One of the most critical questions regarding the future of water regulation in Hawai'i is the validity of the Hawaii Supreme Court's decision in the landmark case of McBryde Sugar Co. v. Robinson. In that case, the state supreme court overturned the assumption that surface waters in Hawai'i could be privately owned. To the parties involved in the litigation, the decision came as a surprise and upset the basis for their claims to waters of the stream. As a result, the parties sought to have the results of the state supreme court decision nullified in federal court. Their efforts were successful, and in October 1977, the federal district court voided the state supreme court decision. This article challenges the validity of the federal court's decision. The question presented before the federal court was a novel and unique one. The article discusses three models for resolving the problem and discusses an important distinction between the function of courts in declaring law and enforcing their judgments.
THE ENFORCEMENT OF CONSISTENCY
IN HAWAIIAN WATER RIGHTS:
AN INTRODUCTION TO ROBINSON v. ARIYOSHI

by

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ABSTRACT

One of the most critical questions regarding the future of water regulation in Hawai'i is the validity of the Hawaii Supreme Court's decision in the landmark case of McBryde Sugar Co. v. Robinson. In that case, the state supreme court overturned the assumption that surface waters in Hawai'i could be privately owned. To the parties involved in the litigation, the decision came as a surprise and upset the basis for their claims to waters of the stream. As a result, the parties sought to have the results of the state supreme court decision nullified in federal court. Their efforts were successful, and in October 1977, the federal district court voided the state supreme court decision. This article challenges the validity of the federal court's decision. The question presented before the federal court was a novel and unique one. The article discusses three models for resolving the problem and discusses an important distinction between the function of courts in declaring law and enforcing their judgments.
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INTRODUCTION

The law of Hawaiian surface water rights is currently in a state of paralysis. This paralysis stems from the dual system of federal and state courts. The laws pertaining to water rights, as property laws, are ordinarily left to state courts to decide. However, in 1974, the losing parties in a state court suit regarding Hawaiian water rights went into federal court to nullify the state court decision. In its 1977 opinion the federal court agreed with these litigants, voided the decision of the state supreme court, and enjoined the state from carrying out the state supreme court's decision. The federal district court's action are currently being appealed to the next highest federal court, the Ninth Circuit Court of Appeals.

This federal court nullification and intervention raises a multitude of problems. The federal court's action, if valid, casts a great shadow on the sovereignty and power of state courts. If the highest court of the state can be reversed by a federal trial court on a matter of state law, then unsuccessful state court litigants can always pursue their claims in federal court. The federal court would become the highest court of the state. Why then, would there be a need for a state judicial system?

There is an old adage that hard cases make bad law. The factual situation in McBryde v. Robinson, 54 Hawaii 174 (1973) is unusually "hard," and the result reached in McBryde is considered, by some, unusually bad. The error in the eyes of the federal court was the radical and unexpected departure from prior law promulgated by the state courts. The facts and events in the McBryde litigation test the sanctity of federalism and the sovereignty of state judicial systems. The question raised is one of limits: as the ultimate arbiters in the state court system, the state supreme court has broad powers to review cases, but under what constraints must they operate in changing the law? Within the answer lies the decision as to whose hand should be on the throttle of progress in fashioning state law.
THE FACTUAL SITUATION

In order to understand the problem raised by *McBryde*, one must understand the factual setting and the major legal conflict involved. In brief summary the situation arose in the following manner.

In 1973, *McBryde v. Robinson* was decided by the Hawaii Supreme Court. The case had originally been brought in 1959 to adjudicate various appurtenant and prescriptive water rights among the landowners of Hanapēpē watershed valley on the island of Kaua'i in the state of Hawai'i. The most important aspect of the supreme court's decision was that it reversed, without the urging of any of the parties, two major premises of surface water rights. First, the court held that water rights could not be severed from the land; thus, water could not be transported out of the watershed. This substantially undermined a long-established practice of transporting water from one watershed to another through irrigation ditches, a practice which had allowed the sugar industry to develop in Hawai'i.

Second, the Hawaii Supreme Court held that all water in excess of that claimed under riparian and appurtenant water rights belonged to the state. The court overruled *Carter v. Territory*, 24 Hawaii 47 (1917), which held that such water belonged to certain adjoining landowners. This aspect of the decision was particularly shocking to the litigants since none of the parties, including the state, had argued that the water belonged to the state.

The parties who were adversely affected by the decision petitioned the state supreme court for a rehearing. They asserted that this radical change in law constituted a "taking" of their property without compensation in violation of the fifth amendment. The supreme court set the case for rehearing but refused to consider the constitutional arguments. After considering the arguments on rehearing, the supreme court affirmed its previous opinion.

Subsequent to the opinion on rehearing, the parties adversely affected (hereafter "petitioners") sought review in the Supreme Court of the United States. Review on the basis of either appeal or certiorari was denied.

Thereupon, the petitioners brought suit against the officers of the state in federal district court seeking to enjoin the decision and to enjoin any attempt to enforce the decision. In October 1977, the federal
court issued its opinion, declaring the state supreme court's decision in *McBryde* void and restraining any attempt by the state to assert ownership in the stream waters.

The federal court agreed with the petitioner's argument and held that the state supreme court's decision, in changing the law so rapidly and unexpectedly, constituted a "taking" of property without just compensation. The court refused to apply state law on the issue of who owned the water rights because state law, as pronounced in *McBryde*, held that the water had always belonged to the state and therefore could not be taken from the petitioners. Thus, if state law had been applied, the constitutional question would have been avoided.

**THE CONFLICT**

The difficulty in resolving the propriety of federal court intervention in *Robinson v. Ariyoshi* rests in the head-on collision between two fundamental legal principles. The first principle is that the interpretation of state statutes and state property law rests supremely and ultimately in the highest court of the state. The second principle includes the constitutional guarantee of due process through just compensation.

This second principle, requiring due process in the deprivation of property can be separated into concepts of substantive due process and procedural due process.

Substantive due process is a result of the incorporation of the fifth amendment into the fourteenth amendment through the due process clause. The fifth amendment prohibits the taking of private property for public use without just compensation. Although the fifth amendment applies only to actions by the federal government, the fourteenth amendment due process clause applies this prohibition to actions by the states. At various times, the term "state" as used in the fourteenth amendment has been read to include the judicial as well as legislative and executive branches of government.

Procedural due process, on the other hand, embodies the notice and "opportunity to be heard" concept that the state may not deprive persons of property, life, or liberty without giving them an adequate opportunity to be heard.
The petitioners in Robinson v. Ariyoshi raised both substantive procedural due process claims. They alleged that the sudden, unexpected change in the law which gave the state the ownership of the waters and also prevented the transfer of water was a "taking" of their rights without just compensation. They also alleged that this sudden change without warning and an opportunity to be heard constituted a deprivation of procedural due process. Furthermore, they argued that the denial of the right to present the constitutional issues on rehearing also constituted a denial of procedural due process. For the purposes of this paper only the substantive due process claims of petitioners will be considered.

The petitioners in Robinson v. Ariyoshi alleged that their property, in the form of water rights, had been taken without due process and just compensation. It is fairly clear that property rules should be a matter of state law and state court determination. Since the Hawaii Supreme Court determined that the water belonged to the state, then it follows that petitioner sugar companies never had the property rights they claim were taken from them. Thus, one issue is whether the federal court must abide by state court determinations in measuring whether the due process clause applies. If the due process clause does apply, then jurisdiction in the federal court was proper. This clash between the power and sovereignty of the state court to determine its own property law and the jurisdiction of the federal court to determine what constitutes a deprivation of property without due process of law is the central conflict underlying Robinson v. Ariyoshi.

THE EXISTENCE OF A FEDERAL QUESTION

The threshold question for obtaining jurisdiction in federal court is the existence of a claim arising under federal statutes or the Constitution. The federal court obtained jurisdiction based on its view that the unexpected change in water law following McBryde and the subsequent destruction of the petitioner's water rights, under the theory that these rights never existed at all, raised a federal constitutional question, namely whether the petitioner's property had been "taken."
Thus, while it is ordinarily clear that state courts have the absolute right to interpret and develop state law, the critical question is whether a federal court may claim the right to intervene on the basis that the state court's decision, albeit merely an interpretation of state law, deprived the parties because it resolved the case in an unforeseeable manner.

One of the problems with assuming jurisdiction on such grounds is that, arguably, all changes in state law raise this due process issue; thus, federal courts would have the jurisdiction to entertain such suits and prevent state law from changing.

A distinction can be drawn between those cases where the asserted denial of due process is the declaration of a change in law itself and those cases where the asserted denial of due process is the declaration and change of the law accompanied by an actual enforcement or carrying out of the deprivation of the property right. This declaration-enforcement distinction may prove useful in resolving the two main principles in conflict.

THREE ALTERNATIVE MODELS FOR RESOLUTION

Once the federal court has been petitioned to take jurisdiction, how is it to act in a manner that best preserves the policies behind Principle I, the state court supremacy in the interpretation of state laws, and Principle II, due process protection of property rights? One can foresee three possible models of resolution. All three models incorporate the declaration-enforcement distinction.

Model I: Maximum Deference

Under this view, mere declarations by the state court which result in unforeseen changes in state law can never, in and of themselves, constitute a denial of due process. However, enforcement of such decisions which result in a denial of due process, i.e., a "taking" of property without just compensation, may give rise to a cause of action in federal court. In such a case, the federal court could find that a "taking" has occurred and order compensation if the threatened "taking" continues. In deter-
mining whether or not a "taking" has taken place, however, the federal court must adhere to all state court interpretations of state law—even decisions which "eliminate" property and thus afford no basis for a "taking."

Model II: Maximum Intervention

Under this view, declarations of law by state courts which are an unexpected and radical change in state law may be reviewed by a federal court to determine whether or not a property interest has been "taken" by the decision. If the court determines that a "taking" has occurred, it may "void" the declaratory aspects of the state opinion and restrain any enforcement of the decision. Under Model II, the court would not have to adhere to state court determinations of property law if such adherence would result in evasion of the constitutional issue. The court would determine whether a "taking" had occurred by looking to the end result of the state court's action.

Model III: Declaration-Enforcement Distinction

Under Model III, the declaratory aspects of a court's decision would never constitute a denial of due process. Thus, in the absence of enforcement, unexpected and unforseeable changes in state law would not constitute a "taking."

However, a federal court would have the power to determine whether actual enforcement of the decision constituted a "taking." It would apply the same test as used in Model II—whether the end result constituted a "taking."

DISCUSSION OF MODELS

In order to understand how alternatives I, II, and III would work, one may apply them to a hypothetical situation simpler than Robinson v. Ariyoshi.

Suppose that, in an action between X and Y who both claim title to a plot of land in Mānoa Valley, the supreme court of the state of Hawaii were to declare that the plot did not belong to either X and Y but, upon
a reinterpretation of the Mahele grant\textsuperscript{17} executed in 1850, held that the King never intended to give away Mānoa Valley, and that thus, through his successors—the Republic, Territory, and State of Hawaii—it is really the state which owns the plot of land and, in fact, all of Mānoa Valley.

Subsequent to this decision (let's call it \textit{X v. Y}), X and Y sue the state to enjoin enforcement of the decision in \textit{X v. Y}. The state has not attempted to assert possession of the plot or of any part of Mānoa Valley. Predictably, however, land values in Mānoa Valley have fallen by 50%. X and Y sue officers of the state of Hawaii in federal district court, alleging that the unexpected change in the law and the declaration that title belongs to the state is a "taking." What should the federal court do?

**Model I: Maximum Deference**

Under Model I, the federal court would completely defer to the state court on all questions of state law. Since the property laws are matters of state concern and expertise, the federal court would defer on these issues. In other words, if in \textit{X v. Y}, the state supreme court stated that the title to the plot and all of Mānoa Valley was and always had been in the state, then there could be no "taking" because neither X nor Y had the property to begin with. Thus, the federal court would not have a federal question upon which to base jurisdiction.

The problems with Model I are manifestly clear from this example. Since the federal court defers on all questions of state law, including the question of what constitutes property, a state court may, by judicial action, commit a "taking" by defining an interest as no longer constituting a property interest.

Model I exalts the first of the two conflicting policies, that is, in order to preserve state judicial sovereignty, state court decisions on property issues should be ultimately controlled in federal courts.

As a general principle it has always been recognized that, as to issues of property law, state court determinations are definitive.\textsuperscript{18} As the United States Supreme Court stated in \textit{Fox River Paper Co. v. R.R. Commission}, 274 U.S. 651, 655 (1927):

...the nature and extent of rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state.
Even Justice Stewart, in the concurring opinion in *Hughes v. Washington*, so strongly relied upon by the court in *Robinson v. Ariyoshi*, recognized the ultimate authority of state judicial interpretations on questions of property law.¹⁹

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual states to develop and administer. And surely Washington or any other state is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners.

Moreover, since the petitioners are alleging that their "property" was taken or deprived in violation of the fifth and fourteenth amendments, the central question in *Robinson v. Ariyoshi* can be viewed as one of the degree to which the federal court is obligated to apply state law in defining the term "property" in these Constitutional amendments.

If the state law is applied, petitioner's constitutional claims disappear, since, in *McBryde v. Robinson*, the Hawaii Supreme Court ruled that it is the state, and not petitioners, which is the owner of the water rights. Thus, there would be no property to be taken.

The Constitution does not define what, of various tangible and intangible interests, constitutes property. As the supreme court indicated in *Board of Regents v. Roth*, the sources of law which determine what is property are essentially nonconstitutional and nonfederal:²⁰

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.

Thus, whether or not certain water rights are property interests initially seems to be a question of state law. It appears, however, that there must be reserved out of this general principle the logical exception that the federal courts would not allow the state courts to determine out of existence certain obvious categories of property, such as land. The supreme court's intention in *Roth* seems to be that, as to the variety of interests collectively referred to as the "New Property,"²¹ whether or not such interests constitute property is determined by reference to nonconstitutional sources. One cannot read *Roth* as a complete deference to state law where a federal court is convinced that a "true" property interest,
although not so defined by the state court, is not receiving constitutional protection. The supreme court's treatment of "property" is somewhat analogous to the impairment of contract cases where the court, on review of state court decisions, determines for itself whether a contract exists. 22

Thus, while it can be said that there must be a general deference to state law in defining property under the fifth and fourteenth amendments, it can also be reasonably assumed that certain minimal interests will always remain "property" regardless of state law.

This conclusion is actually more supportive of the position taken by the Model II adherents in that rights in the surplus waters are arguably one of these minimal property interests that should always be considered property. On the other hand, perhaps an argument can be made that the proper inquiry is not determining whether or not such rights are property, but rather, assuming that they are, determining who is the owner of such property.

If the question in *McBryde* was one of who has title, then the issue is one of deference to title—determining rules—and not deference to definitional rules. Title-determining rules would seem to merit greater deference than state definitional rules focusing on a constitutional term.

Thus, Model I is based on traditional deference to state title-determining and definitional rules of property. A useful inquiry at this point is to determine whether this deference is obligatory or optional.

Although Justice Stewart seems to hint that this deference is compelled by the Constitution, 23 it appears that the deference to state law is based more on the fact there really is no other body of law to apply. This discussion parallels the question of whether the application of state substantive law in diversity suits brought in federal courts is constitutionally required. The view taken by more and more commentators is that state law is not compelled by the Constitution in such cases but that there is no justifiable reason to apply any law other than state law. 24

Similarly, in federal nondiversity actions, the decision to apply state law in interpreting a federal statute, for example, is not based on constitutional concerns but on considerations of federal or state law homogeneity. 25

This point, whether or not the obligation to apply state law is
constitutionally required, is an important one for those who subscribe to Model I, for if the obligation is constitutionally compelled, then the federal court would have little choice but to defer to state law. However, if the decision to apply state law is based on the consideration that there is no good reason not to apply state law, then the federal courts, under the argument that the application of state law constituted a denial or evasion of constitutional rights, may have found a valid reason not to apply state law and subsequently to declare its own view of state property rights.

It is this suspicion that the state court's decision is motivated by the attempt to accomplish a result at the expense of constitutional rights that gives the basis for nondeference in Model II. 26

The last point to be made in support of Model I is, in a way, mostly a rejection of a premise of Model II. Under Model II, as expressed by Justice Stewart's concurring opinion in Hughes, rapid, unexpected changes in state law can constitute "takings" under the fifth amendment and thus constitute a denial of due process under the fourteenth amendment. However, mere changes in state law itself should never constitute a denial of due process. 27

This clearly serves the policy considerations mentioned earlier in respecting the sovereignty of state courts to mold and change state law. Allowing federal courts to intervene on the basis that a change in state law constitutes a fourteenth amendment denial of due process would give the courts the means to act as the appellate courts of the state, negating the power and efficacy of the state court system.

Hence, Model I is based on a traditional deference to state courts on questions of property law and a corresponding resort to state law in defining the contours of the term "property" in the fourteenth amendment. Lastly, in an effort to avoid the institutional problem of federal courts overruling state courts, changes in state law, contrary to the view expressed in Model II, do not, under Model I, constitute a denial of due process.

Model II: Maximum Intervention

Under Model II, the unforeseen change in law itself may constitute a denial of due process in the substantive, "takings," sense. Thus, in our example, even though the state has not asserted any ownership rights over
Manoa Valley or the plot of land, X and Y can bring an action in federal court alleging that the new declaration of law is a denial of due process.

The federal court in determining whether there has been such a denial of due process would not be bound by state court decisions but could look to traditional tests. Thus, the court may decide that the 50% diminution in value was a "taking" and order compensation.

Model II is essentially the view taken by the court in Robinson v. Ariyoshi. As set forth in Robinson v. Ariyoshi, the "taking" may take place without any attempt by the state, as beneficiary of the decision, to enforce its rights pursuant to the decision. In essence, the "taking" is not the taking of tangible property but rather the destruction of various expectations to use property by changes in the law.

Thus, in the example of X and Y, even though the state has not asserted any ownership rights over Manoa Valley or the plot of land, under Model II, X and Y (or any owner of land in Manoa Valley) could conceivably bring suit in federal court alleging that the declaration of ownership in the state was a "taking" and therefore a denial of due process.

The critical difference between Model II and Model I is that in Model II the court would not be bound by state decisional law on property issues. Thus, the federal court in Robinson v. Ariyoshi, disregarded or "voided" the Hawaii Supreme Court's determination that the state, and not McBryde or Robinson, was the owner of the water. Clearly, the decision not to apply state law is at odds with the obligation to apply state law as exalted in Model I. The rationale for not applying state law in Model II is based upon a suspicion that such an application would result in an evasion of constitutional rights.28

Moreover, support for this interventionist approach of voiding or negating the state court determination rests upon the firm belief that the due process guaranteed by the fourteenth amendment can be violated as easily by the judicial branch of government as by the executive and legislative branches.29

Both of these ideas blended together in Justice Stewart's concurring opinion in Hughes v. Washington. Although Hughes was decided on different grounds, Justice Stewart proceeded to discuss an alternative issue very similar to the situation in Robinson v. Ariyoshi. In a 1946 decision,30 the Supreme Court of Washington interpreted Article 17 of the Washington
Constitution to hold that title to gradual shoreline accretions vested in the owner of the adjoining land. Twenty years later, the Washington Supreme Court in *Hughes v. Washington* reversed itself and held that Article 17 terminated the rights of such landowners. Justice Stewart posed the problem in this manner:

First: Does such a prospective change in state property law constitute a compensable taking?

In answering this question in the affirmative, Justice Stewart provided the basis for the court's reasoning in *Robinson v. Ariyoshi* that changes in state law can constitute a "taking":

[A] state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

Justice Stewart also linked the obligation to apply state law to the rate at which such law changed:

To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of relevant precedents, no such deference would be appropriate.

In Justice Stewart's view this nondeference was justifiable. State law issues which were resolved in an unpredictable manner did not remain solely issues of state law; instead, since a radical change would constitute a "taking," a federal constitutional question was raised:

Such a conclusion by the state's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decisions now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

Thus, Justice Stewart squarely takes issue with the last proposition asserted under Model I—that mere changes in law cannot constitute a denial of due process. Unfortunately, Justice Stewart did not support his theory with any authority. Rather, his conclusion was based on the logic that a "taking" is a "taking" whether committed by the executive branch of government or by the judiciary.
Because the Due Process Clause of the Fourteenth Amendment for­bids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is un­intended than when it is deliberate, I join in reversing the judgment.

In other words, although it is clear that state courts can violate the fourteenth amendment, it is not clear that state courts in their deci­sional processes can violate the fifth amendment. On the surface, this distinction appears eminently sensible since the intent of the fifth amend­ment seems to protect the private property of individuals from government when it acts in a "private enterprise" sense, for example, as a road builder. The fifth amendment protection of private property does not seem to be aimed at government when it acts in a "mediator" role, for example, through the courts.

Although it is true that the state may just as effectively deprive a person of a property right or an expectation interest in its "mediator" role as well as in its "private enterprise" role, the difference between the two roles would indicate applying the "takings" provision in one situa­tion and not the other. For example, in a suit between the state and X on the issue of who was the owner of property on which X has resided for a number of years, the state court acting as the state in a "mediator" role, may, in relying on well-settled rules of property, decide that the state was the actual owner. Or, acting in the "private enterprise" role, if for some reason the state decided not to litigate the issue of title but chose instead to exercise the power of eminent domain and condemned the property, then it would clearly have to compensate X.

In the first situation, the "state," acting in its role of "mediator," received the land as the prevailing litigant. In the second situation, the "state," acting as "private enterpriser," acquired the land. Surely the two situations are different. However, Justice Stewart's view is to con­sider the two identical when one additional fact is added: namely, when the result in the first situation (when the state acts as mediator) is reached through a suspected manipulation of law by the state court.

On the other hand, the due process clause of the fourteenth amendment, in contrast to the "takings" provision of the fifth amendment, clearly should apply to the state acting in its various forms. If one views the fourteenth amendment's due process clause as essentially requiring "pro­cedural due process," then there is no adequate reason not to require it
in the actions the government takes through its various entities.

For example, the "state" in its "mediator" role as a court must comply with procedural fairness in the assertion of jurisdiction or in execution of a judgment. Moreover, the state in its other forms, as a private (or public) enterprise in the providing of services such as police protection or welfare benefits, must also comply with due process.

Hence, the fourteenth amendment's requirement of procedural due process can be applied to the state in its "mediator" and "private enterprise" roles without interfering with the functioning of the government in those capacities and with the additional benefit of ensuring a minimal level of attention to the citizen and consistency in form and procedural fairness. On the other hand, the application of the fifth amendment's "takings" provision to the state in its "mediator" role undermines the ability of the state to perform that service while minimally assuaging the fears of the Model II adherents that the "mediator" is really the "private enterpriser" in disguise.

The great potential for diminishing the "mediator's" effectiveness if the "taking" provision is applied to the courts lies in the fact that state courts are constantly required to adjudicate conflicts over property rights, whether involving the state versus citizens or citizens among themselves. If the "takings" clause were to apply, then a federal constitutional question theoretically could be raised every time a court awarded property to one of several competing litigants.

In fairness to the adherents of Model II, Model II does not advocate such a wide-open use of the "takings" clause, but seeks only to assert the takings argument when the state, as "private enterpriser," masquerades as a "mediator." The suspicion of such a masquerade is certainly a theme that underlies the federal court's reasoning in Robinson v. Ariyoshi. The court in that case was quite vituperative in admonishing the state for perpetrating through the judiciary what it could not do through the legislature.

Perhaps the Model II adherents would only apply the "takings" provision to cases where the state as "private enterpriser" masqueraded as the "mediator." Although Model II adherents propose to limit these instances to cases where constitutional evasions were accomplished through radical and judicially awkward changes in law, nevertheless, several major problems
loom large even in this limited application of Model II.

First, Model II seems to require an investigation of the motivations of judges in declaring changes in law. Since Model II is based upon a suspicion of constitutional evasion, the inquiry really seems to be: "Did the judges really intend to take the property for the public?" The troublesome aspects of such investigation are self-evident. Except for conflicts of interest where there is an appearance of the strong possibility for nonlegal motivations in a decision, the mental attitude of a judge towards a case is simply not a relevant issue for collateral attack. The legal system is based on a presumption of judicial neutrality in the application of law. The risk of appearing before an unsympathetic judge is simply one of the risks of the system. Theoretically, this is also one of the democratic pillars of the system because the biases of judges should reflect the prevailing attitude of the society at large. For example, there is absolutely no question of the validity of the U.S. Supreme Court's decisions although many of the reversals of Warren Court doctrines are more reflective of the social attitude of the new justices than of any fundamental change in jurisprudence.

Second, even if an investigation into motivation is discarded, using the rate of change in state law as some measurement of when Model II may be invoked provides no clear standard of when changes in state law may rise to the level of "takings." The determination of what constitutes a "taking" as to tangible property is itself erratic. Moreover, the interrorem effect of possible application of the "takings" provision to judicial declarations of law would lead state judges, out of fear from federal intervention, to change law only in minced steps.

Hence, the Model II solution to eliminate the problem of the state masquerading as "mediator" when it is really acting as "private enterpriser" creates more problems than it solves. For these reasons, it is wise to confine the "takings" provision to the government acting in its "private enterprise" role.

Undoubtedly, much of the problem is caused by rigid adherence to the old rule of thumb that "the legislature makes the law and the courts interpret the law." When the courts ostensibly legislate, as they allegedly did in McBryde v. Robinson, the Model II adherents ask, "Why is it not justifiable to treat the court as a legislature and, therefore, to apply
the 'takings' provision?"

The answer, perhaps, is that the functions of the creation and the interpretation of law cannot be cleanly separated. Although the courts do not write statutes, they certainly do "make" law by filling in the gaps left by statutes and by interpreting and giving content to the statutory language. Rules of statutory construction guide the courts in filling these gaps in a manner consistent with the intent of the legislature. No statute is detailed enough to cover all of the fact situations which may fall within the confines of an act.

Thus, like the inquiry into the motivation of judges, it is simply not a profitable line of attack to attempt to isolate instances where the court acts in a legislative manner as appropriate for applying the "takings" provision.

Moreover, the particular situation brought about by the McBryde case literally demands that the court act in a quasi-legislative sense.

First, in McBryde there was no statutory scheme for the court to rely on. Second, in the viewpoint of the three justices who constituted the majority in McBryde, the law pertaining to the ownership of surface water rights was far from settled.43

This question of the uncertainty or unsettledness of the law is the most critical question in the McBryde and Robinson litigation. Upon this determination of the settledness of the law turns the answer to the degree to which the McBryde decision constitutes a radical departure from prior law, the critical element which triggers Model II.

It is not clear whether there is a long line of unbroken cases upholding private ownership of the surplus water. Although the petitioners in Robinson do point to historical water uses in reliance on the concept of private ownership, nevertheless, the weight to be given such "traditional" practices remains a debatable point.

Hence, when called upon to adjudicate the water rights in McBryde, the Hawaii Supreme Court, in its own view, was writing upon a legislative and judicial blank slate. The court was admittedly acting in a policymaking, if not quasi-legislative mode, but it was "making law" only in the sense that all courts which operate in such voids "make law" the first time they speak.

The petitioners in Robinson v. Ariyoshi contend, of course, that there
was no such void or blank slate but rather, that there existed a century of settled water law and practice which was suddenly upset by _McBryde_ in 1973. It is this view, in addition to the conviction that the court was evading constitutional issues by really masquerading as the state in its "private enterprise" mode or as the legislature in its lawmaking role, which provides the basis for intervention under Model II.

Model II not only seems to lack a solid conceptual basis in its use of the "takings" clause as an instrument of enforcing state law consistency, but it also raises a number of institutional problems which will occur from increased state and federal conflict.

The inherent vagueness in the "takings" standard is one of the major problems with Model II. The law review commentaries on "takings" have focused on the lack of ability by courts to draw a line between regulation under the police power (requiring no compensation) and "takings" for public use (requiring compensation). The inability to determine what constitutes a "taking" is particularly important in this context where the integrity and sovereignty of the state judicial system rest upon the proper characterization.

Furthermore, an assertive federal court could, in effect, become the supreme appellate court of the state. The possibility of federal court intervention would cast substantial doubt on the finality of state court decisions. The losing party before the state supreme court could challenge the state court's judgment in federal court on the basis that any departure from preexisting determinations of state law constituted a "taking."

Whether or not the federal district court decided to intervene, there would also be increased delay because of the right of appeal, as with any decision, to the United States Circuit Courts of Appeal. Unsuccessful litigants in the circuit courts could appeal to the United States Supreme Court, further prolonging the period in which state court interpretations of state law would remain in doubt.

This is exactly the situation in which the _McBryde_ case exists. Subsequent to the Hawaii Supreme Court's decision in _McBryde_ in 1973, the petitioners sought review in the United States Supreme Court. They were unsuccessful and filed suit in the U.S. District Court in Hawai'i. The case is now on review before the Ninth Circuit Court of Appeals and ulti-
mately may go to the United States Supreme Court. Thus, federal courts will have had four different opportunities to review the Hawaii Supreme Court's determination of Hawai'i law. The effect of the use of Model II in the McBryde litigation has been to paralyze the state of Hawaiian water law with no end in sight until all levels of federal courts have had their say on the issue.

Almost every change in state law—whether it be in the property, commercial, or corporate areas—diminishes some person's rights or expectations. Thus, under Model II, the possibilities of federal court intervention could be opened in an endless variety of situations. Since it is extremely difficult to define a clear standard of what constitutes a "taking," the pattern of federal intervention in these cases may be haphazard and chaotic, creating doubt on the finality of any state court judgment.

Lastly, intervention would result in federal courts issuing advisory opinions on state law and effectively defining the amount and rate of change at which state law could occur. The effect of allowing federal courts to correct state judgments under the "takings" provision is to limit state courts on how they may change their laws and, in effect, to permit federal courts to write state law.

In conclusion, the basis of Model II intervention rests upon the preeminence of constitutional rights and a suspicion of the various forms of state power. Under Model II and Justice Stewart's view as expressed in Hughes, a "taking" does not depend on which branch of government perpetrates it, but rather:46

...the Constitution measures a taking of property not by what a state says, or by what it intends, but by what it does.

Under Model II the taking is measured by the diminution in value of the property interest as determined before and after the state action. Moreover, if the deprivation is accomplished through some perceived manipulation of state law by a state court, no respect need be given the state court decision.

The problems with Model II can be divided into two, albeit related, categories of conceptual and institutional problems.

Justice Stewart and the Model II adherents may be conceptually wrong about the purpose of the "takings" provision. It does not seem that that constitutional guarantee was ever aimed at the state acting as a "mediator" as opposed to acting in the "private enterprise" mode.
Moreover, Model II raises a number of institutional problems and significantly impairs the ability of state courts to mold and fashion laws in areas of purely local concern. Lastly, Model II is triggered by a "radical departure" in state law which, although Justice Stewart in Hughes implies "I know it when I see it, and, I see it here" is a standard impossible to administer according to any previously determined criteria.

Model III: Declaration-Enforcement Distinction

Model III seeks to preserve the policies of Principle I (state court sovereignty over its own law) and Principle II (due process protection of private property rights).

Under Model III the federal court must respect the state court's declarations of law. In other words, in the case of X and Y v. State, the court must abide by the decision that the state has title to Mānoa Valley. In the case of Robinson v. Ariyoshi, the federal district court under this alternative should have given full faith and credit to the state supreme court's determination that all the waters of the stream belong to the state.

In effect, the federal court would not have the power to void the decision, i.e., to prevent in some manner the state supreme court from declaring the state the owner of all surface waters. In this manner, the policy of Principle I, state court sovereignty over its own law, is protected.

On the other hand, if the enforcement or carrying out of the state court's decision were to result in a "taking," then the federal court would have the power to order that just compensation be paid.

Thus, the federal court, under Model III, could not prevent the state decision from effectively declaring law, but it could order the state to pay compensation if it chose to exercise ownership in a manner which constituted a "taking."

Thus, in applying Model III to our hypothetical decision, subsequent to the case of X v. Y, the state is the holder of title to all of Mānoa Valley. If the state chooses not to disturb the existing tenants, then none of the parties has an action in federal court. If, however, the state chooses to exercise its ownership rights, the injured parties may have an action in federal court as to whether there is a "taking."
In *Robinson v. Ariyoshi*, under Model III, the federal court would have had to give effect to the state court's determination that the state owned all of the waters. If the state sought to use the water in a manner which interfered with preexisting water rights, and which effectively condemned those rights, the state would have to compensate the previous owners. If the state chose not to compensate, then, at that point, the former water users could bring an action in federal court (or any state court) claiming that "taking" without just compensation had occurred.

In essence, under Model III, a mere change in law itself cannot be a "taking." For example, the diminution in value of the water rights because of the *McBryde* decision, and the 50% drop in land values in Mānoa, could never, in and of themselves, be a denial of due process. However, if, in enforcing the declaratory aspects of the decision, i.e., preventing others from using the water after *McBryde*, the state's action were to constitute a "taking" under ordinary tests, then compensation must be paid.

Model III seeks to distinguish the declaratory aspects of a court's decision from the enforcement actions by the state in its executive or judicial capacity. Because of the institutional problems raised under Model II, actions by a court in its declaratory role should never constitute "takings." On the other hand, the state, in enforcing the law as it has subsequently changed may indeed act in a manner which denies substantive due process.46

There is no indication that the Hawaii Supreme Court in *McBryde* sought to deny petitioners compensation for property interests that may be "taken" by the state's assertion of jurisdiction under the *McBryde* ruling.

Moreover, under Model III analysis the state's use and regulation of the water might not rise to the level of a "taking." In essence, while Model III grants the state ownership rights in the water, it allows the state the choice of whether or not it will assert its right in the waters to the extent that use by the petitioners is impaired. That would be the proper point in time for petitioners to litigate whether the impairment constituted a "taking."
CONCLUSION

The purpose of this paper has been to give a brief, introductory view into the jurisprudential problems presented by *Robinson v. Ariyoshi* and to propose three alternative views for disposition of the case.

The main conflict in the case is a clash between the principle of state sovereignty over interpretation of its own property laws and the fourteenth and fifth amendment protections from the "taking" of private property without just compensation.

The first alternative to resolution of this conflict is maximum deference by federal courts to state interpretation of its own laws, even to the point of deferring to a state court's determining a property right out of existence.

The second alternative is to allow maximum intervention by the federal court on the theory that the unexpected change in law itself (without the enforcement of the decision) can be a "taking." The major problem with Model II is that it provides a means of constant federal court review of state law. This would place the federal courts in a position to control the rate of change in state property law; in essence, it would grant the supreme authority over state property law to the federal courts.

Model III recognizes that the enforcement of changes in state law may constitute a "taking." If the state enforced a decision which "took" property, the state would necessarily have to compensate the injured party. On the other hand, under Model III, all declarations of state law by the highest court of the state would be entitled to deference by the federal court. In this sense the power of state courts to interpret their own property laws would be left intact.

Although Model III is preferable to Model II in that it prevents the federal court from "voiding" a state court decision, similar problems to those presented in Model II arise when the federal court must evaluate whether the application and enforcement of the decision constitute a "taking."

Thus, neither of the alternatives presents an absolutely clear resolution of this difficult state and federal problem. Each of the alternatives presents a different mixture of concern for either of the two principles in conflict. The answer to this dilemma is unclear because it is a
problem that has rarely arisen. It is, however, a question that has tremendous ramifications in the face of Hawai'i's changing property law.  It is hoped that the subsequent courts, upon review of Robinson v. Ariyoshi, will achieve a just and delicate balance of the competing concerns.

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NOTES


3. An appeal to the Ninth Circuit was filed in April 1978.


10. U.S. Const. amend. XIV: "...nor shall private property be taken for public use, without just compensation."


16. A picturesque valley in Honolulu, Hawaii, where current landholders are confident that the land is really theirs.

17. In 1848 the King of the Hawaiian Kingdom parted his lands in what was called the Great Mahele.


23. Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J. concurring opinion): Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to
the states to develop and administer (emphasis added).


Second, Justice Stewart may be referring to the tenth amendment which may constitutionally leave the states the power to develop property laws.


26. In proclaiming that it must follow state courts on state law issues, the Supreme Court has excepted from this general requirement situations where the application of state law would result in evasion of constitutional rights. Indians are rel. Anderson v. Brand, 305 U.S. 95 (1938); Broad River Power Co. v. South Carolina, 282 U.S. 187, 191 (1930); Ward v. Love County, 253 U.S. 17 (1920); Fox River Paper Co. v. Railroad Commission, 274 U.S. 651, 665 (1927); Demorest v. City Bank Farmers Trust Co., 321 U.S. 42 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1929).

27. See Patterson v. Colorado, 205 U.S. 454, 461 (1907):

There is no constitutional right to have all general propositions of law once adopted remain unchanged.... But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.


The answer to the first half of the plaintiff's contention is no less plain. It is that the construction of a statute does not take a party's property without due process of law simply because it takes him by surprise, and when it is too late for him to act on the construction and save his rights.


29. See cases cited in note 12.


33. Id. at 296, 297.

34. Id. at 296.

35. Id. at 296.

36. Id. at 298.

37. See cases cited in notes 12 and 13.

38. Credit for the "mediator"—"private enterprise" distinction must be given to Professor Sax as expressed in his article Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964).


40. See Bell v. Burson, 402 U.S. 553 (1971) (Protecting the public from drunk drivers through the suspension of a motorist's license unless he posts security for damages, regardless of fault, requires a suspensory hearing in order to comply with procedural due process); Goldberg v. Kelly, 397 U.S. 254 (1970) (Procedural due process requires a state to hold an evidentiary hearing prior to terminating a welfare recipient's welfare benefits).


From the manner in which the court wrote the majority opinion in McBryde I, it was obvious that the court determined without notice to any party of its intent, that it was going to completely reconstruct what was universally thought to be the well settled law of waters of Hawaii. The court sua sponte decided that all the flowing waters of the streams in the State should belong entirely to the State, subject only to appurtenant use under the English common law doctrine of riparian rights. It was strictly a "public policy" decision with no prior underlying "legal" justification therefor. The majority wanted to see streams running down to sea on an all-year-around basis. Knowing that this was squarely contrary to the accepted state of water rights law in 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?


45. See articles cited in note 42.
