

be found guilty.”³⁹ A second “vitally important interest[]” embodied in the Double Jeopardy Clause “is the preservation of ‘the finality of judgments.’”⁴⁰

The concept of double jeopardy goes far back in history, but its development was uneven and its meaning has varied. The English development, under the influence of Coke and Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.⁴¹ In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction. The rule’s elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.⁴² Madison’s version of the guarantee as introduced in the House of Representatives read: “No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense.”⁴³ Opposition in the House proceeded on the proposition that the language could be construed to prohibit a second trial after a successful appeal by a defendant and would therefore either constitute a hazard to the public by freeing the guilty or, more likely, result in a detriment to defendants because appellate courts would be loath to reverse convictions if no new trial could follow, but a motion to strike “or trial” from the clause failed.⁴⁴ As approved by the Senate, however, and

³⁹ *Green v. United States*, 355 U.S. 184, 187–88 (1957). The passage is often quoted with approval by the Court. *E.g.*, *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *United States v. DiFrancesco*, 449 U.S. 117, 127–28 (1980); *Yeager v. United States*, 557 U.S. ___, No. 08–67, slip op. at 7 (2009). For a comprehensive effort to assess the purposes of application of the clause, see Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

⁴⁰ *Yeager v. United States*, 557 U.S. ___, No. 08–67, slip op. at 6, 7 (2009), quoting *Crist v. Bretz*, 437 U.S. 28, 33 (1978).

⁴¹ M. FRIEDLAND, *DOUBLE JEOPARDY* part 1 (1969); *Crist v. Bretz*, 437 U.S. 28, 32–36 (1978), and *id.* at 40 (Justice Powell dissenting); *United States v. Wilson*, 420 U.S. 332, 340 (1975).

⁴² J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 21–27 (1969). The first bill of rights that expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. “No subject shall be liable to be tried, after an acquittal, for the same crime or offence.” Art. I, Sec. XCI, 4 F. Thorpe, *The Federal and State Constitution*, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. *Id.* at 3100.

⁴³ 1 ANNALS OF CONGRESS 434 (June 8, 1789).

⁴⁴ *Id.* at 753.