</sup> Indeed, as we shall soon show, in one important but unappreciated case, the Court made clear that the *Brown* footnote does indeed allow double prosecution of lesser included and greater offences in some important cases.<sup>172</sup>

The *Brown* footnote should not mean that judges can simply carve out ad hoc exceptions to clear textual rights—that courts can blithely disregard the Double Jeopardy Clause and the plea of *autrefois convict de même felonie*. Rather, the *Brown* footnote should be read as intuiting that greater and lesser included offences are not, strictly speaking, the same; therefore, successive prosecution is sometimes allowable. This does not mean that a prosecution for a greater offence following conviction for a lesser included offence is automatically legitimate; here, too, we must confront due process issues above and beyond the commands of the Double Jeopardy Clause. Due process is broader, but more flexible.<sup>173</sup> It extends to prosecutions for different offences, but does not categorically bar two trials. Under this due process approach, the prosecutor may not seek two trials merely to vex the defendant. Nor should she bifurcate trials merely to get a cheat peek at defendant's strategy at a "preliminary bout" in order to improve her odds at the second trial, the "main event".<sup>174</sup> She could satisfy this due process standard by demonstrating that she was unable to try the more serious murder charge at the first prosecution because of belated (and not irresponsible) discovery of new evidence or the occurrence of subsequent events—e.g., the death of the victim after the first trial, from injuries proximately caused by defendant.<sup>175</sup>

170. See *Diaz v. United States*, 223 U.S. 442, 448–49 (1912).

171. See, e.g., *United States v. Dixon*, 113 S. Ct. 2849, 2887 n.7 (1993) (Souter, J., concurring in the judgment in part and dissenting in part); *Grady v. Corbin*, 495 U.S. 508, 516 n.7 (1990); *Garrett v. United States*, 471 U.S. 773, 797 (1985) (O'Connor, J., concurring); *id.* at 803–04 (Stevens, J., dissenting); *Illinois v. Vitale*, 447 U.S. 410, 420 n.8 (1980); *Jeffers v. United States*, 432 U.S. 137, 151–52 (1977); see also *Ashe v. Swenson*, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring) (following *Diaz*).

Lower courts have also relied on the *Brown* exception to the *Blochburger* rule. See, e.g., *United States v. Stearns*, 707 F.2d 391, 393–94 (9th Cir. 1983) (applying exception to permit second prosecution for felony murder after conviction for lesser offence where government did not possess evidence necessary to sustain greater charge at outset despite exercise of due diligence), cert. denied, 464 U.S. 1047 (1984).

172. See *Garrett v. United States*, 471 U.S. 773 (1985), discussed *infra* text accompanying notes 186–191.

173. The aptness of a flexible *due* process analysis is in fact subtly signalled by the *Brown* footnote, which speaks of "*due* diligence." See *supra* text accompanying note 169 (emphasis added).

174. We do not take any position on the precise contours of presumptions, *prima facie* showings, burdens of going forward, and burdens of proof entailed by such a *due* process approach. See *infra* note 184.

175. See *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977). The asymmetric rules of collateral estoppel, discussed earlier, also provide strong disincentives against strategic

Underlying such an approach is the principle that the government should be able to punish the defendant for the most culpable aspects of his conduct, but not if the punishment is exacted in a manner that is deliberately designed to harass the defendant. If the government later secures conviction on the greater offence, then the defendant must be credited for the time served or allotted for the lesser included offence (in order to avoid double counting, per the original purpose of the *Blockburger* rule) unless the legislature intended the offences to be punished separately.<sup>176</sup>

4. *Initial Conviction of the Greater Offence.* — Finally, consider the prosecution of a defendant for attempted murder after he was convicted for murder. Murder obviously carries a stiffer penalty than attempted murder; and so the government prosecuting a defendant for attempted murder after getting a conviction for murder would be hard-pressed to come up with a justification for its action other than a desire to harass the defendant. The greater penalty typically will subsume the lesser such that no additional sentence can be meted out for the conviction on the lesser. Thus, the initial conviction for the greater offence typically merges all lesser included offences into the first verdict.

But the *Dixon* case provides an example of where the *Blockburger* test goes awry. The Court held that the Double Jeopardy Clause barred Dixon's prosecution for a drug offence because he had already been convicted of contempt of court.<sup>177</sup> Contempt of court was the logical greater offence because it required proof of knowledge of a court order (issued pursuant to an unrelated charge) and proof of any offence prohibited by the D.C. Code—the order prohibited defendant from violating any part of the D.C. Code.<sup>178</sup> The substantive charge, cocaine possession (an offence prohibited under the D.C. Code), was a logical lesser included offence of contempt, which also required knowledge of the court order. Thus, the Court ruled that *Blockburger* prohibited subsequent prosecution for cocaine possession.

Yet although the contempt offence was the greater logical offence, it was the lesser penal offence. It carried a maximum prison sentence of six months,<sup>179</sup> whereas the cocaine charge carried a maximum prison sentence of thirty years.<sup>180</sup> So here, unlike our murder/attempted murder

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bifurcation by the prosecutor. If she wins the first bout, she must prove everything again at the second trial; but if she loses, she is forever barred from bringing the second case.

176. See supra note 148 and accompanying text.

177. See *United States v. Dixon*, 113 S. Ct. 2849, 2858 (1993).

178. The release order's incorporation by reference of the entire D.C. criminal code presents what we will call a "disjunctive elements" problem that need not be explained for purposes of this discussion but will be treated infra notes 227–232 and accompanying text.

179. See *Dixon*, 113 S. Ct. at 2853.

180. See D.C. Code Ann. § 33-541(2)(A) (1981). Defendant Foster's prosecution presented the same problem. He was first convicted of criminal contempt based on proof that he committed two assaults. See *Dixon*, 113 S. Ct. at 2854. The Court found that under *Blockburger* a second trial for assault was barred because assault, though it carried a stiffer

hypothetical, we can see why the government had a legitimate reason for pursuing a so-called "lesser" prosecution after securing a conviction on the so-called "greater" offence. The government should not be denied the opportunity to punish the defendant to the fullest extent of his culpability—to try Dixon on the thirty-year drug charge and not just the trivial contempt charge. As a matter of common sense and plain meaning, it is hard to see how contempt of court and cocaine possession are the "same offence" under the Double Jeopardy Clause.<sup>181</sup> And due process allows a second trial so long as the government can show that it had a legitimate nonvexatious reason to try the charges separately.<sup>182</sup>

5. *Beyond Blockburger*. — In the end, *Blockburger* ordinarily reaches the right result—but not always. And even where *Blockburger* gets it right, it gives the wrong reason, insisting that day is night and that different offences are really the same.

To reach the right results for the right reasons, we have proposed three simple rules: (1) the Double Jeopardy Clause means what it says—"same" means "same";<sup>183</sup> (2) the Due Process Clause generally gives a criminal defendant who prevails on any issue a right to collaterally estop the government from relitigating that issue; (3) the Due Process Clause also counsels that even where two different offences are involved, the government must have good, nonvexatious reasons for prosecuting these offences in two separate trials rather than one.<sup>184</sup>

penalty than criminal contempt, was the logical lesser included offence of criminal contempt. See *id.* at 2858.

181. And of course it is also hard to see how a six-month crime is "greater" than a thirty-year crime.

182. The government likely could have satisfied this burden in *Dixon* because the criminal contempt statute permitted convictions after expedited proceedings without a jury. See *Dixon*, 113 S. Ct. at 2853–54. Whether *Blockburger* would require a punishment setoff after the second conviction to avoid double counting depends on legislative intent. As we suggested, *supra* note 148, where the logical greater offence is the lesser penal offence, the presumption against double counting is inapt.

183. An offence must of course be the same in fact as well as law. Two burglaries, committed on two days, might involve the same law and the same elements, but different facts: the defendant violated the same law twice. At times, nice "unit of prosecution" issues arise: Is an ongoing course of conduct one offence or several? Can a single theft of \$500 be seen as five thefts of \$100? But these are ultimately issues of statutory construction and legislative intent, see *Westen & Drubel*, *supra* note 147, at 111–22.

184. Note how the second rule creates strong incentives that help implement the mandate of the third rule, see *supra* note 175. Note also how our second rule is a due process cousin of *autrefois acquit*, protecting defendants who win in their first trial, whereas our third rule—like *autrefois convict*—protects even defendants who lose their first trial. (Our earlier rule against double counting in punishment, see *supra* text accompanying notes 148–150, is yet another due process cousin of *autrefois convict*.)

Note finally how the adequacy of reasons the government might offer to meet the third rule will often depend on the precise degree of factual and logical proximity between offences. And this is once again evidence that the principle is one of flexible due process, rather than categorical double jeopardy. In some ways, Justice Brennan's famous suggestion that the government must prosecute all crimes arising out of a single "transaction" in one shot is a broad application of our third principle. See *Ashe v.*

Taken together, these three principles explain almost all of what the Court has done under *Blockburger*, but where our rules and *Blockburger* diverge—the *Brown* footnote and *Dixon*, for example—our approach is better as a matter of text, logic, and common sense. Our principles also have one happy side effect. By moving some issues out of double jeopardy and into due process, they can help courts craft rules that place special emphasis on protecting *innocent* defendants.<sup>185</sup> The formal rules of double jeopardy require symmetry between *autrefois acquit* and *autrefois convict*—between those defendants who have been proved innocent, and those proved guilty in (presumptively) fair trials. The more flexible norm of due process need not demand strict symmetry, and may enable judges to craft stronger rules protecting acquitted defendants.

Although our analytic assault on *Blockburger* might seem idiosyncratic and our fist-pounding insistence that “same” means “same” might look naive, we would invite skeptics to read with care an important but often overlooked 1985 case, *Garrett v. United States*.<sup>186</sup> In *Garrett* the Supreme Court upheld a prosecution for a greater offence—a federal “continuing criminal enterprise” (CCE) charge—after defendant had already been convicted of a predicate, lesser included drug charge.<sup>187</sup> This result plainly violated a strict application of *Blockburger*, but the Court instead followed the logic of the *Brown* footnote.<sup>188</sup> Even more important than what the Court did is what the Court said in *Garrett*: “Quite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the ‘same’ offense as one of the [lesser included] predicate offenses.”<sup>189</sup>

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Swenson, 397 U.S. 436, 453–54 (1970) (Brennan, J., concurring). But Justice Brennan frames his rule categorically, perhaps because he claims it is a principle of double jeopardy rather than due process. In this claim, he errs. Kidnapping is not the “same offence” as rape, even if both arise out of the same “transaction.” The Double Jeopardy Clause is categorical precisely because it is narrow, almost mathematical. “Same” equals “same,” and “offences” are defined by common law and statutes, see *infra* text accompanying notes 192–193, 199–205. By contrast, there is no Platonic essence called a “transaction.” A categorical rule might nevertheless be justified, but it must be defended as a mandate of due process, not double jeopardy. Thus, the Due Process Clause is compatible with a wide range of anti-vexation rules, from a narrow set focusing only on malicious prosecutorial intent, to a broader set focusing on the harmful effect of two trials on a defendant, triggering a governmental duty to consolidate trials wherever possible. So too, a due process approach is compatible with a wide range of implementing rules concerning burdens of proof and so on—from broad rules presuming vexation in certain unexplained reprosecutions to narrow rules placing the burden of proof on defendants to make out a *prima facie* case of bad faith before obtaining discovery on the issue. (On this last point, we are indebted to Paul G. Cassell.)

185. See, e.g., *supra* note 158.

186. 471 U.S. 773 (1985).

187. *Id.* at 793–95; see also *Ohio v. Johnson*, 467 U.S. 493 (1984) (allowing prosecution for murder after judge accepted defendant’s guilty plea, over state’s objection, to lesser included charge of involuntary manslaughter).

188. See *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977), discussed *supra* text accompanying notes 168–175.

189. *Garrett*, 471 U.S. at 786.

Though it went virtually unnoticed in *Dixon*, *Garrett* seems inconsistent with that 1993 case in language and result. For those, like Justice Souter, who particularly value precedent, it should be noted that *Garrett* was an opinion of the Court authored by now Chief Justice Rehnquist, whereas in *Dixon* no opinion commanded a majority on how *Blockburger* should be understood.<sup>190</sup> For those, like Justice Scalia, who place a premium on “common sense” and “literal meaning,” it should, upon further reflection, seem preposterous that cocaine possession is the “same offence” as contempt of court.<sup>191</sup> *Dixon* was a windfall to the guilty, supported by neither the text of the Double Jeopardy Clause nor the common sense underlying due process.

### B. *Same Words or Same Things?: Blockburger in a Cross-Sovereign Setting*

*Blockburger's* test has other flaws that become apparent in cross-sovereign contexts. The Court has never confronted these problems because of its rigid adherence to the dual sovereignty doctrine, which obviates the need to resort to a substantive “same offence” test such as *Blockburger*. It is precisely because *Blockburger* is designed to determine a single legislature's output that it does not, in its current form, readily apply across jurisdictions.

Let us begin by focusing on what *Blockburger* does right. Though it misses the plain meaning of the word “same” it does focus squarely on the next word: “offence.” As we have seen, a court applying *Blockburger* looks at the language of two statutes, (or common-law crimes), parses the elements of each offence, and asks whether one set of elements is a lesser included set of the other. *Blockburger's* focus on legal elements rather than conduct accords with the text of the Double Jeopardy Clause, which

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190. Though *Garrett* did not purport to overrule *Brown*, 432 U.S. 161, its holding is in some tension with *Brown*, where the Court prohibited Ohio from trying the defendant on the greater offence of auto theft after convicting him of the lesser included offence of joyriding. The state's reasons for two trials did not seem particularly malicious, but sounded in local autonomy: the police in one county, where defendant was caught, apparently did not know of the plans of the prosecutor from another county, where defendant had stolen the car nine days earlier. Under an intent-based due process analysis, the state's actions might pass muster as nonvexatious; but under a stricter effects-based due process test, the fact that a highly organized state could have brought a single case might be enough for *Brown* to win. But if *Brown* is right, it is only because of due process rather than the Double Jeopardy Clause, strictly speaking. As a Double Jeopardy Clause case, the logic of *Brown* cannot survive *Garrett*—or, indeed, the logic of its own footnote 7 discussed *supra* notes 168–175 and accompanying text.

191. Sir William Blackstone, in a key passage quoted by Justice Scalia, insisted that double jeopardy pleas were valid only for “the same identical act and crime.” 4 William Blackstone, Commentaries \*336, quoted in *Grady v. Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting). Blackstone's immediately preceding sentence, in which he stated that a manslaughter conviction would bar a murder prosecution, also anticipated *Blockburger*, whose results, as we have seen, generally track ours, save in rare cases. Several other historical sources quoted by Scalia in *Grady* also support our approach. See *Grady*, 495 U.S. at 530–35.

speaks of the same "offence"—commonly understood in 1791 to mean a violation of a law.<sup>192</sup> And this focus on legal elements finds strong support in early case law and commentary.<sup>193</sup> *Blockburger's* approach is also easy to administer, in dramatic contrast to a focus on conduct. Statute books and common-law decisions contain discrete units—distinct offences like murder, mayhem, etc.—but in the real world no natural unit of conduct exists.

But in dual sovereign situations, instead of having to assess the law of a single legislature, a court must examine the laws of two legislatures vis-à-vis each other. Because different legislatures often do not work from the same linguistic building blocks, they will not use uniform language to describe an offence, even when each is indeed outlawing the same crime with the same elements—the "same offence" within the meaning of the Double Jeopardy Clause. *Blockburger* therefore will offer minimal protection to defendants prosecuted in multiple jurisdictions if different statutory language will automatically lead courts to say that separate offences were created.<sup>194</sup>

Consider, for example, the offence of second degree murder. In Florida, second degree murder is defined as "the unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life . . ." <sup>195</sup> In California, murder is the unlawful killing of a human being "with malice aforethought."<sup>196</sup> Malice is further defined as "express" when there is a "deliberate intention unlawfully to take away the life of a fellow creature" and as "implied" when "no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."<sup>197</sup>

Although each state appears to define the same crime—a form of murder that is neither premeditated nor committed during the perpetration of another felony—the states use different language. An unvarnished *Blockburger* test might permit separate prosecutions or multiple punishments under these statutes because one of California's "elements" of murder is "an abandoned and malignant heart" or "no considerable

192. See *Grady*, 495 U.S. at 529 (Scalia, J., dissenting).

193. See *id.* at 530–35; see also 3 Edward Coke, *Institutes of the Laws of England* 213 (London, Clarke 1809) ("[A]fterfoitz acquite must be of the same felony . . ."); 2 Matthew Hale, *The History of the Pleas of the Crown* 243 (London, Payne 1778) (using "same felony" and "same offence" interchangeably). A focus on the conduct proved at the first trial would have been especially odd in light of the primitive state of early judicial record-keeping, in which only the ultimate verdict of acquittal or conviction might be recorded. Even today, it is often hard to establish what was truly "proved" at the first trial, see *supra* note 166.

194. Perhaps this is too harsh a reading of *Blockburger*, as currently understood. But see *infra* note 198.

195. Fla. Stat. § 782.04(2) (1992).

196. Cal. Penal Code § 187(a) (1988).

197. *Id.* § 188.

provocation," whereas Florida's "element" is "a depraved mind regardless of human life." Different words apparently trigger a finding of different "elements" under *Blockburger*.<sup>198</sup>

As this example illustrates, even if the Court abandoned the dual sovereignty doctrine, the doctrine's definitional rule that two governments always create separate offences might resurface under the guise of *Blockburger*. In most cross-sovereign cases the *Blockburger* inquiry might be nothing more than a hollow exercise. Surely a defendant's rights should not depend on the fortuity of two governments adopting the Model Penal Code. To provide ordinary citizens real protection from successive prosecution by dual sovereigns, we must do more than abandon the general dual sovereignty doctrine; we must further adjust the traditional *Blockburger* approach. To find the right adjustments, we shall examine the Supreme Court's recent debates over *Blockburger*, a key nineteenth century Supreme Court case at the heart of these recent debates, and English case law wrestling with the "same offence" problem in an inter-sovereign setting. From these different sources, we shall propose a functional test capable of vindicating the goals of the Double Jeopardy Clause in a cross-sovereign context.

1. *The Blockburger Debate*. — Interestingly, the Court's recent debates over *Blockburger* help to point the way to a solution. In *United States v. Dixon*,<sup>199</sup> a majority of the Court agreed to overrule *Grady v. Corbin*,<sup>200</sup> which established a "same conduct" test that made it far more difficult for the government to bring successive prosecutions: "[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offence charged in that prosecution, will prove conduct that constitutes an offence for which the defendant has already been prosecuted."<sup>201</sup> Led by Justice Scalia, dissenters in *Grady* properly insisted that the Clause speaks of the same "offence"—the same legally-defined crime—rather than the same conduct.<sup>202</sup> The *Grady* dissenters also rightly complained that the "same conduct" test would be unworkable and would frustrate the Double Jeopardy Clause's clear rule, designed to prevent a defendant from having to stand trial twice. A plea of *autrefois acquit* or *autrefois convict* should be entered at the outset of a second trial;<sup>203</sup> yet the *Grady* majority's test would require a

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198. See *Albernaz v. United States*, 450 U.S. 333, 336 (1981) ("[O]ur starting point [when applying *Blockburger*] must be the language of the statutes. Absent a 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' ") (quoting *Consumers Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

199. 113 S. Ct. 2849 (1993).

200. 495 U.S. 508 (1990).

201. *Id.* at 521.

202. See *id.* at 526. Though unmentioned in *Grady*, the Court's opinion in *Schmuck v. United States*, 489 U.S. 705, 719 (1989), strongly supported the dissenters' view that "offence" focuses on the elements of a crime, not the conduct of a defendant.

203. See *Grady*, 495 U.S. at 539, 541-42 (Scalia, J., dissenting).

judge to wait until the second trial was well underway before being able to determine properly whether the prosecution "prove[d] conduct that constitutes an offence for which the defendant [was] . . . already . . . prosecuted."<sup>204</sup> After *Grady* came down, lower courts confirmed the dissenters' concern about the administrability of the majority's same conduct test.<sup>205</sup>

Justice Scalia cited the confusion *Grady* generated as a justification for overruling it just three years later in *Dixon*.<sup>206</sup> He also stated that the *Grady* same conduct test lacked "constitutional roots,"<sup>207</sup> whereas the *Blockburger* test had the proper constitutional pedigree.<sup>208</sup> Among other cases, Justice Scalia discussed *In re Nielsen*,<sup>209</sup> a nineteenth century decision that was oddly absent from his dissent in *Grady*, where he made the same argument about precedential support for *Blockburger*. Yet Justice Scalia's attempt to characterize *Nielsen* as a strict application of *Blockburger* is awkward, as Justice Souter argued in dissent in *Dixon*. But contrary to Justice Souter's suggestion, *Nielsen* does not provide direct support for *Grady*'s same conduct test either. Rather, *Nielsen* hints at an approach, albeit not well articulated, that stands as a middle ground between Justices Scalia and Souter. If sorted out, this approach would serve well the purposes of the Double Jeopardy Clause even when applied across jurisdictions.

2. *The Nielsen Model*. — In *Nielsen* the defendant contended that his trial for the crime of adultery after an earlier conviction for unlawful cohabitation violated the Double Jeopardy Clause.<sup>210</sup> The first indictment charged that Nielsen had cohabited with two women as his wives and the second indictment charged that Nielsen committed adultery with one of these women.<sup>211</sup> The Court, in a serpentine opinion, held for Nielsen,

204. *Id.* at 541.

205. See *United States v. Dixon*, 113 S. Ct. 2849, 2864 & n.16 (1993); see also *United States v. Sanchez*, 992 F.2d 1143, 1154 (11th Cir. 1993) ("Determining ex post whether the 'same conduct' was prosecuted in two proceedings can be a delicate task."), cert. denied, 114 S. Ct. 1051 (1994); *Sharpton v. Turner*, 964 F.2d 1284, 1287 (2d Cir. 1992) ("That formulation [*Grady*] has proven difficult to apply . . ."), cert. denied, 113 S. Ct. 494 (1993); *Ladner v. Smith*, 941 F.2d 356, 364 (5th Cir. 1991) ("*Grady* is new and its lesson, even if carefully analyzed and painstakingly administered, is not easy to apply."), cert. denied, 112 S. Ct. 1665 (1992); *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990) (each of three judges interprets *Grady*'s requirements differently), cert. granted and judgment vacated, 112 S. Ct. 1657. Judge Newman in his *Calderone* concurrence raised questions as to the meaning of the *Grady* test. He noted that it was unclear what the Court meant by the word "element," that is, whether the conduct previously prosecuted had to establish the entirety of an element of the offence (to invalidate the second prosecution) or whether it only needed to serve as evidence of an element. See *id.* at 723–26. He also found it unclear whether the conduct proved at the second trial had to constitute the entirety of the offence previously prosecuted or simply an element of the offence. See *id.* at 724.

206. See *Dixon*, 113 S. Ct. at 2863–64.

207. *Id.* at 2860.

208. See *id.* at 2860–62.

209. 131 U.S. 176 (1889).

210. See *id.* at 177–78.

211. See *id.* at 177.

concluding that adultery was subsumed within unlawful cohabitation. An element of adultery, marriage, though not explicitly an element of unlawful cohabitation, could be considered included within unlawful cohabitation since the statute "is construed by this court as requiring . . . that the parties should live together as husband and wives."<sup>212</sup> The Court also construed the cohabitation statute to hold that sexual intercourse, another element of adultery, was likewise necessarily included within unlawful cohabitation.<sup>213</sup> In this way the Court was able to shoehorn the case into the "familiar" rule that "[a]n acquittal or conviction for a greater offence is a bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less . . . ." <sup>214</sup>

Although *Nielsen* thus purported to apply a *Blockburger*-like test, a stingy application of *Blockburger* would have led to a different result in *Nielsen*. The cohabitation statute explicitly required proof of one element—that a man was living with more than one woman—that the adultery statute did not. And the adultery statute explicitly required proof of an element—that either the man or woman was married—that the cohabitation statute did not.<sup>215</sup> The *Nielsen* Court rejected this hyper-literal approach, however, by looking beyond what the statutes by their letter required for conviction. Although the unlawful cohabitation statute explicitly proscribed only "living together with more than one woman," the Court extrapolated from the language a requirement of proof of living together as "husband and wives," which served as a proxy for proof of both marriage and sexual intercourse—unlike fornication, cohabitation in effect required marriage.<sup>216</sup> By this method of statutory interpretation, adultery became a lesser included offence of unlawful cohabitation.<sup>217</sup>

Justice Souter in his *Dixon* dissent contended that *Nielsen* established the rule that a subsequent prosecution is barred "for any charge comprising *an act* that has been the subject of prior conviction."<sup>218</sup> He believed that *Nielsen* eschewed the technical *Blockburger* practice of examining the statutory elements of the offences in favor of looking at the conduct or act at issue. Justice Souter was half-right: The *Nielsen* Court's parsing of the statutory elements of unlawful cohabitation suggests that the Court

212. *Id.* at 189.

213. *See id.* at 187.

214. *Id.* at 189 (quoting 1 Wharton's Treatise on Criminal Law § 560). *See supra* Part II.A for discussion of how the *Blockburger* test expands application of this rule beyond what the Double Jeopardy Clause requires. In fact, *Nielsen* contains important language supporting our earlier critique of *Blockburger*, *see id.* at 190, quoted *supra* note 165. Note also how the quote at hand supports our analysis in its "wherever" clause.

215. *See Nielsen*, 131 U.S. at 176–77.

216. *See id.* at 187.

217. *See id.* at 189.

218. *United States v. Dixon*, 113 S. Ct. 2849, 2886 (1993) (Souter, J., concurring in the judgment in part and dissenting in part) (emphasis added).

was guided by a sense of fairness to the defendant, rather than by a mechanical and hyper-literalistic version of the *Blockburger* test. Yet Justice Souter, it seems, was also half-wrong: *Nielsen* did not apply the *Grady* test, and the Court did not consider what conduct the prosecution actually proved at trial. In fact, the Court did not look beyond the statutes; it simply construed them to require certain elements that were not apparent from a literal reading.

Though tortuous, *Nielsen's* look behind the literal meaning of the words in the statutes offers a paradigm for dual sovereign successive prosecutions. Within a single jurisdiction, perhaps different statutory language is strong, though rebuttable, evidence that the legislature did indeed intend to create different offences. But this presumption is far less sensible in a dual sovereign context.

3. *The English Model.* — As we saw in Part I, the modern American dual sovereignty approach is at odds with the longstanding English common-law doctrine that “an acquittal or conviction by a court of competent jurisdiction abroad is a bar to a prosecution for the same offense.”<sup>219</sup> Over three hundred years ago the King’s Bench ruled that a defendant who had been acquitted for the killing of a Mr. Colson in Portugal could not be tried again for that offence in England.<sup>220</sup> A century later England reaffirmed this principle in *The King v. Roche*<sup>221</sup> by ruling that Captain Roche could not be tried again for the murder of John Ferguson at the Cape of Good Hope if he had previously been acquitted of the murder by the Supreme Court of Criminal Jurisprudence in South Africa. And *Hutchinson* and *Roche* are still good law today. As we have noted above,<sup>222</sup> England today pays more respect to a Georgia conviction than does Alabama.

Recent English cases demonstrate that a workable “same offence” test can be developed to decide double jeopardy issues across jurisdictions. England’s “same offence” test appears to fall somewhere between a literalistic “same words” test and the far more open-ended same conduct test—in fact, it is strikingly similar to the *Nielsen* analysis.

Consider, for example, the recent decision in *R. v. Lavercombe*,<sup>223</sup> where the English Court of Criminal Appeals rejected the defendants’ plea of *autrefois convict* in a Thailand court. The Court’s approach mirrored *Nielsen* insofar as it looked beyond the literal terms of the statutes to determine whether what appeared to be different offences were “in effect” the same without collapsing into a *Grady*-like same conduct analy-

219. Grant, *British Empire Comparisons*, supra note 21, at 8.

220. *R. v. Hutchinson* was not reported, but is referred to in several other cases. See *The King v. Roche*, 168 Eng. Rep. 169, 169 n.(a) (1775); *Beak v. Thyrrwhit*, 87 Eng. Rep. 124, 125 (1689). For a thorough discussion of the English cases, see Grant, *Successive Prosecutions*, supra note 21, at 1318–31.

221. 168 Eng. Rep. 169 (1775).

222. See supra text accompanying notes 29–32.

223. 1988 Crim. L.R. 435 (C.A. March 7, 1988) (LEXIS, Enggen Library, Cases File).

sis. The key test was not whether the two statutes had the same words, but whether they featured the same "essential ingredients."<sup>224</sup> This test prevents unfairness to defendants caused by overemphasis on happenstance of phraseology. It also forecloses complex inquiries into what conduct was proved at each trial and preserves each government's ability to protect different interests by establishing different elements for different offences. The English test can thus also serve as a model.

4. *A Functional (Same Real Elements) Test.* — In order to give substance to a "same offence" test applied across jurisdictions, a "same real elements" test should be established. Unlike the *Grady* approach, this same real elements test would look only to statutes, borrowing from *Blockburger's* strengths of simplicity, administrability, textual rootedness, and historical pedigree.<sup>225</sup> But the same real elements test would go beyond a literalistic application of *Blockburger* by requiring a more probing consideration of what element or elements the language in the statute is actually describing. It would demand that judges give content to the abstract language often employed in criminal statutes. This test would not presume legislative intent to create separate offences merely because different words are used. Rather, it would seek to discern whether in fact the statutes substantively describe the same offence with the same real elements. For example, the Florida and California murder statutes<sup>226</sup> might be construed to describe the same offence because each statute outlaws a kind of killing that does not involve premeditation or the commission of an additional felony, but that is actuated by evil intent and is not mitigated by external circumstances. The Florida statute called this depraved mind murder; the California statute, abandoned heart murder. But are not these phrases functionally synonymous? Are not both statutes using different metaphoric language to describe the same offence with the same real elements?

### C. *Rodney King Revisited*

1. *The Functional Test Applied.* — Although the federal prosecution of the Los Angeles police officers fits into the Section 5 exception elaborated above, we will apply our proposed "same real elements" test to the trial to illustrate how the test could apply to successive prosecutions by dual sovereigns. But before we proceed, we must explore a final *Blockburger* wrinkle raised by a "disjunctive elements" statute. The disjunctive elements problem arises when one statute under which the defendant is charged can be satisfied by a number of alternative elements and the other statute includes one of those elements. Take the example of felony murder. A felony murder statute requires proof of a killing (A) during the commission of a felony, such as rape (B), arson (C), or armed

224. *Id.*

225. See *supra* text accompanying notes 192–193, 201–208.

226. See *supra* text accompanying notes 195–197.

robbery (D). Rape (B) is not necessarily a lesser included offence of felony murder, which could be established by (A) + (C) or (A) +(D). But if the indictment for felony murder lists rape as the predicate offence, rape (B) is in effect the lesser included offence of felony murder, (A) + (B). The fact that a legislature has adopted a single felony murder statute, rather than three separate statutes—rape murder, arson murder, and armed robbery murder—should presumably make no difference. And since rape would be a lesser included offence within rape murder, presumably it should also be so with a felony murder prosecution where rape is the predicate felony. This is the logic behind *Harris v. Oklahoma*.<sup>227</sup>

Let us now turn to the dual trials of the Los Angeles police officers. The state charged the defendants under a statute prohibiting the use of unnecessary force by a public officer.<sup>228</sup> The federal government charged the officers with violating 18 U.S.C. § 242,<sup>229</sup> which prohibits willfully depriving an individual of his constitutional or other federal rights.<sup>230</sup>

The first step in the test is to determine the appropriate statutory language to compare. Because the federal statute references the Constitution and the laws of the United States, the language from the Constitution and the U.S. Code should be read into the federal statute. Section 242 requires proof that the defendants willfully deprived a person of any one constitutional or federal statutory right.<sup>231</sup> But, consistent with *Harris's* teaching regarding such disjunctive elements, only the applicable alternative elements (the predicate offences) should be considered; it presumably should make no difference that Congress enacted a single

227. 433 U.S. 682 (1977). The *Harris* logic was elaborated and reaffirmed in *Whalen v. United States*, 445 U.S. 684, 694 (1980). In *Schad v. Arizona*, 501 U.S. 624 (1991), the Court made clear that not all uses of the word "or" in a statute should lead to a finding of disjunctive elements. Sometimes, a single element can be proved in a number of alternate ways, and a jury need not be unanimous as to which alternative occurred, so long as they are unanimous that at least one did. See *id.* at 631–32. *Schad* thus confirms that the *Harris-Whalen* rule—like the *Blockburger* rule—is merely a presumption that can be rebutted by clear legislative intent to the contrary.

228. See Cal. Penal Code § 149 (1988). Section 149 provides: "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person is punishable by a fine not exceeding ten thousand dollars, or by imprisonment in the state prison, or in a county jail . . . ."

The state also charged all four police officers with assault, two with filing false reports, and one with being an accessory after the fact. See *Powell v. Superior Ct.*, 283 Cal. Rptr. 777, 779 (Ct. App. 1991). For purposes of simplicity in this example, we will consider only § 149.

229. See *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993), *aff'd in part*, vacated in part, 34 F.3d 1416 (1994).

230. Section 242 provides, in relevant part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned . . ." 18 U.S.C. § 242 (1988).

231. See *id.*

global statute, rather than a series of statutes for willful deprivation of Free Speech, of Free Press, of the right against unreasonable seizures, and so on. To find the predicate offences, we look at the indictment. The federal prosecutors charged that the police officers acted to deprive Rodney King of his Fourth Amendment right against unreasonable searches and seizures.<sup>232</sup>

The next step is to compare the appropriate provisions. The federal statute expressly requires a willful state of mind and thus an intent to perform the prohibited acts, while the state statute prohibiting an unnecessary assault or beating does not. In other words, under the federal statute, the officers could claim as a defense that they believed the bodily seizure they effected was not unreasonable. The same claim would not be a defense under the state statute—if the jury concluded that the beating was unnecessary, the officers could be convicted despite their belief in its necessity.

Conversely, the state statute includes as an element an unnecessary assault or beating which the federal statute does not. An unreasonable seizure (the federal predicate offence) does not necessarily involve an unnecessary assault or beating. For example, a seizure might be constitutionally unreasonable only because it is perpetrated without explicit department authorization or because it is excessive even if nonassaultive, or because it is impermissibly motivated, or for any number of reasons. Thus, both the state and federal statutes require proof of a fact that the other does not. Even under a *Blockburger* approach equating greater and lesser included offences, the two statutes here are therefore different, with different real elements; and of course, this is so a fortiori under our “same means same” approach, which treats even greater and lesser included offences as different.

Even without the dual sovereignty doctrine, the second prosecution in the Rodney King affair thus passes double jeopardy muster, for it truly did focus on an analytically different offence, with different real elements. The two statutes involved not just different words, but different things.

2. *Beyond Double Jeopardy*. — As we have seen, proper analysis must range beyond the strict rule of the Double Jeopardy Clause. We must also test the police officers' second trial against the general commands of due process.

a. *Collateral Estoppel*. — To begin, let us recall that due process encompasses a collateral estoppel component: where a criminal defendant has prevailed on a point against the government, the government is ordinarily estopped from relitigating that point. The King defendants would

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232. The alleged Fourth Amendment offence implicated Officers Powell, Briseno, and Wind. See *Koon*, 833 F. Supp. at 774. The indictment also alleged a general Fourteenth Amendment due process violation implicating Sergeant Koon. See *id.* In light of our analysis below that even the Fourth Amendment offence was different from the state law crime, it follows a fortiori that the due process offence was also different.

obviously try to bring themselves under this principle, but two big stumbling blocks stand in the way.

First, because the Simi Valley jury returned only a general verdict of not guilty, it is impossible to identify the element or elements on which defendants prevailed.<sup>233</sup> Perhaps the key victory was on an element exclusive to the state offence. If so, this victory would not bar a second trial on the different elements of the federal offence. Perhaps, for example, the first jury found the brutal beating of King “necessary” for self-defense and thus permissible; but the second jury decided that above and beyond the necessity of the beating the overall episode (the “seizure”) was constitutionally unreasonable under the Fourth Amendment—a violation of department procedures, arbitrary, capricious, malicious, taunting, degrading, racist,<sup>234</sup> or what have you.

Second, how can the federal government be estopped by a factual issue resolved against a state government? Ordinarily, estoppel is not so much a right or privilege of the winning party as a disability of the losing party. If A prevails on a point in a litigation against B, A ordinarily cannot estop C; but B may sometimes be estopped against D.<sup>235</sup> Of course, at precisely this point it looks as if we have, in one important pocket of law, resurrected a kind of dual sovereignty idea—but one rooted in the much more general principles and purposes of estoppel law, applying to all parties, public (“sovereign”) and private.

If we somehow switched from a “disability” perspective on estoppel to a “privilege” perspective, however, the general principles of our earlier dual sovereignty analysis would come into play. Perhaps, in an age of cooperative federalism, a state government could be bound by the litigation disabilities of the federal government, and vice versa—where ordinary citizens are involved and governments presumably work together in law enforcement. But not in a case involving Section 5 of the Fourteenth Amendment and state officials. Surely, we cannot allow a state to whitewash the wrongdoing of its own officials by prosecuting them in patty cake trials, excluding all damning evidence, procuring findings of fact in defendants’ favor, and then insisting that these findings collaterally estop federal criminal prosecution under Section 5.

b. *Vexatious Harassment.* — Finally, consider the due process principle that even where different offences are at stake, government must justify its decision to prosecute the offences separately rather than together.<sup>236</sup> In the Los Angeles police affair, federalism itself provides a neutral, nonvexatious reason for two trials. Even though the state and

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233. For our concrete suggestion on how to make collateral estoppel a workable instrument in a world of general verdicts, see *supra* note 166.

234. King did not testify at the state trial, but he did at the federal, claiming that the police called him “killer” and taunted him, “we’re going to kill you nigger, run.” See Levenson, *supra* note 120, at 531 n.121.

235. See Fleming James, Jr. et al., *Civil Procedure* 617–28 (4th ed. 1992).

236. See *supra* notes 173–175, 183–184 and accompanying text.

federal offences were closely related in logic (though not “the same”), and arose out of the same factual “transaction,” there were good, nonvexatious reasons not to consolidate those offences into a single “hybrid” trial. Within a given state, it is ordinarily<sup>237</sup> easy enough for a state prosecutor to bundle all “transactional” state law charges together; but where both state and federal law offences are implicated, bundling is far more tricky. State and federal systems have traditionally had different prosecutors appointed by different entities, different courts with different judges, different rules of procedure and evidence and so on. A single hybrid state-federal proceeding is imaginable; but a hybrid system would require a major overhaul of traditional divisions between state and federal systems—and would raise knotty threshold questions of when different sovereigns’ different laws were nevertheless close enough to require a single hybrid trial.<sup>238</sup>

Of course, here too it looks as if we have recreated a kind of dual sovereignty idea—this time under the Due Process Clause. The federal government must explain why it chooses to prosecute a defendant twice for different but related offences, and so must the state government—but together the two governments need not explain very much; federalism itself is the explanation. But as with collateral estoppel, the dual sovereignty look-alike here is rooted in a more general principle, and in a functional analysis rather than a *Heath*-like definitional formalism. As we saw in our earlier discussion of *Dixon*,<sup>239</sup> the difficulty of transactional bundling within a single jurisdiction could at times suffice to support separate prosecutions for different offences even by a single government. And in our earlier double jeopardy dual sovereignty analysis, the special functional problems of transactional bundling, knotty thresholds, and hybrid adjudication were nonissues. By hypothesis, we were dealing with only a single offence—the same offence—and the only question was whether a prosecution of an ordinary citizen for this offence would occur in a state court applying state law or a federal court applying federal law.

Nevertheless, a sweeping post-incorporation assault on dual sovereignty might insist that in a world where federal and state governments generally are presumed to, and do indeed, cooperate in investigating and enforcing criminal law, they should also be obliged to cooperate in hybrid adjudication to prevent ordinary citizens from being whipsawed. But once again, cases involving federal prosecutions of abusive state officials should survive any general attack on dual sovereignty: The architecture of the Fourteenth Amendment encourages unbundling here, allowing states to clean up their own mess, with federal prosecution as a last resort

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237. Ordinarily, but not always. See *supra* text accompanying notes 164–165, 182 (discussing neutral reasons for two trials in *Dixon*); *supra* note 190 (discussing possible “local autonomy” reason for upholding two trials in *Brown*).

238. See *Hoffman*, *supra* note 60, at 657–58; *Double Prosecution*, *supra* note 21, at 1562.

239. See *supra* text accompanying notes 164–165, 182; see also *supra* note 190.

if state efforts fail. If the feds can re prosecute for literally the same offence in Section 5 cases, they should be allowed to prosecute different offences a fortiori.

### III. SKEWED JURIES AND THE FINALITY OF JURY ACQUITTALS

It remains to ask the hardest questions about the Rodney King case—questions about racial justice and democracy in America. Suppose that California were to try to re prosecute the acquitted officers for the same (state law) offence on the theory that the initial acquittal in state court was invalid because the Simi Valley jury was not properly constituted; the venue should never have been shifted to an area with so few blacks, and defendants sought, and must thus bear responsibility for, this improper venue transfer. Under current doctrine, California's hypothetical theory would clearly fail; but in this concluding section, we wonder aloud—in a speculative vein—whether there might be some strong things to say on behalf of this theory.

Under current double jeopardy jurisprudence, a verdict of acquittal, even where the trial was plagued by pro-defendant error, is given special significance.<sup>240</sup> Peter Westen and Richard Drubel discuss this asymmetry in their classic article, "Toward a General Theory of Double Jeopardy."<sup>241</sup> They contrast the different treatment of erroneous convictions (where retrial is permitted) and erroneous acquittals (where it is not) and suggest that the only legitimate justification for the distinction is the historic prerogative of the jury to acquit against the evidence—that is, to nullify the law.<sup>242</sup>

But why should such a prerogative be protected where the jury itself is suspect? When blacks are excluded from a jury in a racially charged case where the victim is black and the defendants are white, must we always respect the jury's verdict or its prerogative? Consider, for example, the emerging case law on race-based peremptory challenges.<sup>243</sup> Various

240. See, e.g., *Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("[A]n acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" (citation omitted)). But see *Kepner v. United States*, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting). Justice Holmes, believing that the prosecution was just as entitled as the defendant to an error-free trial, embraced the concept of "continuing jeopardy" under which a defendant could be retried if error was found to have prejudiced the prosecution's case.

241. See Westen & Drubel, *supra* note 147, at 122–55.

242. See *id.* at 129–31. The authors note, however, that courts do not permit defense attorneys to instruct the jury about its nullification power. See *id.* at 131 & n.232.

243. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (criminal defendant cannot use peremptory challenges to exclude jurors on account of race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private litigants in civil cases cannot use peremptory challenges to exclude jurors on account of race); *Powers v. Ohio*, 499 U.S. 400 (1991) (white criminal defendant has standing to bring equal protection claim on behalf of excluded black juror); *Batson v. Kentucky*, 476 U.S. 79 (1986) (government's use of peremptory challenges to exclude blacks on account of race violates Equal Protection Clause); see also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (government's use of

recent decisions have recognized that race discrimination in jury selection corrodes the legal system and the practice of democratic governance. As Justice Kennedy wrote in his eloquent majority opinion in *Edmonson v. Leesville Concrete Co.*: "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."<sup>244</sup> Not much later, after riots erupted in Los Angeles and Florida, the Court reemphasized the point: "Selection procedures that purposefully exclude African Americans from juries undermine th[e] public confidence. . . . The need for public confidence is especially high in cases involving race-related crimes . . . . [It] is essential for preserving community peace . . . ."<sup>245</sup>

### A. Jurors and Voters

The very legitimacy of the law depends on community participation in its application and the belief that those responsible for selecting citizens who will exercise such power are not deliberately preventing citizens from participating on account of race.<sup>246</sup> Racist selection procedures prevent citizens from exercising their constitutional right to participate in governing through the jury, just as they prevented blacks in years past from exercising their other most important civic right—the vote. Indeed, Justice Kennedy in *Edmonson* drew an apt analogy between the race-based peremptory challenge and the white primary: "If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race-neutrality."<sup>247</sup>

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peremptory challenges to exclude men on account of gender violates Equal Protection Clause).

244. *Edmonson*, 500 U.S. at 628.

245. *McCollum*, 112 S. Ct. at 2353–54.

246. In dissent in *Batson*, Justice Rehnquist suggested that government prosecutors could discriminate against black jurors in case A because in case B, they might discriminate against whites, and so it all equals out, see 476 U.S. at 137–39 (Rehnquist, J., dissenting). This is a truly bad argument. Even assuming the dubious factual predicate of equal and opposite discrimination is true, the logic plainly violates *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation law is not saved because government prosecutes both races who engage in it), and the general principle of colorblindness that Justice Rehnquist elsewhere invokes. Two wrongs do not make a right—and both race-based peremptories violate the colorblindness principle. Though more subtly phrased, Justice Scalia's dissent in *Powers*, 499 U.S. at 423–26, is similarly flawed. What's more, a fixed number of peremptory challenges will always diminish minority representation on a given jury more than majority representation. And so, with due respect, the "it-all-equals-out" argument fails as a matter of math as well as of constitutional principle.

247. *Edmonson*, 500 U.S. at 624. In *Terry v. Adams*, 345 U.S. 461 (1953), the Court considered the constitutionality of the Jaybird Democratic Association, which excluded blacks from voting in elections it held each election year to select candidates for county offices to run for nomination in the Democratic primary. For over 60 years the Jaybird's white candidates with few exceptions won the Democratic primaries unopposed and the

The right to vote for officials and the right to serve (and to vote) on juries are the two most important (and related) civic duties of our citizens.<sup>248</sup> Elections and juries are the places for active citizen participation; they provide the legitimacy our democratic system of government requires for survival. Where citizens are excluded from participating because of their race, the verdicts of juries and elections are suspect.

Indeed, the Court has gone so far as to hold—repeatedly—that a conviction delivered in an error-free trial by a properly constituted petit jury is invalid where blacks were excluded from the pre-trial grand jury. For example, in *Rose v. Mitchell*,<sup>249</sup> the Court reasoned that where racial discrimination in the grand jury exists, “[t]he harm is not only to the accused . . . . It is to society as a whole. . . . [T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”<sup>250</sup> Following this reasoning, the Court found in later cases that race-based discrimination in jury selection violates not only the defendant’s rights, but also the rights of excluded jurors to participate in governance in a place where the constitutional authority of the government is most visibly expressed.<sup>251</sup>

Let us be clear: *Rose* condemned race discrimination in jury selection in a case where that condemnation helped the defendant. Yet might the reasoning of *Rose* in some cases apply equally cogently to support *the people’s* right to one fair jury, untainted by wrongful racial exclusion?

Of course, under the Court’s current doctrine, a finding that the change of venue in the Rodney King case was an equal protection violation is unlikely. Yet the obvious analogy here is to peremptory challenges, the argument being that the change of venue accomplished what peremptory challenges could (eliminating black jurors in Los Angeles

general elections that followed. See *id.* at 463. The Association had successfully managed to render the vote of all blacks meaningless, thereby subverting democratic governance according to the Court. Significantly, even though Jaybird was not a state actor, the Court struck down its system as violative of the Fifteenth Amendment. “The effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.” *Id.* at 469–70.

248. For more discussion and analysis, see Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 *Cornell L. Rev.* (forthcoming 1995); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1182–99, 1202–03 (1991) [hereinafter *Amar, The Bill of Rights*]; Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 *Yale L.J.* 1283, 1287–89 (1984). Under this analysis, the recent *J.E.B.* case involving sex-based peremptory challenges, discussed *supra* note 243, is best defended as a Nineteenth Amendment case.

249. 443 U.S. 545 (1979).

250. *Id.* at 556 (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)). For a long line of Supreme Court cases prior to *Rose*, see *id.* at 551 & n.3. For a more recent reaffirmation of *Rose*, and still more cases, see *Vasquez v. Hillery*, 474 U.S. 254, 260–64 (1986).

251. See cases cited *supra* note 243.

county) in one fell swoop. The argument is at least a respectable one since the Court held in *Georgia v. McCollum*<sup>252</sup> that the defendant is prohibited from making race-based peremptory challenges.<sup>253</sup> Nonetheless, this argument is more problematic in the Rodney King case, because the defendants could not achieve the new venue, peremptorily, on their own, but could only petition a court to move the trial. And in this petition, defendants could rely on ostensibly neutral reasons—pretrial publicity and superheated local politics—for their change-of-venue motion.<sup>254</sup>

The trial judge's decision to move the trial to Ventura County could likewise be subject to the rule of *Batson v. Kentucky*, which prohibited government officials from engaging in race-based peremptory challenges.<sup>255</sup> Yet because a single decision to move the trial does not represent a "pattern of strikes,"<sup>256</sup> the prosecution would have a difficult time making out a prima facie case of discrimination, and the burden of explanation would probably never shift to the judge.<sup>257</sup> Even if it did, the judge could also present several ostensibly neutral rationales for the change of venue—such as cost and convenience to the parties—and thus deflect accusations of deliberate discrimination (charges that other judges would probably be loathe to direct against a fellow judicial officer in any event).

But assume for the sake of argument that the venue transfer could be shown to be constitutional error. The error here would be unique, going to the integrity of the jury itself. This is not a case where the jury was denied incriminating evidence, but rather a case where, on account of the selection process, the jury itself might not be trusted to provide a just and impartial verdict, a verdict representing not part, but all of the community.<sup>258</sup> Arguably, Westen and Drubel's idea about the jury's pre-

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252. 112 S. Ct. 2348, 2359 (1992).

253. See, e.g., M. Shanara Gilbert, An Ounce of Prevention: A Constitutional Prescription for Cboice of Venue in Racially Sensitive Criminal Cases, 67 Tul. L. Rev. 1855, 1918-30 (1993) (undertaking *Batson-McCollum* equal protection analysis); Note, Out of the Frying Pan or into the Fire: Race and Choice of Venue After Rodney King, 106 Harv. L. Rev. 705, 716-19 (1993) (same) [hereinafter Out of the Frying Pan].

254. On the flimsiness of these claims as grounds for venue transfer, see Hoffman, supra note 60, at 681-84.

255. See 476 U.S. 79 (1986). This rule provides that race-based peremptory challenges by the prosecutor violate the Fourteenth Amendment and requires the prosecutor to offer neutral reasons for eliminating black jurors where the defense has established that a pattern of strikes has been made against blacks. The percentage of blacks in Los Angeles County was 11.2%, whereas in Ventura County it was 2.3%. See Out of the Frying Pan, supra note 253, at 705 n.4.

256. *Batson*, 476 U.S. at 97.

257. To complicate matters further, the decision that venue must be moved was made by one set of judges (a California Appellate Court) and the ultimate decision where to move was made by a different judge (the trial judge). See Levenson, supra note 120, at 525.

258. If the jury is, as de Tocqueville observed, "above all a political institution," juries must be impartial not merely in a narrow adjudicatory sense, but also in a political sense, representing all of the polity. See 1 Alexis de Tocqueville, *Democracy in America* 293 (1945). The opposite of *impartial* here is not simple *partiality* to one of the *parties* in the

rogative to nullify the law should not apply where skewed selection procedures create real doubts that the jury seeks justice and speaks for the people.

### B. Defendant-Induced Error

Not only was there a unique kind of error bearing on the legitimacy of the jury, but it was induced by the defendants, who filed the motion for a change of venue. Where an error is defendant-induced, the Double Jeopardy Clause arguably provides the defendant less protection. The Court's mistrial case law is illustrative.

In *Oregon v. Kennedy*,<sup>259</sup> the Court ruled that the "classical test" for determining whether the Double Jeopardy Clause bars a second trial after the first trial is terminated over the defendant's objection has "no place" where the mistrial is declared "at the behest of the defendant."<sup>260</sup> Rather than applying the "manifest necessity" standard that makes it difficult for the state to justify reprosecution, the Court adopted an intent test whereby a retrial would be barred only where the prosecutor intended to " 'goad' the defendant into moving for a mistrial."<sup>261</sup> Thus, if the defendant is responsible for terminating the initial trial, he has essentially waived a double jeopardy claim. The Court applied the same principle in *United States v. Scott*,<sup>262</sup> reasoning that "this language from *Green* [describing the harms against which the Double Jeopardy Clause protects] . . . is not a principle which can be expanded to include situations in which the *defendant is responsible* for the second prosecution."<sup>263</sup> The Court held that the defendant may lose the right to have his guilt decided by the first jury empaneled to try him where he is responsible for terminating the trial on grounds unrelated to guilt or innocence.<sup>264</sup>

These decisions indicate that a defendant's double jeopardy rights are very much a function of the strategic choices he or she makes both before and during trial, such as the decision to seek or oppose a mistrial. If those choices interfere with a prosecutor's right to "one full and fair opportunity to present his evidence to an impartial jury,"<sup>265</sup> then the defendant's double jeopardy claim may be unavailing.<sup>266</sup>

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case, but *partisanship* more broadly—juries representing only one race, or gender, or political party. See generally Gary Wills, *Explaining America: The Federalist 193–215* (1981) (discussing party and faction).

259. 456 U.S. 667 (1982).

260. *Id.* at 672.

261. *Id.* at 676.

262. 437 U.S. 82 (1978).

263. *Id.* at 95–96 (emphasis added).

264. See *id.* at 87.

265. *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

266. For reasons similar to those outlined in Part II, *supra*, it might be argued that mistrial cases implicate due process principles in tandem with the spirit underlying the Double Jeopardy Clause, but not the strict words of the Double Jeopardy Clause itself. On this reading, the Double Jeopardy Clause, strictly speaking, only applies—jeopardy only

While the principle of *Kennedy* and *Scott* is clear, its scope extends only so far. Neither case involved an acquittal by a jury. And the Supreme Court has never yet upset a jury verdict of acquittal, even if the defendant is responsible for substantial legal error. Because a jury does not often disclose its reasons for reaching a verdict, its prerogative to acquit against the evidence would be upset by a rule permitting invalidation of acquittal in cases plagued by pro-defendant legal error. Nonetheless, where the defendant-induced error undermines the very status of the jury as a properly constituted body, grounds arguably exist for disregarding its verdict and permitting retrial.

### C. *Tainted Acquittals*

Disregarding a tainted acquittal would not be wholly illogical or unprecedented. In many state courts, acting under double jeopardy clauses in state constitutions or analogous common-law principles, it seems that a judgment of acquittal procured by an accused by fraud or collusion is a nullity and does not put defendant in jeopardy. Consequently, it does not bar a second trial for the same offence.<sup>267</sup> This proposition is sup-

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"attaches"—after a verdict in the first trial, which may be pled in any subsequent trial. In order to prevent a prosecutor who thinks she is losing the first case from deliberately or negligently causing a mistrial—and thereby evading the first jury's right to acquit with finality—courts must craft a flexible but penumbral body of rules prohibiting prosecution-induced retrials. See *Green v. United States*, 355 U.S. 184, 188 (1957). But this body of rules, in its nature, cannot be as absolute as the Double Jeopardy Clause mandate, strictly speaking. Sometimes, a second trial may proceed after a mistrial—as where a juror falls ill during the first trial. Rather than saying that jeopardy "attaches" early in the trial, but is not absolute, we should say that jeopardy attaches only after a verdict, but due process principles and penumbral double jeopardy principles bar prosecutorial manipulation of mistrials. Under this logic, we need not, strictly speaking, single out any magic moment of attachment pre-verdict; a sliding scale could presume increasing potential for prosecutorial manipulation as the first trial proceeds along, see *Westen & Drubel*, supra note 147, at 98–99. Alternatively, doctrine could give great, but not necessarily dispositive weight to certain key events, such as the impanelling of the first jury, cf. *Crist v. Bretz*, 437 U.S. 28, 32–36 (1978) (jeopardy attaches when jury is impanelled and sworn). This nonattachment approach would be more in keeping with the absolute but narrow text of the Double Jeopardy Clause, with the views of Joseph Story's classic Commentaries on the Constitution, and with English practice, see *Amar*, *The Bill of Rights*, supra note 248, at 1190 n.261. It would also accord with early American case law. See, e.g., *United States v. Haskell*, 26 F. Cas. 207, 212 (C.C.E.D. Pa. 1823) (No. 15,321) (Washington, Cir. J.) ("jeopardy" means "nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon."); *People v. Olcott*, 2 Johns. Cas. 301 (N.Y. Sup. Ct. 1801) (Kent, J.) (discharge of jury before verdict does not bar further prosecution); see also *Crist*, 437 U.S. at 49 (Powell, J., dissenting) (discussing history of American attachment rules).

267. See, e.g., *State ex rel. Curtis v. Heflin*, 96 So. 459, 462 (Ala. Ct. App. 1923); *State v. Ketchum*, 167 S.W. 73, 75 (Ark. 1914); *State v. Caldwell*, 66 S.W. 150, 152 (Ark. 1902); *State v. Lee*, 30 A. 1110, 1111 (Conn. 1894); *State v. Brown*, 16 Conn. 54, 58 (1843); *State v. Green*, 16 Iowa 239, 242–43 (1864); *Edwards v. Commonwealth*, 25 S.W.2d 746, 747 (Ky. 1930); *Sexton v. Commonwealth*, 236 S.W. 956, 957 (Ky. 1922); *Smith v. State*, 69 So. 2d 837, 839 (Miss. 1954); *Price v. State*, 61 So. 314, 314 (Miss. 1913); *State v. Little*, 1 N.H. 257,

ported by various distinguished treatises, and even appears in *Corpus Juris Secundum* as a rule of hornbook law.<sup>268</sup> And the proposition has considerable common sense to commend it. If a defendant on trial for murder bribes his jury and wins acquittal, and in a subsequent prosecution this bribery is proved beyond a reasonable doubt, should the double jeopardy principle absolutely bar retrial for murder? If so, the defendant will have, in a sense, gotten away with murder simply by compounding his crime with bribery.<sup>269</sup>

Of course, we have earlier expressed great reservations about ad hoc exceptions to explicit constitutional rights; and so it remains to ask how a bribery exception might be rooted in constitutional text or general legal norms, and whether the principled logic of a bribery exception would extend to cases involving racially stacked juries.

Two main lines of argument appear to undergird the bribery exception. The first never gets to the Double Jeopardy Clause. It simply prevents a defendant from raising the issue.<sup>270</sup> Call it what you will—estoppel, fraud, unclean hands, waiver, or forfeiture—the basic idea, rooted in general legal principles, is that defendant's own prior misconduct bars him from asserting a double jeopardy claim. (And here we see again how estoppel typically runs against one party rather than in favor of his opponent, creating a disability in him rather than a right in the other.)

The second argument is more textual. If the jury was bribed, the defendant was never truly in jeopardy. The fix was in, and he ran no risk, suffered no jeopardy—from the French *jeu-perdre*, a game that one might lose, and the Middle English *iupart*, an uncertain game.<sup>271</sup> On this theory, a second trial would truly put defendant in jeopardy not “twice” but only once, in keeping with the textual command.

What does all this mean in the race-stacking context? Where defendant convinces a judge to erroneously transfer a case, it's hard to see clever lawyering as the estopping equivalent of fraud or bribery. Where the de-

258 (1818); *State v. Swepson*, 79 N.C. 632, 641 (1878); *State v. Howell*, 66 S.E.2d 701, 706 (S.C. 1951); *State v. Reid*, 479 N.W.2d 572 (Wis. Ct. App. 1991); *McFarland v. State*, 32 N.W. 226, 227–28 (Wis. 1887). Many of these discussions are dicta.

268. See 22 C.J.S. Criminal Law § 217 (1989); 1 Joel P. Bishop, Commentaries on the Criminal Law § 678, at 699–700 & n.3 (1858); 2 Francis Wharton, A Treatise on Criminal Procedure § 1381, at 1837–38 & n.2 (10th ed. 1918); 2 Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 579, at 1190 & n.8 (10th ed. 1912). Each of these treatises cites many cases. See also *Bartkus v. Illinois*, 359 U.S. 121, 161 (1959) (Black, J., dissenting) (“Sham trials, as well as those by courts without jurisdiction, have been considered by courts and commentators not to be jeopardy, and might therefore not bar subsequent convictions.”).

269. One possible solution would be to allow bribery to be punished as severely as the murder for which the defendant was never convicted. Yet this alternative is problematic since, even after conviction for bribery, there has never been a fair adjudication of whether the defendant in fact committed the murder.

270. Cf. *Ricketts v. Adamson*, 483 U.S. 1 (1987) (by knowingly violating his plea bargain agreement, defendant in effect forfeited his double jeopardy objection).

271. See 8 The Oxford English Dictionary 214 (2d ed. 1989).

fendant achieves the same result through unconstitutional peremptory challenges, the issue is closer. The defendant himself has acted unconstitutionally; on the other hand, his actions take place in open court—a far cry from secret jury tampering—and are not criminal.

So much for estoppel. The “no true jeopardy” argument is even more interesting in the race-stacking context. Reading the bribery paradigm narrowly, we might say that jury-stacking is very different from jury-bribing. The latter eliminates all suspense, but the former only tips the odds towards defendant. Even loaded dice are a chancy—uncertain—proposition; and a trial before even a friendly jury is a game that defendant might lose.

But there is a different “no jeopardy” argument that might support a “jury-stacking” exception to *autrefois acquit*. Where a jury is racially rigged, perhaps it is not a true jury. The very idea of the jury, constitutionally speaking, is a body that represents the people—all the people—by constituting a fair cross-section, an impartial sample, of the whole polity.<sup>272</sup> Unconstitutional racial stacking destroys the very essence of a jury and, in effect, deprives the jury of its very representative status, its jurisdiction, its right to decide. If this argument works, a stacked jury is, constitutionally speaking, no jury; its acquittal, no acquittal; and so defendant, as a result of his own race-stacking, was never constitutionally in jeopardy.

Taken to its logical conclusion, this argument might seem to prove too much. Any time an appellate tribunal or a second court wanted to disregard a jury verdict, it might be said, casuistically: “Juries are bodies that are designed to reach the right result. Since this result is obviously wrong [in our view] it couldn’t have come from a true jury, and thus, defendant was not truly in jeopardy.” But this logic is faulty. A jury does not always get it right. Jurisdiction, in a key sense, is the right to decide either way, and thus in a certain sense the right to be wrong (from a God’s eye perspective, or the perspective of a later court).<sup>273</sup> A roughly analogous distinction is well-established in contempt case law, where an incorrect decision cannot be collaterally challenged in many instances, but a decision rendered without jurisdiction—by an improper deci-

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272. We are not claiming that blacks must actually sit on any given jury; but they may not be systematically excluded—the process of jury selection may not be stacked against any group. So too, blacks need not vote in any election; but they may not be systematically excluded from the voting process.

For more discussion of the cross-sectional and democratic ideal of the jury, see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. (forthcoming 1995).

273. See Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 702, 710 n.36 (1995).

sionmaker—often can be.<sup>274</sup> And our argument here is that a racially stacked jury may be just such an improper decisionmaker.<sup>275</sup>

#### D. *Reconstructing Double Jeopardy (Again)*

But how, it might be asked, could it be that an exception to *autrefois acquit* in the case of a racially stacked jury might lie coiled near the core of the Double Jeopardy Clause, unnoticed for two centuries in America? If a racially-stacked-jury exception is even plausible, why did the issue not bubble up to the Court long ago?

To answer these last questions, we must reflect on how constitutional law works itself pure, always moving towards a horizon where (one hopes) different clauses cohere into an integrated whole—where it is “a Constitution” and not merely a jumble of separate clauses, that we are expounding. In Part I of this article, we saw how the Double Jeopardy Clause must be read in light of the Fourteenth Amendment—alongside other post-incorporation cases under the Fourth Amendment and the Self-Incrimination Clause, and Section 5 cases like *Screws*.<sup>276</sup> Similarly, in Part II, we saw how the Due Process Clause and the Double Jeopardy Clause work side by side, and how certain ideas should be taken out of the Double Jeopardy Clause, precisely because they fit so much more snugly into the Due Process Clause. And here, in Part III, we see once again how constitutional ideas outside the Double Jeopardy Clause might influence interpretation of the Clause itself.

The key linkages here are those between the Double Jeopardy Clause and the provisions establishing the role of the criminal jury (Article III and the Sixth Amendment, now of course made applicable to states via Fourteenth Amendment incorporation<sup>277</sup>); and the linkages, in turn, between juries and the constitutional ideal of democratic political participation embodied in, for example, the Fifteenth Amendment.<sup>278</sup>

The Double Jeopardy Clause in America has always, in important respects, piggybacked onto the right of jury trial in criminal cases. The two ideas work in tandem, as do the two clauses of the Seventh Amendment

274. For emphasis on the necessity of the first court's having jurisdiction to support a plea of *autrefois acquit* in a second proceeding, see 4 William Blackstone, Commentaries \*335, quoted *supra* text accompanying note 31; 2 Hawkins, *supra* note 3, at 368, 372; *United States v. Ball*, 163 U.S. 662, 669 (1896). On contempt and the collateral bar rule, see, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (injunction issuing from court with jurisdiction generally cannot be collaterally attacked, even if substantially unconstitutional).

275. Cf. *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (plurality opinion) (distinguishing between errors, like racial discrimination in jury selection, that “undermine[] the structural integrity of the criminal tribunal itself” and other errors that do not; former can never be seen as “harmless error”); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (similar).

276. *Screws v. United States*, 325 U.S. 91 (1945).

277. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

278. See generally Vikram D. Amar, *supra* note 248.

specifying first, a right of civil jury trial, and second, limits on subsequent actors' power to overturn the jury's verdict.<sup>279</sup> As Westen and Drubel point out, the absolute finality of jury acquittals ultimately draws its strength from certain historical and structural ideas about the constitutional role of juries—Sixth Amendment ideas, and not just double jeopardy ideas.<sup>280</sup> (This is why pro-defendant decisions by judges are not as final in double jeopardy case law as pro-defendant decisions by juries.<sup>281</sup>) And so once the Supreme Court begins to rethink the underlying right of jury trial, the Court must rethink double jeopardy too.

The Court's recent cases do indeed appear to be rethinking the jury trial, shifting from a view emphasizing the defendant's right to be tried by a jury towards one stressing citizens' right to serve on and to vote in a jury. This shift, in turn, finds strong support in a Fifteenth Amendment vision emphasizing the right of blacks to equal political participation—the right to vote for legislatures, but also in juries, free from race-based exclusion.<sup>282</sup> Though the Court may not yet realize it, the deep logic of this shift may require revising ancient Double Jeopardy Clause ideas. And so just as the Fourteenth Amendment and *Benton*<sup>283</sup> required rethinking dual sovereignty in Part I, so the Fifteenth Amendment and

279. "[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

The only state constitutional precursor of the Double Jeopardy Clause conjoined this provision to its criminal jury trial guarantee. See N.H. Const. of 1784 pt. I, art. I, § XVI, reprinted in *Sources of Our Liberties* 384 (Richard L. Perry & John C. Cooper eds., 1978). A century earlier the colony of Pennsylvania had anticipated the double jeopardy principle by providing that the jury "shall have the final judgment." Pa. Const. of 1682 art. VIII ("Laws Agreed Upon in England, & C"), reprinted in *Sources of Our Liberties*, supra, at 217. The Maryland state ratifying convention—one of only two that raised the double jeopardy issue—made this linkage even more explicit: "That there shall be a trial by jury in all criminal cases . . . and that there be no appeal from matter of fact, or second trial after acquittal." This clause was immediately followed by a proto-Seventh Amendment bar on appellate relitigation of facts found by a civil jury. See 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 550 (Jonathan Elliot ed., 1876). For further evidence of linkages between the Sixth and Seventh Amendments, and the Double Jeopardy Clause, see *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873); 2 *The Complete Anti-Federalist* 432 (Herbert J. Storing ed., 1981) (*Essays of Brutus*); *id.* at 70 (Luther Martin's *Genuine Information*); see also 4 William Blackstone, *Commentaries* \*361 (proclaiming, in section discussing jury trial, that "if the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation").

280. See Westen & Drubel, supra note 147, at 124–32, 133 & n.241; see also *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (plurality opinion) (linking Sixth Amendment and Double Jeopardy Clause); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1012–23, 1033–34 & n.99 (1980) (same).

281. See Westen & Drubel, supra note 147, at 132–55; Westen, supra note 280, at 1064–65.

282. See generally Vikram D. Amar, supra note 248. .

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

*Powers/Edmonson*<sup>284</sup> may require rethinking the absolute finality of jury acquittals. Here too, we must, perhaps, Reconstruct double jeopardy.

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284. *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).