Golden Gate University Law Review

Volume 16
Issue 1 *Ninth Circuit Survey*

Article 11

January 1986

Federal Jurisdiction

Williamson B.C. Chang

FEDERAL JURISDICTION

MISSING THE BOAT: THE NINTH CIRCUIT, HAWAIIAN WATER RIGHTS AND THE CONSTITUTIONALITY OF RETROACTIVE OVERRULING

WILLIAMSON B.C. CHANG*

I. INTRODUCTION

Unquestionably, the Ninth Circuit panel in *Robinson v. Ariyoshi*[1] agonized over the final result. The appeal from the district court was filed in 1977. The Ninth Circuit issued its decision affirming the lower court opinion in 1985. Between these two dates, the Ninth Circuit convened two panels to hear the case, held three different hearings and even certified questions of state law to the Hawaii Supreme Court. The issue that made

---

* Associate 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 was a special deputy attorney general representing the Chief Justice of the Hawaii Supreme Court in the case discussed in this article, Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) *petition for cert. filed*, 54 U.S.L.W. 3279 (U.S. Sept. 10, 1985) (No. 85-406), and filed an amicus curiae brief on behalf of the Chief Justice and participated in two of the oral arguments before the Ninth Circuit. The author is no longer participating in the case and wishes to emphasize that the views expressed in this article are solely his own and do not represent the opinions of any agency with which he may be associated. The author would like to thank Jason Yoshida, third-year law student at the University of Hawaii School of Law, for his assistance on this article. The author also wishes to acknowledge the assistance, financial and otherwise, of the Water Resources Research Center of the University of Hawaii, which has made possible my research in the area of Hawaiian water rights. A shorter version of this article appeared first in the Winter 1986 issue of the Western Natural Resource Litigation Digest, which has subsequently ceased publication.

1. 753 F.2d 1468 (9th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3279 (U.S. Sept. 10, 1985) (85-406).

this case so difficult was not that the case related to Hawaiian water rights, but rather that it focused on the constitutionality of retroactive changes in the law—an issue that has also surfaced recently in California cases involving the public trust doctrine.[2] In *Robinson v. Ariyoshi*, the Ninth Circuit upheld the action of the lower federal court[3] in voiding a state supreme court decision that allegedly had overruled earlier precedents. Prior to the district court's injunction, the decision of the Hawaii Supreme Court in *McBryde v. Robinson*,[4] had been appealed to the United States Supreme Court and certiorari had been denied.[5]

The retroactive overruling of prior decisions, and the process of judicial change in general, has always been a difficult phenomena for courts to explain. The conventional Blackstonian explanation must seem nonsensical to the non-lawyer. The law was viewed as a "brooding omnipresence" in the sky.[6] The judge simply recorded what he saw. The fact that a decision might be overruled was explained on the basis that later judges had a clearer, more accurate view of the law. Thus, it was not the law that had changed, but rather the "clouds" or whatever obscured the judicial vision which had changed. This Blackstonian view of the law preserves the fiction that the judge has no active role in shaping the law. He does not make law. He declares what law is.[7] However patently transparent this explanation may seem, it is nevertheless a necessary premise of contemporary thinking. Any other explanation brings one to the conclusion that it is the judge who changes the law. If judges change law, however, they inevitably must be said to create and destroy property rights. Arguably, as asserted in *Robinson v. Ariyoshi*, such action is the equivalent of a taking that requires just compensation.

The Ninth Circuit confronted these issues in *Robinson v.*

---

2. *See, e.g.*, National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 466 U.S. 977 (1983); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

3. 441 F. Supp. 559 (D. Hawaii 1977).

4. 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).

5. 417 U.S. 962 (1974).

6. This is Holmes' sarcastic phrase. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting). *See generally*, Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960).

7. *Id.*

Ariyoshi, a case that has wide ranging implications concerning the relationship between federal and state courts.[8] However, the rationale and reasoning of the Ninth Circuit misses the boat. The result reached by the court threatens to subordinate state supreme courts to the powers of federal district courts in areas of traditional state law concern.[9]

This article is divided into five parts. The Background section provides an overview to the *McBryde v. Robinson* and *Robinson v. Ariyoshi* decisions. *McBryde v. Robinson* is the 1973 Hawaii Supreme Court decision that allegedly changed the law of surface water rights in Hawaii. *Robinson v. Ariyoshi* is the Ninth Circuit opinion that affirmed a district court decision voiding the Hawaii Supreme Court's *McBryde* decision.

The next section Doctrinal Pathology, is a study of the Ninth Circuit decision, examining how three false assumptions by the Ninth Circuit allowed the court to avoid the application of a number of doctrines designed to forestall the use of lower federal courts as appellate courts of the state. The three incorrect premises used by the court were, first, that the constitutionality of a final state judgment constituted a new and separate cause of action different from the underlying claim.[10] Second, that the appellate court's declaration of law constituted "state action" for the purpose of the fourteenth amendment.[11] Third,

---

8. There are several ramifications of the type of collateral attack in *Robinson v. Ariyoshi*. First, the United States Supreme Court would no longer perform its role as the exclusive appellate court for state judgments. Second, state court decisions would have no finality. Third, state courts would no longer be the final arbiters of state law. *See generally*, Chang, *Unraveling* Robinson v. Ariyoshi: *Can Courts 'Take' Property?* 2 U. HAWAII L. REV. 57, 58-59 (1979) [hereinafter cited as Chang, *Unraveling* Robinson]. *See also*, O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

9. *Id.* at 59.

10. *Id.* at 89-90.

11. The federal district court in *Robinson v. Ariyoshi* cited the Supreme Court's decision in Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 690 (1930) for the proposition that state judicial action can violate the due process clause of the fourteenth amendment. 441 F. Supp. at 580 (D. Hawaii 1977). The brief of McBryde Sugar Company before the Ninth Circuit asserts that appellate decisionmaking can violate the fourteenth amendment on the basis of *Shelley v. Kraemer*:

> Furthermore, the just compensation clause is made applicable to the states by the fourteenth amendment, and it has always been the law that the state action, which Section 1 of that Amendment restricts, comprehends action by 'its legislative, its executive, or its judicial authorities.' Ex parte Virginia, 100

that the rules enunciated in a judicial decision could create vested rights that were protected from later changes in the law by the just compensation clause.[12] These three assumptions allowed the court to arrive at a bizarre result, giving federal district courts the power to set aside state supreme court decisions in the area of state property law, even after the state judgment had been reviewed by the United States Supreme Court.

The third section, The Layman's View of a Taking, seeks to explain why the Ninth Circuit felt compelled to reach so far for this odd result. In the next section, Change and Due Process: The Myth, this article discusses the philosophical difficulties in explaining change in the law. The Conclusion notes the effect of political and social change in Hawaii on the development of water rights law.

II. BACKGROUND

McBryde v. Robinson involved a question of water rights in Hawaii. In 1959, various parties, including the state, sued each other in state court for a determination of their respective water rights. The parties had previously litigated some aspects of their claim. The parties proceeded to trial and obtained a state trial court judgment that apportioned the water according to Hawaiian water rights believed to be in effect at the time: 1) konohiki water rights (rights derived from the ownership of land upon which waters arise),[13] 2) prescriptive water rights[14] and 3) ap-

---

U.S. 339, 347 (1880); Civil Rights Cases, 109 U.S. 3, 11, 17 (1883); Shelley v. Kraemer, 334 U.S. 1, 14-18 (1948).

Answering Brief of McBryde Sugar Co., Ltd., at 23, Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985).

12. With the exception of Muhlker v. New York and Harlem R. Co., 197 U.S. 544 (1905), the Supreme Court has held that there are no property rights in the decisions of courts and changes in law are not a deprivation of due process. *See* Central Land Co. v. Laidley, 159 U.S. 103 (1895); 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). *See generally* Chang, *Unraveling* Robinson, *supra* note 8, at 68-71.

13. Konohiki water rights are defined as rights to the normal surplus waters in a stream. The sugar companies contended that the proper rule in Hawaii was that the owner of the lands that were owned by the konohiki was also the owner of the normal surplus waters. The case of Hawaii Commercial Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 675 (1904) is cited for that proposition. However, the Hawaii Supreme Court in answering the certified questions requested by the Ninth Circuit held that *Hawaiian Commercial* should not be given this reading. *See* Robinson v. Ariyoshi, 65 Hawaii 641, 669-70, 658 P.2d 287, 307 (1982). In reviewing 125 years of case law on the issue of ko-

purtenant water rights (a unique Hawaiian water right that grants the owner of land a right to a fixed quantity of water).[15] Up until this point the case was an ordinary action to allocate the waters. However, when the Hawaii Supreme Court decided the case on appeal, it challenged the premise upon which the parties had brought the action: that surface water in Hawaii could be privately "owned."[16] While there is no serious talk about private ownership of the corpus of water in other states, some parties contended that Hawaiian law allowed parties to "own" the physical corpus of water. In other western states, when one speaks of "owning water," one is really communicating a notion of ownership of the right to use water.[17] In Hawaii, lawyers have argued that Hawaiian law is unique in providing for the ownership of water.

The importance of the concept of private ownership of water becomes clear when one considers the two important rulings made by the Hawaii Supreme Court. First, the court stated that, except for appurtenant and riparian rights, the state was the "owner" of all surface waters.[18] Second, the court stated that no one could transfer water from one watershed to another.[19]

Given the notion of private ownership of water in Hawaii that existed at the time, the court's assertion that the state was the true "owner" of water seemed to place title to the water in the state. Hence, this judicial declaration appeared to take property. Furthermore, the court's rule against transferring water from one watershed to another was potentially disruptive in that

---

nohiki rights, the Hawaii Supreme Court stated that konohiki water rights were not rights to a fixed body of water: "Surplus water, as discussed in our cases, did not present a right to a fixed quantity of water; it was the residuum of the waters in a natural watercourse after the rights of others had been accounted for." *Id.* at 672, 658 P.2d at 309.

14. Prescriptive water rights refer to rights acquired against other parties on principles similar to that of adverse possession. *See* McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 198, 504 P.2d 1330, 1344-45 (1973).

15. Appurtenant water rights are rights to take the amount of water historically needed to grow taro. *Id.* at 187-91, 504 P.2d at 1339-41.

16. *See supra* note 13. The sugar companies based their action on the rule that the owner of the lands formerly held by the konohiki was the owner of the normal surplus waters of the stream.

17. *See generally*, Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957).

18. 54 Hawaii at 200, 504 P.2d at 1345-46.

19. *Id.*

it would terminate the flow of water in many of the irrigation ditches that served the sugar industry.[20]

Subsequent to the Hawaii Supreme Court's decision, it appeared that the only water rights left in Hawaii were riparian and appurtenant rights. Both required the use of the water only on the land that gave rise to the right. Konohiki water rights—the rights to the vast bulk of surface waters—no longer existed. The state was now the "owner" of these waters and as such, no one else could transfer the waters without state permission.

A western water lawyer coming upon this scene would be somewhat amused. First, this talk of ownership of water would seem quite odd.[21] Second, this view of so-called "state ownership" of water would not appear all that threatening. In the west, statements of "state ownership" of water have been treated as the equivalent of the state power to regulate and manage the water.[22] Indeed, prior appropriation exists where state constitutions or state statutes assert that the state is the owner of all waters.[23]

In all fairness, the Hawaii Supreme Court did qualify its statement that the state was the owner of all waters. In a footnote it explained that it meant to convey the notion of *publici juris*.[24] Indeed, if the court truly meant that the state held the waters as *publici juris*, or in other words, merely as an assertion of the government's power to regulate, then the state did not receive anything more than what the state already had under the police power. Thus, the contentious litigation since then may be much ado about nothing.[25]

---

20. The lower federal court in *Robinson v. Ariyoshi* made the following findings of fact: "The sugar lands, if unirrigated, would be appraised as 'very poor pasture,' at an assessed value of $8 an acre, or $4 if dedicated to agricultural use. In contrast, 'cane' lands are assessed at $666 an acre (or $333 if dedicated), indicating $951.42 an acre as a sound value." 441 F. Supp. at 575.

21. *See* Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957).

22. *Id.* at 643-45.

23. *Id.* at 644.

24. 54 Hawaii at 187 n.13, 504 P.2d at 1339 n.13.

25. *See* Chang, *Unraveling* Robinson, *supra* note 8, at 91:

> When it comes to writing an epitaph for *Robinson v. Ariyoshi* as it concerns Hawaii water rights, one might fittingly pirate

The parties, nevertheless, treated the decision in *McBryde* as if it transferred corporeal ownership from private parties to the state. The state through its attorney general, seemingly acquiesced in this understanding, perhaps on the theory that corporeal ownership would maximize the state's power to regulate. The practical effect of this de facto stipulation between the state and the private parties regarding the meaning of "state ownership" was to set the stage for the taking claim. Thus, the private parties characterized their cause of action against the state in district court as an original claim, and not an appeal of the *McBryde* decision. The effect was to attack the state supreme court judgment in a federal district court.

First, however, the losing parties sought a rehearing before the Hawaii Supreme Court. The sugar companies wanted to present evidence of the devastating effect that the Hawaii Supreme Court rulings would have on their industry. Any ruling that gave the state the right to force the sugar companies to buy back waters clearly presented a frightening prospect. The Hawaii Supreme Court granted the rehearing but limited the argument to non-constitutional questions. The court confined the rehearing to the applicability of the Hawaii statute that was the basis for the two rulings.[26] Thus, while the sugar companies were able to present their constitutional claims in the form of a motion for reconsideration, they were not allowed to present oral argument or introduce evidence before the supreme court. This limitation on rehearing later became significant. The federal district court in *Robinson* voided the *McBryde* decision, partly on the grounds that the refusal of the Hawaii Supreme Court to allow argument on these constitutional claims was a denial of due process.[27]

> 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.

Id.

26. 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 supported 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).

27. As the district court noted in *Robinson*:

> Thereafter on the almost farcical "rehearing," although the due process issues were urged by the plaintiffs, the court refused to permit argument thereon or consider the same.

In a short opinion, the Hawaii Supreme Court reaffirmed its earlier opinion and denied reconsideration.[28] Justice Levinson, who was formerly in the majority, changed his position and wrote a lengthy dissenting opinion disagreeing with the court's interpretation of the ancient statutes that led to the two critical rulings. He even included his own version of the translation of critical passages from Hawaiian to English to prove the court's error in interpretation.[29]

Subsequent to this failure on rehearing, the sugar companies sought review in the United States Supreme Court and succinctly presented their claim that the decision in *McBryde v. Robinson* was an unconstitutional taking. The Court refused to review the case.[30] There are two different interpretations of the meaning of this denial of certiorari. The state contends that the sugar companies had an appropriate opportunity in a federal forum, the United States Supreme Court, to present their constitutional claims. Hence, subsequent to denial of certiorari, the *McBryde* judgment became final and barred any collateral attack in federal district court. On the other hand, the sugar companies argue that the Supreme Court's refusal to hear the case did not represent adequate review since the parties did not have a chance to fully argue those claims to the Court. Moreover, since the Supreme Court grants so few petitions, it could not serve as an adequate body to review the issues. Thus, the right to petition for certiorari was not the substitute for adequate federal fact finding on the effects of the *McBryde* decision.

The next move by the sugar companies was unprecedented. The sugar companies, who formerly had been adverse parties in the *McBryde* state litigation, joined together as plaintiffs and sued in federal court alleging a violation of procedural and sub-

---

> Rather, the court extended a clearly pro forma invitation to the plaintiffs to "prove to us why we were wrong" on issues and conclusions assumed sua sponte and decided sua sponte by the court.
>
> On this basis alone the judgment of the court would have to be declared void. . . .

441 F. Supp. at 580.

28. 55 Hawaii 260, 517 P.2d 26 (1973).

29. *Id.* at 288-91, 517 P.2d at 41-44.

30. 417 U.S. 976, *cert. denied and appeal dismissed sub nom.* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

stantive due process.[31] Since the eleventh amendment bars suits against the state in federal courts, the plaintiff sugar companies had to find appropriate state officials to sue. The governor, attorney general and others were named as defendants. The nature of the claim, however, focused on wrongdoing by the Hawaii Supreme Court. That court had allegedly denied them due process by deciding the case in a manner not urged by the parties. Moreover, it was the Hawaii Supreme Court opinion itself that allegedly "took" the plaintiffs' property.

No state official, however, had ever considered enforcing the decision. Indeed, it was not yet final and required remand to the trial court.[32] Nor was there any indication that the state desired to sell the water. To the state's water managers, the idea of selling "state owned" water must have seemed somewhat farfetched. The primary responsibility of these officials was to conserve and manage the water. The state did not need "ownership" of water to assert those powers. The state already possessed those powers in the form of a groundwater management statute. Thus, if anyone inflicted harm on the sugar companies, it was clearly the justices of the Hawaii Supreme Court. Under the "taking" theory, the Supreme Court of Hawaii should have been named defendants. Under the plaintiffs' theory of "taking," the ownership of the water was transferred at the moment the state supreme court decision was issued. Tactically, however, naming the state supreme court as a defendant would have made it clear that the new suit was an appeal of the judgment in *McBryde*. It is a fundamental rule that federal district courts should not act as the appellate courts of the state.[33] Thus,

---

31. As the district court noted in *Robinson*, "The two basic grounds of relief urged by the plaintiffs are that they were deprived of their property and their water rights—property rights of great financial value—without either procedural or substantive due process in violation of the Fourteenth Amendment." 441 F. Supp. at 580.

32. The Hawaii Supreme Court in answering the certified questions from the Ninth Circuit stated:

> For *McBryde* necessarily left unresolved factual and legal issues that would require a determination by a trial court prior to any final judgment respecting the distribution of the waters of the Hanapepe. These include the identification of riparian lands to which such rights attach and most significantly, the nature and scope of any remedies to be afforded the parties.

Robinson v. Ariyoshi, 65 Hawaii 641 at 653, 658 P.2d 287 at 297.

33. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); *see generally* Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*,

instead of proceeding against the court, the plaintiff sugar companies sought to enjoin state officials from enforcing the decision.

In addition to the substantive due process claim, namely the taking of water by the *McBryde* decision, the sugar companies also based their complaint in federal district court on a number of procedural due process violations.[34] First, the sugar companies argued that none of the parties had argued for the result in *McBryde*. Thus, the sua sponte nature of the court's decision violated due process.[35] Second, due process was violated when the Hawaii Supreme Court denied the sugar companies the right to contest the constitutionality of the *McBryde* decision on rehearing.[36] Third, the plaintiff sugar companies urged that their rights to due process were violated when the Hawaii Supreme Court decided an issue allegedly not before the Court: *McBryde* held that surface water could not be transported out of the watershed of its origin. The sugar companies had long relied on the right to transport surface waters outside of the watershed to cultivate and irrigate sugar lands. Since the original trial court proceeding in *McBryde* was limited to the determination of the ownership of the water, the supreme court's ruling prohibiting the transportation of water was an alleged violation of proce-

---

31 HASTINGS L. J. 1337 (1980) [hereinafter cited as Chang, Rooker *Doctrine*.

34. As the district court stated in *Robinson*, "As appears above and as decried by Justice Marumoto in dissent in *McBryde I*, the effect of the judgment of the Supreme Court was to deprive the plaintiffs of their property, water and water rights, without affording any of them an opportunity to be heard in their defense." 441 F. Supp. at 580. For a discussion of the validity of the due process claims, see generally Chang, *Unraveling* Robinson, *supra* note 8, at 78-81.

35. The fact that a rule is declared by a court sua sponte is not reason to consider the rule a violation of procedural due process. The famous decision of the Supreme Court that the substantive law of the state should apply in federal diversity actions was laid down in a sua sponte fashion. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The opinion of Justice Butler in *Erie* expresses this point:

> No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. [Citations omitted.] Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.

304 U.S. at 82 (Butler, J., dissenting).

36. The author, in an earlier article, argued that this does not constitute a violation of procedural due process. *See* Chang, *Unraveling* Robinson, *supra* note 8, at 79.

dural due process.[37] Finally, a fourth due process violation was alleged because the Hawaii Supreme Court failed to give res judicata effect to an earlier case, *Territory v. Gay*,[38] which allegedly had determined that several of the parties involved in the present *McBryde* case were the owners of the water.[39]

The formerly adverse private parties who joined as plaintiffs thus rested their claims on two grounds: a taking of their property by the Hawaii Supreme Court and the procedural due process violations noted above. The federal district court assumed jurisdiction. This assumption of jurisdiction ignored both the res judicata[40] effect of the now final state decision and the *Rooker*[41] limitation on federal district courts acting as the appellate courts of the state. After a short trial, the federal district court agreed with the plaintiff sugar companies that their constitutional rights had been violated, enjoined the state from enforcing the decision and voided the state supreme court decision in *McBryde v. Robinson*.[42] In February 1985, after convening two three-judge panels and holding three separate hearings, the Ninth Circuit affirmed the district court opinion.[43] The state of Hawaii sought review of this decision in the United States Supreme Court.

On December 9, 1985, the Supreme Court asked the Solicitor General of the United States to file briefs expressing the

---

37. If a court speaks on an issue not before it, the statement would be considered dicta and not a violation of procedural due process. *Id.* at 80.

38. 31 Hawaii 376 (1930).

39. The Ninth Circuit in *Robinson* expressed the view that the decision in *Gay*, which was affirmed by the Ninth Circuit in Territory of Hawaii v. Gay, 52 F.2d 356 (9th Cir. 1931) created vested water rights for two of the parties in *Robinson*:

> The water law, at least between the territorial government and the Gay and Robinson interests, thereafter remained settled until statehood.
>
> Relying upon the decrees in *Territory I* and *II*, Gay and Robinson proceeded with further development of their plantations. . . . By any reasonable interpretation of the word "vested," Gay and Robinson's rights to the continued use of their water and related engineering works had become vested.

753 F.2d at 1473-74.

40. *See generally*, Chang, *Unraveling* Robinson, *supra* note 8, at 84-90.

41. *Id.* at 81-83.

42. 441 F. Supp. at 586.

43. 753 F.2d 1468 (9th Cir. 1985).

view of the United States.[44] This indicates that the issues involved in *Robinson v. Ariyoshi* are broad in scope and involve questions of federalism and of constitutional concern. The result effectuated by the Ninth Circuit must appear quite startling: a federal district court voiding a final state decision on a question of traditional concern to the states—water law. Moreover, the action of the district court, ostensibly justified by the finding of substantive and procedural due process violations, came after the aggrieved parties had presented the same arguments to the Supreme Court and had been denied review.

The action of the Ninth Circuit and the federal district court is all the more amazing when one considers these two courts needed to sidestep a number of different doctrines to reach the result: res judicata, ripeness, sovereign immunity, the *Rooker* principle that only the United States Supreme Court may properly review the constitutionality of decisions of state supreme courts, and the essential freedom of courts to overrule earlier precedents.

Another category of objections might be broadly termed "jurisprudential." This set of objections focuses on the assumption made by the federal district court and the Ninth Circuit that final judicial decisions such as *McBryde v. Robinson* "take" property. This issue is set amidst the ongoing debate as to whether judges "discover" or "make" the law.[45] *Robinson v. Ariyoshi* proves that the answer to this question has pragmatic consequences in terms of modern constitutional law. If jurisprudence is founded on a belief that judges discover law and that changes in the law are reflections of discovering a more accurate version of the law, then a change in law is not a "taking." The only premise on which one may even assert that a state supreme court decision has "taken" the property is one in which judges

---

44. 106 S. Ct. 565 (1985).

45. Professor Levy makes the following point:

> Even today "when a judge invents his own law and concocts his version of the facts, he will not fail to profess obedience to the accepted tradition." He still purports to be finding the very law which he has himself laboriously rebraided. The hold of an inherited legal philosophy controls our mind against our will and forces us into intellectual circumlocutions which would shame a medieval schoolman (footnote omitted).

Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 4 (1960).

are deemed to "make" law.

Largely through the efforts of the legal realists, courts and commentators have begun to admit the degree to which courts "make" law. Legal realism is generally viewed as a progressive movement allowing law to more adequately meet the needs of a changing society.[46] The Ninth Circuit's decision represents ironic misuse of legal realism: the legal realists never thought that being honest about what courts do would equip parties with the means of stifling progressive change in law.[47]

III. DOCTRINAL PATHOLOGY

If one dissects the Ninth Circuit's opinion in *Robinson v. Ariyoshi*, one discovers three premises that led to the final result. As stated earlier these are 1) that the correctness of a decision constitutes a new cause of action, 2) that state supreme court decisions can "take" property, and 3) that the rules of prior decisions can create vested rights. This article argues that these three premises are false since they would lead to a lack of finality in the judicial system. They are inconsistent with the inherent requirements of a legal system that must accomplish two goals—resolve disputes with finality and allow the law to evolve and change.

Proof of the invalidity of these assumptions is the head-on conflict of the Ninth Circuit's decision with many of the doctrines requiring finality or the proper respect of state court judgments. The following section shows how the result reached in *Robinson v. Ariyoshi* required the Ninth Circuit to ignore these

---

46. *Id.*

47. The lower federal district court asserted that *McBryde v. Robinson* was a decision based on public policy. Since the Hawaii Supreme Court had decided to "make" instead of "declare" law, its actions could be deemed a taking:

> 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.

441 F. Supp. at 566-67.

doctrines.

A. Ripeness and Sovereign Immunity

There were several barriers to federal district court jurisdiction in *Robinson v. Ariyoshi*. First, a lack of ripeness, since there was no concrete state action to judge.[48] The state never took any action to enforce *McBryde*. Indeed, it could not take such action since the decision ordered a remand to the state trial court. If this is true then, the federal district court's action essentially constituted an injunction against further state judicial proceedings.[49] Moreover, the Hawaii Supreme Court held, in answering the certified questions from the Ninth Circuit, that the *McBryde* decision essentially expressed a declaration of the state's public trust responsibility over the waters.[50] This declaration of public trust is more akin to a reaffirmation of the police power of the state to manage and regulate the water than an attempt to transfer the body of water to the state.

If *McBryde* merely represented an affirmation of the police power, then it is even more clear that an action to enjoin state officers is not ripe.[51] The case would only be ripe if, pursuant to

---

48. In its answers to the certified questions, the Hawaii Supreme Court stated that the *McBryde* judgment was not complete and needed to be remanded to the trial court for a specific allocation of the quantities of water to be accorded the parties. Robinson v. Ariyoshi, 65 Hawaii at 653, 658 P.2d at 297.

49. Under the *Younger* doctrine, federal courts should abstain from intervening in incomplete state civil proceedings. Mitchum v. Foster, 407 U.S. 225 (1972).

50. In its answers to the certified questions, the Hawaii Supreme Court stated that state ownership was not a corporeal ownership, but was akin to a public trust:

> This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State's ownership as retention of such authority to assure the continued existence and beneficial application of the resource for the common good.
>
> The nature of this ownership is thus akin to the title held by all states in navigable waterways which was recognized by the United States Supreme Court in *Illinois Central Railroad v. Illinois* [citations omitted]:
>
> > It is a title held in trust for the people of the State that they may enjoy the navigation of the water. . . .

65 Hawaii at 674, 658 P.2d at 310.

51. There are two reasons why *Robinson v. Ariyoshi* did not present an actual case or controversy. First, the judgment was not complete. *See supra* note 48. Second, the declaration of a public trust, without any concrete action by state officials, presents no claim to judge. The Amended Judgment on Remand issued by the lower court in *Robinson* after the decision of the Ninth Circuit gives further indication that the case was not

a state statute, state officials issued limited duration permits that substantially diminished the economic value of water to a particular user.[52] An injunction prior to that stage is analogous to an injunction against zoning that may eventually go too far.

In addition, the Ninth Circuit took the position that ripeness exists where there is a "cloud" over property rights.[53] The rules announced in many appellate decisions create a "clouds" of some sort over the rights of the immediate parties as well as persons with an economic stake in the legal issues involved.[54] For the Ninth Circuit to assert that there is a ripe controversy justifying an original action in federal court simply because there is a "cloud" over the rights of one of the parties is to interpret the doctrine of ripeness in a way that renders it meaningless.[55]

The case *might* be ripe if the corpus of the waters were transferred by the *McBryde* decision itself. If this is true then the suit should be dismissed as barred by the eleventh amendment.[56] No one denies that the state could exercise its eminent

---

ripe:

> *McBryde* constitutes a cloud on the surface water rights of the private property owners, but because the defendant State Officials in these proceedings have taken no steps to interfere with, and have denied that they are presently planning to take steps to interfere with the property of the Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners, as declared above, an injunction against the defendant State Officials may be premature at this time. Thus, no injunctive relief will be granted at this time since the declaration of the rights of the parties herein would appear sufficient to protect the rights of the private parties.

Amended Judgment on Remand at 4-5, Robinson v. Ariyoshi (Civ. No. 74-32) (D. Hawaii, Sept. 24, 1985).

52. If the water rights of the parties could be considered settled and such rights were replaced with short term permits that substantially reduced the amount of water allowed, then a taking claim is conceivable. Even then, the parties are not likely to succeed in invalidating a state statute that is applied in a rational manner. *See generally*, Kloos, Aipa and Chang, *Water Rights, Water Regulation and the "Taking Issue" in Hawai'i*, Technical Report No. 120, Water Resources Research Center, University of Hawaii (May 1983). *See also*, Cherry v. Steiner, 716 F.2d 687 (9th Cir.), *cert. denied*, 466 U.S. 931 (1984) (upholding the Arizona Groundwater Management Act of 1980).

53. 753 F.2d at 1471.

54. It is obvious that new decisions can have economic implications for non-parties.

55. To satisfy the "case or controversy" requirement of article III of the Constitution, a plaintiff must show real and immediate possibility of direct injury, not conjectural or hypothetical harm. City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983).

56. The eleventh amendment states: "The judicial power of the United States shall

domain powers and acquire the water or water rights of the sugar companies. In that case, the state would be required to pay just compensation. If the case is ripe in the sense that the waters have already been transferred to the state by the *McBryde* decision itself, then the suit would be against the state for payment of just compensation. When a suit against named state officials seeks the award of monetary relief for retroactive conduct, it must be barred by the eleventh amendment.[57] This result may seem odd in that it appears to eliminate any possible cause of action against a state that commits a taking.[58] Prior to the alleged taking, the case is not ripe. Immediately after the taking, the claim for money damage is precluded because of the eleventh amendment. The eleventh amendment, however, only acts to bar the suit in federal district court. In the normal case, one could sue in state court to compel payment of just compensation.

The basic flaw lies in the visualization of the *McBryde* decision as a taking, much as if it were a state bulldozer that destroyed plaintiffs' property. The error is in viewing an appellate decision as "taking" property.[59] As discussed here, decisions do not take property.[60] Rather, they declare the rights of the parties. In other words, *McBryde*, even if viewed as a decision determining the ownership of the surface waters, must be seen as declaring that the state has *always* been the owner of the waters.[61]

The suit in *Robinson v. Ariyoshi* could be interpreted as simply seeking a declaration of a taking without seeking payment of compensation. If successful, the parties would have to seek valuation of their claims in state court. This would put the state judge in a difficult position since the state court would be bound by the Hawaii Supreme Court's decision that *McBryde*

---

not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

57. Quern v. Jordon, 440 U.S. 332 (1979).

58. One possible means of avoiding this result is for the parties to bring an action in ejectment against the state. *Cf.* United States v. Lee, 106 U.S. 196 (1882).

59. *See generally*, Chang, *Unravelling* Robinson, *supra* note 8.

60. *Id.* at 57.

61. If the state has always been the owner of the water then the *McBryde* decision itself could not constitute a taking.

was simply a reaffirmation of the public trust doctrine. At the same time, the state judge would have to consider the argument that he should apply full faith and credit to the federal district court's judgment declaring a taking.[62]

In short, the action in *Robinson v. Ariyoshi* did not present an actual case or controversy since it was a disguised appeal of the *McBryde* decision.[63] It is not ripe in the same manner that any declaration of law, without more, does not create a case or controversy.[64] One cannot enjoin a court's declaration of law, just as one cannot enjoin the effects of dicta.[65] The lack of ripeness is only one aspect of the inherent falsity of the cause of action in *Robinson.*

B. The *Rooker* Doctrine and Res Judicata

Assuming that the Ninth Circuit was correct about ripeness, it still had to deal with two doctrines which declare that the federal courts should not entertain state claims that were, or should have been, raised and decided in a prior state proceeding. Two almost identical doctrines, the *Rooker* principle,[66] that federal courts should not act as appellate courts of the states, and the claim preclusion aspect of res judicata command this result.[67] The chief difference between these two is that *Rooker* is a jurisdictional bar and res judicata is a defense.[68] Thus, a federal judge could raise the *Rooker* bar to jurisdiction on the court's own motion, at any time in the proceedings.[69] On the other hand, res judicata is waived unless raised by a party.[70]

---

62. Arguably, the declaratory judgment in federal court would be res judicata as to the issue of a taking in the subsequent state court action to determine valuation. *Cf.* Stoll v. Gottlieb, 305 U.S. 165 (1938).

63. A subsequent action is a disguised appeal of an earlier action if the law of the jurisdiction rendering the first judgment would deem the second action barred by its law of claim preclusion. For an explanation see Chang, Rooker *Doctrine, supra* note 33, at 1357-63.

64. Acts of appellate courts in declaring the law do not create an original cause of action. *Id.* at 1346-49.

65. Dicta, by its very nature, has no legal effect on the immediate parties, or others, to the decision.

66. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

67. *See* Chang, Rooker *Doctrine*, supra note 33, at 1350-56.

68. *Id.* at 1355.

69. *Id.*

70. *Id. See* Huffman v. Pursue, Ltd., 420 U.S. 592, 607 n. 19 (1976).

In response to the argument that the *Rooker* or claim preclusion doctrine barred the action in *Robinson*, the sugar companies would assert two objections. First, they would argue that it is not true that the claim was considered in the prior state proceeding.[71] Second, even if the claim had been implicitly considered, the failure to allow the sugar companies to fully brief the claim or present factual evidence as to the implications of the new *McBryde* decision constituted a denial of due process.[72] Arguably, both grounds justify the refusal of the federal district court to apply res judicata.[73] Similarly, it can be asserted that both grounds serve as an exception to the *Rooker* doctrine that lower federal courts should not act as appellate courts of the state.[74]

The Ninth Circuit agreed with the sugar companies and held that where the state court never entertained a claim, a lower federal court is not barred from considering that claim.[75] Of course, this reasoning misses the most obvious objection of all. As noted earlier, the constitutionality or correctness of a decision is not a new and separate claim different from the underlying claim. Even if one persists in the belief that it is a new and separate claim, then, it is still true that a court rendering a decision considers and resolves affirmatively the constitutional validity of its own decision by the very act of rendering the decision.

Every decision represents an implicit decision of constitutional validity.[76] It would be superfluous for every court to add

---

71. 753 F.2d at 1472.

72. 441 F. Supp. at 564.

73. 753 F.2d at 1472.

74. The Ninth Circuit, holding that the failure to entertain a claim was an exception to the subject matter principle of *Rooker*, stated that "if *Rooker* were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, *Rooker* would swallow the 'full and fair opportunity to litigate' limitation to res judicata clearly established elsewhere by the Supreme Court." 753 F.2d at 1472.

75. The Ninth Circuit also held that "[w]here a state court has refused to entertain federal constitutional claims, a federal court violates the precepts of neither subject matter jurisdiction nor res judicata by hearing those claims." *Id.* at 1473.

76. *Cf.* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876) ("[T]hat a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate."). *See also* Grubb v. Public Util. Comm'n, 281 U.S. 470, 477 (1929); Grossgold v. Supreme Court of Ill., 557 F.2d 122, 124-25 (7th Cir. 1977); Tang v. New York Supreme Court, 487 F.2d 138, 141 n.2 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

at the end of its opinion: "Moreover, we decide that the decision reached above is constitutional." Obviously, no court considers the constitutionality of its own decision and then rules in the negative. Hence, every state and federal decision implicitly affirms the court's view that its acts are constitutional. It is logical to presume that all courts believe they are issuing decisions which are constitutional and do not intentionally issue decisions that they secretly believe are unconstitutional. Courts may be wrong as to the constitutionality of a decision, but it cannot logically be argued that the issue was not decided. Hence, in the case of state supreme court decisions, the United States Supreme Court may ultimately decide that the state court was wrong as to the constitutionality of the decision, but there is no question that the issue is always implicitly considered and implicitly decided. Recent Supreme Court decisions have held that a claim that should have been raised in the state proceeding cannot be relitigated in a federal proceeding.[77] A fortiori, claims that were raised and decided even implicitly, are also barred.[78] This result is commanded by the full faith and credit clause.[79] If the state law would have barred relitigation, the federal court must provide the same result.[80] This is true even if the federal court believes that the state court erred in its application of state law.[81]

The second objection that the sugar companies would make to the application of *Rooker* or res judicata is that this new claim regarding the constitutionality of *McBryde* was not fully

77. *See, e.g.*, Parsons Steel, Inc. v. First Alabama Bank, 106 S.Ct. 768 (1986) (even if the state court mistakenly rejected respondent's res judicata claim, this does not justify a federal court injunction against enforcement of state court judgment); Marrese v. American Academy of Orthopedic Surgeons, 84 L.Ed.2d 274, 105 S.Ct. 1327 (1985) (lower federal courts must apply res judicata law of the state in which judgment was entered); Migra v. Warren City School Dist., 465 U.S. 75 (1984) (with respect to claims that could have been raised in the prior state proceeding but were not, the federal court must apply claim preclusion to bar such a claim if the state law of the state which rendered the judgment would also apply claim preclusion); Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) (federal court must apply the res judicata law of the state that rendered the allegedly preclusive judgment); Allen v. McCurry, 449 U.S. 90 (1980) (same).

78. *Cf.* Migra v. Warren City School Dist., 465 U.S. 75 (1984) (applying the law of the state rendering the judgment to bar claims reserved and not raised in the prior state proceeding).

79. 28 U.S.C. § 1738 (1976).

80. See cases cited *supra* note 77.

81. Parsons Steel, Inc. v. First Alabama Bank, 54 U.S.L.W. 4144 (U.S. Jan. 27, 1986) (No. 84-1616).

and fairly litigated in the previous action.[82] In other words, res judicata should not apply because the state supreme court violated procedural due process by failing to allow the sugar companies the right to address the constitutionality of *McBryde* in overruling earlier precedents.

The Ninth Circuit was wrong on two counts. The system did afford the sugar companies two opportunities to raise their constitutional objections and the United States Supreme Court has required much less in terms of procedural due process in its own proceedings. First, the sugar companies had an opportunity to notify the Hawaii Supreme Court of their constitutional objections when they petitioned the Hawaii Supreme Court for a rehearing.[83] Second, when the sugar companies sought review in the Supreme Court they asserted their constitutional concerns in their petition for certiorari.[84] It is true that the Hawaii Supreme

---

82. 441 F. Supp. at 580.

83. McBryde Sugar Company stated in its answering brief before the Ninth Circuit:

> Timely petitions for rehearing and motions for an opportunity to present evidence and argument on the constitutional claims were filed by McBryde, G & R, Olokele and the Small Owners. . . . On June 18, 1973, the Supreme Court ordered the parties to file briefs limited to two questions framed by the Court which in no manner related to the constitutional issues, or provided opportunity for a hearing on McBryde's federal claims (citations omitted).

Answering Brief of McBryde Sugar Co., Defendant-Appellee at 9, Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985).

84. McBryde Sugar Company and Olokele Sugar Company joined in an appeal, or petition for certiori, from the Hawaii Supreme Court's *McBryde* decision and made the following constitutional claim in their appeal:

> The property rights of both Olokele and McBryde have now been taken. The Hawaii Supreme Court's construction of Stat. L. Kamehameha III 81 (1847) has conferred ownership of all water on the State of Hawaii, the term "ownership" not being used by the Court in the publici juris sense, since prescription of the right to use water is precluded. Moreover, the Court's construction of Hawaii Rev. Stat. § 7-1 has taken some portion of Gay & Robinson's normal flow surplus water for use of other riparians. Under the decisions of this Court, a taking without compensation has occurred. [Citations omitted.] Olokele also submits that the Hawaii Supreme Court has violated the Due Process Clause, by failing, in the absence of circumstances relevant under the Due Process Clause (such as the existence of a judgment rendered without jurisdiction or procured by fraud), to accord res judicata effect to the decision of *Territory v. Gay* . . . .

Appellants' Petition for a Writ of Certiorari at 35, McBryde Sugar Co. v. Hawaii, *cert.*

Court denied them a right to argue the constitutional issues on rehearing and that the U.S. Supreme Court denied certiorari, depriving them of the opportunity to brief fully both courts at length on these issues. This does not, however, prove a denial of procedural due process. Rather, it simply shows that both courts did not consider these claims worthy of reconsideration or certiorari. No court is required by the constitution to provide full briefing and oral argument on every issue that a party contends is at stake. In summary affirmance proceedings, the Supreme Court of the United States has ruled at times without oral argument or briefs from the losing side.[85]

---

denied and appeal dismissed, 417 U.S. 962 (1974).

Moreover, a number of small farmers joined in the petition for certiorari on the side of the sugar companies. Their constitutional claim was that the *McBryde* decision's rule against transfer of water deprived them of economic rights since they were engaged in the sale of their water rights. There is no basis for these parties to participate in the present action. Since these parties agree that the issue of transfer and severance of the appurtenant water rights of the parties were never raised, then, any judicial statements on the issue in *McBryde* must have been dicta. As dicta, the statement could not have deprived them of their property. In their brief to the Supreme Court, the small farmers state that the issue of transfer was never raised:

> The State of Hawaii never challenged Petitioners' rights to sever the ownership of their water rights from the land with which they originally passed as an appurtenance, or to transfer those waters for use on other lands, whether or not within the watershed of origin. . . . The sole issues before the trial court affecting Petitioners were the determination of what lands had appurtenant water rights by virtue of ancient Hawaiian taro culture thereon and the amount of water to which each such acre was entitled.

Petitioners' Petition for a Writ of Certiorari at 5-6, Albarado v. Hawaii, *cert. denied*, 417 U.S. 962 (1974).

The small owners also challenged the constitutionality of the *McBryde* decision in their petition. *Id.* at 11. The small owners also raised these same claims in their petition for rehearing before the Hawaii Supreme Court. *Id.* at 11 n.16. In any event, the Hawaii Supreme Court, in a separate case, has ruled that appurtenant water rights cannot be severed and transferred. Such rights can only be extinguished by deed. Reppun v. Board of Water Supply, 65 Hawaii 531, 656 P.2d 57 (1982) *cert. denied sub nom.* Board of Water Supply v. Nakata, 105 S. Ct. 2016 (1985).

85. As Stern and Gressman in their treatise on Supreme Court practice point out, the Supreme Court has summarily affirmed and reversed cases arising from the lower courts without briefings on the merits by either side:

> In such cases it is unlikely that the appellee will have filed a motion to affirm on the ground that no substantial question has been presented . . . . But unless . . . counsel is familiar with the Court's practice in this respect, he will not be forewarned that the case may be lost on the appeal papers without his having filed anything at all.

STERN AND GRESSMAN, SUPREME COURT PRACTICE, 379 (1979). This is a practice which the Supreme Court views as comporting with the requirements of procedural due process.

Furthermore, the sugar companies argued they were denied procedural due process because they were not allowed to present factual evidence as to how the *McBryde* decision would affect the operation of the sugar industry as a whole. When landmark decisions are issued by a court sua sponte, parties or interested amicus curiae are often denied the opportunity to present to the court facts as to how the new rule would affect any particular segment of society. In one of the most celebrated sua sponte decisions of all, *Erie v. Tompkins*,[86] the Supreme Court implicitly rejected any notion that due process guaranteed the parties a right to present evidence as to how *Erie* would affect the evolution of state law.

None of the arguments presented here conflict with the assertion that new and separate claims, different from the underlying claim, can arise during the judicial process. For example, suppose during an appellate argument an annoyed justice of a state supreme court leaned over and banged an advocate over the head with a gavel. Or, suppose a state supreme court had a rule which allowed defendants' brief to be one hundred pages and plaintiffs' brief to be four.[87] Or, suppose in attaching property, sheriffs enforcing a judicial decree maliciously shot a protesting defendant. In each of these cases, the resolution of the underlying case in a final judgment would not necessarily terminate the separate action brought in tort, equal protection, or as a civil rights action. But these instances of "state action" or "judicial misconduct" are different from the alleged judicial wrong in *McBryde*. One might term the above "process" acts. On the other hand, *McBryde* involved a court acting in its "appellate" capacity.[88]

United States v. Haley, 358 U.S. 644 (1958); Wickard v. Filburn, 317 U.S. 111 (1942); Chamberlin v. Dade County Board, 377 U.S. 402 (1963); and School District of Abington Township v. Schempp, 374 U.S. 203 (1962). Moreover, the Supreme Court has summarily reversed cases without briefing from the losing side. Vachon v. New Hampshire, 414 U.S. 478 (1974); Eaton v. City of Tulsa, 415 U.S. 697 (1974); Menna v. New York, 423 U.S. 61 (1975) and Texas v. White, 423 U.S. 67 (1975). The constitution clearly does not require oral argument on every issue or on every appeal. STERN AND GRESSMAN, SUPREME COURT PRACTICE, 317 (1978).

86. 304 U.S. 64 (1938).

87. *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956) (violation of due process and equal protection clauses for state judicial system to condition appeal on the ability of an individual to purchase a transcript).

88. The author, in a different context, has defined "appellate acts," as opposed to "original acts" as follows:

The lower federal court in *Robinson v. Ariyoshi* broadly asserted that judicial action could be the basis for state action. *McBryde* does not involve the enforcement of a judgment. Appellate acts, in the form of judicial decisions by properly constituted state supreme courts, are not "state action." If appellate decisionmaking, without more, constituted state action, many final decisions could be collaterally attacked in federal trial courts. Such a theory would undermine the finality of the judicial process. There would be two routes to appeal cases. State supreme court decisions could be appealed either to the U.S. Supreme Court or to federal district court as was done in *Robinson*.[89]

In conclusion, both *Rooker* and res judicata apply to bar the subsequent federal action in *Robinson v. Ariyoshi*. It is erroneous thinking and bad theory to contend that the correctness of a judicial decision constitutes a new and separate claim from the underlying action. Even so, the normal rules of res judicata apply to bar this "new" claim from being raised in federal court. Once the *McBryde* judgment had been reviewed by the United States Supreme Court, the system as a whole had spoken. The judicial process would be substantially weakened if another part of the system could revive a dispute which had been finally adjudicated.

C. Unforced Errors: Six Answers in Search of an Audience

Probably the most disturbing aspect of *Robinson v. Ariyoshi* was the Ninth Circuit's decision to ignore the answers

---

> The term "original acts" means acts, such as automobile accidents, breaches of contract, employment termination, and the like, that give rise to legal claims. In contrast, appellate acts are events that occur within the legal system: the decision of any court, even one of first resort, is thus an "appellate act." Within the concept of appellate acts there exists a distinction between declaration acts (acts of declaring law) and process acts (the procedural manner in which the system treats a litigant). Since the procedural manner in which the system treats a litigant could constitute a separate claim; claims based on procedural abuses should not be dismissed under *Rooker*. Federal court challenges to the substantive determinations of state court decisions (declaration acts), however, are impermissible under *Rooker* [citations omitted].

Chang, Rooker *Doctrine*, *supra* note 33, at 1346-47.

89. *Id.* at 1345-46.

it requested from the Hawaii Supreme Court concerning the meaning of *McBryde*.[90] This is unfortunate since the answers given by the Hawaii Supreme Court rendered moot the conflict between the two sides. The answers to the certified questions eliminated the harm upon which plaintiffs had based their case. Thus, the decision to ignore these answers is curious. It would appear that the Ninth Circuit was seeking predetermined answers and was willing to disregard nonconforming answers. If this is so it would be an improper use of the certification procedure. It would also seem to violate the well-established rule that a state supreme court has a sovereign right to determine questions of state law and that such determinations should be binding on federal courts.[91]

In its answers to the six questions, the Hawaii Supreme Court made two statements which in effect mooted the case. First, the court withdrew its earlier ruling absolutely prohibiting water from being transported outside of the watershed.[92] Second, it held that its ruling on "state ownership" of water was not meant to transfer the water in a corporeal way to the state. Instead, the court explained that it had asserted that the state had a public trust over the waters.[93]

---

90. Robinson v. Ariyoshi, 65 Hawaii 642, 658 P.2d 287 (1982).

91. Herb v. Pitcairn, 324 U.S. 117 (1945).

92. The Hawaii Supreme Court in its answers to the certified questions clarified its earlier statements:

> Thus we take issue with the federal district court's characterization of *McBryde* as "restraining the free diversion of surface waters for use outside the lands of the plaintiffs to which they are appurtenant." [Citation omitted]. *McBryde* merely established that there was no *right* on the part of the plaintiffs to benefit from such diversions. But, as was the case in our preexisting law, governing the transport of water, diversions will be restrained only after a careful assessment of the interests and circumstances involved indicates a need for restraint. A delineation of these interests and circumstances were not before us in *McBryde* and we did not order the cessation of any diversions. Consistently with our statutory prerogative, we merely defined the appropriate scope of the rights established in the case and left the actual enforcement of these limitation to appropriate subsequent actions brought by the parties including the State.

65 Hawaii at 649-50, 658 P.2d at 295 (footnote omitted, emphasis in original).

93. *See supra* note 50. The United States Supreme Court reviews judgments not opinions. *See* Chevron v. Natural Resources Defense Council, 104 S.Ct. 2778 (1984). Thus, considered in light of the Answers to Certified Questions, the judgment in *Mc-*

These two interpretations of the *McBryde* rulings completely gut the plaintiffs' taking claim. First, the court stated that the original decision only meant there was no absolute right to transfer water. Such transfers must be reasonable in light of the possibility of harm to other water users.[94] These statements are within the mainstream of riparian rights. Moreover, they are particularly reasonable in an island state with a scarcity of water resources.

Secondly, the certified answers stated that the term "state ownership," as used in the original *McBryde* decision, meant that the state had a "public trust" over the waters. With this reinterpretation of the *McBryde* decision, it could not be argued that decision itself transferred the corpus of the waters. The notion of a state public trust over the waters is akin to that of the police power to regulate.[95] Thus, the declaration of "state ownership" in *McBryde* could not constitute the state action that took plaintiffs' property. Since, the *McBryde* decision cannot be said to "take" property, and since the state could not enforce *McBryde*, the substantive due process claim of the plaintiffs must fail in its entirety.

In the alternative, the sugar companies might assert that the declaration of a public trust may be the basis for a future taking. This may be so if a limited duration permit system were adopted in Hawaii and the amount of water allowed the sugar companies were substantially reduced. But the constitutionality of a permit system as implemented is a completely different question from the constitutionality of *McBryde*. It would only become ripe as a question of law when and if such a permit system were adopted and implemented.

It was never necessary for the state to "own" the water to accomplish its goals of management and regulation. It may have been thought that ownership of the body of water would allow the state to sell the sugar companies the water they were using prior to *McBryde*. However, no official of the State Department of Land and Natural Resources, charged with administration and regulation of water, has taken the position that the state

---

Bryde v. Robinson certainly did not take petitioners' property.

94. *See supra* note 92.

95. *See supra* note 50.

should sell water to the sugar companies as a means of raising revenues. This is simply not a realistic political position. Sugar is one of the three major industries in Hawaii, with approximately 8,500 employees.[96] The sugar industry is completely dependent on federal price supports to stay in business.[97] Raising production costs by charging for the use of water would only hasten the demise of the sugar industry and lead to catastrophic consequences for the state.

The clarification in the certified answers may have been a recognition that it was never in the state's interest to "own the water" in a corporeal sense. Like every other state, the state needs the power to regulate and manage water. Under the police powers inherent in its sovereignty, the state already possessed much of the necessary power. Indeed, the state already had a groundwater management statute.[98] A new statute granting similar powers to manage surface water could have been enacted with or without declaration of a public trust over such waters by the Hawaii Supreme Court.[99] The clarification in the certified answers that "state ownership" meant "public trust" merely re-

---

96. Total number of jobs in the sugar industry has declined from 14,635 in 1960 to 9,000 in 1979 and less in 1986. *See* Plasch, *Hawaii's Sugar Industry: Problems, Outlook and Urban Growth Issues* at 70, *Dep't of Planning and Economic Development, State of Hawaii*, April 1981.

97. Under previous sugar legislation, quotas, import levies and taxes were used to maintain domestic sugar prices at levels profitable to domestic producers. *Id.* at 130. Sugar price supports were recently included in the Food Security Act of 1985, 99 Stat. 1354.

98. Hawaii's Ground-Water Use Act allows the Department of Land and Natural Resources to designate areas and manage the withdrawal of groundwater from these areas through a permit system. HAWAII REV. STAT. §§ 177-1—177-35 (1976).

99. In addition to the powers of the state to legislate in this area under its inherent police powers, the state has a mandate to enact a water code to provide comprehensive water management by virtue of a 1978 amendment to the state constitution that provides:

> Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
>
> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

HAWAII CONST. art. XI, § 7.

affirmed the state's power to regulate water and did not constitute a transfer of the corpus of the water.

At this point the litigation should have ended. The Ninth Circuit should have reversed the lower court and dissolved the injunction. Instead the Ninth Circuit ignored the certified answers,[100] and proceeded to find a federal constitutional violation. This is unfortunate since the *McBryde* decision, viewed in its least attractive light, simply did not decide the issues before the court. The Hawaii Supreme Court was asked to decide whether the trial court's allocation of waters among the parties was correct. The net effect of the original *McBryde* decision and the certified answers is that the state supreme court simply asserted that the state has a public trust over the waters and that there is never an absolute right to divert. Both statements are, in essence, dicta and constitute a non-responsive answer to the questions presented. While such a result is a frustration of the judicial process, particularly for litigants in a case which commenced in 1959, the actions of the court do not constitute a taking.

The result in *Robinson v. Ariyoshi* is ironic. The Hawaii Supreme Court indicated that *McBryde* should be remanded to the trial court without clear instructions as to how to reallocate the waters. Despite the lengthy federal proceedings and dramatic assertions of constitutional violations, this is also the net result of the Ninth Circuit decision. Subsequent to affirmance in the Ninth Circuit, the federal district court in *Robinson v. Ariyoshi* remanded the case to the state trial court to determine prescriptive rights and allocate storm and freshet waters.[101] However, as

---

100. The only mention that the Ninth Circuit makes of the certified questions is the following:

> The leisurely pace of this litigation has produced three oral arguments in this court, two of which were followed by referral of certified questions to the Supreme Court of Hawaii. [Citation omitted.] Following the publication of the state court's answers to the certified questions, the parties briefed the remaining issues that had been narrowed by the earlier proceedings and reargued the case.

753 F.2d at 1471.

101. The federal district court retained jurisdiction over the case and remanded to the state trial court for a determination of prescriptive rights and an allocation of the storm and freshet waters:

> Unless determined by agreement of the parties in interest, the ultimate determination, to be made in the light of the deci-

was the case subsequent to *McBryde*, the state trial court has no new legal basis upon which to allocate the waters. It was the same trial court's initial decision that was appealed to the Hawaii Supreme Court, in the form of the *McBryde* decision, which was again subsequently "appealed" to the federal district court, the *Robinson* decision. The federal court has now remanded the case to the state trial court. This act seems inappropriate given the normal rules regarding the relationship between state and federal courts. In effect, the state trial court has become the appellate court for its own decision. The federal court did not declare any "state" substantive law by which the state court was to re-decide the case. Such an act would have been clearly beyond the powers of the federal court. Nor do the certified answers from the Hawaii Supreme Court, which are binding on the lower state courts, provide any rules upon which to allocate the water. Those certified answers that established the proper meaning of *McBryde* simply declared that the state has a public trust over the waters.

There are three actions that create this ironic circumstance. The first is federal intervention in ongoing state proceedings that have not yet been completed.[102] This prevents the state judicial process from having the opportunity to resolve the meaning of *McBryde* in terms of specific allocation of the water. The second action is the Ninth Circuit's decision to ignore the answers to the certified questions.[103] Even assuming that courts

---

> sions rendered by this Court and the Ninth Circuit Court of Appeals, of the prescriptive water rights of McBryde Sugar Company, Limited, and of the allocation of storm and freshet surplus waters, is left to the Hawaii Fifth Circuit Court sitting as statutory water commissioner. . . .

Amended Judgment After Remand at 7 and 8, Robinson v. Ariyoshi (Civ. No. 74-32) (D. Hawaii, Sept. 24, 1985).

102. The federal court should abstain from such intervention. Trainor v. Hernandez, 431 U.S. 434 (1977).

103. Treating the answers from certified questions as non-binding will undermine the use of this technique. State supreme courts will have no interest in issuing opinions that will be ignored or construed against the wishes of the court. The decision of the Ninth Circuit to ignore the certified questions seems questionable in light of the principles of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) and against the spirit of the Full Faith and Credit Act, 28 U.S.C.A. § 1738 (1976). Within the Ninth Circuit, the Supreme Court of Washington deems its answers to certified questions as binding and non-advisory:

> The case at bar illustrates clearly the needed and binding character of the decision of this court to the question certified.

can "take," the answers eliminated any possibility of a taking. The Ninth Circuit should have deemed the answers binding and reversed the judgment. The third action is the failure of the Hawaii Supreme Court to determine specifically how to allocate the water. The Hawaii Supreme Court, however, cannot be blamed in this matter since the federal courts intervened before the action could be remanded to the state trial court. Moreover, the certified questions to the Hawaii Supreme Court from the Ninth Circuit did not specifically address this issue. Thus, the parties were caught between a federal court that should not have acted and a state court that did not act.

In a very real sense *Robinson* is much ado about nothing. The *McBryde* decision did not change the status quo. Nonetheless, despite the fact that the sugar companies never could have been harmed, the sugar companies may be awarded approximately four million dollars in attorney fees as the "prevailing" parties. It is difficult to understand how they "prevailed," since the perceived threat arose out of the wrong interpretation of the Hawaii Supreme Court's language as to "state ownership" of water. In a sense, the action in *Robinson v. Ariyoshi* was brought on the basis of the opposing parties stipulating to the wrong meaning of a judicial decision. The state should not be penalized by the award of attorneys fees to the plaintiffs simply because the plaintiffs successfully persuaded the district court to adopt an improper interpretation of *McBryde*. The rule of "no harm, no foul" should apply. Even assuming the waters could be owned, the threat of a taking of waters from the plaintiffs was never a conceptual, legal or political reality.

D. No Property Interest in Judicial Decisions

As stated, to reach the result in *Robinson*, it was necessary for the Ninth Circuit to construct false premises. First, as described above, it was necessary for the court to assert that the

---

> The whole reason for invoking the certified question procedure is to obtain an authoritative meaning of RCW 48.410 so that the district court can apply that meaning in disposing of the bankruptcy proceeding pending before it.

In re Elliot, 74 Wash.2d 600, 446 P.2d 347, 355 (1968). *See also In re* Richards, 223 A.2d 827, 832 (Me. 1966) (Supreme Court of Maine considers certified answers binding on the federal courts).

constitutionality of a judicial decision constitutes a separate cause of action from the underlying claim. Moreover, the court misinterpreted United States Supreme Court precedent as holding that the appellate decisions of a state supreme court can constitute "state action" for purposes of the fourteenth amendment.

Finally, the Ninth Circuit assumed that judicial precedents can create property rights. This is a necessary step in any allegation that an overruling decision has taken property. One must assume that the property taken was created by an earlier judicial decision.

There are three senses in which a judicial decision can assertedly create property rights in various parties. First, there is the assertion that parties who did not participate in a judicial decision relied on the rules of law laid down by that judicial decision. Arguably, if there is sufficient evidence of reliance, these parties may claim a property interest created by the rules. These assertions has been rejected. The United States Supreme Court has held that decisions do not create a property interest.[104]

The second sense is that of res judicata. Parties to final judgments have strong rights not to have their judgments disturbed, despite the fact that the original law under which the case was decided may have changed.[105]

Finally, there is a third sense, as implied by the Ninth Circuit, that parties to a proceeding have a property interest in the general rules of law laid down by that decision. The difference between the second and third senses is that in the third sense

---

104. 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). Thus, as to McBryde Sugar Company, which was not related to a party in the *Gay* proceeding, it should not be able to claim a vested property right arising out of *Gay* or other cases. The Ninth Circuit held otherwise:

> The *Robinson I* court found that McBryde Sugar Company also relied upon the law set forth in *Territory II* and developed water rights that became vested. (Territorial cases are collected in *Territory I*, 31 Hawaii at 384). The extent of McBryde's rights, however, the district court left for further litigation in the state courts. [Citation omitted.]

753 F.2d at 1474.

105. Federated Dep't Store, Inc. v. Moitie, 452 U.S. 394 (1981).

the parties to a proceeding assertedly have a right to rely on the reasoning, as opposed to judgment, of a decision. In other words, the reasoning of a decision creates a vested right upon which the immediate parties may rely.[106]

In *Robinson*, the Ninth Circuit held that by an earlier decision in *Territory v. Gay*,[107] the Supreme Court of the Territory of Hawaii determined that the owner of land upon which water arose essentially owned the surface water subject to minor rights of others for domestic use. That Territorial Supreme Court decision was affirmed by the Ninth Circuit. From this language, the

---

106. Parties to a judgment may have a constitutional interest in the protection of the judgment in a res judicata sense. It is the judgment that creates the right. The Ninth Circuit's discussion indicates that it is the rules which create a vested property right for the immediate parties to the decision. Thus, the court does not give a legal ground by which to distinguish the vested rights of non-parties to a decision, such as McBryde Sugar Company, from parties, Gay and Robinson. Non-parties have no vested rights in decisions. *See supra* note 104. Parties do not have a vested right as to a decision, but may claim that their judgment is protected by the bar and merger principles of res judicata. The Ninth Circuit's discussion should have been limited to whether *Gay* was res judicata as to the *McBryde* decision. Apparently, the parties did not think so since the parties to *Gay* participated willingly in the *McBryde* litigation and did not raise the res judicata issue. Hence, *Gay* and *McBryde* must be deemed as having presented two different causes of action: *Gay* as to the right to divert and *McBryde* as to the allocation of the waters. The sugar companies would claim that the right to divert as determined in *Gay* was based on a rule of ownership of the waters and that this reasoning created vested rights that could not be disturbed in *McBryde*. The Hawaii Supreme Court in its answers to the certified questions however, stated that the ownership of these waters was not adjudicated in *Gay* because:

> Issues related to the definition or quantification of such normal daily surplus were not implicated because the parties stipulated to the presence of such waters and left open the question of the rights of others. . . . [T]here was no ruling with respect to the rights of others upon which the very existence of surplus water was contingent.

65 Hawaii at 670, 658 P.2d at 308.

107. 31 Hawaii 356 (1931). The Ninth Circuit interpreted the effect of the *Gay* decision as follows:

> On April 28, 1930, the Supreme Court of the Territory of Hawaii, in litigation between substantially the same parties that are here today, except for the McBryde Sugar Company, held that the common law doctrine of riparian rights was not in force in Hawaii with reference to surplus waters of the normal flow of a stream. The same court further held that the owner (konohiki) of the land (ili) could use the water collected on his ili as he saw fit, subject to the rights of downstream owners to drinking water and other domestic uses that the parties in all this litigation have agreed have not been in controversy.

753 F.2d at 1473.

Ninth Circuit asserted that the parties in *Gay*, substantially the same parties as those in *Robinson*, had a vested right to the rules laid down in *Gay*.[108] The Ninth Circuit went on to say that the Hawaii Supreme Court could overrule *Gay*, but the *McBryde* decision could not divest these parties of their vested rights. *McBryde* could only prospectively effect water rights created after it became final.[109]

The court is wrong on several counts. First, the United States Supreme Court has repeatedly held that the rules laid down in decisions to not create vested rights.[110] Second, the parties in *Gay* have no more of a right to rely on the reasoning of *Gay* than do unrelated parties. The parties in *Gay* clearly have a right to a preservation of the judgment in *Gay*. A judgment, however, must be distinguished from the rules creating the judgment. Parties to a proceeding as well as non-parties have no claim that the particular rules of any decision create vested rights.

Moreover, it was improper for the Ninth Circuit to claim that *Gay* stands for the rule that parties who owned the land on which the surface waters arose controlled that water. The issue of quantification or normal surplus water was not implicated because the parties stipulated to the presence of such waters. A divided court held that the waters belonged to the konohiki.[111] As to storm and freshet surplus waters, Chief Justice Perry would have included such waters in normal daily surplus, but he was unable to convince a majority of the court.[112] Thus even if it

---

108. 753 F.2d at 1473-74.

109. The Ninth Circuit stated:

> This declaration of a change in the water law of Hawaii may be effective with respect to real property rights created in Hawaii after the *McBryde I* decision became final. New law, however, cannot divest rights that were vested before the court announced the new law. See *Hughes*, 398 U.S. at 295-98, 88 S.Ct. at 441-43.

753 F.2d at 1474.

110. See cases cited *supra* note 104. The Supreme Court has also held that state supreme courts may constitutionally overrule earlier decisions with either retroactive or prospective effect. Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932). This is further argument for the constitutionality of the result in *McBryde*.

111. Robinson v. Ariyoshi, 65 Hawaii at 670, 658 P.2d at 308 (1982) (Answers to Certified Questions).

112. *Id.*

were true that the reasoning of a judicial decision could create a vested right, there was no clear rule from which to infer such rights in *Gay*.

Finally, the Ninth Circuit's statement that *McBryde* could only have prospective effect makes no sense at all.[113] Questions of property law like questions of title operate retroactively by their very nature. When the court in *McBryde* interpreted an earlier statute as requiring the application of riparian law, the change in law must refer back to the date of the enactment of a statute. The ostensible purpose of statutory interpretation is to ascertain original legislative intent.[114] When a court rules that earlier interpretations of that original intent were wrong, the new meaning is deemed to speak as of the date of the enactment of the statute, not the date of the new overruling decision. Otherwise, the statute cannot be considered as the basis for the change in law.[115]

One might believe that the Ninth Circuit ruled that *McBryde* must be treated as prospective since such prospectivity might mitigate the harshness of the Hawaii Supreme Court's ruling. Prospective application makes little sense when one attempts to determine the corpus of waters and land to which such a new prospective ruling apply. No new land or rivers are being created in Hawaii.[116] In this sense, the rules of property,

---

113. *See supra* note 109.

114. Professor Dickerson has stressed the importance of legislative intent as follows:

> One of the most fundamental, and at the same time elusive, concepts in the interpretation and application of statutes is that of legislative intent.
>
> The appeal of the concept is strong. In the division of responsibilities represented by the constitutional separation of powers, the legislature calls the main policy turns and the courts must respect its pronouncements. In such a relationship, it would seem clear that so far as the legislature has expressed itself by statute the courts should try to determine as accurately as possible what the legislature intended to be done.

R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 67 (1975).

115. If a statute is deemed to have a different "original" meaning as of the date of the judicial decision which effectuated the change, then it must be the judge and not the statute that is imparting the new meaning.

116. *But see* Hawaii v. Zimring, 58 Hawaii 106, 556 P.2d 725 (1977) (the state is the owner of newly created volcanic lands). This final judgment in *Zimring* was collaterally attacked in federal district court in Hawaii as a taking of property much like the action in *Robinson v. Ariyoshi*. The federal district court dismissed on the grounds that it

unlike the rules of procedure or torts, are, by logical necessity, retroactive.

The Ninth Circuit might have meant that *McBryde* could operate only prospectively as a matter of logic. If so, the taking claim is undermined. If the decision could only operate prospectively as a matter of logic then it was not possible for it to have had effect on the sugar companies. If this is the proper gloss to be given *McBryde* then the taking claim must vanish and with it the claim for attorneys fees.

The purpose of this doctrinal pathology has been to demonstrate the invalidity of the three assumptions made by the federal courts in *Robinson*: 1) that judicial decisions create vested rights; 2) that appellate decisionmaking may constitute "state action" that takes property; and 3) that the constitutionality of a decision is a new cause of action different from the underlying claim. By combining these false premises the federal courts in *Robinson* were able to sidestep the *Rooker* doctrine, res judicata, ripeness and sovereignty. These three false premises, however, give rise to a bizarre, judicial world where the normal relationship between finality and validity are reversed. In the world of *Robinson v. Ariyoshi*, ultimate finality in the system is destroyed in the quest for absolute truth, as if such a truth existed.

As a case concerning Hawaiian water rights, *Robinson* provides no guidance. In federalism terms, however, it must be taken very seriously as a case allowing the federal district courts to set aside final state judgments on the grounds that a decision

---

lacked jurisdiction:

> In resolving this question, plaintiffs' characterization of their complaint and its form cannot prevail over the substance of their action." [citations omitted.] The relief sought by plaintiffs—a declaration that the state has no interest in the lava extension and has taken the property without just compensation, an injunction compelling the State to convey the lava extension to the plaintiffs, or $350,000—is wholly dependent upon the question of title, already determined adversely to the plaintiffs. To grant such relief, this court clearly would have to directly review the Hawaiian Supreme Court's decision, reject its interpretation of Hawaiian property law, and essentially reverse its holding on title, and modify its judgment. [Citations omitted.] This process clearly constitutes the exercise of appellate jurisdiction.

Zimring v. State of Hawaii, No. 79-0054, slip op. at 4-5, (D. Hawaii, filed June 25, 1979).

took property. The next section addresses "The layman's view of a taking," the process by which the courts arrive at decisions such as *Robinson*, and the constitutionality of retroactive overruling.

IV. THE LAYMAN'S VIEW OF A TAKING

The reasoning in *Robinson* runs so strongly against the grain of the normal judicial impulse to treat final state judgments as final, that the result must have been strongly motivated by a view that it was the only just result. This sense of justice was probably predicated on a "layman's" concept of a taking, a concept noted elsewhere.[117] The layman's view of a taking is an "I know it when I see it" approach. Although, the logic of the judicial system may compel a different result, this approach discards rules in favor of an intuitive, experiential understanding of a taking.

The Ninth Circuit's frequent reference to Justice Stewart's concurring opinion in *Hughes v. Washington*[118] is evidence of its conversion to this approach. In *Hughes*, Justice Stewart had before him a problem similar to *Robinson*. Property that had existed under an earlier decision of the Washington Supreme Court was taken away by a later decision. His statement in that case has a common sense "lay" ring to it:

> [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

---

117. As Professor Tribe has described 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.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 456 (1977) (citing B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88-167 (1977)).

118. 389 U.S. 290, 294-98 (Stewart, J., concurring).

> here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. . . .[119]

The problem Justice Stewart posed was this: The Constitution provides that property cannot be taken without just compensation, but nowhere does the Constitution define property. The definition of property is left to state courts which leads to the problem in *Hughes* and *Robinson*.[120] The proper application of the fifth amendment could be manipulated by courts that retroactively change the rules of property, or, in the case posed in *Hughes*, assert that a particular interest was never property.

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

> The military commander of a certain camp announces on a Saturday evening that during the following week there will be a "Class A Blackout." The date and time of the exercise are not prescribed because a "Class A Blackout" is defined as an exercise which the participants cannot know is going to take place prior to 6:00 P.M. on the evening in which it occurs. It is easy to see that it follows from the announcement of this definition

---

119. *Id.* at 296-97.

120. In *Roth*, the Supreme Court stated that property interests are created by the state:

> Property interests, of course are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

> that the exercise cannot take place at all. It cannot take place on Saturday because if it has not occurred on one of the first six days of the week it must occur on the last. And the fact that the participants can know this violated the condition which defines it. Similarly, because it cannot take place on Saturday, it cannot take place on Friday, either, because when Saturday is eliminated Friday is the last available day and is, therefore, invalidated for the same reason as Saturday. And by similar arguments Thursday, Wednesday, etc. back to Sunday are eliminated in turn, so that the exercise cannot take place at all.[121]

The above illustration is a paradox because experience tells us, that despite the logic, it is nonetheless possible to be surprised. In fact, one may be so totally convinced that one could experience a surprise blackout that one may assert that the logic of the paradox is wrong. This is akin to the thrust of Justice Stewart's assertion—regardless of the logic of a "taking," which cannot by definition be occurring, he is sure that a taking has occurred.

However, experience can often be misleading. The Ninth Circuit in *Robinson*, and Justice Stewart in *Hughes*, may "experience" a taking since the result in *McBryde* resembles other takings committed by the legislative or the executive branch. However, the judiciary is different from the other two branches of government. If courts were deemed to take, they would cease to be courts. This is the point of the next section.

V. CHANGE AND DUE PROCESS: THE MYTH

Cases involving change in the law, as in *McBryde v. Robinson*, are a true embarrassment to the legal philosopher. In England, it was not until the last two decades that the House of Lords admitted that decisions could be overruled.[122] In the United States, occasional overruling has been deemed necessary but the theoretical explanation, couched in Blackstonian terms,

121. P. HUGHES AND G. BRECHT, VICIOUS CIRCLES AND INFINITY: AN ANTHOLOGY OF PARADOXES, 35-36 (1975).

122. R. CROSS, PRECEDENT IN ENGLISH LAW 109-13 (3d ed. 1977).

has always seemed oddly simplistic.[123] The Blackstonian theory of appellate decision preserved at all costs the view that judges "declared" and did not "make" the law.[124] In Holmes' sarcastic phrase, the law was a "brooding omnipresence in the sky."[125] The judge consulted this presence and recorded what he discovered. If a later judge applied a different version of the law, it was explained on the basis that he had a clearer vision than the earlier judge. What each judge saw and recorded was not the law itself but only evidence of the law—much as tracks in a cloud chamber are not the sub-atomic particles themselves, but only evidence of the particles. Thus, one could never know the real law with finality.[126] Later judges, equipped with better social and historical vision, were able to "discover" a more accurate version of the law. Thus, in the *McBryde* decision, the Hawaii Supreme Court in 1974 purported to discover a new understanding of mid-nineteenth century statutes which explained that the king never intended to part with sovereignty over the water.[127] The notion of "discovering" the true law is an admitted fiction.[128] The purpose of the fiction is to allow courts to engage in judicial legislation to create a more just or honest result. When courts change the law, they act like legislative bodies.[129] Legisla-

---

123. *See* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960).

124. *Id.*

125. *Id.*

126. As Professor Levy would state:

> 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.

Id. at 2. (emphasis in original). Thus, there is no possibility of arriving at the true law as a matter of absolute finality.

127. 54 Hawaii at 184-87, 504 P.2d at 1337-39.

128. Professor Fuller explained this notion as follows: "The general fiction of Anglo-American jurisprudence that courts do not 'make' law but only 'discover' or 'declare' it has been the cause of innumerable special fictions designed to conceal the process of legislation that goes on in the courts." L. FULLER, LEGAL FICTIONS 88 (1967).

129. Professor Leach points this out:

> On the one hand, the Law Lords, when deciding a case, "find" the law, and announce their finding. But on the other, when they overrule themselves they are legislating, which is the prerogative of the two houses of the Parliament subject to the Royal assent. And this last is unconstitutional.

Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 791, 800 (1967).

tive bodies resolve issues on the basis of "what's best" for society. The Blackstonian fiction dictates that courts follow the commands of the "law" or "what's true."

Thus, when courts act as a legislative body and do so in a way that has severe economic consequences to parties relying on earlier precedent, critics argue that the courts should be subject to the just compensation clause. In other words when courts legislate, they should be treated like the legislature.

The error in such thinking is that the judicial system rests upon a fiction that courts declare rather than create the law. To admit that courts create law and to allow their decisions to be collaterally attacked as in *Robinson* would undermine the most important function of the judicial system—the ability to resolve disputes with finality.

Hence, once the Supreme Court had denied review in *McBryde v. Robinson*, the decision was final, the "system had spoken."[130] To allow a federal district court or a state trial court to set aside that final judgment on the grounds that it was an "unexpected change"[131] in the law, creates the possibility that every final decision, even that of the Ninth Circuit in *Robinson v. Ariyoshi*, could be collaterally attacked in a trial court. The importance of finality need not be restated here. Nor is there need to emphasize the dangers of stale challenges to final decrees.[132]

---

130. *See supra* note 47. The phrase "system had spoken" is taken from the following Note:

> The most obvious candidate to serve as the system's signal that is has spoken with finality is, of course, the final judgment. For the final judgment to be effective as the system's signal it is necessary that the judgment speak not merely for the court entering it but for the system as a whole. . . .
>
> Presumably, no one would disagree with the proposition that a final judgment rendered by the United States Supreme Court is valid and is the system's last word, no matter how "wrong" it may appear. . . . Moreover, for questions admitted to be solely of state law, the same may be said for decisions of state courts of last resort. They, too, speak for the system. [Citations omitted.]

Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L. J. 164, 189-90 (1977).

131. Justice Stewart used the phrase "unpredicted change" in Hughes v. Washington, 389 U.S. at 297 (1967) (Stewart, J., concurring).

132. The time limitations on review to the U.S. Supreme Court are designed to

Even if final decisions may, in some sense, be "wrong" the need for finality is so commanding in any dispute resolution system that collateral attacks must be discouraged.

The justification for delaying finality, as in *Robinson*, rests with the hope that further proceedings will produce "the truth."[133] When interests like liberty are at stake, the American judicial system does suspend finality to a great degree in the various form of post-conviction relief.[134] But, in both the cases of criminal proceedings and determinations of the water law of a particular state, suspensions of finality for some more accurate determination of truth depend on the dubious assumption that the ultimate truth is knowable.[135] In the case of criminal law, the "ultimate truth" may appear if a key prosecution witness recants years after a wrongful conviction. The "ultimate truth" is much less clear when a federal district court second guesses a state supreme court on the issue of that state's water law.

One may argue that preservation of the fiction that judges declare the law hardly seems the basis to justify depriving parties of vested rights. But, the real fiction is that of our concept of law itself—that it is an unchanging body of rules capable of clear interpretation. Our willingness to be bound by the rule of law rests upon the fiction that law is objective. Moreover, much of the moral authority of the law lies in our belief that the governing rule preexisted the particular dispute to be decided even if the court overrules earlier decisions to reach the proper result. In this sense the law can be allegedly trusted as neutral and the result seen as commanded by the law and not the whim of the judge. There are societal benefits in a system that is based on

---

shorten the uncertainty associated with incomplete proceedings, and encourage resolution when witnesses are still fresh and evidence preserved.

133. One reason for the need for finality in judicial systems is that human beings do have awareness of the ultimate truth. Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 87 Yale L. J.* 164, 187 (1977).

134. *See, e.g.*, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting petition for writ of coram nobis to an American citizen interned in a relocation camp during World War II).

135. Once procedural fairness is established final decisions should have preclusive effect on later proceedings seeking to reopen them: "But once it has been determined that due process was satisfied, further inquiry is meaningless. Such an inquiry would be an attempt to ascertain the 'Facts as They Really Are,' an attempt that cannot succeed." Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments,* 87 YALE L.J. 164, 188 (1977).

the rule of law. When law changes, the rule of law may appear more clearly as a legal fiction. Yet, in these cases it is even more important to employ the fiction and at least speak as if the governing law preexisted the particular dispute. Perhaps we are fooling ourselves when we claim that we are ruled by law and not men, but, if we did not so fool ourselves, it would be difficult to distinguish the decisionmaking process of courts from legislative bodies. If courts cannot be distinguished from the legislative branch, the finality and deference accorded judicial decisions would be difficult to defend. After all, if court decisions are openly based on policy considerations, they would be less authoritative, since policymaking is usually the province of the legislature.[136]

The fiction that judges declare law also allows us to reconcile paradoxical notions about law—that law is stable yet capable of change. To complain when law changes or when judges apply discretion is simply not to understand the concept of rules. The concept of rules should be seen as a duality: it is binding and ultimately not binding at the same time.[137] In the long run, the master rule of law is not stability, it is change. In many areas of the law parties are deemed to have implicit notice as to the possibility of change. For example, corporations may be subject to later, different laws whether or not the corporation had incorporated prior to the change. Rights in the rules of corporation law do not vest. Corporation statutes explicitly or implicitly provide that parties are on notice that the rules may change.[138] It is difficult to see why this should not apply in the case of water rights as well. Financial investments made on the basis of the corporation laws may be just as weighty as those made in reliance on property rules.

Over the long run, it is society that changes. Rules that did not change as a society changes could not be deemed the same rule. A rule and a society in which that rule exists are like the

136. *See* Chang, *Unraveling* Robinson, *supra* note 8, at 74-78.

137. As Judge Edward D. Re stated: "If the doctrine of precedents is regarded as the champion of stability and uniformity in law, it must, nevertheless, give way to progress, the needs of society in a subsequent era and the overwhelming considerations of equity and justice." E. RE, BRIEF WRITING AND ORAL ARGUMENT 92 (4th ed. 1974).

138. Such "savings clauses" have become common since Justice Story's comment in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) advising the states to enact them.

foreground and the background of a painting. It is the overall picture which must be evaluated. If the foreground changes and the background remains the same, then the picture has changed. If the foreground remains the same and the background changes then, again, the picture has changed. A rule must not be viewed as merely the words in a judicial decision or a statute. Rather, a rule must be understood in terms of the concrete results it commands upon the life of a society. If society changes, the effects a rule has on society also changes. Hence, if the background has fundamentally changed, the rule too, has changed.

VI. CONCLUSION: WHEN THE BACKGROUND CHANGES

In Hawaii, the societal background to the rules regarding water rights had completely changed by the time of the *McBryde* decision. The rules that supposedly decreed private ownership of water were primarily set out by the Territorial Supreme Court of Hawaii. These rules were not faithful to the way Native Hawaiians managed water prior to the coming of the westerners, a point made by the Hawaii Supreme Court in *Reppum v. Board of Water Supply*.[139] Rather, the Native Hawaiians exercised water rights in a communal manner. The Konohiki was an agent of the King. He did not "own" the water, as later post-annexation, Territorial precedents may have suggested.[140] Rather, the Konohiki oversaw the allocation, management and regulation of water among the taro farmers. Since the King held sovereignty over the waters, similar to the present notion of the public trust, the Konohiki, as an agent of the King did not require ownership of the surface water to perform his task.[141]

---

139. 65 Hawaii 531, 547-48, 656 P.2d 57, 68-69 (1982) *cert. denied*, 108 S. Ct. 2016 (1985).

140. In *Reppun*, the Hawaii Supreme Court stated:

> However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.
>
> Thus, the distinction drawn between "rights" and "supplies by permission" or "favors" in *Horner*, while making perfect sense within the western understanding of "property," would make no sense at all under the ancient system of allocation.

Id. at 547, 656 P.2d at 68.

141. *Id.*

Ownership of the surface waters was a concept that was useful to the sugar industry. That industry needed to acquire reliable sources of water. The ancient system of reciprocal rights and duties at the heart of Native Hawaiian water practice could not form the basis for the firm water contracts necessary for the development of the sugar industry. After annexation, Hawaii became a territory of the United States. The President appointed the governor of Hawaii. The governor appointed the justices of the Hawaii Supreme Court. Since many of the justices of the Territorial Supreme Court were not a product of direct local political participation, coming instead from law firms that served the sugar interests, the notion of private ownership of the surface water was never judicially challenged.

Statehood brought major political changes to Hawaii. From the perspective of local residents the political reasons for statehood were clear. The citizens of Hawaii held a second class political status, having no electoral influence on their governor or the judiciary. They could not even vote for President of the United States.[142] Thus, along with the desire for a popularly elected governor, one of the political motivations behind the move for statehood was development of a judiciary more directly representative of the population. This is a right held by the citizens of every state.

Thus, statehood promised to bring change to the racial makeup and philosophical outlook of the state bench. Given the fact that a majority of Hawaii's citizens were not white, a popularly elected governor would have appointed a judiciary of undoubtedly different color and temperament than had existed in Territorial days.[143]

The decision to grant statehood to Hawaii was brought about through the formal constitutional processes: the approval of Congress, the President and the people of Hawaii. The ex-

142. Robinson v. Ariyoshi, 65 Hawaii, 641, 667 n.25, 658 P.2d 287, 306 n.25 (1982) (Answers to Certified Questions).

143. At the time of statehood, a majority of Hawaii's population was non-white. In 1960, of the total population of 632,772 in the State of Hawaii, 202,230 were counted as Caucasian, defined to include Puerto Ricans, Portugese, Spanish and other Caucasians. Caucasians have never constituted a majority of the population of Hawaii. R. SCHMITT, HISTORICAL STATISTICS OF HAWAII 25 (1977).

pected change in the nature of the judiciary did occur.[144] With different people wearing the robes of judges and justice, there was no question that a different type of jurisprudence would evolve. Indeed, this has happened with statehood: the background of Hawaii had changed.

McBryde v. Robinson was the first water rights case to appear before the Hawaii Supreme Court. As such, the changes wrought by *McBryde* cannot be deemed unexpected. Like the land reforms that occurred in the legislature,[145] jurisprudential change should have been clearly forseen by the act of statehood.

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

The Hawaii Supreme Court pointed out in a footnote this justification for the evolution of state law expressed by *McBryde*.[146] The court did not disavow all precedent prior to statehood. Rather, it suggested that the affirmative decision on statehood by all concerned was an agreement and recognition that political self-determination should apply to Hawaii.

Finally, it is not only the political structure of Hawaii that has changed since the days of the Territory. The environmental situation in Hawaii is vastly different from the days when water was viewed as privately owned. Hawaii's population has grown tremendously, straining water resources. In the years following *McBryde*, there were water shortages, the implementation of emergency groundwater control measures[147] and the passage of a

144. Presently, a majority (57 out of 78) of the judges and justices in the state judiciary are non-white. The Judiciary, State of Hawaii, ANNUAL REPORT (December 31, 1985).

145. *See, e.g.*, Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321, (1984) (upholding constitutionality of a state law providing for redistribution of fee simple land).

146. *See supra* note 142.

147. In November of 1979, the Hawaii State Board of Land and Natural Resources

state constitutional amendment requiring control and protection of water through a state water code.[148]

Moreover, sugar is not the industry it once was. Tourism has replaced it as the premier private sector industry. Sugar survives on the basis of federal price supports and thus has fallen from its status as the state's dominant industry to become an industry dependent on price supports and import quotas. Given the hostility of the Reagan administration to continued price supports, sugar industry officials predict the eventual demise of the industry.[149] In light of the precarious future of sugar in Hawaii, the tenacious desire of the industry to retain private ownership of water may be a means of retaining control of water for land development when sugar lands eventually go out to production.

Thus, as in the political arena, the demographic and economic background has changed since the time sugar was king. Water, once plentiful, is growing scarce. Given the greater and greater competition for water, public regulation and management becomes more and more sensible. The former private market system of buying and selling water, premised on private ownership of water, is no longer appropriate. Water is too critical a resource to be left to market forces where one can only hope that the laws of supply and demand will result in policy that serves the whole community. Hawaii and its self-renewing water supply system can be analogized to a spaceship travelling on a journey that will take many generations. There are a limited supply of goods on board and a finite quantity of renewable resources such as food and water. Which system of allocation would work best: a system where resources are collectively pooled and distributed according to need or a system based on private ownership of water where those who started with the resources or money are allowed to hoard resources the the deprivation of others?

---

adopted regulations for the management of groundwater extraction under Chapter 177 of the Hawaii Revised Statutes (1976). The board proposed designation of the Pearl Harbor Basin for regulation under the statute. Since that time the Board has designated other areas on Oahu.

148. HAWAII CONST. art. XI § 7. *See supra* note 99.

149. *E.g., End sugar industry quickly, suggests former head of C & C*, Honolulu Advertiser, July 13, 1985, at A-2, col. 3.

It is within this context of political, environmental and economic change that one must evaluate the rule of private ownership. Such a rule has a completely different impact on a society that has an endless supply of water than on a society where there is scarcity. When a situation changes so dramatically, as in the case of Hawaii, the rules of allocation must be deemed to have changed as well. Hence, there is no logical basis to the assertion in *Robinson* that federal courts have a right to force state courts to continue the existence of inappropriate rules of law.

In conclusion, there are a variety of reasons why only the United States Supreme Court should have the power to judge the constitutionality of state decisions. Some of these reasons focus on the history of distrust between the states and the federal government.[150] Other reasons, as pointed out in this article, are concerns of the judicial system as a dispute resolution process. There must be a logical end where the system must be deemed to have spoken with finality.[151] Finally, as pointed out in the above section, rules change because society changes.[152] Indeed,

---

150. *See* D. Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964) (discussing state resistance to review of state decisions by the Supreme Court).

151. The problems of lack of finality are self-evident:

> If there are two "final" answers to a dispute, then neither may be relied upon until the dispute between the answers has been resolved. The most obvious candidate to serve as the system's signal that it has spoken with finality is, of course, the final judgment. For the final judgment to be effective as the system's signal it is necessary that the judgment speak not merely for the court entering it but for the system as a whole.

Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L. J. 164, 189 (1977).

152. This point has been made frequently:

> With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future.

Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11 (1936).

This author has also spoken similarly in another context:

> In Hawaii, one cannot expect the property law of Old England to make sense today. Nineteenth century English law focused on the paradigm of "Blackacre," a 25 acre (10-ha) estate with running streams, gardens, and a 20 room mansion. With Blackacre as model, property law developed in a certain way.

in the long run, the master rule is change. To view law as unchanging is to view law in isolation from its impact on society. To enforce consistency in law, as the Ninth Circuit has attempted in *Robinson*, results in enforcement of inappropriate rules. The intrusiveness of the result in *Robinson* emphasizes the importance of state sovereignty in areas of traditional state concern.[153] As the Ninth Circuit's reliance on the importance of protecting its own ruling in *Gay* may attest,[154] the Ninth Circuit once was the highest court of the Territory of Hawaii.[155] Those colonial days, however, are long gone. The supreme court of the state of Hawaii should be given the same deference and sovereignty intended all state supreme courts under the Constitution. There may be instances when federal intervention in state court proceedings is necessary to protect constitutional rights, but in this case, the Ninth Circuit missed the boat.

> On the other hand, the paradigm of Blackacre for Hawaii is likely to be a two-bedroom condominium in a 20 story building with 1000 residents on 3.5 acres (1.4 ha). Given the radical difference between these two paradigms, it is not surprising that prior rules are sometimes overruled.

Chang, *Water Rights in an Age of Anxiety*, 77 J. AM. WATER WORKS A. 40, 43 (1985).

153. *See, e.g.*, Brinkerhoff-Faris Trust & Savings Co.v. Hill, 281 U.S. 673, 680 (1930).

154. 753 F.2d at 1473-74.

155. During territorial days, the Ninth Circuit was the highest court of the Territory of Hawaii in civil cases where the amount in controversy exceeded $5000. Thus, the Ninth Circuit was the "supreme court" of the Territory of most civil matters. *See, e.g.*, Kimbrel v. Territory, 41 F.2d 740 (9th Cir. 1930).