INHERENT SOVEREIGN POWERS: THE INFLUENTIAL YET CURIOUSLY UNCONTROVERSIAL FLIP SIDE OF NATURAL RIGHTS

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The legitimacy of judicial reliance on natural rights reasoning has long been a controversial topic in constitutional law. While judges only can employ natural rights reasoning in the context of specific legal disputes, the legitimacy of natural law arguments has been framed as an overarching debate that transcends any particular doctrinal area. Natural law arguments about the scope of governmental powers also figure importantly in the Supreme Court's constitutional jurisprudence in the form of appeals to the powers inherent in sovereignty. Yet, curiously, the legitimacy of these "natural powers arguments" has not emerged as an overarching subject of controversy among the justices. This Article demonstrates the significant role that natural law arguments about governmental powers have played across a range of issue areas, including the Contract Clause, the Double Jeopardy Clause, and state sovereignty in lands under navigable waters. The examination points to a puzzling dichotomy: natural law reasoning about rights is controversial while natural law reasoning about powers is not. This puzzle presents a challenge for the way that we think about what count as legitimate bases of constitutional argument, calling out for an explanation of why natural law reasoning might be legitimate in one context but not the other. In the absence of such an account, we either must accept the legitimacy of natural rights arguments or condemn long-established constitutional doctrines relying on the concept of inherent sovereign powers.

I. INTRODUCTION

The appropriateness of judicial reliance on natural rights reasoning long has been a controversial topic among court observers and constitutional

theorists. The Supreme Court justices have relied on universal reasoning about rights from the Supreme Court's earliest period[1] to the present day.[2] As used here, the terms "universal" or "natural law" refer to interpretive arguments that reach beyond the context of any specific political community, as in, for example, references to rights "implicit in the concept of ordered liberty",[3] "principles which are the basis of all free government",[4] or the requirements of "human dignity"[5] (as opposed to arguments rooted in standards that are unique to the United States, such as the will of the American people). While universal arguments have played distinctive roles within a wide range of constitutional subjects, including, for example, due process,[6] the Constitution's applicability in U.S. territories,[7] and the Cruel and Unusual Punishments Clause,[8] there is a common essential character to these arguments that cuts across time periods and issue areas. Regardless of the particular doctrinal area, universal arguments appeal to principles that are treated as having an intrinsic validity that does not depend on uniquely American choices or circumstances.

"Natural rights" arguments have met with opposition from the earliest instances of their use[9] to the present day.[10] Like reliance on natural rights

1. In Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), for example, Justice John Jay reasoned from the rights "which every free Government makes to every free citizen, of equal justice and protection," *id*. at 479 (Jay, J.), and Justice James Wilson relied on basic principles of right, justice, and equality. *Id*. at 456 (Wilson, J.). In another late nineteenth century decision, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), Justice Samuel Chase appealed to the "general principles of law and reason," and "vital principles in our free Republican governments." *Id*. at 388 (Chase, J.).

2. In its Eighth Amendment jurisprudence, for example, the Court has asserted its prerogative to conduct an "independent evaluation" of whether a challenged practice comports with the requirements of "the dignity of man." Atkins v. Virginia, 536 U.S. 304, 311, 321 (2002). The Court's substantive due process jurisprudence has reasoned from the implications of liberty. *E.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) (writing for the majority, Justice Kennedy argued from the premise that liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct").

3. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

4. Downes v. Bidwell, 182 U.S. 244, 291 (1901) (White, J., concurring).

5. Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

6. *E.g.*, Twining v. New Jersey, 211 U.S. 78, 113 (1908) (framing Fourteenth Amendment procedural due process inquiry around whether the right in question was "an immutable principle of justice which is the inalienable possession of every citizen of a free government").

7. *E.g.*, Hawaii v. Mankichi, 190 U.S. 197, 218 (1903) (determining that the only rights which applied in U.S. territories regardless of congressional legislation were those which were "fundamental in their nature").

8. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (stating that the Eighth Amendment requires that punishments accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment") (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

9. In *Chisolm*, Justices Wilson, Jay, and William Cushing rested their arguments on the general principles of right, justice, reason, and equality. Justices John Blair (concurring) and Iredell (dissenting) looked only to text, while Justice Blair said the Constitution was "the only fountain from which I shall draw; the only authority to which I shall appeal." 2 U.S. at 450 (Blair, J., concurring). In *Calder*, in response to Justice Chase's contention that government was restrained by "general principles of law and reason," and "vital principles in our free Republican governments," 3 U.S. at 388 (Chase, J.), Justice Iredell objected to judicial reliance on vague and contested principles of natural justice, which were too indefinite to provide meaningful guidance and, thus would place excessive discretion in judges' hands. *See id*. at 398 (Iredell, J.). He asserted that courts were subordinate to legislative will and only could enforce restraints imposed by the Constitution. *Id*. at 398.

10. Justice Antonin Scalia, for example, has opposed the use of universal arguments, arguing that

reasoning, the opposition to such reasoning also shares a common character that cuts across time periods and issue areas. Justices—from James Iredell in the late nineteenth century,[11] to Hugo Black in the mid-twentieth century,[12] to Antonin Scalia on the contemporary Court—[13] have argued that judges lack the authority to ground decisions in natural law, which is too vague and speculative to guide interpretation and which, consequently, opens the door to the illegitimate imposition of the justices' own subjective will on the nation. Constitutional scholars also continue to debate the propriety of judicial reliance on natural law arguments.[14] Thus, quite apart from the implications for particular doctrinal questions, whether judges legitimately may rely on natural rights arguments has long been recognized as a question with overarching significance for constitutional law and theory.

As discussed below, natural law arguments about the scope of governmental powers also have figured in constitutional jurisprudence from the Court's earliest period to the present day across a wide range of issue areas.[15] With respect to governmental powers, universal or natural law arguments typically have taken the form of appeals to the powers inherently

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rights interpretations should be "deeply rooted in this Nation's history and tradition[s]." *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting). Thus, in his partial dissent in Planned Parenthood v. Casey, 505 U.S. 833 (1996), Justice Scalia (joined by Chief Justice William Rehnquist and Justices Byron White and Clarence Thomas) denied that substantive due process encompassed abortion rights "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed." *Id*. at 980 (Scalia, J., dissenting). Justice Scalia criticized the joint opinion for the Court written by Justices Sandra Day O'Connor, Anthony M. Kennedy and David H. Souter, stating that his approach, unlike the joint opinion, was not based on anything "so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.'" *Id*. (quoting *id.* at 851 (majority opinion)). Similarly, in Eighth Amendment cases, Justice Scalia has argued against independent judicial assessment of a punishment's appropriateness, arguing that only original understanding of the Constitution and evolving American standards of decency properly can support a finding of unconstitutionality. When judges speculate about the requirements of dignity, Justice Scalia has argued, it opens the door to subjective judging. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting).

11. *See Calder*, 3 U.S. at 389 (Iredell, J.).

12. *See*, *e.g.*, Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting) (opposing judicial reliance on natural law, because "it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power").

13. *See, e.g.*, *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

14. Some prominent scholars, such as Michael S. Moore, for example, have developed elaborate defenses of natural law reasoning in constitutional law, see generally Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087 (2001), while opposition to the use of universal arguments is so widespread that the practice is widely viewed as illegitimate. *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, UCLA L. REV. 639, 703; STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 93 (1998).

15. Indeed, reliance on universal arguments to ground specific governmental powers traces to the period before Chief Justice John Marshall's ascension to the Court. In *Calder*, for example, best known for Justice Chase's extraconstitutional reasoning to ground rights, Justice Iredell suggested that eminent domain was an inherent power without which "the operations of Government would often be obstructed, and society itself would be endangered." 3 U.S. at 400 (Iredell, J.). Two years later, joining in a decision upholding the State of Georgia's refusal to honor the debt of an individual who had sided with the British during the Revolutionary War, Justice William Paterson described the power of confiscation and banishment as one that "grows out of the very nature of the social compact." Cooper v. Telfair*,* 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.). In the same case, Justice William Cushing wrote that the power of confiscation and banishment "must belong to every government." *Id*. at 20 (Cushing, J.)

necessary for effective government[16] or the essential attributes of sovereignty.[17] As with natural law arguments about rights, these natural law arguments about powers have shared essential characteristics that cut across doctrinal lines. Regardless of the issue area, these arguments appeal to principles with a foundation that is independent of any specific political community; their validity is not yoked to contingent circumstances or the particular choices of the American people. Yet, remarkably, the legitimacy of these arguments has not emerged as a subject of controversy among jurists or scholars.[18] Thus, American constitutional law is characterized by a puzzling dichotomy: natural law reasoning about rights is controversial while natural law reasoning about powers is not.

This Article examines the significant role that universal arguments about governmental powers have played across a range of issues in constitutional jurisprudence, including the Contract Clause, the Double Jeopardy Clause, and state sovereignty of the lands under navigable waters. In doing so, it brings to light the dichotomy noted. Like natural rights arguments, appeals to inherent powers have figured importantly in constitutional jurisprudence. Furthermore, like appealing to natural rights, appealing to powers inherent in sovereignty represents a distinctive approach to constitutional interpretation, which, in principle, can be examined apart from the particular doctrinal implications it is used to support. However, unlike natural rights jurisprudence, inherent powers jurisprudence has not generated controversy and has not emerged as a subject with an overarching importance that transcends doctrinal boundaries. As the concluding section argues, this dichotomy calls out for an explanation of why appeals to universal principles might be appropriate in one context and not the other. In the absence of such an explanation, we either must accept the legitimacy of judicial reliance on natural rights principles or condemn judicial reliance on principles based in reasoning about the indispensable elements of sovereign authority.

16. *E.g.*, United States v. Wheeler, 435 U.S. 313, 320 (1978) (rooting the doctrine that the federal government and a state government may both constitutionally prosecute a defendant for the same crime in the determination that the power to enforce criminal laws is "inherent in any sovereign").

17. *E.g.*, U.S. Trust Co. of N.Y., v. New Jersey, 431 U.S. 1, 23 (1977) (stating that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty").

18. Scholarship touching on the role of inherent powers reasoning typically focuses on its relation to doctrine within a particular issue area. *See, e.g.*, Abigail D. Blodgett, *Lessons From Oregon's Battle Over Measure 37 And Measure 49: Applying The Reserved Powers Doctrine To Defend State Land Use Regulations*, 26 J. ENVTL. L. & LITIG. 259 (2011); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 181-82 (2002); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881-82 (2011).

II. THE WIDE REACH OF "INHERENT SOVEREIGN POWERS"

A. The Contract Clause

Universal reasoning about the scope of governmental powers has played a central role from an early point in the Supreme Court's development of jurisprudence on the application of the Contract Clause. The Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[19] Universal reasoning has been especially influential with respect to contracts in which a state is one of the parties. The Court opened the door to this line of jurisprudence in its first case interpreting the Contract Clause[20] by holding that the Clause applied to agreements entered into by states.[21] *Fletcher* unanimously struck down Georgia's repeal of a land sale[22] because it interfered with the property rights of innocent buyers. The Court soon after held that the Clause also applied to state-granted charters.[23] Applying the Contract Clause to agreements between private parties and states was part of a broader effort by the Marshall Court to transform the Clause into a critical judicial tool for the protection of property rights.[24] Indeed, during Chief Justice John Marshall's tenure (1801–1835), the Court made the Clause the most significant limitation on state regulations, a position it held for most of the century.[25]

However, the application of the Clause to state agreements also raised difficulties because it potentially placed substantial limitations on state governments in the exercise of their legislative authority.[26] By the 1830s, the Court developed an approach that was favorable to state governments in allowing them to reserve powers and in strictly construing charter provisions that potentially limited regulation.[27] The question arose, though, whether the Clause prevented states from exercising the powers in ways that interfered with activities authorized by charters. Shortly after the Marshall Court's decisions began applying the Contract Clause to governmental contracts, states and localities began advancing the argument that the Clause's applicability had to be limited in order to protect their ability to carry out crucial governmental functions.[28] While these arguments did not bear fruit

19. U.S. CONST. art. I, § 10, cl. 1.

20. DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 128 (1985).

21. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

22. The state rescinded acts affecting the sale because they had been enacted corruptly by an earlier legislature.

23. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 642-44 (1819).

24. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 64, 68 (2008).

25. *See id*. at 67.

26. *See* United States v. Winstar Corp., 518 U.S. 839, 874 (1996).

27. *See, e.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); *see also* Samuel R. Olken, *Charles Evans Hughes and the* Blaisdell *Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 536-38 (1993).

28. Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary*

during Chief Justice Marshall's stewardship,[29] the Court began developing doctrines drawing on them as early as the mid-nineteenth century.

West River Bridge Co. v. Dix[30] concerned the Vermont legislature's exclusive grant to a company to build and operate a toll bridge for one hundred years. Forty-four years after the initial grant, the state legislature, preferring the bridge to operate without tolls, exercised its power of eminent domain over the bridge, turning it into public property. Under well-established precedents dating back to *Fletcher*, there was no question that the Contract Clause applied in the context of privileges granted to an incorporated company through an agreement with the state. The question, though, was whether the Clause had the effect of blocking the state's exercise of the power of eminent domain. A strict application of the Clause would seem to have required a finding against the State of Vermont since the legislation affecting the seizure of the company's property in the bridge clearly interfered with the company's rights under its contract with the state.

The Court, however, upheld the state's action on the grounds that the power of eminent domain could not be bargained away because it was inherent to sovereignty.[31] The Court's reasoning did not depend on the language of the Constitution or any other enactment. It did not depend on particular choices of the people of the United States or Vermont or on the contingent circumstances in the nation or the state. Rather, the reasoning was based in principles that were deemed to be true with respect to all governments, principles which followed from the very concept of sovereign authority. In his opinion for a unanimous Court, Justice John McLean wrote,"[I]n every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large."[32] This "power and this duty" were not limited to the "highest acts of sovereignty, and in the external relations of governments," but also reached to "the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society."[33] Thus, the power of eminent domain was "paramount to all private rights vested under the government."[34]

It is worth stressing that the charter that the state had granted to the bridge company had been effected through acts of the state legislature, and, regulated the rights and responsibilities of the parties involved. The Court was not holding that the original charter in all respects was invalid and without any legal effect. Rather, Justice McLean was arguing from principles with a basis independent of the particular laws enacted in Vermont. As

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Maze, 75 IOWA L. REV. 277, 289 (1990).

29. *Id*.
30. 47 U.S. (6 How.) 507 (1848).
31. *Id*. at 532.
32. *Id.* at 531.
33. *Id.* at 531-32.
34. *Id.* at 532.

a result of these principles, all contracts, regardless of their specific terms or circumstances, were subject to the unwritten condition that they were subordinate to the state's power of eminent domain. Justice McLean wrote that, in all contracts:

> [T]here enter conditions which arise not out of the literal terms of the contract itself, they are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong, they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.[35]

The power of eminent domain was among the powers to which all contracts were subordinate because it was one which "inheres in every sovereign government," one which springs "from the very foundation of civil government."[36]

As discussed below, the basic principle laid down in *West River Bridge Co.* that certain governmental powers could not be bargained away because they were inherent to sovereignty became a pillar of the Court's jurisprudence. The aftermath of the Court's early reliance on natural law reasoning about powers is striking when seen in contrast to the aftermath of the Court's early reliance on natural rights reasoning. Natural rights reasoning drew criticism from the earliest instances of its use by the justices.[37] Indeed, by the middle of Marshall's tenure as Chief Justice, a shift was underway towards an approach that ensured a link between reasoning about rights and constitutional text.[38] Especially striking are the instances in which justices condemned the use of natural rights reasoning while in the same opinions described natural law foundations for governmental powers. In *Calder v. Bull*, for example, while Justice Iredell sharply criticized the reliance by "speculative jurists" on principles of "natural justice,"[39] he suggested at the

35. *Id*.

36. *Id.* at 533. While questions remain regarding the exact definition of those powers which states cannot bargain away, the Court never has wavered from the conclusion that eminent domain ranks among those powers. Griffith, *supra* note 28, at 291.

37. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176 (1987).

38. *Id*.; Alford, *supra* note 14, at 662-63. While Chief Justice Marshall in *Fletcher* had appealed in part to "great principles of justice, whose authority is universally acknowledged," *Fletcher*, 10 U.S. at 133, limitations on legislatures flowing from the "nature of society and of government," *id*. at 135, and "general principles which are common to our free institutions," *id*. at 139, in later cases, like *Trustees of Dartmouth College*, 17 U.S. at 518 and Sturges v. Crowninshield, 17 U.S. 122 (1819), for example, the Court protected vested property rights clearly via the text of the Contract Clause. CURRIE, *supra* note 20, at 128.

39. *Calder*, 3 U.S. at 398 (Iredell, J., dissenting).

same time that eminent domain was an inherent power without which "the operations of Government would often be obstructed, and society itself would be endangered."[40] Similarly, in *Ogden v. Saunders*,[41] Justice Robert Trimble criticized Chief Justice Marshall's dissenting opinion for appealing to individual rights with a natural law grounding while in the same opinion writing that governmental authority to regulate contracts "seems to be almost indispensable to the very existence of the States, and is necessary to the safety and welfare of the people."[42]

In a series of cases in the late 1870s, the Court further developed the approach adopted in *West River Bridge Co.* and held that the police powers were among the powers inherent to sovereignty which could not be bargained away.[43] The term "police powers" referred to the general powers of the states to regulate in the interest of the public health, safety, morality, and general welfare.[44] Early on, the Court had articulated a universal basis for the police powers, describing them in the *License Cases* as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[45] This conception of the police powers on the part of the justices was consistent and uncontroversial, as was evident in the *Slaughter-House Cases*,[46] the first significant decision interpreting the Fourteenth Amendment. In upholding a legislative act granting exclusive privileges to operate commercial slaughterhouses, a five-member majority adopted a restrictive view of the limitations that the Amendment imposed on states.[47] The four dissenters would have invalidated the act under a much broader interpretation of the Amendment's reach in constraining the states.[48] Notwithstanding the sharp division between the justices over the Amendment's impact, however, they agreed on the fundamental basis of the police powers. Justice Samuel Miller's opinion for the majority referred to the police powers as those which were necessary for "the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."[49] This understanding did not stress the needs of a particular community but the requirements of pub-

40. *Id*. at 400. Two years later, Justice Paterson described the power of confiscation and banishment as one that "grows out of the very nature of the social compact." Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

41. 25 U.S. 213 (1827).

42. *Id*. at 322 (Trimble, J., concurring).

43. *W. River Bridge Co.*, 47 U.S. at 532.

44. *See* New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837) ("[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends.").

45. Thurlow v. Massachusetts (*The License Cases*), 46 U.S. (5 How.) 504, 583 (1847).

46. 83 U.S. 36 (1872), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

47. *See id.* at 73-74.

48. *See id.* at 97-98 (Field, J., dissenting).

49. *Id*. at 62 (majority opinion).

lic welfare. It did not reason from enacted texts but from the nature of society and government. The dissenters did not challenge these propositions.

Munn v. Illinois[50] likewise characterized the police powers as those "inherent in every sovereignty"[51] and further established their natural law foundations by linking them explicitly with a social contractarian rationale, stating:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This . . . authorize[s] the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government . . . From this source come the police powers[.][52]

In a similar vein, *Jacobson v. Massachusetts*,[53] which upheld a mandatory vaccination law, evoked the natural law views of John Locke's social contract theory in stressing that liberty was not unrestrained: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."[54] Without regulations "for the common good,"[55] the Court reasoned, "organized society could not exist with safety to its members."[56] The decision in the case followed from the requirements for a society's survival, since "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[57]

With the police powers understood as having a basis in the powers inherent to sovereignty, and the doctrine of *West River Bridge Co.* holding that the Contract Clause did not interfere with states in exercising the powers inherent to sovereignty,[58] it would seem to follow naturally that the Contract Clause did not interfere with the states' exercise of police powers.

50. 94 U.S. 113 (1876).
51. *Id.* at 125.
52. *Id*. at 124-25 (citation omitted); *see also* Holden v. Hardy, 169 U.S. 366, 391 (1898) ("This right of contract . . . is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers [and] this power is inherent in all governments.").
53. 197 U.S. 11 (1905).
54. *Id*. at 26.
55. *Id*.
56. *Id*.
57. *Id*. at 27.
58. *W. River Bridge Co.*, 47 U.S. at 532 (holding that the contract clause does not prevent a State's power of eminent domain).

Moreover, the social contract reasoning of cases like *Munn v. Illinois*[59] fit hand in glove with the *West River Bridge Co.* doctrine. After all, if the police powers were indispensable for the protection of life and property, and a basic purpose of social contract was to authorize them, then it would seem to follow that the powers could not be forfeited. This indeed is what the Court held in a series of cases beginning with *Beer Co. v. Massachusetts*.[60] The state of Massachusetts issued a charter authorizing the manufacture of liquor. The dispute arose when the state later enacted legislation that would have criminalized the company's continued production of liquor. The case posed a similar issue to the one the Court addressed in *West River Bridge Co.*, but here the state action involved was the enactment of regulations pursuant to the police powers, rather than a seizure of private property under the power of eminent domain. In upholding the challenged act, the Court stated that the company's charter provided no exemption from regulation in the public interest, and that "[a]ll rights are held subject to the police power of the State."[61] The charter could not grant immunity from regulation because "[t]he legislature cannot, by any contract, divest itself of the [police] power . . . [D]iscretion [regarding the exercise of the police powers] can no more be bargained away than the power itself."[62]

Other cases in this line of jurisprudence fell within the same basic fact pattern.[63] A state-granted charter would recognize a company's right to engage in a particular type of commercial activity. Subsequently, the legislature of the same state would enact regulations, which, if given full effect, would prevent the chartered company from continuing to engage in that commercial activity. In one of the best-known of these cases,[64] *Stone v. Mississippi*,[65] the commercial activity in question was the operation of lotteries. After granting a company the privilege of conducting lotteries, the state later banned their operation. The Court unanimously upheld the lottery ban, reaffirming the interconnection between the police powers' social contractarian roots and their inalienability, stating:

> No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is orga-

59. 94 U.S. at 113.
60. 97 U.S. 25 (1877).
61. *Id*. at 32.
62. *Id*. at 33.
63. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814 (1879).
64. *See Winstar Corp.*, 518 U.S. at 888 (characterizing *Stone* as the "classic example" of the cases holding that the states' inherent sovereign power limit the scope of the Contract Clause's applicability).
65. 101 U.S. 814.

> nized with a view to their preservation, and cannot divest itself of the power to provide for them.[66]

Since prohibiting lotteries fell within the purview of the police powers, a charter to conduct them was issued "with the implied understanding" that the state might regulate or even ban the practice.[67] In language reminiscent of *West River Bridge Co.*, Chief Justice Morrison Waite wrote in his opinion for the Court that each contract contained an implicit, unamendable provision indicating that it was subject to the police powers.[68] In another case in the same line of jurisprudence, Justice Miller wrote that the inalienability of the police powers followed from their being "indispensable to the public welfare" and "necessary to the best interests of social organization."[69] The consensus regarding the doctrine of inalienable powers was remarkable. As Chief Justice Waite wrote in *Stone*: "All agree that the legislature cannot bargain away the police power of a State."[70]

This line of cases in the late nineteenth century firmly established what has come to be known as the "reserved powers doctrine."[71] While the limitation of the Contract Clause with regards to state contracts is significant in itself, it is important to note that the Court has gone further in holding that the same fundamental principles underlying the reserved powers doctrine also operate to limit the Clause's applicability to contracts between private parties. The Court hinted at this in *West River Bridge Co.* As noted, that decision held that all contracts contained an unwritten provision to the effect that they were always subject to the exercise of state powers that were inherent in sovereignty. Although *West River Bridge Co.* concerned a state-granted charter, Justice Peter Daniel's opinion for the Court indicated in dicta that the unwritten provision regarding inalienable state powers was read "into all contracts, whether made between States and individuals or simply between individuals."[72]

The Court cited this language from *West River Bridge Co.* eighty-six years later in *Home Building and Loan Association v. Blaisdell*,[73] a prominent Contract Clause case involving an alleged impairment of the obligation of contracts between private parties. The challenged regulations, which were a response to a great number of foreclosures resulting from the Depression, enforced a moratorium on foreclosures, which had the effect of nullifying provisions in the contracts between private parties. The Court applied the basic principles of the reserved powers doctrine, notwithstand-

66. *Id*. at 819.
67. *Id*. at 821.
68. *Id*. at 817-18.
69. Butchers' Union Slaughter-House Co. v. Crescent Slaughter-House Co., 111 U.S. 746, 750-51 (1884).
70. 101 U.S. at 817.
71. *Winstar Corp.*, 518 U.S. at 888.
72. *W. River Bridge Co.*, 47 U.S. at 532.
73. 290 U.S. 398, 435 (1934).

ing the fact that the state was not a party to the contracts with which the challenged legislative acts interfered. Stressing that the police powers were rooted in the requirements of public order and the authority inherent to sovereignty, Chief Justice Evans Hughes wrote in his majority opinion: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."[74] Citing numerous examples[75] of cases where the Court had upheld state exercises of the police powers against Contract Clause challenges,[76] Chief Justices Hughes also wrote that the state retained authority to regulate for the common good even if it "has the result of modifying or abrogating contracts already in effect."[77] While *Blaisdell* and several decisions rendered shortly thereafter stressed the exigent circumstances involved,[78] the Court made clear within a few years that emergency situations and the limited duration of measures were not prerequisites to governmental interference with contractual obligations through the exercise of the police powers.[79]

The doctrine that the state's inherent sovereign powers were inalienable played an important role in the relative decline of the Contract Clause after the late nineteenth century.[80] The Marshall Court had transformed the

74. *Id*.

75. *Id*. at 436-37.

76. *E.g.*, Sproles v. Binford, 286 U.S. 374, 390 (1932) (regarding states' authority to regulate the use of public highways by common carriers); Atl. Coast Line R.R. Co. v. Goldsboro, 232 U.S. 548, 558 (1914) (regarding states' authority to regulate to protect the public safety); Manigault v. Springs, 199 U.S. 473 (1905) (regarding states' authority to regulate to protect economic interests, as in authorizing the construction of a dam across the creek where the state previously had contracted to clear a passage through the creek); Douglas v. Kentucky, 168 U.S. 488, 497 (1897) (regarding states' authority to regulate lotteries); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878) (regarding states' authority to regulate to protect the public health against nuisances).

77. *Blaisdell*, 290 U.S. at 435 (quoting Stephenson v. Binford, 287 U.S. 251, 276 (1932)) (internal quotation marks omitted).

78. *See, e.g.*, Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); *see also* Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 192-93 (1985).

79. *E.g.* Gelfert v. Nat'l City Bank of N.Y., 313 U.S. 221, 235 (1941). *See* ELY, *supra* note 24, at 121; *see also U.S. Trust Co. of N.Y.*, 431 U.S. at 23 n.19. Roughly twenty years after *Blaisdell*, the Court reaffirmed that the inherent powers doctrine included regulations aimed at protecting the state's economic interests. City of El Paso v. Simmons, 379 U.S. 497 (1965).

80. The Clause's relative importance also was diminished by the rise of the Fourteenth Amendment's Due Process Clause, which eventually eclipsed the Clause as the Court's principal vehicle for protecting property rights. *See* Edward Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME LAW. 258, 273-74 (1949–1950). That said, the recognition of the inalienability of the police powers also figured in the development of the Court's approach to economic due process. Indeed, the Court's jurisprudence under the Due Process and Contract Clauses converged, see, e.g., Robert L. Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 890 (1944), which was not surprising since contractual obligations readily could be recognized as a form of property. The Court recognized this convergence as early as a decision in 1914, stating: "[I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise." *Atl. Coast Line R.R.,* 232 U.S. at 558 (upholding regulations of the speed, shifting, and other aspects of the railroads' operations); *see also* Chi. & Alton R.R. Co. v. Tranbarger. 238 U.S.

Clause into the most significant constitutional check on state legislatures.[81] Although Chief Justice Roger Taney is viewed as having been "more accommodating of state power than was Marshall," the Court continued to develop and apply the Clause as a significant check on state action under his leadership.[82] Indeed, the Taney Court wielded the Clause more than any other provision to invalidate state legislation,[83] and it remained the most important limitation on state legislation following the Civil War.[84] The Clause's significance, however, began to diminish in the late nineteenth century.[85]

In the early nineteenth century, the Contract Clause was "regarded as an absolute bar to any impairment";[86] parties contested whether an act impaired obligations, but it was understood that an impairment violated the Constitution. Under the reserved powers doctrine, the Contract Clause was not categorical in this way. Acts impairing or even nullifying obligations could be upheld, with analysis focused on whether an act was a valid exercise of the police powers. The Clause entered a steep decline in the decades following the recognition of inalienable governmental powers,[87] with the Court upholding acts as valid exercises of the powers even though they clearly infringed on the state's contractual obligations.[88] As long as all contracts were subject to the police powers, judicial review under the Contract Clause amounted simply to inquiring whether the challenged act was a reasonable exercise of the powers.[89]

Cases like *Blaisdell* [90] and *City of El Paso v. Simmons*[91] captured the extent of the Clause's decline,[92] because they applied the inalienability doctrine to block Contract Clause challenges, even where the regulations at issue were aimed at elements of the public welfare that could be described

67, 76 (1915) ("But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property."). In the long run, of course, the relative demotion of property in the hierarchy of rights was a common factor in the decline both of the Contract Clause and economic due process.

81. ELY, *supra* note 24, at 64, 69.

82. JAMES W. ELY, ed., *VOLUME INTRODUCTION TO PROPERTY RIGHTS IN AMERICAN HISTORY: THE CONTRACT CLAUSE IN AMERICAN HISTORY*, at xii (1997).

83. CURRIE, *supra* note 20, at 210-11.

84. Bernard Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, *in* ELY, *supra* note 83, at 300.

85. *Id.*

86. *U.S. Trust Co. of N.Y.*, 431 U.S. at 19-20 n.17.

87. Clarke, *supra* note 78, at 191-92.

88. Examples included regulations regarding railroad safety, see *Atl. Coast Line R.R.,* 232 U.S. at 558; *Chicago & Alton R.R.*, 238 U.S. at 77, and the placement of billboards. St. Louis Poster Adver. Co. v. St. Louis, 249 U.S. 269 (1919). *See also* Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349 (1908) (transportation of water across state lines); *Manigault*, 199 U.S. at 473 (state legislation allowing a party to maintain a dam after it had privately contracted not to do so).

89. *E.g.*, *Manigault*, 199 U.S. at 480-81; *see also* ELY, *supra* note 82, at xii; Schwartz, *supra* note 84, at 99.

90. 290 U.S. 398 (1934).

91. 379 U.S. 497 (1965).

92. Clarke, *supra* note 78, at 192.

as economic in character, rather than protecting public health or safety.[93] Some considered the Clause to have been rendered irrelevant, as the Court's approach amounted to a highly deferential consideration of whether regulations were reasonably related to a legitimate governmental purpose.[94] Indeed, the Court did not invalidate a state law under the Clause from the late 1930s through the late 1970s.[95]

In the late 1970s, however, two cases using the Clause to invalidate state acts suggested a potential revival of the Clause, or at least the adoption of an approach calling for greater scrutiny of certain state laws interfering with contractual obligations.[96] Like *Blaisdell* and *Simmons*, *U.S. Trust Co. of New York v. New Jersey*[97] concerned legislation that was primarily concerned with public interests that were economic in character. In 1962, the state of New Jersey, along with the state of New York, imposed by statute certain limitations on the ability of The Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves, which secured bonds.[98] The states, however, later repealed these limitations as part of an effort to expand the Port Authority's rail operations.[99] The Court, in a 4-3 decision, upheld the challenge to the repeal brought by bondholders.[100] Justice Harry Blackmun's plurality opinion cited the long-established principle that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."[101] The opinion also sought to distinguish legislative acts that did not fall within the reserved powers doctrine, focusing particularly on acts establishing financial obligations.[102] Justice Blackmun observed in this regard that "the Court has regularly held that the States are bound by their debt contracts."[103] In support of this proposition, Justice Blackmun cited language from a decision issued one hundred years earlier:

> The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a

93. *See id.*
94. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 n.12 (1978).
95. *U.S. Trust Co. of N.Y.*, 431 U.S. at 60 (Brennan, J., dissenting).
96. *See generally Allied Structural Steel Co.*, 438 U.S. 234; *U.S. Trust Co. of N.Y.*, 431 U.S. 1.
97. 431 U.S. 1.
98. *Id*.
99. *Id*. at 13-14.
100. *Id*. at 32.
101. *Id*. at 23.
102. *Id*. at 24-25.
103. 431 U.S. at 24.

> right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.[104]

Since the legislation challenged in *U.S. Trust Co.* concerned a "financial obligation," it did not "automatically . . . fall within the reserved powers that cannot be contracted away."[105] Justice Blackmun was careful to note, though, that "[n]ot every security provision . . . is necessarily financial," pointing out as an example that a revenue bond "secured by the State's promise to continue operating the facility in question . . . could not validly be construed to bind the State never to close the facility for health or safety reasons."[106] Applying the distinction to the security provision at hand, the plurality concluded that it was "purely financial and thus not necessarily a compromise of the State's reserved powers."[107]

Having explained why the legislation at issue was not necessarily free from the constraints of the Contract Clause, Justice Blackmun went on to clarify that the Clause "is not an absolute bar to subsequent modification of a State's own financial obligations."[108] Even an act impairing the obligation of contracts with the state could be constitutional if they were "reasonable and necessary to serve an important public purpose."[109] This standard was not entirely deferential to the legislature, however, since "complete deference to a legislative assessment of reasonableness and necessity [was] not appropriate" where "the State's self-interest is at stake."[110] It was important to take into account the state's self interest, since:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[111]

Applying the standards it had articulated to the case at hand, the plurality concluded that the state's repeal of the 1962 legislation violated the Contract Clause, because it was neither reasonable nor necessary under the circumstances.[112]

In dissent, Justice William Brennan, joined by Justices Byron White and Thurgood Marshall, did not challenge the pillars of the reserved powers doctrine. To the contrary, he reaffirmed them and argued that the Contract

104. *Id*. at 25 n.23 (quoting Murray v. City of Charleston, 96 U.S. 432, 445 (1877)).
105. *Id*. at 24-25.
106. *Id*. at 25.
107. *Id*.
108. *Id.*
109. 431 U.S. at 25.
110. *Id*. at 26.
111. *Id*.
112. *Id*. at 29.

Clause was no bar to valid exercises of the police powers.[113] He observed that the Court's decisions "for at least a century have construed the Contract Clause largely to be powerless in binding a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity."[114] The Court's longstanding doctrines made clear, Justice Brennan wrote, that "lawful exercises of a State's police powers stand paramount to private rights held under contract."[115] For the dissenters, then, the case was an easy one, since the challenged state actions fell comfortably within the legitimate exercise of the police powers.

Allied Structural Steel Co. v. Spannaus[116] was the second instance since the 1930s in which the Court struck down a law on Contract Clause grounds, thus further suggesting the possibility of the Clause's revival. Unlike *U.S. Trust Co*., the challenged legislation did not concern agreements to which the state was a party. At issue was an act of the Minnesota legislature which charged a fee to private employers that terminated employee pension plans or moved out of the state, even where existing agreements with the employees would not have required the payment of a pension. The Court held, 5-3,[117] that the legislation violated the Contract Clause by altering the employers' contractual relationship with their employees.[118] Building on the approach adopted by the plurality in *U.S. Trust Co.*, Justice Potter Stewart, writing for a five-member majority, described a two-stage approach, with the first stage inquiring into the "severity of the impairment," which "measures the height of the hurdle the state legislation must clear."[119] "Minimal alteration of contractual obligations," Justice Stewart wrote, "may end the inquiry at its first stage."[120] Where the impairment is substantial, however, the Court would have to conduct a "careful examination of the nature and purpose of the state legislation."[121] Scrutinizing the particular facts of the case, the majority concluded that the impairment was severe.[122] In contrast to the legislation at issue in *Blaisdell*, Justice Stewart wrote, the Minnesota legislation was aimed at a "narrow class"[123] and did not even purport "to deal with a broad, generalized economic or social problem."[124] The majority also stressed that the legislation "invaded an area never before subject to regulation by the State," and that it "worked a severe, permanent, and

113. *Id*. at 33 (Brennan, J., dissenting).
114. *Id*.
115. 431 U.S. at 33.
116. 438 U.S. 234 (1978).
117. Justice Blackmun did not participate.
118. *Allied Structural Steel Co.*, 438 U.S. at 249-51.
119. *Id.* at 244-45.
120. *Id.*
121. *Id.*
122. *Id.* at 246.
123. *Allied Structural Steel Co.*, 438 U.S at 249.
124. *Id.* at 250.

immediate change in those relationships—irrevocably and retroactively."[125] As in *U.S. Trust Co.*, Justice William Brennan (joined again by Justices Byron White and Thurgood Marshall) dissented, reiterating his objection to what he viewed as an attempt to expand significantly the reach of the Contract Clause beyond what longstanding precedent had determined.[126]

Following *U.S. Trust Co.* and *Allied Structural Steel Co.*, however, the Court did not continue to expand the reach of the Contract Clause. Indeed, the few Court decisions in this area since those cases have called into question the lasting impact of the decisions, suggesting that their principal significance might be to recognize the Clause as a check on legislation that was the result of improper motives or procedures. In *Exxon Corp. v. Eagerton*,[127] for example, the Court unanimously held that there was no Contract Clause violation occasioned by Alabama legislation that increased the severance tax on oil and gas extracted in the state, noting that the Clause's "'prohibition must be accommodated to the inherent police power of the State.'"[128] Although the Court noted in a footnote that the "statutes under review in *United States Trust Co.* also implicated the special concerns associated with a State's impairment of its own contractual obligations,"[129] the chief basis on which the Court distinguished that case and *Allied Structural Steel* was that the state acts at issue in the earlier cases were specifically aimed at altering the rights and obligations of contracting parties.[130] By contrast, the legislation at issue in the instant case "imposed a generally applicable rule of conduct."[131] Similarly, when the Court in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*[132] unanimously upheld the Kansas Natural Gas Price Protection Act under the standards of review set forth in *United States Trust Co.*, it stressed that the "requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[133]

We have seen, then, that the Court's jurisprudence interpreting the Contract Clause from early on has incorporated a conception of certain powers as inherent to sovereignty. This universal conception of governmental powers has played a pivotal role, sharply limiting the Clause's reach by recognizing that contracts are subject to the exercise of governmental powers that cannot be bargained away. The consensus on the basic pillars of the reserved powers doctrine has been striking. While the Justices, to be sure, have disagreed at times over the extent to which the Clause might in certain

125. *Id*.
126. *Id*. at 251 (Brennan, J., dissenting).
127. 462 U.S. 176 (1983).
128. *Id.* at 190 (quoting Energy Reserves Grp. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983)).
129. *Id*. at 192 n.13.
130. *Id*. at 192.
131. *Id*. at 191.
132. 459 U.S. 400 (1983).
133. *Id*. at 412.

circumstances act as a constraint on state legislatures,[134] not even in these cases has the central role of the recognition of inherent sovereign powers been questioned. Natural law reasoning regarding the basis of governmental powers throughout the Court's development of Contract Clause doctrine has been influential and uncontroversial.

II. THE DOUBLE JEOPARDY CLAUSE

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[135] Rooted in "principles of fairness and finality,"[136] the Double Jeopardy Clause protects against multiple prosecutions or punishments for the same offense.[137] "The underlying idea" behind the Clause's protections

> [I]s that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[138]

The principles behind the Clause's protections have "been regarded as so important that exceptions to the principle have been only grudgingly allowed," and the prosecution may not appeal from an acquittal even where it appears that the initial judgment was wrong.[139]

Yet, despite the strong policy that the Clause expresses against the practice of multiple prosecutions or punishments for the same crime, the Court consistently has recognized a major exception. Known as the "dual sovereignty exception," the exception allows more than one prosecution for the same offense where the prosecutions are brought by independent sovereign powers.[140] While the Court earlier had recognized that the federal government and the states could have concurrent jurisdiction to prosecute the same offenses,[141] the Court first articulated what would become the dual sover-

134. *Compare Allied Structural Steel Co.*, 438 U.S. at 242 (acknowledging that the Contract Clause limits State's power to abridge existing contractual relationships "even in the exercise of its otherwise legitimate police power"), *and U.S. Trust Co. of N.Y.*, 431 U.S. at 21-22 (recognizing that the State's power to safeguard the welfare of its citizens has limitations when its exercise effects substantial modifications of private contracts), *with Blaisdell*, 290 U.S. at 434 (acknowledging that States retain authority to enact laws "to safeguard the vital interests of [their] people").

135. U.S. CONST. amend. V.

136. United States v. Wilson, 420 U.S. 332, 343 (1975).

137. *Id*.

138. Green v. United States, 355 U.S. 184, 187-88 (1957).

139. *Wilson*, 420 U.S. at 343.

140. United States v. Enas, 255 F.3d 662, 683 (9th Cir. 2001).

141. *See* Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 176 (2011).

eignty doctrine in *Moore v. Illinois*.[142] The defendant in *Moore* was prosecuted in Illinois for violating a state law that made it a crime to harbor a slave. One of the defendant's arguments on appeal was that the prosecution unconstitutionally opened the door to the possibility of his being subjected to double jeopardy in the form of a later prosecution for the same offense by the federal government. The Court rejected the argument, holding that the Constitution did not prevent the federal government and a state government from prosecuting an individual for the same conduct.[143] The key to the Court's reasoning was the view that a crime was defined in part by the sovereign against whom it was committed. Since American citizens were citizens of both the nation and a state, they could "be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both."[144] To commit an offense meant to commit an offense against a particular sovereign. Thus, when two distinct sovereigns punished an individual for the same acts, it could not "be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."[145] In dissent, Justice McLean did not question the majority's crucial premise, conceding that "the criminal laws of the Federal and State Governments emanate from different sovereignties," but he argued that allowing the state prosecution in the case would infringe the federal government's ability to prosecute and the prohibition against double jeopardy, which was rooted in "humanity and justice."[146]

While *Moore* had articulated the Dual Sovereignty Doctrine, the Court had not needed to employ it, since in that case only the State of Illinois actually had initiated a prosecution against the defendant. In *U.S. v. Lanza*,[147] however, the Court for the first time applied the doctrine.[148] Having already been convicted of crimes relating to the production and possession of alcohol by the State of Washington, the defendants in *Lanza* challenged the federal government's subsequent prosecution under the National Prohibition Act for the same acts. The Court adopted the pivotal move made in *Moore* of viewing illegal actions committed against distinct sovereigns as distinct offenses.[149] The defendants, as Chief Justice William Howard Taft explained in his opinion for a unanimous Court, had "committed two different offenses by the same act."[150] It followed that the state and federal prosecu-

142. 55 U.S. (14 How.) 13, 19-20 (1852).
143. *Id*. at 20.
144. *Id*.
145. *Id*.
146. *Id*. at 22 (McLean, J., dissenting).
147. 260 U.S. 377 (1922).
148. *See* Bartkus v. Illinois, 359 U.S. 121, 129 (1959) (recognizing that *Lanza* was the first case in which the Court squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction).
149. *Lanza*, 260 U.S. at 382-83.
150. *Id.* at 382.

tions could not be considered to place the defendants in jeopardy twice for the same offense.

For present purposes, the most interesting aspect of Chief Justice Taft's opinion concerns his justification for the claim that not only the federal government but also the states had the authority to prosecute the defendants for crimes relating to the manufacture and possession of alcohol.[151] Chief Justice Taft emphasized that the states' power to enforce prohibition laws neither derived from the Eighteenth Amendment nor from any other constitutional provisions or specific enactments.[152] Rather, the states' authority to enforce criminal laws existed "in full measure prior to the [Eighteenth] Amendment,"[153] and was derived "from power originally belonging to the States, preserved to them by the Tenth Amendment."[154] The states had separate authority to prosecute, and federal and state prosecutions were necessarily for distinct offenses, because the states had the inherent sovereignty to enforce criminal laws like those at issue in *Lanza*.[155] Thus, Chief Justice Taft wrote: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[156] Tracing the states' prosecutorial authority to their inherent sovereignty rather than to any specific enactment was critical in its practical implications because it meant that the opinion's reasoning would apply not only to cases involving the Eighteenth Amendment, but to all kinds of criminal actions.[157]

Rooting the Dual Sovereignty Doctrine in the concept of inherent sovereign powers had significant doctrinal implications, as was made evident by cases involving territorial prosecutions. In *Grafton v. United States*,[158] for instance, the defendant, having been acquitted on charges of homicide by a court-martial, later was convicted on similar charges by a court in the Philippines, then a U.S. territory. The prosecuting authorities, not surprisingly, cited *Moore v. Illinois*[159] to support their argument that the second

151. *Id*.
152. *Id.* at 381-82. Referring to Section 1's prohibition on "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes," Section 2 of the Eighteenth Amendment provided: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII §§ 1, 2, *repealed by* U.S. CONST. amend. XXI.
153. *Lanza*, 260 U.S. at 381.
154. *Id*. at 382.
155. *See Wheeler*, 435 U.S. at 320 n.14 (characterizing *Lanza* as "holding that a State's power to enact prohibition laws did not derive from the Eighteenth Amendment's provision that Congress and the States should have concurrent jurisdiction in that area, but rather from the State's inherent sovereignty").
156. *Lanza*, 260 U.S. at 382.
157. *See* Michael Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 292-93 (1992).
158. 206 U.S. 333 (1907).
159. 55 U.S. 513 (1852).

prosecution did not violate the prohibition against double jeopardy.[160] The Court, however, unanimously overturned the conviction.[161] In his opinion for the Court, the first Justice John Marshall Harlan[162] distinguished *Moore* based on fundamental differences between the states and U.S. territories with respect to the source of their authority.[163] The basis of *Moore* had been that the federal government and the "governments of the several States in the exercise of their respective powers move on different lines"; while the federal government's authority derived from the U.S. Constitution, the states enjoyed inherent sovereign authority with a basis that was independent of the Constitution.[164] The difference in the outcomes of *Moore* and *Grafton* hinged on the distinction between the basis of authority of the states and U.S. territories: "The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States."[165] The reasoning of *Moore*, that is, the Dual Sovereignty Doctrine, did not apply "where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States."[166] Similarly, the Court in *Puerto Rico v. Shell Co.*[167] held that prosecution of the defendants under local Puerto Rican anti-trust law would bar subsequent prosecution under the federal Sherman Anti-Trust Act.[168] Citing *Grafton*, the Court stressed that "[b]oth the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty."[169]

Whereas *Lanza* held that the federal government could initiate a prosecution against individuals who already had been convicted for the same conduct by a state,[170] *Bartkus v. Illinois*[171] was the first case to hold that a state could prosecute an individual who previously had been acquitted on federal charges for the same acts.[172] Having been acquitted on federal bank robbery charges, the defendant subsequently was subjected to prosecution for the same events by the State of Illinois. In his opinion for a five-member

160. *Grafton*, 206 U.S. at 353.
161. *Id.* at 355.
162. The first Justice John Marshall Harlan served on the Court from 1877–1911. His grandson, the second Justice John Marshall Harlan, served on the Court from 1955-1971.
163. *Grafton*, 206 U.S. at 354-55.
164. *Id*. at 354.
165. *Id*.
166. *Id*. at 355.
167. 302 U.S. 253 (1937), *superseded by statute*, Puerto Rican Federal Relations Act, Ch. 145, 39 Stat. 951, *as recognized in* Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, 649 F.2d 36 (1st Cir. 1981).
168. *Id.* at 264.
169. *Id.*
170. *Lanza*, 260 U.S. at 385.
171. 359 U.S. 121 (1959).
172. Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 364 (1997).

majority, Justice Felix Frankfurter offered two lines of justification for rejecting the defendant's double jeopardy challenge to the state charges. First, the Court had held in *Palko v. Connecticut*[173] that the Fifth Amendment's double jeopardy protection did not apply against state governments via the Fourteenth Amendment's Due Process Clause.[174] If the state governments were not bound by the double jeopardy prohibition in general, then it followed that the defendant's double jeopardy challenge to the state of Illinois' prosecution on double jeopardy grounds had no merit. Justice Frankfurter, however, also rested the decision on the Dual Sovereignty Doctrine, citing *Lanza* and other precedents for the proposition that the double jeopardy prohibition in any event did not block federal and state prosecutions for the same acts.[175] In the companion case, *Abbate v. United States*,[176] the Court applied the *Lanza* precedent to a situation similar to that in *Lanza* itself, reaffirming that the Double Jeopardy Clause did not block the federal government from prosecuting individuals already convicted by a state for the same conduct.[177]

Justice Black, joined by Chief Justice Earl Warren and Justice William Douglas, dissented in both *Bartkus* and *Abbate*. In *Bartkus*, Justice Black argued that allowing prosecutions by federal and state governments for the same acts violated basic principles of fairness, noting that being subjected to multiple prosecutions was no less burdensome to the defendant just because the prosecutions were brought by distinct sovereigns.[178] In *Abbate*, Justice Black raised a different question in stating: "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."[179] Noting that "most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction," Justice Black added that he could not "conceive that our States are more distinct from the Federal Government than are foreign nations from each other."[180] In neither case, however, did Justice Black advance a general argument that it was inappropriate for the Court to base its reasoning on the powers inherent to sovereignty. Rather, in both cases, Justice Black indicated that he did not agree with the Court regarding the implications of prosecutions being brought by separate sovereigns,[181] and in *Abbate*, he also questioned whether the state and federal governments really should be considered separate sovereigns in the sense in which the majority deemed them as such.[182]

173. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).
174. *Bartkus*, 359 U.S. at 124.
175. *Id.* at 129.
176. 359 U.S. 187 (1959).
177. *Id.* at 195-96.
178. *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).
179. *Abbate*, 359 U.S. at 203 (Black, J., dissenting).
180. *Id*.
181. *Id.* at 196-97; *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).
182. *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

United States v. Wheeler,[183] required the Court to apply the Dual Sovereignty Doctrine in a distinctive context. By the time of *Wheeler*, the pillars of the Dual Sovereignty Doctrine had long been in place. The Court also had made clear that the states and the federal government were separate sovereigns for purposes of the doctrine,[184] while U.S. territories and the federal government,[185] and state governments and municipal governments within the same state,[186] were not.[187] *Wheeler* concerned a member of the Navajo Tribe who had been convicted under the Navajo Nation Code of disorderly conduct, contributing to the delinquency of a minor, and subsequently was faced with a federal charge arising out of the same events. The Court's justification for finding that the federal prosecution would not violate the Double Jeopardy Clause is especially illuminating with respect to the reasoning behind the Dual Sovereignty Doctrine.

As cases like *Waller*[188] and *Puerto Rico v. Shell Co.*[189] have made clear, the Court noted that the Dual Sovereignty Doctrine did not apply "in every instance where successive cases are brought by nominally different prosecuting entities."[190] The defendant's argument, which had been adopted by the Court of Appeals, was that the Indian tribes were not sovereigns, since they were subject to Congress' plenary authority over them.[191] The Court clarified, however, that the pivotal question in determining the applicability of the Dual Sovereignty Doctrine was "not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken."[192] The reason that the doctrine applied to cases involving prosecutions both by the federal government and a state government was that "States and the National Government are separate political communities," deriving their "'power from different sources.'"[193] The conclusion that the federal government and a state government have different sources of power was linked crucially

183. 435 U.S. 313 (1978).

184. Although the Court overruled *Palko* in *Benton*, 395 U.S. at 784, holding that the Fifth Amendment's Double Jeopardy Clause applied against the states via the Fourteenth Amendment's Due Process Clause, the Court has not repudiated its longstanding doctrine that a state may prosecute even if the defendant already was charged for the same acts by the federal government. *See* Matz, *supra* note 172, at 366.

185. *Shell Co.*, 302 U.S. at 253. Based on similar reasoning, the Circuit Court of Appeals for the District of Columbia has held that the Dual Sovereignty Doctrine does not apply to prosecutions by the District of Columbia subsequent to a federal prosecution for the same acts. United States v. Alston, 609 F.2d 531, 537 n.31 (D.C. Cir. 1979).

186. Waller v. Florida, 397 U.S. 387, 393 (1970) (reasoning that the relationship between the government of Florida and a Florida municipality was analogous to the relationship between the U.S. government and a U.S. territory, since in each instance, the two authorities "are arms of the same sovereign").

187. *Wheeler*, 435 U.S. at 318-19.

188. 397 U.S. 387 (1970).

189. 302 U.S. 253 (1937).

190. *Wheeler*, 435 U.S. at 318.

191. *Id*. at 319.

192. *Id*. at 320.

193. *Id*. (quoting *Lanza*, 260 U.S. at 382).

with the concept of inherent sovereign powers, as Justice Stewart wrote in his opinion for a unanimous Court:

> Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each "is exercising its own sovereignty, not that of the other." And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power.[194]

Cities were crucially distinct from states in that they did not enjoy the inherent sovereign power to prosecute crime.[195] Any authority they had in this regard was entirely dependent on a grant of such authority from the state in which they were located.[196] Similarly, territories depended for their prosecutorial authority on a grant of such authority from the United States.[197]

Regarding the Indian tribes, there was no question that they had authority to prosecute crime.[198] However, in determining whether the Dual Sovereignty Doctrine applied to a federal prosecution subsequent to a prosecution by tribal authorities, the "controlling question" was the source of this power: "[was] it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?"[199] The key to the Court's holding in the case was the observation that:

> The powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished*. Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.[200]

The fact that the governance of the tribes was subject to the exercise of congressional authority and that Congress had enacted legislation recognizing tribal authority to prosecute crimes was not decisive; the crucial fact

194. *Id*. (internal citations omitted).
195. *Id.* at 320-21.
196. *Wheeler*, 43 U.S. at 320-21.
197. *Id*.
198. *Id*. at 322.
199. *Id*.
200. *Id*. at 322-23 (citations omitted).

was that "none of these laws *created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders."[201] The power to prosecute crimes committed by Tribe members against tribal law, Justice Stewart wrote:

> [W]as part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.[202]

In *Heath v. Alabama*,[203] a seven-member majority applied the principles established by *Wheeler*, *Bartkus*, and other precedents to find that the Dual Sovereignty Doctrine applied to prosecutions initiated by two different states.[204] In her opinion for the majority, Justice Sandra Day O'Connor reaffirmed that the reason that the Dual Sovereignty Doctrine applied to prosecutions for the same acts by the federal government and a state government was that:

"[E]ach State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government."[205] The same line of reasoning necessitated the outcome in *Heath*:

> The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.[206]

In dissent, Justice Marshall, joined by Justice Brennan, approvingly cited Justice Black's dissent in *Bartkus* while also elaborating policy considerations that he believed distinguished successive state prosecutions from prosecutions by both the federal government and a state government.[207] As with Justice Black's dissents in *Bartkus* and *Abbate*, however, Justice Marshall did not advance a general objection to the Court's reliance on the concept of inherent sovereign powers in deciding *Heath* or previous cases applying the Dual Sovereignty Doctrine.[208]

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201. *Id*. at 328.
202. *Wheeler*, 435 U.S. at 328 (footnote omitted).
203. 474 U.S. 82 (1985).
204. *Id*. at 88.
205. *Id*. at 89 (quoting *Wheeler*, 435 U.S. at 320 n.14).
206. *Id*.
207. *Id.* at 98-101 (Marshall, J., dissenting).
208. Motivated by interests of fairness, the federal government and some state governments have

III. STATE SOVEREIGNTY IN LANDS UNDER NAVIGABLE WATERS

The Court early on drew an essential connection between the sovereign powers of the states and control of the lands under navigable waters. *Martin v. Waddell's Lessee*[209] concerned a dispute over the ownership of lands under navigable waters in the State of New Jersey. The plaintiff brought his claim to the lands under charters that had been granted by English authorities during the second half of the seventeenth century. In rejecting the claim, the Court declined to get caught up in questions regarding the precise terms of the charters, stressing that:

> [W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.[210]

In *Pollard v. Hagan*,[211] the Court held that the same principles applied to states admitted to the Union after the enactment of the Constitution.[212] The case involved a claim to submerged lands under navigable waters in Alabama with the claim based in a federal patent issued by the United States after the state's admission. The Court indicated that states admitted to the Union were admitted "on an equal footing with the original states."[213] Consequently, "[T]o Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."[214] Citing *Martin v. Waddell's Lessee*, the Court held that the state's control of the lands under navigable waters was linked so intimately with sovereignty that it could not be divested by the transfer from the United States on which the plaintiff relied.[215] The decision established that upon admission each state obtains an absolute and indefeasible title to the beds of navigable waterways within its boundaries; this title could not even be defeated by the language of the legislation effecting the admission of the state or a grant by the federal government to a third party.[216]

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adopted policies limiting the practice of multiple prosecutions even in circumstances where the prosecutions would not amount to violations of the double jeopardy prohibition. However, these limitations go beyond what the Court has held the Constitution requires, and do not alter the above analysis of the Court's constitutional jurisprudence on the Dual Sovereignty Doctrine. White, *supra* note 141, at 174.

209. 41 U.S. (16 Pet.) 367 (1842).

210. *Id. at* 410.

211. 44 U.S. (3 How.) 212 (1845).

212. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283 (1997).

213. *Pollard*, 44 U.S. at 229.

214. *Id*.

215. *See id*.

216. Oregon *ex rel*. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

In *Illinois Central Railroad Co. v. Illinois*,[217] the Court held that a state's control of lands under navigable waters was part of their "inherent sovereignty,"[218] representing an element of the police powers and which consequently "cannot be alienated."[219] The line of reasoning was evocative of the fundamental precepts behind the reserved powers doctrine examined earlier.[220] In the mid-nineteenth century, the state of Illinois purported to transfer to Illinois Central Railroad Company the title to a portion of the navigable waters of Lake Michigan. The case presented the question of "whether the legislature was competent to . . . deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters."[221] Even though the statutory provisions in question specified that the company could not use the property in a way that produced obstructions to the harbor, the Court found that even clear legislation otherwise properly adopted could not effect such a transfer.[222] Citing *Pollard*,[223] the Court reaffirmed that "[i]t is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found."[224] The Court's reasoning drew on the notion that the government had certain responsibilities towards the governed that could not be contracted away. While States might be able to effect limited grants of parcels under navigable waters for specific purposes that would enhance the public use of the waters, they could not give up all control over such lands because "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."[225] The Court linked the inalienability doctrine in the context of submerged lands with the inalienability of the police powers, stating:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[226]

Because the lands under navigable waters and the public interest are so intertwined:

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217. 146 U.S. 387 (1892).
218. *Id*. at 459.
219. *Id*. at 455.
220. *See supra* Part II.A.
221. *Ill. Cent. R.R. Co.*, 146 U.S. at 452.
222. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 285.
223. 44 U.S. 212 (1845).
224. *Ill. Cent. R.R. Co.*, 146 U.S. at 435.
225. *Id*. at 453.
226. *Id*.

> The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.[227]

Subsequent cases have reaffirmed the principles established by the earlier cases.[228] *Idaho v. Coeur d'Alene Tribe of Idaho*,[229] for example, concerned a claim by an Indian tribe and tribal members against the state of Idaho and state officials to certain submerged lands. While the decision rejected the claim on Eleventh Amendment grounds,[230] the most interesting portions of the case for present purposes concerned the Court's emphasis on precedents establishing state ownership of submerged lands as "an essential attribute of sovereignty."[231] In his opinion announcing the judgment of the Court (joined in part by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas), Justice Kennedy stressed that state ownership of the lands under navigable waters "uniquely implicate[s] sovereign interests,"[232] and that, if successful, the claim against the state's property

> [n]ot only would . . . block all attempts by [state] officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect.[233]

In a concurring opinion (joined by Justices Scalia and Thomas), Justice O'Connor noted that the Court's decisions had "repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters."[234] While Justice O'Connor's concurring opinion and Justice Souter's dissenting opin-

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227. *Id*. at 456 (quoting Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821)) (internal quotation marks omitted).

228. *E.g.*, *Corvallis Sand & Gravel Co.*, 429 U.S. at 374 (noting that "[t]he rule laid down in *Pollard's Lessee* [44 U.S. 212] has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned"); United States v. Holt State Bank, 270 U.S. 49, 54 (1926) ("It is settled law in this country that lands underlying navigable waters within a State belong to the state in its sovereign capacity."); Idaho v. United States, 533 U.S. 262, 272 (2001) ("Due to the public importance of navigable waterways, ownership of the land underlying such waters is 'strongly identified with the sovereign power of government.'") (quoting Montana v. United States, 450 U.S. 544, 552 (1981)).

229. 521 U.S. 261 (1997).

230. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

231. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283 (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987)).

232. *Id*. at 284.

233. *Id*. at 283.

234. *Id*. at 289 (O'Connor, J., concurring).

ion (joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer) each took issue with Justice Kennedy's interpretation of the Eleventh Amendment, neither questioned the longstanding principles that Kennedy had reiterated regarding state control of submerged lands as an essential attribute of sovereignty. Thus, as in the Court's jurisprudence applying the Contract Clause[235] and the Double Jeopardy Clause,[236] the Court's jurisprudence regarding state control of the lands under navigable water has been influenced significantly by the justices' appeal to the concept of powers that are inherent to the exercise of sovereign authority.

IV. CONCLUSION

From the earliest instances in which Supreme Court justices have relied on natural rights reasoning in their opinions that reliance has met with opposition. When Justice Chase stated in *Calder v. Bull* that legislatures were limited by "general principles of law and reason" and "vital principles in our free Republican governments,"[237] Justice Iredell decried judicial reliance on "abstract principles of natural justice," which were "regulated by no fixed standard."[238] When the Court in *Loan Association v. Topeka*[239] based its ruling that governments could tax only for public purposes in the "essential nature of all free governments" and the social compact,[240] Justice Nathan Clifford objected in dissent that such reliance on "natural justice" would "convert the government into a judicial despotism."[241] Similarly, in the mid-twentieth century, Justice Black attacked the Court's natural law jurisprudence, which he equated with the judges' imposition of their own moral predilections.[242] Today, in response to the Court's appeals to principles following from the requirements of broad concepts, like liberty and human dignity, Justice Scalia advocates exclusive reliance "[on] this Nation's history and tradition[s]."[243]

Just as the Court only can employ natural rights arguments within the context of specific areas of jurisprudence, the justices objecting to such arguments also have done so, of course, in the context of specific doctrinal controversies. Nevertheless, the objections to natural law arguments have shared a common character across issue areas and time periods. These objections have expressed the view that judges have the authority only to enforce the particular laws adopted by the American people; appeals to the requirements of broad, abstract principles are seen as opening the door to

235. *See supra* Part II.A.
236. *See supra* Part II.B.
237. 3 U.S. (3 Dall.) at 388.
238. *Id*. at 399.
239. 87 U.S. 655 (1874).
240. *Id*. at 663.
241. *Id.* at 668-69 (Clifford, J., dissenting).
242. *Adamson*, 332 U.S. at 69, 70, 91 n.18 (Black, J., dissenting).
243. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

the subjective imposition of the judges' own will on the nation. When justices have reacted negatively to natural rights arguments, they have expressed dissatisfaction not just with the impact on the immediate doctrinal question at bar but more fundamentally with the quality of the Court's reasoning. These justices have not simply opposed the outcome of the particular case, but have cried foul with respect to the grounds of decision. Due to the persistence and common character of the objections to natural rights arguments, the legitimacy of such arguments long has been recognized as a general subject of controversy in constitutional law.[244]

As this Article has examined, the justices also have engaged in natural law arguments about the scope of governmental powers, from the Court's earliest period to the present day, across a wide range of subject areas. These natural law arguments about powers share crucial characteristics with the natural law arguments about rights that have generated so much controversy. Instead of appealing to provisions in specific enacted laws or the particular choices or customs of the American people, they have appealed to considerations that are universal in character. That is, they have appealed to inherent principles that follow necessarily from a proper understanding of certain broad concepts. We have seen that the Court has found the basis of the states' police powers in those powers that are "inherent in every sovereignty," and in the social compact by which "[w]hen one becomes a member of society, he necessarily parts with some rights or privileges" in order that "all shall be governed by certain laws for the common good."[245] These powers, then, did not result simply from the enactments of a specific state, but from principles that transcended any particular political community. The universal character of these powers had significant implications for constitutional jurisprudence. The powers were inherent and, therefore, inalienable: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants."[246] This reasoning was the foundation of the "reserved powers doctrine," a crucial element of the Court's jurisprudence interpreting and applying the Contract Clause.[247]

The Court also has relied on the concept of inherent sovereign powers in its jurisprudence applying the Double Jeopardy Clause. In justifying the rule allowing the federal government and a state government to prosecute an individual for the same acts, the Court has reasoned that "Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty."[248] The reference to inherent powers

244. *E.g.*, Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269 (2001); John E. Keeler, *Survival of the Theory of Natural Rights in Judicial Decisions*, 5 YALE L.J. 14 (1895); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 133 (1893).
245. *Munn*, 94 U.S. at 124.
246. *Stone*, 101 U.S. at 819.
247. *See supra* Part II.A.
248. *Wheeler*, 435 U.S. at 320.

has not been merely a rhetorical flourish but has had doctrinal bite, as the Court has concluded that the dual sovereignty doctrine applies to prosecutions by state or Indian tribal governments following a federal prosecution, because state and tribal governments enjoy the inherent sovereign power of prosecuting crimes.[249] By contrast, the federal government and a territorial government may not both prosecute an individual for the same act because territorial governments do not enjoy this inherent authority but instead only have authority that is dependent on, and derivative of, the federal government's power to enforce criminal laws.[250] The concept of inherent sovereign powers also has played an important role in a very different area of the law, concerning the states' governance of lands under navigable waters. Because the states enjoy inherent sovereign powers, and these powers include the regulation of lands underlying navigable waters as an "essential attribute of sovereignty,"[251] the states' regulatory authority over these lands cannot be bargained away, regardless of the preferences or circumstances that might prevail at any particular time.[252]

While the cases examined span a wide range of issue areas, they share crucial features regarding the nature of their reasoning. As noted, the reasoning in these cases may be characterized as universal or natural law reasoning for the same reasons that other judicial opinions have been viewed as having relied on natural law reasoning regarding the basis of certain rights. Just as Justice Chase, Chief Justice Marshall, and other justices have treated certain rights as being inherent and inalienable, these "natural powers" cases have treated certain governmental roles as being inherent and inalienable. Just as other cases had drawn broadly on the concept of a social contract in recognizing that all individuals had rights independently of any particular enactment of law, the natural powers cases have drawn broadly on social contract in recognizing that all sovereign governments share certain fundamental purposes and powers independently of any particular enactment of law. Indeed, natural law reasoning about powers and about rights represent different sides of the same coin.

Consequently, in principle, they raise the same concerns. Yet, despite the congruity in principle, there is an incongruity in practice. In comparison with natural rights reasoning, judicial reliance on natural law reasoning about powers has flown under the radar, not generating anything like the attention that long has been generated by natural rights reasoning. Even when justices have dissented from opinions employing universal reasoning about governmental powers, they have focused on the immediate doctrinal questions at hand, rather than launching a broad attack on the concept of

249. *See supra* Part II.B.
250. *See supra* Part II.B.
251. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283 (quoting *Utah Div. of State Lands, 482 U.S. at 195*).
252. *See supra* Part II.C.

inherent sovereign powers as an illegitimate mode of judicial decision-making. Unlike universal rights, universal powers simply have not emerged as a general subject of controversy in constitutional law, transcending doctrinal boundaries.

My aim is neither to criticize nor to defend judicial reliance on natural law reasoning either with respect to rights or powers; rather, the point is that the case against natural rights reasoning appears to apply equally well against natural powers reasoning. Consider the familiar charge that natural law reasoning is vague and speculative. In contrast to interpretive arguments appealing to sources reflecting the will of the American people, such as the text of positive enactments, arguments appealing to natural law have been criticized as unmoored to anything with discernible content, and, therefore, indeterminate and unacceptably malleable. It is not clear, however, why this line of attack would not apply to natural law reasoning about powers. If we are at sea once we depart from the strictures of positive law in interpreting rights, then it would seem that we are equally at sea when speculating about powers. It is not obvious why the notion of inherent powers should be any less vulnerable than the notion of inherent rights to the ridiculing indictment that natural law claims are comparable to astrology or alchemy.

If natural powers reasoning is vague, speculative, and indeterminate, then the rest of the wholesale case against natural law reasoning logically seems to follow. After all, once judges are purporting to base opinions on a style of reasoning that is too indeterminate to provide guidance, then it follows that their opinions actually are based on something other than what they have presented publicly as the reasons underlying their decisions. Appealing to purported constraints that do not really constrain, then, would leave judges with excessive discretion. If this line of attack against natural law generally has validity, then it exposes natural powers reasoning as a fraud. It seems to follow further that when judges purport to base their opinions in natural powers reasoning, they really are basing their opinions in nothing more than their own personal predilections, which has been seen as an illegitimate basis for judicial decision-making.

The coup de grâce of the case commonly made against natural law reasoning is the charge that it is anti-democratic. If judges base their decisions in their own personal preferences, the argument goes, then they substitute their own will for that of the people. Perhaps the reason that the controversy provoked by natural rights reasoning has not materialized with respect to natural powers reasoning is that the latter is not perceived as anti-democratic in the same way. Perhaps the concept of inherent governmental powers is viewed as providing the underpinning for an expanded exercise of legislative powers, which, in turn, is assumed to advance the popular will, instead of frustrating it. If it is this perception that explains the incongruity in the reaction to natural rights and natural powers reasoning, it does not justify it. First, it is a defining element of the power of judicial review, widely accepted today as an element of American constitutionalism, that judges may impose limitations on popular will as expressed through legisla-

tive enactments. The case against natural rights reasoning cannot merely be that it is anti-democratic because it leads to an interference with a current legislative majority, since this generally is the case when courts exercise the power of judicial review to invalidate legislation. The target of the case against natural rights reasoning must concern the sources relied upon to interpret constitutional limitations. But this case appears to apply with equal strength as against natural powers reasoning. Moreover, natural powers reasoning, like natural rights reasoning, has been used to frustrate the preferences of current legislative majorities. As we have seen, the concept of inherent sovereign powers operates in some instances—as in the doctrine of reserved powers—to prevent legislatures from binding themselves to certain kinds of contractual commitments.

It may be that there is a valid basis on which to distinguish natural powers and natural rights reasoning such that one might be held up as legitimate while the other is not. But this case needs to be made. As it stands, the reaction to natural powers and natural rights reasoning points to a puzzling dichotomy in American constitutional law: natural law reasoning about rights is controversial while natural law reasoning about powers is not. This incongruity, which has been neglected in the literature, calls out for an account to justify it. The matter has significant implications for debates over constitutional interpretation. In the absence of an account to justify this disparate treatment, we either must accept the legitimacy of judicial reliance on natural rights principles (which has been viewed as discredited) or condemn judicial reliance on principles based in inherent sovereign powers.