accepted by the House for referral to the states, the present language of the clause was inserted.[45]

Throughout most of its history, this clause was binding only against the Federal Government. In *Palko v. Connecticut*,[46] the Court rejected an argument that the Fourteenth Amendment incorporated all the provisions of the first eight Amendments as limitations on the states and enunciated the due process theory under which most of those Amendments do now apply to the states. Some guarantees in the Bill of Rights, Justice Cardozo wrote, were so fundamental that they are "of the very essence of the scheme of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed."[47] But the Double Jeopardy Clause, like many other procedural rights of defendants, was not so fundamental; it could be absent and fair trials could still be had. Of course, a defendant's due process rights, absent double jeopardy consideration *per se*, might be violated if the state "creat[ed] a hardship so acute and shocking as to be unendurable," but that was not the case in *Palko*.[48] In *Benton v. Maryland*, however, the Court concluded "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments."[49] Therefore, the double jeopardy limitation now applies to both federal and state governments and state rules on double jeopardy, with regard to such matters as when jeopardy attaches, must be considered in the light of federal standards.[50]

In a federal system, different units of government[51] may have different interests to serve in the definition of crimes and the enforcement of their laws, and where the different units have overlapping jurisdictions a person may engage in conduct that will violate

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[45] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1149, 1165 (1971). In Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting), Justice Powell attributed to inadvertence the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being "of academic interest only." Id. at 34 n.10.

[46] 302 U.S. 319 (1937).

[47] 302 U.S. at 325, 326.

[48] 302 U.S. at 328.

[49] 395 U.S. 784, 795, 795 (1969) (citation omitted).

[50] Crist v. Bretz, 437 U.S. 28, 37–38 (1978). *But see* id. at 40 (Justices Powell and Rehnquist and Chief Justice Burger dissenting) (standard governing states should be more relaxed).

[51] Id. *See also* cases cited in Bartkus v. Illinois, 359 U.S. 121, 132 n.19 (1959), and Abbate v. United States, 359 U.S. 187, 192–93 (1959).