I. INTRODUCTION

In the end, William S. Richardson was hailed as a "legal giant." The jurisprudence of the Chief Justice, including the body of property cases he authored for the Hawai‘i Supreme Court, was equally acclaimed.


2 This body of cases includes In re Robinson, 49 Haw. 429, 421 P.2d 570 (1966) (interpreting Land Commission Awards and Royal Patents); In re Property Situate at Moiliili, 49 Haw. 537, 425 P.2d 83 (1967) (asserting an interpretation of the School Lands Act of 1850 by which lands used as schools were exempt from passing into private ownership under the Great Māhele); Schimmelfenning v. Grove Farm Co., 50 Haw. 166, 434 P.2d 314 (1967) (affirming a traditional and customary duty to keep auwai (irrigation ditches) clean; plaintiff landowner could not receive any damages from defendant because plaintiff's failure to receive water resulted from his own failure to maintain the auwai); Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968) (recognizing traditional Hawaiian customary access rights and establishing traditional Hawaiian usage as the context within which Western property rights must be interpreted); In re Ashford, 50 Haw. 314, 440 P.2d 76 (1968) (holding that location of boundary described as "ma ke kai" was along upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves; first of three landmark decisions that changed the shoreline demarcation between public and private boundaries on beaches); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (Abe, J.), aff'd on rehearing, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam) (holding that water cannot be privately owned and that riparian and appurtenant users have the right to use, but not own, such water; although written by Justice Abe, McBryde is identified as part of Richardson's jurisprudence because he personally defended the opinion from constitutional attack in federal court and because he reaffirmed its holding in his own opinion in Robinson v. Ariyoshi); County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973) (holding that seaward boundary of landowner's lot should have been located along the vegetation line, not the debris line; second of the three shoreline cases); In re Sanborn, 57 Haw. 585, 562 P.2d 771 (1977) (applying Ashford to property registered with the Land Court and holding that any purported registration of land below the upper reaches of the wash of the waves was ineffective; third of the three shoreline cases); State ex rel. Kobayashi v. Zimring, 58 Haw. 106, 556 P.2d 725 (1977) (holding that land newly formed by a lava flow belonged to the State, not to the abutting
During his seventeen years as chief justice he became known for decisions in property law that expanded the beaches and preserved state waters and newly-added volcanic lands for the people of Hawai‘i. Today, those and other decisions have become the foundation of natural resources law in the State of Hawai‘i.

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


It was not always this way, and his jurisprudence was not always universally acclaimed. Thirty years ago, when first rendered, those decisions were bitterly and vehemently contested in certain quarters. Critics called them pure policy-oriented decisions, implying that Chief Justice Richardson avoided applying settled law simply to reach results that were to his personal liking.

Today, it is different. The jurisprudence of Chief Justice Richardson is more than merely accepted as settled simply because it is final; it is hailed as defining a new, historically oriented approach to the law of property. For example, the three decisions that Chief Justice Richardson authored as to shoreline boundaries have become settled law. His opinion in Robinson v. Ariyoshi has established the legal context by which all water rights are


It is important to clarify what is meant by the jurisprudence of Chief Justice Richardson. Every majority opinion officially represents the views of a number of judges or justices. We cannot know, therefore, the specific role of the chief justice in these property decisions. It is with this caveat in mind that one speaks about the “jurisprudence” of Chief Justice Richardson or the “Richardson Court.” Nonetheless, such a reference is fair when one examines and counts the common elements of those decisions—a deep understanding of the true history of Hawai‘i, a basic sense of fairness, and an awareness of the uncommon political forces that brought Chief Justice Richardson to the Hawai‘i Supreme Court in 1966. One assumes that while the results are those in which a majority must concur, much of the logic, the reasoning, and passion of these decisions arises from the sense and sensibilities of Chief Justice Richardson.


See cases cited supra note 9.

McBryde, 55 Haw. at 303, 517 P.2d at 50 (Levinson, J., dissenting); see also Smyser, supra note 3; Robinson, 441 F. Supp. at 583 ("McBryde I therefore came as a shocking, violent deviation from the solidly established case law—totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions.").

See cases cited supra note 4.
adjudicated. His opinion in *State ex rel. Kobayashi v. Zimring* settled the principle that newly accreted volcanic lands are property of the state. Richardson’s opinions in *Palama v. Sheehan* and *Kalipi v. Hawaiian Trust Co.* are equally important for affirming the legal basis for asserting gathering and access rights on private property and were the backbone of the landmark decision in *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*.

The bold decisions of Chief Justice Richardson demonstrated how a jurist could support the rights of the people without resorting to legislation from the bench. Richardson may have been considered “activist” because he used the power of the court to create profound, progressive change, but he did so by reaching back into history and precedent and thus showing a respect for the deep-rooted values of the Western legal system. Today, nominees to the office of Chief Justice of the Supreme Court of Hawai‘i are held to the standard set by Chief Justice Richardson. This article addresses how and why the jurisprudence of the Chief Justice, once so controversial, has become so celebrated today.

The Chief Justice succeeded in part because of his personality and place in history: he was the right man, at the right time, with the right tools. He also succeeded because of the nature of his jurisprudence, which had four qualities: it was constitutional, restorative, unifying, and island-based. His jurisprudence survived constitutional attack. It was restorative of Hawaiian sovereignty and values, yet it was also unifying, uniting Hawaiians and the immigrant communities that had settled in Hawai‘i. Finally, it was a jurisprudence particularly appropriate for an island society.

Justice Oliver Wendell Holmes once said that the life of the law was not logic, but experience. The jurisprudence of the Chief Justice succeeded because it was tailored to the uniqueness of Hawai‘i’s island history and experience.

Generally speaking, the Chief Justice’s jurisprudence succeeded because it was the legal embodiment of the political motto of Hawai‘i—that the life of the land is perpetuated in righteousness. To Chief Justice Richardson, the life of the law was itself perpetuated in righteousness. This

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14 *See In re Water Use Permit Applications (Waiāhole I)*, 94 Haw. 97, 9 P.3d 409 (2000) (affirming the imposition of a public trust over the waters of the State as asserted in *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982)).
16 50 Haw. 298, 440 P.2d 95 (1968).
17 66 Haw. 1, 656 P.2d 745 (1982).
19 OLIVER WENDELL HOLMES, THE COMMON LAW I (1881).
righteousness meant, at its most basic, that the power to make law was a trust. Those who were lawmakers were kahu, or stewards, whose primary responsibility was to care for those for whom the laws were made. The values and needs of the governed must be reflected in the laws themselves. Importantly, the phrase "the life of the law" meant that the law itself was alive—not dead, static, or pre-existing. The law must grow and evolve as necessary. This is the credo of an activist jurist.

Part II of this article looks at Chief Justice Richardson as a person and examines his success. Part III elaborates on his jurisprudence as having the right "fit"—as restorative, unifying, and island-based. Part IV examines the controversy over the constitutionality of his jurisprudence and whether his jurisprudence violated the Constitution by taking property without just compensation. His jurisprudence was not, as alleged by his critics, a radical departure from pre-existing law. Instead, his jurisprudence was corrective, rectifying errors made by earlier courts. Those courts had erred in accepting the unrighteous, un-pono common law of the Territory of Hawai'i, an undemocratic period of Hawai'i's history.

II. CHIEF JUSTICE RICHARDSON: THE RIGHT PERSON AT THE RIGHT TIME WITH THE RIGHT INSTRUMENT

Chief Justice Richardson was the right man because he belonged to two key political and ethnic communities within post-statehood Hawai'i. He was a Hawaiian and he was a Democrat. These were separate communities at that time, and he had the ability to bridge the two.

He also had the right tool. His instrument was the state supreme court. As Chief Justice of the Hawai'i Supreme Court, he was the leader of an institution that had the power to establish the property law of the State of Hawai'i with finality.

His timing was also superb. He was appointed chief justice at the beginning of statehood and was the first chief justice selected by Democrat John A. Burns. The Democrats controlled Hawai'i and would control Hawai'i for many years. The appointment of William S. Richardson as chief justice would be followed by the appointment of many like-minded Democrats. See Carol S. Dodd, The Richardson Years: 1966-1982, at 49-82 (1985). In time, the new majority would be in a position to render a new and transformative jurisprudence.
A. The Instrument

Chief Justice Richardson had the precise tool needed to carve his jurisprudential legacy: the Hawai'i Supreme Court. In the Supreme Court he had the power to make state property law with finality. It is settled law in the United States that the various states are sovereign as to the law of property. Thus, each state supreme court is the final arbiter with regard to the property law of that state.

He also knew the importance of the Hawai'i Supreme Court in shaping history. He was knowledgeable about Hawaiian culture, politics, and history by birth, family, and ancestry. He was also a lawyer from a family of lawyers. His grandfather had been a judge and counsel to Queen Lili'uokalani. William Richardson knew the importance of the Supreme Court in the political history of Hawai'i. He knew its significance as to property law, particularly law that led to the demise and dispossession of the Hawaiian people.

Equally important, he was a Democrat. He was close to the Nisei, the second-generation Japanese-Americans. He knew them from shared experiences in World War II. He knew them from the practice of law. He knew them from working within the Democratic Party. He shared their

22 See Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); see also Chang, Unraveling, supra note 21; Cent. Land Co. v. Laidley, 159 U.S. 103, 112 (1895) ("When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of this property without due process of law, within the Fourteenth Amendment of the Constitution of the United States.").
23 See Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 303 (1982). "That our state supreme court is the final arbiter within our state system of constitutional issues arising in or from a particular case is supported by the fact that the United States Supreme Court is authorized to consider and will consider only final judgments in its review and that the takings issue was presented as part of final judgment before the Supreme Court in the McBryde appeal. The Supreme Court has stated the test of finality for the purposes of review is whether the state appeals court 'has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court.'" Id. (quoting United States v. Pink, 317 U.S. 264, 268 (1942)); see also Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).
24 He had grown up in a political family with deep ties to the Hawaiian monarchy.
25 See DODD, supra note 20, at 17.
26 As discussed in Robinson, 65 Haw. at 667-77, 658 P.2d at 305-12, the following cases established ownership rights in surplus water, thus benefiting the sugar industry: Peck v. Bailey, 8 Haw. 658 (1867); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 14 Haw. 50 (1902), on subsequent appeal, 15 Haw. 675 (1904); Carter v. Territory, 24 Haw. 47 (1917); and Territory v. Gay, 31 Haw. 376 (1930).
understanding of the plantation experience. Richardson knew the role that the Hawai‘i Supreme Court and the law played in the discrimination, racism and oppression that occurred during the plantation era. He would, as chief justice, use the Hawai‘i Supreme Court to forge a corrective jurisprudence—one that would correct past harms to both Hawaiians and immigrants.

Thus, at statehood, he had precisely the right tool in his hands, the power to make property law—right or wrong—that was final.27 As he would remark later, after leaving the court:

Maybe the guy [himself as chief justice] was right. Maybe he was wrong, you know (chuckles), but I do have that luxury in that, if I made some mistakes, throughout the generations historians will be able to point them out to me. What’s done is done. What’s right is right. Maybe when you run the highest court in the state, when you say this is the law, it is the law. (chuckles) It’s a little tough for someone to say you’re wrong because that is the law.28

B. The Moment

William S. Richardson would never have been selected as a chief justice during the territorial period. The justices of the Territorial Supreme Court were selected by the President of the United States. The residents of Hawai‘i could not vote for the President. Thus, Hawai‘i residents had no impact on the President’s appointment of a chief justice for the Territory. The justices and judges of the territorial courts were not representative of the common people of Hawai‘i.29 The justices chosen by the President were “insiders,” attorneys from the large, predominantly white law firms that represented the sugar interests and the Big Five companies—the oligarchy of mercantile agents of the sugar plantations that effectively controlled the economic and social structure of the Territory.30


28 Id.


In some respects, Hawaii’s oligarchy was different. No community of comparable size on the mainland was controlled so completely by so few individuals for so long. Rarely were political, economic, and social controls simultaneously enforced as in Hawaii. Rarely were controls so personal, and rarely were they as immune from such
William S. Richardson was an outsider, a member of the "downtown" rather than the "uptown" bar. He recalled what it was like to practice before territorial judges, appointed from afar and often not from Hawai‘i:

And you get down to the judges, and that was one thing that really motivated us to go for statehood because we didn’t have any judges, you know. And it was hard for a young lawyer, who had been through the war, to come back and take a second class position in a trial, knowing that the judge wasn’t catering to you, he was catering to some secretary in the interior department, because the Secretary of Interior would do the appointing of the judges. And you never thought you had a fair shake as a lawyer. And I couldn’t see going my whole life as a second-class lawyer and getting judgments I didn’t think was fair.31

With statehood, justices were selected by the governor,32 who was popularly elected. This meant that the justices, as appointed by the governor, reflected the constituency that selected the governor. Thus, the kind of person who became a justice of the Hawai‘i Supreme Court was vastly different after statehood.

After statehood, justices and judges reflected the electorate: Hawaiians, Japanese, Chinese, Filipinos, and others. It was clear that one of the consequences of statehood would be a judiciary comprised of persons more representative of the people of Hawai‘i.33 It was equally clear that an attendant consequence of this shift would be a new judiciary rendering different decisions.

Thus, there should have been little surprise that the Richardson Court, now constituted by persons selected by the new, popularly-elected governor, would challenge the jurisprudence set down by the Territorial Supreme Court.34 It would be unrealistic to expect that the new court, made of persons from different classes and different backgrounds than past courts, would simply rubber-stamp the jurisprudence of the past.35

31 Richardson Interview, supra note 27.
32 See HAW. CONST. art. VI, § 3. In 1978, the Hawai‘i Constitution was amended to require that the governor’s nominees be selected from a list provided to him from the Judicial Selection Commission.
33 DODD, supra note 20, at 71-72, 80 n.37 (describing the make-up of the Hawai‘i Supreme Court as of 1974).
34 Cf. id. at 80 n.37.
35 See id. at 48 ("This is a ‘real people’ court. These justices know the people of the real world, they know how real people feel. They know especially how local people feel."

counterforces as Eugene Deb’s socialism, Woodrow Wilson’s New Freedom, and Franklin D. Roosevelt’s New Deal as in Hawaii. For forty years, Hawaii’s oligarchy skillfully and meticulously spun its web of control over the Islands’ politics, labor land and economic institutions, without fundamental challenge.

Id.
The act of statehood thus constituted a mandate for change in the jurisprudence of Hawai‘i. Support for statehood, both among the electorate in Hawai‘i and among Congress in Washington D.C., was also support for change. Statehood was a referendum on a broad number of changes to political life, including a referendum on the nature of the common law of Hawai‘i.

The decisions of the Richardson Court were not sudden and radical departures from settled law. Changes in the governance of Hawai‘i, as well as changes in the manner in which the law was interpreted, were expected as a natural consequence of change by both those in Washington as well as in Hawai‘i.1

C. The Man: Hawaiian and Democrat

1. The ability to cross over

William S. Richardson grew up in a family that was Hawaiian and Democrat.37 These were two communities that normally did not overlap. Hawaiians and Democrats had different histories and different political agendas. Chief Justice Richardson was unique because he bridged these


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

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

Id.

37 He was a Democrat in part because of the influence of his Hawaiian grandmother. See DODD, supra note 20, at 17.

His paternal grandmother was an active Democrat on Maui at a time when it was neither popular nor especially wise to be one. Mary Ann Kaulaikalauele Shaw Richardson—the same Kaula Shaw who used to be confined to the upper alcove in Iolani Palace for childish misdeeds—instilled in her son Wilfred a devotion to the Democratic and Hawaiian causes, which she viewed as intertwined.

Id.
two communities. Equally important, his jurisprudence would draw from the experiences of both communities.

On one hand, his jurisprudence borrowed from Hawaiians by resurrecting the principles and values of Hawai’i’s kings and queens who reigned during the monarchy. His jurisprudence drew on Native Hawaiian values, which emphasized kinship and stewardship of the environment. Hawaiians knew how to care for resources. They knew how to live on islands.

On the other hand, his jurisprudence also reflected the aspirations and values of immigrant plantation communities and in particular borrowed from the experience of those who made up the Democratic Party—predominantly the Nisei, second-generation Americans of Japanese ancestry. Their experience was one of inequality, discrimination, political ostracism, and racism. Chief Justice Richardson could, by friendship and affiliation with the Nisei Japanese, share these experiences. Thus, his jurisprudence always reflected concern for the “little guy.”

His experiences as both Hawaiian and Democrat blended, and two principles emerged from the Chief Justice’s membership in these two communities. The first was a distrust and suspicion of territorial jurisprudence. The second was his celebration of the jurisprudence of the Kingdom of Hawai‘i. The Chief Justice combined these two principles to formulate a jurisprudence that was restorative, unifying, and island-based.

As chief justice, Richardson would effectively blend his membership in both communities. On one hand, he was able to convince the Japanese-American and other immigrant communities of the value of resurrecting and living by traditional Hawaiian principles. The Chief Justice knew, by background and ancestry, the customs, practices, and principles of the old Hawaiian legal ways. He could draw on knowledge gleaned from generations of Hawaiians and thus do what no Nisei could: speak authentically about Hawaiian historical practices and traditions that should be incorporated into the law.

On the other hand, as a Democrat, Richardson was a bridge to the Hawaiian community. It was difficult for many Hawaiians to accept the Democratic Party because an important part of the Democratic platform was the acceptance of statehood. Statehood was one further step away from the restoration of sovereignty and independence.

Unlike many Hawaiians, William S. Richardson believed in the United States. Whatever wrongs had occurred (and he agreed that there were

\[39 \text{ See HAW. REV. STAT. § 1-1 (2009).} \]
\[40 \text{ The territorial era was, in a sense, the “dark age” of Hawaiian law. The Kingdom was the “golden age” of Hawaiian custom, usage, and precedent.} \]
\[41 \text{ William S. Richardson served, after all, as Lieutenant Governor of the State of} \]
wrongs), the United States now had jurisdiction over Hawai‘i. That was, to Richardson, political fact. His acceptance of United States jurisdiction over Hawai‘i was more than just practical politics, however. He sincerely believed in the promise of the American Constitution. It was this belief in America that Richardson brought to Hawaiians as a Democrat. In a sense, he was like the Japanese-Americans. Like the Nisei, whose parents had immigrated to Hawai‘i and the United States, Richardson had decided to cast his lot with the United States. He had voluntarily embraced America. He was an American by consent while some Hawaiians still viewed themselves as Americans by conquest.

The value of Richardson to the Democratic Party was his belief in America. If there was to be sovereignty for Hawaiians, it would be within the rubric of the United States Constitution. When asked about Hawaiian independence and the return of the monarchy, he would reply:

We cannot go back that far. Too many generations have gone by. Can you think of my not being an American anymore, you know, and that’s unthinkable. Cannot do it. I think [Native Hawaiians] have to live within the system. The American system is a good system that can cope with these things.42

Thus, on one hand, he was the Hawaiian who could, with experience, integrity, and knowledge, convince the Japanese-Americans and other groups of the value of Hawaiian ways. On the other hand, he was the Democrat who sought to convince Hawaiians that some kind of sovereignty could be resurrected and recreated within an American framework.

2. Different communities: Hawaiian and Japanese

In order to understand William S. Richardson, one must understand the differences between Democrats and Hawaiians. At statehood, few Hawaiians were members of the Democratic Party. Hawaiians were largely Republican.43 The haole (Caucasian) elite that had dispossessed Hawaiians

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42 Richardson Interview, supra note 27.
43 FUCHS, supra note 30, at 182.

The skillful juggling of the haole-Hawaiian alliance and the influence of the plantation vote enabled the oligarchy to maintain its control for nearly four decades, despite the imposition of universal citizen suffrage by Congress in the Organic Act. Helping sustain the Oligarchy during difficult periods was the weakness of the Democratic party of Hawaii—a weakness stemming from two sources.

Id.
had, through various alliances, enticed them into the Republican Party. Hawaiians were taught to be suspicious of the numerically superior Japanese. Moreover, different experiences divided the Hawaiians from immigrant communities like the Japanese-Americans.

On one hand, the Japanese-Americans and other immigrant groups thought not of sovereignty and self-determination but of survival and acculturation in a new land. Japanese-Americans and Filipino-Americans who made up the Democratic families were the sons and daughters of first-generation immigrants who had left homelands in Japan and the Philippines for the United States. Now that they had chosen to stay, the Nisei, like other immigrants, wanted, above all, the privileges and rights of

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44 Id. at 161. On the haole-Hawaiian Republican coalition, Fuchs writes:
Throughout the Territory as a whole, the Home Rulers undoubtedly won a majority of the Hawaiian votes. But a minority of Hawaiians combined with the near-monolithic strength of haoles and Portuguese, was enough to change the balance of power and to keep it in favor of the GOP for the next several years.

Id. at 160-61.

45 Id. at 162. Fuchs describes how the haole-Hawaiian Republican coalition was held together:
Outright bribery was probably less important than promises of jobs in winning native support for Republican candidates. According to old-timers who were part of the inner circle of Hawaiian and haole leaders in the Republican party, key jobs on some ranches and most plantations could not be held without dedicated service in the Republican cause. Government jobs also bound thousands of Hawaiians to the G.O.P. A political scientist discovered that in 1927 Hawaiians held 46 per cent of the appointive executive positions, 55 per cent of the clerical and other government jobs in the Territory, and more than half of the judgships and elective offices. Certain categories of government service, such as local law enforcement, were virtually turned over to the Hawaiians by the oligarchy. An investigation of law enforcement in Hawaii in 1932 found the field highly influenced by "kanaka politics."

Three years later, another study showed that Hawaiians, then less than 15 per cent of the population, held almost a third of the public-service jobs in the Islands.

Id.

46 Id. at 159. Regarding this suspicion of the Japanese, Fuchs notes:
Kuhio had only to look around to realize that the Hawaiians should join the haoles to protect themselves against the rising Oriental tide. There would come a day, Kuhio was probably warned, when the Japanese who already outnumbered Hawaiians and haoles combined would inundate the politics of the islands and Kuhio had best be prepared.

Id.

47 See Tom Coffman, The Island Edge of America: A Political History of Hawai‘i 178 (2003) ("For deeply rooted reasons, Japanese Americans supported statehood more actively than any other group. Initially, the unique identity of native Hawaiians seemed to be further obscured by statehood.").

48 See Boylan & Holmes, supra note 3, at 305.
American citizenship—they wanted to be American. They wanted to be treated as equals.

On the other hand, many Native Hawaiians longed for monarchy and independence. Many Native Hawaiians were not willing Americans, not Americans by consent. Hawaiians had not come to the United States from a foreign land; instead, the United States had come to Hawai‘i. The United States had annexed the Hawaiian Islands over the objection of the vast majority of Hawaiians. Few Hawaiians accepted American citizenship without some sense of ambivalence or resentment. Put bluntly, the difference between Hawaiians and immigrant communities in Hawai‘i was as to the manner in which they had become Americans. It was the difference between being an American by conquest and an American by consent.49

Americans of Japanese ancestry and other immigrants to Hawai‘i were, of course, free to reinvent themselves, confident that the ways of their homeland, its culture, language, food and ethos were being preserved back in their home country. They could be American without fear of the loss of language or culture. Hawaiians, on the other hand, did not have a homeland outside of the islands, which were now a part of America. For Hawaiians, theirs was the daily task of ensuring the survival of language, custom, and culture. As America became a bigger part of their lives, being Hawaiian became a smaller part. Hawaiians assimilated at the risk of losing their Hawaiianness, which is what made sovereignty such an important political aspiration.

3. William S. Richardson: A Hawaiian

First and foremost, William Shaw Richardson was Hawaiian. As a Hawaiian from a family with deep ties to both the monarchy and Hawaiians who were members of the legal profession, the Chief Justice grew up knowing and observing the operation of the legal system. He observed the manner by which Western lawyers and judges misinterpreted Hawaiian customs and practice—mistaking kahu, or stewardship, for ownership.50

As a Hawaiian, Richardson knew the power of the law in molding and shaping society. What Hawaiians know about the law is not evident to others:

The system by which the Hawaiian understood the world and ordered their daily lives was interpreted by outsiders to their detriment. In time, this

outside interpretation gained authority as a series of extraordinary political, social[,] and economic events in Hawai‘i placed outsiders in a position to make conclusive assumptions about the Hawaiian. Simply thinking and acting as a Hawaiian accelerated the downfall. An inability to reject the West, as the West becomes a larger and larger part of one’s life, renders the individual vulnerable. Not understanding how one’s own actions are interpreted, one faces a choice between a loyalty to one’s own culture at an unknown cost or meaningless imitation of Western forms at the cost of alienation from one’s own self. Unexpected consequences befall ordinary Hawaiian actions and experiences: lands are lost, paper and “title” supplant traditional duties and responsibilities. . . . An effective and real Hawaiian order centered on a Hawaiian cosmology chaotic to Westerners is now displaced by a Western order chaotic to Hawaiians. Westerners come to feel at home in Hawai‘i, while Hawaiians come to feel lost.

Central to the Western order is its centuries-old Eurocentric legal system. Hawaiians act as Hawaiians at their peril, since Hawaiian actions will have unintended meanings when evaluated in terms of the Western model. The “reasonable man,” in short, does not act like a Hawaiian. As the Western model becomes the consequential model one eventually cannot afford to act as a Hawaiian, since the Western (and only operational) legal system in Hawai‘i penalizes “unreasonable men.”

One may still sense that one is a Hawaiian and have Hawaiian thoughts and emotions, but since one’s intuitive actions will be evaluated incomprehensibly, action itself is discouraged. One is then chastised for laziness. That is, a rational strategy for avoiding danger and pilikia is perceived as indolence. When Westerners serving as Her Majesty’s Cabinet members (i.e., Hawaiian subjects engaging in treason) plotted to overthrow the monarchy, Hawaiians were instructed by Queen Liliuokalani not to resist; she urged them to have faith in the U.S. government. A responsible government would never ratify this violation of international law by its pied noirs. The subsequent submission of Hawaiian militants to the will of their ruler would ultimately appear to have been submission to the annexation of Hawai‘i by the United States, i.e., to the disappearance of Hawai‘i as a country off the face of the earth.51

Richardson had seen how Western judges had misconstrued the Hawaiian ahupua‘a system and the power of the konohiki. Westerners had observed the konohiki, or the lesser chief of the ahupua‘a, direct the tenants when to close and open gates, when to allow water to run, and when to stop it with barriers. Judicial decisions from the territorial period tied the power of the

konohiki of water to his or her ownership of the lands on which the waters arose.  

Such interpretations were self-serving, often inuring to the benefit of the Westerners. In traditional Hawaiian society, the konohiki did not own the waters but rather was an administrative agent representing the ali‘i (who was simply a kahu—a steward or trustee—of the waters).

Western concepts by which water could be owned and transferred far from its original source had disastrous consequences for Hawaiians. Windward waters were diverted to the hot leeward side of the island, never to be returned. Taro, which depended on the constant flow of water, suffered from the lack of water. Long irrigation systems diverted water to the leeward plains for sugar plantations and taro cultivation. That water could never be returned. The taro plants on the windward side rotted and died. The Hawaiian communities that were built around the cultivation of taro were forced to relocate.

There was no ownership of water in traditional Hawai‘i. Western interpretations of Hawaiian practices, however, became Western misinterpretations, and often those misinterpretations were deliberate. These early lessons in legal history would influence Chief Justice Richardson’s later jurisprudence.

In the most important of his decisions, the Chief Justice ruled that the surface waters of Hawai‘i were not private property owned by those who purchased certain parcels of land. He held that the surface waters of Hawai‘i were under a public trust and that the State as trustee held the waters for the people of Hawai‘i.

4. William S. Richardson: A Democrat

The Democratic Party was comprised mostly of Americans of Japanese ancestry, who were the political power behind the Party. William S. Richardson was essentially an honorary Nisei who understood well the plantation experience, the significance of the internment of thousands of Japanese Americans, and the challenges of World War II. He understood what was unfair and oppressive about territorial Hawai‘i.

Chief Justice Richardson shared the experience of discriminatory treatment during the territorial period. He was not one of the elite, landed Hawaiians who socialized with the Caucasian missionary families. As did

52 See Reppun, 65 Haw. at 547-48, 656 P.2d at 68-69.
55 Id.
Nisei and other immigrant groups, he lived and experienced the social and class biases of the territorial period.\(^5\) If the restoration of Hawaiian law was the first key tenet of the jurisprudence of Chief Justice Richardson, the second key tenet of his jurisprudence was disgust with the unfairness of territorial Hawai‘i.

This distaste with the colonialism of the Territory of Hawai‘i would lead Chief Justice Richardson to a key principle of his jurisprudence: territorial precedent was not really “Hawaiian” precedent for the purposes of the law. Hawai‘i, during the territorial period, had been captured by the federal government. Federal judges that ruled in Hawai‘i during the territorial period did not apply Hawai‘i law. Thus, he would write in his most important decision, Robinson v. Ariyoshi, that the common law established during the territorial period was not equal to the common law of Hawai‘i before and after this period.\(^6\)

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\(^{5}\) Hawai‘i State Senator Clayton Hee related an anecdote about the chief justice which demonstrates the importance of background experiences and upbringing:

Chief Justice Richardson often told the story of when, as a curious youngster, he found himself peering over the hedges from the shore at a grand party going on inside the Royal Hawaiian Hotel at Waikiki. He reminded us that a worker of the hotel instructed him, that he, Richardson, needed to watch the ongoing party from “in the water,” as the beach was “private property.” He said he never forgot the humiliation as a young Hawaiian being told that the beach was private property which he said gave rise to the ruling by the Hawai‘i Supreme Court regarding the rights of access of all people that the beach, up to (at the time) the high water mark belonged to the public.

\(^{6}\) See Robinson, 65 Haw. at 667-68 n.25, 658 P.2d at 306 n.25. This position was later criticized by Judge Pence in Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987):

In the quotation from Robinson II, supra, is to be found note 25. That note typifies the frantic search on the part of the Richardson Court to justify its sudden reversal of settled law. Because the rights of the konohiki as to surplus water were first decided during the Monarchy and the Republic, and after 1897 by judges and justices of the Territorial Supreme Court appointed by the President of the United States, therefore, said the Answers, all those opinions “were not the product of local judiciary,” therefore, “we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state . . . And it is from our authority as a state that our present common law springs.” Pure chauvinistic sophistry! The Richardson Court would hold for naught the Constitution of the State of Hawai[i].”

Id. at 1019 n.35 (emphasis in original).
III. THE JURISPRUDENCE OF CHIEF JUSTICE RICHARDSON: LAWMAKING AS A TRUST

A. Lawmaking as a Political Trust

While Chief Justice Richardson may have been the right person with the right tool at the right moment, these factors alone did not make him celebrated. These factors only meant that he and Hawai‘i were blessed with good fortune. The Chief Justice still had to forge his jurisprudence. What would be the principles that underlay his jurisprudence? The Chief Justice himself provides the best description:

Hawai‘i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained.

During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai‘i’s territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn’t a comfortable fit with Hawai‘i’s indigenous people and its immigrant population.

We set about returning control of interpreting the law to those with deep roots in and profound love for Hawaii. The result can be found in the decisions of our Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people and that water resources could not be privately owned.\(^\text{58}\)

The principle that underlay his jurisprudence was political and Hawaiian. It is best expressed in the state motto: “the life of the land\(^\text{59}\) is perpetuated in righteousness.”\(^\text{60}\) The exercise of governance must be “pono,” or righteous.\(^\text{61}\) Similarly, that philosophy guided lawmaking, for it

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\(^{60}\) *See* Haw. Const. art. XV, § 5; *see also* Ralph Kuykendall, *The Hawaiian Kingdom 1778-1854: Foundation and Transformation* 220 (1938) (describing the origins of the motto as arising from the restoration and return of the sovereignty of the Kingdom of Hawai‘i by the British upon the wrongful taking by Lord George Paulet).

was equally true that the life of the law is perpetuated in righteousness. For lawmaking to be just, it must be derived from a harmonious relationship between the government and the governed. The power to make law is a power held in trust for the people. If government is not representative of the people, then law is not righteous. Chief Justice Richardson would use this concept of righteousness and representative government to rewrite the property law of Hawai‘i.

In doing so, Chief Justice Richardson recognized that references to caselaw in Hawai‘i were misleading because the body of law represented separate political regimes. There are five political periods in Hawaiian history: (1) The Kingdom of Hawai‘i, 1840-1893, (2) the Provisional Government, which came to power by overthrow, 1893-1894, (3) the Republic of Hawai‘i, which was an extension of the Provisional Government and was a Republic in name only, 1894-1898, (4) the Territory of

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62 The Chief Justice believed that law must evolve. The law was alive. Law must change. The master rule is not stability, but change. Oliver Wendell Holmes also shared this opinion. He stated, “The life of the law has not been logic; it has been experience. . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” HOLMES, supra note 19, at 1; see also Chang, Missing the Boat, supra note 36, at 163 (“In the long run, the master rule of law is not stability, it is change.”).

63 See KAME‘ELEHIWA, supra note 59, at 30-31.

In practical terms, the maka‘āinana fed and clothed the Ali‘i Nui, who provided the organization required to produce enough food to sustain an ever-increasing population. Should a maka‘āinana fail to cultivate or mālama his portion of the ‘Āina that was grounds for dismissal. By the same token, should a konohiki fail in proper direction of the maka‘āinana, he too would be dismissed—for his own failure to mālama. The Ali‘i Nui were no better off in this respect, for if any famine affected the ‘Āina they would be ousted for failing to mālama their religious duties. Hence to Mālama ‘Āina was by extension to care for the maka‘āinana and the Ali‘i, for in the Hawaiian metaphor these three components are mystically one and the same.

Id.


65 Robinson, 65 Haw. at 667-68 n.25, 658 P.2d at 306 n.25.

66 See KUYKENDALL, supra note 60.


68 WILLIAM ADAM RUS, JR., THE HAWAIIAN REPUBLIC AND ITS STRUGGLE TO WIN ANNEXATION (1894-98), at 33 (1992) (“Native Hawaiians were, perhaps, not extremely
Hawai’i, which followed the annexation of Hawai’i by the United States, 1898-1959, and (5) statehood in 1959.

Certain periods were righteous—that is, representative. Others were not. Accordingly, the common law arising from the “dark” periods of Hawai’i, the periods in which government was not representative of the people, was not authentic, not valid, not “pono.”

The Chief Justice, in footnote 25 of the Hawai’i Supreme Court’s opinion in Robinson v. Ariyoshi, pointed to the territorial period as non-representative:

We recognize that [Hawai’i Revised Statutes] § 1-1, which was enacted during the monarchy in 1892 and amended only once, in 1903, might be construed to adopt territorial caselaw as among the “Hawaiian judicial precedent” representing the common law of the State. We do not at this time, however, address the question of whether those cases can truly be considered “Hawaiian” rather than federal precedent for we wish only to point out that the development of the law governing surplus water took place during a period when the resources of our land were subject to an authority which did not directly represent Hawai’i’s people and that the most recent pronouncements on the subject arise more immediately from the authority of those who will be forever affected by it.

The era of the Kingdom was a golden one. The rulers of that era were stewards of the land. The politics of the Kingdom, although a monarchy, were essentially Hawaiian with Western labels. There was a hierarchy of titles and positions from top to bottom. At the top was the island’s mō‘ī, the highest chief. At the bottom was a tenant who worked a taro lo‘i. In between these two ranks were high chiefs, lesser chiefs or konohiki, and maka‘āinana or tenants. Each was charged with the care and use of certain parcels of land. The chiefs received the largest parcels. Lesser chiefs received land divisions carved from the lands held by the high chiefs.
Tenants had lo‘i within the units of the konohiki. No one “owned” land or water—rather, there was a right of use with a concomitant duty or responsibility.73 Each individual in customary Hawaiian was a kahu or steward of the land. Thus, use of land and waters did not arise from ownership but arose from duty or responsibility, the concept of kuleana (responsibility) and mālama (caring). Each individual had a kuleana—the highest chiefs, the mō‘i, had the broadest kuleana—responsibility for the nation as a whole. One could not separate favors—or rights of use—from responsibility.74 Lawmaking did not stem from the autocratic power of the highest chiefs, it arose from the concept of caring for the land, mālama ‘āina, and caring for the people, mālama Lāhui.75

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

The rules that supposedly decreed private ownership of water were primarily set out by the Territorial Supreme Court of Hawai‘i. These rules were not faithful to the way Native Hawaiians managed water prior to the coming of the westerners . . . . Rather, the Native Hawaiians exercised water rights in a communal manner. The Konohiki was an agent of the King. He did not “own” the water, as later, post-annexation, Territorial precedents may have suggested . . . . Rather, the Konohiki oversaw the allocation, management and regulation of water among the taro farmers.76

To Chief Justice Richardson, the precedent and jurisprudence of the territorial period was not “Hawaiian”—not “pono.” The elite and powerful of the Territory, such as the sugar industry, captured the Hawai‘i Supreme Court and changed the property law of Hawai‘i, particularly the law of water rights. The Chief Justice saw his duty as returning the law to those with “deep roots” in and a “profound love” of Hawai‘i. Territorial precedent

73 See KAME‘ELEHIWA, supra note 59, at 51.
74 See generally Horner v. Kumuliili, 10 Haw. 174 (1895) (describing a system of water rights by which tenants were kahu (stewards) of the waters and lands).
75 See KAME‘ELEHIWA, supra note 59, at 150 (“One cannot malama the ‘Aina if one does not mālama the maka‘āinana who work the ‘Aina.”).
76 Chang, Missing the Boat, supra note 36, at 164 (noting that the societal background to the rules regarding water rights in Hawai‘i had completely changed by the time of the McBryde decision).
could be set aside. As Chief Justice Richardson wrote in *Reppun v. Board of Water Supply*:

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

Hawai'i Revised Statutes section 1-1 was the statutory tool by which the Hawai'i Supreme Court could resurrect the past. It was designed, as of 1892, to incorporate the common law of England and the United States as the law of the Kingdom of Hawai'i. It had important exceptions: common law was displaced if there was conflicting Hawaiian precedent, custom, or usage. The original section 1-1, the Judiciary Act of 1892, was reenacted by the Territory and by the State. Today, it reads as follows:

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

For the Chief Justice, section 1-1, or the principle of "looking back" to the laws and values of the Kingdom, was present in all of his critical property decisions: *Palama v. Sheehan, In re Ashford, County of Hawaii v.*

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78 For Chief Justice Richardson, Hawai'i Revised Statutes section 1-1 was the most important of Hawai'i's laws. On many occasions he would emphasize to his law clerks the central importance of section 1-1. For example, Justice Robert Klein recalled, as a law clerk for Chief Justice Richardson, being taught and reminded by the Chief Justice of section 1-1. It was the vehicle that connected jurisprudence of the State of Hawai'i with the laws, values and customs of the Kingdom of Hawai'i. Justice Klein would use section 1-1 in the landmark PASH decision by which he, for the court, incorporated section 7-1, as applicable to modern property rights. See Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n, 79 Haw. 425, 437, 903 P.2d 1246, 1258 (1995) (citing HAw. REv. STAT. § 1-1 (Supp. 1992)).
79 HAw. REv. STAT. § 1-1 (2009).
80 50 Haw. 298, 440 P.2d 95 (1968).
Chief Justice Richardson also used section 1-1 to correct the law—disregarding decisions that arose from the "dark ages." Thus, in footnote 25 of Robinson v. Ariyoshi, he distinguishes the territorial period as a regime in which the people of Hawai‘i were essentially non-self-governing.

The use of both section 1-1 and footnote 25 became extremely controversial. Some critics sarcastically commented that footnote 25 meant that the volumes of the Hawai‘i Reports containing cases dating from 1898 to 1959 should be thrown away. Judge Pence, for example, sharply denounced the logic of footnote 25 as "frantic" and "[p]ure chauvinistic sophistry[.]

The jurisprudence by which the Chief Justice looked past territorial precedent to resurrect the values and principles of the Kingdom would be sternly challenged. Ultimately, though, that jurisprudence would succeed. First, it would restore to Hawaiians a sense of sovereignty. Second, it would unify both Hawaiians and the immigrant communities that had come to work the plantations. Third, it would be a jurisprudence appropriate for an island-based society. Fourth, and perhaps most importantly, that jurisprudence would withstand constitutional attack.

B. The Jurisprudence of Restoration

The jurisprudence of Chief Justice Richardson was restorative in two different senses. First, it took values and principles of the kings and queens of Hawai‘i and restored them to present law. Second, it restored to Hawaiians one attribute of sovereignty—the ability to live under one's own laws.

The power to make laws and live under those laws is an essential element of sovereignty. Imagine if Hawai‘i had survived as an independent nation. In such a case, the property decisions of the Hawai‘i Supreme Court would

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84 65 Haw. 531, 656 P.2d 571 (1982).
85 66 Haw. 1, 656 P.2d 745 (1982).
87 See id. at 667-68 n.25, 658 P.2d at 306 n.25.
88 Robinson v. Ariyoshi, 676 F. Supp. 1002, 1019 n.35 (D. Haw. 1987); see also supra note 57.
89 See Robinson, 65 Haw. at 667, 658 P.2d at 306 (restoring the concept of publici juris (the public trust) for surface waters).
likely resemble the property jurisprudence of Chief Justice Richardson. In other words, his property jurisprudence was the jurisprudence of Hawai‘i had it remained sovereign and independent.

C. The Jurisprudence of Unification

The jurisprudence of the Chief Justice ultimately succeeded because it was non-discriminatory. It was unifying. It treated all communities equally. The restoration of Hawaiian values, customs, and usage was not for Hawaiians only. Hawaiian principles established rights for all who reside in contemporary Hawai‘i.

Chief Justice Richardson widened the beaches because that is what the kings and queens during the monarchy would have done. Chief Justice Richardson imposed a public trust applicable to all waters in the state because that is what the kings and queens of Hawai‘i would have done. He made that public trust applicable to all because that is what the kings and queens under the monarchy would have done. If Hawai‘i had remained independent and sovereign, there would be no distinction between the rights of Native Hawaiians and others. Much as if Hawai‘i had remained independent, the jurisprudence of Chief Justice Richardson is a “Hawaiian,” not a “Native Hawaiian,” jurisprudence. The principle of non-discrimination was applied to the whole of the common law, including torts, property, and contracts.

Nonetheless, the Chief Justice did support statutory and constitutional provisions that gave Native Hawaiians special rights. Constitutional and statutory provisions according Native Hawaiians specific rights were appropriately “pono,” particularly when such rights were reflective of the political will of the people of Hawai‘i or the United States. Thus, in decisions such as Ahuna v. Department of Hawaiian Home Lands, he

90 See cases cited supra note 4.
92 See id.
94 See cases cited supra note 4.
96 See Ahuna v. Dep’t of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982) (establishing a fiduciary duty on the State as to a federal program, created by statute, to provide homestead lands to native Hawaiians).
vigorously protected the rights of Native Hawaiians as enjoyed under federal law.\footnote{Id.}

**D. Toward an Island-Based Jurisprudence**

The jurisprudence of Chief Justice Richardson also incorporated principles particularly appropriate for life in an island environment. Hawaiians had lived in the Hawaiian islands for thousands of years. Hawaiian concepts of the ‘āina reflected communal values particularly suited to island life. During the territorial period, the imposition of Western market-based property rules undermined communal practices.

Hawaiians understood how life on islands was different from life on continents. Market-driven economies do not work well on islands. Accumulation, the hoarding of goods by which the wealthy can deprive others of access to resources, does not promote societal well-being on islands. Rather, the ahupua‘a system, by which stewardship and sustainability of resources is emphasized, was the political norm for traditional Hawai‘i.

The importance of communal property rights and public ownership of resources is expressed in a number of Chief Justice Richardson’s property decisions. In the shoreline cases, he expanded the public area of beaches because in crowded island communities, access to ocean resources is critical for sustenance, recreation, and public access.\footnote{See cases cited supra note 4. In the shoreline cases, Chief Justice Richardson expanded the beaches so that the demarcation between public and private dominion was the higher of the vegetation line or the debris line. Usually, the vegetation line is much higher on the beach. It is where permanent vegetation begins to grow.} Thus, his decisions expanding public use of beaches make absolute sense for an island community\footnote{See Dodd, supra note 20, at 72. As the controversy continued, especially after the land and water decisions, Bill Richardson would say, with a smile, in private conversations: “If I had my way, the public would have even greater access to water and shoreline property. Hawaiian kings, I’m sure, intended to give their subjects more public seashore lands than we now allot. No one but a fool would leave his canoe at the vegetation line and let the waves wash it out to sea! The kings really must have intended to extend public property to that area on the beach where canoes could be left without danger of being washed away.} because that was where early Hawaiians parked their canoes in olden days so canoes would not wash out to sea. As Chief Justice Richardson acknowledged: “You couldn’t leave your canoe on the beach...
and have it [drift] out to sea at night. You must bring it far enough up. And as far up as you needed to bring it, must have been public domain."\textsuperscript{100}

Moreover, the water rights opinions reflected the heightened importance of fresh water resources in island societies. The privatization of surface water rights, which occurred during the territorial period, meant that the public was effectively excluded from decisions regarding the allocation of water. The decisions of the Hawai‘i Supreme Court during the territorial period allocated all power to private owners, namely the large sugar companies. A market system, as had been established during the territorial period, affirmed the rights of sugar companies and those with money. Water is too critical a resource to be left to market forces where one can only hope that the laws of supply and demand will result in policy that serves the whole community.

Hawai‘i and its self-renewing water supply system can be analogized to a spaceship traveling on a journey that will take many generations. There are a limited supply of goods on board and a finite quantity of renewable resources such as food and water. Which system of allocation would work best: a system where resources are collectively pooled and distributed according to need? Or a system based on private ownership? Private ownership permits those who started with the resources or money to hoard resources to the deprivation of others.\textsuperscript{101}

Islands are different from continents. The property law appropriate for a continent is not compatible with small islands. The paradigm for property rights on an island, with scarce lands, must be different from the paradigm of property for England where estates are the norm. The legal paradigm for Western property law is "Blackacre." The Blackacre of contemporary Hawai‘i is far different from that of common-law England:

The property law one would expect to find on a spaceship would be different from that of seventeenth-century England. In Hawaii, one cannot expect the property law of old England to make sense today. Nineteenth-century English law focused on the paradigm of "Black- acre," a 25-acre (10-ha) estate with running streams, gardens, and a 20-room mansion. With Blackacre as a model, property law developed in a certain way. On the other hand, the paradigm of Blackacre for Hawaii is likely to be a two-bedroom condominium in a 20-story building with 1000 residents on 3.5 acres (1.4 ha).\textsuperscript{102}

Islands must be self-sustaining. Hawai‘i, as an island state, cannot rely on neighboring states; if Hawai‘i residents do not have enough water, food,

\textsuperscript{100} Richardson Interview, supra note 27.
\textsuperscript{101} See Chang, Missing the Boat, supra note 36, at 167.
\textsuperscript{102} Williamson B.C. Chang, Water Rights in the Age of Anxiety, J. AM. WATER WORKS ASS'N, Mar. 1978, at 40-43.
recreational space, and jobs, they cannot find substitutes in neighboring, contiguous states. Hawai‘i’s electric grid cannot rely on a regional multi-state system that would protect it from a blackout. Hawai‘i, in short, is like a spaceship, and resource rules on a spaceship must be far different than those on a bountiful planet.

Hawaiians knew how to live on islands. They knew enough to eschew market-driven economies for economic systems based on gifting. Hawaiians knew the importance of stewardship and applied principles such as mālama ‘āina (caring for the land) and kuleana (responsibility) to resource management. The incorporation of communal Hawaiian resource principles has succeeded today because it is the appropriate way of living on an island.

IV. CONFISCATION OR CORRECTION: THE CONSTITUTIONALITY OF CHIEF JUSTICE RICHARDSON’S JURISPRUDENCE

The jurisprudence of Chief Justice Richardson has its place in history today because it survived constitutional attack. So long as a cloud hung over those decisions, there could be no acceptance, no celebration, no legacy. When the court first rendered these key decisions, there was a storm of controversy. Critics did not see them as restorative, unifying, and island-based, but condemned them as confiscatory. The losing parties in these cases, including McBryde v. Robinson, County of Hawaii v. Sotomura, and State ex rel. Kobayashi v. Zimring, would all sue in federal court seeking enforcement of vested rights that were based on territorial common law. This part provides a history of the constitutional litigation in the most important of those cases, McBryde v. Robinson.

104 See generally KAME‘ELEBIWA, supra note 59.
105 Typical of such opinion was the opinion of A.A. Smyser, long the editor of the Honolulu Star-Bulletin. Smyser objected to the jurisprudence of Chief Justice Richardson. To him, it was destabilizing. Only when the constitutional controversy was over did Smyser grudgingly accept the decision in Robinson v. Ariyoshi.
107 McBryde v. Robinson was challenged in federal court as Robinson v. Ariyoshi. See cases cited supra note 9.
1. McBryde v. Robinson: The original action

*McBryde v. Robinson* was a quiet title action by which two sugar companies sought to settle ownership of the surface water rights of the Hanapēpē River on Kauaʻi. Both sugar companies claimed ownership of the bulk of the surface waters of the rivers. Under prior law, the Territorial Supreme Court had ruled that the ownership of waters was vested in the ownership of lands on which such surface waters originated. Surface waters were private property and could be used as the owner of such waters pleased. The trial court in *McBryde* divided the waters between the competing claimants, and all was quiet until the Hawaiʻi Supreme Court ruled on appeal.

On appeal, Justice Abe, writing for the court, overturned the law establishing private ownership of surface waters and held that the waters were owned by the State of Hawaiʻi. The sugar companies were shocked as the decision divested both parties of all ownership rights. None of the parties, even the State, had urged such a result. All parties sought rehearing before the Hawaiʻi Supreme Court.

The sugar companies alleged that Justice Abe's decision resulted in a taking of their property without just compensation because prior to the decision they had water rights, and after the decision they had none. Surely, they argued, this was as much of a taking as if the State had actually condemned their rights, which would require the State to pay just

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110 *McBryde v. Robinson*, a 1973 decision adjudicating water rights on the island of Kauaʻi, was actually written by Justice Kazuhisa Abe. Nonetheless, the *McBryde* decision is today so closely associated with Chief Justice Richardson that it is treated here as part of his body of work. Although he did not author the decision, Chief Justice Richardson clearly concurred in the result and the reasoning of Justice Abe. When the decision was collaterally attacked in federal district court, the Chief Justice, under his authority as Chief Administrator of the Hawaiʻi Judiciary, actively became involved in defending the decision.

Most important, when the Ninth Circuit directed certified questions to the Hawaiʻi Supreme Court to answer, the response was written by Chief Justice Richardson. Those answers, reported in *Robinson v. Ariyoshi*, constitute the most important decision of the Chief Justice's body of work. Thus, *McBryde v. Robinson*, which the chief justice did not author, and *Robinson v. Ariyoshi*, which he did, are both treated as part of the core of his jurisprudence.

111 54 Haw. 174, 504 P.2d 1330 (Abe, J.), aff'ed on reh'g, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

112 See Chang, *Unraveling*, supra note 21, at 61 (footnotes omitted) ("McBryde is the Hawaii Supreme Court decision culminating some twenty years of litigation regarding the extent to which various parties have rights to the water in the Hanapepe River. The parties involved were the State of Hawaii and the various landowners whose property adjoined the river and streams.").

113 See cases cited supra note 26.
compensation. The sugar companies also alleged a violation of procedural due process and claimed that their property had been taken without a proper hearing.

The Hawai'i Supreme Court granted a rehearing but limited the issues: the takings and procedural due process claims could not be argued. The only issue that would be reheard would be as to whether Hawai'i Revised Statutes section 7-1, a law from the Kingdom of Hawai'i, had been applied correctly. The Hawai'i Supreme Court reaffirmed the decision of Justice Abe.

Significantly, however, Justice Levinson joined Justice Marumoto in dissent. Levinson wrote a lengthy dissent, arguing passionately that the sugar companies had vested water rights. Levinson was the first to articulate the theory that the Hawai'i Supreme Court, by its very decision, had taken the property of the sugar companies without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. The losing parties sought review in the United States

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114 McBryde, 55 Haw. at 261, 517 P.2d at 27.
115 HAW. REV. STAT. § 7-1 (2009).
116 McBryde, 55 Haw. at 261, 517 P.2d at 27.
118 Thereafter on the almost farcical "rehearing", although the due process issues were urged by the plaintiffs, the court refused to permit argument thereon or consider the same. Rather, the court extended a clearly pro forma invitation to the plaintiffs "to prove to us why we were wrong" on issues and conclusions assumed sua sponte by the court. On this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the state on a silver platter without even a request by the State for the gift.
119 Id.
118 McBryde, 55 Haw. at 262-304, 517 P.2d at 27-51 (Levinson, J., dissenting).
119 Justice Levinson quoted Justice Stewart's concurring opinion in Hughes v. Washington:

"For 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. Id. at 302, 517 P.2d at 50 (quoting Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring))."
Supreme Court, making the same arguments. The United States Supreme Court refused to hear the appeal.

In an innovative move, the two sugar companies joined forces and together, as plaintiffs, sued the State of Hawai‘i in federal district court, alleging that the State, through the Hawai‘i Supreme Court, had taken their property without just compensation. In 1977, Judge Martin Pence ruled in favor of the sugar companies, enjoining the enforcement of the Hawai‘i Supreme Court decision. Judge Pence was extremely harsh in his criticism of the Hawai‘i Supreme Court. Pence said the ruling was “strictly a ‘public-policy’ decision with no prior underlying ‘legal’ justification” and called it “one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject.” Judge Pence’s ruling enjoined state officials from acting to enforce the McBryde decision and essentially “reversed” the Hawai‘i Supreme Court.

Chief Justice Richardson understood the implications. Although the named defendants were the Governor of the State of Hawai‘i and the members of the Board of Land and Natural Resources, the real defendant was the Hawai‘i Supreme Court. Here, contemplated Chief Justice Richardson, a federal district court, the lowest court in the federal system, had reversed a state supreme court, the highest court of the state system. If a federal district court could set aside a judgment of the Hawai‘i Supreme Court whenever the Hawai‘i Supreme Court overturned prior law, then federal trial courts would be, in fact, the highest court of the state system. Richardson firmly believed that the Hawai‘i Supreme Court had acted constitutionally. A state supreme court has the power and right to correct

121 Id.
124 Id. at 583 (“McBryde I therefore came as a shocking, violent deviation from the solidly established case law, totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions.”).
125 Id. at 566; see also id. at 583 (“It may be that the court did not conceive its action as a taking—it said the plaintiffs never had had any such water rights, ergo, no taking! Just that simple! The Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result.”).
126 Id. at 568; see also Chang, Reversals of Fortune, supra note 71, at 28-29 n.31.
127 Richardson Interview, supra note 27 (“And I felt that the highest court of a state should be higher than the lowest court in the federal system.”).
the law of its state. The Hawai‘i Supreme Court was sovereign over state law.

The whole of the property jurisprudence of the Chief Justice hung in the balance. Each of his landmark cases—Sheehan, Ashford, Sotomura, Sanborn, Zimring, Reppun, and Kalipi—all overruled intervening law in some fashion. Each could similarly be collaterally attacked as a taking of property. If the federal district courts could enjoin the enforcement of these decisions, then the Chief Justice’s judicial transformation of the property law of Hawai‘i would be stopped in its tracks. Moreover, the independence and sovereignty of the Hawai‘i Judiciary would be subservient to the federal district courts.

The named state defendants, including the Governor, appealed Judge Pence’s ruling to the Ninth Circuit Court of Appeals. Chief Justice Richardson, however, believed that the Hawai‘i Supreme Court and the Hawai‘i Judiciary had an interest separate from the individuals named as state defendants. As such, Chief Justice Richardson himself sought to be heard in the appeal before the Ninth Circuit. Thus, as Chief Administrator of the Hawai‘i Judiciary, Chief Justice Richardson retained the author of this article as a Special Deputy Attorney General to represent the Hawai‘i State Judiciary in federal court.128

Chief Justice Richardson’s fears were correct: the federal district court’s injunction in Robinson v. Ariyoshi led others to attack state supreme court judgments that allegedly took property when overturning prior law. The Sotomuras, for example, who had lost beachfront land when the Hawai‘i Supreme Court reduced their beach frontage, sued in federal district court.129 The Zimring case also sued after they lost land they claimed by volcanic accretion.130 This was a precarious moment for the Hawai‘i Supreme Court. Its independence, sovereignty, and ability to elevate Hawaiian principles above Western property concepts, were all on trial.

This author and others represented the State in all three actions. The State defendants and Chief Justice Richardson argued that the federal district courts lacked jurisdiction to enjoin the property decisions of the Hawai‘i Supreme Court. If federal district courts could enjoin state supreme courts,

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128 The Chief Justice thought it critical that he retain his own counsel because the attack on McBryde was sure to lead to other attacks on his jurisprudence. He was correct. See supra notes 106-109 and accompanying text.
129 See supra note 108.
130 See supra note 109. The attacks on McBryde, Sotomura, and Zimring all raised the same issue: did the Hawai‘i Supreme Court, in implementing the jurisprudence of the Kingdom over that of the Territory, “take” the property of the plaintiffs in violation of the United States Constitution? The author was also retained as counsel in the Sotomura and Zimring federal cases.
then state supreme courts were no longer sovereign as to matters of property law. This author argued that if losing parties were allowed to re-file an original action and sue on the basis of a judicial taking, there would be no finality in the legal system.

This author also asserted that there was no such cause of action as a judicial taking; courts do not take property when they declare winners and losers. A state supreme court, when rendering a decision, does not take from one party and give to another; it adjudicates the rights of parties. If a court is deemed to have taken property every time it rules on a case, then every ruling is a judicial taking because there is a losing party in every case.

Nonetheless, the sugar companies, the parties that had allegedly lost vested rights, had a simple yet powerful argument: before McBryde, they had water rights, and after McBryde, they had no water rights—ipso facto, the Hawai‘i Supreme Court had taken the water rights of the sugar companies. The economic ramifications of such a decision were huge because all sugar companies in the state relied on private ownership of surface waters for irrigation. The two sugar companies, now joined by other sugar companies from around the state, launched extraordinary efforts into the fight that reflected the large stakes involved. For example, the sugar companies retained the former dean of Harvard Law School, Solicitor General Erwin Griswold, as co-counsel. They brought disciplinary charges alleging that this author had violated the canons of ethics for publishing law review articles on related issues. Attorneys for the sugar industry even sought to stifle this author’s publications and succeeded in blocking the publication of one article in the Hawaii Bar Journal.

The case was destined for the United States Supreme Court. As counsel for Chief Justice Richardson and the Hawai‘i State Judiciary, this author feared the result there. The sugar companies had, in practical terms, a very strong case. Their arguments were visceral while the judiciary’s defenses were academic and theoretical.

It was clear that this author could not afford to risk winning or losing before the Ninth Circuit and the United States Supreme Court on the theoretical grounds that courts simply could not “take” property. There was a strong chance that the United States Supreme Court would follow the

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132 See Chang, Reversals of Fortune, supra note 71, at 48-49 n.69.
133 See id.
134 The United States Supreme Court had looked at the issue from various viewpoints and had never ruled on whether courts can take property. See Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Dunbar v. City of New York, 251 U.S. 516 (1920); Patterson v. Colorado, 205 U.S. 454 (1907); Cent. Land Co. v. Laidley, 159 U.S. 103 (1895).
concurring opinion of Justice Stewart in *Hughes v. Washington*: "For 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."\(^{135}\)

But this was a case of first impression and the Supreme Court would probably want to avoid the takings question. In all its history, the United States Supreme Court had never ruled that a state supreme court, in overturning or overruling prior law, had "taken" property in violation of the Constitution.

For, if a state supreme court that overturned prior law could be charged with taking property, the same could be said of the United States Supreme Court when it overturned prior precedent. Yet, how could the United States Supreme Court, in rendering a decision, be guilty of taking property? The Supreme Court would likely do everything possible to avoid the substantive issue—avoid having to rule on the question of whether courts could take property when overruling prior law. Thus, the Ninth Circuit and the United States Supreme Court needed some other way out—some other issue by which to rule in favor of the Hawai‘i Supreme Court. In short, this author sought a basis by which to win without exposing the Hawai‘i Supreme Court and the jurisprudence of Richardson to an all-or-nothing result.

The answer lay in the Chief Justice's own jurisprudence and his own view that Western concepts of ownership had misinterpreted the trust principle by which Hawai‘i’s kings and queens held the waters of Hawai‘i. The whole claim that the Hawai‘i Supreme Court had taken the property of the sugar companies rested on a single assumption: that water could be owned in a corporeal sense. Yet, this was not the Hawaiian view of water. Under the Hawaiian view, no one could "own" water. Thus, no one could "take" water. When Justice Abe in *McBryde v. Robinson* awarded the State "ownership" of the surface waters of the stream, all parties had interpreted the term "ownership" in its Western sense, in the sense used by the Territorial Supreme Court.\(^{136}\) However, Justice Abe did not mean ownership in a corporeal sense. Justice Abe carefully intimated that water under English common law could not be owned; rather, it was held as publici juris—a public trust.\(^{137}\)


\(^{136}\) *See* Chang, *Unraveling*, *supra* note 21, at 86-87.

\(^{137}\) *See* McBryde Sugar Co. v. Robinson, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973) ("It appears that this Act was very similar to the English common law rules which had evolved by that time that no one may acquire property to running water in a natural water course; that flowing water was publici juris; and that it was common property to be used by all who had a right of access to it, as usufruct of the water course.").
Moreover, Chief Justice Richardson believed, as did the Hawaiians during the time of the Kingdom, that "ownership" was how Westerners mischaracterized the king’s relationship with the lands and waters of Hawai’i.\(^3\) The king was not the owner of the waters of Hawai’i—he was its trustee. Ownership was not righteous. Trusteeship was righteous. Trusteeship recognized both the beneficiaries’ interest in the waters and the fiduciary duty of the trustee to the beneficiaries.\(^3\)

Thus, this author raised in oral argument before the Ninth Circuit the possibility that there was a misunderstanding in the use of the term “ownership.” The sugar companies used “ownership” to mean ownership and possession of the water in a real, corporeal sense. Suppose, this author asked, the Hawai’i Supreme Court did not use “ownership” in that sense but rather used the term “ownership” as it was used in all jurisdictions outside of Hawai’i—as publici juris. Suppose the Hawai’i Supreme Court meant to merely give the State a public trust over the surface waters. If the latter were true, then there was no taking of property. The assertion of the public trust was akin to an assertion of a police power over the waters. The State always had a police power over its resources; thus, a decision establishing state police power over the surface waters of Hawai’i did not give the State something it did not already have, and no taking had occurred.

This author argued that if there was ambiguity about state law, then the Ninth Circuit should certify questions to the Hawai’i Supreme Court for clarification.\(^1\) The sugar companies were of course reluctant to return to the very court they were suing; nevertheless, the Ninth Circuit ordered certification. Once back in the Hawai’i Supreme Court, the sugar

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\(^{138}\) See Reppun v. Bd. of Water Supply, 65 Haw. 531, 545, 548, 656 P.2d 57, 67, 69 (1982) (citations omitted) (“In McBryde . . . our decision there was premised on the firm conviction that prior courts had largely ignored the mandates of the rulers of the Kingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable western society . . . . We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. McBryde was a necessary and proper step in the rectification of basic misconceptions concerning water ‘rights’ in Hawaii.”).

\(^{139}\) Chief Justice Richardson was to make clear that the use of the term “ownership” was not meant to refer to ownership in a corporeal sense. This was clearly stated in Robinson v. Ariyoshi, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982) (“This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of such authority to assure the continued existence and beneficial application of the resource for the common good.”).

\(^{140}\) See HAW. R. APP. P. 13(a) (“When a federal district or appellate court certifies to the Hawai’i Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawai’i that is determinative of the cause and that there is no clear, controlling precedent in the Hawai’i judicial decisions, the Hawai’i Supreme Court may answer the certified question by written opinion.”).
companies moved to recuse Chief Justice Richardson. The Hawai‘i Supreme Court denied that motion.

The question of “ownership” was certified, as one of six questions, to the Hawai‘i Supreme Court. After lengthy briefing and hearings on the questions, Chief Justice Richardson’s answer was clear: corporeal ownership of water was never a Hawaiian concept. Thus, “state ownership” as was awarded to the State by the McBryde decision merely meant that the State had a public trust, not ownership in a corporeal sense. Chief Justice Richardson’s opinion on the certified questions would be the finest of his legacy. It also provided the basis by which to win before the United States Supreme Court.

If the Hawai‘i Supreme Court had merely awarded the State a public trust over the waters and not corporeal ownership, there was no “taking,” for nothing had been given to the State of Hawai‘i. If nothing had been (judicially) taken, and no action had been taken to enforce the McBryde

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

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


144 Id. at 667, 658 P.2d at 306.

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

Id. at 667-68, 658 P.2d at 306 (footnote omitted).

145 See Chang, Unraveling, supra note 21, at 86-87.
decision, then the complaint filed in the federal district court had been premature. The federal case was not ripe—not ready to be heard. The Supreme Court of the United States now had a basis by which to rule and avoid the difficult constitutional question of whether or not the Hawai'i Supreme Court had taken the plaintiffs’ property. A ruling based on ripeness would not, in a technical sense, forever foreclose plaintiffs’ from seeking relief. The sugar companies could file suit when property had “really” been taken, namely at some future time when the State stopped the sugar companies from withdrawing water.

The intuition that the United States Supreme Court did not want to rule on the constitutional issue of a judicial taking proved accurate. The United States Supreme Court granted certiorari but vacated the injunction against the Hawai'i Supreme Court, remanding to the Ninth Circuit on the basis of a lack of ripeness. A win was a win. If the federal injunction was set aside on any ground, the jurisprudence of Chief Justice Richardson would remain intact. It was much better to win on ripeness grounds than to risk everything on the chance that the United States Supreme Court would hold that federal courts were absolutely free to overrule earlier state court decisions.

The Ninth Circuit remanded to Judge Pence. However, Judge Pence refused to follow the Supreme Court’s suggestion that the case was not ripe. Sticking to his guns, Judge Pence argued that the Solicitor General had little knowledge of Hawai‘i. Pence even asserted that the Supreme Court

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146 Id. at 87.
147 The Supreme Court had never definitively ruled on the issue of whether state courts could take property. See id. at 68-71 (discussing Edward A. Stimson, Retroactive Application of Law—A Problem in Constitutional Law, 38 MICH. L. REV. 30 (1939); Muhlker v. N.Y. & Harlem R.R. Co., 197 U.S. 544 (1905)).
149 Thus, in 1986 the United States Supreme Court remanded the case to the Ninth Circuit to examine whether Judge Pence had acted prematurely—whether the case was ripe. The Supreme Court completely avoided the takings claim. The case was not ripe, for no action had been taken on the original 1973 Abe decision. No waters had yet been seized.
150 Robinson v. Ariyoshi, 676 F. Supp. 1002, 1004 (D. Haw. 1987). A review of the record and briefs filed with the Supreme Court shows that less than one month from the time The Court received the Solicitor General’s brief, and only 14 days before the end of its 1985 term, it issued the above remand. . . . Since, as indicated, this judge has concluded that it was the brief of the Solicitor General and his uncritical assumption of “unripeness” of this case which triggered The Court’s granting certiorari and remand, therefore, this judge in this decision will primarily address the position taken by the Solicitor General in his Amicus Brief.
had acted hastily—being too busy in June to give the case its full attention. Judge Pence reaffirmed his earlier opinion, holding that a taking had occurred regardless of Chief Justice Richardson’s answers to the certified questions in *Robinson v. Ariyoshi*. In doing so, Judge Pence vehemently denounced the Richardson Court:

The Richardson Court’s discussion of the takings issue sharply illustrates the obfuscation and evasiveness of the Answers of that Court.

One can only conclude that the above statements were deliberately and grossly misleading (and, if presented in the federal courts, would mandate F. R. Civ. P. Rule 11 sanctions). It was only in this federal court that the plaintiffs had a full and uncircumscribed opportunity to raise the constitutional questions.

When one reviews the 30-printed-page response of the Richardson Court to the six questions, it becomes manifest that it was endeavoring, by misdirection, misinformation, misapplication, and misconstruction of facts and law to save its *McBryde* decisions and avoid the constitutional consequences of its unprecedented radical and violent change in the law on waters in the State of Hawaii. Cutting like a strand of barbed wire in the fabric of the Richardson Court’s artfully manufactured Answers is that Court’s adamant refusal to modify any rule set forth in *McBryde*.

*Reppun* clearly and finally implemented *McBryde*’s destruction of the value of the water rights owned by several of the small owners, as well as G & R and *McBryde*, who had purchased the same from owners of such appurtenant rights, when it held that “the riparian water rights . . . cannot be severed from the land in any fashion.”

As repeatedly and vehemently expressed above, after the court of appeals had received the verbose and evasive Answers, it was clear to that court that

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151 Id.

152 Id.

This judge draws the conclusion that The Court, “caught in the end of the term crunch,” and, having a high regard for all briefs filed by the Solicitor General of the United States, simply followed the Solicitor General’s recommendation that the “petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank*,” opting not to decide the case at that time, and thus postponing, indefinitely, the time-consuming effort involved in the ultimate disposition of the case.

153 Id. at 1017-18.

154 Id. at 1018.

155 Id. at 1019.

156 Id. at 1020.
*McBryde I* and *II* constituted a final judgment, taking away property of the plaintiffs in violation of their constitutional rights.\(^{156}\)

Judge Pence did not stop with that opinion. In parallel proceedings he awarded four million dollars in attorneys’ fees to the sugar companies.\(^{157}\)

Predictably, the Ninth Circuit, based on the instructions of the United States Supreme Court, reversed Judge Pence and directed him to dismiss the complaint based on a lack of ripeness.\(^{158}\) The Ninth Circuit also reversed Judge Pence’s ruling on attorneys’ fees.\(^{159}\)

At long last, the jurisprudence of Chief Justice Richardson was safe. It had survived constitutional attack. As a personal matter, Richardson, as chief justice, could not, and never did, publicly speak about the controversy.\(^{160}\) He preferred to let counsel speak for him in public. Even ten years after leaving the bench, in 1992, he refused to criticize Judge Pence, noting only that Judge Pence had come down “pretty hard” on Justice Abe.\(^{161}\)

The jurisprudence of Chief Justice Richardson, attacked on a broad front,\(^{162}\) would ultimately prevail. Today, some twenty years hence, the

\(^{156}\) *Id.*


\(^{160}\) DODD, *supra* note 20, at 61. Dodd described the Chief Justice thus:

> Throughout reactive developments stemming from the Supreme Court’s reversal of the 1959 decision of the Kauai court, Richardson remained quietly confident. He refused to disqualify himself from the case. He was certain that his Court’s McBryde decision was justified. In private conversations with his friends, Richardson expressed feelings of hurt and disappointment at Pence’s injunction and statements to the press. It seemed to the Chief Justice that Pence’s written and spoken language was injudicious and inappropriate, aimed personally at Richardson himself rather than at the issues in the case.

*Id.*

\(^{161}\) Richardson Interview, *supra* note 27 (“Well, I thought he wrote some opinions that used language that he should not have used. And I answered one of them just before I left and that was one on the water rights case. And he was pretty tough on Justice Kazuhisa Abe, and should not have been.”).

\(^{162}\) The first of the shoreline boundary cases, *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), also raised a firestorm of controversy. Justice Marumoto wrote a particularly pointed dissent to Chief Justice Richardson’s opinion. See *id.* at 318-46, 440 P.2d at 78-95 (Marumoto, J., dissenting). Among the bar there were powerful leaders who criticized the *Ashford* decision. J. Russell Cades, a partner in one of the most prominent of Hawai‘i’s law firms, wrote:

> Again the floodgates of uncertainty have been let open and established precedent is, in effect, overturned. What was believed to be the law of Hawaii virtually since the
jurisprudence of Chief Justice Richardson is alive and thriving. Most important, the “golden age” still lives. In Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission, the Hawai‘i Supreme Court resurrected section 7-1 and the 1850 statute awarding the people various gathering and access rights.  

McBryde, Sotomura, and Zimring were not radical departures from state law. They were, if anything, the preference of Kingdom law over Territory law. Territorial law was colonial law—an aberration.

The decisions rendered by Chief Justice Richardson were choice of law decisions. Chief Justice Richardson, in overturning territorial precedent, faced a conflict of laws situation. The Supreme Court of the State of Hawai‘i faced issues of shoreline boundaries, water rights, and volcanic accretion, and in deciding those cases it had to choose from among competing “jurisdictions”—whether to apply the law of the Kingdom of Hawai‘i, the Provisional Government of Hawai‘i, the Republic of Hawai‘i, or the Territory of Hawai‘i.

The court was not making up law. The court was not reaching results which no court had ever reached. The court was choosing law, not making law. In addition, in this sense, as a conflict of laws problem, the appropriate measure of the constitutionality of that choice should be the limitations the United States Supreme Court has imposed on state supreme courts.

In a number of cases, the United States Supreme Court has sought to define the limits by which state supreme courts may choose to apply the law of one jurisdiction over another. There is only one case in which the Supreme Court has held that it is a violation of substantive due process for a court to apply the law of a foreign jurisdiction—and that is where there were no connections or contacts whatsoever between the law to be applied and the


organized government of Hawaii has been established has been cast into darkness. Every private title bordering on the sea, whether registered or unregistered, is affected by this decision, and the titleholders, at least thus far, have had no opportunity to be heard before any deliberative body.

Cades, supra note 9, at 65.


facts of the case. Here, there is clearly a political connection between the common law of statehood and that of the Kingdom. Section 1-1 of the Hawai‘i Revised Statutes provides sufficient contacts between the State of Hawai‘i and the laws of the Kingdom of Hawai‘i.In each of the critical property cases, the Chief Justice applied the law of the Kingdom of Hawai‘i, instead of the law of the Territory or the Republic. Section 1-1 commands the state court to look back to and apply Hawaiian precedent, custom and usage, when and where such sources are available. If, in applying section 1-1, the court chooses to overturn intervening law, it may do so because it has the right and the power to do so. The implications of section 1-1 and footnote 25 of Robinson v. Ariyoshi may raise eyebrows, but they are not unconstitutional.

V. CONCLUSION

William S. Richardson had a destiny. By ancestry, experience, and temperament, he would prove to be the right person, at the right place, at the right time. The man was made for the moment, and the moment was made for the man.

The moment was statehood. How would the common law of property evolve? Would the court borrow the common law of the continental United States? Would the court simply persist in applying the property law fashioned during the territorial period? Some believed that statehood, like annexation in 1898, provided a fresh start, a blank slate, by which the Hawai‘i Supreme Court would rely solely on English and American common law.

To Chief Justice Richardson, the slate was not blank. Hawai‘i was completely unique in American history. Hawai‘i had once been a Kingdom, a sovereign and independent nation. Property law was not free to evolve. Rather, Hawai‘i had an existing property law rooted in the Kingdom of Hawai‘i. In the flush of statehood, some in Hawai‘i forgot the significance of the Kingdom as the basis for property law.

Richardson looked to the Kingdom as shaping the law of property; this was the command of section 1-1 of the Hawai‘i Revised Statutes. It declared that Hawaiian judicial precedent, tradition, and usage were the law of Hawai‘i. Hawaiian law was primary. English and American common law were incorporated only when not in conflict with Hawaiian law. Using section 1-1, Richardson corrected erroneous precedents arising from the

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168 See cases cited supra note 64 and accompanying text.
territorial period and restored the principles and values that underlay the concept of property established during the Kingdom of Hawai‘i.

This intuition flowed naturally from his being Hawaiian. The Hawaiian sense of the future is rooted in understanding the past. As one Hawaiian scholar has written about the Hawaiian concept of the present:

It is interesting to note that in Hawaiian, the past is referred to as Ka wā mamua, or “the time in front or before.” Whereas the future, when thought of at all, is Ka wā mahope, or “the time which comes after or behind.” It is as if the Hawaiian stands firmly in the present, with his back to the future and his eyes fixed on the past, seeking historical answers to present day dilemmas. Such an orientation is an eminently practical one, for the future is always unknown, whereas the past is rich in glory and knowledge. It also bestows upon us a natural propensity for the study of history.169

As William S. Richardson faced the future he looked to the past. He relied on the concepts and practices of ancient Hawaiians to shape modern property law. Life on an island, after all, is cyclical. The waters that wash the shores, the rains that come and go, do so with an inevitable regularity. What was good practice in the past, what worked yesterday as a way of life, would work today. Hawaiians well knew how to live on islands. Their property law was based in principles of communal ownership and stewardship. This was the core of a successful and thriving society. For the Chief Justice, the past was a guide for the future.

169 KAME‘ELEHIWA, supra note 59, at 22-23.