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Untangling Double Jeopardy in Mixed-Verdict Cases

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I. INTRODUCTION

THE Double Jeopardy Clause of the Fifth Amendment commands that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[1] It is the oldest edict in the Bill of Rights.[2] Double jeopardy rights date back to ancient Rome and Greece,[3] and are even found in the Bible.[4] In addition, the Double Jeopardy Clause is "one of the most frequently litigated [constitutional] provisions."[5] Despite this history, one justice of the Supreme Court has called the Clause "one of the least understood . . . provision[s] of the Bill of Rights."[6] The Court has repeatedly acknowledged this confusion in its double jeopardy jurisprudence,[7] describing its cases as a tangled "Sargasso Sea."[8] The Court is right.[9] In no other area of criminal procedure

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1. U.S. CONST. amend. V.

2. Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 81. Many commentators have chronicled the historical antecedents of the double jeopardy clause. One excellent example is George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 4 U. ILL. L. REV. 827, 836–37 (1988).

3. Thomas, *supra* note 2, at 836–37; Westen & Drubel, *supra* note 2, at 81; *see also* HERBERT BROOM, A SELECTION OF LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED 326, 346–50 (8th Am. ed. 1882).

4. Bartkus v. Illinois, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting).

5. Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

6. *Id.*

7. *See, e.g.*, Burks v. United States, 437 U.S. 1, 13 (1978) (noting "the conceptual confusion" in cases addressing "the double jeopardy implications of an appellate reversal").

8. Albernaz v. United States, 450 U.S. 333, 343 (1981). "Sargasso" is defined as "a mass of floating vegetation." WEBSTER'S NEW COLLEGIATE DICTIONARY 1043 (11th ed. 2003); *see generally* Lissa Griffin, *Two Sides of a "Sargasso Sea": Successive Prosecution for the "Same Offence" in the United States and the United Kingdom*, 37 U. RICH. L. REV. 471 (2003).

9. For years, commentators have decried the Supreme Court's inability to articulate a coherent theory of double jeopardy. *See, e.g.*, Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1, 1, 16 (1983) (noting that double jeopardy jurisprudence "is in a state of disarray" and "a regular procession of Supreme Court pronouncements" has done little to solve the "perplexing puzzle" of a coherent double jeopardy rationale); Thomas, *supra* note 2, at 828 ("Unfortunately, the proliferation of case law and commentary has not produced a coherent theory to date."); Westen & Drubel, *supra* note 2, at 82 (noting that the doctrine "is in an 'acknowledged state of 'confusion'" and

has the Supreme Court so frequently overruled its own recently created precedent.[10]

It is fair to ask why the Double Jeopardy Clause has produced such unusual uncertainty and confusion. To be sure, its text is brief, and its legislative history unilluminating.[11] Moreover, historical developments have entirely altered the context of double jeopardy. Incorporation of double jeopardy protection through the Fourteenth Amendment's Due Process Clause has increased its impact. Furthermore, the proliferation of overlapping statutory crimes and the increased number of agencies that can prosecute them has drastically broadened the possibilities for multiple prosecutions and multiple punishments.[12] Equally, if not more importantly, double jeopardy protection represents an uneasy tension among several core criminal procedure interests: the government's interest in prosecuting crime, the defendant's right to be free of oppressive prosecution, and the defendant's protection of the right to jury trial through the finality of the result. Viewed this way, the Supreme Court's double jeopardy jurisprudence reflects an intense struggle to prevent government oppression, preserve individual liberty, protect the finality of a jury's decision, and ensure, at the same time, that the state has one legiti-

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that "the problem . . . is that the individual Justices have yet to develop coherent positions of their own"); Note, *Criminal Law—Double Jeopardy*, 24 MINN. L. REV. 522, 522 (1940) ("[T]he riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion."); Comment, *Twice in Double Jeopardy*, 75 YALE L.J. 262, 264 (1965) (Double jeopardy jurisprudence is composed of "fictions and rationalizations [that] are the characteristic signs of doctrinal senility.").

10. In three separate double jeopardy areas, the Supreme Court reversed its prior decisions within three terms. In each of them, the Court had originally interpreted the double jeopardy protection broadly and then abandoned that interpretation as mistaken, adopting a narrower one. Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993); United States v. Halper, 490 U.S. 435 (1989), *overruled by* Hudson v. United States, 522 U.S. 93 (1997); United States v. Jenkins, 420 U.S. 358 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1978). The clearest example is *United States v. Dixon*. In *Dixon*, the Court overruled its three-year-old decision *Grady v. Corbin*, in which it had adopted an arguably fairer and definitely broader same-conduct definition of "same offense," 509 U.S. at 704, to return to the bright-line, statutory same-elements definition of "same offence" it had set forth long ago in *Blockburger v. United States*, 284 U.S. 299 (1932). In *United States v. Jenkins*, the Court held that once a trial terminates in a defendant's favor, regardless of whether there is an acquittal or a dismissal, retrial is barred if the retrial will require resolution of the facts. *Jenkins*, 420 U.S. at 369–70. Three terms later, it overruled this bright-line rule in *United States v. Scott*, in which it held that retrial is only barred after a true acquittal. *Scott*, 437 U.S. at 86. In *Scott*, Chief Justice Rehnquist—the author of both decisions—described *Jenkins* as a failed attempt to draw a "bright-line rule." *Id.* at 86–87. A third example is *United States v. Halper*, overruled three years later by *Hudson v. United States*. *Hudson*, 522 U.S. at 99. In *Halper*, the Court adopted a disproportionality analysis for determining whether a civil sanction constituted double punishment. 490 U.S. at 452. In *Hudson*, the Court abandoned that balancing approach in favor of a narrower interpretation that deferred to the legislative intent behind the civil sanction. 522 U.S. at 99.

11. United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973).

12. *See* Griffin, *supra* note 8, at 474; Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1188–96 (2004).

mate, full, and fair opportunity to convict.[13]

Not surprisingly, the Court has searched widely for help in interpreting the Double Jeopardy Clause. The Court has relied on the text of the Clause at times[14] but it has also clearly rejected it.[15] At times the Court has looked to the Clause's narrow "common-law ancestry,"[16] but it has also focused on the Clause's broader underlying interests.[17] In its most recent foray into the subject, the Court even went so far as to seek definitive meaning in the Clause's "spirit."[18]

The most recent example of the Court's turbulent double jeopardy jurisprudence is *United States v. Yeager*.[19] In *Yeager,* the Court held (1) that when a jury returns a mixed verdict acquitting a defendant of some charges and failing to agree on other charges, the fact of the hung jury and the resulting mistrial does not interfere with the acquittal's collateral estoppel effect and (2) that retrial on mistried counts, therefore, is prohibited.[20] According to the majority's decision, the hung jury is a "nonevent" and has no bearing on the collateral estoppel effect of the accompanying acquittal.[21] Justice Kennedy concurred in part and con-

13. For an example of that struggle, compare *Green v. United States*, 355 U.S. 184 (1957), with *United States v. Dixon*, 509 U.S. 688 (1993).

14. Yeager v. United States, 129 S. Ct. 2360, 2369 (2009) (citing United States v. DiFrancesco, 449 U.S. 117 (1980)).

15. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170 (1873).

16. *Yeager*, 129 S. Ct. at 2365.

17. Richardson v. United States, 468 U.S. 317, 330 (1984).

18. *Yeager*, 129 S. Ct. at 2365 (quoting *Ex Parte* Lange, 85 U.S. (18 Wall.) at 170).

19. *Id.*

20. *Id.* at 2368. In *Yeager*, the defendant was charged in a 126-count indictment with securities fraud, wire fraud, and conspiracy (Counts 1–6) in addition to insider trading and money laundering (Counts 7–126). *Id.* at 2363–64. The indictment alleged that he participated in making misleading statements at an annual analysts' meeting about the value of a telecommunications system offered by his employer Enron and that he also violated insider trading and money laundering prohibitions by selling his own stock for a profit. *Id.* at 2363. The jury acquitted Yeager on the fraud and conspiracy counts but were deadlocked and failed to reach a verdict on the insider-trading and money-laundering counts. *Id.* at 2364. When the government sought to retry Yeager on the mistried counts, he moved to bar the retrial, claiming that the government was collaterally estopped. *Id.* Yeager claimed the jury's acquittal on the fraud and conspiracy counts showed that the jury had concluded that he did not possess material, non-public information. *Id.* And, since the insider trading counts required proof that Yeager possessed such information, the jury's finding barred relitigation of that issue. *Id.*

The district court disagreed and denied the motion. *Id.* It held that the acquittal could have and "likely" resulted from the jury's conclusion that Yeager "'did not knowingly and willfully participate in the scheme to defraud . . . .'" *Id.* (quoting Yeager v. United States, 446 F. Supp. 2d 719, 735 (S.D. Tex. 2006)). The Fifth Circuit agreed with Yeager and disagreed with the district court. *Id.* at 2365. But the appellate court held that the retrial was not collaterally estopped by the acquittals because if the jury had indeed found that Yeager had not possessed insider information, then they would have acquitted him on the insider trading counts rather than failing to agree on those counts. *Id.* Given the court's inability to find that the jury had conclusively determined that Yeager did not possess insider information, the doctrine of collateral estoppel could not be invoked. *Id.*

The Supreme Court reversed. *Id.* at 2370. It held that the Fifth Circuit had erred in considering the significance of a hung jury when evaluating a collateral estoppel claim. *Id.* Because it is impossible to know the basis for a jury's failure to agree, the Court held, a hung jury has no legal significance at all. *Id.*

21. *Id.* at 2367.

curred in the judgment.[22] Justice Scalia, joined by Justices Alito and Thomas, dissented.[23] Justice Alito also separately dissented.[24]

The *Yeager* case is unique for two reasons. First, *Yeager* presented the Court with the need to address four major areas of its existing double jeopardy jurisprudence: collateral estoppel,[25] finality of acquittals,[26] non-finality of mistrials,[27] and inconsistent verdicts.[28] In fact, *Yeager* presents a direct conflict between two strands of the Supreme Court's double jeopardy jurisprudence. Represented by *Ashe v. Swenson*, the first strand established constitutional collateral estoppel.[29] The second, represented by *Richardson v. United States*,[30] unqualifiedly established that a mistrial by a hung jury does not preclude retrial.[31] In *Yeager*, the Court resolved this conflicting precedent not by balancing the interests underlying the two lines of authority but rather by extending *Ashe* well beyond its idiosyncratic facts, which involved successive robbery trials against the same defendant but different victims of the same robbery. The Court also disregarded the well-established non-finality rule of *Richardson*, the rule that a hung jury does not terminate jeopardy and therefore does not bar retrial.[32] The Court accomplished both of these feats without adequate analysis or explanation.[33]

This Article attempts to describe and untangle the confusion leading up to and resulting from the *Yeager* decision. Part II examines the four distinct double jeopardy areas presented in *Yeager,* with particular emphasis on the two conflicting precedents of collateral estoppel and the non-finality of a hung jury. Part III closely examines the *Yeager* decision itself. Part IV analyzes *Yeager* in light of its tangled doctrinal history and places it in the context of the Court's several other short-lived and rapidly reversed precedents. The Article concludes that the Court's holding in *Yeager* is neither justified by its precedent nor adequately explained. By failing to justify the extensive departures from its double jeopardy precedent—greatly extending *Ashe* and severely narrowing *Richardson*—the *Yeager* Court further tangled its doctrinal Sargasso Sea.

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22. *Id.* at 2371.
23. *Id.* at 2371.
24. *Id.* at 2374.
25. *See generally* Ashe v. Swenson, 397 U.S. 436 (1970).
26. *See generally* Fong Foo v. United States, 369 U.S. 141 (1962).
27. *See generally* Richardson v. United States, 468 U.S. 317 (1984); Arizona v. Washington, 434 U.S. 497 (1978).
28. *See generally* United States v. Powell, 469 U.S. 57 (1984); Dunn v. United States, 284 U.S. 390 (1932). *Dunn* and *Powell* held that courts must respect, and therefore uphold, a jury's verdict of seemingly inconsistent acquittals and convictions.
29. 397 U.S. 436.
30. 468 U.S. 317.
31. Yeager v. United States, 129 S. Ct. 2360, 2366 (2009); *see* George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. CAL. L. REV. 1551, 1551, 1558 (1996) (noting that "[a] hung jury mistrial never bars a second trial. . . . If the jury cannot agree, for whatever reason, the way is clear for another trial" and that Justice Rehnquist's majority opinion in *Richardson* held that "a hung jury mistrial is always permissible").
32. *See Yeager*, 129 S. Ct. at 2360.
33. *See infra* notes 166–251 and accompanying text.

II. THE SUPREME COURT'S DOUBLE JEOPARDY JURISPRUDENCE

As noted above, *Yeager* is a unique and absolutely fascinating case because it presents issues involving four distinct areas of constitutional double jeopardy jurisprudence—collateral estoppel, the finality of an acquittal, the non-finality of a mistrial, and inconsistent verdicts. Each of these topics will be addressed below.

A. COLLATERAL ESTOPPEL

The *Yeager* decision relied on the collateral estoppel doctrine that was constitutionalized in *Ashe v. Swenson*.[34] That doctrine provides that "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties . . . ."[35] As applied to criminal cases, the doctrine means that where an ultimate issue of fact is finally decided by an acquittal, relitigation of that issue is barred by the Double Jeopardy Clause.[36]

The facts in *Ashe* are notably, and notoriously, sui generis.[37] Ashe was charged with robbing six poker players and was initially brought to trial on the charge of robbing one of them.[38] At trial, "[t]he proof that an armed robbery had occurred and that personal property had been taken" was clear, but the State's case was weak on the issue of whether Ashe had been one of the robbers. Two of the witnesses thought that there had been only three robbers"—not four—and could not identify Ashe as one of the three.[39] Two other witnesses gave equivocal identification testimony—one based on the similarity of Ashe's voice to the voice of one of

34. *Yeager*, 129 S. Ct. at 2367 (relying on Ashe v. Swenson, 397 U.S. 436 (1970)) (noting that constitutionalization follows the well-worn incorporation road). After the Court decided in 1969, in *Benton v. Maryland*, 395 U.S. 784 (1969), that the Fifth Amendment double jeopardy protection was applicable to the states through the due process clause, the Court held in *Ashe* that the federal collateral estoppel protection was applicable to the states as part of the now-incorporated double jeopardy clause. *Ashe*, 397 U.S. at 440.

35. RESTATEMENT (FIRST) OF JUDGMENTS § 68(1) (1942).

36. The Supreme Court first applied the doctrine of collateral estoppel to bar a criminal prosecution in 1916 in *United States v. Oppenheimer*, although not on constitutional grounds. 242 U.S. 85 (1916). In *Oppenheimer*, the Court affirmed the dismissal of an indictment because an earlier, identical indictment had been dismissed on statute of limitations grounds. *Id.* at 87–88. Since jeopardy had not attached before that earlier dismissal, the constitutional double jeopardy protection was not implicated, but retrial was barred on the ground of collateral estoppel. *Id.* Later, in *Hoag v. New Jersey*, the Court refused to dismiss an indictment where the defendant had been tried and acquitted for robbing three of four victims and was then brought to trial for robbing the fourth victim. 356 U.S. 464, 465 (1958). The Court upheld the State's right to try the Defendant separately for each case. It refused to find that the Due Process Clause binds the states through double jeopardy protection. *Id.* at 467–68. Chief Justice Warren, in dissent, would have held that such a protection was a fundamental right included in the Fourteenth Amendment Due Process and, thus, binding on the states. *Id.* at 473–74 (Warren, J., dissenting).

37. *See, e.g.*, Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1734 n.37 (1996) [hereinafter *Due Process Roots*].

38. *Ashe*, 397 U.S. at 437–38.

39. *Id.* at 438.

the robbers and the other only based on Ashe's "size and height[ ] and . . . actions."[40] Cross-examination was brief and primarily aimed by the weakness of the identification testimony.[41] The trial judge instructed the jury that if it found Ashe "was one of the participants in the armed robbery, the theft of 'any money' [or property] . . . would sustain a conviction," even if he had not personally taken it.[42] The jury found Ashe "not guilty due to insufficient evidence."[43]

Following the acquittal, the State sought to try Ashe for robbing one of the other players.[44] Although traditional double jeopardy principles would not have barred a second prosecution that involved a different victim,[45] Ashe moved to dismiss based on collateral estoppel, arguing that the acquittal finally determined that he was not one of the robbers.[46] The trial court denied the motion, allowing the second trial to occur.[47]

The witnesses were essentially the same at the second trial, but their testimony on identity was "substantially stronger."[48] Indeed, the State conceded that after the acquittal it treated the first trial "as no more than a dry run for the second prosecution."[49] In fact, the Supreme Court recognized that the State substantially improved its case.[50] The judge charged the jury as he had at the first trial, and the jury found Ashe guilty.[51] He was sentenced to thirty-five years imprisonment.[52]

The state appellate courts affirmed the conviction, as did the district and circuit courts, on federal habeas corpus.[53] The federal courts held that they were bound by the Supreme Court's decision in *Hoag v. New Jersey*.[54] The Supreme Court reversed, holding that the second trial violated the Fifth Amendment's prohibition against double jeopardy, which had recently been made applicable to the states in *Benton v. Maryland*.[55]

The Court held that the jury's acquittal collaterally estopped the State from trying Ashe for the robbery of a different victim.[56] Its analysis is, to say the least, skeletal. First, the Court noted that "collateral estoppel has been an established rule of federal criminal law" since it was first recog-

40. *Id.*
41. *Id.*
42. *Id.* at 439.
43. *Id.*
44. *Id.*
45. Hoag v. New Jersey, 356 U.S. 464, 467–68 (1958).
46. *Ashe*, 397 U.S. at 439.
47. *Id.*
48. *Id.* at 439–40.
49. *Id.* at 447.
50. *Id.* at 440.
51. *Id.*
52. *Id.*
53. *See* Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968); Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967); State v. Ashe, 403 S.W.2d 589 (Mo. 1966); State v. Ashe, 350 S.W.2d 768 (Mo. 1961).
54. 366 U.S. 464, 467–68 (1958); *see Ashe*, 397 U.S. at 440–41.
55. 395 U.S. 784 (1969); *see Ashe*, 397 U.S. at 442–43.
56. *Ashe*, 397 U.S. at 446–47.

nized in *United States v. Oppenheimer*.[57] Second, the Court held that the federal protection is embodied in the Double Jeopardy Clause; "[f]or whatever else that constitutional guarantee may embrace . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time."[58] Thus, under this brief analysis, once Ashe had been acquitted of robbing the first victim, the State could not have tried him again for that charge. Further, the State could not have tried Ashe for robbing a second victim; "[f]or the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers."[59] In addition, the Court explicitly relied on the State's concession that "it treated the first trial as no more than a dry run for the second prosecution."[60] As the Court observed, quoting the State's brief:

> 'No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial.' But this is precisely what the constitutional guarantee forbids.[61]

Having found collateral estoppel in the Double Jeopardy Clause, the Court explained that to ensure protection of the right, collateral estoppel analysis "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[62] The Court thus directed the lower courts to "'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'"[63] "The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' Any test more technically restrictive would . . . amount to a rejection of the rule" where, as in criminal cases, a general verdict of acquittal is returned.[64]

Applying its analysis, the Court held that the record was "utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that the complaining witness had not been a victim of that robbery."[65] Accordingly, the Court held that the only rationally conceivable issue in dispute before the jury was

57. *Id.* at 443.

58. *Id.* at 445–46 (quoting Green v. United States, 355 U.S. 184, 190 (1957)) (citation omitted).

59. *Id.* at 446.

60. *Id.* at 447.

61. *Id.*

62. *Id.* at 444.

63. *Id.* (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960)).

64. *Id.* (quoting Sealfon v. United States, 332 U.S. 575, 579 (1948)).

65. *Id.* at 445.

whether the petitioner had been one of the robbers.[66]

Chief Justice Burger dissented.[67] He believed that

> [n]othing in the language or gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment that the Court today accords to the collateral-estoppel doctrine. . . . this is truly a case of expanding a sound basic principle beyond the bounds—or needs—of its rational and legitimate objectives to preclude harassment of an accused.[68]

First, Chief Justice Burger explained that, under the recognized *Blockburger* test, the two robberies were not the "same offence" because each required proof of a fact the other did not—a different victim.[69] Second, he did not agree that double jeopardy protection included collateral estoppel, a dubious conclusion that he noted had "eluded judges and justices for nearly two centuries."[70] Third, in what would turn out to be prescient language, Chief Justice Burger described collateral estoppel as a "strange mutant" when transferred from civil to criminal cases.[71] In civil cases, collateral estoppel applies to the same parties, saves resources, and provides finality.[72] In criminal cases, issues of finality and conservation of resources are less important, and the parties—or complainants—are not the same.[73]

According to Chief Justice Burger, the majority had misinterpreted *Green*'s protection against twice "run[ning] the gantlet."[74] In fact, he characterized the majority's reliance on that language as "decision by slogan."[75] Green was found guilty of second-degree murder when charged with first-degree murder and secured a new trial.[76] The Court held that having once "run the gantlet" on the first-degree murder charge he could not be forced to do so again.[77] In *Ashe*, of course, the defendant had

66. *Id.* Justice Black concurred on the ground that the Court's inclusion of collateral estoppel in the Double Jeopardy Clause was correct as well as consistent with his view that the Fourteenth Amendment totally incorporated the Bill of Rights and made it applicable to the states. *Id.* at 447–48 (Black, J., concurring). Justice Brennan, joined by Justices Douglas and Marshall also concurred. *Id.* at 448 (Brennan, J., concurring). Justice Brennan agreed that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Id.* But even if collateral estoppel had not been applicable in *Ashe*, Justice Brennan would have barred a second prosecution because the "same offence" language of the double jeopardy protection requires the government to try all charges that arise out of the same transaction at one time. *Id.* at 449–54. Justice Harlan also concurred but wanted to make clear that the Court's opinion did not embrace "to any degree the 'same transaction'" test for same offence set forth in Justice Brennan's concurring opinion. *Id.* at 448 (Harlan, J., concurring).

67. *Id.* at 460 (Burger, J., dissenting).

68. *Id.* at 460–61.

69. *Id.* at 463.

70. *Id.* at 464.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 465.

75. *Id.*

76. *Id.* (citing Green v. United States, 355 U.S. 184, 190 (1957)).

77. *Id.* (citing *Green*, 355 U.S. at 190).

never "run the gantlet" on the untried robbery charges.[78]

Finally, Chief Justice Burger disagreed with the majority's reading of the record.[79] He found that the jury's acquittal could have been based not on a failure of proof of identity but from confusion arising out of the fact that there were two robberies in different areas of the home.[80] Thus, the majority's attempt to find a single, rational issue supporting the acquittal was "sheer 'guesswork.'"[81]

As precedent, *Ashe* has always invited skepticism and uncertainty.[82] First, its superficial analysis makes its holding uncertain.[83] Indeed, the Court's analysis resembles its analyses in other decisions of the Incorporation Era, in which the Court identified existing federal constitutional standards and then adopted them, in toto, as applicable to the states through the Fourteenth Amendment.[84] Like other decisions of its era, *Ashe* relies almost exclusively on the broad notion of fundamental fairness but fails to identify any text, history, or underlying interests that justify its holding.[85] Second, *Ashe*'s unusual facts limit its precedential value. It is not an overstatement to say that *Ashe* is factually unique. In *Ashe*, of course, the charges and underlying conduct were absolutely identical except for the name of the victim.[86] They all arose out of one simple event—a robbery.[87] Moreover, the record uniformly pointed to a single contested issue—identity.[88] Finally, the prosecutor candidly and explicitly conceded that he treated the first trial as a "dry run."[89] All of these factors are unusual in a criminal case, to say the least. Certainly, they have never appeared in any of the Court's subsequent collateral es-

78. *Id.*
79. *Id.* at 462–63, 466–67.
80. *Id.* at 467.
81. *Id.* at 468.
82. *See, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 30–31 (1995).
83. Interestingly, several commentators have noted that due process is the more appropriate constitutional basis for protecting the interests underlying the double jeopardy provision. *See, e.g.*, *id.* at 4–27 (applying this theory to the dual sovereignty doctrine); Griffin, *supra* note 8, at 503–05 (applying this theory to the interpretation of the same offense requirement); Charles William Hendricks, Note, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 392–93 (2000) (tracing collateral estoppel's due process roots); *Due Process Roots*, *supra* note 37, at 1741 (stating that the collateral estoppel protection is more properly located in the Due Process Clause than in the Fifth Amendment). These commentators believe that the misplacing of the protection against successive prosecution under the Double Jeopardy Clause has led to doctrinal confusion. *See* Amar & Marcus, *supra* note 82, at 31; Griffin, *supra* note 8, at 503–05. Moreover, before incorporation, traditional double jeopardy jurisprudence did not address collateral estoppel questions; thus, there is no historical or analytical framework to evaluate collateral estoppel claims that are different from the unique factual context of *Ashe*. *See generally* Amar & Marcus, *supra* note 82; Griffin, *supra* note 8.
84. *See, e.g.*, Griffin v. California, 380 U.S. 609, 610–11 (1965); Mapp v. Ohio, 367 U.S. 643, 655 (1961).
85. *Griffin*, 380 U.S. at 610–11.
86. *Ashe*, 397 U.S. at 437–40.
87. *Id.*
88. *Id.*
89. *Id.* at 447.

toppel decisions.[90]

Since *Ashe*, the Supreme Court has rarely addressed collateral estoppel in criminal cases, but when it has done so, it has uniformly narrowed the decision, essentially isolating it.[91] In fact, after Ashe and until *Yeager,* the Court had never applied collateral estoppel to bar litigation in a criminal case. Thus, for example, in *United States v. Dowling*,[92] the Court refused to extend the effect of a prior acquittal beyond the acquittal itself, such that the government could use testimony indicating that the defendant committed the crime for which he had been acquitted as other crimes evidence in a separate trial for a distinct offense.[93]

More recently, in *Bobby v. Bies*,[94] the Court narrowly construed several different independent aspects of collateral estoppel precedent.[95] First, the Court held that a state court's finding that the defendant was borderline mentally retarded, which it had considered (and rejected) as a mitigating factor in imposing the death penalty, did not bar subsequent litigation of whether the same retardation was sufficient to bar the death penalty.[96] The Court held that collateral estoppel did not apply because the two mental retardation issues were not the same issues.[97] Second, it held that the defendant had not been "twice put in jeopardy" because he, not the State, sought review of his sentence after the change in law that occurred with *Atkins*.[98] The Court also held that collateral estoppel was unavailable because the defendant had not been the prevailing party; the sentencing court had rejected the claim of mental retardation as a mitigating factor.[99] Similarly, because collateral estoppel is only available on an issue that is "necessary to the ultimate outcome of a prior proceed-

90. *See also id.* at 460 (Burger, J., dissenting).

91. Indeed, some commentators have used stronger language in describing the Court's interpretation of Ashe. *See, e.g.*, Hendricks, *supra* note 83, at 388–90 (arguing that criminal collateral estoppel has been so eroded that it provides virtually no protection to defendants); *Due Process Roots*, *supra* note 37, at 1729 (noting that since *Ashe*, "criminal collateral estoppel has been significantly weakened" and that the doctrine has been subjected to "steady erosion").

92. 493 U.S. 342 (1990). For an in-depth analysis of the evidentiary use of collateral estoppel in criminal cases, see Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1 (1989).

93. *Dowling*, 493 U.S. at 348.

94. 129 S. Ct. 2145 (2009).

95. At Bies's capital sentencing proceeding, the jury had been instructed to consider his borderline mental retardation in considering the death penalty. *Id.* at 2149–50. The jury recommended a sentence of death, and the court imposed it. *Id.* The Ohio Supreme Court affirmed, observing that Bies's "mild to borderline mental retardation merit[ed] some weight in mitigation," but it concluded that the mitigating factors were outweighed by the aggravating circumstances. *Id.* (alteration in original).

Thereafter, the Supreme Court held in *Atkins* that the Eighth Amendment prohibited imposition of the death penalty on the mentally retarded. Atkins v. Virginia, 536 U.S. 304, 321 (2002). This subsequently led the federal district court in *Bies* to grant a writ of habeas corpus vacating the defendant's death sentence based on the court's earlier finding that he was retarded. *Bies*, 129 S. Ct. at 2151. The Sixth Circuit affirmed. *Id.*

96. *Id.* at 2149.

97. *Id.*

98. *Id.*

99. *Id.*

ing,"[100] the sentencing court's rejection of that factor meant the defendant's mental state was "not outcome determinative."[101] Finally, even if collateral estoppel applied, the Court invoked the exception for changes in the law, noting that "[b]ecause the change in law substantially altered the State's incentive to contest Bies' [sic] mental capacity, applying preclusion would not advance the equitable administration of the law."[102]

B. The Finality of an Acquittal

Collateral estoppel is a subspecies of double jeopardy protection for the finality of an acquittal. The Supreme Court has repeatedly and consistently held that an acquittal is absolutely final.[103] As long ago as Blackstone the rule has been the same: "[W]hen a man is once fairly found not guilty upon an indictment, or other prosecution . . . he [can] plead such acquittal in bar of any subsequent accusation for the same crime."[104]

Indeed, as the Court established in *Fong Foo v. United States*, an acquittal is an absolute bar to additional proceedings even where the acquittal is "based upon an egregiously erroneous foundation."[105] Cases following *Fong Foo* protected the finality of an acquittal as terminating the prosecution's right to prosecute regardless of whether the acquittal was granted by a jury or a judge,[106] at trial or on appeal,[107] or correctly or erroneously.[108] Indeed, where a defendant has previously been acquitted, no balancing of interests is required to bar subsequent proceedings

100. *Id.*

101. *Id.* at 2153.

102. *Id.* The Court explained that the state frequently does not contest the evidence of mental retardation as a mitigator because, based on that evidence, the jury might find for the state on the aggravating factor of future dangerousness. *Id.* (citing *Atkins*, 536 U.S. at 321).

103. *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 442–43 (1981).

104. Green v. United States, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting) (quoting 4 William Blackstone, Commentaries *335). In Blackstone's England, the Crown prosecutors developed the practice of discharging a jury when the evidence was so weak that acquittal appeared likely. *Id.* The Crown would then re-indict and retry the defendant with better evidence. To prevent this, the rule was established that "whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops." Kyden Creekpaum, Note, *What's Wrong with a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right*, 44 Am. Crim. L. Rev. 1179, 1195 (2007). That rule was embodied in the double jeopardy clause and has been consistently upheld ever since. This is without doubt the brightest of the bright-line rules in double jeopardy.

105. 369 U.S. 141, 143 (1962). In *Fong Foo*, during the course of a trial, the district court improperly directed the jury to return a verdict of acquittal based on alleged misconduct by the trial prosecutor and on the alleged incredibility of the prosecution's evidence. *Id.* at 142. The judgment of acquittal was entered, and the prosecution brought a writ of mandamus to vacate it; the writ was granted on the ground that the judge was without power to order the acquittal. *Id.* When the prosecution sought a retrial, the Supreme Court held that, although the judge's decision was erroneous, the judgment of acquittal was final and double jeopardy prohibited further proceedings. *Id.* at 143.

106. United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977).

107. Burks v. United States, 437 U.S. 1, 18 (1978).

108. Sanabria v. United States, 437 U.S. 54, 69 (1978).

on the same offense.[109]

The absolute finality of acquittals protects the innocent, of course, who may be worn down or convicted by successive proceedings. More importantly, however, it also protects the jury's right to acquit for any reason or no reason. The finality of an acquittal rests on the notion that there can be no such thing as an erroneous acquittal. A jury always has the power to acquit, for any reason, even for a bad reason or no reason at all.[110] That power is, in turn, reinforced by the well-established prohibition against scrutinizing the jury's deliberations.[111] Indeed, in criminal procedure the only time that a jury's deliberations are ever examined to determine the basis for an acquittal is in the double jeopardy context, when a court considers whether to apply collateral estoppel to bar successive proceedings on other charges.

C. THE NON-FINALITY OF A HUNG JURY

In *Yeager*, the unique collateral estoppel inquiry came into a head-on conflict with the Supreme Court's centuries-old rule that the failure of a jury to agree on a verdict is not a bar to retrial.[112] Two separate reasons support this rule of non-finality. First, the failure of a jury to agree on a verdict does not terminate the original jeopardy, which is said to continue until a final verdict or a guilty plea.[113] Second, the failure of a jury to

109. Harris v. Washington, 404 U.S. 55, 56–57 (1971) (stating that where *Ashe* applies, reversal is required "irrespective of whether the jury considered all relevant evidence [at the first trial] and irrespective of the good faith of the State in bringing successive prosecutions"). Moreover, U.S. courts simply refuse to allow retrial after an acquittal. *See* Arizona v. Washington, 434 U.S. 497, 503 (1978) ("The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal."). Moreover, there has been no decision in which the Court has held, or even stated in dicta, that there is an exception for a fraudulently obtained acquittal. David S. Rudstein, *Double Jeopardy and the Fraudulently-Obtained Acquittal*, 60 MO. L. REV. 607, 620–25 (1995). And unlike the recently enacted statutory rule in the United Kingdom, in the United States, no legislature or court has ever sanctioned retrial of an acquitted defendant based on the discovery of new and compelling evidence of guilt. *Compare* Criminal Justice Act, 2003, c. 44, §§ 76–80 (Eng.), *with* David Hamer, *The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exception to Double Jeopardy*, 2 CRIM L. REV. 63 (2009).

110. Amar & Marcus, *supra* note 82, at 49.

111. *See generally* United States v. Powell, 469 U.S. 57 (1984); Dunn v. United States, 284 U.S. 390 (1932). It is one of the most basic tenets of our criminal justice system that courts will not inquire how the jury reached a decision absent evidence that third-party influence invaded the jury room. *Powell*, 469 U.S. at 67. This absolute, the so-called Mansfield's Rule, against impeaching a jury's verdict has been widely accepted for over two hundred years; as long ago as 1785, the Court refused to consider juror affidavits that revealed that the jury had arrived at its verdict by tossing a coin in an attempt to impeach the jury's verdict. *See* Vaise v. Delaval, (1785) 99 Eng. Rep. 944, 945 (K.B.). As other commentators have noted, the "only legitimate justification" for this refusal to inquire into jury deliberations "is the historic prerogative of the jury to acquit against the evidence—that is, to nullify the law." Amar & Marcus, *supra* note 82, at 49.

112. United States v. Perez, 22 U.S. 579, 580 (1824). *See generally* Richardson v. United States, 468 U.S. 317 (1984); Arizona v. Washington, 434 U.S. 497 (1978); Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1892).

113. *Perez*, 22 U.S. at 580.

agree on a verdict constitutes a "manifest necessity," permitting a judge to grant a mistrial and permitting retrial of the defendant because "the ends of public justice would otherwise be defeated."[114]

The Court's first decision allowing retrial after a hung jury was *United States v. Perez*.[115] That decision was not based on the Constitution but rather on the then-existing common-law doctrine that jeopardy did not attach until a verdict was rendered.[116] Thus, according to the Court, a defendant was not placed in jeopardy if a jury failed to agree.[117]

Many years after *Perez*, the Court held that jeopardy attaches at a point much earlier than a verdict, i.e., when the jury is sworn in a jury-trial case.[118] Thus, the double jeopardy implications of a hung jury had to be reconsidered because jeopardy already would have attached even if a jury disagreed. That issue was addressed by the Court in *Richardson v. United States*, where the Court held that a jury's failure to agree on a defendant's guilt does not terminate the original jeopardy; thus, reprosecution following a hung jury is allowed.[119] The Court explained 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.'"[120]

In *Richardson*, the defendant was charged with various narcotics offenses and moved unsuccessfully during trial for a judgment of acquittal based on insufficient evidence.[121] Ultimately, the jury acquitted him of one charge but was hung as to the others.[122] After the district court declared a mistrial as to the hung counts and scheduled a retrial, the defendant again moved to dismiss, arguing that retrial would violate double jeopardy because the evidence had been insufficient at the first trial.[123] The motion was denied, and the court of appeals dismissed the appeal for lack of jurisdiction.[124]

The Supreme Court found the issue to be appealable but affirmed the dismissal.[125] It held that whether or not the evidence had been insufficient at the first trial, the fact that the first trial had ended in a hung jury

114. *Id.* (quoting *Richardson*, 468 U.S. at 324).

115. 22 U.S. 579 (1824).

116. For a complete analysis of the basis for and history leading up to the Court's *Perez* decision, see Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 702–11 (1981).

117. *Perez*, 22 U.S. at 580.

118. *See generally* Downum v. United States, 372 U.S. 734 (1963) (making the rule applicable to federal cases); Crist v. Bretz, 437 U.S. 28 (1978) (binding the states to the rule).

119. *Richardson*, 468 U.S. at 323–24.

120. *Id.* at 325 (quoting Wade v. Hunter, 336 U.S. 684, 688–89 (1949)).

121. *Id.* at 318.

122. *Id.* at 318–19.

123. *Id.* at 319.

124. *Id.* The court of appeals dismissed the appeal on the ground that the case presented an interlocutory appeal that was not reviewable under the collateral order doctrine. *Id.* The Supreme Court disagreed and held that the order was appealable. *Id.* at 321–22. Justice Stevens dissented from this holding. *Id.* at 332–38 (Stevens, J., dissenting).

125. *Id.* at 322 (majority opinion).

meant there had been "no termination of [the] original jeopardy."[126] Since the original jeopardy continued, retrial was not barred.[127]

The *Richardson* Court rejected the defendant's analogy to *Burks v. United States*, where the Court prohibited retrial following an appellate reversal based on insufficient evidence.[128] The Court distinguished *Burks* by recognizing that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy."[129] Otherwise, there is no finality to protect.[130] While the appellate reversal based on insufficient evidence in *Burks* was not an acquittal, it was, according to the Court, the equivalent of an acquittal and, therefore, barred retrial.[131] But, the *Richardson* Court established that a mistrial is not the equivalent of an acquittal.[132] Moreover, observing that "'a page of history is worth a volume of logic,'"[133] the Court supported this non-finality rule by pointing out that a hung jury is not the result of any "oppressive practices" that the Double Jeopardy Clause was designed to prevent.[134]

The Court's next attempt to address the double jeopardy consequences of a hung jury, *United States v. Martin Linen Supply Co.*, is consistent with *Richardson*.[135] In *Martin Linen Supply*, after the defendant's trial ended in a hung jury, the trial court granted a motion for judgment of acquittal.[136] The Supreme Court held that, notwithstanding the non-finality of the hung jury, retrial was barred because the subsequent judicial order of dismissal, like the appellate reversal order in *Burks*, was the equivalent of an acquittal that terminated jeopardy.[137]

126. *Id.* at 318.
127. *Id.* at 326.
128. Burks v. United States, 437 U.S. 1, 18–19 (1978).
129. *Richardson*, 468 U.S. at 325.
130. *Id.*
131. *Id.* at 323.
132. *Id.* at 325–26.
133. *Id.* (citation omitted).
134. *Id.* at 324 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)). In *Richardson*, Justice Brennan, joined by Justice Marshall, dissented. *Id.* at 326 (Brennan, J., dissenting). According to Justice Brennan, the Court's conclusion that a hung jury does not terminate jeopardy "improperly ignores the realities of the defendant's situation and relies instead on a formalistic concept of 'continuing jeopardy.'" *Id.* at 327 (quoting Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 314–15 (1984) (Brennan, J., concurring)). The dissenters accused the majority of "pretending that [the second trial] was not really a new trial at all but was instead simply a 'continuation' of the original proceeding." *Id.* at 329 (quoting Arizona v. Washington, 434 U.S. 497, 503–04 (1978)). In doing so, they pointed to *Arizona v. Washington* where the Court allowed retrial after a mistrial based on manifest necessity, noting that in that case the Court "did not . . . seek to evade the common-sense fact that such an order 'terminates' the first trial." *Id.* at 330 (quoting *Arizona*, 434 U.S. at 505). Second, Justice Brennan believed that *Burks* required reversal. *Id.* at 330–32. As he explained, while in *Richardson*, unlike *Burks*, there had been no court order explicitly declaring the trial evidence insufficient, the fact that the trial ended in a hung jury should not allow the prosecution a second chance to convict where, in fact, the defendant establishes after a hung jury that the trial evidence was insufficient. *Id.* at 330.
135. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).
136. *Id.* at 566.
137. *Id.* at 575–76.

The Court upheld the non-finality of a mistrial based on a hung jury in the more recent decision in *Sattazahn v. Pennsylvania*.[138] *Sattazahn* involved a capital sentencing proceeding in which the jury deadlocked on the question of sentence.[139] According to a Pennsylvania statute, that deadlock required the trial court to impose a life sentence, and the court did so.[140] Thereafter, when the case was remanded following an appeal, the State sought to impose the death penalty again.[141] The Supreme Court held that the existence of the hung jury did not prevent the State from so proceeding or the jury from imposing a death sentence.[142] As in *Richardson*, the Court held that the jury's deadlock was a "non-result" that could not be called an acquittal-equivalent or jeopardy-terminating event.[143] As Justice O'Connor stated in her concurrence, when a jury hangs, it "makes no decision at all."[144] Similarly, the judge's imposition of the life sentence pursuant to statute, while final, was required by operation of law rather than resulting from a resolution of the facts.[145] For that reason, it, also could not be characterized as an acquittal-equivalent, i.e., an "'entitlement to a life sentence'" that would prohibit a second death penalty proceeding.[146]

In a dissenting opinion joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg agreed that the defendant in *Sattazahn* had not been acquitted.[147] Yet, she would have held that the final judgment "qualifies as a jeopardy-terminating event" that would preclude a subsequent capital sentencing proceeding because the judgment was statutorily mandated, was imposed after a jury deadlock, and was not prompted by a procedure sought by the defendant.[148] In other words, it was an acquittal-equivalent. Like dissenting Justice Brennan in *Richardson*,[149] Justice Ginsburg rejected a bright-line approach and looked more to the realities of the situation, to the same underlying interests articulated in *Richardson*, and to the same indicia of government oppression.[150] Justice Ginsburg pointed out that the defendant did not seek the statutory

138. 537 U.S. 101 (2003).

139. *Id.* at 104.

140. 42 PA. CONS. STAT. ANN. § 9711(c)(1)(v) (West 2007) ("[T]he court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.").

141. *Sattazahn*, 537 U.S. at 105.

142. *Id.* at 114.

143. *Id.* at 109.

144. *Id.* at 117 (O'Connor, J., concurring).

145. *Id.* at 110 (majority opinion).

146. *Id.* (quoting Pennsylvania v. Martorano, 634 A.2d 1063, 1070 (1993)). While the Court did recognize that the legislature might have intended to have the judge's life sentence survive reversal of the underlying conviction, even where the case must in any event be retried, it found no evidence of any legislative intent to do so. *Id.*

147. *Id.* at 119 (Ginsburg, J., dissenting).

148. *Id.* at 118.

149. Richardson v. United States, 468 U.S. 317, 326 (1984) (Brennan, J., dissenting).

150. *Sattazahn*, 537 U.S. at 124 (Ginsburg, J., dissenting).

termination of the case by court order.[151] At the same time, all of the defendant's double jeopardy interests against multiple proceedings identified in *Green* were present.[152]

The Court has, of course, recognized exceptions to the non-finality of a mistrial. For example, a mistrial declared in the absence of manifest necessity[153] or as a result of intentional government manipulation[154] will bar retrial. That is because, in such circumstances, all of the defendant's interests in avoiding a second proceeding are present, but the government's interest in one full and fair chance to convict is limited.[155] In the absence of manifest necessity, the defendant has unnecessarily been denied his right to go to the first jury and perhaps secure an acquittal. Under the second exception, where there is intentional government manipulation, there is no legitimate government interest remaining that is entitled to protection. In these two circumstances, the defendant's interest prevails, and retrial is barred. In the mixed-verdict, hung jury situation presented in *Yeager*, however, there is manifest necessity for retrial, while the government's interest is not diminished in any way.[156] Despite all this, the *Yeager* Court did not even address the weight of the government's interest in obtaining one full chance to proceed to verdict in the case of a mixed-verdict.[157]

D. Upholding Inconsistent Verdicts

One final set of double jeopardy precedents discussed in *Yeager* is the Supreme Court's jurisprudence upholding clearly inconsistent verdicts.[158] The seminal case in this area is *Dunn v. United States*,[159] where the Court held that an alleged inconsistency between a guilty verdict on some

151. *Id.* at 125.

152. *Id.* at 124–25. The dissenters believed the result was also compelled by the fact that a defendant sentenced to life after a jury deadlock who chooses to appeal "faces the possibility of death if she is successful on appeal;" if she "chooses to forgo an appeal, the final judgment for life stands." *Id.* at 126. "We have previously declined to interpret the Double Jeopardy Clause in a manner that puts defendants in this bind." *Id.* at 127.

153. *See, e.g.*, United States v. Razmilovic, 507 F.3d 130, 133 (2d Cir. 2007) (holding that retrial was barred because it was an abuse of discretion for a trial court to declare a mistrial based on only one jury note indicating deadlock). *See generally* Arizona v. Washington, 434 U.S. 497 (1978).

154. Oregon v. Kennedy, 456 U.S. 667, 675–76 (1982).

155. *See, e.g.*, Yeager v. United States, 129 S. Ct. 2360, 2366 (2009) (quoting Arizona v. Washington, 434 U.S. at 509).

156. *See infra* notes 312–46 and accompanying text.

157. The Supreme Court simply did not weigh the government's interest in retrial against the defendant's interest. *See generally Yeager*, 129 S. Ct. 2360. Although it did not explain this approach, the Supreme Court has consistently held that a prior acquittal will bar subsequent proceedings on the same offense without a balancing of interests. *See* Fong Foo v. United States, 369 U.S. 141, 143 (1962). On the other hand, all of the Court's cases involving retrial after mistrials have been held to require and have utilized a balancing of interests analysis. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 508–10 (1984); Richardson v. United States, 468 U.S. 317, 326 (1984). As will be argued later, the Court created confusion and instability by ruling that these interests, as represented by the hung jury, should not be considered in determining whether collateral estoppel applies.

158. *Yeager*, 129 S. Ct. at 2370.

159. 284 U.S. 390 (1932).

counts and an acquittal on others did not require that the conviction be reversed.[160] As noted above, the *Yeager* opinion opened with a reference to *Dunn*.[161]

Dunn was tried on a three-count indictment alleging that he (1) "maintain[ed] a common nuisance by keeping for sale . . . intoxicating liquor," (2) unlawfully possessed that liquor, and (3) unlawfully sold that liquor.[162] After he was convicted on the first count but acquitted on the second and third counts, he argued that the conviction could not stand because the verdicts were inconsistent.[163] The Court rejected his claim.[164] Quoting the Second Circuit, it held:

> 'The most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power . . . to which they were disposed through lenity.'[165]

Dunn, then, represents recognition of the jury's power as the voice of the community, to balance justice and law, to protect against arbitrary or oppressive exercises of executive power, and judicial deference to "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons."[166]

The Court revisited *Dunn* in *United States v. Powell*.[167] There, the defendant was indicted, *inter alia*, for (1) possession of cocaine with intent to distribute, (2) conspiracy to do so, and (3) use of the telephone to facilitate those violations.[168] He was convicted of the telephone charge but acquitted of the others.[169] As in *Dunn*, the defendant claimed that

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160. *Id.* at 393; *Yeager*, 129 S. Ct. at 2362 ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict."); *see also* Harris v. Rivera, 454 U.S. 339, 347 (1981) (holding that there would not be a reversal based on inconsistent verdicts in state bench trial). As one commentator has noted, the Double Jeopardy Clause has "piggybacked onto the right of jury trial in criminal cases," by limiting the courts' power to overturn jury verdicts. Amar & Marcus, *supra* note 82, at 57.

161. *Yeager*, 129 S. Ct. at 2362–63. The opening paragraph of the opinion reads as follows:

> In *Dunn v. United States*, the Court, speaking through Justice Holmes, held that a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict. The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not.

Id. (citation omitted).

162. *Dunn*, 284 U.S. at 391.

163. *Id.* at 392.

164. *Id.* at 393.

165. *Id.* (quoting Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925)).

166. Harris v. Rivera, 454 U.S 339, 346 (1981); *see also* Standefer v. United States, 447 U.S. 10, 22–23 (1980).

167. 469 U.S. 57 (1984).

168. *Id.* at 59–60.

169. *Id.* at 60.

the verdicts were inconsistent, but this time he added a collateral estoppel claim.[170] The Ninth Circuit reversed the conviction on the telephone charge.[171] Relying on *Dunn*, the Supreme Court reversed the Ninth Circuit and reinstated the defendant's telephone facilitation conviction.[172]

The Court characterized the *Dunn* doctrine as having four parts: (1) courts are prohibited from attempting to interpret the reasons for a jury's acquittal; (2) the jury's power of leniency is fundamentally important and entitled to protection; (3) courts cannot speculate about what went on during jury deliberations; and (4) existing insufficiency review is an adequate safeguard against factually erroneous verdicts.[173] Accordingly, the Court held that collateral estoppel did not preclude acceptance of the inconsistent verdict.[174] The Court explained that because the jury may have acquitted as an exercise in leniency, its power to have done so must be protected.[175] Any other analysis would engage a court in speculating about a jury's deliberations.[176] In addition, since the government cannot appeal an acquittal, it would be unfair to force the government to give up its fairly-secured conviction.[177] Moreover, collateral estoppel is based on the "assumption that the jury acted rationally" and found identifiable facts; in contrast, inconsistent verdicts are by their nature inherently irrational so that collateral estoppel cannot apply to require reversal of one of them.[178] In essence, the Court held that a defendant presenting a collateral estoppel claim based on inconsistent verdicts cannot meet the heavy burden of establishing that the acquittal represented a final resolution of any specific factual issue.[179]

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170. *Id.*
171. *Id.*
172. *Id.* at 69.
173. *Id.* at 63–69.
174. *Id.* at 66, 69.
175. *Id.* at 65–66.
176. *Id.* at 66.
177. *Id.*
178. *Id.* at 68.
179. At its core, the Court explained that *Dunn* is the "recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id.* at 65. Although this is an "assumption of a power which [the jury has] no right to exercise," that does not make the exercise of that power reversible error. *Id.* at 66 (alteration in original).

The Court also rejected "as imprudent and unworkable" a rule that would require "individualized assessment of the reason for the inconsistency" in every inconsistent verdict case. *Id.* According to the Court, such a rule would be based either on "pure speculation" or would require a prohibited inquiry into the jury's deliberations. *Id.* Courts will not undertake that inquiry out of deference to the determination of the community. *Powell* is, thus, consistent with the Supreme Court's unwavering line of authority that establishes that there is no such thing as an erroneous acquittal, with its recognition that the jury always has the power to acquit. In order to protect that power, the Court allowed the acquittal and conviction to stand. *Id.* at 69.

III. *UNITED STATES V. YEAGER*

A. THE FACTS

The *Yeager* case arose out of the Enron debacle.[180] In 1997, Enron Corporation acquired a telecommunications business that became known as Enron Broadband Services (EBS).[181] F. Scott Yeager became its Senior Vice President of Strategic Development.[182] In 1999, Enron announced to the media that EBS would become a major part of its business.[183] Then, at the company's annual equity analyst conference in 2000, Yeager and others[184] allegedly made false and misleading statements about the company's value.[185] The stock price of Enron rose dramatically.[186] Over the next several months, Yeager sold more than 700,000 of his Enron shares for a personal profit of $19 million.[187] EBS turned out to be worthless.[188] EBS's sole asset, the network, "was riddled with technological problems and never fully developed."[189]

On November 5, 2004, a grand jury returned a 176-count indictment based on these events; 126 of those charges were brought against Yeager.[190] Count 1 charged conspiracy to commit securities fraud and wire fraud, and included as overt acts the offenses charged in counts 2 through 6.[191] Count 2 charged securities fraud based on false and misleading statements at the 2000 conference and Yeager's failure to state facts necessary to prevent statements by others from being misleading.[192] Counts 3 through 6 alleged four acts of wire fraud based on four press releases relating to EBS in 2000.[193] Counts 27 through 46 (the insider trading counts) alleged insider trading violations based on twenty sales of Yeager's Enron stock "while in the possession of material non-public information regarding the technological capabilities, value, revenue and business performance of [EBS]."[194] Counts 67 through 165 (the money laundering counts) alleged ninety-nine transactions involving Yeager's use of the proceeds of his illegal stock sales, which the government described as "criminally derived property."[195]

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180. *See generally* Yeager v. United States, 129 S. Ct. 2360 (2009).
181. *Id.* at 2363.
182. *Id.*
183. *Id.*
184. The Indictment charged Yeager and Joseph Hirko, Kevin Howard, Rex Shelby, and Michael Krautz. United States v. Yeager, 446 F. Supp. 2d 719, 727 (S.D. Tex. 2006).
185. *Yeager*, 129 S. Ct. at 2363.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 2363–64 (alteration in original).
195. *Id.* at 2364. As did the Supreme Court, we "refer to counts 1 through 6 as the 'fraud counts' and the remaining counts as the 'insider trading counts.'" *Id.*

After a thirteen-week trial and four days of deliberation, the jury reported that while it agreed on some counts, it could not reach a verdict on others.[196] The trial court delivered an *Allen* charge[197] and directed the jury to continue deliberating "until the end of the day."[198] When the jury failed to agree by that time, the court accepted its partial verdict acquitting Yeager on the fraud and conspiracy counts (counts 1– 6) but failing to reach a verdict on the insider trading and money laundering counts (counts 7–165).[199] The court declared a mistrial as to the latter counts.[200]

Thereafter, the government obtained another superseding indictment that was substantially different than the one on which Yeager had been tried.[201] Unlike its prior indictments, this one named only Yeager[202] and focused solely on Yeager's knowledge of information about the EBS project and his failure to disclose that information before selling his stock.[203] Also, the indictment re-alleged only select insider trading counts on which the jury had deadlocked.[204]

Yeager moved to dismiss the new indictment.[205] He argued that the acquittals on the fraud counts collaterally estopped "the Government from retrying him on the insider trading counts."[206] According to *Yeager*, the record established that the single issue a rational jury could have resolved in acquitting him was that he "did not possess material, nonpublic information" about the value of EBS.[207] Because the new prosecution on the insider trading and money laundering counts would require the government to prove that he possessed such information, collateral estoppel barred the second trial.[208]

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196. *Id.*

197. *See generally* Allen v. United States, 164 U.S. 492 (1896).

198. *Yeager*, 129 S. Ct. at 2364.

199. *Id.* Interestingly, during the trial, the court had observed that the jurors were upset about the economic hardship of the extended trial.

> The jury is going insane back there [due to the length of the witness examinations] . . . . They're back there having a fit . . . . A whole bunch of people are not being paid [by their employers], so another month out of work is like going to drive them—they're having fits back there. They said everybody but one person says they're not going to get paid . . . . I am just trying to tell y'all, you got a jury that's getting ready to go insane. They're not getting paid . . . .[E]verybody has got problems except for one person."

Reply Brief for Petitioner at 10, United States v. Yeager, 129 S. Ct. 2360 (2009) (No. 08-67), 2009 WL 663923, at *10. Indeed, several statements and actions taken by the court reveal that the jurors were enduring severe financial hardship. First, the court considered dismissing two jurors on that basis and observed that some jurors "aren't even paying attention anymore, they're in such dire financial straits." *Id.* And when the jurors asked not to take off Memorial Day, the court observed that "[t]hese jurors want this case over." *Id.* "One juror was [actually] forced to borrow money to remain on the jury." *Id.*

200. *Yeager*, 129 S. Ct. at 2364.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

The trial judge denied the motion.[209] She disagreed with Yeager's conclusion about the basis for the jury's acquittals.[210] Having presided at trial, the judge interpreted the record to conclude that the jury could have based its acquittal on a finding that Yeager had "'not knowingly and willfully participate[d] in the scheme to defraud.'"[211] According to the judge, the question of "whether [he] possessed insider information was not necessarily resolved in the first trial" so that it could be litigated at the second trial.[212]

Yeager took an immediate appeal.[213] On appeal, the court of appeals disagreed with the district court's factual analysis and agreed with Yeager that the only rational basis for the jury's acquittal was its conclusion that Yeager did not possess any insider information.[214] It reasoned that Yeager had not disputed the government's proof that he had "helped shape the message" of the fraudulent representations at the analyst's conference and, thus, rejected the district court's finding that the jury could have found that he had not participated in the fraud.[215] While the court of appeals acknowledged that its finding normally would preclude retrial on the insider trading and money laundering counts, it nevertheless affirmed.[216] It held that the jury's inability to agree on some of the counts prevented the application of collateral estoppel.[217] According to the court, if "the jury, acting rationally," had concluded that Yeager did not have insider information, it "would have acquitted him of insider trading," rather than deadlocking on those counts.[218] On that basis, the court found it "impossible . . . to decide with any certainty what the jury necessarily determined."[219]

B. The Supreme Court's Majority Opinion

The Supreme Court reversed.[220] Justice Stevens began his opinion by citing *Dunn v. United States*,[221] where "the Court . . . held that a logical inconsistency between a guilty verdict [on some counts] and a verdict of acquittal [on other counts] does not impugn the validity of either ver-

209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* An immediate appeal is allowed under the collateral order doctrine. Abney v. United States, 431 U.S. 651, 662–63 (1977).
214. United States v. Yeager, 521 F.3d 367, 376–78 (5th Cir. 2008), *rev'd*, 129 S. Ct. 2360 (2009). Apparently, the court of appeals analyzed only the securities fraud acquittal. *Id.* at 377. Since that acquittal necessarily found that Yeager did not possess insider information, it was "unnecessary . . . to determine whether the jury made the same conclusion when it acquitted Yeager of [the] other counts." *Id.* at 378 n.20.
215. *Id.* at 377.
216. *Id.* at 378, 381.
217. *Id.* at 380.
218. *Id.* at 379.
219. *Id.* at 378.
220. Yeager v. United States, 129 S. Ct. 2360, 2365 (2009).
221. *See generally* 284 U.S. 390 (1932).

dict."[222] According to Justice Stevens, the related question in *Yeager* was "whether an apparent inconsistency between a jury's . . . acquittal on some counts and its" inability to agree on other accounts impacts the collateral estoppel effect of the acquittals.[223] The Court held that it does not.[224]

By way of introduction, the Court first noted that in deciding "an exceptionally large number of cases interpreting" the Double Jeopardy Clause, it had "found more guidance in the common-law ancestry of the Clause than in its brief text."[225] It then relied on "the *spirit* of the [Double Jeopardy Clause] to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection."[226] The majority articulated the "two vitally important interests" embodied in double jeopardy protection—first, "that 'the State . . . should not be allowed . . . repeated attempts to convict'", subjecting the defendant to stress, anxiety, expense, and the possibility, that although innocent, he will be convicted;[227] and second, "the preservation of 'the finality of judgments.'"[228][229]

The Court dismissed the first interest, freedom from repeated prosecution, by stating that the Clause does not always prevent the government from reprosecution.[230] Thus, for example, a hung jury does not bar retrial because it does not terminate the original jeopardy.[231] Rather, a jury's inability to agree is a "manifest necessity," permitting a mistrial and "continuation of the initial jeopardy".[232] According to the Court, "[t]he 'interest in giving the prosecution one complete opportunity to convict . . .' justifies treating the jury's inability to reach a verdict as a nonevent that does not bar retrial."[233]

Having articulated these principles, however, the Court then stated that "the question presented cannot be resolved by asking whether the Government should be given one complete opportunity to convict petitioner on those charges."[234] According to the Court, "the case turns on the second interest"—finality—that is, "whether the interest in preserving the finality of the jury's judgment on the fraud counts, including the jury's finding that petitioner did not possess insider information, bars a retrial on the insider trading counts."[235] To answer this question in the mistrial situation presented in *Yeager*, the Court admitted it needed "to

222. *Yeager*, 129 S. Ct. at 2362 (citing *Dunn*, 284 U.S. at 393).
223. *Id.* at 2362–63.
224. *Id.* at 2363.
225. *Id.* at 2365.
226. *Id.* at 2365 (quoting *Ex parte* Lange, 85 U.S. (1 Wall.) 163, 170 (1873)).
227. *Id.* at 2365–66 (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)).
228. *Id.* at 2366 (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978)).
229. *Id.*
230. *Id.*
231. *Id.* at 2369 (quoting Richardson v. United States, 468 U.S. 317, 325 (1984)).
232. *Id.* at 2366 (citing Arizona v. Washington, 434 U.S. 497, 505–06 (1978)).
233. *Id.* (quoting *Arizona*, 434 U.S. at 509).
234. *Id.*
235. *Id.*

look beyond the Clause's prohibition on being put in jeopardy twice."[236]

To do this, the Court turned to *Ashe v. Swenson*, its seminal collateral estoppel case.[237] It began by conceding that *Ashe* and *Yeager* involved very different facts.[238] But, the court then proceeded to ignore those differences.[239] It simply noted that "[t]he reasoning in *Ashe* is nevertheless controlling because . . . the jury's inability to reach a verdict . . . was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal."[240] According to the majority, as in *Ashe*, both sets of charges contain an element (knowledge of insider information) that was finally determined in defendant's favor by the acquittal.[241] That conclusion barred retrial on the hung counts because "the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal."[242]

The Court, thus, held that the court of appeals erred when it considered the hung counts in its issue-preclusion analysis.[243] According to Justice Stevens, a jury's failure to agree is neither relevant nor part of the record for collateral estoppel purposes because "there is no way to decipher what a hung count represents."[244] A jury speaks by a verdict, and the failure to reach a verdict does not "yield a piece of information that helps put together the trial puzzle."[245] According to the Court, the "mistried count is therefore nothing like the other . . . record material that *Ashe* suggested should be part of the preclusion inquiry."[246] Thus, "[e]ven in the usual sense of 'relevance,'" under Federal Rule Evidence 401,[247] the existence of a "host of reasons" for jury disagreement makes a hung jury a "nonevent."[248] Relying in part on Black's Law Dictionary's definition of "record" as "the 'official report of the proceedings,'"[249] the Court noted that it is impossible to determine from the record why a jury fails to agree, whether it be confusion, exhaustion, or anything else.[250] Ascribing meaning to a hung count is "not reasoned analysis; it is guess-

236. *Id.*
237. *Id.*; *see generally* Ashe v. Swenson, 397 U.S. 436 (1970).
238. *Yeager*, 129 S. Ct. at 2367 ("Unlike *Ashe*, the case before us today entails a trial that included multiple counts rather than a trial for a single offense. And, while *Ashe* involved an acquittal for that single offense, this case involves an acquittal on some counts and a mistrial declared on others.").
239. *See id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 2367–68.
245. *Id.* at 2367.
246. *Id.*
247. *Id.* at 2368; *see also* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").
248. *Yeager*, 129 S. Ct. at 2368.
249. *Id.* at 2367–68 (quoting BLACK'S LAW DICTIONARY 1301 (8th ed. 2004)).
250. *Id.* at 2368.

work."[251] Thus, "[s]uch conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return."[252] Moreover, the only evidence of "what transpired in the jury room" must be "'confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration.'"[253] Accordingly, the Court concluded, "the consideration of hung counts has no place in the issue-preclusion analysis."[254] Because "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments . . . its finality is unassailable."[255] Thus, if the possession of insider information was ultimately decided in Yeager's favor at the first trial, the second prosecution on different counts would be barred.[256]

The Court summarily dismissed the government's reliance on *Richardson v. United States*,[257] where the Court clearly held that a hung jury does not terminate original jeopardy and, therefore, does not bar retrial. The majority characterized *Richardson*'s holding—that a mistrial does not terminate jeopardy—as "not so broad."[258] The Court held that *Richardson* did not establish that a retrial is always permitted after a hung jury.[259] Rather, as the Court explained, *Richardson* simply established that "a mistrial is [not] an event of [double jeopardy] significance."[260]

Finally, the Court rejected the government's reliance on United States v. Powell,[261] where the Court upheld the integrity of inconsistent verdicts.[262] Based on *Powell*[263] the government argued that an acquittal "can never preclude retrial on a mistried count because" that split verdict is inherently irrational.[264] In *Powell*, the jury acquitted the defendant of substantive drug charges but convicted her of using a telephone to commit them.[265] The defendant claimed the verdicts were irrational and urged reversal of the conviction based on collateral estoppel.[266] The Supreme Court rejected this argument, stating that issue preclusion is "predicated on the assumption that the jury acted rationally."[267] The Court in *Yeager* refused to apply *Powell*'s treatment of inconsistent verdicts to inconsistent hung counts for two reasons. First, the conclusion in

251. *Id.*
252. *Id.*
253. *Id.* (quoting Packet Co. v. Sickles, 72 U.S. (1 Wall.) 580 (1866)).
254. *Id.*
255. *Id.*
256. *Id.* at 2368–69.
257. *See generally* 468 U.S. 317 (1984).
258. *Yeager*, 129 S. Ct. at 2369.
259. *Id.*
260. *Id.*
261. *See generally* 469 U.S. 57 (1984).
262. *Yeager*, 129 S. Ct. at 2369 (citing *Powell*, 469 U.S. at 67).
263. *See generally* 469 U.S. 57 (1984).
264. *Yeager*, 129 S. Ct. at 2370.
265. *Powell*, 469 U.S. at 59–60.
266. *Id.* at 60.
267. *Id.* at 68.

Powell was required to give full effect to the jury's verdicts,[268] but *Yeager* did not involve two verdicts. Second, *Powell*'s assumption that a mistried count is evidence of irrationality is simply wrong: "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything."[269]

Having held that the court of appeals erred in considering the hung jury in its collateral estoppel analysis, the Court reversed.[270] Rather than dismiss the mistried counts, however, it remanded the case to the court of appeals "for further proceedings consistent with this opinion."[271] The Court explained that "[g]iven the length and complexity of the proceedings," the factual dispute between the district and circuit courts was understandable, but it declined to resolve this dispute since to do so would require "a fact-intensive analysis of the voluminous record, an undertaking unnecessary to the resolution of the narrow legal question we granted certiorari to answer."[272] Because the Court had assumed the correctness of the court of appeals' factual conclusions, it remanded the case to the court of appeals and advised that, "[i]f it chooses, the Court of Appeals may revisit its factual analysis in light of the Government's arguments before this Court."[273] On remand, the circuit court unanimously declined to do so.[274]

C. The Concurring Opinion

Justice Kennedy concurred in part and concurred in the judgment.[275] But, he did not join the Court's hortatory suggestion that the court of appeals "'may' '[i]f it chooses,'" revisit its factual findings.[276] As Justice Kennedy noted, the petitioner bore a very heavy burden under collateral estoppel to establish that "it would have been *irrational* for the jury to acquit" without it finding that he did not have insider information.[277] According to Justice Kennedy, the district court presiding at trial found that the petitioner had not carried this burden, and the court of appeals' analysis to the contrary was "not convincing."[278] Accordingly, Justice Kennedy would have required the court of appeals to reconsider its factual

268. *Yeager*, 129 S. Ct. at 2369.
269. *Id.* at 2370.
270. *Id.* at 2370–71.
271. *Id.*
272. *Id.* at 2370.
273. *Id.*
274. United States v. Yeager, 334 F. App'x 707, 709 (5th Cir. 2009).
275. *Yeager*, 129 S. Ct. at 2371 (Kennedy, J., concurring in part). He did not disagree with the Court's holding that the hung jury did not prevent the application of collateral estoppel to mixed verdicts; rather, he held that the court should be required to reconsider whether Yeager had met the demanding *Ashe* standard. *Id.* In view of the factual disagreement between the district court and the court of appeals, Justice Kennedy would not have left it entirely up to the court of appeals to re-examine its factual determinations. *Id.*
276. *Id.*
277. *Id.* at 2371 (quoting *id.* at 2375 (Alito, J., dissenting)).
278. *Id.* (citing *id.* at 2376 (Alito, J., dissenting)).

analysis.[279]

D. The Dissenting Opinions

Justice Scalia, joined by Justices Thomas and Alito, dissented.[280] In brief, Justice Scalia concluded that because, under well-established principles, jeopardy did not terminate with the hung jury, the retrial was simply a continuation of the original jeopardy and, thus, was not barred by double jeopardy protection.[281]

Justice Scalia began by deriding the majority's suggestion that its decision was grounded in the "common-law ancestry" of the Double Jeopardy Clause.[282] As Justice Scalia pointed out, at common law, the pleas of *autrefois acquit* and *autrefois convict* "barred only repeated 'prosecution for the same identical act *and* crime'" and would not have recognized issue preclusion at all.[283] Thus, Ashe itself was a major departure from the original meaning of the Double Jeopardy Clause. Relying on the common-law history of the Clause, Justice Scalia argued that if one who steals a horse and saddle can be successively prosecuted for stealing the horse and then for stealing the saddle, then is no bar to retrial of insider trading counts after an acquittal for fraud.[284]

Even assuming adherence to *Ashe* for stare decisis purposes,[285] Justice Scalia labeled the majority's opinion an "illogical extension" of that decision.[286] First, *Ashe* barred successive prosecution of ultimate facts found during a completed prior proceeding (that resulted in an outright acquittal).[287] An acquittal—like a conviction—incontestably terminates jeopardy so that when a subsequent proceeding is brought a second jeopardy clearly begins.[288] The original jeopardy in *Yeager* never terminated, however, because a mistrial after a hung jury does not terminate jeopardy.[289] Thus, according to Justice Scalia, the majority's decision for the first time interpreted the Double Jeopardy Clause to apply "internally within a single prosecution."[290]

Justice Scalia also disagreed with the majority's reliance on the under-

279. *Id.*
280. *Id.* at 2371 (Scalia, J., dissenting).
281. *Id.* at 2374 ("Until today, this Court has consistently held that retrial after a jury has been unable to reach a verdict is part of the original prosecution and that there can be no second jeopardy where there has been no second prosecution. Because I believe holding that line against this extension of *Ashe* is more consistent with the Court's cases and with the original meaning of the Double Jeopardy Clause, I would affirm the judgment.").
282. *Id.* at 2371.
283. *Id.* (quoting 4 William Blackstone, Commentaries *330 (emphasis added)).
284. *Id.* at 2371–72.
285. *Id.* ("But that is water over the dam.").
286. *Id.*
287. *Id.*
288. *Id.*
289. *See id.*
290. *Id.* at 2372–73. As noted above, Justices Kennedy, Alito, and Thomas would also have remanded with a requirement that the court of appeals revisit its factual findings. *Id.* at 2371 (Kennedy, J., concurring in part); *id.* at 2374 (Alito, J., dissenting).

lying rationale of *Ashe*.[291] While acknowledging that applying issue preclusion to bar *seriatim* prosecutions prevents the government from circumventing acquittals where the prosecution merely seeks to get one full and fair opportunity to convict, there is no risk of such overreaching.[292] As such, where a retrial is sought following a mistrial, in cases like Yeager, there is no risk of government overreaching and the core concerns underlying double jeopardy are not triggered.[293] In addition, barring retrial after a jury acquits on only some counts—and deadlocks on others—"bears only a tenuous relationship" to collateral estoppel's interest in preserving the finality of "'an issue of ultimate fact [actually] determined by a valid and final judgment.'"[294] The finality of the acquittal is fully preserved; it simply is not extended to other charges.[295] And, according to Justice Scalia, there is little justification for that extension in a mixed verdict situation because "all that can be said for certain is that the conflicting dispositions are irrational."[296] That is, "[i]t is at least as likely that the irrationality consisted of failing to make the factual finding necessary to support the acquittal as it is that the irrationality consisted of failing to adhere to that factual finding with respect to the hung count."[297] Thus, where a jury acquits and hangs on charges involving a similar element, the most that can be said is that the jury—in both acquitting and failing to agree—acted irrationally.[298] While that irrationality does not deprive the acquittal of its own finality, it defeats the collateral estoppel claim, which is based on the premise that the jury rationally acquitted based on a single, identifiable issue.[299]

Thus, while Justice Scalia agreed that courts should avoid speculating about the basis for any jury verdict, "the Court's opinion steps in the wrong direction by pretending that the acquittals here mean something that they in all probability do not."[300] As in *Dunn* and *Powell*, "the best course to take" is to insulate both parts of the jury's verdict from scrutiny by upholding the integrity of both the acquittal and the mistried counts and, as required by *Richardson,* allow retrial on the mistried counts.[301] This course of action would be consistent with the long-established rule against scrutinizing the basis for a jury's decision. "If a conviction can stand with a contradictory acquittal when both are pronounced at the same trial, there is no reason why an acquittal should prevent the State from pressing for a contradictory conviction . . . ."[302]

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291. *Id.*
292. *Id.* at 2373–74.
293. *Id.* at 2373.
294. *Id.* at 2374 (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)).
295. *Id.*
296. *Id.*
297. *See id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 2373–74 (quoting United States v. Powell, 469 U.S. 57, 69 (1984)).
302. *Id.* at 2373 (Scalia, J., dissenting). Finally, Justice Scalia asserted that the majority's decision is likely to create substantial burdens. *Id.* at 2374. The fact-intensive *Ashe*

Justice Alito, joined by Justices Scalia and Thomas, joined Justice Scalia's opinion but wrote separately "to note that the Court's holding makes it imperative that the doctrine of issue preclusion be applied with the rigor prescribed in *Ashe* . . . ."[303] According to Justice Alito, applying *Ashe* to the case of mixed verdicts requires "special care."[304] *Ashe* requires a finding that a rational jury could not have acquitted on a first charge without finding in the defendant's favor on an issue essential to another charge.[305] But, in *Yeager*, the mixed verdict proved the jury did not act rationally.[306] As in *Dunn* and *Powell*, the Court had a duty to reconcile those two verdicts by upholding the finality of the acquittal on the fraud charges and the non-finality of the jury's disagreement on the others.[307]

Moreover, as the facts, and as the district court's findings demonstrate, the fraud counts required proof of an element not necessary for the insider trading charge, i.e., that Yeager had caused the misstatements or omissions in the conference and press releases, which could have been the reason for the acquittal.[308] According to Justice Alito the district court's holding, it cannot be said that the acquittal could not rationally have been based on this element.[309] "In light of the length and complexity of the trial record" and the court of appeals' "brief discussion of the question," Justice Alito would have directed the circuit court to reconsider its factual determination.[310]

IV. ANALYSIS

A. *YEAGER* IS UNSUPPORTED BY PRECEDENT

As noted above, the Supreme Court majority in *Yeager* misinterpreted and extended *Ashe* well beyond its idiosyncratic facts by holding that the fact of a hung jury should not be considered in evaluating a claim of collateral estoppel. The Court explicitly based this finding on its cases recognizing the finality of an acquittal even though those cases—excepting

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inquiry—currently required only in the case of outright prior acquittals—will now be required in mixed-verdict cases. *Id.* Citing a concern closer to home, Justice Scalia noted that, under *Abney v. United States*, every defendant who raises such a mixed verdict collateral estoppel issue "will be entitled to an immediate interlocutory appeal (and petition for certiorari) whenever his *Ashe* claim is rejected by the trial court." *Id.*

303. *Id.* at 2375 (Alito, J., dissenting).

304. *Id.*

305. *Id.* ("Only if it would have been *irrational* for the jury to acquit without finding that fact is the subsequent trial barred.").

306. *Id.*

307. *Id.* at 2376.

308. *Id.* at 2375–76.

309. *Id.* at 2376 (discussing Alito's opinion at length about the facts).

310. *Id.* See *United States v. Yeager* for the district court's discussion of the record evidence. 446 F. Supp. 3d 719, 731–37 (S.D. Tex. 2006). The Fifth Circuit stated that petitioner "did not dispute" that he had "helped shape the message of the conference presentations." United States v. Yeager, 521 F.3d 367, 377 (5th Cir. 2008). *See Yeager*, 521 F.3d at 377–78, for further discussion.

Ashe—have never been applied to other charges beyond the acquittal.[311] In fact, by reaching this decision, the Court also extended double jeopardy for the first time to apply internally—within a single indictment.[312] At the same time, the Court disregarded *Richardson*'s non-finality rule and its more general balancing approach to retrials following mistrials.[313] Finally, the Court contravened the jury deference principles reflected in its inconsistent verdict cases, *Powell* and *Dunn*, by refusing to recognize the *Yeager* jury's actual verdict.[314] The *Yeager* decision is neither mandated by nor consistent with precedent.

1. Extending Collateral Estoppel

Although all of the collateral estoppel cases since *Ashe* have narrowly interpreted the collateral estoppel doctrine in criminal cases, the *Yeager* Court clearly extended *Ashe* well beyond its analytical limits. *Ashe* involved two charges of robbery, the first of which resulted in an acquittal.[315] That acquittal finally terminated jeopardy on the first count, so that Ashe was clearly placed in double jeopardy when the second charge was brought to trial.[316] By contrast, *Yeager* involved related charges in a single indictment as to which jeopardy had not yet terminated.[317] As Justice Scalia pointed out, *Yeager* is the first case to apply double jeopardy principles to a single proceeding involving a single indictment.[318]

Second, the charges in *Ashe* were based on a single robbery and were identical except for the name of the victim.[319] It was not a huge leap for the Court to conclude that these charges were the same offense for double jeopardy purposes. On the other hand, the charges in *Yeager* were based on a complicated series of transactions over time and involved different sets of acts, different sets of actors, and entirely different statutory charges.[320] Unlike the nearly identical charges in *Ashe*, the charges in *Yeager* were different except for one fact—the possession of insider information.[321]

Third, the prosecutor in *Ashe* conceded that he had brought the charges separately and serially to get a chance to rehearse and thus get a better chance to convict Ashe on any one of the robberies.[322] This government manipulation, or even the potential for government manipulation, lies at the heart of many of the Supreme Court's double jeopardy

311. *See Yeager*, 129 S. Ct. at 2372–73.
312. *Id.* at 2373.
313. *Id.* at 2369.
314. *Id.* at 2370.
315. Ashe v. Swenson, 397 U.S. 436, 438–40 (1970).
316. *Id.* at 447.
317. *Yeager*, 129 S.Ct. at 2363–65.
318. *Id.* at 2372–73 (Scalia, J., dissenting).
319. *Ashe*, 397 U.S. at 438–40.
320. *Id.* at 2363–65.
321. *Id.* at 2364.
322. *Yeager*, 129 S. Ct. at 2363–65.

rulings.[323] In *Yeager*, of course, the prosecution purposely brought all of the charges contemplated against the defendant at once.[324] That is, rather than manipulating a single criminal event by dividing it into several indictments and proceedings, the government joined all of the charges together to be tried in one proceeding so that the defendant would not be subjected to successive prosecutions.[325] This is exactly what *Ashe* required it to do.

Fourth, *Ashe* directed the lower courts to apply collateral estoppel realistically to the entire record, "taking into account the pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[326] The *Ashe* Court observed that "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'"[327] The *Yeager* Court narrowly interpreted the terms "relevance" and "record" according to their dictionary definitions and found they did not include the fact of the hung jury, but this reading excludes facts significant to the collateral estoppel inquiry, and is both hypertechnical and clearly wrong.[328] It is one thing to say that a court may not be able to articulate the reason for a hung jury; but, it is quite another thing and quite wrong to act as though a hung jury—a circumstance, entered on the record—did not occur. Obviously, the Court's very broad language in *Ashe*—instructing the court to consider "other relevant matter" and use "a practical frame . . . with an eye to all the circumstances of the proceedings"[329]—was meant to give a reviewing court the discretion to consider all the circumstances at work in the case in a realistic way, all to see if identification of a single, rational basis for an acquittal is possible. One need not be able to identify the reason for a jury's indecision to include the fact of that deliberate indecision—the rejection of an opportunity to make a final decision—in a collateral estoppel analysis. The only decision that needs to be analyzed for issue preclusion purposes is the basis of the acquittal. The courts should be restricted to realistically interpreting the failure to agree.[330]

323. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 506–08 (1978). Thus, for example, in *Washington*, the Supreme Court prescribed a sliding scale of appellate deference to a trial court's order granting a mistrial that depended on the extent to which the cause of the mistrial was subject to government manipulation. *Id.*

324. *Id.*

325. Ashe v. Swenson, 397 U.S. 436, 447 (1970).

326. *Id.* at 444.

327. *Id.* (quoting Sealfon v. United States, 332 U.S. 575, 579 (1948)).

328. Yeager v. United States, 129 S. Ct. 2360, 2367–68 (2009).

329. *Id.* at 2367 (quoting *Ashe*, 397 U.S. at 444).

330. Significantly, there may be cases in which the record establishes the reasons that a jury failed to agree. Their questions may do so, for example, and this would legitimately be relevant parts of the record in a way that the content of the jury's secret deliberations are not.

2. *Extending the Absolute Finality of an Acquittal to Other Charges without Considering the Government's Interest*

The Court was incorrect to say that resolving the collateral estoppel issue in a mixed verdict case by considering the fact of a hung jury would violate its principles of finality of acquittals and its long-standing rule against scrutiny of jury deliberations. While it is true that collateral estoppel is based on respect for the finality of judgments,[331] the reason the Court recognized collateral estoppel in a unique case and has consistently construed collateral estoppel narrowly—while construing the finality of an actual acquittal very broadly—is that collateral estoppel extends respect for finality beyond the final judgment to prevent prosecution on other charges. The respect accorded to final judgments should not carry as much weight in the context of a mixed verdict as in that of an outright acquittal, since the jury in the former situation—given the opportunity to render a final verdict for the defendant—did not acquit.

The decision in *Yeager* is also not supported by the Court's precedent barring additional proceedings where there is real or potential government manipulation.[332] Thus, for example, a trial court's decision concerning whether a mistrial is "manifestly necessary" such that a retrial is permitted, is deferred to using a continuum of deference that applies depending on the amenability of the cause to government manipulation. The same is true of mistrials granted at the defendant's request: If the prosecutor intended to provoke the defendant into moving for a mistrial, then the government no longer has a legitimate interest in barring retrial.[333] And, of course, in *Ashe* itself the prosecutor candidly admitted he had treated the first trial as a rehearsal.[334] There was no such government manipulation in *Yeager*. In fact, the prosecution did exactly what was required of it by *Ashe*. Rather than breaking up a criminal event into separate prosecutions or charges, it brought them all together.[335] If the Yeager Court senses or fears a potential for government manipulation in bringing related counts together, it did not say so.

3. *Disregarding the Non-Finality Rule for Mistrials*

The *Yeager* decision is also inconsistent with *Richardson* and its progeny. *Richardson* has consistently been interpreted as holding that a hung jury does not terminate jeopardy so that a mistrial declared after a jury

331. *See* United States v. Powell, 469 U.S. 57, 67 (1984) ("[W]ith few exceptions . . . once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment.")

332. *See* Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1984) ("[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."). For a thorough discussion of the Supreme Court's treatment of government oppression and its place in the interpretation of the double jeopardy clause, see Thomas, *supra* note 2, at 869–78.

333. Oregon v. Kennedy, 456 U.S. 667, 674–75 (1982).

334. Ashe v. Swenson, 397 U.S. 436, 447 (1970).

335. Yeager v. United States, 129 S. Ct. 2360, 2363–65 (2009).

fails to agree does not bar retrial.[336] Indeed, the *Yeager* Court quoted *Richardson*'s holding that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy."[337]

The *Yeager* Court also failed even to mention its long line of mistrial cases in which it balanced the government interest in one full and fair opportunity to convict against the defendant's interest in avoiding a second prosecution.[338] To be sure, the finality of an acquittal is absolute and requires no balancing.[339] But once there is a mixed verdict, as in *Yeager,* the government's interest in trying the non-final counts should be weighed against the defendant's interest in applying the acquittal to counts on which the jury did not acquit and that involve different conduct by different actors at different times.[340] In the mixed-verdict context, the public interest in the prosecution of non-final charges should outweigh the defendant's interest in extending the finality of the acquittal beyond the charges for which he was acquitted. The acquittal stands because the defendant has an absolute right to its finality, but the defendant does not have an absolute right to extend its effect to non-final, factually distinct charges.

4. Ignoring the Principles Protecting Inconsistent Verdicts

While it is true that collateral estoppel extends an acquittal's finality from one charge to another, the *Yeager* Court gave no explanation for why that should be so when the jury was given a chance to acquit on a second set of factually distinct charges and simply failed to agree. Recognizing the finality of the acquittal but the non-finality of the mistried charges would maximize the deference to the jury verdict that underlies the inconsistent-verdict precedent.

Moreover, the sanctity of jury deliberations is not violated by recognizing that the jury failed to agree. In fact, considering this fact would recognize rather than negate the jury's decision to announce its deadlock instead of acquitting or convicting. Moreover, one need not determine

336. *See, e.g.*, United States v. Mauskar, 557 F.3d 219, 228 (5th Cir. 2009); United States v. Charlton, 502 F.3d 1, 6 (1st Cir. 2007); United States v. James, 109 F.3d 597, 601–02 (9th Cir. 1997); United States v. Powers, 978 F.2d 354, 359–60 (7th Cir. 1992).

337. *Yeager*, 129 S. Ct. at 2369 (2009) (quoting Richardson v. United States, 468 U.S. 317, 325 (1984)).

338. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 508–10 (1978); Illinois v. Somerville, 410 U.S. 458, 463–64 (1973).

339. Burks v. United States, 437 U.S. 1, 11 n.6 (1978); Sanabria v. United States, 437 U.S. 54, 75 (1978); *see also* Thomas, *supra* note 2, at 834–38 (collecting cases and commentators).

340. In this connection it is worth noting that the result in *Yeager* is also contrary to the Court's reversal of its own decision in *Grady v. Corbin*, in which it adopted a broad same conduct definition of "same offense." 495 U.S. 508, 527–28 (1990). In *United States v. Dixon*, the Court reversed *Grady* and reaffirmed the narrow same elements test that would allow successive prosecution of two crimes as long as each involves proof of a fact that the other does not. 509 U.S. 688, 603–04 (1993); *see also* Blockburger v. United States, 284 U.S. 299, 304 (1932).

the reason for the deadlock; it is the simple fact of lack of resolution that is considered in analyzing collateral estoppel.

Finally, a collateral estoppel analysis uniquely allows—indeed, requires—a court to scrutinize a jury's deliberations to determine if there is only a single issue that could rationally lead to the acquittal. Compared to this invasive inquiry, simply considering the fact of a hung jury in determining whether the issue preclusion standard is satisfied would be an incidental and utterly *de minimis* intrusion into the jury's deliberative process.

B. *YEAGER* WILL CREATE CONFUSION AND IS UNSTABLE.

The Supreme Court's double jeopardy jurisprudence is already uniquely unstable. In three entirely separate double jeopardy areas, the Court has been forced to overrule recently established precedent. *Yeager* will only add to that confusion and may be a similarly vulnerable precedent.

Certainly, the *Yeager* decision has added to the confusion surrounding interpretation of the Double Jeopardy Clause. This is the first time that the Court has applied double jeopardy within a single prosecution involving a single accusatory instrument, in direct contradiction of all previous double jeopardy jurisprudence. Refusing to acknowledge the jury's decision to declare a deadlock rather than acquit contradicts the finality afforded an acquittal that gives maximum deference to a jury's powers. *Richardson* and its progeny held that a hung jury has meaning—a lack of agreement representing non-finality—while *Yeager* says that it does not.[341] *Ashe* directs the lower courts to scrutinize the entire record realistically, while *Yeager* does not.[342] Until *Yeager*, collateral estoppel was considered to be a double jeopardy protection rarely applied in criminal cases, where general verdicts most likely preclude its application. By radically extending *Ashe* to bar charges that are based on other conduct occurring at different times and involving other actors and other events, the Court has encouraged its use where it clearly was not intended to apply. By prohibiting the courts from considering a jury's mixed verdict, the Court has also contravened *Ashe*'s warning to view all of the circumstances in a realistic light and has left the lower courts clueless about how to proceed.[343] Certainly, the lower courts would consider a jury's mixed verdict a "circumstance" that should "realistically" be considered under *Ashe*. After *Yeager*, claims of collateral estoppel will proliferate, even though that protection adds only marginally to its underlying rationale—the protection afforded the finality of an acquittal.

Other questions remain: what other interests, in addition to prosecutorial bad faith or an accompanying acquittal, will outweigh the government's interest in the one full and fair opportunity to prosecute

341. *Compare Richardson*, 468 U.S. at 325–26, *with Yeager*, 129 S. Ct. at 2368.
342. *Compare* Ashe v. Swenson, 397 U.S. 436, 444 (1970), *with Yeager*, 129 S. Ct. 2368.
343. *Yeager*, 129 S. Ct. at 2368; *Ashe*, 397 U.S. at 444.

that *Richardson* was designed to protect? If a hung jury only sometimes continues jeopardy, when does that occur? Under what other circumstances is a hung jury to be considered final? The Court's failure to balance the collateral estoppel effect of the acquittal was consistent with its decisions eschewing a balancing test for acquittal cases but inconsistent with its mistrial cases. The failure to balance has left the lower courts without a principled analysis of mixed-verdict cases.

In addition to doctrinal confusion, what has *Yeager* wrought for procedures in the lower courts? Will any judge now ever take a partial verdict?[344] If a court learns of a partial verdict of acquittal, will that court ever grant a mistrial on the remaining counts and let the jury go? The Supreme Court has consistently commented on the virtually absolute discretion afforded to trial judges in determining whether to dismiss a deadlocked jury. *Yeager* clearly will interfere with that discretion. Will trial courts now seek to define what a deliberating jury is doing, from jury notes and questions, before deciding whether to declare a mistrial? Will they be less willing to grant a mistrial at all if the mistried counts will never be retried?

Serious questions arise concerning how crimes will be prosecuted. Will *Yeager* effect how prosecutors charge? Will prosecutors now go back to separately prosecuting related charges but with more sophistication than the *Ashe* prosecutor's clumsy attempt to rehearse?

Finally, will Yeager have to be revisited and reversed in the not-too-distant future, as has happened with at least three other double jeopardy cases before? What will the Supreme Court hold, in a future mixed-verdict case, when a concededly erroneous acquittal, which is entitled to the same finality as a true acquittal, is held to collaterally estop retrial on accompanying mistried counts? Will *Yeager* be extended in that situation? Will *Richardson* be overruled? It may be that the Court will again abandon its expansive reading of the double jeopardy protection, as it did with the short-lived *Grady*, *Halper*, and *Jenkins* decisions.[345]

V. CONCLUSION

The Supreme Court's *Yeager* decision is wrong, its underlying reasoning is deficient, and it is likely to create confusion. The extension of *Ashe* to complex, factually distinctive charges and its applicability within a single prosecution is absolutely novel and not adequately explained. At the same time, *Yeager*'s suggestion that a hung jury only sometimes continues jeopardy is confusing. None of this is justified either by the Court's articulated analysis or by any traditional double jeopardy concerns. The absolute finality accorded an acquittal has been extended to outweigh well-recognized government interests, even though the additional protec-

344. FED. R. CRIM. P. 31 (providing that taking a partial verdict is within a federal judge's discretion).

345. Grady v. Corbin, 495 U.S. 508 (1990); United States v. Halper, 490 U.S. 435 (1989); United States v. Jenkins, 420 U.S. 358 (1975).

tion afforded to the acquittal is marginal and inconsistent with the actual decision of the jury. None of these conclusions are justified by the Supreme Court's precedent or by *Yeager*'s superficial analysis. It may be that this decision—like *Grady*,[346] *Halper*,[347] and *Jenkins*,[348]—will yield unexpected results and, like those decisions, be vulnerable to reversal in the future.

346. 495 U.S. 508.
347. 490 U.S. 435.
348. 420 U.S. 358.