Several Justices would have gone further and required a compulsory joinder of all charges against a defendant growing out of a single criminal act, occurrence, episode, or transaction, except where a crime is not discovered until prosecution arising from the same transaction has begun or where the same jurisdiction does not have cognizance of all the crimes.[170] But the Court has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause."[171]

Yeager v. United States,[172] unlike *Ashe*, "entail[ed] 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 [*Yeager*] involves an acquittal on some counts and a mistrial declared on others. The reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on [some] counts was a nonevent and the acquittals on the [other] counts are entitled to the same effect as Ashe's acquittal." The lower court in *Yeager* had "reasoned that the hung counts must be considered to determine what issues the jury decided in the first trial. Viewed in isolation, the [lower] court explained, the acquittals . . . would preclude retrial because [of the facts that the jury would have had to have found in light of its acquittals]. Viewed alongside the hung counts, however, the acquittals appeared less decisive,"[173] because, if the jury had actually found the facts implied by its acquittals, then it would have acquitted on the hung counts as well. In other words, its having acquitted on some counts and not on others was logically inconsistent.[174] The Supreme Court, however, found that nothing should be inferred from the failure to acquit on some counts, because "there is no way to decipher what a hung count represents. . . . A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to

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[170] Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Justices Brennan, Douglas, and Marshall concurring). Justices Brennan and Marshall adhered to their position in Brown v. Ohio, 432 U.S. 161, 170 (1977) (concurring); and Thompson v. Oklahoma, 429 U.S. 1053 (1977) (dissenting from denial of certiorari).

[171] Garrett v. United States, 471 U.S. 773, 790 (1985). Earlier, the approach had been rejected by Chief Justice Burger in Ashe v. Swenson, 397 U.S. 436, 468 (1970) (dissenting), by him and Justice Blackmun in Harris v. Washington, 404 U.S. 55, 57 (1971) (dissenting), and, perhaps, by Justice Rehnquist in Turner v. Arkansas, 407 U.S. 366, 368 (1972) (dissenting).

[172] 557 U.S. ___, No. 08–67, slip op. at 9 (2009).

[173] 557 U.S. ___, No. 08–67, slip op. at 9–10.

[174] The Court drew an analogy between its finding that this logical inconsistency does not affect the preclusive force of the acquittals under the Double Jeopardy Clause, and Justice Holmes' holding, in Dunn v. United States, 284 U.S. 390, 393 (1932), "that a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." 557 U.S. ___, No. 08–67, slip op. at 1.