

## OF WOODCHUCKS AND PRUNE YARDS: A VIEW OF JUDICIAL TAKINGS FROM THE TRENCHES

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*Justice BREYER must either (a) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (b) answer in the negative what he considers to be the “unnecessary” constitutional question whether there is such a thing as a judicial taking.<sup>1</sup>*

### INTRODUCTION

Eighty-four years after the Supreme Court acknowledged that an exercise of governmental authority other than the eminent domain power could be a taking,<sup>2</sup> it appears the search for what might fit the bill has devolved from “the lawyer’s equivalent of the physicist’s hunt for the quark”<sup>3</sup> to the riddle of a nursery rhyme. Having now acknowledged Justice Scalia’s reference to one of the most unlikely phrases ever turned in a Supreme Court opinion, we can move on to the more intriguing questions presented by *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, the case in which the Court came tantalizingly close to answering the most metaphysical of legal issues: can a state supreme court decision “take” property when it changes state law?

The case held out the promise of providing long-sought guidance about whether a state’s exercise of judicial power is constrained by the Takings Clause, but ultimately fell one vote short. Six Justices agreed that in certain circumstances, a state supreme court’s recharacterization of property from private to public would violate the Constitution; the four-Justice Scalia-led plurality concluded it would be a Takings Clause problem, while Justice Kennedy, joined by Justice Sotomayor, saw it as involving the legitimacy of

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1. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2603 (2010) (Scalia, J., plurality opinion).

2. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

3. CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* 875 (4th ed. 1989).

the state court's action—in other words, substantive due process.<sup>4</sup> Justice Breyer, joined by Justice Ginsburg, agreed there was no judicial taking in the case, but demurred on expressing any opinion of when there would be.<sup>5</sup>

“Renourishing” beaches is the term used by Florida’s Beach and Shore Preservation Act to describe the state’s filling of submerged land to create a state-owned artificial beach seaward of an existing beach, to restore an eroded beach. Stop the Beach Renourishment, Inc., a coalition of property owners who objected to the dumping of sand seaward of their properties, asserted the Act was a taking on two theories. First, it replaced their ambulatory property line under Florida common law (the mean high water mark) with a permanent line defined by the Act (the Erosion Control Line). Second, it wiped out their right under Florida law to have their properties maintain contact with the ocean.<sup>6</sup> The Act, they asserted, placed a state-owned strip of sand between their properties and the water, and turned their beach-*front* lots into beach-*view* lots.<sup>7</sup>

All eight Justices who considered the case (Justice Stevens recused himself) agreed that Florida common law was clear before the Florida Supreme Court’s decision, was clear after the Florida Supreme Court’s decision, and was not changed by the Florida Supreme Court’s decision upholding the renourishment of beaches under the Act.<sup>8</sup> All eight Justices agreed that the state dumping sand to replenish a beach was not different in kind from an avulsion. The State always had the right to ownership of avulsions, even man-made avulsions called renourished beaches, and thus when the Florida Supreme Court concluded the state’s dumping of tons of sand did not infringe upon littoral owners’ common law right to gain ownership of accreted land, no taking resulted.<sup>9</sup> Not having changed Florida law, in the Court’s view, the Florida Supreme Court could hardly be accused of a judicial taking of private property without compensation: littoral owners’ common law right to accretion had *always* been subject to the ability of the state to fill its submerged land and create a state-owned artificial beach seaward of their properties.<sup>10</sup> That was simple enough, even though the Court’s conclusion that Florida common law did not change was

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4. *Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

5. *Id.* at 2619 (Breyer, J., concurring in part and concurring in the judgment).

6. *Id.* at 2612 nn.11 & 12 (majority opinion).

7. *Id.*

8. *Id.* at 2613.

9. *Id.* at 2612 (“It did not abolish the Members’ right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied.”).

10. *Id.* at 2610–13.

not particularly convincing (but we will leave that to other essayists and the dissenting opinion in the Florida Supreme Court to deconstruct).<sup>11</sup>

Where the case became interesting was in the way the Justices might have analyzed the situation where it could be said that the Florida Supreme Court changed the common law to avoid ruling that the Act was a taking. No Justice categorically rejected the concept that state court opinions on matters of state law might infringe on property rights, and six Justices agreed that “private property” is not a completely malleable concept that may be redefined at will by state courts.<sup>12</sup> Six of the Justices were expressly open to an argument that the term “private property” embodies some principles immunized by the Fifth and Fourteenth Amendments from state judicial interference.<sup>13</sup>

No doubt the fractured opinions in the case will be a boon for academics who may continue the search for the “takings quark” (if not woodchucks) in the pages of law journals. But what about practitioners laboring in the trenches of takings law in the courts, struggling to determine whether a state supreme court’s decision changed the law in a manner such that, from the property owner’s perspective, the State might as well have

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11. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1121 (Lewis, J., dissenting) (“[T]he majority has, in my view, unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority’s construction of the Beach and Shore Preservation Act is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis, and has further disregarded the manner in which the parties pled, and the lower court analyzed, an *as-applied* constitutional challenge.”) (emphasis in original).

12. Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, wrote that the State’s argument that judges need flexibility to alter the common law has “little appeal when directed against the enforcement of a constitutional guarantee . . . .” *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (Scalia, J., plurality opinion). Justice Kennedy, joined by Justice Sotomayor, stated that although “[s]tate courts generally operate under a common-law tradition that allows for incremental modifications to property law, but ‘this tradition cannot justify a *carte blanche* judicial authority to change property definitions wholly free of constitutional limitations.’” *Id.* at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis in original) (quoting Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 435 (2001)).

13. In the plurality opinion, Justice Scalia wrote “the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.” *Id.* at 2602 (Scalia, J., plurality opinion) (emphasis in original). Justice Kennedy, joined by Justice Sotomayor, concluded that

[t]he Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom. The right to retain property without the fact or even the threat of that sort of expropriation is, of course, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

*Id.* at 2613 (Kennedy J., concurring in part and concurring in judgment) (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)).

exercised eminent domain and taken it? In this Essay, we will attempt to provide a view of how we see the issue, focusing on the Scalia plurality opinion and the *PruneYard* case, the only other case where the Court has expressly weighed in on the judicial takings question.<sup>14</sup> We conclude with a suggestion of how *PruneYard* and the plurality opinion in *Stop the Beach Renourishment* may provide a roadmap for asserting and winning a judicial takings claim.

### I. THE PLURALITY OPINION

The unstated assumption in Justice Scalia's plurality opinion is that the Takings Clause prevents redefining certain core private property rights as public property. What those core principles might be is left undefined, but "property" in the plurality's view is not an evolving bundle of rights. These Justices viewed property as either private or not, and if a right was private before a state court decision, but public after, the state court decision effected a taking.

Justice Scalia took the opportunity to lay out a slightly different formulation of the judicial takings theory than has been employed by the Court previously in regulatory takings, most notably omitting from the calculus *Penn Central*<sup>15</sup>—the case the unanimous Court recently noted was the test for regulatory takings "[o]utside . . . [of] two relatively narrow categories."<sup>16</sup> The case was not mentioned at all in the portion of the opinion in which Justice Scalia set out the judicial takings test,<sup>17</sup> and only appeared in a footnote within the discussion of whether it was appropriate to conclude there was no judicial taking without first determining the contours of a judicial takings test (the woodchuck thing).<sup>18</sup> The Scalia plurality viewed judicial takings as another category of *per se* takings, akin to physical invasions and deprivation of all economically beneficial use in regulatory takings doctrine.<sup>19</sup> In this view, state supreme court decisions are a form of regulation of property, and if that regulation "goes too far" by transforming a private right into a public one, it will be recognized as a taking without any balancing.<sup>20</sup> Recharacterizing private property as public

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14. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

15. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

16. *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 538 (2005).

17. *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (Scalia, J., plurality opinion).

18. Justice Scalia noted that in *Penn Central*, the Court first determined the test for a regulatory taking, then applied it to conclude *Penn Central* did not suffer a taking. *Id.* at 2603 nn.6 & 8.

19. *Id.* at 2606 ("We are talking here about judicial elimination of established private property rights.")

20. *Id.* at 2602.

property would plainly be a regulatory taking were a state legislature to do it, and in Scalia's view a state court is not immunized from the Takings Clause when it accomplishes the same thing.<sup>21</sup> The plurality expressly rejected the property owners' suggestion that a court's decision takes property when it changes the law "suddenly" and "unpredictably."<sup>22</sup> It was not a matter of surprise, or the warning shots in Justice Scalia's view, but rather "whether the property right allegedly taken was established."<sup>23</sup> In those circumstances, state supreme courts may change the law, but they cannot "declare that what had been private property under *established* law no longer is."<sup>24</sup>

## II. PRUNEYARD

The plurality is not alone in viewing the problem as one of existence or nonexistence. The opinion revived a little-known gem, *PruneYard Shopping Center v. Robins*.<sup>25</sup> That case involved the issue of whether a shopping center was a forum for public speech. The California Supreme Court changed its interpretation of the California Constitution's speech clause, and expressly overruled an earlier decision holding that it did not protect speech on shopping center property.<sup>26</sup> The owner appealed to the United States Supreme Court, asserting the California court's change of California speech law allowed a physical invasion of its property by handbillers it wished to exclude, and was therefore a taking.<sup>27</sup> The Court disagreed, holding the California Supreme Court's decision was not a taking.<sup>28</sup> Although it reached the same result as in *Stop the Beach Renourishment*—and for the same general reasons (the plaintiffs had not shown they owned "property")—the *PruneYard* Court's approach was somewhat different. In *Stop the Beach Renourishment*, the Court held that the plaintiffs could not demonstrate a property right in acquiring ownership of natural or artificial avulsions, so the Florida Supreme Court did not change the law.<sup>29</sup> In *PruneYard*, the California court admitted it changed the law, but because the shopping center owner voluntarily opened the property

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21. *Id.* at 2601 ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.") (citing *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting from denial of certiorari)).

22. *Id.* at 2610.

23. *Id.*

24. *Id.* (emphasis added).

25. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

26. *Id.* at 78.

27. *Id.* at 82.

28. *Id.* at 83.

29. *Stop the Beach Renourishment*, 130 S. Ct. at 2611.

to the public for shopping for the owner's commercial gain, it lacked a property interest and had not shown that allowing handbilling would interfere with whatever right to exclude remained.<sup>30</sup> In short, the shopping center owner "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"<sup>31</sup> Despite that holding, however, the Justices did not seem at all bothered by the concept of a judicial taking, or that a judicial takings doctrine might require them to make judgments about state law.

### III. THE ROADMAP

When read together, these two cases provide a roadmap for analyzing judicial takings claims. The first step is to identify the property right at stake and show that it is "essential to the use or economic value of [the] property."<sup>32</sup> The right to exclude others is essential (unless, of course, the property involved is a California shopping center or other facility already opened to the public), as are so-called "core" common law aspects of property such as interest following principal,<sup>33</sup> obtaining ownership of accretion,<sup>34</sup> the ability to transfer property,<sup>35</sup> and making reasonable use of land.<sup>36</sup> In *PruneYard*, Justice Marshall concurred in a separate opinion setting forth his view that property has a "normative dimension" which the U.S. Constitution protects from state court redefinition:

I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the

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30. *PruneYard*, 447 U.S. at 77 ("The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments.").

31. *Id.* at 84. In other words, depriving the shopping center owner of the absolute right to exclude others was not the functional equivalent of an exercise of eminent domain, because the owner had affirmatively opened up the property to the public, and had not shown that handbilling would interfere with whatever right to exclude remained.

32. *Id.*

33. *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980)); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (recognizing that interest on lawyer's trust accounts is "private property").

34. *County of St. Clair v. Lovington*, 90 U.S. 46, 68-69 (1874) (noting that the right to future accretions is a vested right and "rests in the law of nature").

35. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (finding that passing property by inheritance is a fundamental attribute of property).

36. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.<sup>37</sup>

Justice Marshall continued:

Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish “core” common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.<sup>38</sup>

When these core rights are threatened with extinction, the Court has had little difficulty finding them to be fundamental without detailed reference to state law.<sup>39</sup> The search for these normative dimensions of “property,” which are insulated by the Fourteenth Amendment from state abrogation, will not put the Court in the position of creating a body of federal common property law or substituting its judgment for that of state courts about what state common law should be any more than it has when it determines whether a state court decision infringes upon “life” or “liberty.”<sup>40</sup>

The determination that the right to exclude the public was not essential to the shopping center owner’s use or economic value of the property<sup>41</sup> solved the *Prune Yard* case, but in those cases where a right is essential, the next step is to determine whether the state supreme court decision changed

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37. *Prune Yard*, 447 U.S. at 93 (Marshall, J., concurring).

38. *Id.* at 93–94. Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Prune Yard*, 447 U.S. at 94 n.3 (quoting *Ingraham*, 430 U.S. at 672–73).

39. *See, e.g., Lucas*, 505 U.S. at 1019 (“We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”) (emphasis in original); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (“The usual and general rule is that any interest on an interpleaded and deposited fund follows the principle and is to be allocated to those who are ultimately to be the owners of that principle.”) (citations omitted).

40. Furthermore, the nature of the rights protected by the Bill of Rights such as “freedom” and “religion” are necessarily federal questions and are not left to state law for definition.

41. Contrast this with a contemporaneous opinion also authored by Justice Rehnquist in which the Court concluded the right to exclude others was essential to the owner’s value and use, and was property that the government “cannot take without compensation.” *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

the law. The Court did not need to address this issue in *PruneYard* because the California Supreme Court expressly stated it changed the law. But *PruneYard* preceded *Lucas*, and we might safely presume that state supreme court justices are versed in that case and understand they can avoid governmental liability for a taking by finding that the regulation at issue “inher[ed] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place[d] upon land ownership.”<sup>42</sup> The rub presented by the second step in our analysis is how the Court would determine that the state supreme court’s assertion that the restriction is a “background principle” is pretextual, and that the state court changed its law, even though it asserts it did not. Without some ability to say that a state supreme court is wrong when it makes such an assertion, the regulatory takings doctrine is likely to be completely swallowed up by the background principles exception.<sup>43</sup> This would eliminate takings analysis for all cases except affirmative exercises of the eminent domain power.

In some cases, it is obvious. For example, in *Sotomura v. County of Hawaii*,<sup>44</sup> the district court concluded that the Hawaii Supreme Court violated the Constitution when, in the course of a condemnation action, it *sua sponte* redefined the seaward boundary of a Torrens-titled<sup>45</sup> littoral parcel from the high water mark to the “upper reaches of the wash of the waves,” holding that the county owed no compensation for the land seaward of the new boundary line because it was, and had always been, owned by the state.<sup>46</sup> One Hawaii Supreme Court justice dissented from the ruling:

I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making. That is apparent from the quoted statement in the opinion that the holding is being made “as a matter of law,” and from the

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42. *Lucas*, 505 U.S. at 1029. Even were we to presume that state judges did not understand *Lucas*, they certainly can read law review articles encouraging them to rely on the “background principles” exception to avoid takings liability for transforming a private property right into a public one. See John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 705 (1993) (noting that nuisance law may consume the *per se* takings rule).

43. See, e.g., *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (“Only when a regulation goes beyond what the relevant background principles of state law would dictate must compensation be paid.”) (citation omitted), *cert. denied*, 510 U.S. 1207 (1994).

44. *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 478 (D. Haw. 1978).

45. In a Torrens system the state guarantees title, including a parcel’s boundaries.

46. The trial court awarded nominal compensation of one dollar to the property owner for the condemnation of this property, but the Hawaii Supreme Court declared that was error and took the dollar away because the land was not private property under the newly announced rule. *County of Hawaii v. Sotomura*, 517 P.2d 57, 62–63 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974).

following reason given therefor: “Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii’s shoreline as is reasonably possible.”<sup>47</sup>

The property owners brought suit in federal district court for due process violations, an approach that would not likely work today since under the *Rooker–Feldman* doctrine, federal district courts may not exercise appellate review of state supreme courts.<sup>48</sup> However, the theory the district court applied is sound. The court determined “[j]udicial transfers of title to private lands to the State which do not permit the owner an opportunity to be heard or to present evidence is not constitutionally valid. Whenever a party is to be deprived of property, he is entitled to a meaningful hearing before the fact.”<sup>49</sup> The district court concluded:

This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the wash of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to the tides, as opposed to the run or reach of waves on the shore. For example, on the Island of Hawaii, the seaweed line was used to indicate the level of the high tides and high water mark. The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court’s conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.<sup>50</sup>

Another example is provided by *Robinson v. Ariyoshi*,<sup>51</sup> a case in which the Ninth Circuit invalidated a Hawaii Supreme Court decision on judicial takings grounds. That case began in 1959 in a Kauai County trial court as a dispute among several sugar plantations over which of them

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47. *Sotomura*, 517 P.2d at 65–66 (Marumoto, J., dissenting) (emphasis in original).

48. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

49. *Sotomura*, 460 F. Supp. at 477.

50. *Id.* at 480–81. The state’s appeal to the Ninth Circuit was dismissed as untimely.

51. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985).

possessed the rights to surplus water in a Kauai stream, among other things. The parties based their claims on long-standing water law and prescriptive rights precedent of the Kingdom, Territory, and State of Hawaii. Nine years later, the trial court issued a 65-page decision based on that precedent, and declared who was entitled to what. At that stage, the case was just another in a long line of water disputes between private parties. The losing parties appealed to the Hawaii Supreme Court, where no party—including the State—argued the controlling water law was anything but as established by long-standing Hawaii precedent.

The Hawaii Supreme Court, however, “*sua sponte* overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights.”<sup>52</sup> The court “also held *sua sponte* that there was no such legal category as ‘normal daily surplus water’ and declared that the state, as sovereign, owned and had the exclusive right to control the flow,” and “that because the flow of the Hanapepe [stream] was the sovereign property of the State of Hawaii, McBryde’s claim of a prescriptive right to divert water could not be sustained against the state.”<sup>53</sup> In other words, in a dispute between “A” and “B” over which of them possessed water rights, the Hawaii Supreme Court simply declared “neither of you do, the State owns it all.”

The private parties who thought they had owned something for over one hundred years were understandably upset that property they believed they possessed had morphed into public property simply by the stroke of three justices’ pens, and, to add insult to injury, without even the chance to brief the court before it announced the new rule. But after a rehearing on a narrow issue of state law, during which the court rebuffed an attempt by the private parties to raise federal constitutional issues, the court reaffirmed the *McBryde* ruling, with two justices dissenting.<sup>54</sup> One justice switched his vote from the first opinion, concluding that it was a “radical departure” from established law, and was a taking:

Although I voted with the majority of this court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973) [hereinafter referred to as *McBryde I*], I am constrained to recant that position in view of my current understanding of the problems of this case. In light of the arguments adduced on rehearing, historical evidence discovered upon further research subsequent to the court’s previous decision in this case, and a reappraisal of

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52. *Id.* at 1470 (citing *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1344 (Haw. 1973)).

53. *Id.*

54. *See McBryde Sugar Co. v. Robinson*, 517 P.2d 26 (Haw. 1973) (per curiam) (*McBryde II*).

the reasoning supporting that decision, it is my opinion that the court committed error in holding that all surplus water belongs to the State and that private water rights, however acquired, may not be transferred to nonappurtenant land. Because of the importance of this case to the development of the law on the subject of Hawaii's water resources, I have undertaken to present a detailed analysis explaining why *McBryde I* is not in keeping with long established and unique principles of Hawaiian water law. Precisely because *McBryde I* is such a radical departure from these principles as they have been heretofore understood, moreover, I have concluded that *McBryde I* effectuates an unconstitutional taking of the appellant's and cross-appellants' property without just compensation and should be reversed on this ground as well.<sup>55</sup>

The U.S. Supreme Court declined to review the Hawaii court's decision, but that was not the last word. The sugar companies sued state officials in federal district court under 42 U.S.C. § 1983. The district judge held that the Hawaii Supreme Court's *McBryde* decision took property without just compensation, and enjoined the state from enforcing the decision.<sup>56</sup> On appeal, the Ninth Circuit noted the tortured procedural path the case took, including a detour back to the Hawaii Supreme Court on certified questions when the Ninth Circuit asked that court whether it really meant what it said in *McBryde*:

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. See *Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982) (*Robinson II*). 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. A number of complex questions remain, but to expedite the matter we will discuss only those essential to a resolution of the main question: Can the state, by a judicial decision which creates a major change in property law, divest property interests?<sup>57</sup>

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55. *McBryde II*, 517 P.2d at 27 (Levinson, J., dissenting).

56. *Robinson v. Ariyoshi*, 441 F. Supp. 559, 586 (D. Haw. 1977).

57. *Robinson*, 753 F.2d at 1471.

After addressing jurisdictional issues, res judicata, and the *Rooker–Feldman* doctrine, the Ninth Circuit addressed the merits:

The state conceded at oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.<sup>58</sup>

The court determined the water rights claimed by the private parties were vested, and that neither the state legislature nor the state supreme court could alter those rights without condemnation and payment of just compensation. By the time *Robinson* again reached the Supreme Court, *Williamson County* had been decided, establishing the rule that certain regulatory takings cases brought in district courts were not ripe without initial resort to state court processes,<sup>59</sup> and the Court summarily vacated the Ninth Circuit's *Robinson* decision, ordering reconsideration in light of *Williamson County*'s new ripeness rules.<sup>60</sup> The Ninth Circuit consequently vacated its earlier order<sup>61</sup> and remanded the case back to the district court, which found the case ripe under *Williamson County*.<sup>62</sup> Eventually, the Ninth Circuit vacated the district court's decision and remanded the case with instructions to dismiss because the thirty-one year-old case was not ripe under *Williamson County* in that the state had not yet implemented the Hawaii Supreme Court's decision.<sup>63</sup>

Our third example is also provided by the Hawaii Supreme Court. In *In re Ashford*,<sup>64</sup> the court rejected over 100 years of its own precedent holding the boundary between public and private property on Hawaii's beaches was the mean high water line. The *Ashford* court disregarded these established precedents and changed the legal boundary of littoral parcels from the mean

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58. *Id.* at 1473.

59. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

60. *Ariyoshi v. Robinson*, 477 U.S. 902, 902 (1986).

61. *Robinson v. Ariyoshi*, 796 F.2d 339, 339 (9th Cir. 1986).

62. *Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1020–21 (D. Haw. 1987).

63. *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir. 1990). *Robinson*, 887 F.2d 215, also illustrates how a state court, keenly aware of the finality requirement in *Williamson County*, can tailor a decision and manipulate the ripeness rules to avoid federal court review simply by declaring that the new rule of law is not "final" and is an interlocutory ruling subject to change. *Id.* at 218–19. State courts, like state and municipal agencies, are presumed not to employ "stupid staffs." *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025–26 & n.12.

64. *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968); Carol Santoki Dodd, *The Richardson Court: Ho'Oponopono*, 6 U. HAW. L. REV. 9, 23–24 (1984).

high water line to the “upper reaches of the waves,” effectively confiscating for the public 20 to 30 lateral feet of what had until then always been private property.<sup>65</sup> The court reached this result by reinterpreting the term *ma ke kai* (“along the sea” in Hawaiian) in the parcel’s royal patent, asserting the earlier cases all misunderstood the “true” meaning of the phrase.<sup>66</sup> The court concluded the King who originally issued the royal patent must have been ignorant of the survey data and therefore could not have intended to grant the land below the upper reaches of the waves.<sup>67</sup> To reinterpret *ma ke kai* in this fashion, the court turned to oral testimony and reputation evidence regarding “customary” usage of the shoreline.<sup>68</sup> One justice dissented, noting the majority relied on “spurious historical assumptions,” and concluded there was nothing in ancient tradition, custom, practice, or usage which dictated the use of the upper reaches of the waves instead of the mean high water mark as established by the earlier cases.<sup>69</sup>

It may not be as easy as in *PruneYard* to tell if the state supreme court is manipulating<sup>70</sup> state law to turn a formerly private right into a public one, but there are other indicators as in our three examples, such as: vigorous dissents from state justices who presumably understand their own common law,<sup>71</sup> the state supreme court’s claim that the right at issue was never private at all because it was always subject to the “public trust,”<sup>72</sup> or invocation of custom to reach the same result.<sup>73</sup> A judicial takings analysis need not put the Supreme Court in the position of creating a body of federal common property law, nor would it require the Court to substitute its

65. *Ashford*, 440 P.2d at 78.

66. *Id.*

67. *Id.* at 77.

68. *Id.* at 77–78.

69. *Id.* at 81 (Marumoto, J., dissenting).

70. *In Re Ashford* is celebrated as the most famous of decisions from the Hawaii Supreme Court under Chief Justice William S. Richardson. D. Hevesi, *William S. Richardson, Ex-Chief Justice in Hawaii, Dies at 90*, N.Y. TIMES, June 25, 2010, available at <http://www.nytimes.com/2010/06/25/us/25richardson.html>.

71. See, e.g., *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1121 (Fla. 2008) (Lewis, J., dissenting); *McBryde Sugar Co. v. Robinson*, 517 P.2d 26, 27 (Haw. 1973) (Levinson, J., dissenting).

72. Especially where the “public trust” invoked expands the traditional scope of the doctrine from tidelands and navigable waters to include such things as all water resources. See, e.g., *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 595–96 (Cal. Ct. App. 2008) (finding that public trust doctrine covers wildlife and is not limited to navigable waters and tidelands); *Matthews v. Bay Head Imp. Ass’n*, 471 A.2d 355 (N.J. 1984), cert. denied, 469 U.S. 821 (1984); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970) (“certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.”).

73. See, e.g., *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676 (Or. 1969) (applying the English doctrine of custom to beach property rights case); *Pub. Access Shoreline Haw. v. Cnty. of Haw. Planning Comm’n*, 903 P.2d 1246 (Haw. 1995), cert. denied, 517 U.S. 1163 (1996).

judgment for that of state courts about what state common law should be. The *Stop the Beach Renourishment* plurality concluded that “federal courts must often decide what state property rights exist in nontakings contexts,” and “indeed they must decide it to resolve claims that legislative or executive action has effected a taking.”<sup>74</sup> The plurality noted that in *Lucas v. South Carolina Coastal Council*, the Court had reserved for itself the determination whether the restriction in the regulation that was claimed to work a taking was inherent in title and a preexisting limitation on land ownership.<sup>75</sup> Thus, it does not offend federalism principles for the Court to make its own conclusions about the state of state property law, and whether the state supreme court altered its existing laws to transform a previously private right into a public one. Indeed, the Supremacy Clause and the Fourteenth Amendment demand it exercise such power.<sup>76</sup>

#### CONCLUSION

The core of *Stop the Beach Renourishment* concerned whether the “background principles” exception to categorical regulatory takings allows state courts to construe property law in a manner that could virtually eliminate all regulatory takings. That the actions of state courts are constrained by the Constitution—all of it, including the Takings Clause—seems like it should be wholly uncontroversial because the Fourteenth Amendment incorporates the guarantees of the Fifth Amendment against the *states*, not merely state legislatures and state executive branches. If the actions of state legislatures and executive agencies can be regulatory takings when they exercise powers other than eminent domain, then similar actions by state courts, at least in theory, can be judicial takings. As the *Stop the Beach Renourishment* plurality noted, the Takings Clause “is concerned simply with the act, and not the government actor.”<sup>77</sup>

There is much more at stake here than theoretical fodder for law reviews. The past eighty-plus years of regulatory takings doctrine would be virtually meaningless if state courts could conclude that state regulation has not worked a regulatory taking simply by holding that what was thought to be private property was never private in the first place—and the Supreme Court was powerless to say otherwise.

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74. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2609 (2010) (Scalia, J., plurality opinion) (internal citations omitted).

75. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). *See also id.* at 1014 (“[T]he government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.”) (citation omitted).

76. U.S. CONST. art. VI, cl. 2.

77. *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (Scalia J., plurality opinion).