Selective Preemption: A Preferential Solution to the Bartkus-Abbate Rule in Successive Federal-State Prosecutions

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NOTES

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Bartkus-Abbate Rule in Successive Federal-State
Prosecutions

The United States Constitution's fifth amendment double jeopardy clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."\(^1\) The double jeopardy clause's foundation is the belief that a second prosecution after either conviction or acquittal threatens an individual's fundamental rights and impairs the administration of criminal justice.\(^2\) The Constitution prohibits double jeopardy by preventing re prosecution or retrial. The Supreme Court of the United States, however, has held that successive prosecutions\(^3\) are not double jeopardy.

*Bartkus v. Illinois*\(^4\) and *Abbate v. United States*\(^5\) reaffirmed that states may prosecute individuals for crimes for which they previously stood trial in federal court, and federal authorities may prosecute individuals for crimes for which they stood trial in state court ("the Bartkus-Abbate rule").\(^6\) The rule presupposes that the federal and state governments are separate sovereigns protecting separate interests.\(^7\) In practice, however, the *Bartkus-Abbate* rule disregards the in-

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1 U.S. Const. amend. V.
3 The term successive prosecutions as used in this note refers to both a state prosecution after an earlier federal prosecution for crimes arising from the same facts, as in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and a federal prosecution following an earlier state prosecution for crimes arising from the same facts, as in *Abbate v. United States*, 359 U.S. 187 (1959).
6 The Supreme Court first held a federal prosecution following a state prosecution constitutional in *United States v. Lanza*, 260 U.S. 377 (1922). *Abbate* reaffirmed *Lanza* and the *Bartkus* majority used *Lanza*'s rationale to allow state prosecutions subsequent to federal prosecutions. Until *Abbate*, however, courts questioned the theory that federal and state governments exercised different powers of sovereignty in prosecuting crimes ("the dual sovereignty theory").
7 In *Lanza*, Chief Justice Taft reasoned:

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory . . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sover-
dividual's interest in avoiding successive prosecutions, an interest which in a single jurisdiction is enough to bar a second prosecution.  

Carried to its logical extreme, the Bartkus-Abbate rule would permit successive prosecutions in every case involving overlapping federal and state statutes regardless of whether the context justified dual prosecutions. In response, federal and state governments have limited their powers of successive prosecution by employing discretionary prohibitions.

This note will discuss the successive prosecutions problem inherent in the Bartkus-Abbate rule. Part I reviews the nature and development of the double jeopardy clause focusing on the emergence of the Bartkus-Abbate rule; Part II criticizes the Justice Department's (the Department) discretionary policy, "the Petite policy," in light of strong Supreme Court dissents; and Part III analyzes proposed statutory remedies under the assumptions that the Bartkus-Abbate rule is good law and successive prosecutions are constitutional, and second, that the Bartkus-Abbate rule should be overruled and successive prosecutions are unconstitutional.

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9 After Bartkus and Abbate were decided, the Attorney General in a memorandum order to all United States attorneys, published a policy restraining successive prosecutions unless an Assistant Attorney General found "compelling reasons" to prosecute. This policy, however, is vague, is applied too haphazardly and is unenforceable by the defendant as a defense to subsequent federal prosecutions. Attorney General William Rogers' memorandum is reprinted in N.Y. Times, Apr. 6, 1959, at 19, col. 2. See also United States v. Mechanic, 454 F.2d 849, 856 n.5 (8th Cir. 1971) (reprinted in full).

10 ALASKA STAT. § 12.20.010 (1962); ARIZ. REV. STAT. ANN. § 13-146 (1956); CAL. PENAL CODE § 656 (West 1965); IDAHO CODE § 19-315 (1947); ILL. ANN. STAT. ch. 38, § 3-4(c) (Smith-Hurd 1961); IND. CODE ANN. § 35-1-2-15 (Burns 1963); MINN. STAT. § 609.045 (1963); MISS. CODE ANN. § 99-11-27 (1972); MONT. REV. CODES ANN. § 171.070 (1963); N.Y. CRIM. PROC. LAW § 139 (McKinney 1958); N.D. CENT. CODE § 29-03-13 (1960); OKLA. STAT. ANN. tit. 21, § 25 (West 1954); OR. REV. STAT. § 131.240(1) (1965); S.D. COMP. LAWS ANN. § 22-5-8 (1967); TEX. CRIM. PROC. CODE ANN. art. 1323 (Vernon 1966); UTAH CODE ANN. § 76-1-25 (1953); WASH. REV. CODE ANN. § 10.43.040 (1961); WIS. STAT. ANN. § 999.71 (West 1958).

11 The Department's policy of prosecutorial discretion in successive prosecutions got its name from the first case to give effect to the policy, Petite v. United States, 361 U.S. 259 (1960) ("the Petite policy").

12 Part III of this note, which proposes remedies to the successive prosecutions problem, will discuss the Model Penal Code, the New Federal Criminal Code and selective preemption.
I. The Dual Sovereignty Problem

A. The Double Jeopardy Clause: Its Development and Rationale

The double jeopardy clause’s rationale was best stated by Justice Black in *Green v. United States*:\(^{13}\)

The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an 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.\(^{14}\)

The first Congress adopted the double jeopardy clause in its present form only after considerable discussion that the provision’s text should reflect the already well-established double jeopardy principle.\(^{15}\) The 1789 Congressional debates reflected this concern.\(^{16}\)

The representatives at the first Congress also considered a proposed amendment to the double jeopardy clause to bar double prosecutions for the same offense only if brought under “any law of the

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\(^{13}\) 355 U.S. 184 (1957).

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\(^{14}\) *Id.* at 187.

\(^{15}\) The principle against successive prosecutions developed as a basic notion of fairness. The double jeopardy prohibition is traceable to the Hebrew Talmud, Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution* 34 S. Calif. L. Rev. 252 (1961), and found expression in Roman law, see 2 SHERMAN, *ROMAN LAW IN THE MODERN WORLD*, 488-89 (3d ed. 1937), and Canon law, see Justice Black’s dissenting opinion in *Bartkus*, 359 U.S. at 151. In 1759, Blackstone suggested that the plea of *autrefois acquit* or former acquittal, stemmed from the English common law maxim that no man may be brought into jeopardy of his life more than once for the same offense. 4 W. BLACKSTONE, *COMMENTS* 335 (1769). Thus, it is not surprising that after the earliest settlers introduced the doctrine to the United States, it has been repeatedly recognized as a fundamental principle. Today it is found, in varying forms, in the federal Constitution, U.S. Const. amend V, and in the jurisprudence or constitutions of every state, see Newman, *supra* note 15, and most foreign nations. For a discussion of the history of double jeopardy and its emergence in modern law, see J. SINGLER, *supra* note 2.

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\(^{16}\) The fifth clause of the fourth proposition was taken up viz: “No person shall be subject, in case of impeachment, to more than one trial or one punishment for the same offense . . . .

[A representative] thought . . . its meaning appeared rather doubtful. It says that no person shall be tried more than once for the same offense. This is contrary to the right heretofore established; he presumed it was intended to express what was secured by our former constitution, that no man’s life should be more than once put in jeopardy for the same offense; yet it is well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment . . . .

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1 ANNALS OF CONG. 781 (1789).
United States." The rejection of this limitation on the clause indicates that Congress intended to establish a broad national policy against federal courts trying a person after acquittal or conviction in another court. The Supreme Court, however, later established this limitation, as the constitutional rule in *Bartkus v. Illinois* and *Abbate v. United States.*

**B. The Bartkus-Abbate Rule**

In *Bartkus* and *Abbate,* the Supreme Court reaffirmed an important line of decisions holding successive prosecutions constitutional. The Court relied on the dual sovereignty doctrine, first expounded in dictum in *Fox v. Ohio* and *United States v. Marigold.* *Fox* and *Marigold* recognized that the same act might be an offense against both the state and federal governments, and could thus be punished by each in cases "of peculiar enormity or where the public safety demanded [it]. . . ."

The Supreme Court first authoritatively articulated the dual

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17 The history of the Congressional debates and proceedings on the amendments to the Constitution does not explain why the representatives refused this proposed amendment to the double jeopardy clause. The Annals of Congress, however, do reflect a general concern that the double jeopardy clause secure "the privileges of those who are prosecuted." *Id.* at 782.
22 Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), was the Supreme Court's first confrontation with successive prosecutions stemming from overlapping state and federal criminal statutes. *Houston* involved whether a state court martial might try a state militia member who had failed to answer a call to service by the United States. The Supreme Court sustained the conviction, but its reasoning is obscure: "in cases where the state governments have a concurrent power of legislation with the national government, [the states] may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or operation, contradictory or repugnant to each other." *Id.* at 24. But, it was not until the decisions of *Fox v. Ohio*, 46 U.S. (5 How.) 470 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), that the Court supported the dual sovereignty doctrine. The Court held that each citizen owes "allegiance to two sovereigns, and may be liable to punishment for an infraction of the law of either." *Moore*, 55 U.S. (14 How.) at 20. The rationale's overriding consideration was the balancing of state and federal interests during a period when the dual sovereignty doctrine was a political question. See L. Miller, *Double Jeopardy and the Federal System* 10 (1968).
25 46 U.S. (5 How.) at 484. Commentators have criticized *Fox* and *Marigold* as products of Justice Daniel, whose judicial statements throughout his Supreme Court tenure were marked by pronounced sentiments for the political crisis over state's rights. See Miller, *supra* note 22 at 24; Note, 11 WM. & MARY L. REV. 946, *supra* note 8, at 949.
sovereignty doctrine in Moore v. Illinois. Moore challenged the constitutionality of an Illinois statute prohibiting the harboring of fugitive slaves because there was a conflict between the state and federal statutes. Moore argued that the Supremacy Clause required that the State law yield. The Supreme Court upheld the Illinois statute, finding that the statute was a reasonable exercise of the state's police power. More importantly, the Court stated that the state and federal statutes were vastly dissimilar in their underlying purposes, the actual conduct proscribed, and the nature of the penalty imposed.

In United States v. Lanza, the Court held that under the dual sovereignty doctrine, successive prosecutions were constitutional. The Court in Lanza upheld a federal Volstead Act conviction after Washington state convicted the defendant for manufacturing liquor. In Lanza, Chief Justice Taft stated the classic formulation of the dual sovereignty framework later cited by Bartkus and Abbate:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

In Bartkus, the defendant was tried under the National Bank Robbery Act for robbing a federally insured Illinois savings and

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26 55 U.S. (14 How.) 13 (1852). The issue in Moore was the constitutionality of an Illinois statute prohibiting the harboring of fugitive slaves. Moore had been convicted and fined under the Illinois statute. Moore argued that the Illinois statute, in conflict with the federal fugitive act, violated the federal and state constitutions, prohibiting two punishments for one offense. The Supreme Court upheld the Illinois statute, but the constitutional objections avoided scrutiny because the case raised only the possibility of successive prosecutions.

27 Fox, Marigold and Moore were pre-Civil War cases. The dual sovereignties issue in those cases was inextricably entwined with the debates over the nature and scope of the concurrent powers between state and nation. The Court's reasoning then was due in part to the political atmosphere of the time.

28 260 U.S. 377 (1922).

29 The National Prohibition Act (Remington's Codes & Stats., § 6262, as amended by Session Laws 1917, c. 19, p. 46).

30 Based on the Volstead Act's legislative history and the eighteenth amendment, the Lanza decision was unjustified. See MILLER, supra note 22, at 34.

31 359 U.S. at 129.

32 359 U.S. at 193.

33 260 U.S. at 382.


loan association. A federal district court acquitted \textit{Bartkus}, but he was reindicted on substantially the same evidence for violating the Illinois Robbery Act.\textsuperscript{36} The only difference between the state and federal statutes was that the federal law only applied to federally insured banks. \textit{Bartkus} was convicted under the Illinois Robbery Act and the Illinois\textsuperscript{37} and the United States\textsuperscript{38} Supreme Courts affirmed his conviction.

\textit{Bartkus}’ companion case before the Supreme Court of the United States was \textit{Abbate v. United States}.\textsuperscript{39} In \textit{Abbate}, a federal conviction followed a state conviction. The defendants in \textit{Abbate} pleaded guilty to state charges of conspiring to dynamite telephone company facilities during an extended labor dispute.\textsuperscript{40} On the same facts, a federal district court subsequently convicted the defendants for conspiring to destroy integral parts of a United States communication system.\textsuperscript{41} The Court also affirmed Abbate’s conviction.

The Supreme Court, thus affirmed the constitutionality of successive prosecutions by state and federal governments without regard to which trial came first or whether the first trial resulted in an acquittal or a conviction. Justice Frankfurter, speaking for the majority in \textit{Bartkus}, concluded that “[p]recedent, experience and reason”\textsuperscript{42} supported his conclusion that the defendant had not been deprived of due process through successive prosecutions. Justice Frankfurter reasoned that the fifth amendment double jeopardy clause was not incorporated into the fourteenth amendment and therefore did not apply to the states\textsuperscript{43} and that dual sovereignty required a strong state and federal justice system.\textsuperscript{44}

\textsuperscript{36} Illinois prosecuted \textit{Bartkus} on an indictment that recited facts “substantially identical” to the federal indictment, 359 U.S. at 122, for violation of Illinois’ robbery statute. ILL. REV. STAT. ch. 38, § 501 (1951) (current version at ILL. ANN. STAT. ch. 38, §§ 18-1, 18-2 (Smith-Hurd 1977)). \textit{Bartkus} was sentenced to imprisonment under the Illinois habitual criminal statute. ILL. REV. STAT. ch. 38, § 602 (1958) (repealed 1963).

\textsuperscript{37} People v. \textit{Bartkus}, 7 Ill. 2d 138, 130 N.E.2d 187 (1955).

\textsuperscript{38} 359 U.S. 121 (1959).

\textsuperscript{39} 359 U.S. 187 (1959).

\textsuperscript{40} \textit{Abbate} and others were indicted in Illinois for violating an Illinois statute making it a crime to conspire to damage property. ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd 1972 & Supp. 1978)). The indictment described the property as “communication facilities belonging to Southern Bell Telephone and Telegraph Company.”

\textsuperscript{41} The federal indictment did not refer to the facilities as belonging to the telephone company, but charged a violation of the federal conspiracy statute, 18 U.S.C. § 371 (1976), for conspiracy to destroy parts of “systems and means of communication operated and controlled by the United States.” 18 U.S.C. § 1362 (1976).

\textsuperscript{42} 359 U.S. at 189.

\textsuperscript{43} \textit{Id.} at 124.

\textsuperscript{44} \textit{Id.} at 134.
Recognizing that the Court’s reasoning would allow two governments to do what each could not do alone, Justice Black dissented:

The court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by the state. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two ‘sovereigns’ to inflict it than for one.\textsuperscript{45}

Justice Black further argued that double prosecutions conflict with the fourteenth amendment because they violate “the spirit of our free country.”\textsuperscript{46}

Justice Brennan, joined by Chief Justice Warren and Justice Douglas, also dissented in \textit{Bartkus}.\textsuperscript{47} Justice Brennan predicated his dissent solely on federal agents’ intimate role in the state prosecution.\textsuperscript{48} The state trial, he said, was “actually a second federal prosecution.”\textsuperscript{49} Justice Brennan’s dissent did not attack the merits of \textit{Bartkus}, however, and Justice Brennan showed that he concurred with Justice Frankfurter when he wrote the majority opinion in \textit{Abbate}.

In \textit{Abbate}, Justice Brennan, relying on \textit{Lanza}, reasoned that the same act produced two offenses.\textsuperscript{50} Therefore, Justice Brennan concluded, Abbate was not put in jeopardy twice for the “same” offense.\textsuperscript{51} Justice Black again dissented, joined by Chief Justice Warren and Justice Douglas.\textsuperscript{52} Justice Black attacked \textit{Abbate} for its heavy reliance on \textit{Lanza}. \textit{Lanza}, Justice Black objected, had accepted dicta of earlier cases rather than any direct holdings of the Court. Those cases, Justice Black argued, assumed that “identical conduct”
might be successively prosecuted by the federal and state governments. Because of the first Congress' rejection of the proposed amendment to the double jeopardy clause, Justice Black concluded:

I believe the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court. It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense once by a state and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense. Recognizing the critical distinction between successive prosecutions where each sovereign's legitimate interests are at stake and other successive prosecutions, the Department and several states adopted self-imposed limitations upon their power to prosecute successively.

II. Limitations on the Dual Sovereignty Problem—The Petite Policy

Although the Supreme Court upheld the constitutionality of successive prosecutions, the Court advised authorities to exercise self-restraint because of the potential abuses of successive prosecutions. Therefore, just seven days after Bartkus and Abbate, Attorney General William Rogers issued a memorandum establishing the "Petite policy." The memorandum stated:

53 Id. at 202.
54 See text accompanying note 17 supra.
55 359 U.S. at 203.
56 See text accompanying note 9 supra.
57 See note 10 supra.
58 The memorandum was an internal order to all United States attorneys outlining the procedure for prosecuting criminal cases where the defendant had already been prosecuted by the state. The memorandum attempted to ensure that the Bartkus-Abbate rule would be used sparingly. Attorney General William P. Rogers' memorandum is reprinted in the N.Y. Times, April 6, 1959, at 19, col. 2. See also United States v. Mechanic, 454 F.2d 849, 856 n.5 (8th Cir. 1971) (reprinted in full).
59 The Supreme Court approved the Department's prosecutorial self-restraint policy in Petite v. United States, 361 U.S. 529 (1960), where the Court granted the Department's motion to vacate a conviction and dismiss an indictment for suborning perjury in a deportation hearing. The defendant in Petite had previously paid a fine and served a two month sentence for conspiring to make the same false statements. Although both a district court and a circuit court of appeals upheld the government's right to prosecute, the Department told the Supreme Court that a policy against successive prosecutions for the same criminal conduct was "dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." Id. at 530.

The Petite Policy is published in the United States Attorney's Manual § 9-2, 142 (January 3, 1980 revision) and provides:
[No] Federal case should be tried when there has been a State prosecution for substantially the same act or acts without the United States Attorney submitting a recommendation to the appropriate Assistant Attorney General in the department. No such recommendation should be approved by the Assistant Attorney General . . . without having it first brought to [the Attorney General’s] attention.  

Attorney General Rogers also indicated that he would not approve of a federal trial following a state prosecution “unless the reasons are compelling.”  

This policy attempted to ensure the proper exercise of prosecutorial discretion and compliance with the Department’s duty to “act wisely and with self-restraint.”

The *Petite* policy provides prosecutorial self-restraint and recognizes that possessing legal authority does not automatically require the exercise of that authority. Yet, the *Petite* policy’s scope and effectiveness has three limitations: (1) since the *Petite* policy is an internal administrative policy it is not subject to judicial review; (2) the Department’s guidelines on applying the policy are vague; and (3) defendants cannot use the policy as a defense to successive prosecutions.

**A. The Petite Policy’s Limitations**

First the *Petite* policy guides the Department’s internal affairs only. The policy, therefore, does not create any substantive or procedural rights that the defendant can legally enforce. Supreme Court decisions speak of the policy as being activated by the govern-
ment’s motion. Federal defendants, however, have often asserted that the policy should be applied in their favor. The lower federal courts have uniformly rejected this view, holding that a federal defendant’s reliance on the Department’s Petite policy will not cause the dismissal of a federal indictment or the setting aside of a conviction. Absent government application, the policy confers no rights upon the defendant, even where the United States Attorney fails to follow the policy’s prescribed procedure. The federal prosecutor must demonstrate to the Assistant Attorney General a compelling federal interest in prosecution and obtain the Attorney General’s approval to proceed.

Defendants objecting to successive prosecutions brought without the Assistant Attorney General’s approval, have also been unsuccessful in asserting that a federal agency must adhere to its policies and regulations. Courts have held that a letter, press release, or similar statement by the Attorney General published in the Federal Register which expresses policy not promulgated as a Department regulation is simply a Department housekeeping provision not subject to judicial scrutiny.

Second, the Petite policy lacks concrete guidelines for federal prosecutors on what constitutes “compelling reasons” for a second prosecution. With ninety-three United States Attorneys, differing views exist between prosecutors and courts, regarding the meaning of the Petite policy standard.

Third, federal prosecutors apply the Petite policy inconsistently and unevenly. This results from the policy’s vague standards and

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64 Rinaldi v. United States, 434 U.S. 22 (1977) (defendant should receive the policy’s benefit “whenever its application is urged by the government”). See also United States v. Snell, 592 F.2d 1083 (9th Cir. 1979) (Supreme Court has remanded cases because of the Petite policy at the Department’s request).
65 United States v. Michel, 588 F.2d 986 (5th Cir. 1979); United States v. Frederick, 583 F.2d 273 (6th Cir. 1978); United States v. Musgrove, 581 F.2d 406 (4th Cir. 1978); United States v. Thompson, 579 F.2d 1184 (10th Cir. 1978); United States v. Wallace, 578 F.2d 735 (8th Cir. 1978); United States v. Synnes, 438 F.2d 764 (8th Cir. 1971).
67 Former Attorney General Edward Levi stated that the policy’s application proved “both as to substance and procedure, to be difficult and puzzling.” He stated that the Department “does not have much of a memory of the cases which have gone through the process.” Address by Attorney General Edward H. Levi, Ninth Circuit Judicial Conference (July 28, 1976). As a result, no procedure exists for ascertaining that all cases receive substantially equal scrutiny, and no criteria exist for determining what reasons are “compelling.”
69 See text accompanying note 71 infra.
70 See text accompanying note 67 supra.
the federal prosecutors' failure to uniformly review each case.\textsuperscript{72}

\section*{B. Criticisms of the Petite Policy's Application}

In \textit{Petite v. United States},\textsuperscript{73} the Supreme Court directed the dismissal of an indictment in a successive prosecution brought without a compelling reason by a federal prosecutor.\textsuperscript{74} The Court granted the Solicitor General's motion to vacate the judgment of the court of appeals. The Solicitor General made the motion because the federal prosecutor violated the Department's policy against successive prosecutions.\textsuperscript{75} Although the Per Curiam order noted that the Court could dispose of the matter in the interest of justice,\textsuperscript{76} the concurring opinion of Chief Justice Warren and the dissenting opinion of Justice Brennan\textsuperscript{77} warned against disposing of the case without considering its merits. Chief Justice Warren stated:

\begin{quote}
As I believe that the Court should not deny all such motions peremptorily, so do I believe that we should not automatically grant them through invocation of the policy of avoiding decision of constitutional issues. There are circumstances in which our responsibility of definitively interpreting the law of the land and of supervising its judicial application would dictate that we dispose of a case on its merits.\textsuperscript{78}
\end{quote}

The federal courts have the authority to grant a motion vacating a judgment,\textsuperscript{79} but that authority is discretionary.\textsuperscript{80} Realistically, though, courts rarely use that discretion to refuse a motion to dismiss

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} Several Department attorneys attempted to formulate concrete guidelines for determining compelling reasons, but they were unsuccessful. \textit{See} Note, \textit{The Problem of Double Jeopardy in Successive Prosecutions: A Fifth Amendment Solution}, 31 STAN. L. REV. 477, 483 (1979).
\item \textit{See} text accompanying note 67 \textit{supra}.
\item 361 U.S. 529 (1960).
\item The Supreme Court directed that \textit{Petite} be remanded to the court of appeals with instructions to vacate its judgment and dismiss the indictment. The Court however, did not review the double jeopardy question's merits.
\item 361 U.S. at 531.
\item \textit{Id.}
\item \textit{Id.} at 533.
\item \textit{Id.} at 532.
\item The authority to grant a motion to vacate a judgment is provided in 28 U.S.C. § 2106 (1976) and \textit{Fed. R. Crim. P.} 48(a). Section 2106 states:
\begin{quote}
The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. [emphasis added].
\end{quote}
\item Rule 48(a) states:
\begin{quote}
The Attorney General or the United States attorney \textit{may by leave of court} file a dismissal of an indictment, information or complaint and the prosecution shall
\end{quote}
\end{enumerate}
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a successive prosecution.\textsuperscript{81} A federal court presented with the request
to dismiss an indictment that violates not only the \textit{Petite} policy but
also the spirit of the double jeopardy clause finds it hard to deny the
request despite the Government's bad faith in maintaining the
conviction.\textsuperscript{82}

In the twenty-one years since \textit{Petite}, the Court has on seven occa-
sions been confronted with successive prosecutions in violation of the
\textit{Petite} policy. Each time the Solicitor General has urged the Court to
vacate the judgment and to remand the case with directions to dis-
miss the indictment.\textsuperscript{83} Thus far the Supreme Court has done so, al-
though stimulating some vigorous dissents.\textsuperscript{84}

These cases aroused deep sentiment in the dissenting judges

\textsuperscript{81} On appeal to the United States Court of Appeals for the
Fifth Circuit, Rinaldi argued that his prosecution violated the Depart-
ment's \textit{Petite} policy. The Government acknowledged the
violation and moved to remand the case to the district court to seek the
indictment's dismissal. The Fifth Circuit granted the motion to remand,
United States v. Pearson, 508 F.2d 595 (1975). The district court, however,
denied the motion to dismiss because the prose-
(1975). In the appeal from the district court's decision, the Fifth Circuit described the gov-
ernment's bad faith:

"In this case, an unidentified, but responsible, official within the Depart-
ment au-
thorized a federal prosecution with full knowledge that such a prosecution was for-
bidden by the \textit{Petite} Policy. For the Government to attempt to dismiss by arguing
that no compelling reason now exists for a separate federal conviction, when the
considerations that allegedly imply a lack of 'compelling reasons' were known as
fully to the Government throughout both federal trials as now, does, for this court,
constitute bad faith." 544 F.2d 203, 208 (1976).

\textsuperscript{82} The Supreme Court, however, held that the district court had abused its discretion in
failing to dismiss. The Court found the salient issue was not whether the decision to prosecute
was made in bad faith, but whether the Government's later efforts to terminate the prosecu-
tion were similarly tainted with impropriety. 434 U.S. at 22 (1977). Therefore, despite the
provisions of § 2106 or Rule 48(a), federal courts exercise little discretion in deciding whether
to deny a motion to dismiss an indictment. In \textit{Rinaldi} the Court reasoned that because of the
\textit{Petite} policy's parallel purposes and the constitutional guaranty against double jeopardy,
"federal courts should be receptive, not circumspect, when the government seeks leave to
implement that policy." 434 U.S. at 29.

\textsuperscript{83} United States v. Mariscal, 49 U.S.L.W. 3513 (1981); \textit{Rinaldi} v. United States, 434
U.S. 22 (1977); \textit{Watts} v. United States, 422 U.S. 1032 (1975); \textit{Ackerson} v. United States, 419
U.S. 1099 (1975); \textit{Hayles} v. United States, 419 U.S. 892 (1974); \textit{Redmond} v. United States,

\textsuperscript{84} United States v. Mariscal, 49 U.S.L.W. 3513 (1981) (White, J., and Rehnquist, J.,
dissenting); \textit{Rinaldi} v. United States, 434 U.S. 22, 32 (1977) (Burger, C.J., Rehnquist, J., and
against the Court’s mechanical acceptance of the Solicitor General’s motion without independently examining the cases’ merits.\textsuperscript{85} Central to this debate is some Justices’ concern that in “rubberstamping” the \textit{Petite} policy’s application,\textsuperscript{86} the Court exercises neither its judicial obligation to independently examine a question presented for review nor its authority to deny certiorari.\textsuperscript{87} Particularly unsettling to the dissenters in \textit{Rinaldi v. United States}\textsuperscript{88} was the majority’s failure to explain why federal courts must reverse a valid conviction because of the government’s admission of administrative error,\textsuperscript{89} when they have the authority to independently examine the case’s merits. The examination of the merits, the dissenters argue, is especially critical because the decisions have precedential value and the “proper administration of the law cannot be left to the stipulation of the parties.”\textsuperscript{90} The dissenting justices determined that the only purpose served by the Court’s approval of the Department’s internal prosecutorial policy was emphasizing to federal prosecutors the need

\textsuperscript{85} Chief Justice Burger in his dissent in \textit{Watts}, argued that it was the Court’s role to review the case’s merits. Giving effect to the \textit{Petite} policy without reviewing the case’s merits, he reasoned, is abusing the Court’s function: 

\begin{quote}
[I]t is not at all clear to me that any federal court, and particularly this Court, should automatically conform its judgments to results allegedly dictated by a policy, however wise, which the judicial branch had no part in formulating. If these doubts be well founded, independent judicial appraisal is required \textit{a fortiori} where, as here, the policy purportedly derives from the rulings of this Court and their spirit. The federal courts have no role in prosecutorial decisions but, once the judicial power has been invoked, it is decidedly the role of federal courts to interpret the decisions of this Court and to assess the validity of judgments duly entered. \textit{422 U.S.} at 1036.
\end{quote}

Justice Rehnquist, in a vigorous dissent in \textit{Mariscal} wrote:

Congress has given us discretionary jurisdiction to deny certiorari if we do not wish to grant plenary consideration to a particular case, a benefit that other federal courts do not share, but it has not to my knowledge moved the Office of the Solicitor General from the Executive Branch of the Federal Government to the Judicial Branch. Until it does, I think we are bound by our oaths either to examine independently the merits of a question presented for review on certiorari, or in the exercise of our discretion to deny certiorari. Because the Court exercises neither of these alternatives here, I dissent.


\textsuperscript{88} \textit{434 U.S.} 22 (1977).

\textsuperscript{89} \textit{434 U.S.} at 34 (Rehnquist, J., dissenting).

\textsuperscript{90} \textit{422 U.S.} at 1036 (Burger, C.J., dissenting).
to apply the Petite policy consistently. They concluded this purpose was insufficient to "persuade [them] that the Court should have a hand in nullifying such a substantial commitment of federal prosecutorial and judicial resources."  

III. Proposed Solutions to the Successive Prosecutions Problem

The Bartkus-Abbate rule balances federalism interests and defendant's individual rights: it prevents one government from frustrating the other's interests. Opponents of the rule feel the Supreme Court should overrule Bartkus and Abbate because they are based on infirm legal precedents. They also argue that the rule's protection against nullification does not outweigh the defendant's constitutional inter-

91 The only purpose served by the Court's action is to aid the Government in emphasizing to its staff lawyers the need for a consistent internal administrative policy. But with all deference I suggest that is not a judicial function and surely not the function of this Court. Neither the rulings of this Court, nor their spirit, required that we sacrifice the careful work of the District Court and the Court of Appeals to say nothing of the public funds which that work required—to the vagaries of administrative interpretation. If the Government attorneys who initiated this prosecution did so without consulting their superiors, that is an internal matter within the Department of Justice to be dealt with directly by that Department, but it should not bear on a judgment lawfully obtained. . . . The resources of law enforcement agencies and courts, once committed to a rational course of action culminating in a valid judgment, should not be dissipated without better reason. 422 U.S. at 1035.

92 Id. at 1032 (Burger, C.J., dissenting).

93 For a view of the policy questions involved in balancing federalism interests with the individual rights of the defendant, see Miller, supra note 22 at 1; Note, Double Jeopardy by State and Federal Governments: Another Exercise in Federalism, 80 Harv. L. Rev. 1538 (1967); Note, Multiple Prosecution: Federalism vs. Individual Rights, 20 U. Fla. L. Rev. 355 (1968); Note, Federalism and Double Jeopardy: A Study in the Frustration of Human Rights, 17 U. Miami L. Rev. 306, 327 (1963).


95 Two principles formed Bartkus' basis: (1) that the fifth amendment double jeopardy clause is not binding on the states, Palko v. Connecticut, 302 U.S. 319 (1937); and (2) that dual sovereignty is applied in other areas of criminal procedure to uphold the action of federal and state officials.

The Supreme Court, however, "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down' subjective version of the individual guarantees of the Bill of Rights." Malloy v. Hogan, 378 U.S. 1, 10 (1964); quoting Eaton v. Price, 364 U.S. 263, 275 (1960). In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court held the double jeopardy clause applicable to the states through the fourteenth amendment, thus overruling Palko, 302 U.S. 319 (1937).

In addition to overruling the basis of Bartkus' first basis, the scope of the dual sovereignty rule was diminished. See Murphy v. Waterfront Comm'n, 387 U.S. 52 (1964) (rejecting the rule that a jurisdiction granting a witness immunity can require testimony which might be given to another jurisdiction for prosecution); Elkins v. United States, 364 U.S. 206 (1960)
ests. Solutions to the successive prosecutions problem thus fall into two categories involving conflicting assumptions: (1) the Bartkus-Abbate rule is constitutional; and (2) the Bartkus-Abbate rule is unconstitutional.

A. The Bartkus-Abbate Rule Is Constitutional

This position adopts the Supreme Court’s stance on the issue. Under the dual sovereignty doctrine, courts have held that when a man commits an act made illegal by two sovereigns, he has committed two distinct offenses. These courts reason that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” But, the peace and dignity referred to does not belong to each sovereign, it represents society’s interest given to two sovereigns—federal and state governments—to protect. Thus, the Bartkus-Abbate rule overemphasizes defendant’s interests. Fairness to defendants requires that courts or Congress impose limitations on successive prosecutions. The Model Penal Code and the New Federal Criminal Code both attempt to solve this problem.

1. The Model Penal Code


When conduct constitutes an offense within the concurrent jurisdiction of the State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:

(1) The first prosecution resulted in acquittal or in a convic-

(overruling the doctrine which permitted evidence illegally seized by state officials to be used in federal prosecutions as long as federal officers had not participated in the search).

If Justice Harlan is correct in his assertion that “[t]his Court has . . . abolished the two sovereignties rule,” Stevens v. Marks, 383 U.S. 234, 250 (1966) (dissenting opinion), then the policy arguments behind successive prosecutions are nonexistent. Once courts balance the interests of federalism against the defendant’s individual rights, the Bartkus-Abbate rule is left as a constitutional anachronism.

97 Id. at 382.
100 The American Law Institute submitted the Proposed Official Draft of the Model Penal Code at the thirty-ninth annual meeting in May 1962.
tion... and the subsequent prosecution is based on the same conduct, unless (a) [the first prosecution and the subsequent prosecution] each requires proof of a fact not required by the other and the law defining each [offense] is intended to prevent a substantially different harm... or (b) the second offense was not consummated when the former trial began; or

(2) The [first prosecution resulted in an acquittal]... which necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.101

The proposed statute requires that the Court decide (1) whether to apply the federal courts “same evidence” test102 and (2), if so, whether the basis of the prosecution is the same in both prosecutions. Under the “same evidence” test, a court will not bar a successive conviction if one offense requires proof of facts not required by another. Paragraph (1)(a), however, goes one step beyond this test. It states that despite the test’s application, a prosecution for one offense will still bar a prosecution for the other if both prosecutions were intended to prevent substantially the same harm.103 By adding this limitation to the “same evidence” test, the M.P.C. forces courts to examine society’s interests as well as the offenses’ technical elements.

Once a court has decided to apply the same evidence test, it must then decide whether the conduct of the second prosecution is the same as the first. The M.P.C.’s test should be interpreted liberally because it gives defendants more protection. The Code’s drafters intended the “same conduct” test to remedy the problem that most criminal conduct consists of more than a single act.104 The drafters also have given federal courts the discretion to expand the “same

102 See Blockburger v. United States, 284 U.S. 299 (1932). Federal courts use the “Blockburger rule” in determining whether the defendant’s act created two offenses. The Blockburger rule states: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, 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...” Brown v. Ohio, 432 U.S. 161, 166 (1977). Accord, Gavieres v. United States, 220 U.S. 338, 342 (1911); Carter v. McClaughery, 183 U.S. 365, 395 (1901); Morey v. Commonwealth, 108 Mass. 433, 434 (1871). See also Note, Double Jeopardy: Multiple Prosecutions Arising From the Same Transaction, 15 AM. CRIM. L. REV. 259 (1978).
103 Section 1.10(1) provides that a court bar a successive prosecution where the first prosecution resulted in acquittal and the second prosecution’s basis is the same conduct, unless “the law defining each [offense] is intended to prevent a substantially different harm.” MODEL PENAL CODE § 1.10(1) (Proposed Official Draft, 1962) [emphasis added]. The drafters, therefore, gave weight to the conduct’s similarity and the statutes’ purposes.
104 MODEL PENAL CODE, Comment § 1.10, (Tentative Draft No. 5-6, 1956).
since the A.L.I. drafted the Model Penal Code so flexibly, it is conceivable that it could also protect the defendant more than the constitution requires. This would occur if the courts interpret the phrase "same conduct" as barring a second prosecution, even if the offense violated a different societal interest. Under this interpretation, the courts would look at the whole transaction; if the defendant was prosecuted for any part of the transaction, that would bar a subsequent prosecution. Even with this liberal interpretation, the Model Penal Code does not deal with the problem as comprehensively as the New Federal Criminal Code.

2. The New Federal Criminal Code

Congress established the National Commission on Reform of Federal Criminal Laws ("the Commission") in 1966 to review and to recommend revisions of federal criminal laws. The Commission published its research and recommendations in its Working Papers, which contain several comprehensive reviews of present criminal law and procedure. The Working Papers provided the legal basis and policy foundations for the Commission's New Federal Criminal Code ("the Code"). Sections 707 and 708 of the Commission's proposed Code represent Congress' attempt to deal comprehensively with the successive prosecutions problem.

Section 707 provides a general legislative policy on the question:

When conduct constitutes a federal offense and an offense under the law of a local government . . . , a prosecution by the local gov-

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105 The "same transaction" test bars a second prosecution if the trial judge determines that the offenses are part of the same criminal transaction. See 2 DE PAUL L. REV. 263, 267 (1952). The case establishing the "same transaction" test involved a defendant who ignited a building, killing a person inside. State v. Cooper, 13 N.J.L. 361, 25 Am. Dec. 490 (Sup. Ct. 1833). The "same transaction" test is favorable to a defendant since it is harder for a prosecutor to distinguish separate crimes during a continuous transaction than it is to select an uncommon element as a reason for justifying a second prosecution under the "same evidence" test.

106 The Reporter at the American Law Institute Proceedings noted: [T]he purpose [of section 1.10] is to give the courts some leeway to expand the scope of the protection in dealing with criminality if it involves a succession of acts, but to do so in relation to what it conceives to be the policy of double jeopardy. . . . MODEL PENAL CODE, Comment § 1.10 (Tentative Draft No. 5-6, 1956).

107 The Commission presented its Working Papers to Congress in its Final Report pursuant to Section 8 of Public Law 89-801, as amended by Public Law 91-39. The Commission submitted the Final Report as a proposed revision of Title 18, United States Code, upon which Congress could undertake the necessary reform of the federal criminal laws.

ernment is a bar to a subsequent federal prosecution under either of the following circumstances: (a) the first prosecution . . . and the subsequent prosecution [are] based on the same conduct or arose from the same criminal episode, unless (i) [the laws of the two jurisdictions are] intended to protect substantially different harm or evil . . . or (ii) the second offense was not consummated when the first trial began; or (b) the first prosecution was terminated by an acquittal . . . which necessarily required a determination inconsistent with a fact or legal proposition which must be established for the conviction of the offense of which the defendant is subsequently prosecuted; unless the Attorney General of the United States certifies that the interests of the United States would be unduly harmed if the federal prosecution is barred.109

The Commission’s solution to successive prosecutions is almost identical to the M.P.C.’s110 solution. The New Federal Criminal Code creates a presumptive bar against successive prosecutions and requires a judicial assessment of the facts.111 Section 707 also instructs the Attorney General to determine the federal government’s interests in the issue.112

In applying the Model Penal Code formulation, however, the Commission failed to develop a standard dealing with the Code’s problem of defining those situations where the subsequent federal

109 Federal Criminal Code § 707 (Proposed Draft, 1971) [emphasis added]. Section 707 applies only to the Abbate situation—a federal prosecution following a state prosecution. The Commission, in drafting § 707, considered federal supremacy in granting the Attorney General discretionary power to proceed. Id. § 707 Comment.

Section 708 applies only to the Bartkus situation—a state prosecution following a federal prosecution. Section 708 is similar to § 707 except that in § 708 the state has no discretionary power and thus an absolute bar exists against successive prosecutions. Commission members, while not in disagreement with the section, favored its deletion because they doubted its constitutionality. These members also argued that as a matter of comity, it is preferable to leave the matter to the states rather than force Congressional action upon them.

110 The Model Penal Code permits a second prosecution only if the second prosecution either is intended to prevent a substantially different harm or the second prosecution has not been consummated when the first trial begins. Model Penal Code § 1.10 (Proposed Official Draft, 1962).

111 Section 708(a) of the new Federal Criminal Code bars a local prosecution after a federal prosecution based on the same conduct or arising from the same episode, regardless of the Blockburger “same evidence” rule, unless the statutes defining the offenses are intended to prevent a substantially different harm or evil, or the second offense was not consummated when the first trial begins. See Federal Criminal Code § 708(a) (Proposed Draft, 1971).

prosecution is for the same offense.\textsuperscript{113} Although the Code has adopted a "same conduct or same transaction" test,\textsuperscript{114} it is still unclear whether the facts alleged in each prosecution must be literally the same or whether the subsequent prosecution need only arise from the same transaction.\textsuperscript{115} This distinction is vital in light of courts narrow interpretation of criminal provisions.\textsuperscript{116}

Section 707 also departs from the Model Penal Code by codifying existing federal practice, the \textit{Petite} policy.\textsuperscript{117} Codification of the \textit{Petite} policy as an exception to the general rule against successive prosecutions provides defendants with enforceable statutory rights and diminishes the opportunities for prosecutorial impropriety.\textsuperscript{118} Invoking the exception insures that the matter receives careful attention at the governmental policymaking level; in that the Attorney General authorizes the prosecution. Where the Attorney General does not authorize the prosecution, a court must bar the prosecution.

Invoking this exception, however, requires two steps: (1) the Attorney General must certify to the district court that governmental interests would be unduly and substantially damaged if the court bars the federal prosecution; and (2) the court must determine that the federal statute is aimed at harm substantially different from that of the statute under which the state prosecution is brought. Although the Commission's standard of undue and substantial harm may be vague, the clause is not designed to provide a definitional standard for determining when to prosecute. Rather, it provides for a case-by-case consideration of the government interests involved. The clause gives federal prosecutors appropriate discretion, while still stressing that the Government meet a high standard. Congressional

\textsuperscript{113} The Commission did not adopt the \textit{Blockburger} "same evidence" rule employed by the Model Penal Code and federal courts. For a brief discussion of the test \textit{see note 101 supra}.

\textsuperscript{114} The proposed Federal Criminal Code provides a bar to successive prosecutions if the second prosecution is "based on the same conduct or arose from the same criminal episode" as the first. \textit{Federal Criminal Code} § 707(a) (Proposed Draft, 1971).

\textsuperscript{115} \textit{See} notes 101 and 104 \textit{supra} (discussion of the "same evidence" and "same transaction" tests). If no requirement exists that the facts alleged in each prosecution be the same, then the scope of the "same conduct" test will be broader that the \textit{Blockburger} rule adopted by the Model Penal Code.

\textsuperscript{116} \textit{See} Note, 15 AM. CRIM. L. REV. 259, \textit{supra} note 101, at 260.

\textsuperscript{117} The \textit{Petite} policy is an internal administrative policy of the Justice Department requiring prosecutorial self-restraint in cases of successive prosecutions. The policy was first announced after \textit{Bartkus} and \textit{Abbate} were decided. \textit{See} note 59 \textit{supra} for the text of the policy.

\textsuperscript{118} Courts have held that the \textit{Petite} policy, as an internal administrative guideline, does not create any rights in the defendant. Therefore, codification of the \textit{Petite} policy would give defendants the right to use the policy as a defense to successive prosecutions not authorized by the Attorney General. Elevating the \textit{Petite} policy to a statutory right also subjects it to judicial review, requiring more uniformity and scrutiny by federal prosecutors.
enactment of Section 707 would statutorily provide a presumptive bar against successive prosecutions. A determination of the facts, the evidence, and the different governmental interests involved would be required before a court could allow a successive prosecution. In adopting the section 707 bar, however, Congress should design the tests that courts would use in determining: (1) whether the facts alleged must be literally the same for application of the "same evidence" test; (2) whether the subsequent prosecution need only arise from the same transaction as the first; (3) what constitutes "same conduct;" and (4) what distinguishes different governmental interests.

In determining whether the facts alleged must be literally the same for application of the "same evidence" test, Congress may choose to adopt either the *Blockburger* rule—the facts alleged in each prosecution must be the same—or a broader definition of "same evidence." Although federal courts have adopted the *Blockburger* rule, a broader "same evidence" test would better protect the defendant.

The New Federal Criminal Code bars a successive prosecution *arising from the same criminal episode.* In determining what constitutes "arising from," Congress should adopt the "same transaction" test. The "same transaction" test bars a second prosecution if the trial judge determines that the offenses are part of the same criminal transaction. The "same transaction" test would be more favorable to a defendant since it is difficult for a prosecutor to distinguish separate crimes during a continuous transaction.

The New Federal Criminal Code also bars a successive prosecution based on the defendant's same conduct, but does not define same conduct. The drafters explained only that 'same conduct' does not include 'criminal conduct which was not consummated when the first trial began.' If Congress adopts sections 707 and 708, it should define 'same conduct' as either the defendant's same act or the same transaction. Adopting the same transaction test would pro-

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120 See Note, 15 Am. Crim. L. Rev. 259, note 101 *supra*.
122 See text accompanying note 94 *supra*.
123 If the Supreme Court overruled *Bartkus* and *Abbate*, the double jeopardy clause would bar successive prosecutions because:

(1) the fifth amendment would bar the federal government from prosecuting after a state prosecution; and (2) the fourteenth amendment, incorporating the fifth amendment to the states, would bar the state government from prosecuting after a federal prosecution.
mote prosecutorial efficiency by requiring the prosecutor to join all the criminal acts and prosecute the most serious crime.

Sections 707 and 708 allow successive prosecutions, notwithstanding that the second prosecution's basis is the same conduct or the same criminal episode, if the two statutes are 'intended to protect substantially different harm[s].’ In determining what constitutes different harms, Congress should state that a government interest in protecting against harm supports a second prosecution only where that interest is not vindicated by the first prosecution and is within the traditional jurisdiction of that sovereign.

B. The Bartkus-Abbate Rule Is Unconstitutional

The second line of analysis is based on the position that the Bartkus-Abbate rule is unconstitutional. Commentators have criticized the rule as constitutionally faulty. They argue that Bartkus and Abbate should be overruled because of the decisions' precedent and the dual sovereignty doctrine's erosion. If Bartkus and Abbate are overruled, the double jeopardy clause would bar successive prosecutions between two sovereigns.

If the double jeopardy clause bars successive prosecutions, however, one government conceivably could use double jeopardy to nullify the other government's laws. In United States v. Lanza, Chief Justice Taft warned that a double jeopardy bar would give states the power to preempt federal law: "the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect." Justice Frankfurter, in Bartkus, also considered potential nullification: (1) one government’s statute could impose small or nominal penalties in comparison to the other government's severer strictures; and (2) the first government's prosecutors could prosecute ineptly, causing acquittal or nominal sentencing. Nullification is a valid concern in situations like Southern states’

124 See Note, 31 STAN. L. REV. 477, supra note 71, at 487 (discussing problems raised by nullification).
125 260 U.S. 377 (1922).
126 Id. at 381.
127 359 U.S. at 137.
128 Id. at 138.
129 See Note 80 HARV. L. REV. 1538, supra note 92, at 1551 (discussing civil rights offenses as paradigm cases of obstructive state action).
prosecutions of civil rights violations. Nullification’s potential harm in civil rights cases is exemplified by ineffective state action, lack of cooperation between state and federal authorities, and local prejudice obstructing the vindication of important federal interests.\textsuperscript{131}

Federal preemption of the state government’s prosecution might solve the nullification problem if the double jeopardy clause barred successive prosecutions.\textsuperscript{132} Preemption seems appropriate, however, only when the interest protected is predominantly national and state involvement would disrupt the federal scheme.\textsuperscript{133} When the federal statute concerns a field affecting state interests, preemption deprives a state of the power to vindicate its interests when federal authorities do not prosecute. Moreover, a significant increase in the scope of exclusive jurisdiction would require expanding the federal police force, duplicating some expenses, hindering federal-state cooperation, and perhaps eroding state responsibility.\textsuperscript{134}

\textsuperscript{131} See Note, Pre-emption By Federal Criminal Statutes, 55 Colum. L. Rev. 83 (1955).
\textsuperscript{132} Mr. Walter Fisher, Bartkus’ court-appointed attorney, proposed that Congress adopt preemption as a remedy to successive prosecutions. Fisher stated that Congress might “surely take over the field to the limited extent of insisting that federal officials be given the right to do the prosecuting.” Brief for Petitioner, p. 61. Fisher addressed the implementation of his preemption solution by applying it to a bank robbery example: In a jurisdiction where the state prosecutions for the robbery of federally insured banks were being conducted inefficiently, if Congress could totally divest states of authority to prosecute. Thus requiring federal trials for virtually all bank robberies in the United States, since almost every bank is federally insured.

Fisher also suggested a second, less extreme measure requiring: [T]hat no state prosecution for federal bank robbery shall be commenced until, say, thirty days after notifying the United States Attorney, so that he may have an opportunity to try the accused if he wishes the trial to be a federal rather than a state trial. Such a statute would assure a federal trial when and where deemed to forestall either an interfering state trial or a race to the courts. But [and Fisher recognized—at least implicitly—that this was precisely the difficulty with addressing such an argument to a court in a constitutional controversy] that is up to Congress to decide.

See Miller, supra note 22, at 69.

\textsuperscript{133} 28 U.S.C. § 2283 (1976) restricts federal courts from granting injunctions to stay state court proceedings. Section 2283, however, has been held inapplicable (1) where Congress expressly directs the federal court to stay a state court proceeding notwithstanding § 2283; and (2) where the United States as a party to the action seeks the stay. Leiter v. United States, 352 U.S. 220 (1957). See also NLRB v. Nash-Finch, 404 U.S. 138 (1971) (holding that an administrative agency of the United States is the United States for purposes of the Leiter exception).

\textsuperscript{134} Congressional adoption of selective preemption requires: (1) federal criminal statutes to expressly state that they preempt the states, and (2) a definition of what types of cases involve national interest. Defining what constitutes national interest is not limited to any set criteria. However, examples of where national interest does and does not exist may be helpful. Ineffective prosecutions of civil rights violations by the states is an example where na-
The best way to protect national interests, while disallowing successive prosecutions, is "selective preemption." Selective preemption would allow federal officers to enjoin a state prosecution if a federal trial was necessary to protect national interests. This solution would avoid the problems of state's rights and nullifications. States would retain primary responsibility for law enforcement and protect the federal government against local prejudice and incompetency in prosecution. It would also bring the federal government's full resources into play in cases of national interest.

IV. Conclusion

The Barkus-Abbate rule unnecessarily denies defendants double jeopardy protection in successive prosecutions. The rule's basis is the dual sovereignty theory: our federal system created two sovereigns to protect society and each sovereign may prosecute to vindicate the same interest—in effect trying a man twice for the same offense. The United States Justice Department made a good faith effort to protect defendants in successive prosecutions through the Petite policy. However, the Petite policy lacks clarity, is haphazardly applied and is not subject to judicial review.

The Model Penal Code and the New Federal Criminal Code have proposed solutions to the problem of successive prosecutions. These statutory proposals, however, have not been adopted by Congress.

Although use of administrative discretion and "barring statutes" might restore the defendant's fifth amendment rights, selective preemption is the best solution. Allowing federal prosecutors to enjoin a state prosecution where a federal trial is necessary to protect national interests will give primary law enforcement responsibility to the states while protecting against local prejudice and incompetency. Federal preemption could be implemented through Congressional adoption or through the use of the federal government's power to

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The ability of the states to nullify national interests through inept prosecution, nominal sentencing, or lack of state and federal cooperation, justifies invoking a power to preempt state prosecution. Sections 659, 660, 1992, and 2117 of Title 18 of the United States Code are examples of federal determinations that no supreme national interest exists. In these sections, Congress has stated that: "A judgment of conviction or acquittal under the laws of any state shall be a bar to any prosecution hereunder for the same act or acts." 18 U.S.C. §§ 659, 660 (embezzlement and theft from intrastate shipments); § 1992 (willful damage to interstate carriers); § 2117 (breaking or entering interstate carrier's facilities).
enjoin state proceedings to prevent "irreparable injury to a national interest."

With the protection of both federal and state interests by selective preemption, there no longer exists a justification for the *Bartkus-Abbate* rule. The extreme criticisms of the *Bartkus-Abbate* rule, the attacks on its precedents, and erosion of dual sovereignty should encourage the Supreme Court to overrule *Bartkus* and *Abbate*. In doing so the Court will return to the defendant the fifth amendment protection that he should not "be subject for the same offense to be twice put in jeopardy."

*Ophelia S. Camiña*