JUDICIAL TAKINGS: *ROBINSON V. ARIYOSHI* REVISITED

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I. INTRODUCTION

The Hawai'i experience in terms of judicial takings is of national significance. The concept of a judicial taking—namely, where a state supreme court by retroactively overruling prior precedent allegedly "takes" vested rights in violation of the United States Constitution—was first held to be a valid claim by a federal district court in Hawai'i.[1]

Throughout the United States, there are only three federal decisions affirming the concept of a judicial taking.[2] All three arise

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[1] Robinson v. Ariyoshi, 441 F. Supp. 559, 585-86 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

[2] *See* Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); Sotomura v. County of Hawaii, 460 F. Supp. 473, 481-82 (D. Haw. 1978); *Robinson*, 441 F. Supp. at 585-86. These are the only lower federal court opinions that have found a judicial taking to exist. The decisions in *Robinson v. Ariyoshi* were vacated and remanded by the Supreme Court of the United States in *Ariyoshi v. Robinson*, 477 U.S. 902, 902 (1986). The decision in *Sotomura* was appealed to the Ninth Circuit. *See* Sotomura v. County of Hawaii, 679 F.2d 152, 152 (9th Cir. 1982). The Ninth Circuit affirmed the decision, but not on the merits, ruling that the late filing of the State's brief undermined the State's position on appeal. *Id.*

from disputes originating in Hawai'i.[3] The most important of these disputes was the water rights dispute in *McBryde Sugar Co. v. Robinson*,[4] later to be known as *Robinson v. Ariyoshi*.[5]

Today, in light of the ruling by four justices in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[6] that such a claim as a judicial taking does exist,[7] judicial takings have become a hot topic.[8] There are more than 100 law review articles addressing some aspect of judicial takings.[9]

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[3] *See Robinson*, 753 F.2d at 1469; *Sotomura*, 460 F. Supp. at 474; *Robinson*, 441 F. Supp. at 561.

[4] *See generally* McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw. 1973) (deciding water rights dispute between parties who owned land in Hawai'i), *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973) (per curium).

[5] *See generally Robinson*, 441 F. Supp. at 561-65 (showing the development of the underlying dispute that involved the *McBryde* decision).

[6] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).

[7] *Id.* at 2601-02 (plurality opinion).

[8] This author has written several articles that deal with the issue of judicial takings, at least in part, and related matters. *See generally* Williamson B.C. Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE U. L. REV. 123 (1986) [hereinafter Chang, *Missing the Boat*]; Williamson B.C. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1980) [hereinafter Chang, *Rediscovering* Rooker]; Williamson B.C. Chang, *Unraveling* Robinson v. Ariyoshi: *Can Courts "Take Property?"*, 2 U. HAW. L. REV. 57 (1979) [hereinafter Chang, *Unraveling* Robinson]; Williamson B.C. Chang, *Zen, Law and Language: Of Power and Paradigms*, 16 N.M. L. REV. 543 (1986) [hereinafter Chang, *Zen*].

[9] *See, e.g.*, D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903 (2011) (making several arguments regarding judicial takings in light of the *Stop the Beach Renourishment* decision); Elizabeth B. Wydra, *Constitutional Problems with Judicial Takings Doctrine and the Supreme Court's Decision in* Stop the Beach Renourishment, 29 UCLA J. ENVTL. L. & POL'Y 109 (2011) (addressing constitutional issues implicated by the concept of judicial takings).

Still, the number of federal judicial opinions finding a judicial taking remains at three.[10] There are only those three opinions from Hawai'i. Thus, it is important to examine the most important of these cases in detail. What exactly happened in *Robinson v. Ariyoshi*?

The federal district court and the court of appeals held that the Supreme Court of Hawai'i decision in *McBryde Sugar Co. v. Robinson* was a taking.[11] The Supreme Court of the United States vacated those two federal opinions.[12] Many commentators view *Robinson v. Ariyoshi* as the prima facie case of a judicial taking.[13] Was *Robinson v. Ariyoshi* a judicial taking?

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[10] *See supra* note 2 and accompanying text.

[11] *See* Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); Robinson v. Ariyoshi, 441 F. Supp. 559, 585-86 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

[12] Ariyoshi v. Robinson, 477 U.S. 902, 902 (1986).

[13] The dispute has been cited, in its various forms, in over sixty cases and more than sixty law review articles, including a majority of judicial takings scholarship. *See, e.g.*, Barros, *supra* note 9, at 941 (calling the *Robinson* decision a good example of a "deprivation of a property interest without procedural due process"); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1438 (1996) (calling *Robinson* the "best known" decision where "federal courts have overturned state court judgments that, via a retroactive change in the state common law of property, resulted in property rights being transferred to the states"); J. Nicholas Bunch, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747, 1796 (2005) (reflecting *Robinson*-related scholarship arguing against a judicial takings doctrine as the "weight of the academic literature"); James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur?*, 9 U. DENV. WATER L. REV. 1, 25-26 (2005) (citing *Robinson* for the proposition that a "judiciary's action amending state property law pertaining to water rights may, however, have the effect of taking the property without compensation"); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 341 (1988) (using *Robinson* as a case study for a proposed approach to takings law);

This article seeks to determine whether, in light of the plurality's definition of a judicial taking in *Stop the Beach Renourishment*, *Robinson* would be a judicial taking.

Moreover, what can we learn today from the tumultuous litigation in *Robinson v. Ariyoshi*? For example, are judicial takings claims as disruptive of state-federal court relations as some commentators think? Should state supreme courts that allegedly take property be given a second chance to explain their actions? Should the Supreme Court of the United States always certify or remand to state supreme courts to garner those courts' views of the taking transgressions they have allegedly committed?

Thus, this article proceeds in three parts. First, it presents the history, the inside details, of *Robinson v. Ariyoshi*. Second, this article examines how *Robinson* would fare under the present plurality's test for a judicial taking. Finally, in the conclusion, this article presents what can be learned from the litigation in *Robinson v. Ariyoshi*.

The history of *Robinson v. Ariyoshi* cannot be told without reference to former chief justice of the Supreme Court of Hawai'i,

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Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471 (1990) (citing *Robinson* as one of two federal court decisions holding state supreme court decisions to be unconstitutional takings and stating that "[the court] radically chang[ed] the face of Hawaiian water law"); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 424 (2001) (using *Robinson* as an example of a case that "directly raised" the takings question and was presented to the Supreme Court); Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 ECOLOGY L.Q. 749, 770 (2011) (citing *Robinson* as "the only federal appellate court opinion that ever recognized a judicial taking"); Mitch L. Walter, Comment, *From Background Principles to Bright Lines: Justice Scalia and the Conservative Bloc of the U.S. Supreme Court Attempt to Change the Law of Property As We Know It [*Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, *130 S. Ct. 2592 (2010)]*, 50 WASHBURN L.J. 799, 810 (2011) (noting that *Robinson* is one of two examples of when a federal court ruled a state supreme court decision "took" property).

William S. Richardson.[14] It was the across-the-board efforts of Chief Justice Richardson to correct Hawai'i's property law[15] that led to the slew of takings claims that were filed in Hawai'i.[16] *Robinson v. Ariyoshi* was the most important of these attacks on his jurisprudence.

The Chief Justice was not only the author for the court in those decisions of the Supreme Court of Hawai'i that allegedly took property.[17] He also appeared, through counsel, in the takings litigation as amicus curiae.[18]

Thus, the chief justice was not only the main protagonist in the takings claim—he was, in a formal judicial sense, an advocate against the application of the judicial takings concept in the very litigation brought against his own court. An understanding of

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[14] For a complete account of Chief Justice Richardson's impact on the *Robinson* case and his influence on Hawaiian property law, see generally Williamson B.C. Chang, *The Life of the Law Is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99 (2010) [hereinafter Chang, *Perpetuated in Righteousness*].

[15] *See generally* Hawaii v. Zimring, 566 P.2d 725, 739 (Haw. 1977) (holding that new land created by lava extension belonged to the state); *In re* Sanborn, 562 P.2d 771, 774-75 (Haw. 1977) (determining that landowner's "beachfront title boundary is the upper reaches of the wash of waves" as represented by the "vegetation and debris line"); *In re* Ashford, 440 P.2d 76, 77 (Haw. 1968) (holding "that 'ma ke kai' is along the upper reaches of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves").

[16] *See* Chang, *Perpetuated in Righteouness*, *supra* note 14, at 124.

[17] *Compare* Robinson v. Ariyoshi, 658 P.2d 287, 292 (Haw. 1982) (showing that Chief Justice Richardson was the authoring justice of the majority opinion in this decision that allegedly took property), *with* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128-29, 132 n.141 (explaining that "the Honorable William S. Richardson appeared as amicus curiae in the Ninth Circuit proceedings" regarding the *Robinson* case).

[18] The author of this article was counsel for Chief Justice Richardson, who appeared as amicus curiae in the *Robinson* litigation on behalf of the Hawai'i judiciary. *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128-29, 132 n.141.

Robinson v. Ariyoshi thus depends on an examination of the chief justice's views as expressed in his opinions and in the briefs filed before the United States Court of Appeals for the Ninth Circuit.[19]

Chief Justice Richardson was a humble man from humble beginnings.[20] He grew up in Honolulu.[21] He was of Chinese, Caucasian, and Native Hawaiian ancestry.[22] He served in the United States Army in World War II.[23] He was a graduate of the University of Cincinnati School of Law.[24] He was active in politics and was elected lieutenant governor of the State of Hawai'i in 1962.[25] He was appointed as the second chief justice of the State of Hawai'i in 1966 and served in that capacity for sixteen years.[26] Thereafter, he became a trustee of the Bishop Estate.[27] He is best known, perhaps, as the founding father of the law school at the

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[19] The Chief Justice strenuously argued that judicial takings violated the division between federal and state courts and enabled federal district courts to become, in effect, the ultimate appellate courts of the state system. *See infra* notes 105, 129-36 and accompanying text.

[20] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 107-14; *see also* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 1-19 (1985).

[21] Kahikino Noa Dettweiler, Note, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174, 190 (2005) (citing LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 317 (1961)).

[22] *See* Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 4 (2010); James S. Burns, *William S. Richardson: A Leader in Hawai'i's Successful Post-WWII Political and Judicial Revolution*, 33 U. HAW. L. REV. 25, 25 (2010).

[23] *See* DODD, *supra* note 20, at 12; Chang, *Perpetuated in Righteousness*, *supra* note 14, at 104; MacKenzie, *supra* note 22, at 3.

[24] *See* DODD, *supra* note 20, at 12.

[25] *Id.* at 5-8; Chang, *Perpetuated in Righteousness*, *supra* note 14, at 108-09 n.41; *see also William S. Richardson Dies at 90*, IMI PONO (June 27, 2010), http://statehoodhawaii.org/2010/06/27/william-s-richardson-dies-at-90/.

[26] MacKenzie, *supra* note 22, at 4.

[27] DODD, *supra* note 20, at 134-35.

University of Hawai'i.[28] Yet today, some thirty years after he finished his term as chief justice, his property rights decisions[29] stand as his most important contribution to the State of Hawai'i.[30]

Today, his decision in *Robinson v. Ariyoshi* is the basis for the regulation of water rights in Hawai'i.[31] His opinions in the beach cases, *In re Ashford*,[32] *In re Sanborn*,[33] and *County of Hawaii v.*

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[28] *See id.* at 83, 91-102. The law school is named after him. *See* Robert G. Klein, *William S. Richardson: Developing Hawai'i's Lawyers and Shaping the Modern Hawai'i Court System*, 33 U. HAW. L. REV. 33, 33 (2010). For this act he was acclaimed and beloved. *See generally* DODD, *supra* note 20, at 83, 91-102.

[29] See Chang, *Perpetuated in Righteousness*, supra note 14, at 99 n.2.

[30] *See id.* at 99-100 & n.3. This footnote states:

> See DAN BOYLAN & T. MICHAEL HOLMES, JOHN A. BURNS: THE MAN AND HIS TIMES 304 (2000) (quoting Bambi Weil, a reporter who eventually became a state judge, as saying that the Hawai'i Supreme Court under Richardson "was an activist court in the best tradition of the United States Supreme Court under Chief Justice Earl Warren"); Michael Tsai, *Former Chief Justice William S. Richardson Dies*, HONOLULU STAR-ADVERTISER, June 21, 2010, *available at* http://www.staradvertiser.com/news/Former_Chief_Justice_William_S_Richardson_ dies.html ("But it was as head of the state's highest court that Richardson's impact was greatest. With Richardson at the helm from 1966 to 1982, the Richardson court handed down a series of judgments that assured public access to beaches, upheld traditional Hawaiian laws on access to kuleana lands, and affirmed public ownership of water and other natural resources. The decisions were consistent with Richardson's controversial stand that western exclusivity concepts were not always consistent or applicable in Hawaii."); *see also* A. A. Smyser, *Richardson Court Bent Rules in Public's Favor*, HONOLULU STAR-BULLETIN, Oct. 17, 1989, at A14 (comparing favorably the jurisprudence of Chief Justice Richardson with that of Chief Justice Warren).

Id. at n.3.

[31] *See In re* Water Use Permit Applications, 9 P.3d 409, 425 (Haw. 2000) (citing Robinson v. Ariyoshi, 658 P.2d 287, 310 (Haw. 1982)).

[32] *In re* Ashford, 440 P.2d 76 (Haw. 1968).

[33] *In re* Sanborn, 562 P.2d 771 (Haw. 1977).

Sotomura,[34] are accepted as the law dividing public and private property on beaches.[35] His opinion in *State v. Zimring*[36] held that volcanic activity that added new lands to the state were lands that belonged to the State of Hawai'i and not the abutting landowner.[37]

However, when first rendered, these decisions—such as *McBryde Sugar Co. v. Robinson*—were the center of a storm of controversy.[38] Critics, including the federal judges who ruled on the takings claims, condemned these decisions as confiscatory public policy decisions.[39]

Moreover, "[t]he losing parties in . . . *McBryde* [*Sugar Co.*] *v. Robinson*, *County of Hawaii v. Sotomura*, and *State . . . v. Zimring*[] would all sue . . . seeking [the] enforcement of [claimed]

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[34] County of Hawaii v. Sotomura, 517 P.2d 57 (Haw. 1973).

[35] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 100-02. These cases moved the public/private demarcation from the lower seaweed line to the higher vegetation line. *See In re Sanborn*, 562 P.2d at 777; *County of Hawaii*, 517 P.2d at 63; *In re Ashford*, 440 P.2d at 76; *see also* DODD, *supra* note 20, at 62-68.

[36] Hawaii v. Zimring, 566 P.2d 725, 727 (Haw. 1977).

[37] *Id.* at 739.

[38] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 101-02, 122 n.99 (quoting DODD, *supra* note 20, at 72) ("As the controversy continued, especially after the land and water decisions, Bill Richardson would say, with a smile, in private conversations: "If I had my way, the public would have even greater access to water and shoreline property. Hawaiian kings, I'm sure, intended to give their subjects more public seashore lands than we now allot. No one but a fool would leave his canoe at the vegetation line and let the waves wash it out to sea! The kings *really* must have intended to extend public property to that area on the beach where canoes could be left without danger of being washed away.").

[39] *See, e.g.*, Robinson v. Ariyoshi, 441 F. Supp. 559, 585-86 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986) (stating that the majority of the Supreme Court of Hawai'i in *McBryde* was "too concerned with the public policy aspects of [its] opinion" and that "such confiscation" of property effected by the decision was inappropriate).

vested rights."[40] Forty years ago, the property legacy of Chief Justice Richardson was neither celebrated nor acclaimed.[41] So long as the judicial takings claim in *Robinson v. Ariyoshi* persisted, there was no legacy, no acclamation.[42] Instead, the reputation of the court was the very opposite of judicial propriety.[43] The Supreme Court of Hawai'i was viewed as a branch of state government bent on confiscating vested rights without paying just compensation.[44] In the minds of its critics, the court was doing what courts should never do—subverting the stability of the legal system.[45]

II. *MCBRYDE SUGAR CO. V. ROBINSON*

McBryde Sugar Co. v. Robinson started as an action in a state trial court "by which two sugar companies sought to settle [competing claims to] ownership of . . . the surface water[s] of the Hanapēpē River" in Hawai'i.[46] Select territorial precedents rendered in the early 1900s held that the "surplus waters" of Hawai'i's streams and rivers—that is, the bulk of the surface

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[40] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 124 (footnotes omitted).

[41] *See id.* at 101, 124.

[42] *See id.* at 124 & n.105 ("Typical of such opinion was the opinion of A.A. Smyser, long the editor of the *Honolulu Star Bulletin*. Smyser objected to the jurisprudence of Chief Justice Richardson. To him, it was destabilizing. Only when the constitutional controversy was over did Smyser grudgingly accept the decision in *Robinson v. Ariyoshi*.").

[43] *See id.* at 101.

[44] *See id.* at 124.

[45] *See supra* note 42; *see also infra* notes 99-101.

[46] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125; *see* Chang, *Unraveling* Robinson, *supra* note 8, at 61 ("*McBryde* is the [Supreme Court of Hawai'i] decision culminating some twenty years of litigation regarding the extent to which various parties have rights to the water in the Hanap[ē]p[ē] River. The parties involved were the State of Hawaii and the various landowners whose property adjoined the river and streams." (footnote omitted)).

waters—belonged to the owner of the lands on which such streams or rivers originated.[47]

In those few decisions, the Territorial Supreme Court of Hawai'i had ruled that the surplus waters were private property.[48] The owner of such waters could do with the waters as he or she pleased.[49] Surplus waters could be bought, sold, and transferred.[50] Under Hawai'i law, as understood at the time, the water was actually owned in a corporeal or *res publicae* sense.[51]

Both sugar companies diverted water from the same river.[52] In the 1940s, one sugar company had begun to divert more water than before.[53] The other sugar company sued, alleging that the diversion was unwarranted.[54] A trial was held.[55] The state trial court divided the waters based on existing territorial law, which accorded surplus rights based on lands owned.[56] The losing party appealed to the Supreme Court of Hawai'i in 1965.[57] In 1973, the Supreme Court of Hawai'i rendered its decision.[58] The decision, in no small way, stunned the parties.[59]

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[47] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125; *see also* Carter v. Territory, 24 Haw. 47, 70 (1917); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680, 682-83 (1904).

[48] *See* McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1336 (Haw. 1973), *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973) (per curium).

[49] *Hawaiian Commercial & Sugar Co.*, 15 Haw. at 680.

[50] *See* Robinson v. Ariyoshi, 441 F. Supp. 559, 570 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

[51] *See* Robinson v. Ariyoshi, 658 P.2d 287, 305-10 (Haw. 1982).

[52] *McBryde Sugar Co.*, 504 P.2d at 1134.

[53] *See* McBryde Sugar Co. v. Robinson, 517 P.2d 26, 29 (Haw. 1973) (Levinson, J., dissenting).

[54] *See id.* at 28-29.

[55] *See id.* at 29.

[56] *Id.* at 29 & nn.4-6; *see also McBryde Sugar Co.*, 504 P.2d at 1333-34.

[57] *McBryde Sugar Co.*, 504 P.2d at 1333-34.

[58] *Id.* at 1330.

[59] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125.

"On appeal, Justice [Kazuhisa] Abe, writing for the [c]ourt, overturned the" decisions of the Territorial Supreme Court of Hawai'i that had purportedly established private ownership of the surplus waters.[60] According to the court, there was no such private ownership.[61] As to the waters in question, neither sugar company owned them; those waters were "owned," the court stated, by the State of Hawai'i.[62]

The king of Hawai'i had never parted with those waters.[63] The State, as successor to the king, was now the owner of such waters.[64] The sugar companies involved, and the whole of the

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[60] *Id.* at 125; *see McBryde Sugar Co.*, 504 P.2d at 1333, 1335-39. As previously explained by this author:

> *McBryde v. Robinson*, a 1973 decision adjudicating water rights on the island of Kaua'i, was actually written by Justice Kazuhisa Abe. Nonetheless, the *McBryde* decision is today so closely associated with Chief Justice Richardson that it is treated [by this author] as part of his body of work. Although he did not author the decision, Chief Justice Richardson clearly concurred in the result and the reasoning of Justice Abe. When the decision was collaterally attacked in federal district court, the [c]hief [j]ustice, under his authority as [c]hief [a]dministrator of the Hawai'i [j]udiciary, actively became involved in defending the decision. Most important, when the Ninth Circuit directed certified questions to the [Supreme Court of Hawai'i] to answer, the response was written by Chief Justice Richardson. Those answers, reported in *Robinson v. Ariyoshi*, constitute the most important decision of the [c]hief [j]ustice's body of work. Thus, *McBryde v. Robinson*, which the chief justice did not author, and *Robinson v. Ariyoshi*, which he did, are both treated as part of the core of his jurisprudence.

Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125 n.110.

[61] *See McBryde Sugar Co.*, 504 P.2d at 1336-39 (holding that the State of Hawai'i owned the water); *see also* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125.

[62] *McBryde Sugar Co.*, 504 P.2d at 1339; *see also* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125.

[63] *See McBryde Sugar Co.*, 504 P.2d at 1337-39.

[64] *Id.* at 1339.

sugar industry, were shocked by the ruling.[65] Prior to the decision in *McBryde*, the surplus waters of a river or stream were private property.[66] Such could be bought, sold, or transferred from one watershed to another by the owner of the lands on which such surplus waters originated.[67] Under the supreme court's ruling, there was no such property interest as surplus water rights.[68] Now, it would be the State that owned the waters that were formerly held as surplus waters by the sugar companies.[69] "None of the parties, [not] even the State, had" argued such a position before the state trial court.[70]

All parties had proceeded on the basis that the Territorial Supreme Court of Hawai'i precedents which affirmed the existence of surplus water rights were correct.[71] The parties sought a rehearing before the Supreme Court of Hawai'i.[72]

The sugar companies sought to argue in the rehearing that their property had been taken without just compensation.[73] "[P]rior

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[65] *See* Robinson v. Ariyoshi, 441 F. Supp. 559, 583 (D. Haw. 1977) ("*McBryde I* therefore came as a shocking, violent deviation from the solidly established case law—totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions."), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); *see also* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125.

[66] *See Robinson*, 441 F. Supp. at 570.

[67] *See id.*

[68] *McBryde Sugar Co.*, 504 P.2d at 1339.

[69] *Id.* at 1338-39.

[70] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125; *see also* Reply Memorandum for the Appellants and Petitioners at 1-2, McBryde Sugar Co. v. Robinson, 517 P.2d 26 (1973) (per curiam) (Nos. 73-1440, 73-1441, 73-1442).

[71] *See Robinson*, 441 F. Supp. at 563; *McBryde Sugar Co.*, 517 P.2d at 27, 29-31 (Levinson, J., dissenting); Reply Memorandum for the Appellants and Petitioners, *supra* note 70, at 4; *see also* note 46 and accompanying text.

[72] *McBryde Sugar Co.*, 517 P.2d at 27.

[73] Reply Memorandum for the Appellants and Petitioners, *supra* note 70, at 5.

to the decision[,] they had [surplus] water rights."[74] After the decision, surplus waters did not exist as a property right.[75] "Surely[] . . . this was as much of a taking as if the State[, through its executive or legislative branches, had exercised eminent domain and] actually condemned their rights."[76] If the waters that formerly constituted surplus waters now belong to the State of Hawai'i, surely the State has "taken" such waters and must pay compensation.[77]

Moreover, there was a second cause of action.[78] In its sua sponte ruling, the state supreme court had allegedly violated procedural due process.[79] The parties before the court never had the opportunity to be heard on the state supreme court's view that surplus waters did not exist.[80]

The Supreme Court of Hawai'i granted a rehearing, but limited the issues to be heard.[81] The substantive due process (takings) and procedural due process claims were off limits.[82] The court would not hear argument on these claims.[83] The supreme court would consider argument on the proper interpretation of the statute used by the supreme court to rule that the concept of surplus waters was

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[74] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125.

[75] *See* McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1345-46 (Haw. 1973), *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973) (per curium); *see also Robinson*, 441 F. Supp. at 570.

[76] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125.

[77] *See id.* at 125-26.

[78] *See id.* at 126.

[79] *Robinson*, 441 F. Supp. at 580.

[80] *Id.*

[81] *See* McBryde Sugar Co. v. Robinson, 517 P.2d 26, 27 (Haw. 1973).

[82] *See id*; Reply Memorandum for the Appellants and Petitioners, *supra* note 70, at 2; *see also* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 126.

[83] *See supra* note 82 and accompanying text.

erroneous.[84] The Supreme Court of Hawai'i reaffirmed its original judgment.[85]

One justice who was formerly among the majority now dissented on rehearing.[86] Associate Justice Bernard Levinson changed his position.[87] Justice "Levinson . . . argu[ed] passionately that the sugar companies had vested . . . rights" in both the ownership of the surplus waters and the right to transfer such waters out of the watershed.[88] Levinson asserted that this was an unconstitutional judicial taking, citing to the judicial takings theory first proposed by Justice Stewart in *Hughes v. Washington*.[89] In *McBryde Sugar Co. v. Robinson*, the Supreme Court of Hawai'i had, by its very decision, taken the property of the sugar companies without just compensation in violation of the United States Constitution.[90]

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[84] *See McBryde Sugar Co.*, 517 P.2d at 27; *see also* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 126. On rehearing, the Supreme Court of Hawai'i did not permit argument on the substantive and procedural due process claims, confining argument to issues of state law. *See supra* notes 82-83 and accompanying text.

[85] *McBryde Sugar Co.*, 517 P.2d at 27. Judge Pence was later to call this rehearing "almost farcical." *Robinson*, 441 F. Supp. at 580.

[86] *See McBryde Sugar Co.*, 517 P.2d at 27 (Levinson, J., dissenting) (stating that "[a]lthough [he previously] voted with the majority of th[e] court, [he was] constrained to recant that position in view of [his] current understanding of the problems of th[e] case").

[87] *See id.*

[88] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 126; *see McBryde Sugar Co.*, 517 P.2d at 51 (Levinson, J., dissenting).

[89] *Id.* at 48-50 (citing Hughes v. Washington, 389 U.S. 290, 296-98 (1967)); *see Hughes*, 389 U.S. at 290.

[90] *McBryde*, 517 P.2d at 48, 50 (Levinson, J., dissenting). Justice Levinson quoted Justice Stewart's concurring opinion in *Hughes v. Washington*:

> For a [s]tate cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an

Judge Pence, the federal district court trial judge in the subsequent federal collateral attack on the Supreme Court of Hawai'i decision, called the opinion of Justice Levinson "probably the finest . . . of [Levinson's] judicial career."[91]

The losing parties sought a writ of certiorari in the Supreme Court of the United States.[92] They asserted that the Supreme Court of Hawai'i had violated both the Fifth and Fourteenth Amendments of the United States Constitution[93] by, in effect, taking property as well as denying the losing parties the right to be heard on rehearing.[94] The Supreme Court of the United States denied the petition for certiorari.[95]

Before the Supreme Court ruled on the petition for certiorari, the two sugar companies joined as plaintiffs and sued the State of Hawai'i in federal district court.[96] They alleged that the State of Hawai'i, by and through its state supreme court, had (1) taken property in violation of the Fifth Amendment (substantive due process) and (2) denied procedural due process under the Fourteenth Amendment to the United States Constitution.[97] In 1977, the federal district court judge, Judge Martin Pence, ruled in favor of the sugar companies, enjoining the enforcement of the

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> unpredictable change in state law thus inevitably presents a federal question for the determination of this [c]ourt.

Id. at 50 (quoting *Hughes*, 389 U.S. at 296-97).

[91] Robinson v. Ariyoshi, 441 F. Supp. 559, 564 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

[92] *See* McBryde Sugar Co. v. Hawaii, 417 U.S. 962, 962 (1974) (dismissing appeal and denying certiorari).

[93] *See* Reply Memorandum for the Appellants and Petitioners, *supra* note 70, at 1-4; Chang, *Perpetuated in Righteousness*, *supra* note 14, at 126-127.

[94] *See* sources cited *supra* note 93.

[95] *McBryde Sugar Co.*, 417 U.S. at 962 (dismissing appeal and denying writ of certiorari).

[96] *See Robinson*, 441 F. Supp. at 561-62.

[97] *Id.* at 580.

Supreme Court of Hawai'i decision.[98] In his opinion, Judge Pence harshly criticized the Supreme Court of Hawai'i;[99] he stated that the ruling "was strictly a 'public policy' decision with no prior underlying 'legal' justification."[100] In addition, Judge Pence called it "one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject."[101]

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[98] *Id.* at 586.

[99] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 127.

[100] *Robinson*, 441 F. Supp. at 566. He stated:

> It may be that the court did not conceive its action as a taking—it said the plaintiffs never had had any such water rights, ergo, no taking! Just that simple!
>
> The Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result.

Id. at 585 (emphasis omitted).

[101] *Id.* at 568.

> Pence criticized the court vehemently[:] . . . "[T]he majority (three justices) in *McBryde II* refused to consider [the constitutional arguments of the parties with regard to *McBryde I*] and summarily and most tersely, in a completely unenlightening per curiam opinion, held . . . ." [He also stated:]
>
> > Thusly did the court 'proceed to spit the victim for the barbecue' . . . .
> >
> > From the manner in which the court wrote the majority opinion in *McBryde I*, it was obvious that the court determined, without notice to any party of its intent, that it was going to completely restructure what was universally thought to be the well settled law of waters of Hawaii. . . . It was strictly a 'public policy' decision with no prior underlying 'legal' justification therefor. . . . In this case stare decisis interfered with the court's policy!
> >
> > . . . .
> >
> > The entire rationale of the majority is one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties or the state of the prior law on the subject.

By enjoining state officials from ever enforcing the judgment in *McBryde Sugar Co. v. Robinson*, Judge Pence had, much like an appellate court, "reversed" the Supreme Court of Hawai'i.[102]

To Chief Justice William S. Richardson, the implications were clear—a point that he was to make clear in his briefs before the Ninth Circuit.[103]

> Although the named defendants were the [g]overnor . . . and the members of the Board of Land and Natural Resources, the real defendant was[, in effect,] the . . . Supreme Court [of Hawai'i. A] federal district court, the lowest court in the federal system, had reversed a state supreme court, the highest court of the state system. If a federal district court could set aside a judgment of the [Supreme Court of Hawai'i], . . . then federal trial courts would be, in fact, the highest court of the state system.[104]

First, Chief Justice "Richardson firmly believed that the [Supreme Court of Hawai'i] had acted constitutionally" and appropriately.[105] Property law is state law, not federal law.[106] It

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Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-Statehood Hawai'i*, 14 U. HAW. L. REV. 17, 30 n.31 (1992) [hereinafter Chang, *Reversals of Fortune*] (quoting *Robinson*, 441 F. Supp. at 564, 565-68).

[102] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 127.

[103] *Id.*

[104] *Id.* Chief Justice Richardson has been quoted as saying, "And I felt that the highest court of a state should be higher than the lowest court in the federal system." *Id.* at 127 n.127.

[105] *Id.*

[106] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010) (stating that "state law defines property interests"); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42, 48 (1944) (showing that state law governs property law and that "rights to succession by will are created by the state and may be limited, conditioned, or abolished by it."); Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 655 (1927) ("[T]he

was the province of the state courts to rule on matters of property law. State courts were final on matters of property law—and should be accorded the same finality that is granted to the Supreme Court of the United States.

Second, the chief justice did not see his decisions as taking property.[107] Rather, his decisions as to property rights were corrective—overturning erroneous property decisions rendered during Hawai'i's territorial period.[108] Courts do not "take" property, rather they "declare" what has always been the case.[109] In this case, water rights had never been private property—that was an erroneous reading of the king's intention at the time of the Māhele.[110] Many of the chief justice's "landmark cases," *Palama v. Sheehan*,[111] *In re Ashford, Sotomura, In re Sanborn, Zimring, Reppun v. Board of Water Supply*,[112] and *Kalipi v. Hawaiian Trust Co.*,[113] overturned or modified territorial "law in some fashion."[114] If *McBryde Sugar Co. v. Robinson* could be set aside by a federal district court, other decisions could be collaterally attacked in the same fashion.[115] In such a case, "the independence and sovereignty

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nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state."); *see also* Chang, *Missing the Boat*, *supra* note 8, at 158 n.120 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), for the proposition that "property interests are created by the state").

[107] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129-33.

[108] *See id.* at 137-38.

[109] *Id.* at 119-33, 137-38.

[110] *See id.* at 111-13, 117-19, 129-33, 137-38.

[111] Palama v. Sheehan, 440 P.2d 95 (Haw. 1968).

[112] Reppun v. Bd. of Water Supply, 656 P.2d 57 (Haw. 1982).

[113] Kalipi v. Haw. Trust Co., 656 P.2d 745 (Haw. 1982).

[114] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128.

[115] *See id.*; *see also* Chang, *Unraveling* Robinson, *supra* note 8, at 57-58.

of the Hawai'i [j]udiciary would be subservient to the federal district [and appellate] courts."[116]

The collateral attack in *Robinson v. Ariyoshi* led others to file in federal district court alleging a judicial taking.[117] A federal action was filed in *Sotomura v. County of Hawaii*[118] seeking compensation and equitable relief.[119] *Sotomura*, a Supreme Court of Hawai'i decision written by Chief Justice Richardson, had moved the demarcation between private and public property from the debris line to the higher vegetation line, diminishing the size of the Sotomuras' property.[120] The Sotomuras sued alleging a judicial taking.[121]

The Zimrings, the losing parties in *State v. Zimring*, also brought an action in federal district court.[122] In *Hawaii v. Zimring*, the Supreme Court of Hawai'i had held that newly created volcanic lands added to the State of Hawai'i belonged to the State, not the abutting landowner.[123] Previous state practice deemed the abutting landowner to be the owner of these newly added volcanic lands.[124]

Thus, in light of these collateral actions, the late 1970s was a critical moment for the Supreme Court of Hawai'i and the property jurisprudence of Chief Justice Richardson. The independence, sovereignty, and ability of the Supreme Court of Hawai'i to correct

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[116] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128.

[117] *See id.*

[118] Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Haw. 1975).

[119] *Id.* at 97.

[120] County of Hawaii v. Sotomura, 517 P.2d 57, 62 (Haw. 1973).

[121] *See Sotomura*, 402 F. Supp. at 97 & n.1.

[122] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128.

[123] Hawaii v. Zimring, 566 P.2d 725, 727, 731 (Haw. 1977).

[124] *Id.* at 740-41 (Vitousek, J., dissenting). The three attacks all raised the same issue—whether the Supreme Court of Hawai'i, in implementing the jurisprudence of the kingdom over that of the territory, took the property of the plaintiffs in violation of the United States Constitution. *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128-29. This author was retained as counsel in the two new actions. *See id.* at 128.

prior errors in state property law were on trial in the federal courts.[125]

III. THERE IS NO SUCH CAUSE OF ACTION AS A JUDICIAL TAKING

First, the chief justice's primary opposition to the concept of a judicial taking was that the state supreme courts were not subordinate to the federal district courts.[126] That is, the federal district courts could not, as the federal district court in *Robinson* had, enjoin the enforcement of state supreme court decisions.[127] The federal district courts could not act as appellate courts of the state supreme courts.[128] The State defendants and Chief Justice Richardson asserted that under the *Rooker-Feldman* doctrine,[129] such appeals and reversals by a federal district court were impermissible.[130] *Rooker v. Fidelity Trust Co.*[131] held that federal district courts lacked the jurisdiction to entertain such "horizontal" appeals of state supreme court decisions.[132] Moreover, such collateral attacks violated the fundamental principle that state courts were final on questions of state property law.[133]

Second, the chief justice, by way of his amicus brief, also argued that if losing parties were allowed to attack a final state supreme court decision by refiling a "new" action in a federal district court, under the fiction that the collateral attack was an original cause of action, there would always be two ways of

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[125] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128.

[126] *See* Robinson v. Ariyoshi, 658 P.2d 287, 303-04 (Haw. 1982); *see also supra* note 104.

[127] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128.

[128] *See* Chang, *Rediscovering* Rooker, *supra* note 8, at 1362.

[129] *See id.* at 1339 (discussing the *Rooker* doctrine, which "prohibit[s] lower federal courts from exercising appellate jurisdiction").

[130] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128-29.

[131] Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

[132] *Id.* at 416.

[133] Chang, *Unraveling* Robinson, *supra* note 8, at 58-59.

"appealing" state supreme court decisions.[134] If there were two avenues to appealing a decision, if every losing party had "two bites of the apple," "there would be no finality in the legal system."[135]

Namely, such collateral attacks on judgments in federal court allowed a second avenue by which to appeal cases.[136] A party that had lost before a state supreme court, or even before a state appellate or trial court, could appeal upwards, as is normally the case, or refile a new and "original" action in either a state or federal trial court alleging a taking of property in violation of the United States Constitution.

Then, the losing party in this new action would have the same options—an appeal upwards or the opportunity to refile a new and original action in a state or federal trial court under the theory that the court had taken property. This could go on and on, with losing parties filing new actions alleging a judicial taking by the court in which these parties had just lost. This would undermine the finality essential to a judicial system.[137]

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[134] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128-29.

[135] *Id.* at 129; *see also* Chang, *Unraveling* Robinson, *supra* note 8, at 58-59.

[136] Chang, *Unraveling* Robinson, *supra* note 8, at 58-59. If that losing party can turn around and file a new action alleging that the court rendering the taking judgment had violated the Constitution, then there would be no end, "no finality in the legal system," for every losing party could bring suit again. Chang, *Perpetuated in Righteousness*, *supra* note 14, at 128-29. Then, the party losing in that action could bring suit—over and over again.

[137] *See* Chang, *Unraveling* Robinson, *supra* note 8, at 59; *see also* Chang, *Rediscovering* Rooker, *supra* note 8, at 1348.

> If there is a lesson to be learned from examining *Robinson v. Ariyoshi*, it is that courts cannot take. It is not that they cannot take property because they cannot act in a manner which has the same results or ramifications of a governmental taking. Rather, they do not take because the implications of the contrary proposition contradict the essential functions of the judiciary. Simply put, courts do not take because that would destroy their ability to resolve disputes. Courts do

Third, the chief justice as amicus curiae also argued that the concept of a judicial taking was essentially incoherent.[138] A decision of a state supreme court when it retroactively overrules prior property law "does not take from one party and give to another."[139] Rather, when a court overrules prior precedent, it is correcting prior erroneous precedent.[140] The losing party never had the right to the property it claimed.[141] If courts take when they rule, then every case is a potential judicial taking.[142]

Nevertheless, those advocating the existence of judicial takings had a powerful argument in their favor: the "layman's view" of a taking.[143] This view stems from what appears eminently sensible and logical.[144] Before the offending judicial decision, a party had property rights.[145] After that decision, they have no such

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> not take; they declare. If courts were said to take, they could not effectively declare.
>
> . . . The implications of *Robinson*-type intervention are that there would be no judicial hierarchy and no finality in appellate systems.

Chang, *Unraveling* Robinson, *supra* note 8, at 90-91.

[138] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129.

[139] *Id.*

[140] *Id.* at 127-28, 130-31, 137-38.

[141] *See id.* at 129-30; *see also* Robinson v. Ariyoshi, 441 F. Supp. 559, 585 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); Chang, *Unraveling* Robinson, *supra* note 8, at 68.

[142] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129.

[143] *See* Chang, *Unraveling* Robinson, *supra* note 8, at 65 (stating that this view is "based primarily on simplicity and clarity"); *see also* Chang, *Missing the Boat*, *supra* note 8, at 157-59 (describing the " 'layman's' concept of a taking" as one that "discards rules in favor of an intuitive, experiential understanding of a taking").

[144] *See supra* note 143; *see also infra* note150.

[145] Chang, *Unraveling* Robinson, *supra* note 8, at 65.

rights.[146] This must be a taking.[147] It does not matter which branch of government effected the taking.[148]

This was the logic of Justice Stewart in *Hughes v. Washington*—a version of "I know it when I see it."[149] If it looks like a taking and has the effect of a taking, then it must be a taking.[150]

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[146] *Id.*

[147] *Id.*

[148] *Id.* at 65-67; *see* Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

[149] Chang, *Missing the Boat*, *supra* note 8, at 157-59; *see also* Chang, *Unraveling* Robinson, *supra* note 8, at 65-67.

[150] *See* Chang, *Unraveling* Robinson, *supra* note 8, at 65. This author has further described this concept in the following manner:

> The term "lay" as used by Professor Bruce A. Ackerman is not unflattering, but rather describes an eminently sensible conclusion based primarily on simplicity and clarity. The laymen's view requires no deep legal scholarship to reach its conclusion. The concept is based on the fundamental legal principle of securing private property from governmental interference. The laymen's perspective reflects such a prominent societal value that one assumes it must be expressed somewhere in the Constitution. It is so because it must be so. It could not be otherwise in a legal system based on private property. As Professor Laurence H. Tribe has put it:
>
> > Most people know a taking when they see one, or at least they think they do. Before the taking, an object or a piece of land belonged to X, who could use it in a large number of ways and who enjoyed legal protection in preventing others from doing things to it without X's permission. After the taking, X's relationship to the object or the land was fundamentally transformed; he could no longer use it at all, and other people could invoke legal arguments and mechanisms to keep him away from it exactly as he had been able to invoke such arguments and mechanisms before the taking had occurred. As Professor Bruce Ackerman has shown in a thoughtful analysis of the taking problem,

Judicial takings are a paradox—an idea that exists intellectually, but not in reality.[151] It is like the following riddle: "What happens when an irresistible force meets an immovable object?"[152] The answer is that there can never be a possible world in which both an irresistible force and an immovable object exist.[153] For, if we assume the existence of an irresistible force, we are assuming that in such a world where there is such a force, there are no immovable objects.[154] To posit the existence of an irresistible force is to by inference posit that there are no immovable objects.[155]

The concept of judicial takings has the same flaw; when we speak about judicial takings, one commits the same error. If one posits a world in which there are courts—namely, a judiciary—there can be no judicial takings, for what we mean by "courts" are institutions that declare what the law is; they do not make law and, therefore, do not take property rights by their decisions.[156]

> much of the constitutional law of takings is built upon this ordinary, lay view of what a 'taking' is all about.

Id. (footnotes omitted) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 456, 459-60 (1978)).

[151] *See* Chang, *Missing the Boat, supra* note 8, at 158-59.

[152] *See* Dave Scriven, *The Irresistible Force Paradox*, WORD TRAVELER (Aug. 16, 2009 11:37 AM), http://open.salon.com/blog/scrivend/2009/08/16/the_irresistible_force_paradox.

[153] *See id.*

[154] *See id.*

[155] *See id.*

[156] This author further explains this phenomenon as follows:

> In a sense, a paradox is created. Property is defined as those interests deemed to be property by the state courts. At the same time, the federal courts assert that some interests are inherently "property," regardless of the definition state courts apply. The paradox is similar to a person who asserts that all bachelors are men (because that is how "bachelor" is defined) but also claims that it is also true as a matter of experience that some bachelors are not men. In other words, logic commands one result, but our experience dictates another.

IV. THE STAKES WERE ENORMOUS

Incoherent or not, to the affected parties—the Hawai'i sugar industry in particular—the stakes were enormous.[157] "The two sugar companies, now joined by other sugar companies from around the state," threw everything into the fight.[158] The sugar industry viewed *McBryde* as a matter of life or death.[159] "The economic ramifications . . . were huge because all sugar companies . . . relied on private ownership of surface waters" and the right to transport waters out of the watershed.[160]

"[T]he sugar companies retained the former dean of Harvard Law School, Solicitor General Erwin Griswold, as co-counsel."[161]

The sugar companies even "brought disciplinary charges alleging that [counsel for Chief Justice Richardson (this author)] had violated the canons of ethics for publishing law review articles on related issues," thus creating an atmosphere in which no fair proceeding could take place.[162] "Attorneys for the sugar industry

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Chang, *Missing the Boat*, *supra* note 8, at 158.

[157] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129.

[158] *Id.*

[159] *See id.*

[160] *Id.*; *see* McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1345, *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973) (per curium) (denying the sugar companies the right to transport needed water to other watersheds).

[161] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129.

[162] *Id.*; *see also* Chang, *Reversals of Fortune*, *supra* note 101, at 48-49 n.69 ("As to the second 'effort . . . to stop Professor Chang's article,' [this author] would assume that Judge Pence is referring to the decision to initiate a disciplinary complaint against [this author] before the office of the [d]isciplinary [c]ounsel. Mr. Russell Cades presented arguments at the hearing alleging that the publication of the aforementioned article, as well as a subsequent article, [Chang, *Rediscovering* Rooker, *supra* note 8, at 1337], again violated ethical canons and disciplinary rules by attempting to influence the judicial process through the [media] and therefore create an atmosphere in which no fair proceeding could take place. Secondly, Mr. Cades asserted that the deliberate citation to [this author's] own articles in briefs submitted in the Ninth Circuit

even sought to stifle . . . publications" of counsel for amicus curiae Chief Justice Richardson.[163] They "succeeded in blocking the publication of one article in the *Hawaii Bar Journal*"[164] and received attorneys' fees for those efforts.[165] These extraordinary

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intentionally violated their page limitations. Finally, he asserted that the use of two attorneys to represent state officials created confusion and conflict of interest. Professor Addison Bowman, a former criminal defense attorney in Washington D.C., represented [this author] at the proceeding. When asked if Mr. Cades was billing his clients for this action, Mr. Cades, at that time, refused to answer. The disciplinary counsel issued a one-sentence decision dismissing the allegations.").

[163] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129.

[164] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 129; *see also* Chang, *Reversals of Fortune*, *supra* note 101, at 48 n.69.

> [A]ttorneys from the firms of Cades, Goodsill, and Hoddick appeared at a meeting of the Board of Editors of the *Hawaii Bar Journal* to argue that an article that had been accepted for publication, written by [this author] as one of the editors of the journal, . . . be excluded from the next issue of the journal. The attorneys argued that the article constituted (1) a violation of ethical canons in that it created a biased atmosphere in the midst of a judicial proceeding [although the case was then in the Ninth Circuit] and (2) constituted a violation of the page limitation [of the] rules of the Ninth Circuit since when the article was cited in the brief that was submitted by [this author] as counsel, the additional pages accorded to the article exceeded the forty-page limit of the Ninth Circuit. In any event, the editors of the *Bar Journal*, [except this author] voted to quash publication of the article.

Chang, *Reversals of Fortune*, *supra* note 101, at 48 n.69.

[165] Chang, *Reversals of Fortune*, *supra* note 101, at 47-48 n.69 (quoting Robinson v. Ariyoshi, 703 F. Supp. 1412, 1430 (D. Haw. 1989) ("The court is well aware of the fact that in this case, Professor Chang was more than an erudite professor of law at the University of Hawaii's School of Law. Chang was selected by and purportedly represented Chief Justice Richardson, and paid by the State in order to assist the State's Attorney General in the State's [d]efense. This court can take judicial notice that some of the circuit judges of the Ninth Circuit during the pertinent years appeared to hold law review articles and conclusions therein in high esteem, since law review articles are normally

tactics were not characteristic of litigation in Hawai'i.[166] Such tactics simply reflected the huge stakes involved.

Chief Justice Richardson knew that the question of judicial takings—namely, whether his court in *McBryde* had taken vested rights—would be a difficult issue for the Supreme Court of the United States. The Supreme Court had never, in a case like *Robinson v. Ariyoshi*, held that a retroactive overruling of prior law was a taking.[167] Thus, it was predictable that the Supreme Court of the United States would look for a doctrinal way out. Both the chief justice and his counsel believed that the Court would, as has been its practice, look for a means to avoid deciding a hard constitutional question—a means by which it could avoid holding that the Supreme Court of Hawai'i had, by its decision, taken property.[168]

Such a ruling would result in chaos as to the relationship between state supreme courts, the federal district courts, and the Supreme Court of the United States.[169] As a matter of practice, the Supreme Court of the United States has looked to

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written from an impartial scholar's standpoint. Anything written by Professor Chang during the time relevant here, however, could and would be only construed as written on a solidly partisan basis from the standpoint of an advocate representing his client. This court agrees with McBryde that the publication was intended to be, and was in effect, an additional brief for the State, after oral argument. The court of appeals even allowed McBryde to reply after the publication."), *rev'd and vacated*, 933 F.2d 781 (9th Cir. 1991)).

[166] *See* Damien P. Horigan, *Some Aspects of Law in Hawaii*, 5 J. S. PAC. L. 1, 7 (2001).

[167] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 130.

[168] *See id.*

[169] *See supra* notes 126-37 and accompanying text; *see also* Chang, *Unraveling* Robinson, *supra* note 8, at 96 (illustrating the importance of the concept of federalism).

nonconstitutional grounds, when available, by which to decide hard cases.[170]

The means of avoiding the judicial takings question rested in the ambiguity of the Supreme Court of Hawai'i's use of the term "state ownership" in the original *McBryde* opinion.[171] Did state ownership mean ownership in a corporeal, *res publicae* sense, or did it refer to communal possession, more akin to a public trust?

The essence of the judicial takings claim rested on the single assumption that the *McBryde* decision had used the term "ownership" in a corporeal sense.[172] Hawai'i courts during the republican and territorial period from 1894 to 1959 had taken the concept of communal ownership of water rights and turned it into private property—a right based on corporeal ownership.[173] This was an erroneous interpretation of the mid-nineteenth century intent of the monarch.[174] Although during the Māhele, the monarch had created private fee interests in land, there never was such an intent as to water.[175]

Under the Hawaiian view, at the time of the Māhele, the first privatization of land in Hawai'i, no one, not even the king, "owned" water in a corporeal sense.[176] "When Justice Abe in

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[170] *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." (citations omitted)).

[171] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 130-33.

[172] *Id.* at 130.

[173] *Id.* at 112-13, 123, 130-32.

[174] *Id.* at 112-13, 130-32.

[175] *Id.* at 117-18, 130-32.

[176] *Id.* at 118, 130.

McBryde Sugar Co. v. Robinson awarded the [S]tate 'ownership' of the surface waters of the stream, [most who read the decision] interpreted the term 'ownership' in its [corporeal] sense, in the sense used by the Territorial Supreme Court" of Hawai'i in the few cases that established surplus water rights.[177]

However, there was substantial doubt as to whether Justice Abe meant ownership in a corporeal sense when he used the term state ownership in *McBryde Sugar Co. v. Robinson*. In his opinion, Justice Abe intimated that under the English common law on which he based the opinion, water could not be owned—it was

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> After the [k]ingdom, during the post-overthrow period, Western laws were used to reconstruct Hawaiian custom and practice. Thus began the misinterpretations, such as the assertion that the king was the owner of all property. As to water rights, this was false. The king held the waters in trust. Westerners also misconstrued the nature of the konohiki's relationship with water. Territorial precedents declared that since the king owned the waters, the king's grants to lesser chiefs, the konohiki, conveyed ownership of the bulk of the surface waters.

Chang, *Perpetuated in Righteousness*, *supra* note 14, at 118.

[177] *See id.* at 130 (citing Chang, *Unraveling* Robinson, *supra* note 8, at 86-87).

> Petitioners and the court in *Robinson* assumed that the mere declaration of ownership in the State by virtue of the *McBryde* decision constituted a confiscatory act. This is not necessarily true. The term "ownership," without clarification, is meaningless in water rights. Ownership of water by the State, as evidenced in most other jurisdictions asserting ownership, simply means that the State has the power to control and regulate the waters if it chooses to do so at all. Hence, the issue of confiscation was not ripe. Life on the Hanap[ē]p[ē] River goes on as before. If the State chose to control and regulate the water in such a manner as to completely prevent petitioners from using the water, such conduct might constitute a confiscatory act for which [F]ifth [A]mendment protection could be invoked. At that point a suit to determine whether a taking has occurred would be more appropriate. Until then, the injunction in *Robinson* is a suit to enjoin undefined state action.

Chang, *Unraveling* Robinson, *supra* note 8, at 86-87 (footnotes omitted).

publici juris.[178] *Publici juris*, unlike *res publicae*,[179] or ownership in a corporeal sense, is similar to a public trust.[180]

Uncertainty in the aftermath of landmark judicial decisions is not uncommon. For example, the meaning of *Brown v. Board of Education*,[181] while simple, was not clear.[182] It took many cases to refine what the Court meant there by "equality."[183]

McBryde was a landmark decision, and like other such landmark decisions, there was uncertainty as to what the Supreme Court of Hawai'i had meant when it awarded the state ownership of the surface waters.[184] State ownership of waters even in a Western sense cannot be equated with ownership in a corporeal, actual sense.[185] Thus, for example, some Western states declare, either by common law or in their constitutions, that the State is the owner of all waters.[186] This does not preclude others from having vested use

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[178] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 130 & n.137 (quoting McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1399, *aff'd on reh'g*, 517 P.2d 26 (1973) (per curium)) ("It appears that this Act was very similar to the English common law rules which had evolved by that time that no one may acquire property to running water in a natural water course; *that flowing water was publici juris*; and that it was common property to be used by all who had a right of access to it, as usufruct of the watercourse." (emphasis added)).

[179] *See* Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 640 (1957).

[180] Chang, *Unraveling* Robinson, *supra* note 8, at 92-93.

[181] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[182] *See* Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation from* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217, 224-25 (2007); Chang, *Unraveling* Robinson, *supra* note 14, at 95 n.185.

[183] *See* Douglas Bryant, III, *"A Failure to Act" from* Brown v. Board of Education *to* Sheff v. O'Neill*: The American Educational System Will Remain Segregated*, 25 T.M. COOLEY L. REV. 1, 13-14, 16-17, 22-23 (2008).

[184] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 130-31.

[185] *See id.* at 130.

[186] *See* Trelease, *supra* note 179, at 639.

rights in such waters.[187] State ownership of water is not like a state's ownership of its fleet of cars.[188]

"Ownership" was how Westerners often mischaracterized the king's relationship with the lands and waters of Hawai'i.[189] "The king was not the owner of the waters of Hawai'i."[190] He was its trustee.[191] "Trusteeship recognized both the beneficiaries' interest

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[187] *Id.* at 640.

[188] *See id.* at 638-39.

[189] *See supra* note 176 and accompanying text; *see also* Reppun v. Bd. of Water Supply, 656 P.2d 57, 67-69 (1982).

> In *McBryde*, we did not lightly infer that a judicially determined system of water rights was subject to alteration. Quite to the contrary, our decision there was premised on the firm conviction that prior courts had largely ignored the mandates of the rulers of the [k]ingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable western society.
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> . . . .
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> . . . Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of [W]estern concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.
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> . . . .
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> . . . Again, the essential nature of the konohiki's customary powers over the waters of his ahupuaa was disregarded, and an individual was granted a personal "right" to profit, presumably by virtue of ancient authority, from the sale and application of water without regard for the consequences to those who historically would have been within his charge.
>
> We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. *McBryde* was a necessary and proper step in the rectification of basic misconceptions concerning water "rights" in Hawai'i.

Reppun, 656 P.2d at 67-69 (footnote omitted).

[190] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 131.

[191] *See id.*

in the waters and the fiduciary duty of the trustee to beneficiaries."[192]

The property jurisprudence of the chief justice often reflected the view that Western lawyers often misinterpreted Hawaiian communal practices in the sharing of resources.[193] Often Westerners interpreted such practices as ownership that arose from the appearance that chiefs controlled resources.[194] Chiefly control of resources, while appearing to be a kind of ownership familiar to the West, was actually a form of trusteeship quite different from Western notions of corporeal ownership.[195] It has always been clear, to Hawaiians, that the sovereign held the land and the water in trust.[196]

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[192] *Id.*; *see also* Robinson v. Ariyoshi, 658 P.2d 287, 310 (Haw. 1982).

> The *McBryde* opinion, however, did not supplant the konohikis with the State as the owner of surplus waters in the sense that the State is now free to do as it pleases with the waters of our lands. In *McBryde* . . . we indeed held that at the time of the introduction of fee simple ownership to these islands the king reserved the ownership of all surface waters. But we believe that by this reservation, a public trust was imposed upon all the waters of the kingdom. That is, we find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of such authority to assure the continued existence and beneficial application of the resource for the common good.

Robinson, 658 P.2d at 310.

[193] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 111.

[194] *See id.* at 111-13.

[195] Chang, *Missing the Boat*, *supra* note 8, at 164 ("In Hawaii, the societal background to the rules regarding water rights had completely changed by the time of the *McBryde* decision.").

[196] *Id.*

> Thus, [counsel for Amicus Curiae William S. Richardson] raised [the possibility] in oral argument before the Ninth Circuit [that *McBryde Sugar Co. v. Robinson* had been misread]. The sugar companies used "ownership" to mean ownership and possession of the water in a real, corporeal sense. . . . [If by "ownership"] the [Supreme Court of Hawai'i only] meant to . . . give the [S]tate a public trust over the surface waters . . . then there was no taking of property. The assertion of the public trust was akin to an assertion of a police power over the waters. The [S]tate always had a police power over its resources [such as water]. [A] decision [declaring that the S]tate [had a] police power over the surface waters of Hawai'i did not give the [S]tate something it did not already have . . . .[197]

If there was ambiguity about the meaning of ownership, counsel for amicus curiae Chief Justice Richardson argued that the Ninth Circuit should certify questions to the Supreme Court of Hawai'i for clarification.[198] Certainly, the Ninth Circuit should be clear as to the meaning of ownership before undertaking the drastic step of affirming an injunction against the enforcement of a decision of the Supreme Court of Hawai'i.

Thus, amicus curiae Richardson, himself a member of the court, was in the odd position of recommending that the Ninth Circuit certify questions back to the state supreme court for clarification. The Ninth Circuit did certify questions to the

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[197] *Id.*

[198] *Id.* at 140 & n.140 ("*See* HAW. R. APP. P. 13(a) ('When a federal district or appellate court certifies to the [Supreme Court of Hawai'i] that there is involved in any proceeding before it a question concerning the law of Hawai'i that is determinative of the cause and that there is no clear, controlling precedent in the Hawai'i judicial decisions, the [Supreme Court of Hawai'i] may answer the certified question by written opinion.')").

Supreme Court of Hawai'i as to what that court had meant by ownership in the *McBryde* decision.[199] The sugar companies vigorously objected.[200]

It was, after all, this very court which had denied the sugar companies substantive and procedural due process.[201] The act of certification would simply place the sugar companies before the institution that had inflicted harm on them in the first place. Consequently, the sugar companies made a motion to recuse Chief Justice Richardson.[202] The Supreme Court of Hawai'i denied that motion.[203]

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[199] Robinson v. Ariyoshi, 658 P.2d 287, 292 (Haw. 1982).

[200] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 131-32 (noting the reaction of the sugar companies to the certification order).

[201] *See id.* at 131.

[202] *See generally id.* at 132 & n.141. That footnote states:

> Motion to Recuse the Honorable William S. Richardson at 7, Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) (No. 8241) ("As detailed herein and in the affidavit submitted herewith the Honorable William S. Richardson appeared as amicus curiae in the Ninth Circuit proceedings in this case. The appellees by their attorneys respectfully submit that Chief Justice Richardson is under a duty to recuse himself from participating in this Court's proceedings on the certified questions.").

Id. at 132 n.141.

[203] *See generally id.* at 132 n.142. That footnote states:

> *See* Order of the Supreme Court of the State of Hawai'i, Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) (No. 8241) ("The questions asked by the Ninth Circuit relate in part to the interpretation of a 1973 decision by this court in which the [c]hief [j]ustice participated. It would seem appropriate for him to continue to sit in the instant proceeding to assist in giving the Ninth Circuit meaningful answers to questions which [it has] asked this court to answer. If he were to recuse himself, that would seem to undermine or partially frustrate the purposes of the certification by the Ninth Circuit. Therefore, under the circumstances of this proceeding, we find insufficient grounds for recusal of the [c]hief [j]ustice.").

Id.

The Ninth Circuit ordered certification.[204] Six questions were certified to the Supreme Court of Hawai'i as to the meaning and effect of the *McBryde* decision.[205]

It would be Chief Justice Richardson who would write the opinion answering the certified questions.[206] In his answer, Richardson was clear. Corporeal ownership of water was never a Hawaiian concept.[207] Thus, state ownership, as was awarded to the State by the *McBryde* decision, merely meant that the State had a public trust, "not ownership in a corporeal sense."[208]

> If the [Supreme Court of Hawai'i] . . . had merely awarded the State a public trust over the waters and not corporeal ownership, there was no taking, for nothing had been given to the State of Hawai'i. [Furthermore, no action had been taken to enforce *McBryde Sugar Co. v. Robinson.*[209]] If nothing had been (judicially) taken, and no action had been taken to enforce the *McBryde* decision, then the complaint filed in the federal district court had been premature. The case was not ripe—not ready to be heard. The Supreme Court of the United States now had a basis by which to rule and avoid the difficult constitutional question of whether or not the [Supreme Court of Hawai'i] had taken the plaintiffs' property. A ruling based on ripeness would not . . . forever foreclose the plaintiffs[] from seeking relief. The sugar companies could file suit when [and if the State

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[204] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 131.

[205] Robinson v. Ariyoshi, 658 P.2d 287, 292 (Haw. 1982).

[206] *Id.*

[207] *Id.* at 306.

[208] *Id.* at 310.

[209] *See* Chang, *Unraveling* Robinson, *supra* note 8, at 87 (stating that the suit was to "enjoin undefined state action").

> moved to] stop[] the sugar companies from withdrawing water.
>
> The intuition that the [Supreme Court of the United States] did not want to rule on the constitutional issue of a judicial taking proved accurate. The [Supreme Court of the United States] granted [the petition for] certiorari but vacated the injunction against the [Supreme Court of Hawai'i], remanding to the Ninth Circuit on the basis of a lack of ripeness."[210]

It was much better to vacate the lower court's judgment on the grounds of a lack of ripeness than to risk all on the chance of the Supreme Court finding that there was no such concept as a judicial taking.[211]

However, the trial court judge that had originally found there to be a judicial taking ignored the Supreme Court's order to vacate.[212] Judge Pence gave two reasons for refusing to follow the instructions of the Supreme Court of the United States.

First, Judge Pence asserted that the Solicitor General of the United States, who had filed a critical brief urging dismissal on the grounds of ripeness, had insufficient familiarity with Hawai'i.[213]

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[210] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 132-33 (footnotes omitted).

[211] *Id.* at 133 & n.149 ("Thus, in 1986 the . . . Supreme Court [of the United States] remanded the case to the Ninth Circuit to examine whether Pence had acted prematurely—whether the case was ripe. The Supreme Court completely avoided the takings claim. The case was not ripe, for no action had been taken on the . . . Abe decision. No waters had yet been seized.").

[212] *See id.* at 133.

[213] *Id.* at 133 & n.150. That footnote states:

> A review of the record and briefs filed with the Supreme Court shows that less than one month from the time [t]he Court received the Solicitor General's brief, and only 14 days before the end of its 1985 term, it issued the above remand. . . . Since, as indicated, this judge has concluded that it was the brief of the Solicitor General and his

Second, Judge Pence argued that the Court had insufficient time to adequately consider the complexities of the case.[214] Despite the answers from the Supreme Court of Hawai'i as to the certified questions, Judge Pence reaffirmed his decision of a judicial taking.[215] He deemed those answers self-serving—written simply to avoid constitutional challenge.[216] Throughout his opinion, Judge Pence vehemently denounced the "Richardson [c]ourt."[217]

> uncritical assumption of "unripeness" of this case which triggered [t]he Court's granting certiorari and remand, therefore, this judge in this decision will primarily address the position taken by the Solicitor General in his [a]micus [b]rief.

Id. at 133 n.150 (citing Robinson v. Ariyoshi, 676 F. Supp. 1002, 1004 (D. Haw. 1987), *vacated*, 887 F.2d 215 (9th Cir. 1989)).

[214] *Robinson*, 676 F. Supp. at 1004 ("This judge draws the conclusion that [t]he Court, 'caught in the end of the term crunch,' and, having a high regard for all briefs filed by the Solicitor General of the United States, simply followed the Solicitor General's recommendation that 'the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank* [*of Johnson City*, 473 U.S. 172 (1985)],' opting not to decide the case at that time, and thus postponing, indefinitely, the time-consuming effort involved in the ultimate disposition of the case." (footnotes omitted)).

[215] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 134.

[216] *See Robinson*, 676 F. Supp. at 1019.

[217] *See id.* at 1017-20.

> The Richardson [c]ourt's discussion of the takings issue sharply illustrates the obfuscation and evasiveness of the [a]nswers of that [c]ourt.
>
> One can only conclude that the above statements were deliberately and grossly misleading (and, if presented in the federal courts, would mandate [sanctions under rule 11 of the Federal Rules of Civil Procedure, FED. R. CIV. P. 11]). It was only in this federal court that the plaintiffs had a full and uncircumscribed opportunity to raise the constitutional questions.
>
> When one reviews the 30-printed-page response of the Richardson [c]ourt to the six questions, it becomes manifest that it was endeavoring, by misdirection, misinformation, misapplication, and

The Ninth Circuit reversed Judge Pence's refusal to follow the instructions of the Supreme Court of the United States.[218] The Ninth Circuit directed Judge Pence to dismiss the complaint based on a lack of ripeness.[219]

V. DID THE SUPREME COURT OF HAWAI'I IN *MCBRYDE SUGAR CO. V. ROBINSON* COMMIT A JUDICIAL TAKING IN LIGHT OF THE PLURALITY OPINION IN *STOP THE BEACH RENOURISHMENT*?

Would *Robinson v. Ariyoshi* be considered a judicial taking today under the plurality's test as proposed in *Stop the Beach Renourishment*?

> misconstruction of facts and law to save its *McBryde* decisions and avoid the constitutional consequences of its unprecedented radical and violent change in the law on waters in the State of Hawaii. Cutting like a strand of barbed wire in the fabric of the Richardson [c]ourt's artfully manufactured [a]nswers is that [c]ourt's adamant refusal to modify any rule set forth in *McBryde*.
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> *Reppun* clearly and finally implemented *McBryde*'s destruction of the value of the water rights owned by several of the small owners, as well as G & R and McBryde, who had purchased the same from owners of such appurtenant rights, when it held that "the riparian water rights . . . cannot be severed from the land in any fashion."

Chang, *Perpetuated in Righteousness*, *supra* note 14, at 134 (quoting *Robinson*, 676 F. Supp. at 1017-20) (footnotes omitted).

[218] Robinson v. Ariyoshi, 887 F.2d 215, 219 (9th Cir. 1989); *see also* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 135.

[219] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 135. It did not stop with that opinion. Judge Pence also awarded 4 million dollars in attorneys' fees to the sugar companies—including attorneys' fees for stifling this author's judicial takings scholarship. *Id.* The Ninth Circuit reversed Judge Pence's ruling on attorneys' fees. *Id.*; *see also* Robinson v. Ariyoshi, 933 F.2d 781, 786 (9th Cir. 1991) (reversing award of attorneys' fees).

It has been more than twenty-five years since the Supreme Court of the United States last ruled in *Robinson v. Ariyoshi*.[220] In those twenty-five years, the court has changed. Today, four members of the Supreme Court believe that there is a judicial takings claim under the Takings Clause of the Fifth Amendment.[221] Two more members of the Court support limits on state courts under the substantive Due Process Clause.[222] Thus, a majority of six would find some limit on how far state supreme courts may go in overturning prior precedent upon which vested rights are allegedly based.

The Court in *Stop the Beach Renourishment* fashioned a two-part test.[223] First, was the right that was extinguished an established right under state law?[224] Second, are there background principles inherent in the property law of the state that would dispel any claim of a judicial taking?[225]

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[220] *See* Ariyoshi v. Robinson, 477 U.S. 902 (1986) (vacating and remanding "to the United States Court of Appeals for the Ninth Circuit for further consideration").

[221] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601-02 (plurality opinion).

[222] *Id.* at 2613 (Kennedy J., concurring in part and concurring in the judgment).

[223] *Id.* 2608-09 (plurality opinion).

[224] *See id.* at 2608.

> If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated or destroyed its value by regulation. "[A] State by *ipse dixit*, may not transform private property into public property without compensation."

Id. at 2602 (alteration in original) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

[225] *Id.* at 2608-09 (alteration in original) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)) ("For example, a regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction 'inhere[s] in the title itself, in the restriction that background principles of the [s]tate's law of property and nuisance already place

The answers to the certified questions in *Robinson v. Ariyoshi* clearly demonstrate that both parts of the plurality's test would have been met. First, the Supreme Court of Hawai'i specifically stated that the law of surplus water rights was not settled.[226] Second, the court examined the historical context in which surplus water rights developed and found that the territorial courts which developed the concept were not representative of the political will of the people of Hawai'i.[227] Third, the Supreme Court of Hawai'i relied on section 1-1 of the Hawai'i Revised Statutes,[228] a statute enacted in 1892 that states that Hawaiian custom, Hawaiian judicial precedent, and Hawaiian usage are all exceptions to the English common law.[229] In essence, such custom, precedent, and usage are part of the "background" of titles to land and water in Hawai'i.[230] Fourth, and perhaps most important, the Supreme Court of Hawai'i held that the public trust doctrine is a background principle inherent in all land and water rights in Hawai'i.[231]

A. Surplus Water Rights Were Not Established Property Rights

The certified questions sent to the Supreme Court of Hawai'i provided a basis by which it was able to articulate its view that surplus water rights, the rights that the sugar companies claims were allegedly vested, were not settled and established property

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upon land ownership.'"). Moreover, the Court did away with the "unpredictability" test of *Hughes v. Washington. Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality opinion). "The focus of petitioner's test is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established." *Id.*

[226] Robinson v. Ariyoshi, 658 P.2d 287, 306 (Haw. 1982).

[227] *Id.* at 306 n.25.

[228] HAW. REV. STAT. ANN. § 1-1 (LexisNexis 2009).

[229] *Robinson*, 658 P.2d at 306.

[230] *See id.* (stating that the cited statute had only been amended one time since it was enacted in 1892).

[231] *Id.* at 310.

rights under Hawai'i law.[232] As the court would state in its opinion answering the certified questions:

> A part of Hawai'i's case law, however, appears to have departed from this model by treating "surplus water" as the property of a private individual. We do not believe the departure represented "settled" law. Instead, as the following review of the relevant case law and its impact demonstrates, Hawai'i's law regarding surplus water was at the time of *McBryde* in such a state of flux and confusion that it undoubtedly frustrated those who sought to understand and apply it. The difficulty of insuring an equitable distribution of unevenly flowing waters in the face of competing claims and increasing demands made the delineation and application of a simplistic doctrine of ownership well nigh impossible. *McBryde* was brought to us for decision in this context.[233]

Surplus water rights, according to the Supreme Court of Hawai'i, were always subject to other undefined rights:

> Thus, in the one hundred and twenty five years between the Māhele and the *McBryde* opinion this court had issued three separate opinions respecting surplus water, with more than a decade between each. Each treated surplus water differently and in none of them did the court even attempt to clearly define or quantify the nature of this right. Any reference to the problem was confined to the

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[232] *See id.* at 294 (certified question six asked: "Until *McBryde* . . . was decided, had the issue of who owned surplus water been a settled question in Hawaii law?").

[233] *Id.* at 306 (footnote omitted).

> discussion of the undelineated rights of others to a watercourse.[234]

The court went on to emphasize that surplus water rights were not settled law:

> We do not believe that the concept of surplus water had ever been sufficiently delineated so that ownership of such water could be considered settled to a point where further development of the doctrine was precluded.[235]

The court proceeded to analyze the few territorial precedents on surplus waters.[236] It concluded by noting that even the sugar companies, in their own briefs to the trial court and the supreme court, had noted that the concept of surplus water was not a firmly established principle: "Thus, even in the original *McBryde* action, the parties implicitly conceded that, far from being settled, the law governing surplus water was in a state of flux and confusion and that the court had both the power and duty to reassess and resolve the situation."[237]

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[234] *Id.* at 308.

[235] *Robinson*, 658 P.2d at 308-09.

[236] *Id.* at 309.

[237] *Id.* at 309-10.

> Many of these problems [regarding uncertainty in the concept of surplus water rights] were recognized in the arguments presented by the parties before this court in the original *McBryde* action.
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> . . . .
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> The positions urged by the private parties in the original appeal ran the gamut of conceivable formulations. Gay & Robinson characterized *Carter* [*v. Territory*, 24 Haw. 47 (1917)] as engendering "[fifty-two] years of uncertainty[.]" . . .
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> . . . .
>
> McBryde . . . argued for the retention of *Carter*, not only as existing law of the land but as consistent with the practices of the

Accordingly, surplus water rights were not an established property right.[238]

B. Historical Circumstance as a Background Principle

Moreover, the court held that *McBryde Sugar Co. v. Robinson* can only be understood when viewed against the unique political background of Hawai'i.[239] Hawai'i was a sovereign nation of its own: the Kingdom of Hawai'i from 1840 to 1893.[240] Hawai'i was recognized as an equal sovereign by the United States.[241] The Kingdom of Hawai'i, a constitutional monarchy, had a developing common law that recognized Hawaiian custom and usage.[242] Water, under the laws of the Kingdom of Hawai'i, was not private property.[243] Water was a communal resource.[244]

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ahupuaa from time immemorial. However, it argued in the alternative that:

> "If this court determines that the rule of *Carter v. Territory* as to surplus storm and freshet flow should no longer be the law of Hawaii, then [the court should adopt] . . . some other just rule."

Id. at 309.

[238] *See id.* at 310 (stating that a public trust was imposed on the water).

[239] *See id.* at 306 (discussing the confusion around the law of surplus water rights to be determined in *McBryde*).

[240] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 116.

[241] Michael M. McPherson & Stephanie M. Parent, *Native Hawaiians*, 21 ENVTL. L. 1301, 1314 n.71 (1991).

[242] D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, 323 (1998).

[243] *See* Robinson v. Ariyoshi, 658 P.2d 287, 306 (Haw. 1982) ("Prior to 1848 land and its usufructs within the [K]ingdom of Hawaii were the property of the king."). But to say that water, a usufruct, was the "property" of the king was in effect to establish that water was a communal resource owned in part by the people. *See* Kathryn Nalani Setsuko Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of* Rice v. Cayetano, 15 ASIAN AM. L.J. 9, 12 (2008). Private ownership of lands was not introduced until 1848. *Id.*

[244] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 138.

The Kingdom of Hawai'i was overthrown in 1893.[245] The overthrow was designed not only to seize political control of government, but also to capture the Supreme Court of Hawai'i.[246] The rebels, largely American businessmen with strong ties to the growing and dominant sugar industry, needed the supreme court.[247]

Laws that favored the communal sharing of water in riparian fashion, essential for native taro cultivation, needed to be changed to benefit sugar.[248] In order for the sugar industry to thrive, water had to be transferred from one watershed to another.[249] Hence, water could not be a communal entity; it had to be privately owned. In 1893, the new Supreme Court of Hawai'i, now under rebel control, had no qualms about privatizing water.[250]

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[245] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 102 (1998).

[246] *See generally* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 118 (discussing the changes during the "post-overthrow period" and explaining that the elite and powerful, particularly the sugar industry, captured the supreme court).

[247] *See generally id.* at 105 (discussing the influence of the sugar industry on the supreme court and its justices in controlling Hawai'i's social and economic structure).

[248] *See generally id.* at 113 (explaining that the privatization of water for sugar was detrimental for taro cultivation). Taro was grown on the windward side of the Hawaiian Islands. Sugar grew best on the hot, dry leeward sides of the islands. *See* Christine Daleiden, *Hawaii's Ditch System: Water Allocation After the Sugar Cane*, 10-JUL HAW. B.J. 28, ¶¶ 4-5 (2006). Sugar needs great amounts of water. *See id.* ¶ 3 & n.3. Water had to be privatized so as to transfer water from the wet windward sides of the islands to the hot, dry leeward side where sugar grew best. *See id.* ¶¶ 4-5.

[249] *See generally* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 118 (discussing that the change in water rights influenced by the dominant sugar industry differed greatly from the customary Hawaiian practice of communal water ownership).

[250] *See* Peck v. Bailey, 8 Haw. 658, 671 (1867) (decision of a single justice of the Supreme Court of Hawai'i). *Peck* was significant in that it was the first decision to allow the use of surface water for sugar. Thus, its publication in

Thus, in a series of decisions from 1895 to 1917, the concept of surplus water was used to capture, as private property, large amounts of water that were formerly communal and riparian.[251]

In place of the monarchy, a provisional government ruled from 1893 to 1894.[252] In 1894, the Republic of Hawai'i was established as the successor to the provisional government.[253] In 1898, the United States, without conducting a plebiscite among the people of Hawai'i, annexed the Hawaiian Islands.[254] Annexation was achieved by the unilateral act of the United States—by a joint resolution, not by a treaty.[255]

From the period beginning in 1893 and lasting until statehood in 1959, the Supreme Court of Hawai'i and the decisions rendered by that court were dominated by the needs of the large sugar interests known as the "Big Five."[256] Consistently, justices of the Territorial Supreme Court of Hawai'i were appointed from the very

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1893, after the overthrow, was timed to influence cases that involved conflicts between sugar and taro uses.

[251] *See* Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 14 Haw. 50 (1902); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Carter v. Territory, 24 Haw. 47 (1917).

[252] Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Monogamy*, 8 YALE J.L. & HUMAN. 105, 113 (1996).

[253] *Id.*

[254] *See* Van Dyke, *supra* note 245, at 103-04 & n.49; *see also* Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 490-93 (1995) (explaining that a majority of the Hawaiian people did not approve of the annexation).

[255] Chock, *supra* note 254, at 490.

[256] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 105. The Big Five were the five largest sugar merchants in Hawai'i. *Big Five—Hawaii History—Short Stories*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=29 (last visited Mar. 24, 2012).

law firms that represented the large sugar interests.[257] Unsurprisingly, the Supreme Court of Hawai'i during the territorial period reaffirmed the concept of surplus water rights.[258]

This pattern did not change during Hawai'i's territorial period from 1898 to 1959.[259] The justices of the Supreme Court of Hawai'i during the territorial period were selected by the President of the United States.[260] The people of Hawai'i could not vote for the President,[261] nor was the governor of the territory elected by the people.[262] The justices of the Supreme Court of Hawai'i during the territorial period were selected by the President based on

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[257] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 105-06.

[258] Robinson v. Ariyoshi, 658 P.2d 287, 306-07 & n.25 (Haw. 1982) (explaining that the supreme court during the territorial period used the concept of surplus water rights). As the Supreme Court of Hawai'i, through Chief Justice Richardson, stated in *Reppun*:

> [O]ur decision [in the earlier 1973 opinion of *McBryde v. Robinson*] was premised on the firm conviction that prior [territorial] courts had largely ignored the mandates of the rulers of the [k]ingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable society.
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> . . . .
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> We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. *McBryde* was a necessary and proper step in the rectification of basic misconceptions concerning water "rights" in Hawaii.

Reppun v. Bd. of Water Supply, 656 P.2d 57, 67-69 (Haw. 1982).

[259] *See* Elizabeth Ann Ho-oipo Kala'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 97 (1996) (discussing reversal of private water ownership in 1959).

[260] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 105.

[261] *Id.*

[262] *Id.* at 107 n.36; *see also* Chang, *Missing the Boat*, *supra* note 8, at 165.

recommendations of the Secretary of the Interior.[263] These justices were inevitably selected from the large law firms that supported the sugar interests.[264]

The chief justice, in his own words, explained the imposition of Western practices on Hawaiian law:

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of our [s]upreme [c]ourt beginning after [s]tatehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[265]

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[263] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 105-06 (explaining that Justice Richardson recalled in an interview that the Secretary of the Interior had a hand in appointing the justices).

[264] *Id.* at 105.

[265] MacKenzie, *supra* note 22, at 6-7 (quoting William S. Richardson, Spirit of Excellence Award Acceptance Speech at the ABA Spirit of Excellence Awards Luncheon (Feb. 10, 2007)).

Territorial law had supplanted the principles and practices of the Kingdom of Hawai'i with Western property law.[266]

> To Chief Justice Richardson, the precedent and jurisprudence of the territorial period was not 'Hawaiian'—not 'pono['—that is, "harmonious" or "righteous."] . . . The [c]hief [j]ustice saw his duty as returning the law to those with 'deep roots' in and a 'profound love' of [Hawai'i]. Territorial precedent could be set aside.[267]

McBryde Sugar Co. v. Robinson was thus a corrective decision. It restored communal water practices in place of private ownership of water.[268]

Chief Justice Richardson was the second chief justice to serve after statehood.[269] He was the longest-serving chief justice after statehood.[270] He was a product of the political change that came with statehood.[271] With statehood, the governor was elected by the

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[266] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 118.

[267] *Id.* at 118-19; *see* Pai 'Ohana v. United States, 76 F.3d 280, 282 (9th Cir. 1996) (citations omitted) (citing Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Planning Comm'n, 903 P.2d 1246, 1269 (Haw. 1995)) ("[C]ommon law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of [Hawai'i]. In so holding, the [Supreme Court of Hawai'i] reiterated the fact, well-established in Hawaiian property law, that 'customary and traditional rights . . . flow from native Hawaiians' pre-existing sovereignty,' and were not extinguished by Hawaii's entry into the United States.").

[268] *See* McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1338 (Haw. 1973).

[269] *See generally* MacKenzie, *supra* note 22 (explaining that he was appointed in 1966, which was seven years after statehood).

[270] *See generally id.* (recognizing that he served on the Supreme Court of Hawai'i for sixteen years after being appointed in 1966).

[271] *See generally* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 107 & n.36 (discussing the jurisprudential change that corresponded with Hawaiian political change).

people by popular vote.[272] The governor chose the justices of the Supreme Court of Hawai'i.[273] Thus, those justices reflected the broad coalition that had elected Governor Burns—Japanese Americans, Chinese Americans, Filipinos, and others who made up the Democratic Party.[274] Clearly, the Supreme Court of Hawai'i after statehood would be a different kind of court.[275]

The governor, elected by the new middle class, selected those who were outsiders during the period of provisional government, republic, and territory.[276] A new judiciary meant a new jurisprudence.[277]

In this fashion, the decision to approve statehood for Hawai'i, with the concomitant result of an elected governor and a new kind of supreme court, constituted a political mandate for a new Hawaiian jurisprudence.[278] Support for statehood, both in Washington and in Hawai'i, was support for fundamental changes in Hawai'i—and one such change was the composition of the court.[279] With a new composition, the Supreme Court of Hawai'i could not, and did not, simply reaffirm property and tort rules that had disadvantaged the average person.[280]

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[272] *Id.* at 106.

[273] *Id.*

[274] *Id.*

[275] *See id.*; *see also* DODD, *supra* note 20, at 54, 80 n.37 (describing the composition of the court before and after statehood).

[276] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 111-12 (quoting Williamson B.C. Chang, Law and the Reconstruction of Communal Property Values 1-3 (2010) (unpublished manuscript) (on file with author)).

[277] *Id.* at 106.

[278] *Id.* at 107.

[279] *Id.*

[280] *See* DODD, *supra* note 20, at 54 (showing the Richardson court's shift from traditional Anglo-American law).

> Thus, there should have been little surprise that the Richardson [c]ourt, now constituted by persons selected by the new, popularly elected governor, would challenge the jurisprudence set down by the

"The decisions of the Richardson [c]ourt were not sudden and radical departures from settled law."[281] It is fair to assert that "[c]hanges in the governance of Hawai'i, as well as changes in the manner in which law was interpreted," had to be foreseen and wholly expected "by both those in Washington as well as in Hawai'i."[282]

C. Section 1-1 of the Hawai'i Revised Statutes Justifies McBryde Sugar Co. v. Robinson

Section 1-1 of the Hawai'i Revised Statutes is "the statutory tool by which the" Supreme Court of Hawai'i can correct erroneous intervening law by resurrecting past precedents, custom, and usage.[283]

> Territorial Supreme Court [of Hawai'i]. It would be unrealistic to expect that the new court, made of persons from different classes and different backgrounds than past courts, would simply rubber-stamp the jurisprudence of the past.

Chang, *Perpetuated in Righteousness*, *supra* note 14, at 106.

[281] *Id.* at 107.

[282] *Id.*

> To have expected the judicial decisions of the [Supreme Court of Hawai'i] to simply reaffirm earlier precedents of another political era would have been unrealistic. It would be similar to expecting the first . . . Supreme Court [of the United States] to blindly follow the precedents of the English law, or to expect that a new Supreme Court appointed in the aftermath of the election of President Aquino of the Phillipines, would be required by the rules of stare decisis to uphold all the precedents of the prior Court, appointed by former President Marcos.

Chang, *Missing the Boat*, *supra* note 8, at 166.

[283] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 119-20.

> For Chief Justice Richardson, . . . section 1-1 was the most important of Hawai'i's laws. On many occasions he would emphasize to his law clerks the central importance of section 1-1. For example, Justice Robert Klein recalled, as a law clerk for Chief Justice Richardson, being taught and reminded by the [c]hief [j]ustice of section 1-1. It was the vehicle that connected jurisprudence of the State of Hawai'i

It was designed, as of 1892, to incorporate the common law of England and the United States as the law of the Kingdom of Hawai'i. It had important exceptions: common law was displaced if there was conflicting Hawaiian precedent, custom or usage. The original section 1-1, the Judiciary Act of 1892, was reenacted by the [t]erritory and by the [s]tate. Today, it reads as follows:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the [s]tate, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or the [s]tate.

For the [c]hief [j]ustice, section 1-1, or the principle of 'looking back' to the laws and values of the [k]ingdom, was present in all of his critical property decisions: *Palama v. Sheehan*, *In re Ashford*, *County of Hawaii v. Sotomura*, *In re Sanborn*, *Reppun v. Board of Water*

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with the laws, values and customs of the Kingdom of Hawai'i. Justice Klein would use section 1-1 in the landmark *PASH* decision by which he, for the court, incorporated section 7-1, as applicable to modern property rights.

Id. at 119 n.78; *see also* Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Planning Comm'n, 903 P.2d 1246, 1258 (Haw. 1995) (showing how Justice Klein applied section 1-1 and 7-1 to modern property rights).

> *Supply, Kalipi v. Hawaiian Trust Co.*, and . . . *Robinson v. Ariyoshi.*[284]

The chief justice would use section 1-1 to correct the law, disregarding decisions that arose from the periods in which the Hawai'i judiciary was the product of a disenfranchised public.[285] Thus, in footnote twenty-five of *Robinson v. Ariyoshi*, the chief justice distinguishes the territorial period as a regime in which the people of Hawai'i were essentially non-self-governing:

> We recognize that HRS [section] 1–1, which was enacted during the monarchy in 1892 and amended only once, in 1903, might be construed to adopt territorial caselaw as among the "Hawaiian judicial precedent" representing the common law of the [s]tate. We do not at this time, however, address the question of whether those cases can truly be considered "Hawaiian" rather than federal precedent for we wish only to point out that the development of the law governing surplus water took place during a period when the resources of our land were subject to an authority which did not directly represent Hawaii's people and that the most recent pronouncements

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[284] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 119-20 (footnotes omitted); *see, e.g.*, Kalipi v. Hawaiian Trust Co., 656 P.2d 745 (Haw. 1982); Robinson v. Ariyoshi, 658 P.2d 287 (Haw. 1982); Reppun v. Bd. of Water Supply, 656 P.2d 57 (Haw. 1982); United Congregational & Evangelical Churches of Mo Ku'aikaua & Helani v. Kamamalu, 582 P.2d 208 (Haw. 1978); *In re* Sanborn, 562 P.2d 771 (Haw. 1977); County of Hawaii v. Sotomura, 517 P.2d 57 (Haw. 1973); McBryde Sugar Co. v Robinson, 504 P.2d 1330 (Haw. 1973), *aff'd on reh'g*, 517 P.2d 26 (1973) (per curium); *In re* Kelley, 445 P.2d 538 (Haw. 1968); *In re* Ashford, 440 P.2d 76 (Haw. 1968); *In re* Robinson, 421 P.2d 570 (Haw. 1966).

[285] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 137-38.

> on the subject arise more immediately from the authority of those who will be forever affected by it.[286]

Nonetheless, this view of section 1-1 as expressed in footnote twenty-five was extremely controversial.[287] "The jurisprudence by which the [c]hief [j]ustice looked past territorial precedent to resurrect the values and principles of the [k]ingdom [was] sternly challenged."[288] Critics, such as Judge Pence, "sharply denounced the logic of footnote [twenty-five],"[289] which implied that territorial precedents of the Supreme Court of Hawai'i were not entitled to the same precedential value as decisions rendered during statehood or the period of the Kingdom of Hawai'i:

> In the quotation from *Robinson II*, *supra*, is to be found note [twenty-five]. That note typifies the frantic search on the part of the Richardson [c]ourt to justify its sudden reversal of settled law. Because the rights of the konohiki as to surplus water were first decided during the [m]onarchy and the [r]epublic, and after 1897 by judges and justices of the Territorial Supreme Court [of Hawai'i] appointed by the President of the United States, therefore, said the [a]nswers, all those opinions "were not the product of local judiciary[.]" . . . Pure chauvinistic sophistry! The Richardson [c]ourt would hold for naught the Constitution of the State of Hawaii, [a]rticle XVIII, [s]ection 9—"Continuity of Laws:" ". . . all

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[286] *Id.* at 117; Robinson v. Ariyoshi, 658 P.2d 287, 306 n.25 (Haw. 1982).

[287] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 120.

[288] *Id.*

[289] *Id.*

> existing . . . judgment . . . titles and rights shall continue unaffected . . . ."[290]

Ultimately, after some thirty years, that jurisprudence succeeded.[291] It has become accepted in Hawai'i.[292]

> First, it would restore to Hawaiians a sense of sovereignty. Second, it would unify both Hawaiians and the immigrant communities that had come to work the plantations. Third, it would be a jurisprudence appropriate for an island-based society. Fourth, and perhaps most important, that jurisprudence would withstand constitutional attack [as a judicial taking].[293]

D. The Public Trust Doctrine Constitutes a Legitimate Background Principle

The Supreme Court of Hawai'i declared that state ownership of waters, as used in the first *McBryde* opinion, was a restatement of the public trust over Hawai'i's waters:

> The *McBryde* opinion, however, did not supplant the konohikis with the State as the owner of surplus waters in the sense that the State is now free to do as it pleases with the waters of our lands. In *McBryde*, . . . we indeed held that at the time of the introduction of fee simple ownership to these islands the king reserved the ownership of all surface waters. But we believe that by this reservation, a public trust was imposed upon all

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[290] Robinson v. Ariyoshi, 676 F. Supp. 1002, 1019 n.35 (D. Haw. 1987), *vacated*, 887 F.2d 215 (9th Cir. 1989); *see also* HAW. CONST. art. XVIII, § 9; *Chang, Perpetuated in Righteousness*, *supra* note 14, at 114 n.57.

[291] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 120.

[292] *Id.*

[293] *Id.*

> waters of the kingdom. That is, we find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.[294]

Thus, this imposition of a public trust over Hawai'i's waters was critical to the court's finding that surplus water rights were inconsistent with the public trust doctrine.[295] In finding that the State had a public trust, and not merely a police power, over the waters, the court noted that the trust enabled the State to "necessarily limit[] the creation of certain private interests in [the] waters."[296]

Under the plurality's two-tiered test in *Stop the Beach Renourishment*, the public trust doctrine is a background principle that serves to undermine assertions of a judicial taking and is a

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[294] Robinson v. Ariyoshi, 658 P.2d 287, 310 (Haw. 1982) (citation omitted).

[295] *See id.* at 311.

[296] *Id.* at 310 n.31 ("The state unquestionably has the power to accomplish much of this through its police powers. We believe however, that the [k]ing's reservation of his sovereign prerogatives respecting water constituted much more than a restatement of police powers[;] rather[,] we find that it retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited the creation of certain private interests in the waters." (citation omitted)).

defense to an alleged judicial taking.[297] The public trust doctrine was the background principle used by the Supreme Court of California in the "Mono Lake" Case, *National Audubon Society v. Superior Court*,[298] a case which otherwise would have been challenged as a judicial taking.

McBryde Sugar Co. v. Robinson survives the plurality's test in *Stop the Beach Renourishment* for a judicial taking. First, surplus water rights were never an established right.[299] Second, Hawai'i is unique both politically and legally.[300] Territorial precedents, decisions that established surplus water rights, were not representative of the political will of the majority of the people.[301] As such, these decisions were subject to correction during statehood. Third, section 1-1 of the Hawai'i Revised Statutes empowers the Supreme Court of Hawai'i to resurrect Hawaiian judicial precedent, custom, and usage from the period of the Kingdom of Hawai'i.[302] Fourth, the public trust doctrine is a background principle that inheres in water titles.[303]

VI. CONCLUSION

Finally, what can we learn from the Hawai'i experience in light of *Robinson v. Ariyoshi*?

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[297] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597-98, 2611 (2010).

[298] Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 712 (Cal. 1983) (en banc).

[299] *See* discussion *supra* Part V.A.

[300] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 115 ("Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture.")

[301] *See id.* at 114 ("[T]erritorial precedent was not really 'Hawaiian' precedent for the purposes of the law. Hawai'i, during the territorial period, had been captured by the federal government.").

[302] *See* discussion *supra* Part V.C.

[303] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 130-31.

First and foremost, the fear of chaos arising from the application of the judicial takings doctrine is a real fear. In *Robinson*, one can see that the use of the doctrine of judicial takings can run amok, creating nearly unbearable tensions between the state supreme courts and the lower federal courts.[304] The collateral attack in the *Robinson* litigation was lengthy[305] and costly,[306] and it produced nothing in terms of real results.[307] During the trial and its appeals, state and federal relations were strained, and great uncertainty prevailed as to the state of the law.[308] Moreover, the business of allocating water was paralyzed.[309]

Second, despite what the plurality in *Stop the Beach Renourishment* says about the application of the *Rooker* doctrine,[310] that doctrine is not an effective brake on the ability of

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[304] *See* procedural discussion *supra* Part IV.

[305] The federal litigation began in 1975 and ended in 1991. *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); Robinson v. Ariyoshi, 933 F.2d 781 (9th Cir. 1991).

[306] Fees that were awarded to the plaintiff under title 42, section 1983 of the United States Code and later rescinded were in the amount of 4 million dollars. Chang, *Perpetuated in Righteousness*, *supra* note 14, at 135; *see also Robinson*, 933 F.2d at 786 (reversing the award of attorneys' fees).

[307] *See* Martin et al., *supra* note 259, at 102 (explaining that the collateral attack lasted 15 years, but the State never actually deprived the sugar companies of their water rights, so the issue was not ripe for decision by the Supreme Court of the United States); *see also* Chang, *Missing the Boat*, *supra* note 8, at 151 ("In a very real sense *Robinson* is much ado about nothing.").

[308] *See* discussion *supra* Part IV (detailing the tension between the courts and parties).

[309] *See* Martin et al., *supra* note 259, at 105-06 (stating that large water consumers had to resort to the political process for allocation of water).

[310] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2609 (2010) (plurality opinion) ("The finality principle that we regularly apply to takings claims would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would

federal district courts to collaterally attack the judgments of state courts that are perceived to have committed a judicial taking.[311] *Robinson* shows that the *Rooker* doctrine is not applicable where there are procedural due process claims arising alongside the judicial takings claims.[312] As long as a party can claim that it has not been heard on the constitutional question of a judicial taking, the *Rooker* doctrine is not applicable.[313]

Third, the animosity that surrounded the *Robinson* litigation demonstrates that the judicial takings doctrine fosters an unwarranted suspicion that state courts are bent on destroying property rights.[314] That is a suspicion that is no more applicable to state courts than it is to federal courts.[315] If state supreme courts

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come to this Court. If certiorari were denied, the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against a legislative or executive taking approved by the state supreme-court opinion; the matter would be res judicata.").

[311] Robinson v. Ariyoshi, 753 F.2d 1468, 1472-73 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986). In *Robinson*, the losing parties in *McBryde* were able to pursue a collateral attack despite the *Rooker* doctrine because they were alleging procedural due process violations as well. *See* Chang, *Unraveling* Robinson, *supra* note 8, at 82-83. Thus, they did not have a full and fair opportunity to litigate their constitutional claims before the allegedly offending state supreme court. *See Robinson*, 753 F.2d at 1472-73. As such, the *Rooker* doctrine was not applied in *Robinson*. *Id. Rooker* would thus not protect state sovereignty in the typical judicial takings claim—where the claim arises from the action of a state supreme court. *See id.* at 1472 ("Otherwise, if *Rooker* were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, *Rooker* would swallow the 'full and fair opportunity to litigate' limitation to res judicata clearly established elsewhere by the Supreme Court.").

[312] Barros, *supra* note 9, at 950.

[313] *See* Robinson v. Ariyoshi, 753 F.2d at 1471-72.

[314] *See* dicussion *supra* Parts II, III.

[315] *See* Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. &

can take property under the plurality's test, then so can the federal courts and the Supreme Court of the United States.[316] The only real bulwark against judicial takings for state supreme courts, federal courts, and the Supreme Court of the United States is self-regulation.[317]

Fourth, if possible, judicial takings claims should be viewed primarily as procedural due process violations.[318] It is often the case that the judicial takings claim which surfaces first in a state supreme court will arise alongside a procedural due process claim.[319] When a state supreme court ruling surprises a party with an unexpected or unpredictable result, it is usually the case that the parties have not had an opportunity to argue the takings claim before such an argument can be made in a petition for certiorari.[320]

PUB. POL'Y 107, 108 (2011) (discussing how any judicial decision implementing change could be considered a taking, whether by a state or federal court).

[316] The Supreme Court of the United States, in retroactively overturning prior decisions, can be accused of taking property as well. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906-67 (2007); Lawrence v. Texas, 539 U.S. 558, 577-78 (2003); United States v. Hatter, 532 U.S. 557, 566-67 (2001); State Oil Co. v. Khan, 522 U.S. 3, 21-22 (1997); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85 (1989); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 382 (1977); *see also* David L. Siegel, Stop the Beach Renourishment: *Essay Reflections from Amici Curiae: Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 469-70 (2010).

[317] Chang, *Unraveling* Robinson, *supra* note 8, at 75-76 (discussing how courts were historically viewed differently from the legislative and executive branches as self-regulating). The Tenth Amendment accords to the states certain realms separate and insulated from federal intervention. U.S. CONST. amend. X.

[318] *See* Barros, *supra* note 9, at 936-40 (discussing the substantive due process approach to takings by Justice Kennedy in *Stop the Beach Renourishment*).

[319] *See, e.g.*, Robinson v. Ariyoshi, 658 P.2d 287, 293 & n.7 (Haw. 1982) (providing an example of a judicial takings case being heard by the Supreme Court of Hawai'i in which procedural due process violations were also alleged).

[320] *See, e.g.*, Chang, *Perpetuated in Righteousness*, *supra* note 14, at 125-27 (showing an example of a time when the involved parties are surprised by a

In such a case, it is the Supreme Court of the United States that must first consider the validity of the argument as to the judicial taking—that is, whether the alleged right taken was established.[321]

This was the situation in *Stop the Beach Renourishment*. However, it should not be the Supreme Court of the United States that must first sort out whether state law was settled, whether background principles exist, and whether property rights were established.[322] Those are questions of state law—questions that state supreme courts can best answer.[323] The remedy is for the Supreme Court of the United States to remand or certify questions to the allegedly offending state supreme court, as was done in *Robinson*, to clarify whether its judgment amounts to a judicial taking.[324]

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court's ruling and have not yet had the opportunity to argue a takings claim before petitioning for certiorari).

[321] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600-01 n.4 (2010) ("We ordinarily do not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it. But where the state court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review." (citations omitted)) (citing Adams v. Robertson, 520 U.S. 83, 89 n.3 (1997) (per curium); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 677-78 (1930)).

[322] *See* Barros, *supra* note 9, at 933-34; *see generally Stop the Beach Renourishment*, 130 S. Ct. 2592.

[323] Chang, *Perpetuated in Righteousness*, *supra* note 14, at 104 ("It is settled law in the United States that the various states are sovereign as to the law of property. Thus, each state supreme court is the final arbiter with regard to the property law of that state." (footnotes omitted)).

[324] *See, e.g.*, Robinson v. Ariyoshi, 658 P.2d 287, 292 (Haw. 1982) (showing an example of a state supreme court answering certified questions from a federal court). Given the extraordinary costs to federalism that abound if the Supreme Court of the United States were to enjoin a state supreme court opinion on the grounds of a judicial taking, the Supreme Court should, in adopting a policy of initial respect for state supreme courts, give that state supreme court every opportunity to be the first to clarify its allegedly confiscatory holdings. *See, e.g.*, *id.* (showing an example of a federal court

It is the state supreme court that knows its property law best.[325] It is the state supreme court that should be ruling on questions of state property law, as was done in the answers to the certified questions in *Robinson*.[326] The Supreme Court of the United States is not the best institution to do the "heavy lifting"—the careful sorting out of state property law to determine if rights were absolutely established.[327] It is the state supreme courts that should perform this task. Certification, as was done in *Robinson*, should be the Supreme Court's first step in any petition for certiorari that alleges a judicial taking.[328]

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allowing the state supreme court to clarify state law by answering certified questions); *see also* Chang, *Unraveling* Robinson, *supra* note 8, at 59, 73-74.

[325] *See* Chang, *Perpetuated in Righteousness*, *supra* note 14, at 104; *see also* Chang, *Unraveling* Robinson, *supra* note 8, at 96 (explaining that state courts have sovereignty over state law).

[326] *See Robinson*, 658 P.2d at 292. The fear here is that the state courts will change their rulings so as to diminish or avoid the takings claim—avoiding the implications of confiscation. This is the suspicion as to the answers to the certified questions in *McBryde*. *Id.* It is true that the decision in *McBryde* was modified in certain key respects—the prohibition against the transfer of waters out of the watershed was eliminated—undermining one of the two main complaints of the sugar company. *Id.* at 295. Yet, what is wrong with a state supreme court, in a subsequent opinion, or open certification, modifying and adjusting its earlier holding? Parties are often required to return to their state supreme courts for clarification of the meaning of decisions that effect fundamental changes. *Id.* at 292-94. Courts often modify their earlier landmark opinions in later opinions that reflect on the wisdom of earlier holdings. *Id.* (showing the Supreme Court of Hawai'i's modification of its earlier opinion in *Robinson*).

[327] *See* Barros, *supra* note 9, at 932.

[328] *See Robinson*, 658 P.2d at 292 (showing that questions were remanded for certification to the Supreme Court of Hawai'i). *Stop the Beach Renourishment* shows the folly of imposing upon the Supreme Court of the United States the responsibility and task of ferreting out the meaning of state law. What did the *Sand Key* decision hold? *See generally* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2596 (2010) (showing the difficulty for the Supreme Court of the United States to interpret

Fifth, what one learns from both *Robinson* and *Stop the Beach Renourishment* is that a "judicial takings" doctrine will always exist, even if there are only four votes for such a claim.[329] Namely, even if it never materializes, the myth of a judicial taking still has substantial power. The pull of the takings claim is far too strong for it to ever fully disappear.[330]

This author does not believe there should be a judicial takings doctrine; it is incoherent and impossible to administer,[331] raises stubborn problems of procedure,[332] and undermines the sovereignty of state supreme courts.[333] Nonetheless, the fear of a judicial taking will also be present, meaning in effect that judicial

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state law without an adequate record); Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., 512 So. 2d 934, 941 (Fla. 1987). This is the job and the province of state courts. *See* Chang, *Unraveling* Robinson, *supra* note 8, at 96 (explaining that state courts have sovereignty over state law). The Supreme Court of the United States is used to ruling on cases in which there is an adequate and complete record before them. Adams v. Robertson, 520 U.S. 83, 90-91 (1997) (per curiam). In *Stop the Beach Renourishment*, there was no adequate record arising from the state proceeding as to the meaning of Florida state law. *See Stop the Beach Renourishment*, 130 S. Ct. at 2600-01 n.4 (citing *Adams*, 520 U.S. at 89 n.3) ("We ordinarily do not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it.").

[329] *Stop the Beach Renourishment*, 130 S. Ct. at 2597; McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1339 (Haw. 1973). *McBryde* and *Stop the Beach Renourishment* each show instances of judicial takings. *See* Bradford H. Lamb, Robinson v. Ariyoshi*: A Federal Intrusion upon State Water Law*, 17 ENVTL. L. 325, 350 (1987); *see also Stop the Beach Renourishment*, 130 S. Ct. at 2597. In *Stop the Beach Renourishment*, Scalia's opinion on the conditions for establishing a judicial taking garnered four votes. *See Stop the Beach Renourishment*, 130 S. Ct. at 2597. Scalia was joined only by Chief Justice Roberts and Justices Thomas and Alito. *Id.*

[330] Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia's Shifting Sands*, 35 VERMONT L. REV. 423, 435 (2010).

[331] *See* Siegel, *supra* note 316, at 467.

[332] *Id.* at 471-72.

[333] *Id.* at 461-465.

takings will always be around—and that may have positive benefits in actuality.[334]

The judicial takings doctrine is like a weapon; in terms of the judiciary, imagine it to be a kind of atomic weapon—it should never be used, but the very contemplation of such a weapon, even if only in the mind, is both a deterrent and a force that compels greater transparency.[335] Thus, the Supreme Court of the United States need do nothing more after *Stop the Beach Renourishment*, for the strong intuitive appeal of a judicial takings doctrine,[336] whether or not it actually exists,[337] is a brake on state supreme courts that may go too far. If they go too far, they must be ready to justify their decisions by demonstrating that the vested rights allegedly taken were not established and that there are background principles which justify the progressive evolution of state law.

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[334] *Id.* at 472-74.

[335] In *Robinson*, the threat of a judicial takings claim compelled the Ninth Circuit to certify questions to the Supreme Court of Hawai'i. *See* Robinson v. Ariyoshi, 658 P.2d 287, 292 (Haw. 1982). In answering those questions, the supreme court had to reassess its earlier decision in *McBryde v. Robinson*. *Id.* at 292, 294. Answering the certified questions compelled the Supreme Court of Hawai'i to be more explicit and more specific as to what it had done. *See id.* at 292 (showing the court's further attention to each certified question on remand).

[336] *See supra* notes 143-48, 150 and accompanying text discussing the " 'layman's view' of a taking."

[337] *See supra* note 175 and accompanying text; *see also* Siegel, *supra* note 316, at 459 (discussing the idea that the concept of judicial takings may or may not actually exist and stating that the Supreme Court of the United States is unlikely to adopt a judicial takings doctrine).