UNRAVELING *ROBINSON V. ARIYOSHI:* CAN COURTS "TAKE" PROPERTY?

Williamson B. C. Chang*

*"We are not final because we are infallible, but we are infallible only because we are final."***

The most critical question currently affecting Hawaii's state judicial system is its relationship with the federal district courts of Hawaii. Decisions of the Hawaii Supreme Court have been set aside by federal district courts on three occasions in the 1970's.[1] This pattern of nullification is of obvious importance to the independence and sovereignty of the state judiciary.[2] In particular, if the United States district court decision in *Robinson v. Ariyoshi*[3] is sustained on appeal, then the state supreme

* Assistant Professor of Law, University of Hawaii. A.B., Princeton University, 1972; J.D., Boalt Hall School of Law, University of California, Berkeley, 1975. Member California and Hawaii Bars. The author is a special deputy attorney general representing the Chief Justice of the Hawaii Supreme Court in the case discussed in this article, Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed,* Civ. No. 78-2264 (9th Cir., filed Nov. 29, 1978), and has filed an amicus brief on behalf of the state judiciary in that case and is co-counsel for the State in Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978). The author wishes to emphasize that the views expressed in this article are solely his own and do not represent the opinions of any state agency with which he may be associated.

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** Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[1] Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) (State ownership of beach land below the vegetation); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed,* Civ. No. 78-2264 (9th Cir., filed Nov. 28, 1978) (State "ownership" of surplus waters); Patterson v. Burns, 327 F. Supp. 745 (D. Hawaii 1971) (constitutionality of state statute).

[2] For a thorough discussion of the importance of an independent judiciary, see Richardson, *Judicial Independence: The Hawaii Experience,* 2 U. HAWAII L. REV. 1 (1979).

[3] 441 F. Supp. 559 (D. Hawaii), *appeal docketed,* Civ. No. 78-2264 (9th Cir., filed Nov. 28,

court will have been deprived of the ability to perform its principal responsibility; that is, to resolve questions of state law with finality. The logic of *Robinson v. Ariyoshi* allows district court review and invalidation of a state judicial decision that modifies or overrules prior state law in a manner judged "unexpected" by the federal court. The ramifications of this type of collateral attack are so great as to completely reorder our system of federalism.

First, the United States Supreme Court would no longer perform its role, clearly set forth by statute,[4] as the exclusive appellate court for state judgments. Under the district court's logic in *Robinson*, a reordering of the parties[5] and an allegation that a judicial decision "took" private property[6] suffices to create federal question jurisdiction, allowing a federal district court to negate a state trial court judgment or appellate decision.[7] Moreover, since the court in *Robinson* failed to articulate clear rules as to what is an "unexpected" state ruling,[8] federal intervention may be based on the subjective judgment of the district court that a state court went too far.

Second, state court decisions would be deprived of the preeminent requirement of finality. If the *Robinson* type of collateral attack is allowed, there will be two methods of reviewing state court decisions: appeal and writ to the United States Supreme Court[9] or collateral attack in the federal district courts. Under certiorari or appeal to the Supreme Court there is a statutory time bar that renders the state supreme court judg-

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1978). As of January 1980, the judgment in Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978), had not been entered, but the government is likely to appeal that case as well. For a description of the issues involved in *Sotomura*, see Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979).

[4] 28 U.S.C. § 1257 (1976).

[5] In the original state court action, the plaintiff was the McBryde Sugar Company, the owner of the *ilis kupono* of Eleele and Kuiloa, situated in the southeastern portion of the Hanapepe Valley. The defendants were (1) the territory, now the State of Hawaii, the owner of the *ahupua'a* of Hanapepe, located in the southwestern portion of the valley, (2) the partnership of Gay & Robinson and its individual partners, owners of the *ilis kupono* of Manuahi and Koula, located in the northwestern and northeastern portions of the valley, and (3) the small owners, owners of all other lands in the valley.

In the federal district court action, the plaintiffs were the Robinson family, and the defendants included (1) State officials, (2) McBryde and Olokele Sugar Companies, and (3) the small owners. On appeal to the Ninth Circuit, the Robinsons, Olokele, McBryde, and the small farmers all argued as appellees. In other words, they supported affirmance of the district court opinion.

[6] 441 F. Supp. at 562, 580.

[7] *Id.* at 586.

[8] *Id.* at 583: *"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." The court referred to the original decision and the supreme court's opinion on rehearing as *McBryde I* and *McBryde II*, respectively. *See* text accompanying notes 19 to 31 *infra*.

[9] 28 U.S.C. § 1257 (1976), *quoted in* note 96 *infra*.

ment final.[10] Collateral review in a federal district court would not, however, be subject to a uniform time limit.[11] Aggrieved parties could conceivably attack the state judgment years later.[12] Without finality, the value of a state court judgment is substantially impaired.

Third, under the reasoning in *Robinson*, state courts would no longer be the final arbiters of state law, thus undermining a fundamental premise of federalism.[13] The principle that state courts are free to modify and overrule themselves must be as acceptable as the unquestioned ability of the United States Supreme Court to overrule and modify federal law.[14] Yet, the impact of the *Robinson* decision contravenes this pillar of federalism by empowering lower federal courts to rule invalid those decisions which are deemed radical modifications of precedent. Questions of state law therefore remain issues of state law only so long as they do not change. Once a state court has effected profound change through decisional law, it has created federal question jurisdiction. The integrity of the state ruling and the traditionally inherent power of the court to shape state law are at the mercy of the local federal district courts.

In light of these considerations, *Robinson v. Ariyoshi* must be viewed as more than a case concerning water rights, *ilis kuponos, ahupua'as*,[15] and

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[10] *Id.* § 2101 sets time limits for appeal or application for a writ of certiorari from various types of decisions. Subsection (c) requires that an application for a writ of certiorari in a civil suit like *McBryde* be taken within ninety days, although a Supreme Court Justice may extend the period for sixty days for good cause.

[11] *Robinson* involved a claim under 42 U.S.C. § 1983 (1976). Because section 1983 does not contain a statute of limitations, federal courts apply the state statute that would be applicable in the most closely analogous state action. Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977); Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977); Meyer v. Frank, 550 F.2d 726, 728 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977). Hence, the limitations statute applied is often different even though the nature of the section 1983 action is the same. *Compare* Wooten v. Sanders, 572 F.2d 500 (5th Cir. 1978) (two-year Georgia statute of limitations for analogous tort action), *with* Proctor v. Flex, 567 F.2d 635 (5th Cir. 1978) (one-year Louisiana statute of limitations for analogous tort action).

[12] Sotomura v. County of Hawaii, 402 F. Supp. 95, 103-05 (D. Hawaii 1975) (six-year statute of limitations appropriate to *Robinson*-type claim by analogy to state statute of limitations governing compensation on account of deprivation of land after registration).

[13] Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

[14] "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930).

[15] The terms *ilis kuponos* and *ahupua'a* were explained in Territory v. Bishop Trust Co., 41 Hawaii 358, 361-62 (1956):

> The unit of land was the *ahupuaa* [*sic*], usually running from the mountains to the sea. Within the *ahupuaa* were a number of subdivisions, each of which was called an *ili* [or *ili* of the *ahupua'a*]. This division was for the convenience of the chief, administered by a *konohiki* or agent appointed by the chief. (It is only in the later statutes that the chiefs or landlords are referred to as *konohikis*.) It had no existence separate from that of the *ahupuaa*, except the so-called *ili ku* [*ili kupono*] or independent *ili*, although the independent *ili* paid tribute to the king.

Hawaiian history. The decision changes the fulcrum in the delicate equilibrium between state and federal courts and, if upheld on appeal, will subordinate all state judicial systems within the Ninth Circuit to the federal district courts that reside in their respective states.

Perhaps an appropriate metaphor of the conflict between the federal courts over Hawaii water rights is that of a traffic accident. The "collision" in this case was between the decision of the Supreme Court of Hawaii in *McBryde Sugar Co. v. Robinson*[16] and the injunction issued by the federal district court in *Robinson*, voiding the *McBryde* decision. The analogy is helpful not only to emphasize the force of the collision between the state and federal courts,[17] but also to show that issues are framed depending upon the forum from which one views the case.

One phenomenon common to both vehicular and judicial collisions is that persons with different perspectives will give divergent explanations of what has happened. Yet, these conflicting descriptions each interpret the same event. Similarly, as one views the questions posed in *Robinson*, one eventually concludes that some characterizations of the issues are merely different legal labels to describe the same event.

Second, in viewing this judicial collision there is a temptation to judge fault in an either-or sense. One is prone to say, "If driver *A* were right, then driver *B* must be wrong." In our case the danger is in constructing a theorem that if the *McBryde* decision were "wrong," then *Robinson* is "right," and if *Robinson* were "wrong," then *McBryde* is "right." This absolutist approach has focused commentary solely on the substantive water law issues;[18] that is, the divergent interpretations of water rights as manifested in *McBryde* and *Robinson*. Commentators reason that if the *McBryde* court constructed a new doctrine on a false foundation of misread Hawaiian water rights cases, then the *Robinson* court's interpretation of water law must be correct. Ergo, federal intervention was proper because it achieved the "right" result.

However, the first and most critical question to be asked about this "collision" is whether the second vehicle, namely, the *Robinson* decision, had a right to be in the intersection in the first place. If it did not, then the analytical care with which the district court approached the first vehicle, the merits of the *McBryde* decision, loses its impact. In other words, the central issue is whether the federal court had proper jurisdiction. If there was no power to intervene and nullify, then the Hawaii Supreme Court's decision in *McBryde* must be final regardless of its consistency

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[16] 54 Hawaii 174, 504 P.2d 1330 (1973), *cert. denied*, 417 U.S. 976, *cert. denied and appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

[17] Moreover, as in most accidents, the accusations of fault were quite vigorous. *See* 441 F. Supp. at 566.

[18] *See* Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori & Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141 (Hawaii Institute for Management and Analysis in Government 1977).

with prior water rights law.

This article therefore does not attempt to discuss the different interpretations of Hawaiian water rights as expressed in *McBryde* and *Robinson*. Rather, it addresses the threshold issue of the jurisdictional power of federal courts and attempts an investigation of the circumstances under which district courts may rightfully "collide" with state tribunals. Before proceeding, a brief description of the two "vehicles" is in order.

McBryde is the Hawaii Supreme Court decision culminating some twenty years of litigation regarding the extent to which various parties have rights to the water in the Hanapepe River. The parties involved were the State of Hawaii[19] and the various landowners whose property adjoined the river and streams.[20] The supreme court affirmed the trial court's determination of appurtenant water rights, defined as the right to take the amount of water historically needed to grow taro.[21] But the court set down two rulings that surprised the parties.

First, the court held that all the surplus water in the State, including normal and storm and freshet surpluses, is the property of the State.[22] In large part, the suit originally had been instituted to determine the rights of the various parties to the surplus waters in the stream. Absent the explicit urging of any of the parties, the supreme court held that the State owned all the surplus waters.

The second ruling was that water rights acquired by virtue of ownership of lands adjoining a stream could not be transferred to other parcels.[23] The basis of this ruling was, in part, that section 577 of the Revised Laws of Hawaii (1925)[24] codified the doctrine of riparianism as it existed in Massachusetts in 1850. This ruling was particularly devastating to the sugar plantations since the large agricultural users have continuously transported water to other watersheds. Such irrigation systems had been the foundation for the growth of the sugar industry.[25]

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[19] The State was involved in litigation because it was the owner of the *ahupua'a* of Hanapepe.

[20] *See* note 5 *supra*.

[21] 54 Hawaii at 189, 504 P.2d at 1319-40.

[22] *Id.* at 200, 504 P.2d at 1345.

[23] *Id.* at 191, 198, 504 P.2d at 1341, 1344.

[24] The statute remains substantially unchanged and is currently codified at HAWAII REV. STAT. § 7-1 (1976) which provides as follows:

> **Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

[25] *See* Brief for Amicus Curiae, Hawaiian Sugar Planters' Ass'n at 8-12, Robinson v.

All parties except the State sought a rehearing before the Hawaii Supreme Court.[26] The court granted a rehearing but denied petitioners' request to argue the constitutionality of the earlier decision.[27] The supreme court affirmed its prior decision[28] with two justices dissenting.[29] Petitioners then sought review in the United States Supreme Court on the bases of appeal and certiorari. The Court denied review.[30]

Prior to the Court's denial, petitioners instituted attack on the *McBryde* decision in the United States District Court for the District of Hawaii,[31] seeking a declaratory judgment that the *McBryde* decision was unconstitutional. The district court assumed jurisdiction[32] and on October 26, 1977, issued its opinion, *Robinson v. Ariyoshi.* The court held that the Hawaii Supreme Court decision in *McBryde* was an unconstitutional "taking" of private property and therefore void.[33] State officials were enjoined from attempting to enforce the *McBryde* ruling,[34] and the case was partially remanded to the state trial court.[35]

Several institutional interests are directly affected by the water law issues in *Robinson.* The sugar industry, while applauding the federal decision, is not yet out of the canefield. Still to follow is the decision of the Ninth Circuit and potential review in the United States Supreme Court. Until there is a final resolution, the business of buying and selling water rights[36] will be paralyzed by the uncertainty of the appellate process.

Ariyoshi, No. 78-2264 (9th Cir., filed Nov. 28, 1978). The sugar growers assert that most modern plantations are "absolutely dependent" on the presently extensive irrigation systems. *Id.* at 14-15.

[26] The parties seeking a rehearing were Olokele Sugar Company, McBryde Sugar Company, Gay & Robinson, and the nonappellant small owners.

[27] The Hawaii Supreme Court limited reargument to the following points: (1) The relevance of section 7-1 of the Hawaii Revised Statutes (1968) to the water rights of the parties and (2) the legal theories which support a conclusion that appurtenant water rights can be used on other parcels. McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 261, 517 P.2d 26, 27 (1973), *cert. denied,* 417 U.S. 976 (1974). See note 24 *supra* and accompanying text for an explanation of the statute involved.

[28] McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 517 P.2d 26 (1973), *cert. denied,* 417 U.S. 976 (1974).

[29] *Id.* at 261, 262, 517 P.2d at 27 (Marumoto, J., and Levinson, J., dissenting).

[30] 417 U.S. 962 (1974).

[31] The Supreme Court dismissed the appeal for want of jurisdiction and denied certiorari on June 17, 1974. *Id.* Petitioners filed their complaint in the federal district court more than four months prior to the Supreme Court dismissal. Civ. No. 74-32 (D. Hawaii, filed Feb. 2, 1974). The fact that the Court dismissed the *McBryde* appeal is another intriguing aspect of the *Robinson* litigation inasmuch as dimissal for want of a substantial federal question is considered an adjudication on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[32] The district court asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2283 (1976) and 42 U.S.C. § 1983 (1976). 441 F. Supp. at 562.

[33] 441 F. Supp. at 585-86.

[34] *Id.* at 586.

[35] *Id.*

[36] *See id.* at 577:

> Since the earliest recognition of private property in Hawaii, rights to surface waters

Moreover, various county and state agencies such as the board of water supply, the department of health, and the department of land and natural resources await clarification of the water rights situation in order to implement plans to regulate and preserve Hawaii's diminishing water supply.[37] Furthermore, environmentalists and downstream owners, intrigued by the implications of the riparian doctrine adopted by the Hawaii Supreme Court, are waiting for possible vindication of that decision in order to use it as the legal basis for preserving the natural state of stream waters.[38]

It is against this background of concern over the status of water rights and the incipient judicial conflict over ultimate power to resolve the controversy that this article attempts to unravel the complexities in *Robinson v. Ariyoshi*. While there probably will be no final resolution until the United States Supreme Court once again acts on this case, it is definitely of value to the various interests involved to dissect *Robinson* and to predict how it may be decided.

I. JUSTICE STEWART AND THE LAYMEN'S VIEW OF A "TAKING"

The crucial question in *Robinson* is not whether the Hawaii Supreme Court was correct in its interpretation of Hawaiian water rights, but whether the federal court had the power to judge the propriety of the state court's interpretation of these rights. In other words, did the federal district court properly assert jurisdiction?

Jurisdiction in *Robinson* was based *inter alia*[39] on both 28 U.S.C. § 1331 (1976), federal question jurisdiction, and 28 U.S.C. § 1343 (1976), which confers jurisdiction to redress rights arising under the Constitution or federal statutes in violation of the Civil Rights Act of 1871, 42 U.S.C. §

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have been bought, sold, leased and otherwise dealt with as other private property. The government has bought and paid for privately owned surface water and all branches of the Hawaiian government have consistently dealt with surface water however owned or acquired by the government in all respects and in the same manner as private persons.

[37] As of November 1979, the Hawaii State Board of Land and Natural Resources has adopted Regulation 9, Control of Groundwater Use, for regulation of groundwater under chapter 177 of the Hawaii Revised Statutes (1976); the board has proposed designation of the Pearl Harbor Basin for regulation under the statute. The State Department of Land and Natural Resources, as part of its functional plan for water resources development mandated by chapter 226 of the Hawaii Revised Statutes (Supp. 1979), has proposed regulating the development and use of all ground and surface waters by a permit system. *See* HAWAII DEP'T OF LAND AND NATURAL RESOURCES, STATE WATER RESOURCES DEVELOPMENT PLAN 133-65 (Draft, July 1979).

[38] In Reppun v. Board of Water Supply, Civ. No. 50121 (1st Cir. Ct. Hawaii, Oct. 15, 1979) plaintiffs asserted that the upstream diversion of water by the defendant Honolulu Board of Water Supply illegally deprived them of water. In particular, plaintiffs asserted that under the *McBryde* decision, as owners of riparian land bordering a stream, they have the statutory right to "running water." Trial Brief for Plaintiff at 9.

[39] See note 32 *supra*.

1983 (1976). In essence, both sections require the existence of a federal question. Although the records were in both cases different, *Robinson* was based on essentially the same "factual" situation as *McBryde*,[40] a situation primarily involving nonfederal, state property law issues concerning water rights. The question therefore arises as to what constituted the new issue upon which federal question jurisdiction was asserted. The *Robinson* court purports to answer this question through its analysis of two constitutional provisions.

First, the court said that the Hawaii Supreme Court's decision in *McBryde* and the state court's conduct in reaching that decision were a deprivation of procedural due process, a right derived from the fourteenth amendment.[41] Petitioners had alleged a multitude of due process violations in the form of procedural irregularities.[42] The *Robinson* court found that the failure of the state court to grant petitioners an opportunity on rehearing to argue the constitutional questions was itself sufficient basis for reversal.[43] This will be referred to as the procedural due process claim.

The taking argument was the second federal question that the court grasped. The fifth amendment,[44] as applied to state action by the fourteenth amendment, prohibits a taking by the state without just compensation.[45] In the view of the federal court, a taking occurred when the Hawaii court, through its decision in *McBryde*, diminished the water rights of petitioners.[46] This will be termed the substantive due process claim.

The approach taken by the court in *Robinson* was not a very tradi-

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[40] Both *Robinson* and *McBryde* were actions ultimately seeking a clarification of the ownership of water rights of the various parties. The evidentiary records presented before the Hawaii Supreme Court and the federal district court were, of course, different. The conduct of the Hawaii Supreme Court in its issuance and the content of its *McBryde* decision were the focus of the federal court action. Nevertheless, the facts regarding the conduct of the litigants in their use and reliance on water rights over time were the same before both tribunals.

[41] 441 F. Supp. at 580.

[42] Petitioners alleged that the *McBryde* decision deprived them of due process by: (1) Overruling earlier decisions that the normal surplus of water of a stream belongs to the *konohiki* (owner of the land on which it arises) and he is free to transfer it out of the watershed; and (2) deciding issues that were neither raised nor tried in lower court, thus depriving the parties of an opportunity to present evidence. *Id.* at 580-83.

[43] *Id.* at 580.

[44] U.S. CONST. amend. V provides, in pertinent part: "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

[45] Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

[46] As the district court noted in *Robinson:*

> It may be that the court did not conceive of its action as a taking—it said the plaintiffs never *had had* any such water rights, ergo, no taking! Just that simple!
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> . . . For over a century neither the State nor its predecessors in title ever attempted to take water rights without either purchase or condemnation, but *McBryde I took the plaintiffs' water rights for the State* . . . .

441 F. Supp. at 585 (emphasis added at "took the plaintiffs' water rights for the State").

tional application of the fifth amendment. One normally associates a taking with the executive branch of government through use of the power of eminent domain. It is obviously a taking when the State confiscates private property to build a highway. But, has a taking occurred when a state supreme court decides that a piece of property belongs to neither claimants *X* nor *Y* and declares that the property belongs to a third party, *Z*? The *Robinson* court found no logical distinction between confiscation of property to build a highway and the elimination of the party's water rights in *McBryde*.[47] The court's logic was simple. The petitioners had water rights prior to the *McBryde* decision; they did not have these rights after the *McBryde* decision. Ergo, the decision took these rights away. Moreover, it was the "State" which took these rights by acting through a state entity, the judiciary.

One might label this the "laymen's view of a taking." The term "lay" as used by Professor Bruce A. Ackerman[48] 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.[49] 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, much of the constitutional law of takings is built upon this ordinary, lay view of what a "taking" is all about.[50]

The court in *Robinson* appears to share this lay view of a taking, that it must be a taking because government cannot be allowed to condemn without compensation merely by clothing its actions in the sanctity of the judiciary.[51] The court quoted Justice Stewart's concurring opinion in

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[47] *Id.* at 583-86.

[48] *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88-167 (1977).

[49] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 456 (1978).

[50] *Id.* at 459-60 (footnote omitted).

[51] 441 F. Supp. at 585 (quoting Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)). See text accompanying note 61.

Hughes v. Washington[52] in applying the protections of fourteenth amendment due process to the judiciary.[53] Both opinions reason by implication: The fifth amendment applies to the States by incorporation through the fourteenth amendment;[54] since the fourteenth amendment applies to the actions of courts in other contexts,[55] the fifth amendment also must apply to the courts by virtue of the fourteenth amendment.

Although *Hughes* was decided on different grounds,[56] the concurring opinion of Justice Stewart discussed an alternative issue very similar to the question before the court in *Robinson*.[57] The Supreme Court of Washington had decided in 1946 that title to gradual shoreline accretions vested in the owner of the adjoining land.[58] Twenty years later, the Washington court reversed itself and held that the same constitutional provision, properly construed, terminated the rights of such landowners.[59] For the lay observer this judicial about-face was clearly a taking. Property that had existed under the first decision was taken away by the second. Justice Stewart posed the problem in this manner: "Does a prospective change in state property law constitute a compensable taking . . . ?"[60] His affirmative answer demonstrates the force of the argument that it is so because it must be so:

> [A] State 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 unpredictable change in state law thus inevitably presents a federal question for the determination of this Court . . . .[61]

Justice Stewart also concluded that the fifth amendment applies to state courts. "Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than

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[52] 389 U.S. 290, 294 (1967) (Stewart, J., concurring).

[53] 441 F. Supp. at 585 (quoting 389 U.S. at 298 (1967)).

[54] Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

[55] *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (due process clause); Shelley v. Kraemer, 334 U.S. 1 (1948) (equal protection clause).

[56] The majority opinion in Hughes v. Washington, 389 U.S. 290 (1967), decided that federal, not state, law was controlling on the question of ownership of future accretions to lands conveyed by the United States to a private owner prior to statehood. The state court had held that state law controlled. The State's constitution, the state court concluded, denied the landowner any future rights to accretion. Thus, the majority did not consider the question of whether an overruling judgment of a state court could "take" property vested by an earlier decision. Justice Stewart, on the other hand, argued that if the state constitution had unambiguously denied the landowner the right to future accretion, then the question of change in state law would raise the taking issue.

[57] *See* 389 U.S. at 294-98 (Stewart, J., concurring); note 56 *supra*.

[58] Ghione v. State, 26 Wash. 2d 635, 175 P.2d 955 (1946).

[59] Hughes v. State, 67 Wash. 2d 799, 410 P.2d 20 (1966), *rev'd*, 389 U.S. 290 (1967).

[60] 389 U.S. at 295-96 (Stewart, J., concurring).

[61] *Id.* at 296-97 (citations omitted).

through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."[62]

Fundamental to the lay view of Justice Stewart and the court in *Robinson* is the fear that a State can avoid the obligation to compensate so long as its highest court simply rules that the object seized is not property or that it has always belonged to another. Property could disappear in the sense that a judicial panel "finds" the "true" rule that the claimant's property never existed in the first place. Such evanescent rights would not be compensated under the fifth amendment.

Thus, the primary basis for the court's decision in *Robinson* was the lay view that when one's property vanishes at the hands of a governmental agency, even if that entity be the state judiciary, a taking has occurred and compensation must be paid. The following section will discuss a secondary proposition implicit in the *Robinson* opinion that there are constitutional due process limitations on the ability of courts to overrule prior doctrines upon which persons have relied.[63]

II. Retroactive Overruling and Due Process

The Hawaii Supreme Court's decision in *McBryde* is complicated by all of the constitutional problems associated with retroactive overruling. Retroactive overruling is endemic to the judicial process and is obviously required in any legal system that seeks to avoid being forever locked into ancient doctrines. Moreover, for many years retroactive decisions were thought to be the only possible, logical kind.[64] Retroactive overruling was a necessary element of traditional Blackstonian thinking. When judges overruled an earlier decision, they were not deemed to have "pronounce[d] a new law, but to [have] maintain[ed] and expound[ed] the old one."[65]

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[62] *Id.* at 298. The *Robinson* court quoted most of this rationale. 441 F. Supp. at 585.

[63] 441 F. Supp. at 585 (citing Muhlker v. New York & Harlem R.R., 197 U.S. 544 (1905)).

[64] The controversy surrounding the constitutionality of prospective overruling was resolved in Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932), where the Supreme Court, in an opinion by Justice Cardozo, stated that courts were free to choose between retroactive and prospective overruling.

[65] Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1, 2 (1960) [hereinafter cited as Levy] (quoting 1 W. Blackstone, Commentaries * 69).

> The judge merely *finds* the preexisting law; he then merely *declares* what he finds. A prior judicial decision is not the law itself but only evidence of what the law is. Thus a later judicial decision which seems to change the law has not really changed it at all but has only discovered the "true" rule which was always the law. It follows that any judicial "change" in the law must necessarily be retroactive. It could not be otherwise, for the judge is deemed merely to be articulating what the law has always been—as though the law were, in Holmes' irony-tipped phrase, a "brooding omnipresence" and not some decision to be made by some specific court. The parties acted yesterday but the law at which the court arrives today is the law which nonetheless covered yesterday's conduct.

Id. at 2 (footnote omitted) (original emphasis).

This view of retroactive overruling consistently has drawn criticism when it resulted in the overturning of prior doctrines in property law.[66] Hardships obviously occur when a party who has relied on previously sanctioned property rights has those rights extinguished under a new decision. In Blackstonian terms, however, it would be argued that this party never had a property right in the first place. Thus, to return to the fifth amendment, there was no taking.

Due to the harshness of this view, an exception to the general rule of retroactivity has been urged in cases dealing with property rights.[67] It was asserted that the exception was necessary to assure stability in property law.[68] Realists urged the application of prospective overruling to avoid the dilemma.[69]

Prospective overruling, however, is simply not possible in a case like *McBryde* where the court is ruling upon the question of ownership. Questions of ownership and determinations of title are retroactive concepts inextricably rooted in a Blackstonian view. The judge, in his search to determine title, is "deemed merely to be articulating what the law has always been."[70]

Retroactive overruling is, therefore, the only type of overruling which is consistent with the determinations of title and ownership. When such overruling does occur, for example, when the court decides that *X* and not *Y* has always been the owner of the property, it is easy to see why a claim can be made that *Y*'s property has been taken. If the beneficiary of the decision is the State, as in *Robinson,* it is also easy to see how the overruling can be viewed as a violation of the fifth amendment if no compensation is paid. Answers to these dilemmas lie in an examination of the constitutional limits on retroactive overruling.

The first important case that requires analysis is *Muhlker v. New York & Harlem Railroad.*[71] *Muhlker* is often resurrected in discussions concerning the constitutionality of retroactive overruling.[72] The court in *Robinson* relied on it,[73] and the sugar companies frequently cited it in their post-*McBryde* arguments.[74]

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[66] *See, e.g.,* Kamau v. County of Hawaii, 41 Hawaii 527, 551 (1957) (stare decisis can be applied more flexibly in cases which do not involve "property" rights); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions,* 60 HARV. L. REV. 437, 442 (1974) (arguing that property rights should be handled on a prospective overruling basis).

[67] *See* Note, *supra* note 66, at 442.

[68] *See generally id.*

[69] *Id.* at 442-43, 447-48.

[70] Levy, *supra* note 65, at 2.

[71] 197 U.S. 544 (1905).

[72] *E.g.,* Stimson, *Retroactive Application of Law—A Problem in Constitutional Law,* 38 MICH. L. REV. 30 (1939) [hereinafter cited as Stimson].

[73] 441 F. Supp. at 585.

[74] *See* Answering Brief for Selwyn A. Robinson at 45, Answering Brief for Olokele Sugar Co. at 46, Answering Brief for McBryde Sugar Co. at 32-33, Robinson v. Ariyoshi, Civ. No.

The facts in *Muhlker* are similar to those in *McBryde*. In 1888, when Muhlker purchased his land in New York City, New York law held that the erection of an elevated railroad was not a public purpose or street use within the meaning of an 1813 statute. The statute had been interpreted by cases to mean that the owner of real estate could bring a damage suit against the builder of an elevated railroad constructed in front of his property. The New York & Harlem Railroad built an elevated railroad in front of Muhlker's property. The New York Court of Appeals reversed its prior decisions and held that an elevated railroad was a public use within the meaning of the statute. Thus, Muhlker could not sue. The United States Supreme Court, however, reversed and held that the retroactive overruling by the New York Court of Appeals deprived Muhlker of his property without due process of law. Writing for the Court, Justice McKenna said:

> When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.[75]

Although not a careful analysis of the contract clause or the fourteenth amendment, Justice McKenna's reasoning, as an expression of the lay view, seemed eminently sensible. How could Muhlker's easements to light and air which had existed under prior law be summarily obliterated by a simple declaration of the New York Court of Appeals? If the New York Legislature or the executive branch had attempted to do this, the contract clause or the fifth amendment easily could have been invoked by Muhlker to protect his rights. Thus, the question was whether the courts could accomplish by declaration what the legislature was prohibited from doing. Under the lay view, they certainly could not. Under this view the *Muhlker* decision, regardless of whether it was based on the contract clause or the due process clause, must be right. It must be so.

The continued validity of *Muhlker* squarely conflicts with the argument made here that courts cannot "take" property through their decisional processes. Although *Muhlker* never has been explicitly overruled, it has been undermined by the judicially expressed views stated in later cases;[76] namely, that there are no property rights in the decisions of

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78-2264 (9th Cir., filed Nov. 28, 1978).

[75] 197 U.S. at 570.

[76] *See, e.g.*, cases cited in note 79 *infra*.

courts and that changes in law are not a deprivation of due process.

Ten years prior to *Muhlker*, the United States Supreme Court had taken a different position in *Central Land Co. v. Laidley*.[77] The facts in *Laidley* parallel those of *Muhlker* and *McBryde*. A West Virginia court reconstrued a statute to hold that a deed, which had been valid under an earlier statutory interpretation, was invalid and that a later deed conveyed title. Answering the claim that the new construction was an unconstitutional deprivation of property without due process, the Court stated: "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States."[78] Thus, *Laidley* and *Muhlker* were at odds with each other. However, in subsequent cases the Court followed *Laidley*.[79] In fact, *Muhlker* was treated as based on the contract clause.[80] Moreover, the significance of *Muhlker* was reduced when the Court stated that the contract clause applied only to actions by the legislature.[81]

In his 1939 article, Dean Edward S. Stimson pointed out that another weakness of *Muhlker* was its reliance upon *Gelpcke v. City of Dubuque*.[82] In *Gelpcke*, a state statute authorized the issuance of municipal bonds in exchange for stock of railroad companies in order to encourage development. In several decisions the Iowa Supreme Court had upheld the constitutionality of the law. After the City of Dubuque issued bonds pursuant to the statute, the Iowa court reversed its previous decisions and invalidated the statute. The holders of the bonds sued in federal court under diversity jurisdiction to recover the money due on the interest coupons. The federal district court applied the latest Iowa decision and denied recovery. The United States Supreme Court reversed, holding that the last Iowa decision should be ignored and that the earlier decisions upholding validity should be followed.

The facts in *Gelpcke* and *Muhlker* are similar, but the procedural difference is significant. *Muhlker* was based on a direct appeal from the state supreme court decision, while petitioners in *Gelpcke* had filed suit in federal court under diversity jurisdiction subsequent to the state court decision. *Gelpcke*, however, belonged to the era of *Swift v. Tyson*[83] when

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[77] 159 U.S. 103 (1895).

[78] *Id.* at 112.

[79] Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Dunbar v. City of New York, 251 U.S. 516 (1920); Patterson v. Colorado, 205 U.S. 454 (1907).

[80] Tidal Oil Co. v. Flanagan, 263 U.S. 444, 452-53 (1924). *See* Stimson, *supra* note 72, at 51 (making the argument).

[81] Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924).

[82] 68 U.S. (1 Wall.) 175 (1864). For a discussion of this case see Stimson, *supra* note 72, at 48-49.

[83] 41 U.S. 1 (1842).

the rule of *Erie Railroad v. Tompkins*[84] was not applicable and federal courts could refuse to apply the later decisions of a state court which overruled earlier precedents upon which parties had relied. Hence, *Gelpcke* and therefore the underlying rationale of *Muhlker* are tainted by the prevailing view of the proper law to be applied in diversity actions at the time they were decided. *Gelpcke* and its progeny were completely discredited by the Court's 1938 decision in *Erie* which commanded the federal courts to apply substantive state law as determined by the state supreme court. Thus, one way of viewing *Muhlker* is that it was tenuously based on *Gelpcke*;[85] since *Gelpcke* perished after *Erie*, so did this tenuous justification for *Muhlker*.

A. Brinkerhoff-Faris *and the Substantive-Procedural Due Process Distinction*

In 1930 the Supreme Court decided *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[86] and clarified the confused situation arising after *Muhlker*. In *Brinkerhoff-Faris*, the bank claimed that the formula for assessing bank property taxes at one hundred percent of value was discriminatory because other property was assessed only at seventy-five percent of value. Six years before the action was filed, the Missouri Supreme Court had decided that the relevant statute did not give the state tax commission authority to make an adjustment and held that a suit in equity was the proper means to address unfair taxation.[87] When Brinkerhoff-Faris brought its tax refund suit in a court of equity, the Missouri court reversed its earlier decision, ruling that equity was an improper forum and the only remedy was by a claim to the tax commission. Under the new interpretation, the application to the tax commission could only be made before the tax books had been delivered to the commission. Brinkerhoff-

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[84] 304 U.S. 64 (1938). The *Gelpcke* doctrine allowed the federal district court to ignore a new interpretation by a state supreme court which "took" a person's rights. *Muhlker* was based, at least in part, on Supreme Court approval of this practice by federal district courts which had diversity jurisdiction of cases which were really "appeals" from the state supreme court. The *Erie* doctrine in 1938 eliminated the ability of the federal district court to ignore the last supreme court decision on the subject. The federal district court was thereafter compelled to apply the state supreme court decision, even though it ostensibly took property. Thus, since *Muhlker* was based on *Gelpcke* and the ability of the federal district court to choose between the earlier "nontaking" supreme court decision and the later "taking" supreme court decision, the force and effect of *Muhlker* was swept away with the advent of *Erie*.

[85] "In other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque* and *Louisiana v. Pilsbury* . . . . That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this court a good while to explain." Muhlker v. New York & Harlem R.R., 197 U.S. 544, 573 (1905) (Holmes, J., dissenting) (citations omitted).

[86] 281 U.S. 673 (1930).

[87] State v. State Tax Comm'n, 295 Mo. 298, 243 S.W. 887 (1922).

Faris had delivered its tax book before it filed suit. The state decision overruling prior law therefore completely denied Brinkerhoff-Faris a remedy.

Although the United States Supreme Court reversed the Missouri Supreme Court, the Court made an important distinction between the case before it and the *Muhlker* and *Laidley* decisions. Justice Brandeis, writing for the Court, distinguished *Brinkerhoff-Faris* on the ground that it was a denial of procedural due process, as opposed to a denial of substantive due process or the kind of taking involved in *Muhlker*. "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether it has had an opportunity to present its case and be heard in its support."[88]

Under Justice Brandeis' distinction, courts in their arbitral capacity could not commit takings in a substantive due process sense, but courts could deny due process in a fourteenth amendment, procedural due process sense. Unfortunately, the district court in *Robinson* construed *Brinkerhoff-Faris* as holding that the judiciary as well as the legislature can commit takings under the fifth amendment.[89] It is a mistake to assume that *Brinkerhoff-Faris'* use of due process includes the fifth amendment's taking provision.[90]

One commentator has asserted that Justice Brandeis' procedural-substantive due process distinction is not justified.[91] Upon deeper analysis, this rather unassuming distinction presents a brilliant means of resolving problems of federalism and separation of powers. It also constitutes a framework for conceptual clarification of the confusion surrounding the question of whether courts can take property.

B. No Substantive Due Process Claim in Robinson

The first key implication from a proper reading of *Brinkerhoff-Faris* is that there is no substantive due process claim in *Robinson*. In other words, courts in their arbitral capacity just do not "take." Thus, there is no basis for federal question jurisdiction. As Justice Brandeis stated in *Brinkerhoff-Faris:* "Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review . . . ."[92]

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[88] 281 U.S. at 681.

[89] 441 F. Supp. at 580. The error probably arose from the confusion engendered by the fact that fifth amendment substantive due process is made applicable to the states through the 14th amendment due process clause.

[90] *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

[91] Stimson, *supra* note 72, at 54.

[92] 281 U.S. at 681 (footnote omitted). The *Laclede* case refers to State v. State Tax

In terms of balancing the power between federal and state courts, denying the federal courts jurisdiction in an action based on the theory of a taking by a state supreme court decision serves the important purpose of preserving state court sovereignty. One can easily imagine the problems that would arise if federal courts could assume jurisdiction anytime a so-called taking by a state court allegedly occurred.

First, how would the federal court determine whether a taking has occurred? Justice Stewart in *Hughes v. Washington*[93] suggested a test of "unexpectedness."[94] Since federal courts have jurisdiction to determine jurisdiction, it would be left to the federal courts to fashion this law of unexpectedness and to determine when collateral attacks on state court decisions are permissible. If every "unexpected" state court decision were subject not only to United States Supreme Court review, but also to attack by a federal district court on the basis of surprise, uncertainty as to the finality of state supreme court decisions would persist well after their rendition. Even if the district court dismissed a complaint, the plaintiff would have the opportunity to appeal that dismissal to a circuit court of appeals and to get a second chance at review by the Supreme Court.

Second, the use of federal question jurisdiction based on an unexpected state decision does great violence to the principle of federalism set forth in *Rooker v. Fidelity Trust Co.*,[95] that the federal district courts are not to act as appellate courts of the states. The attempt to act in such an appellate capacity would clearly undermine the principle expressed in 28 U.S.C. § 1257 (1976)[96] that the United States Supreme Court has exclusive jurisdiction to review decisions of state courts. Furthermore, it would run counter to the unmistakable intent of Congress to refrain from giving

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Comm'n, 295 Mo. 298, 243 S.W. 887 (1922), *discussed in* text accompanying note 87 *supra*, where the State brought an action on behalf of Laclede Land & Improvement Co.

[93] 389 U.S. 290 (1967).

[94] *Id.* at 296 (Stewart, J., concurring).

[95] 263 U.S. 413, 416 (1923).

[96] 28 U.S.C. § 1257 (1976):

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

the lower federal courts power to review state court decisions.[97]

Third, granting federal courts such jurisdiction would empower them to control the rate of change in state law and in effect to decide questions of state law. If federal courts can void state supreme court decisions, as the court did in *Robinson,* then they possess a powerful tool to mold state law simply by determining what that law may not be.

Fourth, *Robinson*-type intervention would increase the case load of federal courts thereby aggravating the concern shown by Congress and the Supreme Court to reduce the federal court workload.[98] Litigation would increase in two ways: First, since every state supreme court decision which overrules prior decisions or departs from a previously expected result could, in effect, be appealed to federal district courts, the federal district courts would assume the appellate workload of the state courts; second, since the direct path of state court appeals to the Supreme Court would no longer represent a final determination in view of federal district court review, litigants would perceive the state court system as useless and tend to seek federal jurisdiction in cases where the state courts have concurrent jurisdiction.

Although there is no indication that Justice Brandeis developed the procedural-substantive due process distinction with an eye for these state-federal problems, the dichotomy serves the very important function of preserving state sovereignty in our federalist system. The intervention based on procedural due process which Justice Brandeis sanctioned in *Brinkerhoff-Faris* avoids these institutional problems since it does not allow the court to judge the substance of the state court decision but only requires an adjudication of the fairness of the proceedings. The logical remedy in such a situation would be to remand the case to the state court for it to hold a proper hearing. Thus, there would be no "voiding" of the state supreme court decision as in *Robinson.* The state court would only be ordered to provide an adequate opportunity to be heard.

C. When Courts Legislate

Underlying this distinction between procedural and substantive due process is a rather simple view of the intentions of the Framers of the Constitution that the fifth amendment was meant to apply only to the executive and legislative branches and not to the judicial branch of government. Viewed in this light, the fifth amendment fits in with other constitutional provisions that prohibit the executive and legislative branches of government from diminishing vested property rights without compen-

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[97] *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity,* 64 CALIF. L. REV. 943, 945-48 & 947 n.22 (1976).

[98] *See* authorities cited in *id.* at 943 n.1.

sation. For example, the contract clause of the Constitution,[99] which prohibits states from passing laws that impair contracts, has been held applicable only to the actions of legislatures and not courts.[100] Similarly, the ex post facto clause[101] of the Constitution prohibits Congress and the State legislatures from passing statutes that retroactively alter criminal laws, but it also has been held inapplicable to decisions by courts.[102]

Placed in a framework where the contract clause prohibits legislatures from destroying existing contract rights and the ex post facto clause prevents legislatures from retroactively applying criminal laws, the fifth amendment protects existing property rights from legislative destruction. All these provisions were intended by the Framers of the Constitution and the Bill of Rights to be the substantive limits on the power of the legislature and not the judiciary.[103]

Since Blackstonian jurisprudence was clearly the dominant legal philosophy at the time the Constitution was framed, it is understandable that the original Framers applied these provisions only against the actions of the legislature and not the judiciary. The "government" which needed limiting was the legislature, not the judiciary. It was the legislature that "made" laws. To the Blackstonian mind, the judiciary did not make law but rather "found" the true law. Thus, a judge was not a lawmaker and did not act directly against the individual. In a Blackstonian sense, only legislatures could deprive persons of property, and courts would not be subject to the limitations of the fifth amendment.

Obviously, the concept that courts never make laws has changed.[104] Courts have the power to rewrite statutes,[105] reopen schools,[106] control

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[99] U.S. CONST. art. I, § 10: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . . "

[100] Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924).

[101] U.S. CONST. art. I, § 9, para. 3.

[102] Ross v. Oregon, 227 U.S. 150 (1913) (courts not prohibited from giving retroactive effect to overruling decisions).

[103] It should be noted that the fifth amendment "takings" provision is only a limitation on the actions of the Federal Government and not state governments. From the time of the Constitution until 1868 when the 14th amendment was passed, the courts used the contract clause to prohibit state legislatures from depriving individuals of property rights. Property was thus defined and protected on the basis of contract rights. In 1897, the Supreme Court held that the fifth amendment applied to the states through the 14th amendment due process clause, and thus there was no longer a need for reliance on the contract clause. *See generally* Stimson, *supra* note 72, at 31 n.4.

Since the contract clause clearly has no applicability to the actions of courts, the protection of property from retroactive laws prior to 1868 extended to cover only legislative and not judicial action. There is no indication that the nature of the fifth amendment changed after 1868 such that the protection of property from retroactive laws was extended to judicial action.

[104] *See* Levy, *supra* note 65, at 2.

[105] *See, e.g.*, State v. Huelsman, 60 Hawaii 71, 588 P.2d 394 (1978) (extended-term sentencing).

[106] *See* Griffin v. County School Bd., 377 U.S. 218, 233 (1964).

prison admissions,[107] redistribute tax revenues,[108] design legislative reapportionment schemes,[109] and order bussing of public school children.[110] Not much is left of the old adage: the legislature makes the laws and the courts interpret them. Some ask whether courts should be allowed to legislate so freely.[111] But the question does not concern the wisdom of such action since all might agree that too much legislating would be bad practice. The real question is whether the limits of judicial legislation are to be self-imposed by the state courts or enforced by some outside institution such as a federal district court. Existing appellate jurisprudence is somewhat schizophrenic;[112] while adhering to Blackstonian principles in applying property concepts, everyone recognizes that courts can reach results indistinguishable from legislative actions.

When a court goes too far in legislating, as the court is accused of having done in *McBryde*, adherents of the lay view find it logical to restrict the courts with the same constitutional limitations that apply to legislative actions. The court in *Robinson* similarly expressed this view:

> It [the *McBryde* decision] was strictly a "public-policy" decision with no prior underlying "legal" justification therefor. The majority wanted to see streams running down to the sea on an all-year-around basis. Knowing that this was squarely contrary to the accepted state of water rights law of Hawaii, the court first declared that the rule of stare decisis did not apply to water rights law. In this case stare decisis interfered with the court's policy![113]

Thus, another of the underlying rationales of the *Robinson* opinion is the belief that when courts act in a legislative, policymaking mode they, too, should be subject to the same substantive limits placed on legislatures. The problem with this approach is that it would essentially undermine the sovereignty and mediation function of state judicial systems.

First, judges always, in a crude sense, have "made" law. This is no modern phenomenon. The fact that we are now willing to admit that courts legislate is a rather recent development. Moreover, it is an intellectually more honest view of the tasks courts have been required to perform. Creation and interpretation of law cannot be clearly separated. Although courts do not create law by writing statutes, they certainly create law by filling statutory gaps and giving content to constitutional lan-

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[107] *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. State, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

[108] *See* Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (requiring transfer of public funds to improve prison conditions).

[109] Reynolds v. Sims, 377 U.S. 533, 586 (1964).

[110] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971).

[111] *See, e.g.*, Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[112] Levy, *supra* note 65, at 3.

[113] 441 F. Supp. at 566-67.

guage. In each case, the real lawmaker is the one with the final authority to say what the law is.

> There may be justification in a clerical tradition for unwillingness to recognize the responsibility of the law interpreter in himself giving the law its direction. In the theological tradition, the church doctors or the rabbinical judges regarded themselves as construing the word of God. The word of God must remain untouched, but nonetheless the interpreters had to find a way of giving to it their own human application for their own times. God said in the Old Testament: an eye for an eye. And that fiat could not be altered. But the judicial sages regarded such intentional maiming as inhumane. Thus an eye for an eye remains an eye for an eye; but it means, said the sages, due reparation. We lawyers, however, are not operating in a theological tradition—at least not professedly so—and once appellate judges face honestly their ineluctable lawcreating function, this critical pivot of our legal system will no longer be "among the most neglected questions of legal scholarship."[114]

The advancing realism of courts has provided the basis for innovative techniques such as prospective overruling. The fact that we are now willing to describe the legal process in an honest fashion should not be used to place the courts under the same constraints as the legislature, constraints which would seriously impair the ability of the courts to serve their intended functions.

Second, equating courts with legislatures would skew the judicial process by requiring, in effect, prospective overruling in cases dealing with contracts, property, and criminal law where dispute resolution is only meaningful in a retroactive context. Propsective overruling would clearly contradict retroactive concepts in the law such as ownership.

Third, although the intent of the court in *Robinson* may have been only to intervene in cases of the most egregious policymaking, the problem lies in agreeing upon the criteria to be employed to determine which decisions are truly "policy" decisions. What criteria would a federal judge use? It seems inevitable that the thrust of the inquiry would consider the motivations and subjective views of the state court judges. For example, the federal court would be put in the position of inquiring whether the court in *McBryde* intended to act in a legislative sense. Such an inquiry would be impossible if not inherently misleading.

Fourth, courts often legitimately act in a policymaking sense. In attempting to construe statutes in a manner consistent with the intent of the draftsmen, courts must discern the policy to be effectuated. When dealing with common law issues where there is no statutory language to guide them, the courts often make law by arranging it to serve broadly stated public policies. It was in this type of situation that the court in *McBryde* acted. The court perceived the law of water rights to be unset-

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[114] Levy, *supra* note 65, at 5-6 (footnotes omitted).

tled.[115] It seized the policies evidenced by a long-ignored statute to serve as a guide.[116] Arguably, the court made law only in the sense that all courts that operate in voids or areas of uncertainty make law. Intervention by a federal court based upon a fear that a state court is acting in a legislative mode would create the same four federal-state institutional problems mentioned earlier in Part IIB.[117]

Thus, for a number of reasons based on practical considerations as well as legal theory, there can be no substantive due process claim arising out of a state supreme court decision which changes law. There is no property, in a fifth amendment sense, in the decisions of a court. Hence, there is no property to be taken by a court which chooses to overrule a prior decision. Furthermore, in a jurisprudential sense, courts which determine ownership, cannot "take" property. Moreover, the Framers of the Constitution, as part of the scheme to limit the legislature, could not have intended the fifth amendment to apply to the decisions and judgments of courts. Lastly, while the Supreme Court in *Muhlker* implied that the fifth amendment could, in certain situations, apply to courts, that decision has not been followed and has been superseded by the procedural-substantive due process distinction of *Brinkerhoff-Faris*.

III. Procedural Due Process

Brinkerhoff-Faris clearly implies that a procedural due process question may exist upon which to base federal jurisdiction. Petitioners in *Robinson* understandably raised a number of due process claims, specifically as follows: (1) That they were not granted the right to argue the constitutionality of the taking on rehearing before the Hawaii Supreme Court, (2) that the Hawaii Supreme Court improperly failed to give res judicata or stare decisis effect to previous cases, (3) that the Hawaii Supreme Court resolved the case in a manner not urged by any of the parties, and (4) that the Hawaii Supreme Court ruled on issues not properly brought before it. Although detailed analysis of these claims is beyond the scope of this article, a few brief comments are appropriate.

As to issue (1), that failure to allow argument on the constitutional taking issue was a denial of due process, the first question is whether there was a right to a rehearing in the first place.[118] If not, it is difficult to

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[115] McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 181-87, 504 P.2d 1330, 1335-39 (1973), *cert. denied*, 417 U.S. 976, *cert. denied and appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

[116] *Id.* at 185-87, 191-93, 504 P.2d at 1338-39, 1341-42.

[117] See text accompanying notes 94-98 *supra*.

[118] Arguably, there is no right to rehearing under the Hawaii Supreme Court Rules, which provide:

> **Rehearing.** (a) Time and Form. A petition for rehearing may be presented only within 10 days after the filing of the opinion or ruling unless by special leave additional time is

construct a constitutional right to argue all issues once a rehearing was granted. Since rehearing is discretionary,[119] not a matter of right, the court must also have discretionary power to limit the issues considered on rehearing. Whether the court abused its discretion by denying argument on the alleged constitutional issue, thereby violating due process, is inevitably a question controlled by the substantive due process issue.

In any event, if it is true that courts cannot take property, refusing to allow argument on that ground was harmless error. The court in *McBryde* apparently decided that the constitutional claims were not substantial. If it is true that courts cannot take, then the Hawaii Supreme Court was essentially correct in its judgment that the issue was inappropriate on rehearing.

As to point (2), that the supreme court failed to give res judicata or stare decisis effect to previous cases, the question of the court's right to overrule is, in effect, merely a restatement of the original taking issue. Whether res judicata must be applied is a question of state law to be determined by the highest court of the State.[120] Thus, the Hawaii Supreme Court's implicit or explicit rejection of prior state law in applying res judicata in *McBryde* is clearly within the court's power to fashion the res judicata law of the State.

Suppose that this new application of law or failure to apply res judicata is a radical departure from previous Hawaii law. Does that raise a constitutional question? It cannot create a fifth amendment claim if one agrees with the analysis that courts cannot take. Does it nevertheless constitute a procedural due process violation? Arguably not, since the remedy would not be procedural. In other words, if the federal court were to intervene on the basis that the state supreme court's failure to apply res judicata was a denial of procedural due process, it would be forcing the state court to modify its substantive law of res judicata;[121] that is, to confine the holding in *McBryde*. to prior decisional law. The remedy would dictate

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granted during such period by a justice. The petition shall briefly and distinctly state its grounds and shall include points and authorities relied on in support thereof and shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay.

(b) Argument; Reply; Allowance. No reply to a petition for rehearing will be received unless requested by the court or by a justice who concurred in the opinion or ruling and no petition for rehearing will be granted in the absence of such a request. There shall be no oral argument on a petition for rehearing.

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[119] Since there is no contrary statutory requirement, the supreme court is free to deny petitions for rehearing, as it frequently does. *See, e.g.*, American Ins. Co. v. Takahashi, 59 Hawaii 102, 577 P.2d 780 (1978) (rehearing denied).

[120] Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1939) (res judicata effect of state judgment is governed by state law). *See* Comment, *Res Judicata in the Federal District Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

[121] *See* text accompanying notes 141-53, *infra*.

the substantive outcome in the case and therefore would not be procedural. Such a claim would not be based on the procedural due process, opportunity-to-be-heard type of violation found in *Brinkerhoff-Faris,* but rather upon a substantive due process violation derived from the notion that courts can take, a notion discussed and rejected in the preceding section.

Issues (3) and (4) raise the problem of surprise occurring in the appellate process. Petitioners complained that the result reached was unexpected and that the decision was based on issues not raised. If the court's decision is not based on the legal issues presented, then the court's language must be dicta[122] and therefore not binding on the parties before the court. Thus, to the degree that the statements in *McBryde* are not based on any facts implicitly or explicitly brought before the court, they are harmless to the parties and, moreover, not particularly unusual in the appellate process. For example, if the factual issue of transporting water outside of the watershed were not part of a question of law essential to the judgment in *McBryde,* then the court's statements prohibiting transfer must be dicta. In essence, the court would be indicating how it would rule in the future if a party brought a transfer-of-water case before it.

Similarly, any part of the *McBryde* decision that was decided in a manner not urged by the parties and for which there was no *factual* basis must be dicta. If, however, there was some factual basis, the situation is not very different from many cases where courts arrive at a decision based on judicially noticed facts.[123] For example, if *X* and *Y* bring a declaratory judgment action to determine which of the two of them owns Iolani Palace,[124] is the state court prevented by any substantive doctrines from declaring that the State of Hawaii is the owner? Would such a decision be void? Is not the question of whether anyone other than *X* or *Y* owns Iolani Palace implicitly raised by their action, or is the court required to choose between *X* and *Y*?

In any event, a defect based on procedural due process is more easily

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[122] *See* R. CASAD, RES JUDICATA 8 (1976):

> Declarations of law or of the meaning of laws made by the court have no binding force as precedent for later cases unless the declaration was made in resolving a question of law that was necessary to the decision of the case before the court. Only such declarations are "holdings" having stare decisis effect. Other statements of law contained in the court's opinion are dicta which may or [may] not be followed in later cases . . . .

[123] For a general discussion of judicial notice, see 10 MOORE'S FEDERAL PRACTICE § 200.01, at II-1 (2d ed. 1979) [hereinafter cited as MOORE's]. It is well established that an appellate court can take judicial notice of facts even though the trial court did not do so. *In re* Pioneer Mill Co., 53 Hawaii 496, 497 n.1, 497 P.2d 549, 551 n.1 (1972); 10 MOORE's, *supra,* at II-3. Indeed, the Hawaii Supreme Court has expressly taken judicial notice of land ownership in a case which rejected the State's claim to title. State v. Midkiff, 49 Hawaii 456, 460, 421 P.2d 550, 554 (1966) (judicial notice that Victoria Kamamalu inherited vast land from her mother who died in 1839).

[124] Iolani Palace, now an historical landmark in Honolulu, was once the residence of Hawaii's monarchs.

remedied than one based on substantive due process. Even if a federal court were to find a denial of procedural due process, as in *Brinkerhoff-Faris,* the proper relief would be to remand the case to the state court to be redetermined under fair and adequate procedures. Thus, even assuming procedural due process violations were committed in *McBryde,* the federal district court could not substitute its own judgment on the substantive legal issues.

IV. Even Assuming that Courts Can "Take"— The Court in *Robinson* Should Have Refused Jurisdiction

Suppose that all of the previous discussion is incorrect and that state courts can "take" through their decisions. What then is the proper response of a federal district court? In this section it is argued that even if courts can take, the court in *Robinson* was *compelled* to refuse jurisdiction. First, it is contended that the doctrine expressed in *Rooker v. Fidelity Trust Co.,*[125] that the lower federal courts have no power to review state court decisions, deprives the federal court of jurisdiction. Second, it is contended that res judicata barred the federal court from deciding the *Robinson* case. Lastly, the question of whether a claim under 42 U.S.C.§ 1983 (1976) constitutes an exception to these two rules is examined and answered in the negative.

A. The Rooker *Doctrine—Lack of Jurisdiction*

One of the critical issues in *Robinson* is whether the facts of that case fall within the rule set forth in *Rooker v. Fidelty Trust Co.,* that the lower federal courts have no jurisdiction to act as appellate courts of the states.[126] As in *Robinson,* the plaintiff in *Rooker* was the losing party in a

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[125] 263 U.S. 413 (1923).

[126] Most recently, the district court applied *Rooker* principles to another Hawaii case. Zimring v. County of Hawaii, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979). The continuing vitality of the *Rooker* doctrine is also manifest in circuit court rulings. *See, e.g.,* Williams v. Washington, 554 F.2d 369, 370, 371 (9th Cir. 1977) (section 1983 claimed barred by Younger v. Harris, 401 U.S. 37 (1971); *Rooker* mentioned); Smiley v. South Dakota, 551 F.2d 774, 775 (8th Cir. 1977) (*Rooker* grounds; section 1983 claim noted); Adkins v. Underwood, 520 F.2d 890, 893 (7th Cir.), *cert. denied,* 423 U.S. 1017 (1975) (section 1983 claim barred; *Rooker* argued); Jack's Fruit Co. v. Growers Marketing Serv., 488 F.2d 493, 494 (5th Cir. 1973) (procedural due process claim barred by *Rooker);* Tang v. Appellate Div., 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied,* 416 U.S. 906 (1974) (section 1983 claim barred by *Rooker*); Hutcherson v. Lehtin, 485 F.2d 567, 568-69 (9th Cir. 1973) (section 1983 claim barred by *Rooker;* res judicata noted); Roy v. Jones, 484 F.2d 96, 99 n.11 (3d Cir. 1973) (section 1983 action barred; *Rooker* noted); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481, 484 (9th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974) (section 1983 claim barred by *Rooker*); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536, 538 (10th Cir. 1973) (procedural due process claim barred by *Rooker*); Duke v. Texas, 477 F.2d 244, 253

state court proceeding. After an adverse decision in state court, he turned around and sued in federal district court to set aside the state court judgment. The district court dismissed for lack of jurisdiction. The Supreme Court affirmed saying:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character . . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.[127]

The Court reasoned that the lower federal courts have no power to act as appellate courts in light of the fact that Congress has never granted them that capacity.[128] Section 25 of the First Judiciary Act[129] vested appellate review of state courts solely in the Supreme Court. *Rooker* was only a logical derivation of the exclusiveness of Supreme Court review under 28 U.S.C. § 1257 (1976).[130] As Professor David P. Currie argues, the general federal question grants of jurisdiction embodied in 28 U.S.C. §§ 1331 and 1343 (1976) should not be construed to undermine section 1257's exclusive grant of review to the Supreme Court, for granting federal district courts jurisdiction to review state court decisions would subvert section 1257's requirement that an appeal to the Supreme Court be timely filed.[131] Moreover, federal district court review would undermine section 1257's requirement that review be from the highest court of the State.[132] *Robinson*-type intervention, where a new trial is held, also would be contrary to the Supreme Court's requirement that review of state decisions be limited to the facts on the state court record.[133] Professor Currie states:

> I suspect that the Supreme Court was chosen to review state court judgments because only it had sufficient dignity to make federal review of state courts

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(5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974) (section 1983 claim barred on *Younger* and *Rooker* grounds); Community Action Group v. City of Columbus, 473 F.2d 966, 973 (5th Cir. 1973) (constitutional claim barred under *Rooker);* Bricker v. Crane, 468 F.2d 1228, 1231-32 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (section 1983 claim barred by res judicata and *Rooker*); Paul v. Dade County, 419 F.2d 10, 13 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970) (freedom of religion claim barred by *Rooker);* Brown v. Chastain, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (due process and equal protection claim barred by *Rooker*).

[127] 263 U.S. at 416.

[128] *Id.*

[129] Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85.

[130] *See* 263 U.S. at 416. The 1923 *Rooker* decision invoked section 237 of the amended Judicial Code, *see* Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726. The current codification was based on that section of the Judicial Code. 28 U.S.C. § 1257 (1976).

[131] *See* 263 U.S. at 416; Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 322-23 (1978) [hereinafter cited as Currie].

[132] *See* Currie, *supra* note 131, at 323.

[133] *Id.* at 323-24.

> reasonably palatable; that the highest-state-court requirement was designed to preclude federal interference unless and until state courts had a full opportunity to avoid that clash; and that the time limits on Supreme Court review were meant to protect parties prevailing in state courts from stale challenges to their judgments. If any of these surmises is accurate, *Rooker* is right.[134]

Petitioners in *Robinson,* of course, did not characterize their action as an appeal or review of a state court judgment, but the form of the pleadings should not be allowed to prevail over what clearly was an appeal.[135] As the Court said in *Rooker,* a litigant "cannot be permitted to do indirectly what he no longer can do directly."[136]

Although disguised as an original action, with State officials as the "new" defendants and a "new" claim that the state court "took" their property, the *Robinson* action was clearly an attempt to avoid the effects of the *McBryde* state court determination. In essence, both sides are "appealing" to a different court. The ultimate issue in *McBryde* and *Robinson* was really the same — ownership of water rights.[137] The *Rooker* doctrine was therefore circumvented merely by naming those State officials who must enforce a state court decree as the new defendants and then claiming the federal suit was a new and original action.[138] It is illogical to suppose that the policies inherent in *Rooker* might be so easily undermined.

The *Rooker* doctrine is merely another manner of expressing the idea that courts cannot take and that state decisions which overrule prior law do not create a substantive due process federal question.[139] The difference between the *Rooker* doctrine and res judicata is that *Rooker* is jurisdictional and therefore need not be raised by the parties. The court can dismiss the action sua sponte.[140] Thus, the court in *Robinson* should have followed *Rooker* and dismissed on its own motion.

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[134] *Id.* at 323 (footnote omitted).

[135] *Id.*

[136] 263 U.S. at 416.

[137] *See* text accompanying notes 19-35, 40 *supra.*

[138] Currie, *supra* note 131, at 333-34.

[139] Since *Rooker* invalidates (as lacking jurisdiction) direct or indirect "disguised" appeals of state court decisions, it thus also invalidates the federal question used to gain jurisdiction. Two different ways of looking at this are: (1) *Rooker* held that a federal question cannot be conjured in order to gain appellate jurisdiction of state cases; and (2) if a case is an "indirect appeal" of a state decision, then the question used to gain jurisdiction is not "federal." Thus, if one can determine that the federal action is an attempt to appeal a state action; that is, to avoid the direct consequences of a state decision, then the federal court must dismiss for lack of jurisdiction. Ergo, the question presented to the court — such as the claim that the court "took" property — cannot be, by definition, a substantial federal question.

[140] Currie, *supra* note 131, at 324.

B. *Res Judicata*

In his recent article, Professor Currie also reminds the reader of the often ignored use of res judicata to preclude relitigation of an action in federal court subsequent to a state court determination.[141] When the first action is brought in state court and the second in federal court, the federal court is compelled to apply res judicata if the substantive res judicata law of the state so requires.[142] Although discussing this point,[143] the court in *Robinson* did not mention a critically relevant federal statute, which states:

> [J]udicial proceedings [of any court of any . . . State, Territory, or Possession] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[144]

Thus, the court would have to act as if it were a Hawaii trial court and apply res judicata if the law of Hawaii, as developed by the Hawaii Supreme Court, would so require.[145]

Three initial objections might be raised against applying res judicata in *Robinson*. First, it might be argued that the federal proceeding involved a different action. Second, it might be asserted that res judicata does not apply if the parties to the second, federal action are different from those in the original, state action. Lastly, it may be argued that res judicata should not apply to actions based on a section 1983 claim.[146] The first two

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[141] *See id.* at 325-50. The purpose of res judicata is to "bring an adjudication to a final conclusion with a reasonable promptness and within reasonable limits of cost." F. JAMES & G. HAZARD, CIVIL PROCEDURE 530 (2d ed. 1977). The thrust of res judicata is a search for some point of finality in litigation: "To litigate the same matter twice or more would impose costs on the parties and the burdened and subsidized judicial system. Indeed, if a judgment were not conclusive as to what it actually determined, 'the adjudicative process would fail to serve its social function' of resolving disputes." Currie, *supra* note 131, at 325 (footnote omitted).

[142] Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1939).

[143] 441 F. Supp. at 583-84 & n.35.

[144] 28 U.S.C. § 1738 (1976).

[145] The Hawaii Supreme Court has held that res judicata "precludes a second suit based on the same cause of action involved in a prior suit between the same parties or their privies." Henderson v. Pence, 50 Hawaii 162, 163, 434 P.2d 309, 310 (1967). *See* Yuen v. London Guarantee & Accident Co., 40 Hawaii 213, 223 (1953); text accompanying notes 120-21 *supra*.

[146] 42 U.S.C. § 1983 (1976):

> **Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

arguments will be discussed in this subsection and the last in the following subsection.

The first argument against applying res judicata in *Robinson* is that the claim in the federal proceeding, namely, that the *McBryde* decision unconstitutionaly took property, was truly different from the issue raised in *McBryde*, a suit seeking a declaration of ownership interests. Assuming that courts can take, one then must consider the legal defintion of a claim in order to determine whether these are the same claims for res judicata purposes. A claim includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose.[147] Arguably, the *McBryde* and *Robinson* actions are the same in that both arise out of the same factual situation.[148]

In *McBryde*, the action was a declaration of ownership rights. In *Robinson*, the allegedly new action sought a determination of whether the state adjudication of ownership rights in *McBryde* was correct. In essence, both cases concerned the same "ultimate practical question"[149] of who owns the water rights. A different view could only be based on the untenable argument that an appeal from a trial court is a different claim from the claim brought before the trial court.

Secondly, it might be argued that because there are different parties in *McBryde* and *Robinson* res judicata should not apply.[150] In *McBryde* the suit was between McBryde Sugar Company and Gay & Robinson. In *Robinson*, McBryde Sugar Company, Gay & Robinson, and others sued State officials to enjoin the consequences of the *McBryde* decision. If *McBryde* and *Robinson* do involve the same claim or ultimate practical question, then to allow avoidance of res judicata by rearranging the parties and adding defendants who are responsible for carrying out the original decision would represent the triumph of form over substance. Petitioners should not be allowed to escape the well-settled rule that the binding effect of a judgment is defined by the law of the rendering jurisdiction.[151] Assuming that *Robinson* involves new parties, the *McBryde* decision still governs the situation under the doctrine of collateral estoppel.[152]

If res judicata could be subverted so easily, then civil litigants who lose at trial could eschew the appellate process by refiling their case in an-

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[147] RESTATEMENT (SECOND) OF JUDGMENTS § 71(1) (Tent. Draft No. 1 (1973)).

[148] *See* note 40 *supra*.

[149] Currie, *supra* note 131, at 341.

[150] *Id.* at 331-34.

[151] 28 U.S.C. § 1738 (1976); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 94, 95 (1971).

[152] *See, e.g.*, Parklane Hosiery, Inc. v. Shore, 99 S. Ct. 645 (1979) (collateral estoppel proper even when it denies defendant a jury trial in a civil matter); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942).

other trial court and adding sheriffs or others responsible for enforcement as new defendants.[153] Such evasion of the statutorily protected doctrine of res judicata should not be tolerated by the federal courts.

C. *The Section 1983 Exception*

The last argument against applying res judicata in *Robinson* is a claim that 42 U.S.C. § 1983 (1976) should constitute an exception to both the *Rooker* doctrine and res judicata. Petitioners in *Robinson* sought federal jurisdiction based on claims arising under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). That section essentially provides private parties legal or equitable redress for deprivations of federal constitutional or statutory civil rights by persons acting under color of state law.

In effect, petitioners claimed that threatened enforcement of the *McBryde* decision would constitute a taking in violation of the fifth amendment. Since the justices of the Hawaii Supreme Court were not named as defendants in the complaint, they were not technically the "person", within the section 1983 context, who had allegedly deprived petitioners of their rights. Since the State had not attempted to enforce the *McBryde* decision, there was no way to know whether the State's action would constitute a taking. It was really the action of the Hawaii Supreme Court in *McBryde* that provided the only logical basis for the complaint. Absent the *McBryde* decision there would have been no reason to seek a declaratory judgment on the taking issue and to seek an injunction against future, albeit undefined, state enforcement. Thus, although the supreme court was not named as a defendant, only its conduct could form the basis for a section 1983 claim.

Therefore, the same objections to the assertion of federal question jurisdiction apply to jurisdiction under section 1983. If there is no fifth amendment claim based on the decision, there is no section 1983 claim. If the State were threatening to act in a manner that constitutes a taking of petitioners' rights without just compensation, then petitioners may have had a legitimate 1983 claim. However, there was no indication that the State was about to act in a confiscatory manner.

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.[154] Ownership

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[153] For example, in a suit *X* v. *Y*, *X* loses a money judgment decision to *Y*. *X* brings suit against the sheriffs charged with executing the judgment in another trial court. The suit is called *X* v. Sheriffs. Is this a new action or just an appeal of the original decision? Should res judicata be denied by the second trial court simply because new parties have been added? Obviously not!

[154] *See* Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957) [hereinafter cited as Trelease] (discussion of various meanings associated with State

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.[155] Hence, the issue of confiscation was not ripe.[156] Life on the Hanapepe 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 fifth amendment 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.

Moreover, the power of the State to control and regulate the waters does not depend on the declaration in *McBryde* that the State is the owner of the water. Rather, the power to control and regulate is derived from the inherent police power of the State.[157] Thus, the State was not given anything under *McBryde*, nor was anything taken from petitioners. There is a possibility of a taking under future regulation, but the issue was not ripe in *Robinson*.

Without the threat of tangible governmental action which may constitute a taking, there was no controversy and no section 1983 action over the so-called ownership issue. The *Robinson* suit is simply an action to prevent unspecified government control and regulation of water. Once it is agreed that the State inherently has the power to regulate waters in a manner that does not constitute a taking, there is no controversy left. The *Robinson* action is then reduced to an action similar to an overly broad suit against a state to enjoin any and all control or regulation of land through zoning. Such an injunction can only be sought against particularized state conduct.[158]

"ownership" of water: *res nullius, res communes, publici juris,* and *res publicae*); text accompanying notes 175-76 *infra*.

[155] *See id.* at 640-45.

[156] In other words, the taking issue may have been purely hypothetical and thus not a case or controversy under article III of the Constitution. *See* ILWU Local 37 v. Boyd, 347 U.S. 222 (1954); United Pub. Workers v. Mitchell, 330 U.S. 75, 89-91 (1947).

[157] *See, e.g.,* HAWAII CONST. art. IX, § 1, art. XI, §§ 1, 7. Prior to ratification of constitutional amendments in 1978, similar police powers were explicitly recognized in the constitution. *See id.* art. VIII, § 1 (1968, renumbered art. IX, § 1, 1978); *id.* art. X, § 1 (1968, amended and renumbered art. XI, § 1, 1978).

[158] Plaintiffs arguably did not prove the real or threatened harm necessary to support the injunction. *Cf.* Massachusetts State Grange v. Benton, 272 U.S. 525, 527 (1926) ("[N]o injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."). Plaintiff's suit in *Robinson* was based on the assumption that the *McBryde* decision granted fee-simple-like *res publicae* ownership to the State and that the State planned to confiscate waters presently used by the sugar companies and sell it back to them. Reading *McBryde* in the context of water rights law in general does not sustain the assumption of *res publicae* ownership. *See* Trelease, *supra* note 154. Upon viewing the future plans of the State in terms of water management, the perceived threat of "sale" also was not reasonable. *See* STATE WATER COMM'N, HAWAII'S WATER RESOURCES, DIRECTIONS FOR

Assuming, however, that a valid section 1983 claim existed, it is necessary to consider whether the statutory action provides an exception to res judicata. A number of commentators have suggested that, because of the strong federal policy underlying section 1983, prior state court determinations should not be res judicata as to later federal court proceedings.[159] The Supreme Court has not ruled on this issue. The majority of lower federal courts have held that res judicata applies.[160] In other words, in the view of these courts, section 1983 does not create an exception to the statutory requirement that federal courts give full faith and credit to state court judgments.[161]

The court in *Robinson* viewed the res judicata issue in slightly different terms. According to the court, petitioners' action should not be barred by res judicata because *it was not raised and could not have been raised* by parties in the *McBryde* proceeding.[162] There is disagreement within and among the circuits as to whether section 1983 claims which were not raised in the state proceedings are barred in the federal proceedings.[163]

THE FUTURE, A REPORT TO THE GOVERNOR (1979) (discussing and proposing a permit system to manage the *use* of water resources but not the *sale* of water to raise state revenues). Thus the perceived harm in *Robinson* was based on two unfounded assumptions.

[159] *See* Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191 (1972); McCormack, *Federalism and § 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. II), 60 VA. L. REV. 250 (1974); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). For a contrary view and an excellent analysis, see Currie, *supra* note 131.

[160] Ten circuits have applied res judicata to subsequent section 1983 actions. *See* Davis v. Towe, 526 F.2d 588 (4th Cir. 1975) (mem.); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); Metros v. United States Dist. Ct., 441 F.2d 313 (10th Cir. 1971); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Norwood v. Parenteau, 228 F.2d 148 (8th Cir. 1955), *cert. denied*, 351 U.S. 955 (1956). These cases are cited in Currie, *supra* note 131, at 332 n.106.

[161] *See* text accompanying note 144 *supra*. For further discussion, see Currie, *supra* note 131, at 327-32.

[162] 441 F. Supp. at 584 n.35: "[P]laintiffs claimed wrong in this federal action was not within any of the issues raised and tried. . . . No party including the State could have anticipated what the Supreme Court did, sua sponte . . . . The Supreme Court refused to allow plaintiffs to argue the constitutional issues raised by this federal action."

[163] Circuit courts have differed as to the res judicata effect to be accorded a state court judgment in federal court when the constitutional claim is asserted in federal court but was not raised in state court. *Compare* Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (res judicata is a bar), *with* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) (res judicata is not a bar).

The confusion among courts as to the general applicability of res judicata to section 1983 claims was noted by the Sixth Circuit in Getty v. Reed, 547 F.2d 971 (6th Cir. 1977):

> If what we have said thus far suggests that the District Judge who held he had "no jurisdiction" to try this case simply missed the signs on a well marked trial [*sic*], we

Although the Ninth Circuit held in *Scoggin v. Schrunk*[164] that res judicata bars the unasserted federal claim, dicta from a recent case indicates that the Ninth Circuit's view may be changing where there is a clearly enunciated federal interest to be protected.[165]

In any event, petitioners in *Robinson* argued[166] that their case presented an even more sympathetic factual situation than *Scoggin*.[167] The section 1983 action could not have been brought in *McBryde* because it was allegedly created by the decision itself. Thus, we are back on the same circular path. If the constitutionality of the state decision creates a claim and if section 1983 creates an exception to res judicata, then every state court decision potentially can be relitigated in federal court under section 1983 with no possibility of res judicata applying. The federal courts would become the appellate courts of the states through the use of section 1983.

The fallacy which creates this circularity of reasoning is the misconception that a decision creates a new claim. The correctness of a decision (and the constitutionality of a decision is only one aspect of its correctness) is not a new claim but only an aspect of the original claim, which is

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hasten to acknowledge that no such thing is true. One commentator, Theis, has noted that the Supreme Court has given no guidance as to claim preclusion by final state court decision in § 1983 cases and added that as a result "the decisions of the lower courts teem with inconsistencies." Theis appended the following footnote to illustrate his point:

> *Compare Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), *with Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1974) [*sic*]; *Roy v. Jones*, 484 F.2d 96 (3d Cir. 1973), *with Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969), *with Mack v. Florida State Bd. of Dentistry*, 430 F. 2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 (1971) (White, J., dissenting from denial of writ); *Coogan v. Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970), *with Mulligan v. Schlacter* [Schlachter], 389 F.2d 231 (6th Cir. 1968); *Blankner v. City of Chicago*, 504 F.2d 1037 (7th Cir. 1974), *with Hampton v. City of Chicago*, 484 F.2d 602, 606 n.4 (7th Cir. 1973); *Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), cert. denied*, 415 U.S. 916 (1974), *with Ney v. California*, 439 F.2d 1285 (9th Cir. 1971).

Id. at 975 (parallel citations omitted). Obviously, if there are differences within single circuits, there are differences between the circuits. *Getty* considered federal jurisdiction over section 1983 claims within the narrow context of the three-judge-court statute, 28 U.S.C. § 2281 (1970) (repealed 1976), *see* 547 F.2d at 972, and found that res judicata was no bar to the procedural due process claims.

[164] 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (res judicata bars a claimed due process violation in federal court on grounds of failure to notify homeowners of delinquent installment payments and the resultant sale of property even though the federal constitutional claim was not asserted in state court where the purchaser sought to nullify the conveyance on the basis of unjust enrichment and lack of notice).

[165] Red Fox v. Red Fox, 564 F.2d 361, 365 (9th Cir. 1977) (unique historical relationship between American Indians and the Federal Government).

[166] *See* Answering Brief for McBryde Sugar Co., at 53-59, Robinson v. Ariyoshi, Civ. No. 78-2264 (9th Cir., filed Nov. 28, 1978).

[167] The district court found *Scoggin* inapposite. 441 F. Supp. at 584 n.35. See note 164 *supra* for a brief description of *Scoggin*.

properly reviewed only on appeal. If one accepts the view that a decision creates an action (that courts can take) and that an action based on section 1983 is not subject to res judicata because it could not have been raised previously, then the policies expressed under the *Rooker* doctrine are substantially undermined, and the exclusiveness of review by the United States Supreme Court is negated.

The *Rooker* principle[168] should not be subject to a section 1983 exception for the same reasons that res judicata should prevail. Without a clear indication from Congress, section 1983 should not be read to undercut section 1257 and that section's clear grant of exclusive review of state court decisions to the Supreme Court. Analogies between section 1983 and habeas corpus fail because Congress intended through habeas corpus to give federal district courts the power to collaterally attack state judgments.[169]

It cannot be denied, however, that there may be a section 1983 action arising out of the procedural manner in which courts act. If a litigant were denied an opportunity to be heard, this could constitute a proper claim. However, it must be noted that the proper remedy is to compel the forum to adequately consider the argument. The proper remedy is not to invalidate the substantive aspects of the decision. The distinction between fifth and fourteenth amendment considerations remains critical. Courts can act to deprive persons of fourteenth amendment procedural due process but not fifth amendment substantive due process. The validity of section 1983 claims based on procedural due process would depend on the same considerations discussed in the preceding Part III. Thus, even if it is assumed that a section 1983 action exists in *Robinson,* it is certainly not so clear as the court implied[170] that the *Rooker* doctrine or res judicata do not defeat federal district court jurisdiction.

V. CONCLUSION

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 not take; they declare. If

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[168] See note 126 *supra* and accompanying text.

[169] *See* Currie, *supra* note 131, at 323 n.50. *Cf.* Note, *Federal Relief Against Threatened State Prosecutions: The Implications of* Younger, Lake Carriers *and* Roe, 48 N.Y.U. L. REV. 965 (1973) (availability of federal habeas relief precludes prosecution under a statute held by a local federal court to be unconstitutional).

[170] The court did not discuss *Rooker.* It disposed of the res judicata defense at 441 F. Supp. at 583-84.

courts were said to take, they could not effectively declare.

The ramifications of the *Robinson* theory of intervention are enormous not only for the state courts but for federal courts as well. If a decision can create an independent federal claim, then federal trial courts could enjoin United States circuit court decisions involving "unexpected" results.[171] The implications of *Robinson*-type intervention are that there would be no judicial hierarchy and no finality in appellate systems.

When it comes to writing an epitaph for *Robinson v. Ariyoshi* as it concerns Hawaii water rights, one might fittingly pirate the title: "Much Ado About Nothing." Since the claim was based on the unjustified assumption that "ownership" in *McBryde* was used in the *res publicae* sense, the *Robinson* litigation seems to have been a waste of resources.[172]

Rather than seeking an injunction in the *Robinson* action, the petitioners more sensibly should have waited for the taking issue to ripen.[173] This ripening might occur if (1) the State were to adopt and implement a water regulatory scheme that was overly restrictive with respect to the petitioners' rights to use; or (2) pending a clarification by the court, the State took interim action to prevent actual use of water by the petitioners or to charge them for its use.[174] Any of these possibilities would at least provide the federal district court with a concrete state action to review. Instead, the court prematurely judged the meaning of *McBryde*, thereby provoking the very kind of situation that jurisprudential considerations of ripeness are designed to forestall.

It will not become clear what the Hawaii Supreme Court really meant until that court speaks again. Nevertheless, one can attempt to examine *McBryde* in the same light that one looks at landmark decisions which leave certain questions unanswered. Toward this end, a few closing observations are offered.

The primary holding of the court in *McBryde* was that the State is the owner of all water not subject to appurtenant or riparian rights. What does this mean? Twenty years ago, Professor Frank J. Trelease wrote an

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[171] Moreover, the important consideration of finality in the judicial system would be destroyed. For example, the *Robinson* court took jurisdiction based on the concept that the *McBryde* decision took the property rights of the petitioners. If courts can take, could the State sue in state court to enjoin the federal officials responsible for enforcing *Robinson* on the same theory that the *Robinson* decision took their property rights as created by the *McBryde* decision? Since state trial courts can entertain federal constitutional issues, particularly section 1983 actions, the state court could conceivably assume jurisdiction, void the *Robinson* decision, and enjoin the federal officials from enjoining *McBryde*. Then, suppose that subsequent to this state court's decision a federal trial court similarly assumes jurisdiction to enjoin the state trial court's decision enjoining *Robinson*. The result would be an absurdity.

[172] *See* notes 176-79 *infra* and accompanying text.

[173] See notes 154-58 *supra* and accompanying text.

[174] None of these events would necessarily constitute a taking. The point made here is merely that, in contrast to the situation in *Robinson*, these occurrences would enhance the ripeness of any claim that might be brought for adjudication.

article equating the concept of ownership of water with that of *tu-tu*.[175] *Tu-tu* is the label that a tribe of south-sea islanders gave to one's status after contacting one's mother-in-law. If an islander encountered his mother-in-law, he was subject to a dangerous force or infection that could ruin his whole community. Professor Trelease drew the analogy between *tu-tu* and ownership of water in the following manner:

> Civilized Americans, of course, know that there is no such thing as tu-tu. As the prevalence of mother-in-law jokes testifies, people encounter their mothers-in-law often and nothing like this happens. Therefore, tu-tu does not exist in fact, it has no reference to reality. While it might be argued that tu-tu has reality to the islanders, it can be demonstrated that even they can get along very well without the concept. They say "If a man encounters his mother-in-law, he becomes tu-tu. When a man is tu-tu, he must be purified." But all reference to tu-tu may be eliminated and the same result reached by simply saying "If a man encounters his mother-in-law he must be purified."
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> . . . .
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> An examination of the legal concept of ownership shows that it falls into this pattern. "I bought this watch, therefore I have ownership of it. I have ownership of this watch, therefore I may recover it from one who takes it from me." Just as we eliminated tu-tu, we can eliminate the middle concept entirely: "I bought this watch, therefore I may recover it from one who takes it from me." The author suggests that we may substitute "tu-tu" for "ownership," or, if we prefer, "green cheese," and the logic is unimpaired.[176]

Since ownership is essentially *tu-tu*, one can give it nearly any meaning one chooses. Thus, State ownership in *McBryde* may be given a nonconfiscatory interpretation. Ownership may mean *publici juris*, belonging to the State in the sense that the State is the representatives of the public to enforce the public interest.

Most fears derived from the *McBryde* decision impute the *res publicae*[177] meaning to ownership; that is, ownership in a corporeal sense, in the manner that the State owns Iolani Palace. However, it is unusual to view water rights in this way. For example, Wyoming attempted to use *res publicae* in its constitution, and it was subsequently interpreted by the courts to mean a trust or regulatory sense.[178] In the *McBryde* decision itself, the court attempted to avoid the *res publicae* definition and to employ a public trust sense of the term.[179] Moreover, there is nothing partic-

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[175] Trelease, *supra* note 154, at 638 (citing Ross, *Tu-tu*, 70 HARV. L. REV. 812 (1957)).

[176] *Id.*

[177] *Id.* at 640 (defining *res publicae*).

[178] Willey v. Decker, 11 Wyo. 496, 73 P. 210 (1903); Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900).

[179] 54 Hawaii at 186, 504 P.2d at 1338:

> We believe that the right to water is one of the most important usufruct [*sic*] of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the

ularly desirable about ownership of water in a *res publicae* sense. The purpose of State ownership would be to facilitate control and regulation. The State can achieve those ends through the use of its police power[180] and does not have to rely on judicial declaration. If one interprets ownership as giving the owner the power of control and not a proprietary meaning, then the *McBryde* decision has not given the State anything new. Hence, it is difficult to conceive of water having been taken from the petitioners.

Even if the court in *McBryde* had intended ownership in the *res publicae* sense, the court may not have meant to deny the parties the right to continued use of water. One need only look to the recent Hawaii Supreme Court decision in *United Congregational & Evangelical Churches v. Heirs of Kamamalu*[181] for an example of the majority's extraordinary willingness to protect the property interests of a party whose claim of land title was nonetheless rejected. In that case, plaintiff churches brought an action to quiet title. The court ruled that the State held title to the land at issue, but the special facts of longstanding use of the parcels by the plaintiff under a good faith claim of right created an equitable right to continued use of the land for religious purposes.[182] The equitable

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land grants. [footnote omitted]

[180] *See* note 157 *supra* and accompanying text.

[181] 59 Hawaii 334, 582 P.2d 208 (1978).

[182] *Id.* at 343, 582 P.2d at 214. In *United Congregational*, a bare majority of the Hawaii Supreme Court (even then, only two of the majority votes were held by Supreme Court Justices, since Circuit Judge Shintaku replaced Justice Menor who was disqualified) appears to have created a new interest in real property, an interest characterized as "an equitable right akin to a prescriptive easement." *Id.* at 338, 582 P.2d at 211. The suit arose as an action by United Churches to quiet title to two parcels of land in Holualoa and Kahalu'u *ahupua'a* on the Island of Hawaii. Only the defendant-intervenor State of Hawaii disputed title to the land and appealed from a trial court judgment for the United Churches.

The lands involved as part of the *ahupua'a*, were *maheled* to Victoria Kamamalu in 1848. Title was conveyed in 1852 but with boundaries of the parcels not defined. The Holualoa and Kahalu'u lots were separately surveyed in 1854, subsequently recorded in the Land Book of the Department of Public Instruction as a "School lot" and "School and Church lot", respectively, and granted to the Board of Education by Royal Patent in 1882. Actual school uses continued only between 1880 and 1888. The trial court found that the United Churches had used the lots continuously for over a hundred years exclusively for church purposes, except for the brief period of school use. The trial court ruled in favor of the United Churches based on a two-step theory: (1) Any government title to the lots was lost by operation of a reverter statute which returned the lots to Kamamalu, the original grantor, when school uses ended in 1888; and (2) the United Churches acquired title from Kamamalu by adverse possession.

The majority's rejection of this theory reflected its interpretation of the operation of the reverter statute and its view that private school and church uses were inextricable in 19th century Hawaii. The 1854 survey presumptively evidenced a grant to the Government in fee simple absolute for school and church purposes. An 1859 statute and a successor 1864 statute diminished the Government's interest to fee simple determinable by providing for reverter to the "original grantor" if the school and church uses ceased, but the reverter provision was repealed in 1896. The majority found that the reverter provision was never

principles dictating *United Churches* may provide a basis for longtime agricultural users of water to seek analogous results. *McBryde* never ad-

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triggered. While the school uses ended in 1888, the church uses continued after the repeal of the reverter provision, and the court ruled that reverter required discontinuance of *both* school and church purposes. Continuance of the church uses meant that government title ripened to fee simple absolute with repeal of the reverter statute in 1896.

The majority noted that adverse possession cannot run against the sovereign, *id.* at 341-42, 582 P.2d at 213 (citing State v. Zimring, 52 Hawaii 477, 479 P.2d 205 (1970)), but said that "the doctrine of a presumed lost grant, arising out of adverse, exclusive, and uninterrupted possession for a substantial number of years, may be applied against the sovereign." *Id.* (citing United States v. Fullard-Leo, 331 U.S. 256 (1947); *In re* Kioloku, 25 Hawaii 357 (1920)). Nevertheless, the court was constrained by the facts to agree with the trial court that any presumption of a lost grant of *title* had been rebutted. The presumption was rebutted by (1) the explicit Royal Patent grants of 1882, (2) a 1911 church application requesting grant of the Kahalu'u lot, and (3) statements by church officers that title was in the government.

The majority concluded, however, that the circumstances did not rebut a presumption of a lost grant of lesser rights, noting that in the law of prescriptive easements a lost grant of easements may be presumed. *Id.* (citing Lalakea v. Hawaiian Irrigation Co., 36 Hawaii 692, 706 (1944)). The 1944 decision on which the majority relied had elaborated on acquiring title to an easement by prescription based on the theory of lost grant:

> Title to an easement such as claimed by the defendant upon and over the kuleana may be acquired in two ways: 1. By grant. 2. By prescription . . . . By prescription, is by use and occupation for the period prescribed by law adverse to the true owner of the fee. Such use and occupation are substituted for the grant. In other words, they give rise to the presumption that a grant existed, since lost or destroyed by time or accident.
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> To give rise to the presumption of a grant, the use and occupation of the easement must be long, continued, uninterrupted and peaceable . . . . The longer the period the stronger the presumption.

Lalakea v. Hawaiian Irrigation Co., 36 Hawaii 692, 706 (1944) (citations omitted).

The court analogized to presumed lost grants of easements and invoked principles of equity to allow continued use by the churches.

> In furtherance of basic considerations of justice and equity, and by analogy with the law regarding presumed lost grants of easements, we hold that the United Churches possess equitable rights in the lots for religious and educational purposes, until such uses are abandoned. The State, as holder of the title, is free to use and develop the lots so long as the State does not interfere substantially with religious and educational uses by the churches.

59 Hawaii at 344, 582 P.2d at 214. The evidence cited as establishing longstanding occupation by the churches under a good faith claim of right was: (1) Continuous use since mid-19th century; (2) a 1912 petition to incorporate, approved by the territory which listed the lots as property held; (3) a 1939 warranty deed from the churches' parent organization to the county granting a portion of the Kahalu'u parcel for road widening; (4) a 1948 letter from the Commissioner of Public Lands to a third party saying the Holualoa lot belonged to the churches' parent organization; (5) testimony by a pastor that tax maps in the early 1960's showed the lots under the name of the parent organization; and (6) testimony by the pastor that "the people" had told him, "We owned the lots since the early 1880's." *Id.* at 342-43, 582 P.2d at 213.

The two dissenting votes were cast by Justices Kidwell and Kobayashi (both since retired) who were sympathetic to the equities involved but found no legal grounds to uphold a claim by the United Churches. They objected that an equitable right akin to a prescriptive easement is a nonentity in property law whose substantive meaning and legal impact were left undefined by the majority. The dissent reasoned that the circumstances which the majority

dressed the possible rights to continued use or to compensation, so those matters remain unanswered questions. It is clear from *United Churches*, at least, that the court is not hostile to private property rights, notwithstanding the view of the court in *Robinson*.

The second important ruling in the *McBryde* opinion, that water rights are held only as appurtenant to land and that water cannot be transported beyond those lands,[183] is more difficult to evaluate. If it is true, as petitioners assert in *Robinson*, that the question of severability and transportability of water was not before the court in *McBryde*, then the court's ruling on these matters was dicta and arguably does not affect the parties before the court; neither does the ruling create positive law. In other words, *McBryde* did not make the transport of water illegal. In a proper case, the court might say that certain landowners, perhaps those adjacent to streams, have a common law right to prevent transportation of water by others out of the watershed. Thus, the transportation of water might be prevented by those who have standing to assert that right.[184] Resolution of this issue is not apparent from the decision.

Uncertainty in the aftermath of any major case is not unusual.[185] The problems of creating a system of water law through judicial interpretation and reinterpretation are obvious. It may take years of litigation to place another water case before the supreme court. The nature of the judicial process limits courts to resolving one narrow issue at a time. The *McBryde* decision evidences the problems engendered when a court speaks too broadly. All of these factors point to the desirability of a legislative solution, a comprehensive water law for adjudicating rights. But water legislation would not address the broader significance of this litigation.

This article has focused upon *Robinson* and the validity of its assertion of jurisdiction. Jurisdiction was based on an eminently logical lay view of a taking, a view which conflicts with the larger constitutional framework by distorting fifth amendment values beyond their functional limits. The search for every available legal doctrine to protect individuals from a government which may act in an arbitrary or capricious manner under vague notions of the public interest should be encouraged. But in its attempt to protect the individual, the court in *Robinson*, perhaps unknowingly, tread upon some of the delicate checks and balances between federal and state courts created by the Constitution.

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found sufficient to rebut the presumption of a lost grant of title should equally rebut a presumption of a lost grant of the equitable right.

[183] 54 Hawaii at 191, 504 P.2d at 1341.

[184] See note 38 *supra*.

[185] Landmark decisions often leave unanswered questions. The long history of litigation seeking to clarify and define the limits of Brown v. Board of Educ., 347 U.S. 483 (1954) is but one example. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. New Kent County School Bd., 391 U.S. 430 (1968).

Ours is a system of federalism. One needs to be reminded how grudgingly the States gave power to the Federal Government. They did not readily acquiesce in Supreme Court review of state decisions.[186] Moreover, the States and Congress have never given the lower federal courts the general appellate power to review state decisions.[187] At this time in our history, with the concerns articulated by some regarding state court inadequacy[188] and with the increasing intervention of federal courts into state actions,[189] it is easy to forget that state and federal systems were born equal, with the Supreme Court as the highest court of review for both systems.[190] Although the principle may become blurred by the apparent power of federal courts, the state courts are still paramount and sovereign on matters of state law. Even the Supreme Court is bound to respect this tenet.[191]

If state courts are indeed sovereign on issues of state law, then state supreme court decisions on those matters are final, subject only to review by the High Court. They are not, to quote Justice Jackson, "final because . . . [they] are infallible, but . . . infallible only because . . . [they] are final."[192] It is not the scope of this article to determine whether *McBryde* was correctly decided, but to urge that the decision was final after the Supreme Court denied review.

Although interpretation of *McBryde* is difficult, the decision is nevertheless a valid expression of state judicial sovereignty in the substantive area of water law. Whether the decision is judged a consistent interpretation of prior law, it is the principle of state judicial sovereignty that assures *McBryde* of its claim to legitimacy.

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[186] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 445 (2d ed. 1973).

[187] *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 945 (1976).

[188] Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[189] *See generally Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1147-53 (1977).

[190] C. WRIGHT, FEDERAL COURTS 535 (3d ed. 1976).

[191] 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]

See Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944).

[192] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).