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Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy

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THE MYTH OF DUAL SOVEREIGNTY: MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT AND DOUBLE JEOPARDY

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As the nation redoubles its efforts to fight crime, federal and state cooperation in law enforcement becomes more commonplace. One by-product of such integrated operations is the increased possibility of successive state and federal prosecutions for multiple offenses arising from the same criminal act. Such prosecutions are often justified under the "dual sovereignty" doctrine by which each sovereign retains the right to enforce its own laws.

In this Article, Professor Sandra Guerra challenges the applicability of the dual sovereignty doctrine when successive prosecutions follow highly integrated federal and state enforcement efforts. Noting both the "federalization" of crimes traditionally enforced at the state level and the close cooperation of federal and state activities in the "war on drugs," Professor Guerra argues that, at least in the field of law enforcement, ours is no longer a nation of separate sovereigns. Professor Guerra concludes by observing that, as currently interpreted, the Double Jeopardy Clause of the Fifth Amendment is powerless to prevent successive prosecutions following what is arguably a single offense.

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INTRODUCTION

The federal trial of the police officers who beat Rodney King in Los Angeles, following their acquittals on state charges and the ensuing riots in South Central Los Angeles, cast a bright light on the issue of successive federal-state prosecutions for offenses arising out of the same act or transaction.¹ In run-of-the-mill drug cases, however, such multiple prosecutions regularly pass without notice.

Consider the facts of *United States v. Davis*,² for example. In Albany, New York, federal, state, and local law enforcement joined

1. A number of law review articles have addressed the issue as it relates to the King trial. See Robert C. Gorman, *The Second Rodney King Trial: Justice in Jeopardy?*, 27 AKRON L. REV. 57 (1993); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. REV. 649 (1994); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509 (1994).

2. 906 F.2d 829 (2nd Cir. 1990).

together to form the Capital District Drug Enforcement Task Force. "State and local officers assigned to the Task Force [were] deputized as Special Deputy United States Marshals and operate[d] under the direct control and supervision of the United States Drug Enforcement Administration (DEA). [Task Force members] follow[ed] DEA policies and procedures."³ In January 1988, the Task Force arrested Davis and two others for selling cocaine to an undercover officer. All three defendants were indicted for violating state narcotics and weapons laws.⁴ On March 2, 1989, the Greene County Court ruled to suppress the evidence against the defendants because the arresting officers did not have reasonable cause to stop the car. Without this evidence, the state prosecution could not go forward. Rather than appeal the ruling, the District Attorney simply moved to dismiss the charges and notified the federal authorities of the outcome. Federal prosecutors obtained an indictment on May 18, 1989 on narcotics and weapons charges based on the same drug sale.⁵ The Second Circuit, following Supreme Court precedent, upheld the propriety of the federal prosecution.⁶

Ordinarily, the Double Jeopardy Clause of the Fifth Amendment prohibits a government from prosecuting an individual twice for the same offense.⁷ Successive and dual federal-state prosecutions,⁸ however, involve two governments—a distinction that makes all the difference to the Supreme Court. The "dual sovereignty" doctrine approves successive federal-state prosecutions even for offenses consisting of identical elements on the theory that each sovereign is entitled to enforce its laws and may not be barred by a previous prosecution in another jurisdiction.

This rule has been roundly criticized—and, arguably, for good reason—on many different grounds.⁹ The dual sovereignty exception

3. *Id.* at 831.

4. *Id.*

5. *Id.*

6. *Id.* at 832-35.

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

8. A successive prosecution, for purposes of this Article, is defined as a second prosecution that follows completion of the first. Dual prosecutions are two prosecutions brought simultaneously in different jurisdictions. See also *infra* notes 157-67 and accompanying text for a discussion of unique practical difficulties of representing a defendant in dual prosecutions.

9. See generally 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) (proposing limitation on the dual-sovereignty exception); Walter T. Fisher, *Double*

violates the spirit, if not the letter, of the Double Jeopardy Clause. It also violates any common-sense interpretation of the Double Jeopardy Clause as a provision of the Bill of Rights, which was intended to protect individual rights and liberties.¹⁰

This Article does not intend to suggest modification or abolition of the "dual sovereignty" doctrine. The Supreme Court has made perfectly clear that it will continue to permit successive and dual prosecutions by the federal government and the states for crimes arising out of the same conduct.¹¹ Rather, this Article examines only the inappropriateness of applying the doctrine in cases involving multijurisdictional drug task forces.¹² The Article compares the

Jeopardy, Two Sovereignties and the Intruding Constitution, 28 U. CHI. L. REV. 591 (1961) (suggesting that the common law prohibited successive prosecutions); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1331 (1932) (suggesting that the rule would "fritter away our liberties upon the metaphysical subtlety" of two sovereignties (paraphrasing *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 64 (1820) (Story, J., dissenting))); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963) (rejecting "two offense" theory of exception); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia v. San Antonio Metropolitan Transit Authority*, 22 NEW ENG. L. REV. 31 (1987) (suggesting that exception is inconsistent with Supreme Court's federalism jurisprudence); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986) (criticizing the Supreme Court's continued adherence to exception in contemporary cases); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961) (rejecting exception); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 CASE W. RES. L. REV. 700 (1963) (arguing that successive prosecutions for violations of statutes representing substantially the same interests should be prohibited); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 282 (1992) (arguing that exception is "unconstitutional because it violates the principle of popular sovereignty underlying the Double Jeopardy Clause"); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 496-504 (1979) (suggesting modification of dual sovereignty rule to prohibit states from prosecuting for "same offense" as federal government, and to allow federal successive prosecution only if "compelling interest" shown); Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982) (rejecting federal-state successive prosecutions following acquittal); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967) (suggesting that exception should be overruled).

10. For an insightful analysis of the values of popular sovereignty inherent in the double jeopardy guarantee, see Dawson, *supra* note 9.

11. The Court has also approved successive prosecutions by two states under the dual sovereignty doctrine, *Heath v. Alabama*, 474 U.S. 82, 91-94 (1985), and by the federal government and a Navajo tribe, *United States v. Wheeler*, 435 U.S. 313, 332 (1978).

12. In a more general discussion of the topic, Professor Braun recently has suggested that the dual sovereignty doctrine should be suspended when officers on task forces have acted more like representatives of one government than two. See Braun, *supra* note 9, at

theoretical underpinnings of the dual sovereignty doctrine to the actual federal-state relationship in drug law enforcement.

The nature and degree of federal-state cooperation in law enforcement has changed, in large part due to the "war on drugs" begun in the 1980s. The Article does not take issue with multijurisdictional law enforcement efforts, as integrated operations offer many obvious advantages. It focuses instead on the multijurisdictional nature of contemporary law enforcement to reveal the doctrinal weakness of the dual sovereignty theory in cases arising from multijurisdictional enforcement efforts.

While the theory of "dual sovereignty" as derived from federalism principles has survived unchanged from the early twentieth century, in law enforcement the reality of a nation of separate sovereignties has steadily eroded. Indeed, the creation of a massive, federally-operated criminal justice system turns the theory of our federalist system on its head. Traditionally, the states have assumed the primary role in the administration of criminal justice.¹³ The Supreme Court has stated in the past that for the federal government to take the lead in law enforcement "would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes."¹⁴ Yet, this appears to be precisely what has happened.¹⁵

Part I of this Article examines the development of federal drug crimes that mirror those already found in the penal codes of most states. This Part also demonstrates that the Supreme Court will not interfere with Congress's drive to further federalize criminal law, and the Part will explore federalism issues raised by the proliferation of federal criminal statutes that reach conduct traditionally governed only by state criminal laws.

72.

13. Only one out of every 20 crimes in America today is prosecuted by the federal government. H. Scott Wallace, *Compulsive Disorder: Stop Me Before I Federalize Again*, THE PROSECUTOR, May/June 1994, at 21 (citing OFFICE OF THE ATT'Y GEN., DEP'T OF JUSTICE, COMBATTING VIOLENT CRIME 4 (July 1992)). The federal government has the jurisdiction to prosecute most crimes, but currently lacks the resources to handle the enormous volume such prosecutions would create. *Id.* at 24-25.

14. *Abbate v. United States*, 359 U.S. 187, 195 (1959); *see also* *Screws v. United States*, 325 U.S. 91, 109 (1945) (noting that federal system places administration of criminal justice with states except as Congress may exercise its delegated powers to create federal offenses); *Jerome v. United States*, 318 U.S. 101, 104-05 (1943) (same).

15. *See infra* notes 93-154 and accompanying text.

Part II illustrates the multifaceted expansion of federal government involvement in law enforcement, an expansion facilitated by the so-called "war on drugs." This Part demonstrates that the thorough integration of federal, state, and local law enforcement authorities, particularly in drug cases, renders the concept of independent sovereigns in drug law enforcement nothing more than a myth.

In Part III, the Article addresses the double jeopardy jurisprudence under which successive and dual federal-state prosecutions are permitted. This Part explores the easy manipulation of the "same offense" requirement of the Double Jeopardy Clause. It also takes a critical view of the "dual sovereignty" doctrine, especially as applied to multijurisdictional drug task force cases.

II. THE DEVELOPMENT OF PARALLEL FEDERAL AND STATE CRIMINAL CODES

Virtually any crime involving illicit drugs can be investigated and prosecuted as a federal crime, no matter how insignificant the amount seized or whether any clear federal interest can be discerned. The expansion of the federal government's concurrent jurisdiction in this area of criminal law coincides with the general expansion of federal criminal law in other areas.¹⁶ The anti-drug activity stands out from the rest, however, because the federal government has made it a top priority to enforce these violations, whether the defendant be a "kingpin" or a low-level street pusher.¹⁷

16. The expansion of federal criminal laws dates back to the 1950s and has not since abated. See NORMAN ABRAMS & SARA S. BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 45 (1993). Congress has responded to public frustration with violent crime by enacting an array of new federal statutes prohibiting conduct traditionally prosecuted by the states. For example, in 1992 Congress enacted a statute prohibiting "carjacking," which refers to the theft of a vehicle from its owner at gunpoint. 18 U.S.C. § 2119 (Supp. V 1993) (amended by 108 Stat. 1796, 1970 (1994)). A 1990 statute makes it a federal offense to possess a firearm within 1,000 feet of a school. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. V 1993). In 1984, Congress enacted a law that requires a mandatory five-year sentence enhancement for using a firearm "in relation to any crime of violence." 18 U.S.C. § 924(c) (1988). Another statute, the Brady Handgun Violence Prevention Act, imposes a five-day waiting period on the sale of any handgun in order to give the local law enforcement agency time to conduct a background check on the prospective owner. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (Supp. V 1993)).

17. The federal government has placed a high priority on the enforcement of anti-drug laws since 1980. The Bureau of Justice Statistics reports that between 1980 and 1990, the number of drug offenders convicted in federal courts more than tripled, while the number of non-drug convictions rose by only 32%. DOUGLAS C. McDONALD ET AL., *DEPT' OF*

The following section discusses the expansion of federal criminal jurisdiction into areas previously covered only by state law. As a result of that expansion, every time a drug transaction occurs, two offenses—one state and one federal—are committed. The subsequent section will examine the reasons that the Supreme Court will not impede Congress as it continues on this course.

A. *Expanding the Reach of Federal Drug Laws to Activities Traditionally Governed by State Law*

Early in United States history, most acts considered crimes were subject only to state criminal law.¹⁸ Federal criminal laws were limited to areas in which the Constitution gave Congress specifically enumerated powers.¹⁹ As a general rule, federal legislation that regulates conduct must be justified as an exercise of one of Congress's enumerated powers. So long as Congress acts pursuant to an enumerated power, it may enact whatever laws are necessary and proper to achieve its purpose.²⁰ To the extent that federal law conflicts with state law, the federal law preempts state law by virtue of the Supremacy Clause of Article VI.²¹ The Tenth Amendment

JUSTICE, *FEDERAL SENTENCING IN TRANSITION*, 1986-90, at 4 (1992). Of the 37,725 offenders sentenced to prison by federal courts in 1992, 15,544 were convicted of drug trafficking. 1992 SENTENCING COMM'N ANN. REP. app. B.

18. The 1872 mail fraud statute was the first significant instance of federal legislation in an area traditionally within the states' jurisdiction. See Braun, *supra* note 9, at 4; Wallace, *supra* note 13, at 22. It was not until early in the twentieth century that the Supreme Court even had occasion to review the constitutionality of an 1895 federal criminal law designed to suppress lotteries and enacted pursuant to the Commerce Clause power and the power to regulate the mails. See Robert E. Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 383-88 (1919) (discussing *The Lottery Case*, *Champion v. Ames*, 188 U.S. 321 (1903)).

19. See Braun, *supra* note 9, at 4 n.13.

20. U.S. CONST. art. I, § 8. The Necessary and Proper Clause reads in pertinent part: "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional.").

21. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

reserves any residual powers to the states.²²

Over time, Congress began to criminalize much ordinary criminal activity under the guise of regulating interstate commerce pursuant to its Article I, Section 8 plenary power.²³ With the Controlled Substances Act of 1970, however, Congress established virtually unlimited federal jurisdiction for all drug offenses as a way to protect public morals—without even the pretense of regulating interstate commerce. The statute covers many types of drug-related crimes on the basis of congressional findings that drugs have a “substantial and detrimental effect upon the health and general welfare of the American people.”²⁴

With the Anti-Drug Abuse Act of 1988,²⁵ Congress further increased the scope of activity covered by federal criminal law and significantly enhanced the penalties involved. One provision makes it a federal crime to possess even small amounts of controlled substances.²⁶ Similarly, the federal drug law now gives enhanced protection to young people and pregnant women.²⁷ Although one can discern the policy reasons for granting these groups special protection, there is no obvious reason that federal law—as opposed to state law—should provide the protection.

The federal statute imposes enhanced sentences in drug distribution cases when the buyer is under twenty-one years of age,²⁸ or where drug activity takes place within 1,000 feet of *any*

22. The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

As Professor Hart once stated: “For the most part, . . . [the Constitution] does no more than sketch a delegation of federal powers, leaving to Congress, and in a measure to the federal courts, a broad discretion in deciding whether power should be exercised, and indeed a considerable freedom even in determining whether such power exists.” Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 526 (1954).

23. The Commerce Clause provides: “The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8.

24. 21 U.S.C. § 801(2) (1988).

25. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified in scattered titles of the United States Code).

26. 21 U.S.C. § 844(a) (1988); see also Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 257 (1992) (discussing drug law penalties).

27. The far-reaching law doubles and triples the penalties for first- and second-time drug offenders respectively, if those crimes involve youths or pregnant women. See 21 U.S.C. §§ 859-861 (Supp. V 1993).

28. 21 U.S.C. § 859 (Supp. V 1993).

school—public or private, grade school through university level—or within 100 feet of any playground, public or private youth center, public swimming pool, or video arcade facility.²⁹ The employment of youths under 18 years of age in drug operations³⁰ is covered by the enhanced-sentence provision, as is the distribution of controlled substances to pregnant women.³¹ Each of these provisions reaches conduct traditionally regulated by state laws.³²

Federalization also provides harsher penalties than those available at the state level.³³ The 1988 law prescribes stiff mandatory minimum sentences and increases the maximum penalties for drug offenses.³⁴ Under the Continuing Criminal Enterprise statute,

29. 21 U.S.C. § 860(a) (Supp. V 1993).

30. 21 U.S.C. § 861(a)-(d) (Supp. V 1993).

31. 21 U.S.C. § 861(f) (Supp. V 1993).

32. Most states employ traditional indeterminate sentencing which gives courts broad discretion in deciding which factors to consider at sentencing and how much weight to accord them. *See, e.g., Williams v. New York*, 337 U.S. 241, 247 (1949) (noting that indeterminate sentencing requires courts to look at “the fullest information possible concerning the defendant’s life and characteristics”). Under such a system, offenses that place vulnerable persons such as minors or pregnant women at risk would likely be punished more severely.

State legislatures also have sought to provide increased penalties for some types of drug offenses affecting minors. For example, the distribution of cocaine in the proximity of a school subjects an offender to enhanced punishment in many states. *See, e.g., CAL. HEALTH & SAFETY CODE* § 11353.1(a)(2) (West Supp. 1994) (imposing a two-year mandatory minimum sentence); *N.Y. PENAL LAW* § 220.44 (McKinney 1989) (imposing a separate offense with punishment range of 6-25 years); *TEX. HEALTH & SAFETY CODE ANN.* § 481.134(b) (West Supp. 1994) (doubling minimum prison sentence and maximum fine).

33. While state statutes may authorize long sentences for drug offenses, in most jurisdictions indeterminate sentencing laws give trial court judges wide discretion in sentencing convicted persons. In practice, state courts usually mete out sentences that are shorter than the mandatory minimum terms or guideline ranges required by federal law. *See, e.g., United States v. Vilchez*, 967 F.2d 1351, 1352-54 (9th Cir. 1992) (two persons arrested for same offense by federal-state drug task force; person tried in federal court received five year mandatory minimum sentence, while person tried in state court received two year prison sentence); *see also* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 929-38 (1991) (discussing the federal “severity revolution,” particularly in drug offenses).

34. 21 U.S.C. § 841(b)(1)(A) (1988) (sentencing individual to ten years to life for possession with intent to distribute a controlled substance; if death or serious injury results from the use of drugs, 20 years to life with a fine of up to \$4 million); *see also* Krasnow, *supra* note 26, at 257 (describing penalties assessible under the 1988 law). Previously, the penalty for a first offense consisted of a term of imprisonment not to exceed 15 years and a fine of not more than \$25,000, or both. *See* 21 U.S.C. § 841(b)(1)(A) (1981).

Furthermore, the Supreme Court’s interpretation of the new Federal Sentencing Guidelines has effectively increased federal penalties for drug offenders in some cases for no valid reason. The Court has construed the weight of the controlled substance, which is the factor that most influences the sentence, to include the weight of the carrier medium.

a person convicted of any of the most serious drug felonies will receive a mandatory life sentence.³⁵ The statute also authorizes the death penalty for an intentional killing committed in furtherance of a continuing criminal enterprise.³⁶

Federalization of criminal law also expands the jurisdiction of federal law enforcement and throws the weight of federal prosecutorial and judicial resources into the fight against drug offenders. By making possession of even the smallest amount of a controlled substance a federal crime, Congress has empowered the Drug Enforcement Administration (DEA) to investigate the entire gamut of drug offenses as a national police force.³⁷ The laws further authorize the use of federal prosecutors and courts to enforce these laws.

The expansion of federal jurisdiction raises two issues for purposes of this Article: the federalism implications of the displacement of the states as the leading policy makers in criminal law enforcement, and the expanding practice of successive and dual prosecutions for a single criminal transaction.

Chapman v. United States, 500 U.S. 453, 462 (1991). Under this scheme, penalties can become absurdly out of proportion to the severity of the offense, as the decision is based on arbitrary factors such as the difference in weight of blotter paper versus sugar cubes. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1991) (defining "Drug Quantity Table" to determine level of offense severity); *see also* Alschuler, *supra* note 33, at 918-24 (arguing that the sentencing guidelines cause arbitrary inequalities). Thus, the federal penalties may not only be greater than the state laws covering the same activity, but the reason for the more severe penalties may not even relate to any rational policy.

In addition, the Anti-Drug Abuse Act of 1988 allows trial courts to impose special federal penalties on drug offenders. The Act gives federal, as well as state and local courts, the authority to declare any person convicted of drug trafficking or drug possession ineligible for a wide array of federal benefits. Anti-Drug Abuse Act of 1988, Pub. L. 101-647, § 1002(d)(2) (1988) (codified as amended at 21 U.S.C. § 862 (Supp. V 1993)); *see also* OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 24 (1991) [hereinafter 1991 NATIONAL DRUG CONTROL STRATEGY] (discussing statutes enacted to deter casual drug use). A list of over 462 deniable benefits from 53 federal agencies was compiled in 1990. *Id.* The list includes such things as student financial aid, small business loans, and pilot's licenses. *Id.*

The Clinton Administration Justice Department, headed by Attorney General Janet Reno, has signalled a new willingness to reconsider the severity of drug sentences, at least with regard to minor offenders. Stephen Labaton, *Reno Moving to Reverse Stiff Sentencing Rule for Minor Drug Crimes*, N.Y. TIMES, May 5, 1993, at A19.

35. 21 U.S.C. § 848(b) (1988). A "continuing criminal enterprise" is defined as a violation of title 21 undertaken in concert with at least five other persons and from which the organizer obtains substantial income. *Id.* § 848(c)(2).

36. *Id.* § 848(e)(1)(A).

37. *See infra* notes 93-100 and accompanying text.

B. Unchecked Expansionism: The Futility of Legal Challenges to the Federalization of Criminal Law

Congress can do as it pleases, at least in enacting federal criminal laws. Although the Constitution grants Congress a limited set of enumerated powers³⁸—e.g., the powers to levy taxes, control the mails, and regulate interstate commerce³⁹—the Supreme Court has effectively given Congress *carte blanche* to criminalize conduct.⁴⁰ In reviewing federal criminal laws enacted pursuant to the Commerce Clause power, the Supreme Court has not distinguished between truly commercial regulations and criminal laws.⁴¹ The Court also has not applied a strict test for evaluating criminal laws that Congress contends “affect” interstate commerce.⁴² The Court’s approval of the federalization of criminal law means that we can expect a continuation of the steady march toward a national law enforcement establishment, the continued diminution of the states’ role in formulating criminal justice policy, and the continued development of parallel federal and state criminal codes.

Two legal challenges might be brought to stem the growth of the federal criminal justice enterprise. First, a federal law can be challenged as an improper exercise of the Commerce Clause power. This approach may succeed in the rare case, but fails as a rigorous check on congressional overreaching.⁴³ Second, a state may challenge the law on Tenth Amendment federalism grounds. However, the Tenth Amendment proves inapplicable as an impediment to federal criminal law expansion.⁴⁴ Thus, unless the political climate surrounding the

38. The most important of these are found, of course, in U.S. CONST. art. I.

39. For a discussion of the basic constitutional framework underlying Congress’s powers to regulate, see Cushman, *supra* note 18, at 290-99.

40. See *infra* notes 45-70 and accompanying text.

41. See *infra* note 50 and accompanying text.

42. See *infra* notes 53-70 and accompanying text.

43. The Supreme Court will hear a Fifth Circuit case on this issue this term. *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994). Ultimately, the Court can be expected to reject this claim as foreclosed by its decision in *Perez v. United States*, 402 U.S. 146 (1971). *Perez* approved a federal loan-sharking law in a case that did not involve any interstate activity. *Id.* at 156-57; see *infra* notes 61-70 and accompanying text.

44. Litigants frequently bring both Tenth Amendment and Commerce Clause claims together in these cases. At the same time that the Commerce Clause grants Congress regulatory power, it also implicitly limits the power of the states to regulate those activities. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 305-06 (2d ed. 1988). Thus, the Supreme Court has stated that the Commerce Clause and Tenth Amendment questions are “mirror images of each other.” *New York v. United States*, 112 S. Ct. 2408,

crime issue changes, we can expect Congress to continue to federalize crimes that have traditionally been prosecuted by the states. No legal impediments will block Congress's way.

1. The Ubiquitous Interstate Commerce Power

Early in our country's history, Congress exercised its power to regulate interstate commerce only when its legislation would in fact protect the flow of interstate commerce. By the late nineteenth century, however, the legislature began to rely on its Commerce Clause power to enact criminal statutes in an effort to protect other things, including public morals.⁴⁵

In 1895, Congress responded to national disapproval of lotteries by prohibiting the movement of lottery tickets by mail or via interstate commerce.⁴⁶ Having heard argument on the case no fewer than three times, the Supreme Court approved this legislation in a five-to-four decision.⁴⁷ Justice Harlan, writing for the majority, attempted in dicta to limit the scope of the Court's ruling,⁴⁸ but the questions presented and the decision rendered could only be read as a revolutionary imprimatur on the expansion of congressional powers. The decision was interpreted as permitting Congress's federalization of criminal law and other regulatory activities under the guise of regulating interstate commerce.⁴⁹

Throughout the twentieth century, the Court's rulings have given Congress increasing latitude to enact federal criminal laws in the

2417 (1992). Each provision presents different questions, however, and deserves separate treatment.

45. Cushman, *supra* note 18, at 383-92.

46. *Id.* at 383.

47. *Champion v. Ames*, 188 U.S. 321, 363-64 (1903); *see also* Cushman, *supra* note 18, at 384-88 (discussing arguments and decision in *Champion*).

48. The Court concluded its opinion as follows: "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause." *Champion*, 188 U.S. at 363.

49. As early as 1919, one author wrote:

The decision in the *Lottery Case* has been discussed at length because it was in a sense a pioneer decision, because it has had a profound influence upon the subsequent development of the national police power, and because, in spite of Mr. Justice Harlan's warning against making unwarranted deductions from it, it has been regarded by many as establishing a doctrine regarding the power of Congress to prohibit various kinds of interstate commerce which is far more revolutionary than it was the expressed purpose of the court to sanction.

Cushman, *supra* note 18, at 387.

name of interstate commerce regulation.⁵⁰ Ultimately, however, the decisions have embraced such an expansive interpretation of the power that some regard judicial review as “largely a formality.”⁵¹

The drafting of federal criminal laws to meet the interstate commerce requirement can proceed in one of two ways. First, the statute may require as a jurisdictional element of the offense that the prosecution prove an interstate commerce nexus.⁵² Second, Congress may dispense with the jurisdictional element if it finds that a “class of activities” taken together “affects” interstate commerce. In either case, the great weight of authority permits a finding of federal jurisdiction based only on a showing of a “minimal” effect on interstate commerce.⁵³ Indeed, the lengths to which courts are

50. During a period from 1887 to 1937, the Court attempted to cabin Congress’s power by limiting it to a restrictive category of economic activity. *TRIBE, supra* note 44, § 5-4, at 305-10. Applying formal distinctions between types of economic activity, the Court struck down congressional enactments including important New Deal legislation. *Id.* at 308. The Court abandoned this effort in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and, according to Professor Tribe, “acceded to political pressure and to its own recognition of its doctrine’s irrelevance and manipulability.” *TRIBE, supra* note 44, § 5-4, at 309.

51. *TRIBE, supra* note 44, § 5-8, at 316.

52. When Congress includes language requiring proof of a certain type of connection between the defendant’s conduct and interstate commerce, federal courts have on some occasions shown reluctance to construe these requirements broadly or to allow the government to dispense with them altogether. For example, in *United States v. Bass*, 404 U.S. 336 (1971), the Supreme Court reviewed a statute making it a federal crime for a felon to “receive[], possess[], or transport[] in commerce or affecting commerce . . . any firearm. . . .” *Id.* at 337. The government had interpreted the interstate commerce requirement to apply only to the transportation of firearms, not to their receipt or possession. *Id.* at 338. The Court opted for a narrow reading of the statute and refused any interpretation allowing the government to dispense with the interstate commerce requirement for possession of firearms. *Id.* at 347. The decision rests in part on federalism concerns:

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.

Id. at 349 (footnotes omitted); *see also* *Rewis v. United States*, 401 U.S. 808, 811 (1971) (finding interstate travel of patrons of gambling establishment insufficient); *United States v. Five Gambling Devices*, 346 U.S. 441, 446 (1953) (stating that federal criminal statute that fails to require proof of interstate commerce nexus presents serious constitutional question).

53. *See, e.g.*, *Scarborough v. United States*, 431 U.S. 563, 575 (1977) (arguing Congress intended to require only minimal nexus); *United States v. Johnson*, 22 F.3d 106, 108-09 (6th Cir. 1994) (citing *Scarborough* and upholding carjacking statute that does not require car used in crime to be traveling in interstate commerce). In *United States v. Evans*, 928

willing to go to find an interstate commerce effect render the requirement meaningless. Courts' efforts do, however, make for humorous reading. For example, decisions have determined that courts, prosecutors' offices, sheriffs' departments, and clerks of court have an effect on interstate commerce in part because their offices purchase supplies that have traveled in interstate commerce.⁵⁴ How the prosecution of a corrupt state official can have anything to do with the fact that the office buys out-of-state pencils escapes reasonable comprehension and appears to make a mockery of the interstate commerce jurisdictional requirement.

Most anti-drug legislation does not require that the prosecution prove an interstate commerce connection as a jurisdictional element because Congress has determined that this is a class of activities that, as a whole, affects interstate commerce. In the 1965 Amendments to

F.2d 858 (9th Cir. 1991), the Ninth Circuit found that Congress could prohibit the possession of unregistered machine guns without specific proof of an interstate commerce effect in each case. *Id.* at 862. Because Congress had determined that firearms killed people, this finding was sufficient to show an effect on the national economy through the insurance industry. *Id.* This "tenuous" nexus was sufficient. *Id.*; *accord* United States v. Garrett, 984 F.2d 1402, 1405-06 (5th Cir. 1993) (rejecting argument that defendant's flight was only intrastate because aircraft operated with the intent of being a potential component of interstate transportation).

54. The Fifth Circuit found "more than ample evidence" of an interstate commerce nexus, in part because the Florida court purchased office supplies from outside the state. United States v. Stratton, 649 F.2d 1066, 1075 n.12 (5th Cir. 1981). Other evidence included the fact that the court handled extraditions and that it served out-of-state litigants. *Id.*; *see also* United States v. Altomare, 625 F.2d 5, 6-7 (4th Cir. 1980) (finding prosecutor's office affected interstate commerce); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (finding sheriff's department affected interstate commerce); United States v. Joseph, 510 F. Supp. 1001, 1002 (E.D. Pa. 1981) (finding clerk of court affected interstate commerce). Another court stated, in a case involving the prosecution of a judge for corruption, that most courts affect interstate commerce because "those who interpret and apply the law can indeed work major changes upon the economy." United States v. Vignola, 464 F. Supp. 1091, 1097 (E.D. Penn. 1979).

Other cases assessing the interstate commerce elements of federal criminal statutes should also elicit hearty laughter. *See, e.g.*, United States v. Lovett, 964 F.2d 1029, 1038 (10th Cir.) (holding effect on interstate commerce where defendant bought car manufactured in another state and bought diamond ring in Oklahoma, of which gold came from Indiana and diamonds came from New York), *cert. denied*, 113 S. Ct. 169 (1992); United States v. Lucas, 932 F.2d 1210, 1219 (8th Cir.) (stating, without further explanation, that interstate commerce effect was "inevitable incident of the construction of a shopping mall"), *cert. denied*, 112 S. Ct. 399 (1991); United States v. Barton, 647 F.2d 224, 231 (2nd Cir.) (citing bombing of building used in interstate commerce as affecting interstate commerce), *cert. denied*, 454 U.S. 857 (1981); United States v. Diecidue, 603 F.2d 535, 546-47 (5th Cir. 1979) (finding effect on interstate commerce based on interstate phone calls, purchase of dynamite originating in interstate commerce, and destruction of automobiles used in activities affecting interstate commerce), *cert. denied*, 445 U.S. 946 (1980).

the Federal Food, Drug and Cosmetic Act of 1938,⁵⁵ Congress first dispensed with the usual requirement that the government must show a connection between the criminal conduct and interstate commerce in each case.⁵⁶ Instead, Congress included in the statute findings and policy declarations that sought to justify the application of the amendments to cases involving purely local activity.⁵⁷

The main rationale given, and that which continues to be relied upon in anti-drug legislation, is that illicit drugs are unlabeled, and therefore, law enforcement officers have no way of knowing whether the drugs were manufactured locally or whether they traveled in interstate commerce.⁵⁸ The statute also includes the finding that locally distributed controlled substances "usually have been transported in interstate commerce immediately before their distribution."⁵⁹ Presumably, the logic proceeds as follows: (1) most drugs travel in interstate commerce prior to their local distribution; (2) the federal government may regulate any substance that has at any time traveled in interstate commerce; (3) drugs are not labeled to indicate their source of origin; and therefore, (4) in order to regulate those drugs that have previously traveled in interstate commerce, it is necessary for the federal government to regulate all local distribution. Lower courts have consistently invoked this reasoning to deny defendants' challenges to the constitutionality of their federal drug convictions under the Federal Food, Drug and Cosmetic Act.⁶⁰

In *Perez v. United States*,⁶¹ the Supreme Court ratified this mode of analysis in another context. Three years after the 1965

55. 21 U.S.C. §§ 301-393 (1988).

56. See, e.g., *Deyo v. United States*, 396 F.2d 595, 596 (9th Cir. 1968) ("There is no question but that Congress here has resorted to a wholly new technique for bringing the regulation of drug traffic within the scope of the commerce clause.")

57. Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, § 2, 79 Stat. 226, 226-27.

58. 21 U.S.C. § 801(5) (1988). The Federal Food, Drug, and Cosmetic Act was superseded by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (1988). The findings and declarations in the 1970 statute include this rationale. 21 U.S.C. § 801(5).

59. 21 U.S.C. § 801(3)(B) (1988).

60. See *United States v. Rodriguez*, 438 F.2d 1164, 1165 (9th Cir. 1971); *United States v. Lamear*, 417 F.2d 626, 627 (8th Cir. 1969), cert. denied, 397 U.S. 967 (1970); *United States v. Cerrito*, 413 F.2d 1270, 1271 (7th Cir. 1969), cert. denied, 396 U.S. 1004 (1970); *United States v. Fields*, 410 F.2d 373, 374 (9th Cir.), cert. denied, 396 U.S. 965 (1969); *United States v. Heiman*, 406 F.2d 767, 768 (9th Cir. 1969); *White v. United States*, 399 F.2d 813, 824 (8th Cir. 1968); *Deyo v. United States*, 396 F.2d 595, 597 (9th Cir. 1968); *White v. United States*, 395 F.2d 5, 7 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

61. 402 U.S. 146 (1971).

amendments to the Federal Food, Drug, and Cosmetic Act, Congress enacted Title II of the Consumer Credit Protection Act of 1968 to regulate extortionate credit transactions.⁶² Like the anti-drug legislation, Title II did not require that a particular transaction specifically involve interstate commerce. Instead, Congress's findings stated that all local loan-sharking activities necessarily affected interstate commerce and therefore could be regulated by federal law.⁶³ In contrast to the drug context, the 1968 legislature did not claim any difficulty in distinguishing between interstate and intrastate transactions. Rather, Congress simply stated that loan-sharking "affects" interstate commerce—a tenuous conclusion at best.⁶⁴

The decision to uphold the regulation of all loan-sharking activity marks the Supreme Court's first decision on the constitutionality of a federal criminal law grounded in the commerce clause since the turn of the century. *Perez* is also the Court's last decision on the matter to date.⁶⁵ In *Perez*, the Court applied a test developed in the

62. 18 U.S.C. §§ 891-96 (1988).

63. The relevant congressional finding states: "A substantial part of the income of organized crime is generated by extortionate credit transactions. . . . Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce. . . . Even where extortionate credit transactions are purely intrastate in character, they nonetheless directly affect interstate commerce." Consumer Credit Protection Act, Pub. L. No. 90-321, § 201(a)(1), (3), 82 Stat. 146, 159 (1968).

64. See Craig M. Bradley, *Racketeering and the Federalization Of Crime*, 22 AM. CRIM. L. REV. 213, 252-53 (1984) ("Congress's conclusion that loan-sharking affects interstate commerce is highly questionable in many cases."); Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 276 (1973) (noting that "congressional findings baldly stated there was [an interstate commerce] connection" to loan-sharking).

65. The last such case decided before *Perez* was *Champion v. Ames*, 188 U.S. 321 (1902); see *supra* notes 47-49. At the moment, the Supreme Court's docket includes a Fifth Circuit case in which the lower court invalidated on Commerce Clause grounds the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. V 1993), criminalizing the possession of a weapon within 1000 feet of any school. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994). A Ninth Circuit decision upholding the same statute created a conflict within the circuit courts. See *United States v. Edwards*, 13 F.3d 291, 292-95 (9th Cir. 1993).

The Fifth Circuit's decision in *Lopez* will likely be reversed because it flies in the face of most Commerce Clause jurisprudence. The circuit court clearly disapproved of the reach of the statute:

The Gun Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a country road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session.

Lopez, 2 F.3d at 1366. The court was bothered with the seemingly unlimited reach of congressional power:

context of traditional economic regulations⁶⁶ to the loan-sharking law, but failed to note any distinction between a statute that regulates commercial activity and a criminal law. The test permits Congress to regulate a "class of activities" without proof that the particular intrastate activity in question has any effect on interstate commerce.⁶⁷

In determining the validity of the legislation, the Court must determine only whether there exists a rational basis for Congress's finding that the class of activities affects interstate commerce.⁶⁸ The Court does not require a significant impact on interstate commerce; it upheld the legislation in *Perez* even though the effects on interstate commerce were unclear.⁶⁹ The *Perez* case has put to rest any doubt

If Congress can thus bar firearms possession because of such a nexus to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, "sneakers," Game Boys, or slide rules.

Id. at 1367.

The Fifth Circuit's holding is limited. The decision specifically takes issue with Congress's failure to state any findings or provide any legislative history supporting the nexus between carrying a firearm near a school and interstate commerce. *Id.* at 1367-68. The court found that this omission represented "a sharp break with the long-standing pattern of federal firearms legislation" that rendered the statute unconstitutional. *Id.* at 1366.

On several occasions, the Court has assessed federal criminal statutes to determine the proper interpretation of their interstate commerce provisions. *See, e.g.*, *United States v. Enmons*, 410 U.S. 396, 410 (1973) (Hobbs Act); *United States v. Bass*, 404 U.S. 336, 337-38 (1971) (possession of a firearm by a felon); *Rewis v. United States*, 401 U.S. 743, 812 (1971) (Travel Act); *United States v. Five Gambling Devices*, 346 U.S. 441, 450 (1953) (plurality opinion) (gambling device prohibition).

66. The Court relied primarily on the test developed in *United States v. Darby*, 312 U.S. 100, 117-24 (1941). In *Darby*, Congress set the wages and hours for workers who produced goods "for interstate commerce." *Id.* at 117. The Court invoked the *Darby* test in the civil rights cases of *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In those cases, regulations affecting private hotels, motels, inns, and restaurants were upheld on the grounds that these establishments serve interstate travelers or that a substantial portion of the food served traveled in interstate commerce. *McClung*, 379 U.S. at 300; *Heart of Atlanta Motel*, 379 U.S. at 258. The wisdom of permitting Congress to regulate restaurants because the food served has traveled in interstate commerce can be criticized for the same reasons this Article applies in the criminal context. However, facilitating the interstate travel of citizens by prohibiting discrimination on the part of hotels and restaurants that offer their services to the public is precisely the type of activity appropriate for Commerce Clause regulation. *See Stern*, *supra* note 64, at 272-74; *Bradley*, *supra* note 64, at 253.

67. *Perez v. United States*, 402 U.S. 146, 152 (1971).

68. *See Heart of Atlanta Motel*, 379 U.S. at 255.

69. The decision states that the congressional findings incorporated into the statute are "quite adequate." *Perez*, 402 U.S. at 155. The opinion then cites three reports that show

that Congress can criminalize virtually any type of activity, whether local or interstate in character, because the purported limitations on its power are meaningless.⁷⁰

2. The State Sovereignty Claim

A second avenue by which to challenge the expansion of federal criminal jurisdiction—the Tenth Amendment’s protection of state sovereignty⁷¹—also offers little hope for success in preventing improper successive prosecutions. The Supreme Court has almost consistently rejected claims that federal legislation improperly impinges on states’ sovereignty in violation of the Tenth Amendment.⁷² A few cases striking down federal laws stand out as “oddi-

that loan-sharking schemes are big business, that they are controlled by organized crime syndicates, and that the activities of these syndicates “affect interstate and foreign commerce.” *Id.* at 155-56. This reasoning is flawed: that organized crime syndicates are involved both in loan-sharking rackets and in activities that affect interstate commerce does not show that the loan-sharking is one of the activities that affects interstate commerce.

The last sentence of the decision hints at an alternative theory—most organized crime syndicates are “national operations.” *Id.* at 157. However, the summaries of the three reports do not indicate that criminal organizations were found to extend beyond state borders in most cases, and this theory was not clearly articulated.

70. Until recent challenges, the last cases criticizing the broad use of the Commerce Clause were those brought in the wake of *Perez* in the 1970s. See *United States v. Visman*, 919 F.2d 1390, 1392-93 (9th Cir. 1990) (rejecting Commerce Clause challenge to criminalization of marijuana cultivation), *cert. denied*, 112 S. Ct. 442 (1991); *United States v. Weinrich*, 586 F.2d 481, 498 (5th Cir. 1978) (rejecting Commerce Clause challenge to Comprehensive Drug Abuse Prevention and Control Act of 1970), *cert. denied*, 441 U.S. 927 (1979); *United States v. Davis*, 561 F.2d 1014, 1018-20 (D.C. Cir.) (same), *cert. denied*, 434 U.S. 929 (1977); *United States v. Montes-Zarate*, 552 F.2d 1330, 1331-32 (9th Cir. 1977) (same), *cert. denied*, 435 U.S. 947 (1978); *United States v. Atkinson*, 513 F.2d 38, 39-40 (4th Cir. 1975) (same); *United States v. Esposito*, 492 F.2d 6, 10 (7th Cir. 1973) (same), *cert. denied*, 414 U.S. 1135 (1974); *United States v. King*, 485 F.2d 353, 356 (10th Cir. 1973) (same); *United States v. Collier*, 478 F.2d 268, 272-73 (5th Cir. 1973) (same); *United States v. Leisner*, 469 F.2d 336, 336-37 (5th Cir. 1972) (per curiam) (same), *cert. denied*, 410 U.S. 942 (1973); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221-22 (9th Cir. 1972) (same), *cert. denied*, 410 U.S. 985 (1973); *United States v. Scales*, 464 F.2d 371, 373-76 (6th Cir. 1972) (same); *United States v. Lane*, 461 F.2d 343, 344 (5th Cir.) (per curiam) (same), *cert. denied*, 409 U.S. 952 (1972); *United States v. Lopez*, 459 F.2d 949, 950-53 (5th Cir.) (same), *cert. denied*, 409 U.S. 878 (1972); see also *supra* note 65 (discussing recent cases challenging federal legislation on Commerce Clause grounds).

71. The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

72. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907 (1994) (“[T]he federal courts, despite occasional oddities like *Gregory*, *New York v. United States*, or *National League of Cities v. Usery*, have not favored federalism at any time during their existence. To the contrary, they have

ties" in the otherwise uniform line of decisions.⁷³ The cases evidence some tension over the correct interpretation of "Our Federalism," the doctrine recognizing that states have a sphere of sovereignty protected by the Tenth Amendment.⁷⁴ Although some would dismiss federalism concerns as a kind of national "neurosis,"⁷⁵ many others support the constitutional Framers' vision of separate inviolable spheres of sovereignty maintained between the national and state governments.⁷⁶

The Court made one of its broadest and, ultimately, most short-lived statements on federalist principles in *National League of Cities v. Usery*.⁷⁷ In that case, the Court approved a limitation on Congress's power to regulate state activity—a limitation rooted in federalist principles and grounded in the Tenth Amendment. The decision in *National League of Cities* attempted to curb Congress's ability to "supplant[] the considered policy choices of the States' elected officials"⁷⁸ in areas of "traditional governmental functions"⁷⁹ and further attempted to prevent Congress from "impair[ing] the

been consistent opponents of federalist positions, as recent history demonstrates.").

73. *Id.* at 907-08.

74. The Court articulated its "Our Federalism" theory in *Younger v. Harris*, 401 U.S. 37 (1971). Essentially, the Court stated that there is a federal interest in having states maintain their separate spheres. *Id.* at 44.

75. Rubin & Feeley, *supra* note 72, at 908.

76. The overarching consideration lies in the choice between national uniformity and decentralization. Hart, *supra* note 22, at 528. In reality, federal and state laws and policies often involve "highly complex interrelationships." *Id.* at 527. However, "beneath the technicalities lie far-reaching considerations of policy in the distribution of governmental 'say.'" *Id.* at 527.

A number of articles have been written on federalism issues. See, e.g., Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Bradley, *supra* note 64; Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMPLE L.Q. 901 (1987); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1985); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Rubin & Feeley, *supra* note 72; Stern, *supra* note 64; Richard B. Stewart, *Federalism and Rights*, 19 GEO. L. REV. 917 (1985); Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019 (1988).

77. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

78. *Id.* at 848.

79. *Id.* at 852.

States' 'ability to function effectively in a federal system.'⁸⁰ Recognizing the difficulty of delineating the boundaries of a state's inviolable sphere, the Court nonetheless identified the "traditional governmental functions" test as a means of protecting the states' core functions from officious federal interference. The Court included a short list of examples of activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services."⁸¹ Among the activities listed was "police protection."⁸²

Only nine years later, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.⁸³ The Court held that the decision of whether a function belonged in the state or federal sphere should be made through the political process, and not by the judiciary.⁸⁴ *Garcia* rested on a questionable assumption: that the *National League of Cities* decision underestimated the ability of the states to protect their sovereignty through the national political process.⁸⁵ Oddly, the Court also suggested that

80. *Id.* (citation omitted).

81. *Id.* at 851.

82. *Id.*

83. 469 U.S. 528 (1985).

84. *Id.* at 539, 546, 550.

85. The Court stated that the decision "underestimated . . . the solicitude of the national political process for the continued vitality of the States." *Garcia*, 469 U.S. at 557. The Court looked to the amount of money allocated to states by the federal government and to the states' ability to exempt themselves from some federal regulations. *Id.* at 552-53. This position lacks force in the context of the drug war. A federalist system that leaves to the political process the role of maintaining the proper balance between federal and state control functions properly only if the two spheres of governance consider themselves, in a sense, in competition. Like the advocacy system in which we vest issues of justice, the federalist system produces the "right" outcome from a struggle between two adversaries of relatively equal strength. When one party grows to such an extent that it can dominate the other, or where one party willingly abdicates its role in exchange for other consideration, the political check fails.

In the past, serious reflection ruled out the possibility that we would choose complete national uniformity over some combination of uniformity and decentralization. Professor Hart said of complete national uniformity: "So Procrustean a solution to the problems of federalism is unlikely to find wide favor." Hart, *supra* note 22, at 540. He gave two main reasons for this view: (1) A uniform national system would be administratively unwieldy; (2) common sense and the instinct for freedom of the American people would lead them to not put "all their eggs of hope . . . in one governmental basket." *Id.*

The situation in criminal justice has changed since Professor Hart was writing in the 1950s. His belief in the lasting nature of the federalist system rested on the ability of the political process to police the relationship, which no longer holds true. The administrative obstacles in constructing a national model of government have been overcome by recruiting state and local agencies to provide the knowledge of local landscapes and additional manpower. The other backstop to nationalization—the belief that the American

the “traditional governmental functions” test undermines the states’ role as “laboratories”—presumably because it locks states into “traditional” roles and does not allow them to adapt to the changing needs of communities.⁸⁶

Had *National League of Cities* not been overruled in *Garcia*, its rationale might have supported an argument against the federal government’s development of parallel criminal laws. Since the Court specifically singled out “police protection” as a traditional governmental function of the states, federal criminal law initiatives that have the effect of displacing state laws would fail the *National League of Cities* test. Viewed collectively, federal drug laws may be said to “significantly alter or displace the States’ abilities to structure”⁸⁷ their own policies.⁸⁸

Even if *National League of Cities* were still good law, however, several obstacles would still prevent a state from successfully challenging the constitutionality of federal drug policies. First, none of the anti-drug policies of the federal government directly regulate the “States as States,” one of the threshold requirements of the *National League of Cities* doctrine.⁸⁹ That is, in the anti-drug context, federal policies do not displace state policies by preemption. Instead, federal policies create an enterprise that is larger, more powerful and that

people would not permit the diminution of state power—also has given way under the weight of enormous anxiety over drugs and violent crime. See Wendy Kaminer, *Federal Offense*, ATLANTIC MONTHLY, June 1994, at 102 (criticizing public policy in criminal justice as pandering to public fear of violent crime and disregarding expert assessments). Moreover, state and local agencies willingly cooperate with the federal effort. See *infra* notes 120-26 and accompanying text.

86. *Garcia*, 469 U.S. at 546.

87. *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

88. A state cannot, for example, experiment with drug legalization, since federal law makes the citizens of the state subject to its anti-drug laws. Of course, state legislators are free to decriminalize cocaine or any other substance for that matter. However, as a practical matter, the federal drug laws that reach simple possession of small quantities of controlled substances—and the massive federal apparatus for enforcing these laws—render state policy meaningless.

Moreover, what traditionally were state choices in fixing the proper punishment for various crimes are no longer the states’ alone. The decision whether to permit capital punishment for certain types of traditionally state offenses provides a poignant example of this shift in decision-making power. The federal government now regularly seeks the death penalty in drug cases, even in states that prohibit the death penalty under their state constitutions. See Wallace, *supra* note 13, at 23. In the past, the possibility of a death sentence in a federal case existed for such crimes as treason, but the paucity of offenses subject to the penalty as well as the low incidence of these offenses made a federal death penalty more theoretical than real.

89. *National League of Cities*, 426 U.S. at 845.

imposes its own criminal laws on the citizens of the states. States may change their criminal laws or sentences, but citizens of the state must still abide by federal laws, including their stiff penalties.

Second, the *National League of Cities* decision does not prevent the federal government from creating law enforcement operations that invite state and local agencies to participate. Even if the courts limited the reach of federal criminal laws, such a limitation would not inhibit the authority of Congress to offer financial incentives to states and localities for their cooperation. Were the states to object to the federal policy agenda, they could "just say no."⁹⁰ Legislation creating multijurisdictional task forces⁹¹ does not *require* state and local agencies to cooperate. Only if it did would such an endeavor come within the ambit of the *National League of Cities* ruling.

In sum, because the federal government need not preempt or displace state laws in passing comparable federal criminal laws, states have no grounds on which to challenge the growing scope of the federal law enforcement establishment.⁹² Even under the now defunct Tenth Amendment test of *National League of Cities*, such a challenge would fail.

III. THE CREATION OF A CONSOLIDATED, MULTIJURISDICTIONAL AND FEDERALLY-DIRECTED LAW ENFORCEMENT ESTABLISHMENT

Hand-in-hand with Congress's federalization of anti-drug laws is its effort to promote a national enforcement effort. In one sense, the so-called "war on drugs" marks the continuation of an old trend in federal criminal justice expansionism. For most of the century, the federal government's law enforcement efforts, which focused largely on organized crime, grew steadily.⁹³ However, the scale and the

90. Drug users were advised to "just say no" in the federal government's famous 1980s anti-drug media campaign.

91. See *infra* notes 101-19 and accompanying text.

92. Nonetheless, *National League of Cities* and *Garcia* provide a framework for consideration of a question raised by the anti-drug effort: To what extent may states and the federal government jointly decide to do away with the states' separate sphere of control over the policing of communities? Put another way, if the various governments (presumably representing popular sentiment) agree to merge into one national government, can it be said that the Constitution is somehow violated? As this Article does not attempt to answer all the Tenth Amendment issues presented in this context, I leave these questions for another day.

93. Ever since prohibition and the criminalization of opium spurred the proliferation of organized crime groups, Congress has found ample support for its expansionist activities. See Bradley, *supra* note 64, at 225-26. In virtually every instance, Congress and the Justice Department have promoted the concept of a "war" effort against an evil too vast for the

multi-dimensional nature of the expansion of the war on drugs is unprecedented. By the mid-1980s, Congress shifted from targeting organized crime syndicates per se to attacking every type of drug-related activity.⁹⁴

Beginning in the 1980s, the federal government declared its resolve to engage substantial resources to fight a drug war.⁹⁵ To facilitate this task, Congress worked steadfastly to provide law enforcement with a greater arsenal. The working philosophy behind the "war" effort called for a massive law enforcement program⁹⁶ and harsh treatment for drug offenders.⁹⁷ Congress has allocated substantial drug control budgets for seventeen federal departments and sizeable drug control grants to the states.⁹⁸ Overall, federal spending on drug control efforts has multiplied many times over the last twelve years. From 1981 to 1994, the federal budget for drug

individual states to handle. *Id.* at 232, 235.

94. Today, criminal justice authorities see organized crime as practically synonymous with narcotics trafficking. For example, the primary law enforcement unit that handles drug traffickers is called the "Organized Crime Drug Enforcement Task Force" (OCDETF), thereby highlighting the important connection between organized crime and drug trade. See OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 40-42 (1994) (describing OCDETF).

95. The efforts begun in the 1980s, however, were not unprecedented. See Bradley, *supra* note 64, at 264 (demonstrating that the three branches of federal government united to pursue an organized crime agenda in the past).

96. In fiscal year 1993, 68% of all federal drug control money was earmarked for "supply side" activities, or law enforcement, as opposed to drug treatment or education. See OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 140 (1992) [hereinafter 1992 NATIONAL DRUG CONTROL STRATEGY]; see also Joseph B. Treaster, *Some Think the 'War on Drugs' Is Being Waged on Wrong Front*, N.Y. TIMES, July 28, 1992, at A1 (asserting that the Bush Administration policy "has consistently subordinated health and education to law enforcement"). The Clinton Administration has said that it gives drug treatment a higher priority than did the Bush Administration. OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY, BUDGET SUMMARY 3-4 (1994) [hereinafter 1994 BUDGET SUMMARY]. The numbers, however, do not confirm this statement. Compare 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 34, at 141 (chart depicting distribution of federal resources through fiscal year 1993) with 1994 BUDGET SUMMARY, *supra*, at 2 (same chart through fiscal year 1995). But see Joseph B. Treaster, *Clinton Altering Nation's Tactics in Drug Battle*, N.Y. TIMES, Oct. 21, 1993, at A1 (reporting that President Clinton planned to focus national drug strategy on treatment for hard-core drug users and social programs rather than on interdiction of drugs).

97. See *supra* notes 33-36 and accompanying text.

98. 1994 BUDGET SUMMARY, *supra* note 96, at 184-87; OFFICE OF NAT'L DRUG CONTROL POLICY WHITE PAPER, FEDERAL DRUG GRANTS TO STATES apps. C & D (1990).

control grew 750 percent from 1.7 billion to 12.1 billion dollars.⁹⁹ For fiscal year 1995, the Clinton Administration has requested 13.2 billion dollars.¹⁰⁰

Congress has capitalized on its ability to funnel federal money in exchange for compliance with federal law enforcement policy in order to direct criminal justice policy. The following subsections catalogue the federal laws and initiatives that comprise the national drug control strategy to demonstrate the extent to which federal, state, and local law enforcement have become increasingly consolidated and uniform.

A. *Expanding Federal Resources by Enticing States to Join Forces: The Emergence of a Multijurisdictional Model of Law Enforcement*

Perhaps as significant as increased spending by the federal government is the fact that the enforcement effort has engaged the cooperation of law enforcement at all levels of government. Rather than simply working together on joint programs, however, the federal strategy brings state and local agents into the federal fold.

Although federal law enforcement agencies have worked cooperatively with state and local police since the mid-1960s, these relationships became formal and ongoing with the onset of the drug war.¹⁰¹ The DEA has developed programs for multijurisdictional drug law enforcement to harness the support of state and local police agencies.¹⁰² These programs provide the DEA with access to additional manpower, and state and local police provide street-level intelligence about drug activity in their communities. The two most significant cooperative programs are the DEA State and Local Task Forces (DEA-SL Task Forces) and the Organized Crime Drug Enforcement Task Forces (OCDETFs).¹⁰³

99. 1994 BUDGET SUMMARY, *supra* note 96, at 183; *see also* Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109, 1112 (1992) (stating that between 1981 and 1992 federal spending on drug control increased 700%).

100. 1994 BUDGET SUMMARY, *supra* note 96, at 1.

101. JAN CHAIKEN ET AL., U.S. DEP'T OF JUSTICE, MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 45-47 (1990).

102. *See* Sandra Guerra, *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 824-27 (1994).

103. A third program, created in 1988, designates certain areas as "High Intensity Drug Trafficking Areas" (HIDTAs). The HIDTA areas receive additional federal funds to support federal, state, and local drug enforcement initiatives. 1994 BUDGET SUMMARY, *supra* note 96, at 125-27. The HIDTA areas include the cities of New York, Miami, Houston, and Los Angeles, and the southwest border. In 1993, HIDTA areas received \$86

The DEA-SL Task Forces were created in 1973.¹⁰⁴ The program did not fully develop, however, until asset forfeiture benefits became available to state and local agencies in the 1980s.¹⁰⁵ In 1994, the DEA-SL Task Forces numbered eighty-one, with an additional twenty-two provisional state and local task forces.¹⁰⁶ The Clinton administration has requested a budget of \$73.2 million for the DEA-SL Task Forces in fiscal year 1995.¹⁰⁷

The OCDETF program took effect in 1982 as part of a drug control initiative announced by President Reagan.¹⁰⁸ The program established a second set of multijurisdictional task forces coordinated by the United States Attorneys' offices in thirteen "core" cities.¹⁰⁹ The task forces target high-level drug traffickers and large-scale money laundering organizations.¹¹⁰ The program purports to focus on financial investigations in order to reinforce drug charges, lead to the forfeiture of drug dealers' assets and provide jurors with a better understanding of the size of the drug organization.¹¹¹

While these multijurisdictional operations include state and local agents, federal officials clearly make the final decisions on priorities and policies, with non-federal agents providing input and manpower. The Executive Review Board of the program, for example, is comprised of the heads of the nine federal agencies that participate in OCDETF, as well as senior officials of the Departments of Justice and Treasury.¹¹² State and local officials do not sit on the Executive

million in funding of which \$36.7 million was distributed to state and local agencies. *Id.* at 43.

104. CHAIKEN ET AL., *supra* note 101, at 44.

105. *Id.* at 44-45.

106. 1994 BUDGET SUMMARY, *supra* note 96, at 90.

107. *Id.* at 88.

108. OFFICE OF THE ATT'Y GEN., DEP'T OF JUSTICE ANNUAL REPORT OF THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE PROGRAM, 1989-90 2 (1991).

109. 1994 BUDGET SUMMARY, *supra* note 96, at 109. The 13 Task Force regions include (with the headquarters city for each listed in parentheses): New England (Boston); New York/New Jersey (New York City); Mid-Atlantic (Baltimore); Southeast (Atlanta); Gulf Coast (Houston); South Central (St. Louis); North Central (Chicago); Great Lakes (Detroit); Mountain (Denver); Los Angeles/Nevada (Los Angeles); Northwest (San Francisco); Southwest Border (San Diego); and Florida/Caribbean (Miami). *Id.*

110. *Id.*

111. OFFICE OF THE ATT'Y GEN., *supra* note 108, at 3.

112. The nine federal agencies are: the Bureau of Alcohol, Tobacco, and Firearms; the Drug Enforcement Administration; the Federal Bureau of Investigation; the Internal Revenue Service; the U.S. Attorneys' offices; the U.S. Coast Guard; the U.S. Customs Service; the U.S. Marshal's Service; and the Immigration and Naturalization Service. *Id.* at 2.

Review Board. The task forces are federal creations, funded and operated by the federal government.

A number of other federal initiatives also advance the federal agenda of promoting aggressive, multijurisdictional law enforcement for even low-level drug crimes. The United States Attorneys' offices nationwide direct and control each of the initiatives. Some of them are prosecutorial initiatives that involve the invocation of federal criminal laws against offenders of a particular type. One such initiative, created in April of 1991 and called "Project Triggerlock," has brought together federal, state, and local law enforcement to form task forces coordinated in each district by the United States Attorney. Under this project, federal officials identify and prosecute violent armed criminals, including those who use firearms while trafficking in drugs.¹¹³ The persons arrested by members of the task forces are prosecuted in federal court for possession of a weapon by a felon or possession of a weapon for an offense involving gang members.¹¹⁴ Federal prosecutors have been directed to request the maximum penalties allowed in these cases.¹¹⁵

What is not apparent is why the federal government considers it its business to prosecute persons who possess weapons and who may be felons or gang members. After all, gun possession cases are not violent crimes per se, only dangerous situations. In this sense, they are less serious than murder, armed robbery, or any other crime of violence. States have long prosecuted unlawful gun possession cases, and there is no evidence that they have been ineffective.

Other federal initiatives involve the creation of programs of the sort normally developed at the state or local level. The programs are initially funded and organized by the federal government, with the intent of pressuring states to follow suit and maintain the programs themselves. In each instance, the federal government has used its expansive powers to control the direction of criminal justice policy. For example, in the aftermath of the Los Angeles riots of 1992, much attention focused on a federal initiative known as the "Weed and Seed" program.¹¹⁶ The program is modeled after similar local efforts that aim to sweep through a neighborhood arresting drug

113. Letter from Attorney General William P. Barr to Federal Prosecutors (Jan. 31, 1992), reprinted in Fed. Sentencing Rep. 351 (May/June 1992).

114. *Id.*

115. *Id.*

116. See Michael deCourcy Hinds, *Experts Are Critical of Bush Anti-Drug Program*, N.Y. TIMES, July 20, 1992, at A12 (stating that Los Angeles was added to the "Weed and Seed" Program after riots).

dealers and then provide a broad range of social services to revitalize the area.¹¹⁷ Although the federal government has shown an interest in funding these programs in localities, the second phase of the program—the provision of social services—may lack support at the federal level. The federal initiative, including the social services component, is under the direction of a central federal office and the United States Attorneys.¹¹⁸ Because no proposals for social services have been forthcoming, critics complain that the law enforcement side of the program is over-emphasized.¹¹⁹

B. Encouraging States to Adopt Specific Laws and Policies Using Financial Carrots and Sticks

Because states and localities have not always shown an eagerness to submit to the control of federal agencies, the federal government has found it necessary to entice their cooperation.¹²⁰ The drug task forces encourage participation in two ways. First, they offer state and

117. See Guerra, *supra*, note 99, at 1155-60 (discussing community-oriented operations to rid neighborhoods of drug dealers and invest in long-term improvements in neighborhoods' quality of life).

118. According to the National Drug Control Strategy for 1994:

The Executive Office for Weed and Seed develops policy for Operation Weed and Seed and serves as the primary point of contact for information and decision making for the program nationally. The Office also supports the U.S. Attorneys, who are responsible for the locally-driven development and implementation of the Weed and Seed strategy in communities across the country. . . .

1994 BUDGET SUMMARY, *supra* note 96, at 118.

119. See, e.g., Dan Balz, *Pittsburgh's Hill District Gives Bush An Earful; Urban Plan Is Called All "Weed," No "Seed,"* WASH. POST, May 16, 1992, at A14 ("[T]he federal government has committed \$1.1 million for law enforcement but nothing for inner-city social programs."). Inner-city, anti-drug, and civil rights groups in Seattle recently wrote the Mayor, "urging him to 'send the money back' on the grounds that it will be used to fund street sweeps that disproportionately affect black people." Michael Isikoff, *Critics Question Bush's Urban Bottom Line*, WASH. POST, May 21, 1992, at A23. Even funds for academic work have been earmarked for law enforcement. For example, the Justice Department granted \$4 million to a New York University substance abuse initiative, but university officials threatened to return the grant because Justice Department officials were restricting their funding to narrowly defined "law enforcement-related" projects. *Id.*

In 1994, the NATIONAL DRUG CONTROL STRATEGY had "no new initiatives" to propose for 1995. 1994 BUDGET SUMMARY, *supra* note 96, at 118.

120. See, e.g., CHAIKEN ET AL., *supra* note 101 at 45 ("Federal resources also provided police administrators in state and local agencies with justifications to governing bodies in support of their continued participation in [federal] task forces.").

Of course, the other contributing factor in the states' and local agencies' willingness to work with the federal agencies is the common perception that the drug situation is worsening. *Id.* at 43. Often, however, such motivations may be insufficient to persuade high ranking officials of one agency to submit to the direction of another agency. Such interagency tensions have hindered cooperation in the past. *Id.* at 44.

local agents the opportunity to work with federal agents on equal terms, thereby elevating the status of state and local agents.¹²¹ Thus, state and local criminal justice personnel are less likely to resent the federal presence.

Second, the federal government recognizes that generous remuneration decreases power struggles. The federal anti-drug effort makes substantial sums available to state and local governments following the federal plan.¹²² If the President's 1995 budget request is fully funded, state and local governments will receive roughly \$811 million.¹²³

The timing of the drive for federalization has coincided with a period of economic hardship in most states.¹²⁴ By offering financial incentives, the federal government has effectively dismantled potential political opposition to its growing influence over state and local policy making. To the contrary, state and local agencies consider themselves the beneficiaries of federal largess. To maximize their intake of federal dollars, state and local agencies seek ways to become involved in federal investigations.¹²⁵

The expansion of federal influence also coincides with a self-perpetuating cycle of political rhetoric that has fed a public frenzy over drug crimes. In turn, public opinion has justified even stronger rhetoric and broader policies.¹²⁶ In this environment, any dissent from proposals for broader law enforcement efforts and more severe penalties is widely viewed as political suicide. Neither state nor federal leaders dare come forward with objections, even if the objections are based on federalism concerns rather than substantive

121. This status elevation can be both perceptual as well as real. For example, state and local law enforcement officers involved in the DEA State and Local Task Forces have been deputized as U.S. Marshals since the early 1970s. CHAIKEN ET AL., *supra* note 101, at 46. The designation confers the broad federal enforcement powers equal to those of a DEA agent. *Id.*

State prosecutors can also be designated as Special Deputy United States Attorneys to enable them to prosecute cases in both state and federal courts. *See, e.g.,* United States v. Raymer, 941 F.2d 1031, 1036 (10th Cir. 1991); United States v. Paiz, 905 F.2d 1014, 1024 (7th Cir. 1990); United States v. Safari, 849 F.2d 891, 893 (4th Cir.), *cert. denied*, 488 U.S. 945 (1988).

122. Money may not buy love, but in this case it surely buys tolerance.

123. 1994 BUDGET SUMMARY, *supra* note 96, at 185.

124. *See, e.g.,* Michael deCourcy Hinds, *States' Strained Finances and New Budgets Are Showing Recession's Toll*, N.Y. TIMES, July 28, 1992, at B6 (noting that states are in a worse fiscal condition due to the recession of the last several years than in any of the five previous national recessions).

125. Guerra, *supra* note 102, at 826-27.

126. *See* Kaminer, *supra* note 85, at 102.

policy concerns. Issues of federalism give way under the weight of public fear of crime and the states' needs for economic aid.

1. Funding Joint Task Forces

The most potent force drawing states and localities into the joint drug task forces is the availability of federal funds to employ nonfederal agents. For fiscal year 1995, the federal government potentially will allocate approximately \$541 million for joint federal-state task forces.¹²⁷

Federal task force funding also comes from the federal drug asset forfeiture program, which now returns forfeited assets directly to the seizing agencies.¹²⁸ In 1984, Congress provided for the direct transfer of forfeited drug-related assets to law enforcement in lieu of the previous requirement that such funds be transferred to the general fund of the United States Treasury.¹²⁹ The "equitable sharing" component of the federal asset forfeiture program allows state and local law enforcement to receive a share of assets obtained with their assistance.¹³⁰ Equitable sharing provides funds to agencies based on their level of participation in the investigation yielding the forfeited assets. In 1994, the federal government will share an estimated \$225 million with state and local law enforcement agencies.¹³¹ Since 1986,

127. See 1994 BUDGET SUMMARY, *supra* note 96, at 12-13 (listing FY 1995 budget requests for the Organized Crime Drug Enforcement Task Forces (\$369.9 million), and for High Intensity Drug Trafficking Areas (\$98.0 million)); *id.* at 88 (listing FY 1995 budget request for State and Local Task Forces, \$73.2 million).

128. In addition, the DEA assumes the costs of investigative overtime for nonfederal personnel, costs that could reach hundreds of thousands of dollars annually. CHAIKEN ET AL., *supra* note 101, at 45.

129. The Department of Justice Assets Forfeiture Fund was established in 1984 to collect the proceeds of forfeited assets. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 310, 98 Stat. 1837, 2052 (codified at 28 U.S.C. § 524(c)(1) (1988 & Supp. IV 1992)). In 1988, Congress amended the civil asset forfeiture statute to provide for this forfeited property to go directly to law enforcement:

Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—(A) retain the property for official use or . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property. . . .

21 U.S.C. § 881(e)(1)(A) (1988). The law had previously required transfer to "the general fund of the United States Treasury." *Id.* app. § 881.

130. The forfeiture laws also permit the United States government to share forfeited proceeds with foreign countries in exchange for international cooperation. See 21 U.S.C. § 881(e)(1)(E) (1988 & Supp. V 1993); see also 1992 ATT'Y GEN. ANN. REP. 46 [hereinafter 1992 ANN. REP.] (observing that the United States shared millions of dollars in forfeited assets with cooperating foreign governments).

131. See 1994 BUDGET SUMMARY, *supra* note 96, at 75 (listing 1994 estimate of equitable sharing payments).

state and local governments have received approximately \$1.6 billion through the asset forfeiture program alone.¹³²

2. Promoting Federal Policies Through Direct Funding

The federal government has also garnered state and local support for its drug initiatives by means of financial rewards and penalties. The government makes offers of generous direct financial support, and, on occasion, it threatens to remove funding for noncompliance. States adopting laws and programs modeled on federal counterparts receive grant money. National uniformity in drug programs advances the drive to establish a consolidated law enforcement establishment. Multijurisdictional task forces make little sense unless the various jurisdictions are pursuing the same goals in the same way.

Three federal agencies distributed \$1.3 billion to the states in the form of drug grant programs in fiscal year 1990.¹³³ This represented over half of the money received by states for drug control.¹³⁴ The grants distributed to state and local agencies fund such things as community groups,¹³⁵ local law enforcement,¹³⁶ drug education,¹³⁷ security measures for schools,¹³⁸ and drug treatment.¹³⁹

132. See *id.* at 77 (listing Equitable Sharing Payments from 1993 through the 1995 request); 1992 ANN. REP., *supra* note 130, at 46 (indicating graphically the total equitable sharing from 1986-92).

133. OFFICE OF NAT'L DRUG CONTROL POLICY WHITE PAPER, *supra* note 98, at 2. To qualify for the drug grants, states must submit applications to the three federal agencies. *Id.* at 15. The federal agencies then will decide whether to issue the grants and will monitor and evaluate the use of the funds to ensure compliance with federal law. *Id.* at 15, 29. The majority of drug grant money is devoted to drug prevention and rehabilitation, and states and localities ultimately have discretion to determine their own spending priorities. *Id.* at 4-5, 17.

134. *Id.* at 2.

135. The President has requested \$115 million for Fiscal Year 1995 for the Community Partnership Program, which provides funds for building and implementing local anti-drug strategies. 1994 BUDGET SUMMARY, *supra* note 96, at 6.

136. The Edward Byrne Memorial State and Local Law Enforcement Assistance Program distributed an estimated \$474.5 million in Fiscal Year 1994. *Id.* at 104.

137. The DFSCA Governor's Program provided approximately \$508 million for educational prevention activities in Fiscal Year 1993. 1992 NATIONAL DRUG CONTROL STRATEGY, *supra* note 96, at 37, 44.

138. The Drug Emergency Grant Program provided schools approximately \$60.3 million in Fiscal Year 1993. The federal government encourages the use of the funds for "security personnel, metal detectors and other security-related assets." *Id.* at 44.

139. Through the Alcohol, Drug Abuse and Mental Health Services (ADMS) Block Grants to the States and other categorical grants, the federal government provides funds to states on a matching basis for use in establishing drug treatment facilities. *Id.* at 58-61. In Fiscal Year 1992, \$379 million were made available through the ADMS Block Grant Program and \$248.5 million through categorical grants. *Id.* at 60-61. The Bureau of

Although the "block grant" programs give states some measure of flexibility in designing their own programs, the federal government strongly "encourages," and in some cases requires, that states adopt particular programs. In any case, even though the money is in block grant form, the federal authorities maintain considerable control over the general direction of state criminal justice policy in several respects. First, all of the money is distributed through federal agencies that monitor the uses to which states put the funds, and the agencies promulgate general guidelines for the types of programs qualifying for these funds.¹⁴⁰ In some instances, the federal government has begun to attach "strings" to these open-ended block grant programs, perhaps because states were not conforming voluntarily to the federal agenda. For example, the law enforcement grants have required the implementation of comprehensive drug testing within states' criminal justice systems.¹⁴¹ We can expect to see an increasing number of policies adopted as conditions for the receipt of federal funds.

Federal law also requires states to enact legislation mandating a six-month suspension of driving privileges for anyone convicted of a drug offense.¹⁴² Failure to do so by October 1, 1993, resulted in a five percent reduction of the state's allotment of federal highway funds.¹⁴³ The reduction will increase to ten percent in 1995.¹⁴⁴

Justice Assistance Block Grants also fund state and local programs for drug treatment of prisoners. *Id.* at 72.

140. See OFFICE OF NAT'L DRUG CONTROL POLICY WHITE PAPER, *supra* note 98, at 15-20 (describing the process by which federal grants are awarded to states).

141. 1992 NATIONAL DRUG CONTROL STRATEGY, *supra* note 96, at 72-73, 127.

142. The Highway Safety Act, 23 U.S.C. § 159 (Supp. IV 1992 & Supp. V 1993), includes these requirements. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 34, at 156.

143. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 34, at 156. The constitutionality of this provision could be challenged under the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Dole*, the Supreme Court upheld a provision that withheld five percent of a state's federal highway funds from any state permitting the purchase or public possession of any alcoholic beverage by a person younger than 21. The Court's decision listed four limitations on Congress's spending power: (1) the spending must serve " 'the general welfare,' " *id.* at 207 (quoting U.S. CONST. art I, § 8, cl. 1); (2) the condition must be " 'unambiguously' " stated, *id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); (3) the conditions must be related " 'to the federal interest in particular national projects or programs' " *id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); and (4) the condition must not conflict with other constitutional provisions. *Id.* at 208. The Court found that because uniform state laws governing the minimum drinking age further the federal interest in "safe interstate travel," *id.*, the minimum drinking age condition was sufficiently related to the federal highway funds to pass constitutional muster.

The Bush Administration complained that states used federal funds to replace, rather than supplement, state spending, and it consequently attempted to prohibit this "diversion" of funds.¹⁴⁵ Efforts to prevent states from diverting funds betray an intent to dictate state policy choices by preventing states from determining how best to allocate their scarce resources.

C. *Use of the Military*

The expansion of federal activity has further changed the nature of law enforcement by increasing reliance on the military to conduct domestic policing operations. Federal authorities, in coordinating a national and centralized effort, may call on any of the resources of the massive federal government, including the Department of Defense (DOD). Particularly since the end of the Cold War, the military and federal agencies involved in foreign intelligence have become available to take part in the anti-drug effort.¹⁴⁶

The *Dole* Court rejected a state sovereignty argument grounded in the Tenth Amendment. Since the state could adopt the "simple expedient" of rejecting the funds to pursue its own policy agenda, *id.* at 210 (quoting *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947)), the conditional spending provision in no way constituted federal coercion. The Court refused to accept a showing of widespread compliance with the condition as evidence of coercion. *Id.* at 211. The Court noted that, because the law provided for the withholding of only five percent of the funds for non-compliance, "the argument as to coercion is . . . more rhetoric than fact." *Id.*

Congress would have a much harder time showing that the requirement of a six-month suspension of driving privileges for anyone convicted of a drug offense is "related" to the federal interest associated with the highway funds. If it relies upon the same rationale—that the condition furthers "safe interstate travel"—it will be hard pressed to show how denial of driving privileges to a drug offender would further that interest. Moreover, the Court's position—that the denial of a small fraction of a state's highway funds is not coercive—weakens as the fraction of funds withheld rises. In this case, the amount withheld will increase to 10 percent in 1995. Presumably, Congress could continue to increase the percentage until, at some point, the condition would be coercive.

144. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 34, at 156.

145. 1992 NATIONAL DRUG CONTROL STRATEGY, *supra* note 96, at 61. The Bush Administration sought legislation prohibiting states from diverting state funds out of federally-funded programs. *Id.* The Clinton Administration has not mentioned this issue in its National Drug Control Strategy reports for either 1993 or 1994.

146. Eighty-five FBI agents working espionage cases have been reassigned to violent-crime cases since January 1992. Sharon Lafraniere, *Justice Increasing Funding for Prisons, Agents*, WASH. POST, Jan. 30, 1992, at A21. The Bureau already had transferred 300 of its foreign counterintelligence agents to violent crime cases. *Id.* In addition, the National Drug Intelligence Center has been formed to provide a national system of information for federal, state, and local law enforcement agencies. See 1992 NATIONAL DRUG CONTROL STRATEGY, *supra* note 96, at 115.

Despite legal restrictions on the use of the military for domestic policing activities such as arrests and searches and seizures of property,¹⁴⁷ the federal government involves the DOD in every other aspect of domestic drug control activity. Of greatest significance, the DOD has been designated the "lead agency for detecting and monitoring airborne and maritime smugglers."¹⁴⁸ The military's role in interdiction can be expected to increase because "counterdrug activities have been determined to be a high priority national security mission of the Department of Defense."¹⁴⁹

Furthermore, policymakers have proposed that the DOD redirect its sophisticated military intelligence operations, including the North American Air Defense Command (NORAD) and the DOD's Joint Task Forces, to track the movement of cocaine.¹⁵⁰ The DOD has been charged with coordinating and improving communications systems for multijurisdictional law enforcement operations.¹⁵¹ The DOD is also involved in a domestic marijuana eradication program.¹⁵² The "DEA Domestic Cannabis Eradication/Suppression Program coordinates efforts of Federal, state, and local police, and the National Guard" in eradicating marijuana cultivation.¹⁵³ The National Guard, under the command of state authorities, conducts air and ground reconnaissance, tracks suspect aircraft, and assists in other efforts, including marijuana eradication, cargo and container inspections, and transportation of criminal aliens and pretrial detainees.¹⁵⁴

The federalization of criminal law in the name of the war on drugs has done more than merely expand the federal criminal code. By making even the smallest drug possession case into a federal

147. The Posse Comitatus Act, 18 U.S.C. § 1385 (1988), prohibits the direct military participation in "purely domestic drug law enforcement—that is, making arrests, conducting searches, and seizing property." Leroy C. Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?*, *THE ARMY LAW.*, Dec. 1990, at 3, 4 (emphasis omitted). The Act was amended in 1981 to authorize the military to provide civilian law enforcement with intelligence, facilities, training and expert advice, and assistance in operating and maintaining equipment provided. *Id.* at 6. In 1988, Congress again amended the Act to expand further the military's role in extraterritorial operations. *Id.* at 7-8.

148. 1992 NATIONAL DRUG CONTROL STRATEGY, *supra* note 96, at 104.

149. *Id.*

150. *Id.* at 102.

151. *Id.* at 103.

152. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 34, at 28.

153. *Id.* at 28-29.

154. *Id.* at 30. The DOD also is conducting a program to provide appropriate training services to federal, state, and local agencies in establishing and operating rehabilitation-oriented training camps for first-time offenders. *Id.* at 40.

offense, Congress has given federal law enforcement virtually limitless jurisdiction. Congress backs this broadened enforcement power with the resources necessary to fight a full-scale war. These abundant resources support the military and the numerous federal agencies that have directed their attention to the drug war. Federal dollars also entice state and local law enforcement to join the federal drug enforcement effort. In the fight against drugs, therefore, the federal government is effectively the only government.

IV. THE LAW OF DOUBLE JEOPARDY AS APPLIED TO SUCCESSIVE FEDERAL-STATE PROSECUTIONS IN DRUG CASES

Theory and reality diverge in double jeopardy law as it relates to successive or dual prosecutions, especially in the context of multijurisdictional drug law enforcement. Since federal law and state codes now respond to the same drug offenses, every drug offense is likely to violate two penal codes.¹⁵⁵ For example, possession of cocaine is a crime in every state and under federal law.¹⁵⁶ This parallel coding raises the possibility of multiple prosecutions in all drug cases.

The purpose of the Fifth Amendment's Double Jeopardy Clause is to protect individuals from multiple prosecutions or punishments for the same offense.¹⁵⁷ As the United States Supreme Court has declared:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed

155. See *supra* notes 16-37 and accompanying text.

156. See Danny R. Veilleux, Annotation, *Minimum Quantity Of Drug Required To Support Claim That Defendant Is Guilty Of Criminal Possession of Drug Under State Law*, 4 A.L.R.5TH 1, 24-25 (1992). In fact, to promote uniformity between federal and state provisions, most statutes are modeled after federal law. See Veilleux, *supra*, at 24. The state statutes are modeled after the Uniform Controlled Substances Act, *id.* at 24, which, in turn, was modeled after the Federal Controlled Substances Act, 21 U.S.C. §§ 801-971 (1988, Supp. IV 1992, & Supp. V 1993), with the purpose of achieving uniformity between federal and state drug laws. Veilleux, *supra*, at 24.

157. The Double Jeopardy Clause clearly protects against three types of abuses of prosecutorial power: "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989); *accord Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on different grounds by Alabama v. Smith*, 490 U.S. 794 (1989). The common law recognized defenses for successive prosecutions for both previous acquittals and convictions. These were the plea of *autre fois acquit* (previously acquitted) and the plea of *autre fois convict* (previously convicted). See Murchison, *supra* note 9, at 385.

to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.¹⁵⁸

This guarantee applies equally to a successive prosecution following a conviction or an acquittal.¹⁵⁹ In successive prosecutions, "the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'" ¹⁶⁰ Yet, with only rare exceptions, the rule of double jeopardy permits the federal government and a state government to prosecute an individual successively for the same offense.

The law may even permit federal and state officials to prosecute an individual simultaneously for the same offense.¹⁶¹ Besides the concerns about "embarrassment, expense and ordeal"¹⁶² that attend successive prosecutions, dual prosecutions impose other substantial hardships on defendants. When an individual faces indictments in two courts at the same time, her defense attorney must negotiate the case with two prosecutors. The process of trilateral negotiation is, by definition, more complex. Unlike the ordinary single indictment case, the defense attorney handling dual prosecutions effectively cannot enter into plea bargain negotiations unless both prosecutors will agree to terms acceptable to the defendant and, usually, unless they agree to concurrent sentences as well.¹⁶³ If a defendant were instead to

158. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (citing *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

159. *See supra* note 157.

160. *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)).

161. Nothing in the reasoning of the dual sovereignty doctrine requires that one sovereign must wait until the other has completed its prosecution before initiating similar charges. *See infra* notes 201-37 and accompanying text.

162. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

163. Sound defense strategy calls for simultaneous plea bargaining with both prosecutors, or if that is not possible, it may be necessary to request trials in both jurisdictions. For example, a defendant facing maximum sentences of 20 and 10 years in state and federal courts, respectively, might agree to plead guilty in both courts in exchange for a sentence of 15 years on the state charge and 10 years or less on the federal charge, but only if the sentences will be served concurrently. If either of the prosecutors will not agree to such a bargain, the defendant may be better off going to trial on both charges, depending, of course, on the probabilities of conviction which will vary from case to case.

Unfortunately, even if the prosecutors do agree that sentences should run concurrently, the ultimate decision rests not with the prosecutors, but with the courts and the Federal Bureau of Prisons. Generally, the jurisdiction that has custody of the inmate at

plead guilty in one jurisdiction and go to trial in the other, the conviction in the second jurisdiction might then result in a sentence applied consecutively to the first sentence.¹⁶⁴ Thus, the defendant has a strong incentive to plead guilty in both cases, or in neither case.

The likelihood, moreover, that the defense can convince two prosecutors to agree to terms acceptable to the defendant is obviously lower than when the defense negotiates with only one prosecutor. Assuming plea negotiations are not successful, a defendant may feel "squeezed" by the two indictments so that the only viable course is to demand jury trials in both cases. Naturally, litigating a jury trial involves more expense, time, and embarrassment than entering a guilty plea. Trial courts, furthermore, may not understand the pressures causing a defendant to demand a jury trial, and may, therefore, impose harsher punishments.¹⁶⁵ The defendant who goes to trial, moreover, must forego the opportunity to bargain for a guilty plea on a lesser charge, increasing the likelihood of a harsher sentence. In determinate sentencing jurisdictions, the law may require a minimum sentence for the conviction of a charge greater than that applicable to a lesser charge.¹⁶⁶ Had the defendant negotiated for a reduced charge, the court may have had greater discretion to impose a lower sentence. If the defendant does negotiate a guilty

the time of sentencing can determine whether sentences will be served concurrently or consecutively. In federal courts, the issue is now governed by the Federal Sentencing Guidelines, § 5G1.3, which limits the courts' discretion. Thus, in order to ensure that a defendant facing charges in two jurisdictions receives the sentence he or she bargained for, the prosecutors must receive assurances from the courts that they will agree to the agreed disposition and that the sentence does not violate the mandate of the Sentencing Guidelines.

Rather than go through this messy process, prosecutors will often agree that one of them will dismiss the pending charges with the understanding that the other jurisdiction will impose an adequate sentence.

164. See generally Annotation, *Sentences by Different Courts as Concurrent*, 57 A.L.R.2d 1410 (1958) and Later Case Service for 57 A.L.R.2d 1410, at 457 (1994) (discussing circumstances in which sentences are imposed concurrently and consecutively).

165. It is common practice for both federal and state courts to impose more lenient sentences for defendants who plead guilty. While this practice is rarely documented in writing, the Federal Sentencing Commission, in drafting the Federal Sentencing Guidelines, sought to establish a system that reflected its use. The Guidelines provide a discount which amounts to approximately 20 to 30% for what it calls "acceptance of responsibility." See FEDERAL SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 1994 EDITION § 3E1.1 (1993); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28-29 (1988).

166. This is true in federal drug cases, which carry stiff mandatory minimum sentences. See *supra* notes 33-36 and accompanying text.

plea in the second case, then he waives any double jeopardy claim.¹⁶⁷ This fact discourages defendants from pleading guilty.

The inherent unfairness to defendants and the possibly ineffective use of resources involved in successive and dual prosecutions have not gone unnoticed by the Supreme Court, the Justice Department, or state legislatures. Both federal prosecutors and the majority of state prosecutors face general prohibitions against multiple prosecutions; however, the exceptions to these prohibitions are so broad that multiple prosecutions can go forward in almost any case.

At the federal level, the Attorney General instituted in 1959 what came to be known as the "*Petite* policy."¹⁶⁸ The rule, published in the United States Attorneys' Manual, prohibits dual or successive prosecutions "based on substantially the same act, acts or transaction" unless there exists a "compelling federal interest."¹⁶⁹ The policy statement explains the purpose of the policy: "The policy is intended to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts."¹⁷⁰ The policy discourages the "unnecessary expenditure of federal resources" from dual prosecutions and suggests that "federal prosecutors should . . . coordinate their activities with their state counterparts."¹⁷¹

The *Petite* policy provides explicit guidance for federal prosecutors to use to determine whether the policy applies. The policy identifies a number of possible circumstances that would qualify as "compelling federal interests," thereby justifying dual or successive prosecutions.¹⁷² For example, one "compelling federal interest" is the pursuit of an enhanced sentence in a case in which the state offense carries a maximum penalty substantially below that applicable to the federal offense.¹⁷³ The policy also states that the vindication

167. See *United States v. Broce*, 488 U.S. 563, 574-75 (1989); see also *In re Coulter*, 860 P.2d 51, 53-54 (Kan. Ct. App. 1993) (holding that plea of *nolo contendere* may constitute a waiver of the right to claim a double jeopardy violation).

168. The policy is named after a Supreme Court case in which the Court acknowledged the policy. See *Petite v. United States*, 361 U.S. 529, 530-31 (1960) (*per curiam*).

169. United States Attorneys' Manual § 9-2.142(A) (1992).

170. *Id.* § 9-2.142(A).

171. *Id.* § 9-2.142(A)(1).

172. *Id.* § 9-2.142(A)(3).

173. *Id.* Other factors that may call for subsequent prosecution include:

a. Infection of the proceeding by incompetence, corruption, intimidation, or undue influence (State/Prior Federal);

of "prosecutorial interests" is greatest in "priority areas of the Department."¹⁷⁴ Priority areas include organized crime and firearms cases.¹⁷⁵ Presumably, drug cases fall within the category of "organized crime" cases.¹⁷⁶ Thus, in any drug case in which the prosecutor can obtain greater penalties in federal court than are available in state court, the prohibition against multiple prosecutions may not apply. Because Congress has vigorously increased federal penalties for drug offenses, it is likely that a state sentence will be more lenient.¹⁷⁷ Nonetheless, even if a fair reading of the *Petite* policy should prevent a successive prosecution, the federal prosecutor's failure to abide by the guideline will not give a defendant grounds for appeal.¹⁷⁸

The vast majority of the states have adopted statutes based on either the Uniform Narcotic Drug Act¹⁷⁹ or the Uniform Controlled Substances Act.¹⁸⁰ These state statutes, like the *Petite* policy, are intended to prevent abuses of multiple prosecutions and avoid the unnecessary use of state resources to prosecute cases already adequately prosecuted in federal courts. The language of these

b. Court or jury nullification involving an important federal interest, in blatant disregard of the evidence (State/Prior Federal);

c. The failure of the state to prove an element of the state offense which is not an element of the federal offense (State);

d. The unavailability of significant evidence in the proceeding either because it was not timely discovered or because it was suppressed on an erroneous view of the law (State/Prior Federal);

e. Fairness to other defendants or significant resource considerations favor separate prosecutions (Federal); or

f. The original indictment was held insufficient as a matter of law or there was a fatal variance between the offenses charged and the proof at trial (Federal).

Id.

174. *Id.* at n.8.

175. *Id.*

176. See *supra* notes 93-94 and accompanying text.

177. See *supra* notes 33-36 and accompanying text.

178. Judging from the number of recent cases in which the *Petite* policy was violated, the policy appears to be honored more often in the breach. See, e.g., *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991); *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990); *United States v. Gourley*, 835 F.2d 249, 251 (10th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); *United States v. Alston*, 609 F.2d 531, 536-37 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); *United States v. Hayes*, 589 F.2d 811, 818 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); *United States v. Padilla*, 589 F.2d 481, 484-85 (10th Cir. 1978); *United States v. 1606 Butterfield Road*, 786 F. Supp. 1497, 1506 (N.D. Iowa 1991); *United States v. Byars*, 762 F. Supp. 1235, 1240 n.6 (E.D. Va. 1991).

179. UNIF. NARCOTIC DRUG ACT § 21, 9B U.L.A. 284 (1958).

180. UNIF. CONTROLLED SUBSTANCES ACT § 418, 9 U.L.A. 596 (1990).

statutes (and it is virtually identical in the forty-eight states that have them) creates exceptions so broad that prosecutors have the ability to re prosecute in practically all cases.¹⁸¹

The following sections examine the two grounds of decision relating to double jeopardy claims in successive and dual federal-state prosecutions: the *Blockburger* "same offense" test and the doctrine of "dual sovereignty." Through the operation of these two legal doctrines, prosecutors have the theoretical ability to bring two prosecutions for every drug offense¹⁸²—an ability they increasingly exercise.

A. *Double Jeopardy Only Applies to Successive Prosecutions for the "Same Offense"*

If two jurisdictions choose to prosecute an individual for two different offenses, the double jeopardy guarantee does not come into play, because double jeopardy applies only to multiple prosecutions for the "same offense." The courts have defined "same offense," however, to permit a second prosecution for conduct based on the same criminal act or transaction. In effect, offenses that seem the

181. The New Jersey statute provides a good example:

When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States, a prosecution in the District Court of the United States is a bar to a subsequent prosecution in this State under the following circumstances:

a. The first prosecution resulted in an acquittal or in a conviction, or in an improper termination as defined in section 2C:1-9 and the subsequent prosecution is based on the same conduct, unless (1) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (2) the offense for which the defendant is subsequently prosecuted is intended to prevent a substantially more serious harm or evil than the offense of which he was formerly convicted or acquitted or (3) the second offense was not consummated when the former trial began. . . .

N.J. STAT. ANN. § 2C:1-11 (West 1982). Statutes such as this allow successive prosecutions for the same offense if the state courts find that the two statutes are intended to prevent a substantially different or more serious harm or evil. *See, e.g.,* *People v. Esch*, 786 P.2d 462, 465-66 (Colo. Ct. App. 1989); *State v. Ashrue*, 601 A.2d 265, 266-67 (N.J. Super. Ct. App. Div. 1991); *State v. King*, 522 A.2d 455, 459 (N.J. Super. Ct. App. Div. 1987); *People v. Cooper*, 541 N.Y.S.2d 713, 714 (N.Y. Sup. Ct. 1989). Other statutes, such as the Georgia statute, omit the exception for offenses intended to prevent a "substantially more serious" or "substantially different" harm or evil. GA. CODE ANN. § 16-1-8(c) (1992). The State of Michigan bars successive prosecutions as a matter of state constitutional law. *See* *People v. Bero*, 425 N.W.2d 138, 144 (Mich. Ct. App. 1988).

182. Prosecutors lack the resources, of course, to engage in multiple prosecutions in most cases.

same are said to be different. Even if a defendant only sells one quantity of drugs to one person, the courts may find that the statutes differ enough that the two jurisdictions actually are not prosecuting the "same offense." This, of course, comes as a surprise to defendants who assume that one transaction is only one crime.

Of course, federal appellate courts reviewing convictions resulting from state prosecutions need not address this issue. The dual sovereignty doctrine permits successive prosecutions for the same offense.¹⁸³ Most states, however, have enacted laws that bar successive prosecutions for offenses already prosecuted in federal court.¹⁸⁴ Thus, when state prosecutions follow federal prosecutions, the state courts must determine whether the offenses are the same.¹⁸⁵ State courts have looked to Supreme Court case law for guidance in determining whether two offenses are the "same offense."

The Supreme Court set forth an approach for interpreting the phrase "same offense" in *Blockburger v. United States*.¹⁸⁶ The *Blockburger* decision states that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."¹⁸⁷ To satisfy this test, prosecutors were able to fashion two indictments based on the same act or transaction, each charging an offense requiring proof of at least one element not required in the other.¹⁸⁸ The double jeopardy prohibition was easily subverted.

183. See *infra* notes 202-39 and accompanying text.

184. See *supra* notes 181-82 and accompanying text.

185. Federal courts reviewing successive prosecutions by the federal government following prosecution by one of its territories or the District of Columbia must also address this issue, as the dual sovereignty doctrine does not apply. See, e.g., *United States v. Sanchez*, 992 F.2d 1143, 1153-58 (11th Cir.) (permitting federal prosecution following acquittal in Puerto Rico), *modified*, 3 F.3d 366 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994); *United States v. Mills*, 964 F.2d 1186, 1193 (D.C. Cir.) (en banc) (prohibiting multiple prosecutions in District of Columbia and federal court), *cert. denied*, 113 S. Ct. 471 (1992); *United States v. Alston*, 609 F.2d 531, 535 (D.C. Cir. 1979) (same), *cert. denied*, 445 U.S. 918 (1980); *Government of Virgin Islands v. Foster*, 734 F. Supp. 210, 212-13 (D.V.I.) (prohibiting multiple prosecutions in Virgin Islands and federal court), *aff'd*, 922 F.2d 831 (3d Cir. 1990). *But see* *United States v. Lopez Andino*, 831 F.2d 1164, 1167-68 (1st Cir. 1987) (permitting multiple prosecutions in federal court and Puerto Rico), *cert. denied*, 486 U.S. 1034 (1988).

186. 284 U.S. 299 (1932).

187. *Id.* at 304 (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)); see also *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977) (holding that the Double Jeopardy Clause bars prosecution for a lesser included offense and a greater offense).

188. See *supra* notes 181-82 and accompanying text.

The Court's decision in *Grady v. Corbin*¹⁸⁹ eliminated this avenue to multiple prosecutions, but the *Grady* rule was short-lived. In *Grady*, the Court created a second double jeopardy requirement: even if the offenses satisfied the *Blockburger* test, the Double Jeopardy Clause also barred any subsequent prosecution in which the charge required proof of "conduct that constitutes an offense for which the defendant has already been prosecuted."¹⁹⁰ This test, in turn, received criticism for its expansive breadth.¹⁹¹

In *United States v. Dixon*¹⁹² the Court abandoned an analysis of the actual conduct involved and returned to *Blockburger*'s technical analysis of the elements of the statutes charged. Writing for the majority, Justice Scalia stated that, unlike the *Blockburger* test, the *Grady* "same conduct" rule "lacks constitutional roots"¹⁹³ and is "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."¹⁹⁴

By returning to the *Blockburger* test, the Court effectively eliminated double jeopardy claims in many cases in which a common-sense understanding of the phrase "same offense" might dictate the opposite result. For example, a conspiracy charge based on the same substantive offense as that charged in the other prosecution is one

189. 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

190. *Id.* at 521.

191. See generally Philip S. Khinda, *Undesired Results Under Halper and Grady: Double Jeopardy Bars on Criminal RICO Actions Against Civilly-Sanctioned Defendants*, 25 COLUM. J.L. & SOC. PROBS. 117, 120 (1991) (criticizing the *Grady* approach and suggesting it results in chilling impracticalities for law enforcement authorities); George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1991) (proposing to narrow *Grady*'s "same culpability" test); Ramona Lennea McGee, Note, *Criminal RICO and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This RICO's Achilles' Heel?*, 77 CORNELL L. REV. 687 (1992) (analyzing the *Grady* test as applied to RICO).

192. 113 S. Ct. 2849 (1993).

193. *Id.* at 2860.

194. *Id.* The Court took issue with Justice Souter's dissenting argument that a number of precedents supported the *Grady* rule. The Court then stated that the rule has also "proved unstable in application," citing a 1992 case in which the Court was "forced to recognize a large exception" to the *Grady* rule. *Id.* at 2863. The case, *United States v. Felix*, 112 S. Ct. 1377 (1992), permitted prosecution for conspiracy to manufacture, possess, and distribute methamphetamine following a previous conviction for attempt to manufacture the same substance. *Id.* at 1380. The *Felix* Court justified this result by finding that "longstanding authority" permitted prosecution for both conspiracy and the substantive predicate offense. *Id.* at 1384-85. The majority in *Dixon* found this "exception" to be so large as to "[give] cause for concern that the rule was not an accurate expression of the law." *Dixon*, 113 S. Ct. at 2863.

simple way to circumvent the double jeopardy rule.¹⁹⁵ Because drug operations inevitably involve more than one person, it will almost always be possible to charge both a conspiracy to commit the drug crime (which merely requires proof of an "agreement") and to charge the substantive drug offense itself.¹⁹⁶ Similarly, federal prosecutors can charge a defendant with a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) requiring proof of two predicate acts of racketeering.¹⁹⁷ The state can then prosecute for the same conduct as that alleged as a RICO predicate act. State courts have allowed multiple prosecutions for these offenses on the grounds that they are not the same offense.¹⁹⁸

Some courts have even relied on federal jurisdictional elements—such as the requirement that a firearm "affected" interstate commerce—as evidence that the two statutes require proof of different elements.¹⁹⁹ Thus, the "same offense" standard of *Blockburger*, reaffirmed in *Dixon*, can be easily manipulated by a prosecutor's selection of charges to prosecute the same criminal transaction twice in every case.

In those instances in which the offenses are found to be the same—due perhaps to an oversight by the second prosecutor—state statutes may, in the rare case, bar a state prosecution following a federal prosecution unless some other exception applies.²⁰⁰ On the

195. See *Callanan v. United States*, 364 U.S. 587, 597 (1961) (holding that conspiracy is not same offense as substantive offense). An attempted crime and the conspiracy to commit the same crime are also different offenses for double jeopardy purposes. *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975); *State v. Verive*, 627 P.2d 721, 733 (Ariz. Ct. App. 1981).

196. Most state statutes barring multiple prosecutions employ the same test as that set forth in *Blockburger* to determine if the two offenses are the same. State courts applying these statutes generally find that conspiracy and the substantive offense are two separate offenses. See, e.g., *Brown v. State*, 354 S.E.2d 3, 4 (Ga. Ct. App. 1987); *Commonwealth v. Ramirez*, 533 A.2d 116, 120 (Pa. Super. 1987), *appeal denied sub nom.*, *Commonwealth v. Valentin*, 548 A.2d 255 (Pa. 1988).

197. 18 U.S.C. § 1962 (1988).

198. See, e.g., *Sheeran v. State*, 526 A.2d 886, 897-98 (Del. 1987); *State v. Cooper*, 510 A.2d 681, 690 (N.J. Super. Ct. App. Div. 1986); *People v. Cooper*, 541 N.Y.S.2d 713, 714 (Sup. Ct. 1989).

199. See, e.g., *United States v. Edwards*, 669 F. Supp. 168, 170 (S.D. Ohio 1987); *People v. Covelli*, 540 N.E.2d 569, 575 (Ill. App. Ct. 1989).

200. Infrequently, state courts have applied the statutory bar against successive prosecutions in cases in which the courts find the state offenses charged are the same as the federal offenses. See, e.g., *Schmidt ex rel. McNell v. Roberts*, 548 N.E.2d 1284, 1286-89 (N.Y. 1989); *Kaplan v. Ritter*, 519 N.E.2d 802, 805 (N.Y. 1987); *People v. Helmsley*, 566 N.Y.S.2d 223, 223-27 (N.Y. App. Div. 1991); *Mason v. Rothwax*, 548 N.Y.S.2d 926, 929-33 (N.Y. App. Div. 1989); *Commonwealth v. Traitz*, 597 A.2d 1129, 1130-34 (Pa. 1991);

other hand, federal courts may turn to the “dual sovereignty” doctrine, which simply permits a second prosecution in all cases.

B. The Dual Sovereignty Doctrine

A finding that the federal and state charges are the “same offense” does not mean that one of the two prosecutions will be barred as a matter of constitutional law. The Court has developed a “dual sovereignty” doctrine allowing successive prosecutions and punishments by the federal and state governments even in cases in which the criminal laws require proof of exactly the same elements. The Supreme Court has steadfastly refused to reverse the long-standing and much criticized²⁰¹ “dual sovereignty” doctrine. This doctrine places the vindication of each independent sovereign’s interests over the right of the individual to be protected from multiple prosecutions for the same offense. Notwithstanding a showing that extensive federal and state cooperation foreclose the argument that each sovereign is pursuing its separate interests, the Court has allowed successive prosecutions.

1. The Staying Power of *United States v. Lanza*

The Supreme Court established the dual sovereignty exception to the Double Jeopardy Clause in the 1922 prohibition case of *United States v. Lanza*.²⁰² The case involved the prosecution of several individuals on charges relating to the manufacture of intoxicating liquor. The State of Washington already had prosecuted and punished for the same offenses when the United States Attorney brought charges.

The defendants challenged the federal prosecutions on the ground that they violated the Double Jeopardy Clause.²⁰³ At this point in time, the Double Jeopardy Clause had not yet been applied

Commonwealth v. Savage, 566 A.2d 272, 273-81 (Pa. Super. Ct. 1989). For a discussion of other exceptions to the statutory bars, see *supra* note 181.

201. For a list of articles critical of the dual sovereignty doctrine, see *supra* note 9.

202. 260 U.S. 377 (1922). That *Lanza* involved a violation of the prohibition laws is interesting for its parallel to the current use of successive prosecutions in narcotics cases. One author has suggested that the Supreme Court’s decision in *Lanza* may have reflected the Court’s tendency to favor law enforcement and may also have been influenced by strong popular support for prohibition. Murchison, *supra* note 9, at 398. One might say the same about the Supreme Court’s current support of law enforcement initiatives over individual liberties, and public support of the “drug war” appears to have grown stronger in the last decade.

203. *Lanza*, 260 U.S. at 379.

to the states through the Due Process Clause of the Fourteenth Amendment. The defendants therefore made their case by reference to the second section of the Eighteenth Amendment,²⁰⁴ which stated: "The Congress and the several States shall have concurrent power to enforce [prohibition] by appropriate legislation."²⁰⁵ They argued that both laws were passed pursuant to the same authority—the Eighteenth Amendment—and that the Double Jeopardy Clause therefore applied.²⁰⁶ They claimed, in short, that allowing successive federal and state prosecutions would constitute double punishment for the same act.

Chief Justice Taft, writing for the majority, approved successive prosecutions by the federal government and a state government in no uncertain terms. The decision affirmed the power of each sovereign to enact its own laws—a power that existed prior to the adoption of the Eighteenth Amendment. The Court wrote: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory."²⁰⁷ Thus, the Court reasoned, it follows that each sovereign may punish for violations of its laws.²⁰⁸ The Court then stated that the Fifth Amendment only applied to successive prosecutions by the federal government, since the first eight amendments of the Bill of Rights did not apply to the states.²⁰⁹ By a feat of semantic magic, the Court concluded that the defendants were not punished twice for one offense, but that they had committed "two different offenses by the same act."²¹⁰

The decision cited dicta of nineteenth century cases which seemed to approve successive federal and state prosecutions. Oddly, the Court cited *Fox v. Ohio*:

It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of

204. *Id.*

205. U.S. CONST. amend. XVIII, § 2, *repealed by* U.S. CONST. amend. XXI.

206. *Lanza*, 260 U.S. at 379-80.

207. *Id.* at 382.

208. *Id.*

209. *Id.*

210. *Id.*

peculiar enormity, or where the public safety demanded extraordinary rigor.²¹¹

This is odd, of course, because the *Lanza* case itself involved successive prosecutions for the same crime—the manufacture of intoxicating liquors. One possible explanation for the citation of *Fox* is that the Court considered the manufacture of liquor a crime of “peculiar enormity” justifying double punishment.

In dicta, the decision also suggests a policy rationale for the rule. The Court posited that a contrary rule, barring a federal prosecution after a state prosecution, would create a “race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution” in situations in which the state penalties were nominal fines.²¹² This rationale often would be repeated in the long line of cases reaffirming the *Lanza* decision.

Following *Lanza*, the Supreme Court has passed upon several opportunities to revisit the issue of dual sovereignty in the double jeopardy context. Over time, the reasons for overturning *Lanza* have become more compelling,²¹³ and criticism of the rule has intensified.²¹⁴ Yet the Court not only has reaffirmed the dual sovereignty exception; it has expanded it.²¹⁵ The Court rejected intense federal-state cooperation as an exception to the dual sovereignty doctrine in *Bartkus v. Illinois*.²¹⁶

211. *Id.* at 383 (citing *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847)). For a discussion of earlier precedents contradicting the *Lanza* rule, see Murchison, *supra* note 9, at 398.

212. *Lanza*, 260 U.S. at 385.

213. Part of the Court's rationale in the dual sovereignty cases of *Lanza* and *Bartkus* was that the Fifth Amendment's Double Jeopardy Clause did not apply to the states. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959); *Lanza*, 260 U.S. at 382. The Supreme Court's reversal in *Benton v. Maryland*, 395 U.S. 784, 794 (1969), made the Double Jeopardy Clause applicable to the states through the Fourteenth Amendment and undercut this rationale.

Two other decisions in which the Court rejected dual sovereignty/federalism arguments in other contexts also seemed to call for a reexamination of the *Lanza* and *Bartkus* decisions. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964) (holding that state witness granted immunity from prosecution under state law may not be compelled to give testimony that may incriminate him under federal law); *Elkins v. United States*, 364 U.S. 206, 208 (1960) (rejecting “silver platter” doctrine which allowed admission of evidence in federal court that was illegally obtained by state officials); see also *Braun*, *supra* note 9, at 41-51 (discussing legal developments following *Bartkus* and *Abbate* that undermine the rationales of the these two decisions).

214. See *supra* note 9.

215. See *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (permitting successive prosecutions by two states for same conduct); *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (permitting successive prosecutions by Navajo Tribal Court and federal court).

216. 359 U.S. 121 (1959).

2. *Bartkus v. Illinois*: Rejection of Federal Control of State Prosecutions as an Exception to Dual Sovereignty Doctrine

On several occasions the Supreme Court has acknowledged the multijurisdictional nature of law enforcement agencies working together in the spirit of "cooperative federalism."²¹⁷ This cooperation is most organized and structured in the area of narcotics enforcement.²¹⁸ The Court has recognized the expansion of federal anti-drug legislation mirroring traditional state criminal laws.²¹⁹

Yet the Supreme Court continues to adhere to its reasoning in the 1959 case of *Bartkus v. Illinois*.²²⁰ *Bartkus* represents a further extension of the dual sovereignty doctrine because the Court for the first time approved a second prosecution following an acquittal.²²¹ The facts also make a compelling case, for the decision allowed one government, after failing to obtain a conviction, to "walk across the street" to the prosecuting authorities of the other government, hand them a fully investigated case, and actively participate in a second attempt at conviction.

The majority opinion and Justice Brennan's dissenting opinion paint very different pictures of the cooperation between the federal and state officials. The majority minimized the significance of this cooperation, and stated that the two prosecutions were "separately conducted."²²² The Court noted that the FBI agent who had investigated the case gave the state prosecutors all the evidence he had gathered, including some evidence gathered after the acquittal in federal court. The "only other connection between the two trials," the Court wrote, "is to be found in a suggestion that the federal sentencing of the accomplices who testified against [Bartkus] in both

217. See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-56 (1964) (referring to "age of 'cooperative federalism,' where the federal and state Governments are waging a united front against many types of criminal activity"); *Elkins v. United States*, 364 U.S. 206, 211 (1960) (noting the "commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity"); *Bartkus v. Illinois*, 359 U.S. 121, 122-23 (1959) (discussing cooperation between federal and state prosecutors, "particularly in the narcotics cases").

218. See *supra* Part II.

219. See *supra* Part I.A.

220. 359 U.S. 121. The Court decided another successive prosecution case on the same day. See *Abbate v. United States*, 359 U.S. 187, 189-90 (1959).

221. For a discussion of the issues surrounding a successive prosecution following an acquittal, see Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, *supra* note 9.

222. *Bartkus*, 359 U.S. at 122.

trials was purposely continued by the federal court until after they testified in the state trial."²²³

Justice Brennan dissented, not on the ground that the dual sovereignty exception violated any constitutional principle,²²⁴ but because "the extent of participation of the federal authorities [in the case] constituted [the] state prosecution actually a second federal prosecution of Bartkus."²²⁵ Such a second federal prosecution clearly would violate the Double Jeopardy Clause.

The dissenting opinion depicted the federal authorities as having obtained the state prosecutor's approval to control the direction of the state prosecution.²²⁶ Justice Brennan outlined the role of the federal authorities. At the federal trial, two alleged confederates testified against Bartkus.²²⁷ The defense presented alibi witnesses.²²⁸ The jury acquitted Bartkus, apparently accepting the alibi defense and rejecting the testimony of the confederates.²²⁹ Unhappy with the outcome of the trial, the federal authorities "solicited the state indictment, arranged to assure the attendance of key witnesses, unearthed additional evidence to discredit Bartkus and one of his alibi witnesses, and in general prepared and guided the state prosecution."²³⁰ The State conceded in oral argument before the

223. *Id.* at 122-23.

224. Justice Brennan did not reject the dual sovereignty exception. Indeed, he wrote the majority opinion in *Abbate v. United States*, issued the same term as *Bartkus*, in which the Court upheld a federal prosecution following a state conviction for the same conduct. *Abbate v. United States*, 359 U.S. 187, 189-90 (1959).

225. *Bartkus*, 359 U.S. at 165-66 (Brennan, J., dissenting). Chief Justice Warren and Justice Douglas joined in Justice Brennan's dissenting opinion.

226. *Id.* at 165 (Brennan, J., dissenting).

227. *Id.* at 164-65 (Brennan, J., dissenting).

228. *Id.* at 165 (Brennan, J., dissenting).

229. *Id.* (Brennan, J., dissenting).

230. *Id.* (Brennan, J., dissenting). The dissent disclosed the particulars of the federal involvement. First, the federal court released the two confederates on bail pending the state trial and postponed their sentencing on the federal convictions until after they testified against Bartkus at the state trial. *Id.* at 166 (Brennan, J., dissenting). Second, the FBI agent who had participated in the investigation for the federal trial set out to gather additional evidence to be used at the state trial. *Id.* (Brennan, J., dissenting). The agent admitted that he "was securing [information] for the federal government,' although what he gathered had 'gone to the state authorities.'" *Id.* (Brennan, J., dissenting). He located an inmate at the jail where Bartkus awaited trial who testified to a jailhouse confession by Bartkus. *Id.* at 166-67 (Brennan, J., dissenting). The dissent noted that the agent did not arrange for this witness to meet with the state attorney prior to the day of the trial, a fact "indicative of the attitude of the federal officials that this was actually a federal prosecution." *Id.* at 167 (Brennan, J., dissenting). A federal court also postponed this witness's sentencing until after he testified at the state trial. *Id.* (Brennan, J., dissenting).

Supreme Court " 'that the federal officers did instigate and guide this state prosecution' and 'actually prepared this case.' "231 Therefore, Justice Brennan argued that the state trial should be viewed as a second federal trial, which is prohibited by the Double Jeopardy Clause.²³²

The dissent examined the extent of cooperation to show that the second trial was, in essence, a federal proceeding.²³³ Neither the dissent nor the author of this Article intends to criticize the authorities for working together. Multijurisdictional law enforcement offers many advantages over parallel, uncoordinated efforts and should be encouraged. In *Bartkus*, however, the dissenters believed that the extent of federal participation rendered the state trial a sham for a second federal prosecution;²³⁴ it is the unfairness to the individual who was prosecuted twice by the same authorities for the same offense that is criticized.²³⁵ As Justice Black stated in his dissenting opinion in *Abbate v. United States*,²³⁶ "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."²³⁷

The federal-state cooperation in organized crime and drug cases differs qualitatively from that described in *Bartkus*. In *Bartkus*, the federal authorities had investigated the case without involvement by the state, and, after acquittal, proceeded to enlist the State's prosecutors to retry *Bartkus* with close federal supervision and participation.²³⁸ Contemporary federal-state cooperation in drug cases involves joint investigative task forces, direct and indirect federal funding of state and local law enforcement, and institutionalized policies on the allocation of federal and state prosecutorial resources.

The agent also uncovered impeachment evidence during an interview with one of the defendant's alibi witnesses. *Id.* (Brennan, J., dissenting). He disclosed this evidence in his testimony as a rebuttal witness for the state. *Id.* (Brennan, J., dissenting). This FBI agent was allowed, over defense objection, to remain in the courtroom to assist in the prosecution throughout the trial, although other witnesses were excluded. *Id.* (Brennan, J., dissenting).

231. *Id.* at 165 (Brennan, J., dissenting).

232. *Id.* at 165-66 (Brennan, J., dissenting).

233. *Id.* at 166-67 (Brennan, J., dissenting).

234. *Id.* at 165-66 (Brennan, J., dissenting).

235. *Id.* at 168 (Brennan, J., dissenting).

236. 359 U.S. 187 (1959).

237. *Id.* at 203 (Black, J., dissenting).

238. *Bartkus*, 359 U.S. at 165 (Brennan, J., dissenting).

In either case, the dual sovereignty analysis is the same. Justice Brennan argued that the state trial was de facto a federal trial because the federal authorities had controlled so much of the second prosecution.²³⁹ The multijurisdictional paradigm of drug law enforcement suggests that federal and state law enforcement and prosecuting authorities work together as one team with one mutual goal—the elimination of illicit drugs from our society. When two jurisdictions join forces in this way, the reasons for granting each sovereign the power to enforce its laws disappear. The two sovereignties in effect act as one sovereign; that they represent two governments becomes insignificant.

3. The Proliferation of Successive Prosecutions

The Court has said that prosecutors should use successive prosecutions sparingly. In *Rinaldi v. United States*,²⁴⁰ the Court reversed a federal district court's decision to refuse the government's request to set aside a defendant's conviction obtained in violation of the *Petite* policy against successive prosecutions.²⁴¹ In *Rinaldi*, the Court noted its "repeated expressions of concern" over the use of successive prosecutions.²⁴² Citing "the potential for abuse," the Court stated that "[t]he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy."²⁴³ The *Petite* policy and the comparable laws of most states also represent determinations that successive and dual prosecutions should not be allowed for the same offense except under rare circumstances.²⁴⁴ Thus, one would expect that successive prosecutions would in fact rarely occur and only in the most compelling cases.

Instead, recent cases demonstrate that successive prosecutions, although still a small fraction of the total volume of criminal cases, have proliferated.²⁴⁵ Perhaps surprisingly, the cases also show that

239. *Id.* at 168 (Brennan, J., dissenting).

240. 434 U.S. 22 (1977) (per curiam).

241. *Id.* at 32; see also *supra* notes 168-78 and accompanying text (discussing *Petite* policy).

242. *Rinaldi*, 434 U.S. at 27.

243. *Id.* at 28 (citing *Bartkus v. Illinois*, 359 U.S. 121, 138 (1959)).

244. See *supra* notes 168-81 and accompanying text. The Model Penal Code and a once-proposed federal criminal code also prohibit successive prosecutions. See Murchison, *supra* note 9, at 413-16.

245. Prior to the 1950s virtually no cases of successive federal-state prosecutions could be found. By the mid-1950s, however, successive prosecutions became prevalent, especially in drug cases. See Murchison, *supra* note 9, at 408. Professor Murchison found "literally

successive prosecutions often will be brought in unexceptional cases, even after the first jurisdiction has obtained a conviction and a stiff sentence.²⁴⁶

dozens of cases since 1959 [in which] federal courts have affirmed multiple convictions." *Id.* at 428. Since his article was published in 1986, dozens more federal cases have been decided. For a small sampling, see *United States v. Talley*, 16 F.3d 972, 974-75 (8th Cir. 1994); *United States v. Deitz*, 991 F.2d 443, 445 (8th Cir. 1993); *United States v. Moore*, 958 F.2d 646, 650 (5th Cir. 1992), *cert. denied*, 114 S. Ct. 647 (1993); *United States v. Cooper*, 949 F.2d 737, 750-51 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2945 (1992); *United States v. Coonan*, 938 F.2d 1553, 1562-63 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 1486 (1992); *United States v. Davis*, 906 F.2d 829, 832 (2nd Cir. 1990); *United States v. Echeverri*, No. 93 CR 166, 1993 WL 356919, at *2-*4 (N.D. Ill. Sept. 13, 1993); *United States v. Byars*, 762 F. Supp. 1235, 1240-42 (E.D. Va. 1991); *United States v. Edwards*, 669 F. Supp. 168, 169-70 (S.D. Ohio 1987). A computer generated list of federal cases involving successive prosecutions for drugs and firearms charges alone produces over 100 cases since 1975. Search of LEXIS, Genfed library, Courts file (Feb. 7, 1995) (search terms: dual sovereignty and double jeopardy and federal /3 prosecution and date aft 1975).

State prosecutions following federal prosecutions have also continued to be brought and approved by state courts. See, e.g., *People v. Sandreschi*, 849 P.2d 873, 875-76 (Colo. Ct. App. 1992), *cert. denied*, slip op. (Colo. Apr. 12, 1993); *People v. Esch*, 786 P.2d 462, 465-66 (Colo. Ct. App. 1989) (en banc), *cert. denied*, No. 86CA1686 (Colo. filed Jan. 29, 1990); *Sheeran v. State*, 526 A.2d 886, 897-98 (Del. 1987); *Satterfield v. State*, 351 S.E.2d 625, 630 (Ga. 1987); *Brown v. State*, 354 S.E.2d 3, 3-5 (Ga. Ct. App. 1987); *People v. Porter*, 620 N.E.2d 381, 383-85 (Ill. 1993); *People v. Covelli*, 540 N.E.2d 569, 574-78 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 118 (Ill. 1989); *State v. Durham*, 822 S.W.2d 453, 454 (Mo. Ct. App. 1991); *State v. Cooper*, 510 A.2d 681, 690 (N.J. Super. Ct. App. Div. 1986); *State v. Ashrue*, 601 A.2d 265, 266-67 (N.J. Super. Ct. Law Div. 1991); *People v. Cooper*, 541 N.Y.S.2d 713, 714 (N.Y. 1989); *State v. Meyers*, 346 S.E.2d 273, 273-74 (N.C. Ct. App. 1986); *Commonwealth v. Wetton*, 641 A.2d 574, 575 (Pa. 1994); *Commonwealth v. Scarfo*, 611 A.2d 242, 259 (Pa. Super. 1992), *appeal denied*, 631 A.2d 1006 (Pa. 1993); *Commonwealth v. Ramirez*, 533 A.2d 116, 119-20 (Pa. Super. 1987), *appeal denied*, 548 A.2d 255 (Pa. 1988); *State v. Franklin*, 735 P.2d 34, 35-36 (Utah 1987); *Billington v. Commonwealth*, 412 S.E.2d 461, 463-65 (Va. Ct. App. 1991); *In re Cook*, 792 P.2d 506, 512-14 (Wash. 1990) (en banc); *State v. Rudy*, 719 P.2d 550, 552-54 (Wash. 1986) (en banc).

246. Most of the successive prosecutions this author has found involve the indictment of individuals following their convictions in the other jurisdiction. For a sample of cases involving state prosecutions brought after federal convictions for offenses arising out of the same criminal transactions, see *Sandreschi*, 849 P.2d at 874-75 (concurrent 10-year prison terms); *Esch*, 786 P.2d at 465-66 (federal sentence not mentioned); *Jackson v. State*, 563 N.E.2d 1310, 1311 (Ind. Ct. App. 1990) (same); *Durham*, 822 S.W.2d at 454 (same); *State v. Buhl*, 635 A.2d 562, 573-74 (N.J. Super. Ct. App. Div.) (life sentence), *cert. denied*, 640 A.2d 850 (N.J. 1994); *Wetton*, 641 A.2d at 575 (one defendant received 8-year prison sentence; other received 13 years, 3 years parole, and \$75,000 in fines); *Cook*, 792 P.2d at 512-14 (federal sentence not mentioned); *State v. Hagen*, 512 N.W.2d 180, 183-84 (Wis. Ct. App.) (150-year prison sentence), *review denied*, 520 N.W.2d 88 (Wis. 1994).

For some examples of federal cases involving successive prosecutions following conviction in state courts, see *United States v. Talley*, 16 F.3d 972, 974-75 (8th Cir. 1994) (36 year state sentence); *United States v. Cooper*, 949 F.2d 737, 750-51 (5th Cir. 1991) (state sentence undisclosed); *United States v. Paiz*, 905 F.2d 1014, 1023-24 (7th Cir.) (2 year state sentence), *cert. denied*, 499 U.S. 924 (1991); *United States v. Jordan*, 768 F. Supp. 144, 145-46 (E.D. Pa. 1990) (state sentences undisclosed), *aff'd*, 972 F.2d 1333 (3d

CONCLUSION: MERGING THE THEORY AND REALITY OF
DOUBLE JEOPARDY LAW IN DRUG CASES

When successive and dual prosecutions were virtually unheard of, the unfairness of prosecuting individuals twice for the same offense under the dual sovereignty doctrine rarely occurred. Times have changed in law enforcement; successive and dual prosecutions are not uncommon, especially in drug cases. Ironically, the dual sovereignty doctrine rests on a federalist theory that envisions two separate and independent sovereigns, each of which has its respective laws that reflect its unique priorities and interests. The doctrine shows respect for each sovereign's right to vindicate its own interests without interference from another sovereign. The irony lies in the fact that it is precisely in drug cases where this theory least reflects reality. In drug cases, multijurisdictional drug task forces bring the sovereigns together in a united effort against a common foe. At least in cases involving multijurisdictional law enforcement, therefore, the Court should reconsider its decision in *Bartkus*. The facts in *Bartkus* suggested some level of ad hoc federal and state cooperation, and the majority and dissent disagreed in their assessment of the extent of involvement. Within multijurisdictional drug task forces, the cooperation is extensive and institutionalized. Law enforcement agencies and prosecutors work together in joint, ongoing operations funded and directed by the federal government. To insist that the cooperating governments make a choice of forum for criminal prosecutions resulting from their joint efforts would neither infringe the sovereign rights of the participating governments, nor create incentives for defendants to race to the courthouse of the jurisdiction offering the best plea bargain.

In the meantime, both federal and state prosecutors should reconsider the practice of dual or successive prosecutions, especially in multijurisdictional drug task force cases. The majority of state legislatures have adopted laws barring dual and successive prosecutions. State prosecutors should adhere strictly to these laws and refrain from bringing charges for the same conduct that has been the subject of prosecution in federal court. Similarly, federal prosecutors should abide by the spirit as well as the letter of the *Petite* policy on dual and successive prosecutions. That policy requires that

a second prosecution should be brought only if a “compelling federal interest” is at stake. Not every drug case involves a “compelling federal interest.” If task force members decide to bring charges in a state court, federal prosecutors should refrain from bringing a successive prosecution—even if the outcome at the state level leaves much to be desired. At present, the policy is unenforceable; there are no penalties for its violation. Thus, it is up to the Justice Department and the United States Attorneys around the country to insist that prosecutors abide by the policy.

The Double Jeopardy Clause is not a mere technicality. It embodies principles of fairness and civility that protect individuals from the harassment, embarrassment, and expense of re prosecutions. The time has come to recognize the fallacy of the dual sovereignty doctrine as applied to multijurisdictional task forces and restore the protections of the Double Jeopardy Clause.