PLEA AGREEMENTS AND THE DOUBLE JEOPARDY CLAUSE

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In August 2023, the Sixth Circuit held in Soto v. Siefker *that the Fifth Amendment's Double Jeopardy Clause does not foreclose the prosecution of charges previously dismissed under plea agreements. Although the court correctly ruled against the defendant, the case's facts highlight how the Supreme Court has departed from the original meaning of the Amendment. First, the Court has defined too broadly what constitutes the "same offence" under the Clause. Second, some principles of its double-jeopardy jurisprudence are better rooted in the Fourteenth Amendment's Due Process Clause. Moreover, returning to the Fifth Amendment's first principles would not enable governmental overreach; contract principles can guarantee the fulfillment of promises in plea agreements. This Essay provides a template to resolve future cases like* Soto *consistent with the original meaning of the Double Jeopardy Clause.*

INTRODUCTION

In the 1999 movie *Double Jeopardy*, a husband fakes his death and frames his wife for murder. When she discovers that he is still alive, she resolves to kill him and invoke double-jeopardy protections since she has already been convicted of his murder.[1] The film is premised on an incorrect interpretation of the Fifth Amendment's Double Jeopardy Clause.[2] Yet it demonstrates how the guarantee that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb" is less straightforward than it may appear.[3] What does "same offence" mean? When is one "put in jeopardy"? A recent case from the United States Court of Appeals for the Sixth Circuit, *Soto v. Siefker*,[4] raised these

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1. DOUBLE JEOPARDY (Paramount Pictures 1999).

2. Mohammad Nayeem Firoz, *Double Jeopardy in Criminal Proceedings*, DHAKA TRIBUNE (May 28, 2014), https://www.dhakatribune.com/bangladesh/laws-rights/66036/double-jeopardy-in-criminal-proceedings [https://perma.cc/3TEZ-U9RP].

3. U.S. CONST. AMEND. V.

4. Soto v. Siefker, 79 F.4th 715 (6th Cir. 2023).

and other complex questions. Although the court correctly held that charges dismissed under plea agreements do not trigger double jeopardy,[5] several background issues highlight how courts have departed from the Clause's original meaning.[6] This Essay provides an originalist template for resolving cases like *Soto* under the Fifth Amendment's first principles.

Part I summarizes *Soto* and the Supreme Court double-jeopardy precedent it relied on. I then use *Soto*'s facts to show how the Court has departed from the Double Jeopardy Clause's original meaning. Thus, Part II criticizes the Court's misinterpretation of the Clause's "same offence" language, while Part III shows that much of current double-jeopardy doctrine should be grounded in the Fourteenth Amendment's Due Process Clause. To assuage concerns that returning to the Double Jeopardy Clause's original meaning would permit governmental abuse, Part IV notes how contract principles can protect plea-agreement promises. In short, this Essay shows how the Court should resolve future cases like *Soto* consistent with the Fifth Amendment's original meaning.

I. *SOTO*'S FACTS AND HOLDING

In 2006, two-year-old Julio Soto was killed. His father, Travis, admitted to the killing but asserted that it was due to an ATV accident.[7] Travis pled guilty to child endangerment under a plea agreement that dismissed a more serious involuntary-manslaughter charge. He served five years in prison. In 2016, Travis voluntarily confessed to the police that Julio's death was not an accident. Rather, he had brutally beaten Julio to death.[8]

The State of Ohio charged Travis with several offenses, including murder and aggravated murder.[9] Travis moved to dismiss the two murder charges under the Double Jeopardy Clause. His argument was two-fold. First, the manslaughter charge dismissed in 2006 was a lesser-included offense of murder and aggravated murder,[10] and the Supreme Court has held that lesser-included offenses constitute the "same offence" under the Double Jeopardy Clause.[11] Second, Travis was "put in jeopardy" by being charged with manslaughter in 2006.[12] Thus, a murder

5. At least seven other Courts of Appeals have reached this conclusion, with only one going the other way. *See id.* at 720 (Griffin, J., concurring) (collecting cases).

6. *See infra* Part II.

7. State v. Soto, 158 Ohio St.3d 44, 44 (2019).

8. *Siefker*, 79 F.4th at 717.

9. *Id.*

10. Involuntary manslaughter is a lesser-included offense because proving murder or aggravated murder requires proving involuntary manslaughter. *See* Brief for Petitioner-Appellant at 2 n.1, Soto v. Siefker, 79 F.4th 715 (6th Cir. 2023) (No. 21-4229).

11. Brown v. Ohio, 432 U.S. 161, 168 (1977). In *Blockburger v. United States*, the Court held that "the test . . . to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. 299, 304 (1932).

12. *Siefker*, 79 F.4th at 717–18.

trial would be his second time in jeopardy for the same offense.[13] Ohio conceded the first point,[14] but successfully challenged the second point.[15]

To help determine if an individual has previously been "in jeopardy," the Supreme Court has established two requirements: jeopardy must both attach and terminate.[16] Attachment occurs in a jury trial when "a jury is empaneled and sworn" and in a bench trial "when the court begins to hear evidence."[17] While attachment addresses the point a proceeding reaches, termination focuses on the ruling it yielded: "The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged."[18] The Court has focused on whether a court order is tantamount to an acquittal—rulings that establish the insufficiency of the government's evidence and generally relate to the defendant's guilt or innocence.[19] If a ruling is like an acquittal, jeopardy has terminated.[20] Both attachment and termination are required for double-jeopardy protections to apply;[21] if just one of the two is absent, the government prevails.

The *Soto* court focused on attachment. It rejected Soto's analogy of the plea hearing at which the manslaughter charge was dismissed to a bench trial. In doing so, it emphasized that "the *sine qua non* for attachment is power."[22] Jeopardy attaches when a fact-finder assumes the "power to determine [the defendant's] guilt or innocence."[23] At the plea hearing, the judge did not have the power to find Soto guilty of involuntary manslaughter; he could only dismiss that charge under the plea agreement or reject the agreement and allow that charge to proceed to trial.[24] The court also showed how its clear rule about power aligns with the Double Jeopardy Clause's history. Before the Founding, double-jeopardy protections could only be invoked following a trial and verdict: the Clause is derived from the English common-law protections of *autrefois acquit* and *autrefois convict*, meaning former acquittal and former conviction, respectively.[25]

The *Soto* court correctly applied precedent and history to resolve attachment against Soto. The sole focus on attachment is understandable because it

13. *See id.*

14. Brief of Appellee at 6, Soto v. Siefker, 79 F.4th 715 (6th Cir. 2023) (No. 21-4229).

15. *Siefker*, 79 F.4th at 719–20.

16. Serfass v. United States, 420 U.S. 377, 388 (1975) ("[T]he courts have found it useful to define a point in criminal proceedings at which . . . jeopardy attaches."); Richardson v. United States, 468 U.S. 317, 325 (1984) (noting that "the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." (citation omitted)).

17. *Serfass*, 420 U.S. at 388.

18. *See* Lee v. United States, 432 U.S. 23, 30 (1977).

19. Evans v. Michigan, 568 U.S. 313, 319 (2013).

20. Jeopardy also terminates if a ruling is like a conviction. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1964 (2019). However, the dismissed charge in *Siefker* was clearly not akin to a conviction; thus, the only question was whether it was like an acquittal.

21. *See Richardson*, 468 U.S. at 325 (noting that jeopardy attached but still finding against the defendant on termination grounds); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1840 (1997) (arguing that the "adjudication game" must both start and conclude).

22. Soto v. Siefker, 79 F.4th 715, 719 (6th Cir. 2023).

23. *Id.* (citation omitted).

24. *Id.*

25. *Id.* at 718.

presented a clean basis for resolving the case. However, the facts of *Soto* provide a useful example of several double-jeopardy principles that the Court has either ignored or misattributed to the Double Jeopardy Clause.

II. THE TEXT OF THE DOUBLE JEOPARDY CLAUSE

A. "Same Offence" Should Mean "Same Offence"

A proper originalist analysis begins with the text of the Double Jeopardy Clause:[26] "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."[27] The first textual question that arises is what it means to be "subject for the same offence." Although Soto, Ohio, and the Sixth Circuit agreed that the involuntary-manslaughter charge dismissed in 2006 was the "same offense" as the new murder and aggravated murder charges,[28] that conclusion is not obvious from the Double Jeopardy Clause's text. In fact, it contradicts it.

Samuel Johnson's Dictionary from 1773 defines *same* as follows: "Not different; not another; identical; being of the like kind, sort, or degree."[29] That definition is consistent with today's; among the explanations Merriam-Webster offers are "resembling in every relevant respect" and "equal in size, shape, value, or importance."[30] Under these definitions, the 2006 and 2016 offenses are not the "same." Ohio's involuntary-manslaughter law declares that "[n]o person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."[31] The aggravated-murder law Soto was charged with contains

26. Antonin Scalia, Associate Justice, United States Supreme Court, Remarks at the Woodrow Wilson International Center for Scholars (Washington, D.C., Mar. 14, 2005) (transcript available at https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf) ("Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people.") [https://perma.cc/W74N-KCSU].

27. U.S. Const. amend. V.

28. *See supra* notes 10, 14; *Siefker*, 79 F.4th at 718 (citing *Brown*, 432 U.S. at 168).

29. *Same*, SAMUEL JOHNSON'S DICTIONARY (4th folio ed. 1773), https://johnsonsdictionaryonline.com/views/search.php?term=same [https://perma.cc/UN5Q-G87B] (last visited Nov. 6, 2023).

30. *Same*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/same [https://perma.cc/B355-PHJN] (last visited Nov. 6, 2023). Several remarks about dictionaries are worth making. First, I have not conducted an extensive survey of definitions of *same*. I will note that Noah Webster's 1828 dictionary included the definition most inconsistent with my analysis: "Of the identical kind or species, though not the specific thing." *Same*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed. 1828), https://webstersdictionary1828.com/Dictionary/same [https://perma.cc/BN7S-V38T] (last visited Nov. 6, 2023). However, the 2006 and 2016 offenses should not be considered the same "kind or species." Second, while dictionaries are helpful for discerning linguistic meaning, they are not always the best source. A corpus-linguistics analysis may yield a more accurate and comprehensive understanding of *same*'s meaning at the time of the Fifth Amendment's ratification. Third, as an originalist, I am more interested in the meaning of *same* at that time than today. I merely note today's definition to show how its meaning has remained the same since the Founding. *See* Morgan v. Fairfield Cnty., 903 F.3d 553, 568 (Thapar, J., concurring in part and dissenting in part) (highlighting how the definition of *search* "has remained unchanged since the people ratified the Fourth Amendment").

31. OHIO REV. CODE ANN. § 2903.04(A) (West 2004), available at https://codes.ohio.gov/ohio-revised-code/section-2903.04 [https://perma.cc/VM56-3S8H] (last visited Nov. 6, 2023).

language of intent absent from the involuntary-manslaughter statute: "No person shall *purposely* cause the death of another who is under thirteen years of age at the time of the commission of the offense."[32]

Not only are the texts "different," not "identical," and not "resembling in every relevant aspect," but they also differ in "degree" or "importance."[33] Involuntary manslaughter covers inadvertent killings.[34] Aggravated murder does not.[35] The difference in degree is further highlighted by the sentencing requirements. For the most serious involuntary-manslaughter charges, the maximum sentence is eleven years imprisonment and a $20,000 fine.[36] For aggravated murder, the death penalty is possible.[37]

Distinguishing between the two offenses also aligns with the Double Jeopardy Clause's history. Influential English jurist Sir Edward Coke noted that *autrefois acquit* "must be of the same felony."[38] Prominent English judge Sir Matthew Hale likewise described *autrefois acquit* as applying to the "same felony" and "same offense."[39] Such a strict requirement of identicalness is understandable—at the time of the Founding, judicial records were far from elaborate.[40]

Thus, the Double Jeopardy Clause's text and history suggest that the threshold question should be whether two offenses are the "same."[41] In *Soto*, the 2006 involuntary-manslaughter charge and the 2016 aggravated murder charge were not the "same." Thus, the Sixth Circuit could have rejected Soto's double-jeopardy claim without discussing attachment.

32. OHIO REV. CODE ANN. § 2903.01(C) (West 2019), available at https://codes.ohio.gov/ohio-revised-code/section-2903.01 [https://perma.cc/8GBT-CRW7] (last visited Nov. 6, 2023) (emphasis added).

33. *Same*, SAMUEL JOHNSON'S DICTIONARY (4th folio ed. 1773), https://johnsonsdictionaryonline.com/views/search.php?term=same [https://perma.cc/UN5Q-G87B] (last visited Nov. 6, 2023). *Same*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/same [https://perma.cc/B355-PHJN] (last visited Nov. 6, 2023).

34. OHIO REV. CODE ANN. § 2903.04(A) (West 2004), available at https://codes.ohio.gov/ohio-revised-code/section-2903.04 [https://perma.cc/VM56-3S8H] (last visited Nov. 6, 2023).

35. OHIO REV. CODE ANN. § 2903.01(C) (West 2019), available at https://codes.ohio.gov/ohio-revised-code/section-2903.01 [https://perma.cc/8GBT-CRW7] (last visited Nov. 6, 2023).

36. *Involuntary Manslaughter*, JOSLYN LAW FIRM, https://www.criminalattorneycincinnati.com/criminal-defense/violent-crimes/involuntary-manslaughter/ [https://perma.cc/46X8-PQ8M] (last visited Nov. 6, 2023).

37. OHIO REV. CODE § 2929.02(A) (2021), https://codes.ohio.gov/ohio-revised-code/section-2929.02 [https://perma.cc/CH6V-9B7X] (last visited Nov. 6, 2023). For murder, the sentencing range is fifteen years to life—still exceeding that for involuntary manslaughter. *Id.* at § 2929.02(B).

38. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 213 (1797). "Coke's Institutes were read in the American Colonies by virtually every student of the law." Klopfer v. North Carolina, 386 U.S. 213, 225 (1967).

39. 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 251 (1736).

40. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 39 n.193 (1995).

41. Consider also how the original Constitution uses the word *same*. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 756, 757, 789, 806 (1999) (describing the Constitution as "its own dictionary"). As just one illustrative example, Article II specifies that the President serves a four-year term and the Vice President is "chosen for the same Term." U.S. Const. art. II, § 1, cl. 1. Clearly, the Vice President and President's terms perfectly overlap; it would be preposterous to suggest that "same" could mean a lesser-included term of three years within the President's four-year term.

B. "In Jeopardy of Life or Limb"

If a court is confronted with two "same offences," it can then ask whether a defendant was already "put in jeopardy of life or limb."[42] The best source for the original public meaning of *jeopardy* is Sir William Blackstone, whose work introduced common-law double-jeopardy protections to the colonies and inspired the Double Jeopardy Clause.[43] Blackstone grounded protections against being "brought into jeopardy of [one's] life, more than once, for the same offence" in *autrefois acquit* and *autrefois convict*.[44] Thus, a defendant has been placed "in jeopardy of life or limb" after receiving an acquittal or conviction. This conclusion largely tracks with the attachment and termination tests.[45] For attachment, *Soto* held that a defendant must be subject to a proceeding where a fact-finder can decide on guilt or innocence.[46] For termination, a court must issue a "substantive" ruling akin to an acquittal or conviction.[47]

* * *

A double-jeopardy analysis should ask two questions. First, are the two offenses the same? If not, the inquiry ends. If yes, courts should address a second question: was the defendant placed in jeopardy for the prior offense? To answer this question, courts can proceed to the above attachment and termination analyses.[48]

III. DIFFERENTIATING THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES

Although Part II is faithful to the Double Jeopardy Clause's original meaning, one may worry about its consequences. It appears to let the government "bring multiple prosecutions for purposes of harassment."[49] Consider three offenses, A, B, and C. A is a lesser-included offense of B, which is a lesser-included offense of C. What stops the government from first trying a defendant for A, then B, then C? Not the Double Jeopardy Clause, as construed above. Here is where the Due Process Clause comes into play.[50] Although the latter clause contains different protections—forbidding the deprivation of "life, liberty, or property, without due process of law"[51]—its protections can be informed by double-

42. U.S. Const. amend. V.

43. GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 7 (1998).

44. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 329–30 (1769).

45. *See supra* text accompanying notes 16–21.

46. Soto v. Siefker, 79 F.4th 715, 719 (6th Cir. 2023).

47. Evans v. Michigan, 568 U.S. 313, 319 (2013).

48. *See supra* text accompanying notes 46–47.

49. United States v. Stearns, 707 F.2d 391, 393 (9th Cir. 1983).

50. *See* Amar & Marcus, *supra* note 40, at 31 (explaining how the Court has incorrectly rooted principles of collateral estoppel in the Double Jeopardy Clause instead of the Due Process Clause).

51. U.S. Const. amend. XIV, § 1, cl. 3. In this Essay, I refer to the Due Process Clause of the Fourteenth Amendment and not the identically worded Due Process Clause of the Fifth Amendment. The Fourteenth Amendment's Clause protects persons (including noncitizens) against states whereas the Fifth Amendment's Clause applies to the states via the Privileges or Immunities Clause of the Fourteenth Amendment, which only protects "citizens." Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1224–25 (1992).

jeopardy principles.[52] Thus, courts can rely on the Due Process Clause to prevent an overbearing government from repeatedly trying a defendant, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[53]

A. Applying the Due Process Clause

Part II provided a template for resolving issues under only the Double Jeopardy Clause. If courts return to that Clause's original meaning, litigants would be wise to raise Due Process Clause challenges when two offenses are not the "same."[54] When hearing such a challenge, courts should first utilize the attachment and termination framework to determine if a defendant has previously been acquitted or convicted. If not, then no viable claim under the Double Jeopardy or Due Process Clauses exists. If the defendant has been acquitted or convicted, courts should identify which of the four scenarios below applies.[55]

First, consider a defendant acquitted of a lesser-included offense. Trying the defendant for the greater offense would not violate the Double Jeopardy Clause since the greater offense is not the "same" as the lesser one. However, it would violate collateral estoppel, "the principle that bars relitigation between the same parties of issues actually determined at a previous trial."[56] After all, failure to prove the lesser-included offense implies a failure to prove a greater offense including the lesser one. Contrary to the Court's holding in *Ashe v. Swenson*,[57] however, collateral estoppel is grounded in the Due Process Clause and not the Double Jeopardy Clause.[58]

Second, take a defendant acquitted of a greater offense. Normally, the government can request the inclusion of jury instructions on lesser-included ones, although it need not do so. Even if the lesser-included offense is not in the jury instructions, an acquittal on the greater offense is implicitly (or *a fortiori*) an additional acquittal on the different, lesser-included offense. Thus, the Double Jeopardy Clause forbids a trial on the lesser offense because the defendant has already, in effect, been acquitted of it.[59]

Third, consider a defendant convicted on the greater offense. That offense will typically already include the punishment for the lesser-included offense. Thus, the government could not further penalize the defendant by pursuing the

52. *See* Amar & Marcus, *supra* note 40, at 31.

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

54. *See* Soto v. Siefker, 79 F.4th 715, 718–19 (6th Cir. 2023).

55. For a detailed explanation of the four scenarios, see Amar & Marcus, *supra* note 40, at 30–36.

56. Ashe v. Swenson, 397 U.S. 436, 442 (1970).

57. *Id.*

58. If a jury finds a defendant not guilty of murder because he was in a different country the week of the murder, collateral estoppel would foreclose trying him for a robbery that occurred that same week. Since the two offenses are not the same, the Double Jeopardy Clause would not apply. Hence, the principle is better rooted in the Due Process Clause. *See* Amar, *supra* note 21, at 1827–29.

59. Amar & Marcus, *supra* note 40, at 31–32. In the rare instance in which the prosecutor cannot request that the lesser-included offense be included in the jury instruction, a subsequent prosecution on the lesser offense may be permissible. *See id.* at 32 (citing United States v. Dixon, 509 U.S. 688 (1993)).

lesser charge; if it did so, the government would likely be harassing him or her in violation of due-process protections. In the abnormal scenario in which the lesser-included offense carries a greater penalty, the government could pursue that offense—given that it is not the "same offence." However, it would have to demonstrate a legitimate reason such as fully punishing the defendant consistent with the legislature's will, as opposed to vindictively targeting the defendant.[60]

Fourth, what if the defendant is first convicted of a lesser-included offense? The Double Jeopardy Clause would not bar a prosecution on a greater one; after all, that offense is not the "same" as the lesser one. Yet the Due Process Clause would bar a prosecution meant solely to harass the defendant. Thus, the question turns to whether the government's reasons are legitimate. If so, the prosecution could constitutionally proceed.[61]

One permissible reason for subsequently prosecuting a greater offense is the due-diligence exception.[62] The Court has permitted prosecution on the greater offense if the government could not pursue it initially "because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."[63] Courts of Appeals have applied this due diligence exception in cases where defendants covered up victims' deaths, preventing murder charges until evidence of foul play resulting in death surfaced.[64]

Although Ohio may have forfeited its application of the due-diligence exception in *Soto*,[65] it likely applied. Similar to cases where Courts of Appeals have invoked the exception, Soto covered up the real cause of Julio's death.[66] He fabricated a story about Julio dying from an ATV accident and staged the scene to reflect his lie.[67] Thus, Soto's "*own conduct* prevented his prosecutions" from occurring in 2006.[68] Moreover, Ohio's initial investigation was sufficiently diligent. Soto was the only witness to Julio's death and as the State's expert noted, doctors regularly rely on parents' accounts of children's medical history.[69]

60. *Id.* at 35–36.

61. If the defendant were also convicted of the greater offense, due-process principles would compel reducing his or her sentence by the penalty incurred for the lesser offense. *Id.* at 35.

62. Other exceptions may exist as well. For example, the government may validly forego a charge in an initial prosecution to protect existing undercover operations. *See* Amar, *supra* note 21, at 1825 (citing Garrett v. United States, 471 U.S. 773, 789–90 (1985)).

63. Brown v. Ohio, 432 U.S. 161, 169 n.7 (citations omitted). Although the Court has traced this exception to the Double Jeopardy Clause, it should be rooted in the Due Process Clause's protections against governmental harassment of defendants.

64. *See, e.g.*, United States v. Stearns, 707 F.2d 391 (9th Cir. 1983); United States v. Honken, 541 F.3d 1146 (8th Cir. 2008).

65. *See* Reply Brief for Petitioner-Appellant at 23–24, Soto v. Siefker, 79 F.4th 715 (6th Cir. 2023) (No. 21-4229).

66. Soto v. Siefker, 79 F.4th 715, 717 (6th Cir. 2023).

67. *Id.*

68. *Honken*, 541 F.3d at 1159.

69. Petitioner Soto's Return of the Writ at 4, Soto v. Siefker, 2021 WL 11674261 (No. 3:21-cv-00167-DCN).

B. Comparison with Existing Double-Jeopardy Jurisprudence

At this point, one may question the point of returning to the Fifth Amendment's original meaning—at least in the context of plea agreements. After all, the attachment and termination analysis is critical both under current doctrine and the framework articulated above. On a theoretical level, there is appeal to more faithfully applying the will of "We the People" who ratified the Constitution.[70] As Justice Clarence Thomas put it, while returning to the Constitution's original meaning may raise "hard questions," "they will have the advantage of being the questions the Constitution asks us to answer."[71] Moreover, restoring the Fifth Amendment's original meaning may help "dispel the cloud of illegitimacy" surrounding doctrine or originalism, preventing critics from highlighting how double-jeopardy jurisprudence is inconsistent with constitutional text.[72]

Applying the Fifth Amendment's first principles would also simplify courts' analyses of double-jeopardy issues. Above, I summarized the Court's double-jeopardy jurisprudence as requiring the tribunal to have the power to determine guilt or innocence (attachment) and to issue an order akin to an acquittal or conviction (termination).[73] Truthfully, the Court's doctrine is more confusing. For example, it has suggested that attachment occurs when the Double Jeopardy Clause's "purposes and policies are implicated"[74] and identified two such purposes: "finality and prevention of prosecutorial overreaching."[75] Ascertaining when such purposes come into play is needlessly complicated.

Under my approach, expectations of finality and issues with prosecutorial overreach would arise only under a Due Process Clause analysis. Interpreting the Double Jeopardy Clause would be simpler, in line with clear historical rules. For attachment, courts could follow the *Soto* analysis of the court's power; for termination, the Court's evaluation of whether an order is a "substantive" ruling tantamount to an acquittal or conviction.[76]

To illustrate how this method would work in practice, let me explain how I would have decided *Soto*—absent binding Court precedent, issues of forfeiture, and principles of judicial avoidance. First, I would establish that the 2006 involuntary manslaughter offense is not the same as the 2016 murder and aggravated-murder charges. Thus, Soto has no valid claim under the Double Jeopardy Clause. Second, I would consider potential arguments under the Due Process Clause. None of the four scenarios from Section III.A apply because Soto was not acquitted of the involuntary-manslaughter charge. Consistent with the Sixth

70. U.S. Const. pmbl.

71. McDonald v. City of Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part and in the judgment).

72. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 20–21 (2021).

73. *See supra* text accompanying notes 46–47.

74. Serfass v. United States, 420 U.S. 377, 388 (1975).

75. Ohio v. Johnson, 467 U.S. 493, 501 (1984).

76. Evans v. Michigan, 568 U.S. 313, 319 (2013). For a broader discussion of how the Court's departure from the Double Jeopardy Clause's original meaning has led to unjust results, *see* Amar, *supra* note 21, at 1818–37.

Circuit's holding, jeopardy never attached at the plea hearing. Even if it had attached, it did not terminate because dismissing a charge under a plea agreement is distinct from an acquittal following a fact-finder opining on the defendant's "guilt or innocence."[77] Thus, there is no governmental overreach to deter—the government never got a first bite at the apple in 2006. If the 2006 dismissal were tantamount to an acquittal (and thus the case is like the fourth scenario from Section III.A), a new prosecution would still not violate the Due Process Clause because of the due-diligence exception.

IV. PLEA AGREEMENTS AND CONTRACT PRINCIPLES

Amici—including the ACLU and Innocence Project—admonished that ruling for Ohio would upend the plea-bargaining system. Because over ninety percent of criminal cases today conclude via plea deals, amici argued that ruling for Ohio would "threaten[] both individual liberty and the functioning of the criminal justice system."[78] Some of amici's concerns are addressed by Due Process Clause protections outlined in Part III. For example, they cite Court precedent rejecting a second prosecution that enables the government to learn from its weaknesses and the defense's theories in an initial trial.[79] However, to use exceptions like due diligence, the government would have to offer a legitimate reason for a subsequent prosecution.[80] Shortcomings in its original evidence not attributable to defendant misconduct would be an invalid explanation.

However, another body of law can assuage amici's concerns about governmental overreach: contract principles. The Court has established that "plea bargains are essentially contracts."[81] If the government fails to fulfill its promises in plea agreements, "the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement."[82] Thus, defendants subject to subsequent prosecution could allege governmental contract breaches. In fact, the Sixth Circuit explicitly left that possibility open to Soto.[83]

However, contract principles can also cut against defendants. In *Ricketts v. Adamson*, the Court enabled the government to rescind a plea agreement due to the defendant's refusal to testify against a coconspirator.[84] *Ricketts* is highly fact specific; the plea agreement explicitly provided that the entire deal would be "null and void" if violated,[85] and a state court had already concluded that the defendant breached the agreement.[86] Yet several Courts of Appeals have

77. Soto v. Siefker, 79 F.4th 715, 719 (6th Cir. 2023).

78. Brief of the American Civil Liberties Union Foundation, the American Civil Liberties Union of Ohio Foundation, the National Association of Criminal Defense Lawyers, and The Innocence Project, Inc., as Amici Curiae in Support of Petitioner-Appellant Soto at 5, Soto v. Siefker, 79 F.4th 715 (6th Cir. 2023) (No. 21-4229).

79. *Id.* at 24.

80. *See supra* notes 62–64 and accompanying text.

81. Puckett v. United States, 556 U.S. 129, 137 (2009).

82. *Id.*

83. *See* Soto v. Siefker, 79 F.4th 715, 720 (6th Cir. 2023).

84. 483 U.S. 1, 4–12 (1983).

85. *Id.* at 4.

86. *Id.* at 5.

generally permitted rescission for plea agreement violations.[87] Absent issues of forfeiture,[88] a first-impression analysis of Soto's plea agreement indicates that he may have breached it. After all, he promised in the agreement to "tell the Court the facts and circumstances of [his] guilt,"[89] yet lied at the plea hearing when asserting that Julio died in an ATV accident.

Regardless of whom the breach-of-contract argument favors in Soto's case, contract principles already embraced by the Court can more broadly check governmental overreach.

CONCLUSION

While the Sixth Circuit correctly decided *Soto v. Siefker*, the facts of the case demonstrate how courts should return to the Fifth Amendment's first principles. First, courts should assess whether the two offenses are truly the "same" under the Amendment's text. If not, then no Double Jeopardy Clause violation occurred. Second, courts should locate considerations about governmental harassment and prosecutorial overreach not in the Double Jeopardy Clause but rather the Due Process Clause. Doing so would simplify courts' analysis of whether a defendant was placed in jeopardy, allowing them to concentrate on two questions: did the tribunal have the power to determine guilt or innocence, and was its disposition of the case an opinion on guilt or innocence? While this approach honors the original meaning and history of the Fifth Amendment, it does not upend plea agreements, which can be protected by contract principles.

Undoubtedly, there exist more wrinkles relating to potential double-jeopardy cases.[90] When scholars, jurists, and litigants address them, they would be well served by starting with the text and history of the Fifth Amendment.

87. *See, e.g.*, United States v. Cimino, 381 F.3d 124, 128 (2d Cir. 2004); United States v. Olson, 880 F.3d 873, 879 (7th Cir. 2018); United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir. 1981).

88. Reply Brief for Petitioner-Appellant at 19, Soto v. Siefker, 79 F.4th 715 (6th Cir. 2023) (No. 21-4229) ("Ohio does not develop this argument . . . .").

89. *Id.* at 16.

90. One issue raised by Judge Amul Thapar at oral argument and discussed in Judge Richard Griffin's concurrence is the relevance of whether a charge is dismissed with or without prejudice. *E.g.*, Oral Argument at 11:18, Soto v. Siefker, 2023 WL 5346470 (No. 21-4229), https://www.opn.ca6.uscourts.gov/internet/court_audio/audio/06-15-2023%20-%20Thursday/21-4229%20Travis%20Soto%20v%20Brian%20Siekfer.mp3. In *Soto*, it was unclear how the charge was dismissed. While Griffin's survey of Ohio law indicates that a charge is presumed to be dismissed without prejudice, he suggested that if the charge were dismissed with prejudice, he may have ruled for Soto. *Siefker*, 79 F.4th at 720 (Griffin, J., concurring).