NAVIGATING THE TRUNKS AND SPARS: THE JURY-PRESERVATION THEORY OF DOUBLE JEOPARDY

Isa C. Qasim*

In 2018, the Supreme Court issued a little noticed decision, Currier v. Virginia, *that signaled a potential revolution in the Double Jeopardy Clause doctrine. This essay uses that decision to reconsider the Clause's disparate protections, seeking coherence in this long-confused area of law. In doing so, it finds that the central protections of the Clause are best understood through a single, novel framework: the jury-preservation theory of double jeopardy. This essay explicates the theory, explaining its roots in the Revolutionary Era jury, its applications to modern double jeopardy law, and its implications for* Currier *and future double jeopardy cases.*

Keywords: *double jeopardy,* Currier v. Virginia*, charge preclusion, issue preclusion,* Blockburger v. United States*,* Ashe v. Swenson*, jury preservation*

INTRODUCTION

In the summer of 2018, the Supreme Court issued a decision that has so far received little notice. *Currier v. Virginia* dealt with a seemingly obscure element of double jeopardy law.[1] Michael Currier had been charged with

* Law clerk to the Hon. John M. Walker, Jr., Second Circuit Court of Appeals. I thank Yale Law School, where I was a student when I wrote this essay. Particular thanks to Professor Kate Stith, who supervised my writing and provided invaluable guidance, advice, and criticism. Thanks to Jonathan Green, whose ideas helped inspire this essay, and to Alison Mosier-Mills, whose careful editing improved it considerably. I may be reached at isaqasim@gmail.com.

1. Currier v. Virginia, 138 S. Ct. 2144 (2018).

New Criminal Law Review, Vol. 24, Number 4, pps 518–567. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: https://doi.org/10.1525/nclr.2021.24.4.518.

burglary, grand larceny, and unlawful possession of a firearm as a convicted felon, all in connection with the removal of almost $71,000 in cash from a safe that was also filled with guns.[2] To prevent evidence of his past conviction from being offered to the jury, Currier moved to have the felon-in-possession charge separated from the other two.[3] After he was acquitted in the first trial, Currier moved to dismiss the second on the grounds that it was barred by double jeopardy.[4] Currier's argument rested on an earlier case, *Ashe v. Swenson*, which had established several decades earlier that the Double Jeopardy Clause included a limited form of issue preclusion.[5] *Ashe* held that a defendant could not be tried for an offense in a second trial if "to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial."[6] Five justices, with an opinion by Justice Gorsuch and a concurrence by Justice Kennedy, distinguished Currier's case from *Ashe* on the grounds that Currier had requested the second trial, and so held that the Double Jeopardy Clause did not bar a second trial.[7]

Behind this relatively anodyne ruling lies the potential for transformation. That is because Gorsuch, in a portion that Kennedy declined to sign on to, went onto attack the very concept of *Ashe* issue preclusion.[8] Gorsuch described the practice as "a significant innovation" in the doctrine that "pressed" its boundaries, and went on to argue for its *de facto* overruling.[9] In the words of one commentator, it was an "unnecessary attempt to put the last nail in the coffin of *Ashe*."[10] With Kennedy now off the Court, *Ashe*'s days suddenly seem numbered, putting at risk a central double jeopardy protection.

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2. *Id.* at 2148.

3. *Id.*

4. *Id.* at 2149.

5. *Ashe*, 397 U.S. 436 (1970).

6. *Currier*, 138 S. Ct. at 2150.

7. *See id.* at 2149–52, 2156–57 (Kennedy, J., concurring in part).

8. *Id.* at 2152–56.

9. *Id.* at 2149, 2153. More detailed discussion of the reasoning is provided in Part III, *infra*.

10. Lissa Griffin, *Opinion Analysis: Court Holds Agreement to Statutory Severance of Overlapping Counts Waives Issue-Preclusion Claim After Acquittal at First Trial*, SCOTUSBLOG (June 22, 2018), https://www.scotusblog.com/2018/06/opinion-analysis-court-holds-agreement-to-statutory-severance-of-overlapping-counts-waives-issue-preclusion-claim-after-acquittal-at-first-trial/.

The Double Jeopardy Clause states, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[11] Despite the text's short, clear language, the protections it affords are anything but simple. Even as *Currier* signals significant change, double jeopardy doctrine as a whole is widely considered a conceptual mess.[12] The area of law, which lacks a clear unifying theory, is characterized by confusing precedents and a wide gap between functional protections and stated purposes. Now, then, is an ideal time to step back and reconsider double jeopardy doctrine holistically, to assess whether its apparently incongruous elements can be rationalized.

As it so happens, they can be. But in order to do so, one must adopt a radically different theory of the double jeopardy doctrine than the one traditionally advanced by the courts or the academy. Much of our modern double jeopardy doctrine can be explained by looking to a single value: preserving the defendant's interest in her originally empaneled jury. This interest, unusual to modern legal sensibilities, has its roots in the theory of the Founding Era jury. At the time, the jury was considered a bulwark against judicial abuse; accordingly, the defendant had special authority over its selection and an interest in its preservation. It is this special interest that the double jeopardy doctrine especially protects.

This essay will lay out this "jury-preservation" theory. Part I surveys modern double jeopardy doctrine, focusing on its core protections and the gap between them and the purposes ascribed to the Clause. Part II considers the Founding Era understanding of the jury and the defendant's special interest in it. Part III shows how the jury-preservation theory harmonizes the core protections of double jeopardy, and how it can more effectively explain many seemingly disparate aspects of current doctrine. This part also highlights some areas where the theory suggests a change in the doctrine. Finally, Part IV will consider two leading counterarguments to the theory and its potential, given the changed role of the jury, to motivate a fundamental reconsideration of our double jeopardy doctrine.

11. U.S. CONST. amend. V.

12. *See, e.g.*, RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1549 (2d ed. 2016) (describing the Clause as producing "a varied set of legal doctrines of astonishing complexity" that lack any "agreed-upon theory" to unite them).

If we take the jury-preservation theory seriously, then *Ashe* should be safe from overruling. But its implications are much wider than any one case. It touches almost every element of double jeopardy doctrine and, by extension, has implications for all of criminal procedure. Of course, the theory cannot explain the totality of double jeopardy doctrine. How it interacts with other values is an important area of future study. This essay only hopes to begin the exploration, articulating and applying the jury-preservation theory rigorously for the first time.

PART I

Today's double jeopardy doctrine is a confusing morass. The Court has described the Clause's case law as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator" and a site of "conceptual confusion."[13] Several different protections apply, serving several different hypothesized purposes, all hemmed in by a complicated lattice of judge-made rules that govern when and by whom the protections are triggered. Indeed, perhaps the defining feature of the doctrine is disunity.[14] This essay's thesis is that much of present double jeopardy doctrine actually does fit into a unified framework that has been obscured: the jury-preservation theory. But first, it is necessary to understand the doctrine as it appears today.

For our purposes, the law that has grown up around the Clause is best understood in three parts: the protections it provides, the purposes it serves, and the procedural context in which it applies.[15] The Clause's protections define when a particular charge constitutes "the same offense" as an earlier

13. Albernaz v. United States, 450 U.S. 333, 343 (1981); Burks v. United States, 437 U.S. 1, 15 (1978). The Sargasso Sea is a region of the Atlantic Ocean with an abundance of floating seaweed. Jules Verne described it in *Twenty Thousand Leagues Under the Sea* as a hazardous thicket of "trunks of trees . . . numerous spars, the remains of keels or ships' bottoms." In reality, it is a "calm, sunny region" that is easily navigated. Sargasso Sea, STANDARD ENCYCLOPEDIA OF THE WORLD'S OCEANS AND ISLANDS 275–76 (Anthony Huxley ed., 1962).

14. *See* DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 37–43 (2004) (describing the varied protections and purposes ascribed to the Clause).

15. See Akhil Reed Amar, *Double Jeopardy Made Simple*, 106 YALE L.J. 1807, 1813 (1997) for a similar division, focusing on deciding what constitutes "the same offense."

one. The purposes are the interests served by the Clause and act as guides for legal interpretation. And the procedural context determines when the prohibition on "same offense" prosecutions applies. This Part will focus on the first two elements, leaving the third to be discussed alongside the jury-preservation framework in Part III.

A. The Protections of the Double Jeopardy Clause

The ultimate roots of the Double Jeopardy Clause lie in the English common law, where the pleas of *autrefois acquit* and *autrefois convict* served to bar a second prosecution after an acquittal or conviction, respectively.[16] It has been clear since at least 1824, however, when the Supreme Court first seriously examined the Clause, that the American double jeopardy protection extends further than its English ancestors.[17] Since the adoption of the Bill of Rights, the Supreme Court has recognized three major ways in which the Double Jeopardy Clause protects defendants (or limits prosecutors): it provides a form of charge preclusion, issue preclusion, and protection against multiple punishments. Charge preclusion prohibits charging a defendant twice with the same statutory offense for the same incident. Issue preclusion prohibits certain factual questions from being relitigated in a second trial. Both of these principles are derived from the Double Jeopardy Clause and cannot be overruled by Congressional action. The protection against multiple punishments, meanwhile, although commonly discussed as a double jeopardy protection, has been recognized by the Court as simply a principle of statutory interpretation. "In contrast to the double jeopardy protection against multiple trials," the protection against multiple punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."[18] Because the multiple punishment protection lacks independent force, this essay puts it aside and focuses on charge and issue preclusion.

16. WILLIAM BLACKSTONE, COMMENTARIES *335–36. English common law here, as in many other circumstances, employed Law French.

17. RUDSTEIN, *supra* note 14, at 21 (discussing United States v. Perez, 22 U.S. 579 (1824)).

18. Ohio v. Johnson, 467 U.S. 493, 499 (1984); *accord, e.g.*, Jones v. Thomas, 491 U.S. 376, 381 (1989).

1. Charge Preclusion

Charge preclusion prevents an individual from being prosecuted twice, whether convicted or acquitted, for the same legal offense.[19] If an individual is tried and acquitted of murder, for example, she cannot then be charged again for the same murder.[20] Here, the relevant unit of analysis is the overlap of the statutory elements of the crimes. If, in the same course of events, she also fulfilled the elements of robbery, she could still be charged with robbery concurrently or in a subsequent prosecution. The difficult question, then, is what exactly counts as the "same offense." Defining what does and does not count as the "same offense" has been the focus of most double jeopardy litigation over the past several decades.[21]

Professor Amar has argued that the term should be interpreted as narrowly as the words allow, with re-prosecution only being prohibited when the government is seeking to try an individual for the identical offense.[22] Justice Brennan was at the other end of the spectrum, long advocating for a broad definition of "same offense" that would prohibit any re-prosecution for crimes arising out of the "same transaction."[23] The Court has charted a middle course. In 1932, in the case *Blockburger v. United States*,[24] a unanimous Court laid out what is now the standard test for determining whether two separate statutory offenses constitute "the same offense" for the purpose of charge preclusion analysis. In the case, the Court was considering the prosecution of Harry Blockburger on two separate violations of the Harrison Narcotic Act, first for selling morphine not in its original stamped package, and second for making a sale without a prescription.[25] The two counts arose out of the same transaction, where

19. *See* RUDSTEIN, *supra* note 14, at 76.

20. That is, she cannot be charged in the same jurisdiction. The separate-sovereigns exception, recently upheld by the Court in *Gamble v. United States*, 139 S. Ct. 1960 (2019), would allow the federal or another state government to try her again. This doctrine is beyond the scope of this essay.

21. ALLEN ET AL., *supra* note 12, at 1549.

22. Amar, *supra* note 15, at 1813.

23. *See, e.g.*, Jones v. Thomas 491 U.S. 376, 388 (1989) (Brennan, J., dissenting); Morris v. Mathews, 475 U.S. 237, 257–58 (1986) (Brennan, J., dissenting). Several state courts have adopted the same-transaction test as a matter of state law. *See, e.g.*, State v. Gregory, 66 N.J. 510 (1975) (New Jersey); Com. v. Campana, 455 Pa. 622 (1974) (Pennsylvania).

24. *Blockburger*, 284 U.S. 299 (1932).

25. *Id.* at 301.

Blockburger sold eight "grains" of the drug.[26] Blockburger argued that these two counts constituted the same offense, thus triggering double jeopardy protection.

In response, the Court articulated a test, stating that "where 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."[27] If one offense requires proving elements "x & y" and the other "y & z," then they are not the same offense. Conversely, if one offense requires "x & y" and the other only "x," then the latter is considered a "lesser included offense" of the former and prosecution would be barred.[28] The test exclusively turns on the elements that the prosecution most prove at trial.[29]

Applying its test, the Court ruled that double jeopardy protection was not triggered because the two counts had different elements—the prosecution had to prove for the first count that the grains were sold outside of their stamped package, and for the second count the absence of a prescription. The Blockburger test was originally formulated in the context of concurrent prosecutions of multiple offenses, but the Court later expanded its use to subsequent prosecutions.[30] The Court now considers the test to be a tool of statutory interpretation when applied to a single prosecution, but a constitutional necessity when evaluating subsequent prosecutions.[31]

Although *Blockburger* is the first formal articulation of this test by the Supreme Court, its roots are much deeper. The opinion relies on a long series of precedents whose roots can be traced at least as far back as 1796, when the Court of the King's Bench held that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first

26. *Id.*

27. *Id.* at 304.

28. Brown v. Ohio, 432 U.S. 161, 168 (1977) (holding that subsequent prosecutions for lesser-included offenses trigger double jeopardy protection as they "require[] no proof beyond that which is required for conviction of the greater.").

29. *See* Illinois v. Vitale, 447 U.S. 410, 416 (1980).

30. *Brown*, 432 U.S. at 168.

31. *See* Missouri v. Hunter, 459 U.S. 359, 368 (1983). When applied to a single trial, a *Blockburger*-like scenario raises the possibility of double punishment. As noted *supra*, the prohibition on double punishment is now largely treated as a non-constitutional issue of statutory interpretation.

indictment can be no bar to the second."[32] The Supreme Court has recognized this long lineage, writing in *Currier* that "the courts apply today much the same double jeopardy test they did at the founding."[33] Despite its twentieth-century articulation, the *Blockburger* test reflects an essential element of double jeopardy protection since the Founding.

2. Issue Preclusion

Blockburger's charge preclusion is not the only protection afforded by the Double Jeopardy Clause.[34] Whereas *Blockburger* focuses on the overlap of the statutory elements of crimes in a successive prosecution, the Supreme Court has more recently also held that factual overlap can act as a bar.[35] In *Ashe v. Swenson*, the Court reversed, 8-1, the conviction of Bob Ashe for robbery.[36] Six men playing poker had been robbed by several men in masks.[37] The only disputed factual issue was the identity of the men in the masks.[38] Ashe was charged for the robbery of one of the poker players and acquitted.[39] He was subsequently charged again, with the prosecution offering stronger evidence to prove that he was one of the men in the masks.[40] The second time he was convicted and sentenced to thirty-five years.[41]

In reversing the conviction, the Court held that the Double Jeopardy Clause contains within it a principle of "collateral estoppel."[42] Because of criminal law's use of general verdicts and the various disputed facts in most trials, it is usually difficult to pin down the exact grounds upon which an individual is being acquitted. When, however, the second prosecution

32. King v. Vandercomb and Abbott, 2 Leach 720 (1796).

33. Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018).

34. Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977) (noting that "[t]he Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense").

35. *Id.* ("[S]uccessive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.").

36. Ashe v. Swenson, 397 U.S. 436 (1970). Chief Justice Burger dissented, *id.* at 460.

37. *Id.* at 438.

38. *Id.*

39. *Id.* at 439.

40. *Id.* at 440.

41. *Id.*

42. *Id.* at 443.

would require relitigating "any issue that was necessarily decided by a jury's acquittal in a prior trial," double jeopardy bars the subsequent prosecution.[43] In that situation, the issue is considered to be the "same offense," triggering double jeopardy protection.[44]

Tracing the roots of issue preclusion in the Double Jeopardy Clause is more difficult than with the *Blockburger* test. As the Court noted in *Ashe*, until the twentieth century the issue was unlikely to arise. "[O]ffense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense."[45] The opinion offers no Founding Era evidence to support charge preclusion as part of double jeopardy protection. And the English pleas of *autrefois acquit* and *autrefois convict* that inspired double jeopardy protection focused on legal, not factual, identity.[46] This uncertain lineage underlies Gorsuch's skepticism of the protection in *Currier*.[47]

As noted above, however, it has been clear since the Clause's initial interpretation that the American double jeopardy protection extends beyond the narrow English pleas.[48] In fact, *Ashe*'s issue preclusion has deeper common law roots than the justices in either *Currier* or *Ashe* realized. Indeed, "English case law—bolstered by the more general double jeopardy principles articulated in the common law treatises—reveals that the multiple prosecutions that took place in *Ashe* would not have occurred

43. Yeager v. United States, 557 U.S. 110, 119 (2009); *accord* Currier v. Virginia, 138 S. Ct. 2144, 2150 (2018).

44. Examples of *Ashe* issue preclusion in action include: Turner v. Arkansas, 407 U.S. 366 (1972) (*per curiam*) (prohibiting a trial for robbery when an earlier acquittal for murder could only mean that the prosecution had failed to prove beyond a reasonable doubt that the defendant was even present at scene of the crime); Harris v. Washington, 404 U.S. 55 (1971) (*per curiam*) (holding that the acquittal of a defendant for the murder of one victim of a bomb explosion prevented a subsequent trial for the murder of another victim of the same explosion); United States v. Castillo-Basa, 483 F.3d 890, 897 (9th Cir. 2007) (reversing a conviction for perjury when a previous acquittal for illegal re-entry rested on the truthfulness of the supposedly perjured testimony).

45. *Ashe*, 397 U.S. at 445 n.10 (citing Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 (1956)).

46. *See* Joseph J. DeMott, Note, *Rethinking* Ashe v. Swenson *from an Originalist Perspective*, 71 STAN. L. REV. 411, 435–36 (2019).

47. Currier v. Virginia, 138 S. Ct. 2144, 2154 (2018).

48. *See supra* note 14.

at common law."[49] There are several late-eighteenth-century cases holding that a defendant acquitted of a robbery cannot be subsequently tried for a separate offense that raises no new factual questions.[50]

In the 1778 trial of Thomas Finck and Edward Lake, for example, Finck was acquitted of robbing one of two men in a carriage, while Lake was convicted.[51] Per a second indictment, Finck and Lake were then to be tried for the second robbery.[52] However, an acquittal was entered for Finck without trial on the grounds that "[t]he evidence was the same as upon the last trial."[53] These cases usually do not explicitly raise the English pleas of *autrefois acquit* or *autrefois convict*, but it was not unheard of at the time. In at least one case, the defendant explicitly pleaded *autrefois acquit*, and the judges agreed that he could not be tried for the burglary of a servant when he had already been acquitted of stealing from the servant's master.[54] *Ashe*-like issue preclusion in criminal law was thus accepted practice in English courts at the time of ratification, and was at times linked by courts and commentators to the English pleas that inspired the American double jeopardy protection.

Although seemingly distinct from the *Blockburger* "same offense" framework, *Ashe* issue preclusion is thus deeply rooted in the common law tradition and in double jeopardy more specifically. The practical effect of this protection is to deter prosecutors from unnecessarily separating trials to present the same case to multiple juries.[55] As we will see, the *Blockburger* test has much the same effect.

B. Purposes of the Clause

The original justifications for the American double jeopardy protection are hazy. Only one state constitution provided a similar protection prior to the

49. DeMott, *supra* note 46, 443.

50. *See, e.g.*, *Trial of John Stanley & John Mears*, PROC. OLD BAILEY, May 26, 1784, at 785 (acquitting defendants under similar carriage-robbery circumstances); *Trial of Joseph Smith*, PROC. OLD BAILEY, Sept. 12–19, 1770, at 331 (acquitting an individual accused of stealing bank notes from a private home because he had been previously acquitted of stealing coins and furniture from the same home on the same day).

51. *Trial of Thomas Finck & Edward Lake*, PROC. OLD BAILEY, Feb. 18, 1778 at 96–97.

52. *Id.*

53. *Id.* at 97.

54. Turner's Case, 84 Eng. Rep. 1068, Kelyng at 30.

55. Amar, *supra* note 15, at 1835.

federal Constitution.[56] On the federal level, the congressional debates over the Clause's inclusion in the Bill of Rights focused on technical concerns regarding retrial when the original trial was infected with error prejudicing the defendant, with little discussion of the Clause's motivating principles.[57] The origins of the English *autrefois* pleas, meanwhile, are contested.[58] This gap has been filled with a sort of judicial folk history, with American judges vaguely asserting ancient precedent for the principle—some even falsely claiming it was guaranteed by Magna Carta.[59]

Lacking definitive contemporaneous evidence, we look to modern accounts of the Clause's purpose. In difficult cases, the courts often invoke several interests that the Clause supposedly serves in order to guide their application of its protections.[60] The Court in *Yeager v. United States* identified "two vitally important interests" of the Clause.[61] The first, to guard against prosecutorial over-reaching, was articulated by Justice Hugo Black in *Green v. United States*:

> [T]he State with all its resources and power should not be allowed 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.[62]

The second primary interest identified by the Court is the "preservation of the finality of judgments."[63] Without the protection, the Court has feared that there is "a risk of conviction through sheer governmental

56. New Hampshire. *See* N.H. CONST. OF 1784 pt. 1, art. I, § XVI, *reprinted in* SOURCES OF OUR LIBERTIES 384 (Richard L. Perry & John C. Cooper eds., 1978).

57. 1 ANNALS OF CONGRESS 781–82 (Joseph Gales ed., 1789).

58. *See* RUDSTEIN, *supra* note 14, at 4–11 (providing a summary of different theories of the pleas' early English development).

59. *See* Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 284 (1963) (quoting an erroneous attribution statement in *State v. Felch*, 92 Vt. 477, 482 (1918)).

60. *See, e.g.*, Sattazahn v. Pennsylvania, 537 U.S. 101, 114, 123 (2003) (weighing the defendant's "continuing state of anxiety" against the public interest in justice).

61. Yeager v. United States, 557 U.S. 110, 117 (2009).

62. *Id.* (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)); *see* U.S. v. DiFrancesco, 449 U.S. at 127–28 (also quoting *Green*). Some commentators have broken the *Green* interest into its constituent parts, identifying three different interests. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 86–87.

63. *Yeager*, 557 U.S. at 118; *see* Crist v. Bretz, 437 U.S. 28, 33 (1978).

perseverance."[64] The prosecutor should not be given a "dress rehearsal," whereby the state could test its evidence and strategy and then try again in a second trial for the same offense.[65] Academic commentators have identified a similar set of values underlying the Clause, with minor variations.[66]

What is most striking about these purposes is how poorly the Double Jeopardy Clause furthers them. Our current double jeopardy doctrine is unlikely to prevent a determined prosecutor from making "repeated attempts to convict an individual . . . subjecting him to embarrassment, expense and ordeal."[67] The proliferation of criminal statutes at the federal and state level mean that *Blockburger*'s rigid formalism could often be circumvented by a clever prosecutor, whereas the high bar of *Ashe* limits its application to a small pool.[68] Similarly, although a trial might prevent a particular offense from being relitigated, the wide variety of other potential offenses to litigate means that, as a practical matter, there is not much reason to expect "finality of judgement." This is especially true in cases involving conspiracies or continuous criminal enterprises where, as we will see, the *Blockburger* test is limited.[69]

The end result is that "[a] prosecutor, by carving up what is essentially one criminal transaction into a great number of offenses, may prosecute a person until the statute of limitations has run its course. This is true even though each trial may result in an acquittal."[70] Of course, this is not common practice. Prosecutors generally seek to consolidate charges in a single trial. But the relative rarity of seriatim prosecutions is more likely

64. Tibbs v. Fla., 457 U.S. 31, 41 (1982).

65. United States v. Dixon, 509 U.S. 688, 749 (1993) (Souter, J., concurring in part).

66. *See, e.g.*, Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. Rev. 341 (2002) (identifying four goals: reducing false convictions, reducing litigation costs, protecting jury nullification, and limiting politically motivated prosecutions); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1002 (1980) (focusing on "(1) the integrity of jury verdicts of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose").

67. Green v. United States, 355 U.S. 184, 187–88 (1957).

68. Jay A. Sigler, Double Jeopardy: the Development of A Legal and Social Policy 156 (1969) (writing that the "increasing number of criminal statutes" have "weakened the significance of double jeopardy as it has increased the power of the prosecutor").

69. *See infra* text accompanying notes 238–42.

70. Robert E. Knowlton, *Criminal Law and Procedure*, 11 Rutgers L. Rev. 71, 94 (1956).

the product of prosecutorial conservation of resources than any limits imposed by the Double Jeopardy Clause. The Clause itself contributes little to the finality of judgments or protecting the defendant from state harassment.

Just as the apparent disconnect between the deeply rooted protections of *Blockburger* and *Ashe* suggests the need for a new conceptual framework for double jeopardy law, so too does the disconnect between the ascribed purposes of the Clause and its reality. Here, Court precedent gives us a hint. The Court has, at times, offered a third interest: the "valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him."[71] The Court has occasionally referenced this interest, suggesting that the Clause exists in part to protect the defendant's right to receive the "verdict of a tribunal he might believe to be favorably disposed to his fate."[72] The Court has failed, however, to articulate the nature, source, or significance of this interest, giving it little persuasive power.[73] It also invokes the interest in only a limited set of cases, particularly those having to do with attachment and mistrials.[74] But there is more there than the Court realizes. The defendant has an interest in the jury empaneled, which double jeopardy helps protect. It is this interest, largely ignored in the Court's recent analysis, that can best reconcile double jeopardy's apparent disunity and inconsistent efficacy.

PART II

As we will see, the jury-preservation theory provides a superior explanation of much of double jeopardy doctrine. But, from a modern perspective, preserving a defendant's interest in their original jury may seem an unsatisfying purpose for a constitutional protection. Today, our focus is on a jury that is "fair," and we are primarily concerned with the unjustified

71. Downum v. United States, 372 U.S. 734 (1963) (prohibiting re-trial after a jury was empaneled and then dismissed for logistical reasons).

72. United States v. Jorn, 400 U.S. 470, 486 (1971); *see* Arizona v. Washington, 434 U.S. 497, 514, 98 S. Ct. 824, 835, 54 L. Ed. 2d 717 (1978).

73. *See* Westen & Drubel, *supra* note 62, at 89–90.

74. *See, e.g.*, Crist v. Bretz, 437 U.S. 28 (1978) (holding that the "jeopardy" attaches when the jury is sworn); *Jorn*, 400 U.S. (evaluating a trial court's *sua sponte* mistrial motion).

exclusion of individuals from the jury, even if it benefits the defendant.[75] It is not clear that the defendant has any special interest. After all, the government often has as much interest or more in a jury trial than the defendant.[76] So, in order for the theory to be cognizable, it is first necessary to understand the symbolism and character of the jury in late-eighteenth-century America.[77]

The jury occupied a unique role in the imagination of Revolutionary Era Americans. As a bulwark against judicial and regal persecution, it became a metonym for the popular will. Reversals of its findings signaled tyranny. Meanwhile, the method of selection ensured that the defendant had an especial interest in the particular jury empaneled. Republicanism was thus invested in the preservation of the decisions and findings of the jury empaneled at the first trial. It is this substantial interest that gives weight to the jury-preservation theory of double jeopardy.

A. The Symbol of the Jury

In eighteenth-century England, and especially in the colonies, judges were rightly viewed with suspicion as agents of the Crown. Judicial subservience to the king was among the complaints that motivated the Glorious Revolution of 1688,[78] which served as an inspiration to American colonists in the a century later.[79] Judges at the turn of the century were "looked upon as a branch of the royal administration" and considered "themselves as advancing the royal policy."[80] A series of Parliamentary reforms over the course of the eighteenth century eventually shielded English judges from political control, transforming professional and popular understanding of them from royal agents to uninterested arbiters of the law.[81]

In the colonies, however, judicial independence remained an aspiration. By 1700, colonial judges were universally appointed by the royal governor

75. For an example of this reasoning, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 COLUM. L. REV. 1, 49–59 (1995).

76. Singer v. United States, 380 U.S. 24 (1965) (upholding a rule that required the court and government to consent to a criminal defendant's motion to waive a jury trial).

77. My thanks to Jonathan Green for his assistance in developing this view.

78. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW, 463 (2009).

79. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 136 (1969).

80. G.W. KEETON, LORD CHANCELLOR JEFFREYS AND THE STUART CAUSE, 21 (1965).

81. LANGBEIN ET AL., *supra* note 78, at 656.

and could be dismissed at will.[82] Governors were apparently willing to exercise that power—in 1733, Governor Cosby of New York dismissed the colony's chief justice after he ruled against the governor in a case.[83] This judicial subservience was an ongoing source of discontent in the pre-revolutionary colonies, with several leading figures decrying the lack of tenure and salary protections.[84] Judges were thus an extension of the corrupt royal government.

Instead, trust lay with the jury. On both sides of the pond, the jury was valorized as an essential check on judicial tyranny, and, indeed, tyranny generally. In the run-of-the-mill case, judges and juries often worked together closely. Juries looked to judges for advice not only on the law, but also the facts, and judges frequently commented upon whether they found the evidence persuasive.[85] The available evidence suggests that juries frequently heeded this advice.[86]

In some prominent political cases, however, the picture was very different. Politically charged seditious libel cases sometimes resulted in high-profile showdowns between judge and jury.[87] In the colonies, the most famous of such showdowns was the *Zenger Case* in 1735.[88] John Zenger was a newspaper printer charged with seditious libel following his publication of several essays that criticized the governor of New York, William Cosby.[89] At trial, the judge directed the jury to convict him, but they refused, giving the verdict of "*Not Guilty*, upon which there were three huzzas in the hall which was crowded with people and the next day [Zenger] was discharged from [his] imprisonment."[90] The jury's defiance in *Zenger* was not unusual. Instead, commentators believe that successful prosecutions for

82. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1112 (1976).

83. *Id.* at 1115.

84. *Id.* at 1122–23 (quoting several colonial essays and resolution calling for for-cause dismissal of judges, including by Benjamin Franklin).

85. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, 139 (1985).

86. *Id.*

87. LANGBEIN ET AL., *supra* note 78, at 475.

88. *Id.*

89. *Id.*

90. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., Belknap Press, 2d ed. 1972) (1736).

seditious libel were relatively rare in the colonies.[91] Juries were a bulwark against unjust laws and governments.

Zenger was hugely influential in shaping the Founding Era understanding of the jury. "More than any formal law book," the published account of the trial "became the American primer on the role and duties of jurors."[92] Central to this view was that juries were a bulwark against tyranny. As such, they were deeply connected to the revolutionary project. In 1776, Gouverneur Morris said that "the trial of Zenger in 1735 was the germ of American Freedom—the morning star of that liberty which subsequently revolutionized America."[93] John Adams, writing in his diary, made the connection between juries and tyranny explicit: "As the constitution requires that the popular branch of the legislature should have an absolute check . . . [on] every act of the government, so it requires that the common people should have complete control . . . in every judgement of a court of judicature."[94] The jury was analogous to the legislature, representing the people's will against an overbearing executive.

Colonial experience affirmed the truth of the metaphor. As the colonies became more restive, Parliament passed a law that required colonists charged with treason to be tried in England, depriving them of a jury of their peers.[95] Outrage over the policy eventually made its way into the grievances in the Declaration of Independence.[96] The special republican value of juries survived the Revolution to the ratification debates. Alexander Hamilton, writing as Publius in Federalist Paper No. 83, noted of the criminal jury that "it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in

91. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 874 (1994).

92. *Id.*

93. William H. Adams, Gouverneur Morris, an Independent Life 11 (2003).

94. John Adams, "Diary Notes on the Rights of Juries, 12 Feb. 1771," in 1 Legal Papers of John Adams 229–330 (L. Kinvin Wroth & Hiller B. Zobel eds., Belknap Press, 1965).

95. Alschuler & Deiss, *supra* note 91, at 875 (provoking, notably, protest from Edmund Burke).

96. the Declaration of Independence para. 20 (U.S. 1776) (saying that the King was guilty of "depriving us . . . of the benefits of Trial by Jury").

a popular government."[97] Juries were infused in practice and in rhetoric with a deep republican significance, making their defense a central issue of the Revolution and a requirement for the new country.

B. The Structure of the Jury

If the jury was so important at the Founding, we must understand what exactly it was. The criminal jury of the period varied in important ways from our current practice and understanding. Most relevant here, the "jury" was not just any collection of twelve citizens. Historical experience had established the importance of giving the defendant agency in shaping the jury at the outset of a trial and of preserving the originally empaneled jury from judicial interference at its conclusion.

The evidence available suggests that, at least in high-profile cases, the defendant exercised considerable discretion over the selection of the members of his jury through the use of peremptory challenges. In the eighteenth century, only defendants had access to peremptory challenges.[98] In run-of-the-mill cases, with defendants unrepresented by counsel and trials brief affairs, it is unlikely that they took much advantage of this right.[99] And, unfortunately, direct study of the phenomenon is difficult because reporters for much of the time did not record pre-trial *voir dire* proceedings.[100]

Parliamentary statutes and legal commentary strongly suggest, however, that peremptory challenges served an important role in the prominent, politically charged cases that most influenced the Founders' conception of the jury. During the sixteenth century, Parliament adjusted the number of peremptory challenges available to defendants several times. At the start of the century, defendants in capital cases were entitled to strike thirty-five potential jurors.[101] Then, in 1531, Parliament limited defendants accused of non-treasonous crimes to twenty challenges, while those accused of treason retained the traditional thirty-five.[102] But in 1541, in response to unrest

97. THE FEDERALIST NO. 83 (Alexander Hamilton).

98. LANGBEIN ET AL. *supra* note 78, at 595.

99. *Id.*

100. GREEN, *supra* note 85, at 135 n.113.

101. John Baker, *Criminal Courts and Procedure at Common Law*, in CRIME IN ENGLAND, 1550–1800, at 36 (James S. Cockburn, ed.) (1977).

102. *See* 22 Hen. VII ch. 14 § 6 (1506) (limiting defendants in non-treason capital cases to twenty challenges); 32 Hen. VIII ch. 3 (1540) (affirming this rule).

resulting from the separation from the Catholic Church, Parliament revoked altogether the right of peremptory challenge for defendants accused of treason.[103] A short time later, Parliament reinstated the right,[104] solidifying a two-tier system of challenges (one for treasonous crimes, and one for non-treasonous but still capital crimes) that lasted in England into the nineteenth century.[105] Despite taking place several centuries earlier, this Parliamentary tweaking suggests that the criminal defendant's right to peremptory challenges was not a hollow protection. Instead, it appeared to be both a significant check on the Crown's power (prompting its suspension) and a valued right (leading to its reinstatement) in at least some high-stakes cases.

The value of peremptory challenges was affirmed in the aftermath of the Glorious Revolution of 1688. The lead-up to the Revolution was characterized by several high-profile and successful political prosecutions for treason.[106] The most notorious of these was the so-called Bloody Assizes in which over 200 alleged traitors were convicted and then drawn and quartered, including a deaf widow in her seventies who had unknowingly sheltered a rebel.[107] The trials highlighted the Crown's control over the English legal system, especially in treason trials, and the serious injustice that could result.[108] In response, in 1696 Parliament passed the Treason Trials Act.[109] Included within its several reforms was a guarantee that all those accused of treason "shall have Copies of the Panel of the Jurors who are to try them . . . two Days at least before he or they shall be tried."[110] According to Professor Langbein, the "purpose of this measure was to allow some investigation of prospective jurors' backgrounds, in order to allow the accused to exercise his challenge rights in an informed way."[111] At least in

103. 33 Hen. VIII ch. 23 § 3 (1541) (eliminating peremptory challenges for defendants charged with treason).

104. 1 & 2 Ph. & M. ch. 10 (1554).

105. 6 Geo. 4 c. 50, § 29 (Eng. 1825) (stating that non-treasonous defendants were entitled only to twenty peremptories).

106. LANGBEIN ET AL., *supra* note 78, at 650–53 (discussing the Popish Plot, the trial of Stephen College, and the Rye House Plot.)

107. *Id.* at 653–54.

108. *Id.*

109. *Id.* at 656.

110. *An Act for Regulating of Trials in Cases of Treason and Misprison of Treason*, 7 & 8 Wil. 3, c. 3 (1696).

111. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 96 (2005).

those cases where the defendant had the resources and importance to employ counsel, the defendant was expected to use his peremptory challenges, coupled with knowledge of the jurors' backgrounds, to shape the jury and so check the Crown and Bench.

The American evidence affirms the English pattern. Some of the earliest American trials highlight the defendant's unique power to shape the jury using peremptory challenges. Between September 1778 and April 1779, twenty-three men were tried in Philadelphia for treason against the state.[112] Due to their location and widespread newspaper coverage, these trials were "the most significant jury trials of the American Revolution."[113] Despite the defendants' likely factual guilt, only four of the men were convicted—an unusually low conviction rate even for the time.[114] As Professor Larson has convincingly shown, the low conviction rate was likely the product of the defense counsel's use of peremptory challenges.[115] Although 264 jury positions were created by the trials, only fifty-eight men served on the juries, with thirty-nine serving multiple times.[116] A careful examination of primary sources reveals that the defense counsel used "peremptory challenges along religious, economic, and political lines to shape the jury in ways favorable to the defense."[117] Defendants shaped the jury so that it consisted disproportionately of "Anglican jurors, wealthy jurors, and jurors who had not personally performed their militia duties," all groups inclined to look favorably on the accused Loyalists.[118] Unilateral peremptory challenges formed a critical part of defense strategy in Revolutionary America, giving defendants a unique say in jury composition.

Criminal procedure in the early Republic also reinforced the defendant's interest in the jury. In 1800, James Callender was tried for seditious libel, and, in 1807, Aaron Burr was tried for treason.[119] The trials were widely covered by the press. According to Justice Chase, who presided over the

112. Carlton F.W. Larson, *The Revolutionary American Jury: A Case Study of the 1778–1779 Philadelphia Treason Trials*, 61 SMU L. Rev. 1441, 1443 (2008).

113. *Id.* at 1445.

114. *Id.*

115. *Id.* at 1446.

116. *Id.*

117. *Id.*

118. *Id.* at 1447.

119. United States v. Callender, 25 F. Cas 239 (C.C.D. Va. 1800); United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807).

first, the whole country had "very probably, formed an opinion."[120] In response, the courts expanded the previously limited *voir dire*, permitting the defense counsel to ask whether jurors had negatively prejudged the case.[121] This innovation to "accommodate the interests of defendants," which quickly spread across the country, reinforced the asymmetric influence that defendants and prosecutors had over the jury at the Founding.[122]

Of course, the defendant's unique interest in the jury was not always respected. The American colonists had a prominent, recent example of the sanctity of the jury being undermined on their side of the Atlantic. In the *Zenger Case*, the government attempted to rig the trial by seeding the pool of potential jurors with "persons holding commissions and offices at the Governor's pleasure; that others were of the late displaced Magistrates of this city . . . ; that others were the Governor's baker, tailor, shoemaker, candlemaker, joiner, etc."[123] After this trickery was discovered and rectified, Zenger's counsel, perhaps hoping to minimize conflict with the corrupt clerk running the process, "insisted on no objections" of the potential jurors except for meeting bare technical requirements.[124] The lawyers also "acquiesced that *any person [the Attorney General] disliked* should be left out."[125] In other words, normal practice was reversed, and the prosecution could use peremptory challenges while the defense could not. That Zenger was nevertheless acquitted emphasizes for the reader his innocence. But the detailed recounting of the corrupted jury selection, written by Zenger's lawyer, suggests that this was a serious and unusual aberration from normal procedure. Through its negation, such abuses likely reinforced the defendant's traditional interest in jury selection in the popular imagination.

To ensure the force of the defendant's unique role in jury selection, it was also critical that the jury's decisions be protected from interference or subsequent revision. As the jury developed in the seventeenth century, the English judiciary frequently employed various strategies to undermine jury verdicts. Until 1679, judges dealt with obstinate juries by fining or

120. LANGBEIN ET AL., *supra* note 78, at 540.
121. *Id.*
122. *Id.*
123. ALEXANDER, *supra* note 90, at 56.
124. *Id.* at 57.
125. *Id.*

imprisoning jurors if they refused to deliver the verdict the judge wanted.[126] This practice was ended, however, by the famous *Bushell's Case*.[127] Judges then turned to other strategies to control trial outcomes.

Two approaches emerged in the immediate aftermath. One was to dismiss juries that seemed likely to acquit before they could render a verdict.[128] This approach took advantage of the fact that the English precursors to double jeopardy only applied after the jury had rendered a verdict.[129] So, by dismissing the jury, the judge could ensure that the accused individual would be tried again. This tactic soon fell into disfavor, however, when judges loyal to the Crown abused it to secure convictions in the controversial treason cases immediately before the Glorious Revolution.[130] This "'tyrannical practice' of discharging juries and permitting reindictment when acquittal appeared likely" outraged the public.[131] After the Revolution, the King's Bench held that in capital cases (all felonies at the time), the jury could not be withdrawn once empaneled.[132]

At the same time, judges adopted another approach, which was requesting juries to reconsider their verdict, sometimes multiple times.[133] This tactic, which did not nullify a particular jury's decision-making authority, but did pressure them to reconsider, lasted much longer. It was still used in Connecticut into the 1820s, where the judge was permitted to explain his opinion when asking the jury to reconsider twice, "but if the jury adhere to their verdict on the third consideration, it must be recorded."[134] Thus,

126. *See* GREEN, *supra* note 85, at 208–22 (surveying the judicial career of Sir John Kelyng, a particularly notorious proponent of this practice).

127. Vaughn 135, 136, 124 Eng. Rep. 1006 (C.P. 1679).

128. LANGBEIN ET AL., *supra* note 78, at 438.

129. Crist v. Bretz, 437 U.S. 28, 41 (1978) (Powell dissenting).

130. LANGBEIN ET AL., *supra* note 78, at 438.

131. *Crist*, 437 U.S. at 42 (Powell dissenting) (quoting The Queen v. Charlesworth, 1 B. & S. 460, 500, 121 Eng. Rep. 786, 801 (Q.B.1861)).

132. LANGBEIN ET AL., *supra* note 78, at 438.

133. For an example, see *Exact Account of the Trials of the Several Persons Arraigned at the Sessions-House in the Old Baily for London & Middlesex* 14–16 (London 1678) (O.B. 1678), Old Bailey Online No. t16781211e-2.

134. ZEPHANIAH SWIFT, 1 A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 773 (New Haven 1822) (written by a former Chief Justice of the state). Swift's book was the first legal treatise of the young Republic. The paucity of early American legal writing makes it impossible to establish how widespread the practice was.

although judicial influence over the jury was not eliminated, it was carefully bound. Dismissing juries to prevent them from reaching a verdict was inextricably linked to despotism. And while judges could urge reconsideration, the jury that first heard the case had the final say.

Thus, during the Founding and Ratification, the jury was an institution that the defendant had an outsized role in shaping and whose decisions were final. In cases of political prosecution, the jury checked the state, shielding the defendant from trumped-up charges. In Whig theory, the defendant-jury-judge relationship is a metonym for the citizenry-legislature-executive relationship, with the trial recreating the delicate separation of powers writ small. The defendant had a special interest in the jury, just as the citizenry relied on the elected representatives of the legislature to shield it from the Crown.

At the same time, there was a long historical record of judges, from the pre–Glorious Revolution treason cases to *Zenger*, seeking to undermine the defendant's juridical rights. Judges neutered juries by impeding them from reaching verdicts or refusing to give the their findings binding authority. In this context, preserving the jury was not a merely technical issue of criminal procedure, but a constitutional one laden with republican values. The Constitution guaranteed the right to a jury trial for criminal defendants,[135] but as we have seen, simply promising a jury was not sufficient. Preserving the jury's republican values required protecting the defendant's interest in having the originally empaneled jury decide the case. Conveniently, the Double Jeopardy Clause provides exactly this protection.

PART III

The Double Jeopardy Clause neatly allays Founding Era concerns regarding jury integrity. Its doctrine guarantees that juries will not be preemptively dismissed nor their factual determinations contradicted—except when doing so is in the defendant's interest. Thus, the Clause serves to protect the defendant's interest in the original jury. To see how, we must first consider the fundamental protections of the Clause: issue and charge preclusion.

135. *See* U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

A. Protections and the Jury

1. *Ashe* Issue Preclusion

Ashe issue preclusion guarantees that the first empaneled jury's dispositive findings of fact are binding. Once an issue has been definitively resolved by a jury in the defendant's favor—finding that Ashe was not one of the robbers, for example—it generally cannot be reconsidered by a later jury.[136] The government cannot sidestep a sympathetic jury by litigating the same factual issue in multiple trials until a conviction is secured. At the same time, the protection is relatively narrow. Double jeopardy issue preclusion does not sweep as broadly Seventh Amendment civil issue preclusion—which would bar reintroduction of evidence and issues previously litigated.[137] Here, a bar to a second trial only applies when "one is able to say that 'it would have been irrational for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second."[138]

In most trials, such a precise determination is impossible. Because juries almost always give general verdicts,[139] it is usually impossible to determine definitively on what grounds an individual was acquitted. For example, in a situation similar to *Ashe*, it may be unclear if the defendant was acquitted because the jurors do not think he was one of the masked men or because they do not think the supposed victim was actually present. In such cases, a subsequent trial would not necessarily contradict the original jury's factual determination. Again, using our modified *Ashe* example, the first jury potentially acquitted in the first case because they did not believe the first supposed victim was actually present, leaving a subsequent jury free to convict the defendant in the robbery of another victim without contradicting the original jury. But when a dispositive question was necessarily

136. Currier v. Virginia, 138 S. Ct. 2144 (2018) provides a narrow exception, *see infra* text accompanying notes 199–211.

137. *See Currier*, 138 S. Ct. at 2152.

138. *Id.* at 2150 (quoting Yeager v. United States, 557 U.S. 110, 127 (2009) (Kennedy, J., concurring)).

139. Special verdicts in criminal trials have long been strongly disfavored. They are associated eighteenth-century English libel cases, where judges sought to prevent acquittal by asking juries only whether the accused published the writing, with the judge deciding whether it constituted libel. *See, e.g.*, IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 198–99 (describing this practice in the case of a Henry Woodfall, an English publisher).

resolved in the first trial, the Double Jeopardy Clause ensures that the original jury's pro-defendant determination is final.

Importantly, *Ashe* issue preclusion only applies when the defendant is acquitted.[140] When the defendant is convicted by the first jury, her interest in having facts determined by that jury disappears. The defendant does not want the old jury's determination to be binding. She would rather ask a new jury the same factual question than have the old one give the same negative answer. In that case, the double jeopardy value is not present, and so a subsequent trial is not barred.

2. *Blockburger* Charge Preclusion

Blockburger charge preclusion also protects the defendant's interest in the original jury. It guarantees that a subsequent jury cannot contradict a previous jury or reach a decision that the original jury was fully capable of reaching. To demonstrate this, consider the different applications of the *Blockburger* test in turn: a defendant acquitted of a lesser included offense; acquitted of a greater offense; convicted of a greater offense; and convicted of a lesser included offense.

When a defendant has been acquitted of a lesser included offense, she cannot then be convicted of a greater offense without directly contradicting the previous jury's finding. At the original trial, the jury found that at least one element of the lesser offense was missing. The greater offense includes all the elements of the lesser offense, and can only be found if all the elements are present. Thus, to convict the defendant of the greater offense would necessarily require overruling the previous jury's findings on at least one of the elements. The Double Jeopardy Clause prohibits such factual contradiction.

The situation is different when a defendant has been acquitted of a greater offense. In that case, he could be found guilty of a lesser included offense without necessarily contradicting the original jury. The original jury might have acquitted because one of the greater elements was missing.[141] In order to convict the defendant of the original greater offense, however, the prosecution had to prove all the elements of the lesser

140. Simpson v. Fla., 403 U.S. 384, 386 (1971) (holding that "'mutuality' was not an ingredient" of double jeopardy issue preclusion).

141. If one can definitively determine that the original jury acquitted because one of the common elements was not proven, then *Ashe* preclusion would bar retrial.

included offense. The original jury was given all the information required to determine guilt or innocence for the lesser offense. So, waiting to present the question to a later jury necessarily undermines the defendant's interest in having the original jury find the facts. Regular practice, of course, is to instruct the jury in both the greater and lesser offense, so that the risk of undermining is avoided.[142] When this is not done, double jeopardy prevents subsequent prosecution.[143]

The same logic explains the prohibition of a subsequent trial when a defendant has been convicted of a greater offense. Here too, the original jury had all the facts necessary to consider the lesser offense at the first trial. Charging them separately undermines the defendant's interest in having the case resolved by the original jury. Of course, for the original jury to acquit of the lesser offense would require inconsistent verdicts. Still, the defendant's interest remains as courts do not question such inconsistent verdicts.[144] Meanwhile, if convicted of both the greater and lesser by the original jury, then norms of statutory interpretation generally prohibit double punishment, limiting the downside risk.

The final application of the *Blockburger* test is when the defendant has been convicted of a lesser included offense. Here the logic is weakest and, not incidentally, the case law the most muddled. Unlike in the other instances, here an individual can be convicted of the greater offense without contradicting a previous jury; the second jury would hear new evidence to prove the additional elements. At the same time, in many cases, the evidence introduced to prove the lesser offense will be sufficient to analyze the greater and, if not, the prosecutor will often have whatever further evidence is required near at hand.[145] Allowing such subsequent prosecution would thus tend to

142. Amar & Marcus, *supra* note 75, at 32.

143. The vagaries of criminal procedure can complicate this generally accurate picture. In *United States v. Dixon*, 509 U.S. 688 (1993), for example, an individual being tried for criminal contempt could not also be charged with the underlying drug possession because an expedited procedure that avoided use of a jury was being employed. Rather than undermining the fundamental structure of the *Blockburger* test, however, this aberrant result suggests poorly considered drafting of the criminal procedure.

144. *See, e.g.*, States v. Powell, 469 U.S. 57 (1984) (per curiam) (finding no problem with inconsistent verdicts arising from a jury trial).

145. Of course, sometimes the prosecutor cannot bring the greater charge for reasons beyond her control but not covered by *Diaz*, discussed in the next paragraph. The text accompanying notes 238–45 *infra* suggests a more flexible approach to evaluating subsequent prosecutions following convictions of lesser included offenses.

undermine the defendant's interest in having the original jury decide the facts. Here too, values of jury preservation are implicated, although not with the same syllogistic tightness as above.

There are instances, however, where it is literally impossible for the prosecutor to introduce the needed evidence at the first trial. The Court has accommodated this situation in what appears, at first, to be an exception to the rule. In *Diaz v. United States*, Gabriel Diaz beat a man and was convicted of assault and battery.[146] The man subsequently died of his wounds, and Diaz was tried again for murder, a greater offense.[147] The Supreme Court held that the double jeopardy did not bar this subsequent prosecution.[148] Modern courts have preserved this exception, noting that "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence," double jeopardy will serve no bar.[149]

This is not, however, merely an "ad hoc exception."[150] It is more coherently understood as an implication of the defendant's interest in her original jury. A jury cannot find facts that have not yet happened. And so, the defendant cannot have an interest in the original jury deciding the greater offense when the relevant elements did not occur or become knowable until a later time. Some academics have suggested adopting a more flexible, due process-like approach for prosecutions of greater offense subsequent to a conviction, allowing retrial so long as the second trial is not intended to "vex" the defendant.[151] The Court has so far declined this invitation, sticking to the time-based rule. As we will see, however, elements of the doctrine are moving in a more flexible direction.[152]

3. Two Peaks

Double Jeopardy Clause protections thus only apply when a subsequent trial could directly contradict the original jury's factual findings or resolve

146. *Diaz*, 223 U.S. 442, 444 (1912).
147. *Id.*
148. *Id.* at 448.
149. Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977).
150. Amar & Marcus, *supra* note 75, at 34.
151. *Id.*
152. *See infra* text accompanying notes 238–45.

an issue that the original jury was fully capable of deciding. But the inverse is also true. That is, those situations barred by the *Blockburger* and *Ashe* protections are also the only times in which the jury's decision making is necessarily so undermined. Take *Blockburger* first. So long as two charges each have different elements to be proven and multiple contested, dispositive factual issues (eliminating an *Ashe* claim), one can never definitively show that a subsequent trial had reached a different factual conclusion from the original trial. It is always possible that the previous decision turned on an element not at issue in the later trial. And because these separate elements each have to be proven, the jury in the first trial cannot necessarily render a judgment on the second charge based on the evidence presented to them at trial. Similarly, with issue preclusion, the bar applies when the jury that acquitted on the first charge could not have rationally convicted on the second charge.[153] By definition, then, issue preclusion covers all situations of necessary contradiction. The Double Jeopardy Clause prohibits all cases, and only those cases, where the jury's fact-finding authority would necessarily be undermined.

The protection is narrowly tailored. It only applies when the original jury would necessarily be contradicted or the original jury could have determined the second charge based on the elements already evaluated (with, as described, previous lesser included convictions being the one ambivalent exception). The Double Jeopardy Clause prohibits inevitable undermining based on formal analysis, but gives the government wide practical discretion beyond that. For example, if two charges have different elements, but they can still be proved using the same factual material, then double jeopardy will usually not prevent a second trial.

One could imagine a different rule, one that looked to whether contradiction was probable rather than inevitable. Indeed, that is exactly the approach taken by the Seventh Amendment's civil collateral estoppel, which prohibits whole topics from being relitigated.[154] The Court experimented with a similarly expansive "same conduct" test in the early 1990s, in

153. Currier v. Virginia, 138 S. Ct. 2144, 2150 (2018).

154. U.S. CONST. amend. VII ("In Suits at common law . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). Note, however, that while the Seventh Amendment is more sweeping, it also has more exceptions. To pick one example, in the criminal context an acquittal is an absolute bar to re-litigation, no matter what legal errors occurred, whereas jury's decisions in civil cases may be reconsidered if legal errors are found on appeal.

which subsequent prosecution would be barred if it required proving "conduct that constitute[d] an offense for which the defendant ha[d] already been prosecuted."[155] Within three years, however, this was abandoned and *Blockburger* readopted.[156] The narrow tailoring of the *Blockburger* and *Ashe* tests is more consistent with the realities of prosecution, where evidence can be difficult to gather and maintain, new facts frequently arise, and defendants might strategically seek prosecution to bar greater punishment. As discussed in Part II, the Founding Era defense of juries was not intended to hamstring prosecution in run-of-the-mill cases. Rather, it was motivated by political prosecutions that directly undermined the jury's fact-finding authority. The formalistic structure of the Clause provides that fundamental protection while giving the government flexibility in deciding how to best prosecute difficult cases.

On first appraisal, the *Blockburger* elements-focused and *Ashe* fact-focused protections appear unrelated. This lack of apparent unity underlies Justice Gorsuch's skeptical treatment of issue preclusion in *Currier*.[157] But emphasizing the defendant's interest in their original jury shows that double jeopardy issue and charge preclusion can be easily understood as two manifestations of a deeper underlying logic. Taken together, they ensure that a jury's fact-finding authority is not usurped by a later trial. They are like two mountain peaks whose single base is shrouded in fog—manifestations of the deeper constitutional value of the criminal jury. Far from "serving different purposes,"[158] each is necessary to the other's coherence.

Of course, if this account is right, it should have implications far beyond explaining the structure of issue and charge preclusion. Ideally, it would help us navigate the confusing "Sargasso Sea" of the Clause's broader doctrine.[159] Luckily, the jury-focused approach turns out to be an excellent compass. Using it, we find that, much like the real Sargasso Sea, double

155. Grady v. Corbin, 495 U.S. 508, 510 (1990), overruled by United States v. Dixon, 509 U.S. 688 (1993).

156. United States v. Dixon, 509 U.S. 688 (1993) (overruling *Grady*).

157. *See* Currier v. Virginia, 138 S. Ct. 2144, 2152–56 (2018) (Gorsuch, J., writing for four justices in this section).

158. *Id.* at 2156.

159. Albernaz v. United States, 450 U.S. 333, 343 (1981) (describing the Clause's case law as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.").

jeopardy doctrine is not nearly as treacherous as popular understanding suggests.

B. Exploring the Rest of the Doctrine

Beyond *Ashe* and *Blockburger*, a large body of doctrine determines in what circumstances the Clause's core protections do and do not apply. The rules are not coherently ordered, and the Court has articulated different principles and justifications for rules depending on the circumstances. Frequently, the Court's reasoning turns on ad hoc balancing tests, weighing the competing interests of the defendant, government, and public in a rough manner.[160] Here too, however, there is an unacknowledged order.

Much of the current doctrine can be explained by asking simply, "Does this unreasonably undermine the defendant's interest in the original factfinder?" When the answer is yes, the Double Jeopardy Clause applies, and the *Ashe* and *Blockburger* tests determine whether another trial is permitted. When the answer is no, the Clause does not apply. This test resolves much of the case law's ambiguity. It largely affirms current practice while providing a more compelling explanation and a clear, principled rule of decision for future cases.

A survey of the entirety of double jeopardy law is beyond the scope of this essay; certain topics will have to be reserved for further study. This essay focuses on the archetypal scenario of the criminal jury trial. Bench trials did not become accepted for serious crimes in America until the end of the nineteenth century.[161] Plea bargaining emerged a bit earlier, but become widespread around the same time.[162] As a result, double jeopardy doctrine has largely incorporated these scenarios by analogy. Focusing first on the jury trial will allow us to transfer our understanding to these situations. This section will briefly discuss several elements of the doctrine that currently lack a sound justification. In each of these cases, we find that the jury-preservation test provides clarity that is now lacking.

160. *See, e.g.*, United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971) (weighing whether the amount of "harassment" involved in a summary contempt proceeding was sufficient to trigger double jeopardy protection).

161. *See* Susan Towne, *The Historical Origins of Bench Trial for Serious Offenses*, 26 AM. J. LEGAL HIST. 123 (1982).

162. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 121 (2003).

1. Attachment

First, consider the question of when jeopardy attaches. In English common law, a subsequent trial was only barred after the final verdict.[163] In American practice, jeopardy attaches much earlier, when the jury is empaneled and sworn.[164] Once the jury is selected, the Double Jeopardy Clause applies and potentially bars a subsequent trial. But why not earlier—say, when an individual is indicted? Or later, as in Britain? To some, the American practice "has deep historical roots but no remaining basis in logic or policy."[165] Meanwhile, the Court's explanation is unpersuasive and confused. In *Serfass v. United States*, a case dealing with attachment in a bench trial, the Court invoked various values that guide the determination of attachment, including limiting the defendant's "expense, delay, strain, and embarrassment" and preventing prosecutors from getting a second chance to improve their case.[166] The Court distilled these considerations into a simple rule: "Without risk of a determination of guilt, jeopardy does not attach."[167] It is this risk that supposedly separates pretrial actions from the protected trial proceeding.

Unfortunately, the *Serfass* standard cannot actually be reconciled with jeopardy attaching when the jury is sworn.[168] A defendant is not actually exposed to the "risk of a determination of guilt" immediately after the jury is sworn. If the prosecutor were to rest without introducing any evidence, the judge would dismiss the charges as the government had not proven its case. Whenever the "risk" arises, it must be after the jury is empaneled.

The Court apparently recognized this tension in *Crist v. Bretz*. The majority opinion, in reaffirming that double jeopardy protection attaches once a jury is empaneled, sought to affirm the "interest of an accused in retaining a chosen jury."[169] Except for a vague reference to the "historic

163. Westen & Drubel, *supra* note 62, at 85–86.

164. *See, e.g.*, Martinez v. Illinois, 572 U.S. 833, 834 (2014); Crist v. Bretz, 437 U.S. 28, 36 (1978).

165. Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 512 (1977)

166. *Serfass*, 420 U.S. 377, 391 (1975).

167. *Id.* at 391–92. For a bench trial, the Court held that jeopardy attached with the calling of the first witness.

168. Courts cite *Downum v. United States*, 372 U.S. 734 (1963), as the first Supreme Court articulation of this rule, but the case itself provides little reasoning to justify the line drawn.

169. *Crist*, 437 U.S. at 35.

development of trial by jury in the Anglo-American system of criminal justice,"[170] though, the opinion does not attempt to explain the nature or basis of this right. Justice Blackmun, concurring and providing the critical fifth vote, found this explanation insufficient. He emphasized other interests, including "repetitive stress and anxiety upon the defendant; continuing embarrassment for him; and the possibility of prosecutorial overreaching in the opening statement,"[171] even though he acknowledged that "each of these interests could be used, too, to support an argument that jeopardy attaches at some point before the jury is sworn."[172] Since the *Crist* decision, the Court has simply sidestepped this conceptual confusion, citing and applying the rule without justifying it.[173]

The jury-preservation model provides a simple answer to the attachment question. Would a new trial unreasonably undermine the defendant's interest in the original jury? Well, the defendant cannot actually have an interest in the original jury until it is selected. So, before that point, double jeopardy protections do not apply. The four justices in *Crist* provide a similar rationale, but an understanding of the Founding Era nature of the jury—the unique power the defendant had to shape it, and the tactical dismissals employed by the Crown—gives the theory considerably more heft. It also adroitly answers Justice Blackmun's objection to the basis. It does not, as he says, "also support a conclusion that jeopardy attaches at the very beginning of the jury selection process."[174] At the Founding, the defendant's special interest was, in part, the product of his unique ability to use peremptory challenges to shape the jury membership from the venire. It is thus the final, sworn jury that the defendant has an interest in, not the jury pool. The jury-focused approach allows us to understand the logic underlying our attachment rule, making it a rule of principle, not merely convenience.[175]

170. *Id.* at 36.

171. *Id.* at 38–39.

172. *Id.* at 39.

173. *See* Martinez v. Illinois, 572 U.S. 833, 834 (2014); Schiro v. Indiana, 493 U.S. 910, 913 (1989); Willhauck v. Flanagan, 448 U.S. 1323, 1325 (1980).

174. Crist, 437 U.S. at 38 (Blackmun, J., concurring).

175. Whether one finds the principle compelling today, when the defendant's interest in the jury is mitigated by a professional judiciary and complementary peremptory challenges, is a different question. I raise some initial questions on this topic in Part IV, *infra*.

2. The Summary Contempt Exception

Next, let us consider the proceedings to which the Clause applies. It is "well settled" that double jeopardy protection covers prosecutions that may result in "imprisonment and monetary penalties."[176] There appears, however, to be one exception to this settled understanding. In *Dixon*, the Court held that the Double Jeopardy Clause applies to non-summary criminal contempt proceedings.[177] Non-summary criminal contempt involves notice and hearing, and importantly, is covered by the Sixth Amendment's criminal jury guarantee for serious cases.[178]

At the same time, the Court explicitly withheld judgment in the context of summary contempt proceedings.[179] Summary contempt allows a judge to hold an individual for up to six months without notice, hearing, or jury trial,[180] so long as "the judge saw or heard the contemptuous conduct" in the court.[181] In that case, "the judge has seen the offense and is personally possessed of all the facts necessary to conclude that a contempt has occurred."[182] Summary contempt allows the judge to control her courtroom,[183] and the Court views the power as "'absolutely essential to the protection of the courts'" from "'the disorderly and violent.'"[184]

In the absence of a decision from the Supreme Court, lower courts have nearly universally held that the Double Jeopardy Clause does not extend to summary criminal contempt prosecutions.[185] An individual convicted of

176. Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994).

177. United States v. Dixon, 509 U.S. 688, 691 (1993).

178. Bloom v. State of Ill., 391 U.S. 194, 201 (1968).

179. *Dixon*, 509 U.S. at 697 n.1 (1993) ("We have not held, and do not mean by this example to decide, that the double jeopardy guarantee applies to [summary contempt] proceedings.").

180. Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

181. FED. R. CRIM. P. 42(b). The federal rule "reflects the common-law rule which is widely if not uniformly followed in the States." Bloom v. Illinois, 391 U.S. 194, 209 (1968).

182. David S. Rudstein, *Double Jeopardy and Summary Contempt Prosecutions*, 69 NOTRE DAME L. REV. 691, 696 (1994).

183. *See, e.g.*, United States v. Rollerson, 449 F.2d 1000, 1001 (D.C. Cir. 1971) (describing a federal district court judge employing summary criminal contempt to punish a defendant for throwing a filled water pitcher at a prosecutor).

184. Yates v. United States, 355 U.S. 66, 70 (1957) (quoting *Ex parte* Terry, 128 U.S. 289, 313 (1888)).

185. *See, e.g.*, *Rollerson*, 449 F.2d at 1001 (holding that a defendant summarily punished for throwing a water pitcher at a prosecutor may subsequently be tried for assault); United

criminal contempt in a summary proceeding may then be prosecuted and punished for the same offense in a later trial.[186] In *United States v. Rollerson*, the D.C. Circuit gave two explanations for this unusual exception: that the conduct was "an offense against the court's jurisdiction as well as an offense against the laws of the United States,"[187] and that an individual held in summary contempt and then indicted "does not suffer the harassment of successive trials."[188] As Professor Rudstein has shown, however, these and other explanations are unpersuasive.[189] No court has recognized the judiciary as having a separate "jurisdiction" from the United States in such a way as to trigger a dual sovereign exception like that between the states. Indeed, the Supreme Court has rejected the notion that prosecutions that serve different interests can be exempted from the double jeopardy bar.[190] And while it is true that the defendant does not have to sit through two full trials, a subsequent prosecution still exposes her to "embarrassment," "anxiety," and "insecurity" beyond what a single trial would have.[191] These cases give us no principled way to determine when the "harassment" has been sufficiently minimized to permit subsequent prosecution.

The jury-focused theory, on the other hand, easily explains the summary contempt exception. When an individual is charged following a summary contempt finding, his interest in the original factfinder is in no way diminished for one simple reason: in a summary contempt proceeding, there is no factfinding. That the judge "is personally possessed" of all the relevant facts is what allows for summary contempt to be summary.[192] The facts are already known. In federal practice the judge must "certify" what she saw

States v. Mirra, 220 F. Supp. 361, 363 (S.D.N.Y. 1963) (holding that the Double Jeopardy Clause does not prohibit a prosecution for assault after a defendant was held in summary criminal contempt for throwing a chair at a prosecutor); People v. Totten, 118 Ill. 2d 124, 133 (1987) (holding that summary contempt did not bar subsequent prosecution when the defendant struck an assistant district attorney during a sentencing hearing).

186. *Rollerson*, 449 F.2d at 1001.

187. *Id.* at 1004.

188. *Id.* (quoting *Mirra*, 220 F. Supp. at 366).

189. Rudstein, *supra* note 182, at 719–26.

190. United States v. Dixon, 509 U.S. 688, 699 (1993) ("[T]he text of [the Double Jeopardy Clause] looks to whether the offenses are the same, not the interests that the offenses violate.").

191. Green v. United States, 355 U.S. 184, 187–88 (1957).

192. Rudstein, *supra* note 182, at 696.

and record the facts, but there is no process by which the evidence is weighed and facts determined.[193] Thus, the constitutional value discussed in Part II of this essay, securing the factfinder from government usurpation, is simply not implicated in this situation. Non-summary contempt proceedings, on the other hand, concern conduct that occurred outside of the courtroom, and so factfinding is necessary. The right to a jury trial and double jeopardy protection thus naturally applies.[194] Again, the jury-focused approach concisely explains current doctrine, putting aside tenuous invocations of "jurisdiction" and resolving a messy "harassment" balancing test into a simple principle.

3. Successive Trials on the Defendant's Motion

The jury-focused theory also provides a more solid analytical foundation for the recent *Currier* decision.[195] In the controlling portion of Justice Gorsuch's opinion, the Court holds that a defendant cannot invoke *Ashe* issue preclusion to prevent a second trial when the two charges were separated on his motion.[196] In that case, the defendant is said to have "consent[ed] to two trials," and that consent is sufficient to waive double jeopardy protection.[197]

In support of this theory, the opinion relies almost exclusively on the precedent of *Jeffers v. United States*.[198] In *Jeffers*, the defendant was charged with engaging in a continuing criminal enterprise and conspiracy to distribute narcotics, the latter being the lesser included offense of the former.[199] The government moved to have the charges combined into a single trial, but Jeffers and his codefendants opposed the motion and the trial court did not grant it.[200] After his conviction for conspiracy, Jeffers moved to prevent a trial for the criminal enterprise charge on the grounds that the

193. FED. R. CRIM. P. 42(b).

194. United States v. Dixon, 509 U.S. 688, 691 (1993) (holding that the Double Jeopardy Clause applies to non-summary contempt proceedings); Bloom v. State of Ill., 391 U.S. 194, 201 (1968) (holding that defendant's in serious non-summary contempt proceedings have a right to a jury).

195. Currier v. Virginia, 138 S. Ct. 2144 (2018).

196. *Id.* at 2150.

197. *Id.*

198. 432 U.S. 137 (1977).

199. *Id.* at 140–42.

200. *Id.*

second trial would violate *Blockburger* charge preclusion.[201] A bare majority of the Court rejected his argument, holding that "[i]f the defendant expressly asks for separate trials on the greater and the lesser offenses . . . another exception to [*Blockburger* protection] emerges."[202] Thus, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election."[203]

Currier imports this reasoning to the context of *Ashe* issue preclusion. The Court analogizes, saying that "[w]hat was true in *Jeffers*, we hold, can be no less true here."[204] The opinion continues, "If a defendant's consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under Ashe."[205] This invocation of precedent is the lynchpin of *Currier*'s controlling opinion. Justice Gorsuch attempts to buttress this argument by citing cases that allow for retrial after a defendant's mistrial motion.[206] As the dissent points out, however, these precedents are easily distinguishable as they deal with the termination of "a trial before a substantive ruling on guilt or innocence."[207] The argument turns on *Jeffers*.

It is unfortunate, then, that *Jeffers* is so sparsely reasoned. The opinion asserts that "the defendant expressly ask[ing] for separate trials"[208] triggers an exception to "the heart of the Double Jeopardy Clause,"[209] but it provides no reason for why this should be the case, seeming to take it as obvious. The Court equates the second prosecution to a retrial after a defendant's appeal or motion for mistrial.[210] As noted above, however, a retrial for the same charge as part of ongoing litigation is easily distinguished from a completely new, second trial for a different charge. The

201. *Id.* at 144.
202. *Id.* at 152.
203. *Id.*
204. Currier v. Virginia, 138 S. Ct. 2144, 2150 (2018).
205. *Id.*
206. *Id.* at 2151.
207. *Id.* at 2163 (Ginsburg, J., dissenting) (describing these supplementary precedents as "even weaker reeds" on which to base the holding).
208. *Jeffers*, 432 U.S. at 152.
209. *Id.* at 150.
210. *Id.* at 152.

latter almost certainly imposes greater "embarrassment, expense, and ordeal" on the defendant, for example.[211] Reading the opinion, one gets the distinct impression that the reasoning is a post-hoc rationalization of a decision reached because it is the only workable option. Allowing defendants to strategically block prosecutions through severances would be obviously bad, not least for defendants who might find that "by making severances more costly we might wind up making them rarer too."[212]

Jury-preservation analysis, in contrast, provides a clear answer. When a defendant seeks to be tried separately for two different charges, she does so because she does not want the juries to be exposed to extra evidence that may prejudice their assessment of each charge. In Currier's case, he sought to separate the charges so that the first jury would evaluate the larceny charge untainted by exposure to the evidence required to establish the felon-in-possession charge.[213] Evidence of prior felony convictions "can be hugely prejudicial to a defendant," and so Currier did not want the first jury to know that he was a felon.[214]

In other words, the defendant in this case does not want the original factfinder to determine all the facts. The defendant worries that exposing the original jury to all the evidence will prejudice it against him, and so he moves for a separate trial—he wants two separate factfinders. Because the defendant has no interest in the original jury finding the relevant facts, separate trials cannot undermine his interest.[215] And so, under the jury-focused theory, the value at the heart of double jeopardy protection is not implicated and no bar applies. The Court is thus free to apply more general norms against defendant gamesmanship to protect the government's interest in a fair trial. Because *Ashe* and *Blockburger* protections are simply two

211. Green v. United States, 355 U.S. 184, 187 (1957).

212. *Currier*, 138 S. Ct. at 2156.

213. *Id.* at 2160 (Ginsburg, J., dissenting).

214. *Id.*

215. Of course, if the prosecutor herself desired two separate trials and in some way encouraged the defendant's motion, that might begin to look more like undermining. Thankfully, the Court has suggested that a new trial cannot occur when the prosecutor "contributed" the case separation. *See* Jeffers v. United States, 432 U.S. 137, 152 n.20 (1977) (noting that "considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges.").

manifestations of the same underlying jury-preserving value, this reasoning resolves both *Currier* and *Jeffers*.

4. Mistrials Caused by "Manifest Necessity"

The above examples demonstrate the jury-preservation theory's superior explanatory power for certain portions of double jeopardy doctrine. There are, however, areas where the theory's implications are less clear and will require further, more specific analysis. Mistrials caused by manifest necessity are a prime example. Here, I lay out some initial thoughts on how the jury-preservation theory applies to this complicated field, but do not attempt to canvas it comprehensively.

Retrial is almost always permitted when a mistrial is declared as a result of the defendant's motion.[216] But retrial can also be permitted when mistrial is declared by the court *sua sponte* or in response to the prosecutor's motion.[217] Mistrial, and a subsequent retrial, is allowed in such circumstances when "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated," as the Court articulated in a 1824 test.[218] Of course, determining whether there is "manifest necessity" is often easier said than done, and the Court has refused to supply "a standard that can be applied mechanically."[219] Instead, the trial judge is viewed as the "best situated intelligently" to determine whether justice is served by declaring a mistrial.[220]

To make that evaluation, the Court lays out an analytical framework that bears a striking resemblance to the jury-preservation theory. The trial judge should weigh the public interest against "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."[221] Manifest necessity analysis is the only significant portion of double jeopardy doctrine that centers the defendant's

216. *See* Oregon v. Kennedy, 456 U.S. 667 (1982).

217. *See* Blueford v. Arkansas, 566 U.S. 599, 609 (2012).

218. United States v. Perez, 22 U.S. 579, 580 (1824).

219. Arizona v. Washington, 434 U.S. 497, 506 (1978).

220. Gori v. United States, 367 U.S. 364, 368 (1961).

221. *Arizona*, 434 U.S. at 514 (quoting United States v. Jorn, 400 U.S. 470, 486 (1971)); *see* Blueford v. Arkansas, 566 U.S. 599, 610 (2012) (Sotomayor, J., dissenting); Renico v. Lett, 559 U.S. 766, 792 (2010) (Stevens, J., dissenting) (providing recent invocations of the principle).

interest in preserving a favorable jury. The Court, however, has never explained the nature or source of this interest, and academic commentators have generally dismissed it.[222] As a result, the jury-preservation theory has insight to offer.

Manifest necessity analysis can be thought of as a sliding scale, with some situations clearly requiring a mistrial, some situations clearly not, and an ambiguous middle ground requiring judicial discretion.[223] In the category of cases that clearly do not justify a mistrial are those in which one is sought because the prosecutor's case looks weak or an acquittal seems likely.[224] They can be analyzed in a manifest necessity framework, but such analysis counterintuitively turns on the extent to which one includes effective prosecution within the "public interest."[225] Here, jury-preserving analysis is helpful because it reminds us of the historical roots of the protection. Dismissing a jury and empaneling a new one because of a prosecutor's weak case falls close to the historical abuses that shaped eighteenth-century understanding of the jury, and so it obviously violates the Double Jeopardy Clause.

Jury preservation also clarifies "the classic example" of manifestly necessary mistrial: the hung jury.[226] Determining when a jury is hung is a context-specific question best left to the trial judge.[227] But when a jury truly is hung, the jury-preservation framework makes clear that the analysis need not try to balance the defendant and public's interest. The defendant has an interest in having the original jury find the relevant facts. But a hung jury is one that, by definition, cannot find those facts. As a result, the defendant cannot continue to have an interest in the original jury resolving the dispute. The judge in no way usurps the jury because she has already given it the opportunity to make a binding determination of fact. The hung jury is thus a "nonevent" for double jeopardy purposes, and so retrial is

222. *See* Westen & Drubel, *supra* note 62, at 89–90.

223. *See* RUDSTEIN, *supra* note 14, at 140–48.

224. *See* Downum v. United States, 372 U.S. 734 (1963) (holding that a retrial was not a "manifest necessity" when a judge declared a mistrial and dismissed the jury because the prosecution witness had not been summoned.)

225. *See id.* at 743 (Clark, J., dissenting).

226. *Id.* at 736.

227. Renico v. Lett, 559 U.S. 766, 767 (2010) ("This Court has expressly declined to require the 'mechanical application' of any 'rigid formula,' when a trial judge decides to declare a mistrial due to jury deadlock.") (citations omitted).

permitted.[228] Instead of being a manifest necessity, a retrial resulting from a hung jury simply does not implicate the core value of the Double Jeopardy Clause.

It is in the middle ground of cases where the implications of the jury-preservation theory are least clear. A strong reading would prohibit all mistrials in cases where the defendant's interest in the jury remains intact, potentially protecting egregious defense counsel misbehavior. But *Wade v. Hunter* rejected this approach, holding that "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."[229]

Given this, the best path forward is likely to evaluate such cases to make sure that the defendant's interest in the original jury has not been *unreasonably* undermined. Such analysis is analogous to the "manifest necessity" test currently employed by courts—a good way to determine if the mistrial is reasonable is if it was manifestly necessary. A careful examination of the many different scenarios in which mistrials arise, however, may suggest a more consistently applicable principle.

C. Areas of Change

As described above, the jury-preservation theory rationalizes a substantial portion of double jeopardy doctrine that is currently underexplained. At the same time, it also suggests changes or a different direction in certain areas of the law. In particular, the jury-preservation theory supports a more flexible approach to allowing subsequent trials in the case of a previous conviction for a lesser included offense; it suggests prohibiting retrials following appeals of convictions secured by prosecutors employing "goading" misconduct; and it strongly pushes against the movement toward overruling *Ashe* exemplified by *Currier*. This section will consider each of these topics in turn.

1. Convictions of a Lesser Included Offense

The *Blockburger* test prohibits trial for a greater offense after an individual has been convicted of a lesser included offense. The Court has only

228. Yeager v. United States, 557 U.S. 110, 120 (2009) ("[F]or double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent.").

229. Wade v. Hunter, 336 U.S. 684, 689 (1949).

formally recognized a narrow exception to this rule, for when facts of the greater offense have not yet occurred or been discovered. As noted earlier in this Part, however, the jury-preservation theory does not require so strict a rule. Because proving greater offenses requires finding facts not found for the lesser offense, a second trial does not necessarily imply jury undermining. Instead, a more due-process-like balancing approach, like the one advocated by Professor Amar,[230] could be appropriate.

And, indeed, the Court seems to be moving in that direction, albeit elliptically. In *Garret v. United States* and *United States v. Felix*, the Court held that the Double Jeopardy Clause did not prevent an individual from being tried for a continuing criminal enterprise (CCE) and conspiracy, respectively, after they had already been convicted of a constituent crime.[231] *Harris v. Oklahoma* had established that the felony murder statute implicitly incorporates a list of offenses into the crime's elements for double jeopardy purposes. [232]

One might reasonably conclude that CCE and conspiracy, which also turn on other offenses, would be similarly incorporated. But, citing *Diaz*,[233] the Court said that even if Garret's previous conviction constituted a lesser included offense, double jeopardy protection did not apply because the "continuing criminal enterprise charged against Garrett . . . had not been completed at the time" of his first indictment.[234] The Court employed similar reasoning with conspiracy, writing that a previous prosecution for a substantive crime does not bar prosecution for conspiracy because the substantive crime and the conspiracy do not constitute "a single course of conduct."[235] But it is not clear why, under the *Blockburger* test informed by *Harris* incorporation, it should matter if the CCE or conspiracy had been "completed" if all the necessary facts were available to charge the enterprise crime at the original trial. These two cases could have signaled the end of *Harris* incorporation. But then in *United States v. Dixon*, in an opinion that only cites *Garret* and *Felix* in passing and on unrelated

230. Amar, *supra* note 15, at 1821–25.

231. *Garret*, 471 U.S. 773 (1985); *Felix*, 503 U.S. 378 (1992).

232. *Harris*, 433 U.S. 682 (1977).

233. Diaz v. United States, 223 U.S. 442 (1912) (holding that the Double Jeopardy Clause will not bar a murder trial for a defendant convicted of a lesser offense if the victim died after the original trial).

234. *Garrett*, 471 U.S. at 791.

235. *Felix*, 503 U.S. at 390.

topics, the Court held that non-summary contempt cases did incorporate, and prohibit retrial on, the constituent offense.[236]

Reconciling these cases into a coherent account in terms of *Blockburger* is difficult and perhaps impossible. But they can be seen as halting gestures to recognize that, in certain prosecutions following a conviction for a lesser included offense, the jury-preserving importance of barring a second trial is at a lower ebb than usual. Prosecuting an enterprise crime typically requires gathering a wide variety of witnesses and evidence, far more than would be required for any individual offense. Even if the offenses can be charged and the relevant evidence is known, prosecutors might quite reasonably want to charge the crimes separately for reasons wholly unrelated to undermining a jury's factfinding. Such flexibility is consistent with the strong but limited protections provided to defendants by the *Blockburger* and *Ashe* tests.[237] Going forward, the jury-preservation theory would encourage courts to take a flexible approach to cases involving a previous conviction of a lesser offense, evaluating the equities of each case based on the prosecutorial necessity of bringing the charges in two separate cases.

2. Prohibiting Retrial After Appeals Resulting from Prosecutorial Misconduct

Normally, when a defendant moves for a mistrial or successfully appeals a conviction, the Double Jeopardy Clause does not prohibit retrial.[238] The Court, however, has recognized an exception to this general rule for mistrials arising from prosecutorial misconduct.[239] Such an exception is in keeping with the jury-preservation theory because it prevents the prosecutor from accomplishing indirectly what they cannot do directly—gaining a new trial in more favorable conditions. The protection is relatively "narrow." [240] The defendant needs to prove the prosecutor "intended to 'goad' the defendant into moving for a mistrial."[241] Nevertheless, it is a critical exception. Without it, the right to have the facts decided by one's original jury would become "a hollow shell," as prosecutors would force

236. *Dixon*, 509 U.S. 688, 698 (1993).
237. *See* text accompanying notes 157–63.
238. *See* Oregon v. Kennedy, 456 U.S. 667, 672–73 (1982).
239. *See id.*
240. *Id.* at 673.
241. *Id.* at 676.

defendants to seek mistrials through goading misbehavior if the State's case went badly. [242]

The Court, however, has failed to recognize a similar bar in the context of a successful appeal of a conviction. Instead, it has repeatedly stated that the Double Jeopardy Clause presents "no limitations whatever" upon retrial of a defendant after a successful appeal of trial error.[243] Indeed, even as the Court recognized the mistrial bar in *Oregon v. Kennedy*, it still affirmed that if a defendant were to "successfully appeal a judgment of conviction on the same grounds that he [could have] urged a mistrial," the Double Jeopardy Clause would nevertheless "present no bar to retrial."[244] Some lower and state courts have adopted the *Kennedy* rule to the context of appeals of convictions, holding that retrial would be banned if the prosecutorial misconduct that served as the basis of the appeal was intended to provoke a mistrial at the time.[245] But the Supreme Court has so far failed to recognize any such exception, and its definitive language suggests it would be unlikely to do so.

From the perspective of the jury-preservation theory, a motion for mistrial or an appeal post-conviction are functionally the same when the cause is prosecutorial misconduct intending to "goad" the defendant. In both cases, the defendant's interest in the original jury was undermined by intentional actions of the prosecutor, and so the double jeopardy protection should apply. The jury-preservation theory would extend *Kennedy* to successful appeals post-conviction.

3. Preserving *Ashe*

In *Currier v. Virginia*, the Court held that a subsequent trial of a defendant was not barred, even though the second trial would violate *Ashe* issue

242. *Id.* at 673.

243. Tibbs v. Fla., 457 U.S. 31, 40 (1982) (quoting North Carolina v. Pearce, 395 U.S. 711, 720 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989)); *accord* United States v. DiFrancesco, 449 U.S. 117 (1980); Ludwig v. Massachusetts, 427 U.S. 618, 630 (1976).

244. *Kennedy*, 456 U.S. at 676.

245. *See* United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992); State v. Jorgenson, 198 Ariz. 390 (2000). *But see* United States v. Doyle, 121 F.3d 1078, 1085 (7th Cir. 1997) ("[O]ur case law impliedly suggests that this Circuit does not subscribe to a *Wallach*-type expansion of *Kennedy*.").

preclusion, because the defendant had requested the separate trials.[246] Justice Gorsuch advanced this argument in the second part of his opinion, joined by four justices, and Justice Kennedy concurred on the same grounds.[247] Kennedy declined to sign onto Part III of Gorsuch's opinion, which went much further—setting the stage for the end of *Ashe* issue preclusion.[248]

Gorsuch treats *Ashe* with skepticism. He describes it as a "significant innovation" that "pressed *Blockburger*'s boundaries," and "sits uneasily with this Court's double jeopardy precedent and the Constitution's original meaning."[249] This language is the most prominent example of a recent trend of conservative justices expressing discomfort with *Ashe*.[250] If it were controlling, Part III would "take us back to the days before the Court recognized issue preclusion as a constitutionally grounded component of the Double Jeopardy Clause."[251] Although not expressly overruling *Ashe*, it appears to lay the groundwork to do so. The opinion claims that "this Court has never sought to regulate the retrial of issues or evidence in the name of the Double Jeopardy Clause."[252] But of course, *Ashe* holds that certain issues, when decisively resolved by a first court, cannot be retried. As the dissent makes clear, in such circumstances the line between retrying the same "offense" and the same "issue" is often illusory.[253] With Kennedy no longer on the Court, the opportunity to overturn *Ashe* may soon arise.

The jury-preserving approach, however, pushes against this trend. Viewed through the jury lens, *Ashe* does not "press" *Blockburger*'s boundaries. Rather, they are two applications of a deeper underlying logic. *Ashe* is best understood not as an "innovation," but as an application of the constitutional value of preserving the decision-making authority of the

246. Currier v. Virginia, 138 S. Ct. 214 (2018).

247. *Id.* at 2149–52, 2156–57.

248. *Id.* at 2152–56.

249. *Id.* at 2149, 2153, 2150.

250. *See* Bravo-Fernandez v. United States, 137 S. Ct. 352, 367 (2016) (urging the Court to "reconsider the holdings of *Ashe*"); Yeager v. United States, 557 U.S. 110, 128 (2009) (Scalia, J., dissenting) (claiming that "[i]n *Ashe*, the Court departed from the original meaning of the Double Jeopardy Clause.").

251. *Currier*, 138 S. Ct. at 2164.

252. *Id.* at 2154.

253. *See id.* at 2165 (noting that if Currier were charged for the same statutory offense but under a different factual theory, *Ashe* issue preclusion would not be implicated).

criminal defendant's original jury. It is integral, not ancillary, to the American double jeopardy protection.

The jury-preservation theory provides a coherent theory to explain *Blockburger* and *Ashe* protections, which make up the core of the Double Jeopardy Clause. It supplies us with an easily applied test that explains a wide variety of double jeopardy doctrine, from when it attaches, to what proceedings it applies to, to when it nevertheless permits retrial. And it highlights precedents and trends that deserve reconsideration. Asking "Does this unreasonably undermine the defendant's interest in the original factfinder?" allows one to accurately resolve many double jeopardy cases while staying faithful to Founding Era values. This is not to suggest that judges are consciously employing this rule *sub rosa*, but rather that some combination of our early precedent, intuitions, and practical realities reinforce it. At the same time, the theory raises a variety of serious challenges. The next part will consider two leading objections to the jury-preservation theory and the questions it raises about the future of double jeopardy protection.

PART IV

This essay has laid out a theory of the Double Jeopardy Clause that focuses on the preservation of the defendant's interest in the jury. Part II discussed this theory's roots in the Founding Era understanding of the jury—which differs from our modern one—and the protections it required. Part III demonstrated how this theory rationalizes a wide variety of double jeopardy doctrine. Still, this theory raises serious objections and has wider implications. Although they cannot be resolved fully here, this part will begin to address these questions, hopefully setting the stage for further conversation.

A. Objections

1. The Text

The most serious objection to the jury-preservation theory is also the simplest: it cannot be found in the text. The Double Jeopardy Clause guarantees that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[254] It does not mention juries,

254. U.S. CONST. amend. V.

a defendant's special interest, or the risk of undermining. Where in the text can this jury-preservation approach be found? This argument is especially pressing in light of the Seventh Amendment's guarantee of civil issue preclusion.[255] The Framers could craft clear preclusion language if they wanted to, so it is odd to think they did not here.

The simple fact is that a jury-preservation approach cannot be derived directly from the text. But then, neither can many of the central elements of the current double jeopardy doctrine. As Professor Amar has persuasively argued, a fundamental element of the double jeopardy protections, the *Blockburger* test, cannot be justified based on the text of the Clause.[256] After all:

> If one thing is the same as each of two other things, each of those things must be the same as the other. But the *Blockburger* rule of sameness flunks this elementary test. Under Blockburger, murder is the "same" as the lesser-included offense of involuntary manslaughter, and is also the "same" as the lesser-included crime of attempted murder, but these two lesser offenses are not the same as each other.[257]

Sticking to the text would require a double jeopardy doctrine far removed from what we have today.[258] At the same time, the limited historical record, anachronistic questions, and obvious but unclear distinction from English precedent make developing a purely originalist understanding of current doctrine exceedingly difficult and likely impossible. These considerations may justify a radical reworking of our current doctrine, but they cannot explain it as it is. The jury-preservation theory can and does so with a coherence sorely lacking from the current cases.

Still, the theory is not merely a product of overfitting.[259] Scholars have long recognized that the "the Double Jeopardy Clause in America has always, in important respects, piggybacked onto the right of jury trial in

255. U.S. CONST. amend. VII ("In suits at common law . . . no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.").

256. *See* Amar & Marcus, *supra* note 75; Amar, *supra* note 15.

257. Amar, *supra* note 15, at 1814.

258. *See id.* Professor Amar attempts to deal with this problem by offloading many of the current double jeopardy protections onto the Due Process Clause. Whether or not this would be a better law, it is clearly not what we have today.

259. In statistics, an overfit analysis is one "which corresponds too closely or exactly to a particular set of data." *Overfit*, OXFORD ENGLISH DICTIONARY (3d ed. 2004).

criminal cases."[260] Indeed, the "two ideas work in tandem, as do the two clauses of the Seventh Amendment specifying first, a right of civil jury trial, and second, limits on subsequent actors' power to overturn the jury's verdict."[261] Our scant historical records support this view. The only state constitutional precursor to the Clause explicitly joined it to a guarantee of a criminal jury, and one of the two states that considered the topic at their ratifying conventions directly connected the two, writing "[t]hat there shall be a trial by jury in all criminal cases . . . and that there be no appeal from matter of fact, or second trial after acquittal."[262] The criminal trial guarantee provided by the Sixth Amendment is thus a critical tool in our analysis of the Double Jeopardy Clause.[263] The connection between the jury and double jeopardy is a natural one, which is then reinforced by the theory's explanatory power.

And while the language is not so clear as in the Seventh Amendment, the jury-preservation theory suggests that the Double Jeopardy Clause is not meant to be nearly so sweeping. Instead, it provides a relatively narrow but firm set of protections that developed in the English common law, while still preserving flexibility for the government. In that context, a clear reference to the common law practice may be more effective than detailing the structure of protections in the text. Such a supra-textual reading of the Clause is not unknown in our constitutional law. Consider the Eleventh Amendment, where the Court basically ignores the language of the text. Instead, it has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."[264] Here, the jury-preservation theory reinforces the recognized constitutional structure that seeks to protect the criminal jury.

Ultimately, though, the jury-preservation theory is a descriptive, not normative, claim. The lack of clear textual grounding or direct original proof might lead one—quite reasonably—to reject the approach as a guide for future cases. In order to do so, however, it is necessary either first to

260. *See* Amar & Marcus, *supra* note 75, at 58.

261. *Id.*

262. N.H. CONST. OF 1784 pt. 1, art. I, § XVI, *reprinted in* SOURCES OF OUR LIBERTIES 384 (Richard L. Perry & John C. Cooper eds., 1978); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 550 (Jonathan Elliot ed., 1876) (both cited by Amar & Marcus, *supra* note 75, at 58 n.279.)

263. *See* Westen & Drubel, *supra* note 62, at 133.

264. Blatchford v. Native Vill. of Noatak & Circle Vill., 501 U.S. 775, 779 (1991).

provide an alternative theory with equal explanatory power, or to reject current precedent. Until then, the jury-preservation theory is a powerful tool for understanding double jeopardy doctrine as it currently exists.

2. Interest in Jurors

Another important objection has been raised to a jury-preservation approach. It is, thankfully, more easily addressed. In a classic article,[265] Professors Westen and Drubel dismiss the idea that the Double Jeopardy Clause might especially protect the defendant's "constitutional interest in having his case resolved by a tribunal that he perceives to be 'favorably disposed to his fate.'"[266] The idea is absurd because in a jury trial, it is possible for "a juror whom the defendant perceives to be favorable [to be] excused and replaced by an alternate juror for no compelling reason."[267] Whatever objections might arise, it "can hardly be said to violate double jeopardy."[268] Thus, it cannot be the case that the defendant has a constitutionally recognized interest in retaining a sympathetic factfinder. Justice Powell employed a similar argument, noting that the protection does not apply during the venire stage and that a judge assigned to hear a bench trial may be reassigned.[269]

These arguments, however, mistake the nature of the defendant's interest. The defendant has an interest in retaining the originally empaneled jury, as a whole. It is not a particularized attachment to one or two jurors, or to a larger venire from which the jury will be selected. Rather, it is through the process of selection that a colonial defendant was able to exert particular control over the makeup of the jury, and it is through the formal swearing that the jury became an avatar for republican values. Even though the defendant cannot claim a right to have any particular juror decide her case (assuming alternates were appropriately selected as well), her interest in a favorable jury nevertheless remains.

Once this argument is disposed of, we see that the jury-preservation theory actually harmonizes well with the main thrust of Professor Westen's

265. *See* Amar & Marcus, *supra* note 75, at 49 (describing it as such).

266. Westen & Drubel, *supra* note 62, at 89 (quoting United States v. Jorn, 400 U.S. 470, 486 (1970)).

267. *Id.*

268. *Id.*

269. Crist v. Bretz, 437 U.S. 28, 51 (1978) (Powell, J., dissenting).

argument, which is that significant portions of double jeopardy doctrine are "most coherent[ly]" understood as a "consequence of the jury's prerogative to acquit against the evidence." Under the jury-preservation theory, this nullification defense is subsumed into a larger concern for protecting from usurpation both the original jury's legal and factual determinations.[270]

B. The Future of Double Jeopardy Law

Even if we reject the above and other counterarguments, a critical evaluation of the jury-preservation theory raises serious questions about our current double jeopardy doctrine. The jury-preservation theory argues that the Double Jeopardy Clause primarily protects a criminal defendant's interest in having his case be decided by the original jury. The protected interest is a product of the Founding Era criminal trial and jury, where concern over judicial interference with jury decisions was strong and the defendant had a unique role in the selection of the jury.[271]

But it is no longer 1776. Criminal procedure has changed considerably since the late eighteenth century. Our judges no longer serve at the pleasure of a royal governor, nor are they local notables untrained in the law. They now have protected tenure or fixed terms and are trained in a professional legal education system.[272] Criminal defendants now almost universally rely on trained lawyers at both the state and federal levels.[273] In the years after the Civil War, prosecutorial preemptory challenges became widespread, giving each side comparable control over the jury membership.[274] Not coincidentally, cultural and legal norms now emphasize the importance of an "impartial" jury that is representative of all members of the community.[275] And the application of *Batson* to criminal defendant peremptories has elevated the community interest in a representative jury above the

270. Westen, *supra* note 66, at 1012–22.

271. *See* Part II, *supra*.

272. *See, e.g.*, U.S. CONST. art. III, § 1.

273. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment counsel guarantee against the states).

274. *See* Holland v. Illinois, 493 U.S. 474, 518 (1990) (noting that prosecutors in New York gained access to peremptory challenges in 1881, and in Virginia in 1919).

275. *See* United States v. Ballard, 329 U.S. 187 (1946) (articulating the "cross-section" jury requirement).

defendant's interest in a sympathetic one.[276] These changes have significantly altered the role of the jury in the criminal justice system in a way that could not have been anticipated at ratification.

Their sum effect is that the defendant's special interest in the jury now looks paltry and out of step with our larger criminal procedure. The mechanisms that gave the defendant special authority over the jury have been dismantled, and the risk of the abuses it guarded against have been substantially mitigated. It is unsurprising, then, that the Court's occasional invocation of the "valued" right to have a case resolved by an original tribunal is "merely annonc[ed]," never justified or elaborated.[277] In this changed context, the protections of the Double Jeopardy Clause are considerably less valuable to the defendant. The Clause provides stringent protection for a defendant's interest in the jury, but the jury's value to the defendant is not what it once was. It is thus likely that the Clause provides significantly less *de facto* protection than was anticipated when it was ratified.

This raises serious questions for double jeopardy law. There are at least three potential paths forward. The first is to simply keep the doctrine as it is and apply the jury-preservation theory going forward. But whereas this approach might be the most consistent with our precedent, it also reinforces the growing gap between double jeopardy protections and the rest of criminal procedure. The second approach would attempt to return criminal procedure to an earlier era, most significantly by limiting peremptory challenges to the defendant. But a retrenchment of prosecutorial power in *voir dire* seems unlikely, and such reforms would probably not cohere with the modern context. Finally, the Double Jeopardy Clause could be reimagined. It could be transformed into a doctrine that actually does effectively serve the ends—limitation of prosecutorial harassment, preserving the defendant's repose, finality in decisions—so often ascribed to it in judicial opinions. A limited version of such a reimagining would be to adopt the pragmatic, due-process-inflected approach advocated by Professor Amar.[278] More ambitious interpretations could resemble a same-transaction test.[279] Doing so would provide a different protection from

276. Georgia v. McCollum, 505 U.S. 42 (1992).

277. Crist v. Bretz, 437 U.S. 28, 47 n.13 (1978) (Powell, J., dissenting).

278. *See* Amar, *supra* note 15.

279. *See, e.g.*, Jones v. Thomas 491 U.S. 376, 388 (1989) (Brennan, J., dissenting); Morris v. Mathews, 475 U.S. 237, 257–58 (1986) (Brennan, J., dissenting).

that described by the jury-preservation theory, but it might better reflect current realities while staying true to the deep value of defending the individual from state abuse.

CONCLUSION

Much like the real Sargasso Sea, the Double Jeopardy Clause's doctrine and protections are easily navigated, once one moves past old myths. The core protections of the Clause, *Blockburger* and *Ashe* preclusion, and much of its doctrine can be understood as the outcome of a fundamental value: the preservation of a defendant's interest in his original jury. This value is informed by the Founding Era understanding of the jury, when it was viewed as a critical safeguard against overreaching judges, securing a defendant's liberty from executive abuse.

The jury-preservation theory explains current double jeopardy doctrine more clearly than the opinions themselves and also can help guide future decisions. At the same time, it highlights the way in which the Clause no longer provides the level of protection it once did. As a result, it asks us to reconsider the role of the Clause in our criminal procedure. The *Currier* plurality suggests that we may be on the eve of a revolution in double jeopardy jurisprudence. Rather than weakening it further, we should take this opportunity to rationalize and revitalize the doctrine.