State Supreme Court decision would restore ownership of all surface waters to the State

By Dennis Loo

On January 10, 1973 the State Supreme Court, acting upon a narrow question of disputed water rights between the McBryde Sugar Company and the Gay & Robinson Sugar Plantation, declared the State owner of all surface waters in Hawaii. This declaration reverses the agricultural assumptions of the last 120 years and resurrects the principle of undivided property interest, this time under the guardianship of the State. The decision has been greeted with consternation by Hawaii's agribusinesses. They are screaming that the decision deprives them of their 14th Amendment rights (by taking away property without due process or just compensation) and threatens to abruptly end a century of plantation agriculture in Hawaii. The corporations' indignant reference to the 14th Amendment is hypocritical in light of the lack of concern for Hawaiian property rights demonstrated by the 19th century haole missionaries, adventurers and entrepeneurs who founded them.

Water rights in the Hanapepe Valley on Kauai, where McBryde and Gay & Robinson are located, have been disputed ever since the Territory of Hawaii brought suit against Gay & Robinson in 1917, claiming Territorial ownership of a major portion of Koula. Gay & Robinson won that case. In 1927 the Territory challenged Gay & Robinson again, this time over the surplus waters of the Koula and Manuahi streams. Gay & Robinson won once more. The latest Court decision results from the McBryde Sugar Company's suit against Gay & Robinson. In 1949 Gay & Robinson built a new dam on the Koula Stream, which leaked less than the old dam. McBryde wanted the downstream flow of water – restricted by the new dam – restored to its previous level.

McBryde v. Gay & Robinson slowly worked its way through the courts. The case finally reached the State Supreme Court in 1969. The Supreme Court decision of January 10, 1973 resulted in three sweeping opinions:

First, under the doctrine of riparian rights, waterfront landowners are entitled to the preservation of the water's "natural shape and flow" without substantial diminution.

Second, the State is the owner of all surface waters in Hawaii. Landowners may continue to use specific amounts of water adjudged as their appurtenant rights (the quantity of water necessary to irrigate taro land at the time of the Land Commission awards in 1846). Landowners may also receive an unspecified greater amount of water based on their riparian rights.

Third, water may not be transported by private companies from one watershed (a ridge of high land dividing two areas drained by different river systems) to another.

Collectively and individually these opinions reverse precedent and case law compiled over the last 120 years. They represent, according to Attorney J. Garner Anthony, the most important issue since Statehood: "No opinion of this Court has ever laid down rules of property law as sweeping and revolutionary as the opinion in this case."

The assertion of riparian law and the prohibition against transporting water from one watershed to another could hamper or halt the use of irrigation systems throughout the State. According to the Hawaiian Sugar Planters Association (HSPA), only 50 per cent of the 232,000 acres in sugar production in Hawaii are irrigated, but two-thirds of the annual Hawaiian sugar tonnage comes from those irrigated fields. The HSPA claims that nearly $50 million were invested over the years by the sugar companies to develop water outlets and irrigation systems. Those systems feed sugar cane fields through a complex system of flumes and open ditches. The HSPA further estimates that only 100,000 acres of sugar cane could be cultivated without irrigation and predicts the demise of the 11 remaining plantations on Kauai, Oahu and Maui, should irrigation be restricted or stopped.

Outraged by the State Supreme Court decision, both McBryde and Gay & Robinson along with the sugar industry as a whole filed for a rehearing, which they obtained on Tuesday, September 18. The scene in the courtroom was striking. J. Garner Anthony and John Plews – whose firm Anthony, Hoddick, Reinwald and O'Connor represents clients whose names read like a Who's Who of Big Business in Hawaii – represented Gay & Robinson. Sitting next to them was J. Russell Cades of Cades, Schutte, Fleming and Wright, who represented Alexander and Baldwin, the owners of the McBryde Sugar Company. Be-

hind them, joining in on the rehearing, was William F. Quinn of Goodsill, Anderson and Quinn, who pleaded Olokele Sugar Company's appeal to use water purchased from Gay & Robinson outside of the Hanapepe watershed. Next to Quinn sat Clinton Shiraishi, representing a gaggle of small landowners defending their right to sell their water rights to Alexander and Baldwin, *et al.* To their left sat Deputy Attorney General Andrew Lee, who represented the State. On the bench were Justice Bernard Levinson, Justice Masaji Marumoto, Chief Justice William Richardson, Justice Kazuhisa Abe and Circuit Court Judge Thomas Ogata (substituting for Justice Bertram Kobayashi).

The setting was rife with historic twists. Ethnic lines could hardly have been drawn more sharply. Three major haole law firms confronted the Burns-appointed, nonhaole (with the exception of Levinson) State Supreme Court. Justice Abe, whose nomination to the Court in 1967 met stiff resistance from these same firms on the grounds that he couldn't speak English well enough to write an opinion, vigorously defended the Court's January 10, 1973 decision, which he had written. Former Republican Governor Quinn, defeated by John Burns in 1962, faced Part-Hawaiian Chief Justice Richardson, Burns's running mate in that campaign. Economic lines were drawn between the upper-class corporate interests represented by the attorneys and the middle-class political interests represented by the Court. The audience was composed in part of young, local-born lawyers who squirmed at Quinn's dramatic pleas for a return to the "free marketplace" and his pronounced incredulity that canoeing, swimming and surfing could take precedence over sugar and pineapple.

period, eventually concluded that the best way to ensure Hawaiian landownership was to convert to a fee simple system of land tenure. Hence, the Land Commission and the Great Mahele. In 1846 the Land Commission was charged with settling and adjudicating disputed land claims; it did not have the power to grant new landholdings. The Great Mahele of 1848 divided the land into 1,000,000 acres for Kamehameha III and his progeny, 1,500,000 acres for the alii and their progeny, 1,500,000 acres for the "government and people" and less than 30,000 for native tenants. Finally, on July 10, 1850 foreigners were granted full rights to hold and purchase land.

The Great Mahele of 1848 ended the feudal system of the Hawaiian Kingdom and made theoretically possible a Jeffersonian vision of a "sturdy, well-to-do, independent yeomanry" (from The Polynesian, October 25,1845, quoted by R.S. Kuykendall *The Hawaiian Kingdom,* Volume I). But by obliterating the idea of an undivided land held and protected by the King, the same laws introduced the concept of private property, paved the way for the great sugar and pineapple plantations and assured the dispossession of the Hawaiians of their lands.

An understanding of how feudal landholding practice was transformed into capitalist property law is crucial to understanding the Court's recent decision. Prior to the Great Mahele, access to water was available to all *ahupuaa* (old Hawaiian land divisions) dwellers. The conversion of landholdings into fee simple private property created barriers to free access, but the people's need for water did not suddenly cease. Moreover, by its flow through and across many different landholdings, water resists possession as private property.

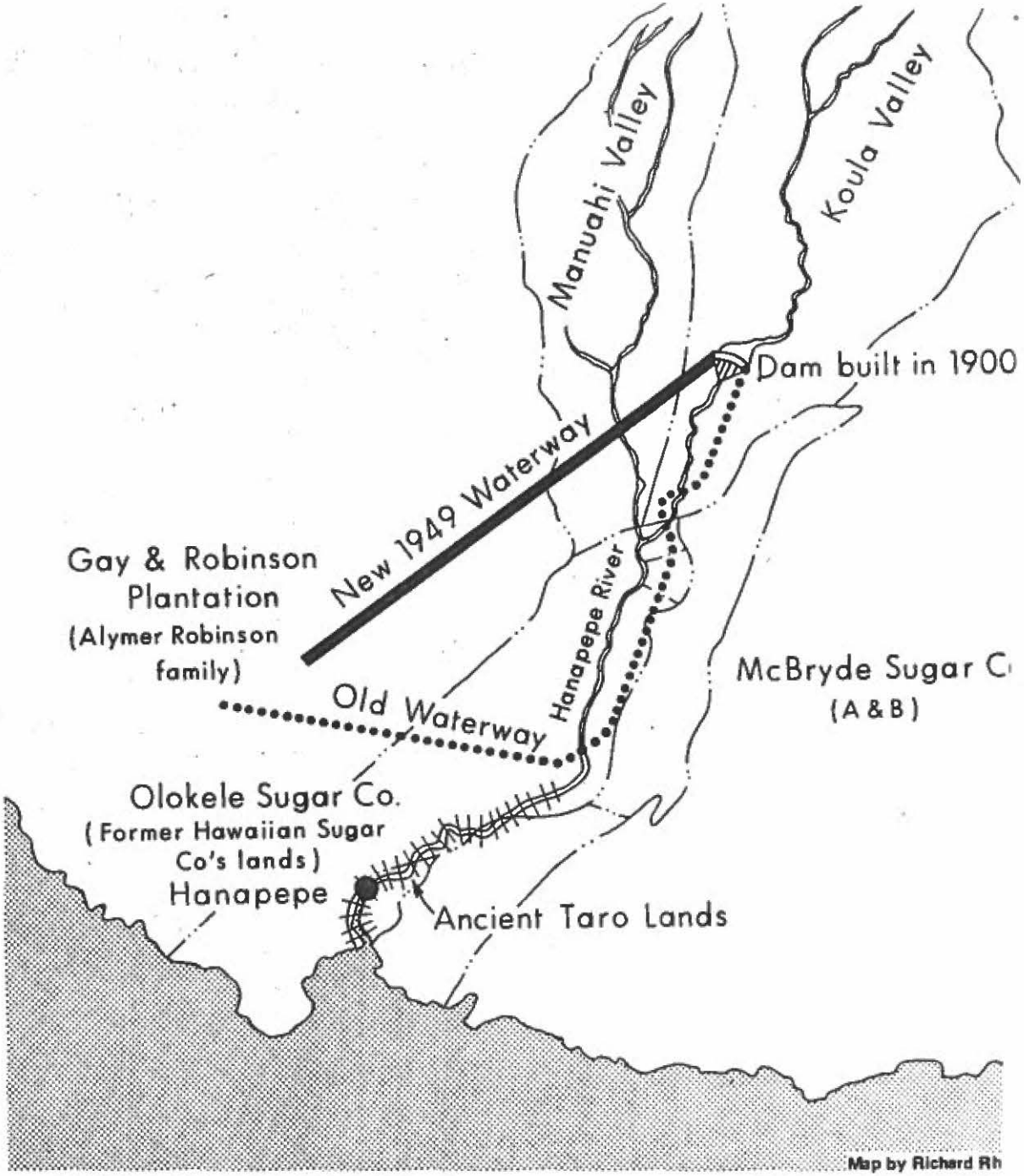
Hawaiian water rights have traditionally been determined by calculating appurtenant rights (the amount of water needed to cultivate taro in 1848). When appurtenant rights have proven inadequate, an admixture of riparian and prior appropriative doctrines have been invoked by the courts to settle water disputes.

Noting that appurtenant rights are ridiculously antiquated, the Court invited the Legislature in its January 10 decision to modernize Hawaiian water rights law: "It does seem a bit quaint in this age to be determining water

swimming and surfing could take precedence over sugar and pineapple.

The struggle enacted in the courtroom was far older than the McBryde-Robinson case, which had been in litigation for 24 years. It dates back to the 1830s and 1840s, when Caucasian immigration exerted tremendous pressure on the feudal landholding system of the Hawaiian Kingdom. Ralph Kuykendall wrote in *The Hawaiian Kingdom*, Volume I, that "All land, save that of the King, was held by a revocable tenure and dispossession was in fact not uncommon; insecurity was an essential feature of the system." The security the King and his feudal lords promised the *makaainana* ("commoners") against enemy attack (warfare was almost incessant prior to 1796) was extracted at the cost of heavy tributes and insecure land tenure.

In 1825 the alii ("chiefs") won an important dispute with the King on the issue of inheritance. Henceforth, the lands of a dead alii would revert to his family rather than to the King. Although the alii's holdings thereby gained greater security, the *makaainana* were left as insecure as they had been previously late as 1836 agreements between the British and Hawaiian kingdoms contained specific references that "the land . . . is the property of the King." In 1839 laws were passed granting protection against dispossession of land without just cause. However, this went against the grain of traditional practice and was rarely enforced on behalf of small landowners disputing larger landowners. In dizzying succession the laws of the Kingdom declared that the lands belong jointly "to the chiefs and people in common" with the King as proprietor (1840); renounced the King's right to dispossess at will, in an unsuccessful effort to shift all foreign landholdings to leases (1841); and prohibited all sales of land except to natives (1842). Dr. Gerritt P. Judd, a missionary who played a pivotal role in this



rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii, and we are bound to follow it. We invite the legislature to conduct a thorough re-examination of the area."

On issues other than appurtenant water rights, however, the Court did not hesitate to rule. Its decision: (1) affirms State ownership of surface waters, (2) denies rights of adverse use (i.e., gaining title to someone else's property through having used it for 20 years or more without the owner's protest) to the State's water, (3) gives riparian law (which requires each taker to leave the water in aproximately its "natural-shape and form") an unprecedented importance and (4) prohibits the transfer of water from one watershed to another by McBryde and Gay & Robinson and, for that matter, any other private company.

The Court's majority opinion, written by Justice Abe, is solidly grounded on an August 6, 1850 Hawaiian law: "Enactment of Further Principles." The relevant section reads: "The people [meaning owners of land] also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple."

Justice Abe then goes on to assert that the right of "running water" amounts to a guarantee of riparian rights: the right to the natural shape and flow of a waterway and its use through "laundering, canoeing, swimming, bathing, etc."

The remainder of Abe's argument focuses on several citations from Massachusetts and English riparian law. The link between Massachusetts and English riparian law and Hawaiian law is established in a most extraordinary paragraph:

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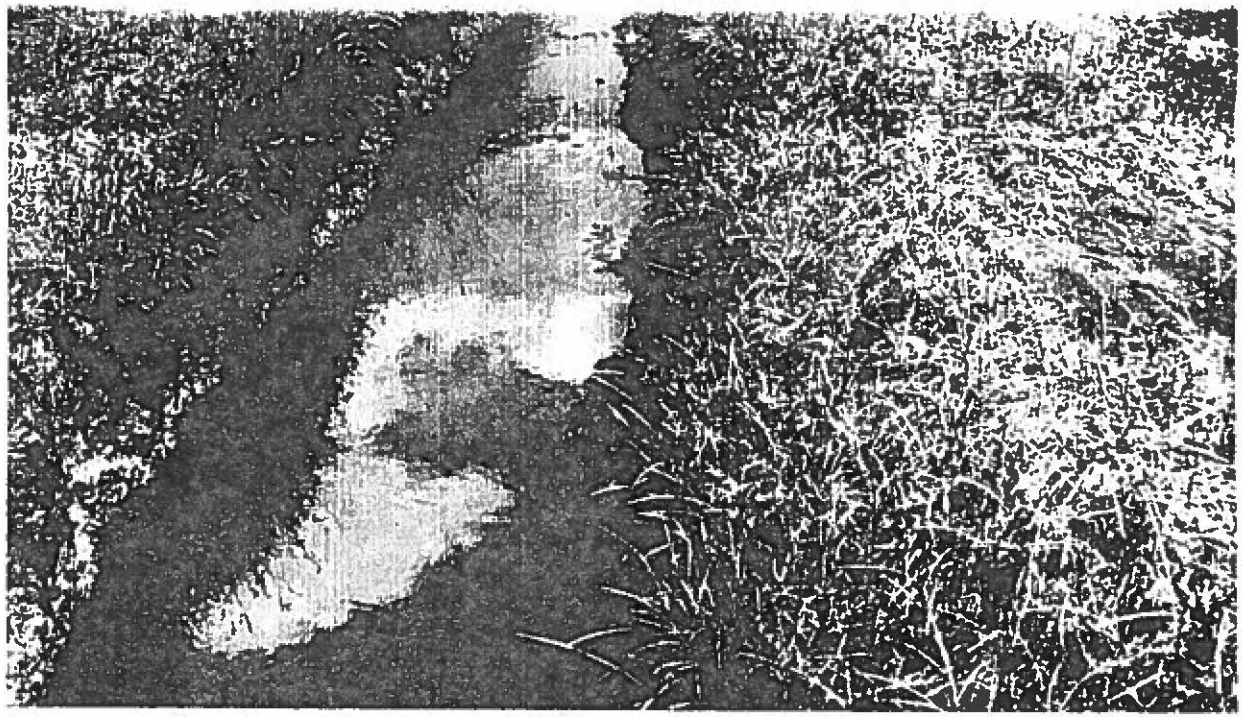
"We shall next consider the possible reason for the enactment of the law. We are aware that the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts. Also, history shows that missionaries had tremendous influence among the leaders of the Hawaiian Kingdom."

Attorney J. Garner Anthony attacked this argument on two grounds. First, Anthony pointed out that the missionaries from Massachusetts never exceeded ten per cent of the total number of missionaries in Hawaii. Second, he noted that riparian laws originated in Massachusetts and England during the early stages of the Industrial Revolution, when a "substantial diminution" of the river's flow would decrease the water power of mills located downstream. "Riparian law was a form of protecting an infant industry," said Anthony. "Given the uniform rainfall of Massachusetts which precluded any need for irrigation, and the prohibitive cost of steam power it was a sound decision *for its place and time.*" According to Anthony, a Federal judge named Joseph Story authored this riparian law. Anthony added that it "is worth noting that Justice Story was a friend and admirer of the leading figures in the development of Massachusetts water power." When steam power became economical, riparian law gave way to varying degrees of the prior appropriation doctrine – that is, first come, first served.

Attorney Russell Cades argued that Abe confused riparian doctrine with *publici juris* ("for public use"). The latter term, said Cades in his brief, only meant common



The Hawaiian Sugar Planters Association predicts the demise of the 11 remaining plantations on Kauai, Oahu and Maui should irrigation be restricted or stopped. Photographs by Dennis Loo.

property to those with a right of access to it –not to the public as a whole. In their attack on Abe's interpretation of riparian law, both Anthony and Cades are generally correct. *The crux of Abe's argument, however, does not depend on his distracting use of riparian doctrine. He should have relied instead on the 1850 statute and on Hawaiian laws and customs which predated riparian rights, the Industrial Revolution and even the arrival of the haoles.*

In a distinct but related argument the Court bases its declaration of State ownership of surface waters on the principles adopted by the Land Commission in 1846, which limited the number of rights that the King would be surrendering in the Great Mahele. According to the Court's interpretation of the Land Commission principles, the King did not relinquish title to the waters. But the attorneys challenging the Court's decision are saying that the King retained only ordinary executive powers to direct the use of water and did not retain actual ownership of the water.

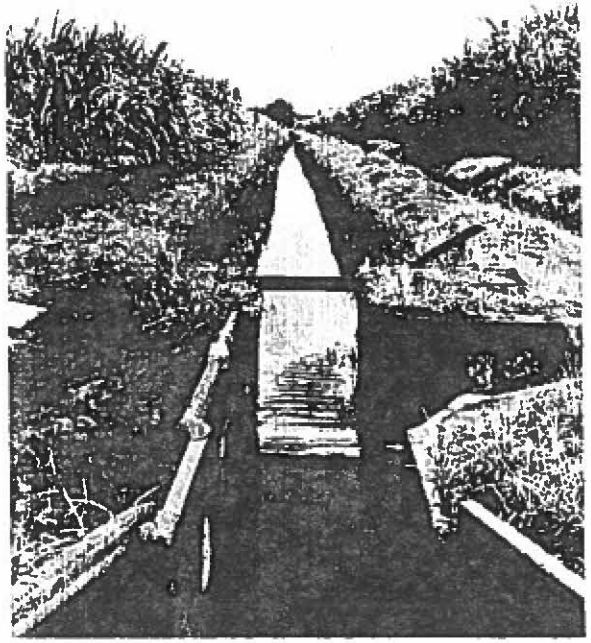
The 1850 statute and the 1846 Land Commission awards guarantee broader and more sensible water rights than riparian law does. Reference to riparian law weakens Justice Abe's opinion on two counts: first, by obeying the doctrine of guaranteeing the waterway in its "natural shape, size, and flow," the Court places extremely rigid strictures on water diversion that in all likelihood will severely damage agriculture in Hawaii; second, by abandoning the broader public rights extended by the law of 1850 to all *ahupuaa* dwellers – and not just waterfront property holders – the Court's decision that water is common property for the benefit of all is not fully supported.

Employing riparian law for his argument, Abe seeks legal precedents in a doctrine that originally guaranteed a river's natural state only as a by-product of protecting downstream industrial water power. When economic conditions changed, entrepeneurs eagerly abandoned the doctrine of riparian rights

and felt no qualms about diverting as much water as they needed. Riparian law was used to protect new industries; it did not represent a serious concern about the environment; it did not protect water as a public resource. If Abe and the State Supreme Court want to restore water to the public domain, they should base their decision on public law – for instance, the 1850 statute – which specifically upholds the preservation of water as a public resource.

At least two major complications immediately arise from the Court's decision. The first concerns an inconsistency within the decision. It declares that the State owns all surface waters. Yet, it grudgingly grants Gay & Robinson sole ownership of the Manuahi Stream inasmuch as a previous Supreme Court decision in 1930 granted a title of ownership to the company. The second complication arises from the omission of an explicit declaration that while "neither Gay & Robinson nor McBryde may transport water to another watershed," the State may. The omission led William Quinn to argue that nobody would be allowed to transport water from one watershed to another. On this basis he described the Court's decision as a disastrous blow to agriculture. Responding for the State, Andrew Lee argued that the State could indeed transport water if it was for "the common good."

If the decision stands as written, and Justice Abe gave every indication at the September 18 rehearing that he, at least, wants it to stand, the courts will be flooded with challenging suits, and an appeal to the United States Supreme Court is inevitable. The legal attack on the Court's opinion will probably



be based on the two arguments already raised by the attorneys who were present at the rehearing. First, the agribusinesses will argue that the decision constitutes a taking of property without due process and just compensation in violation of their 14th Amendment rights. Second, the decision reverses 120 years of practice during which time the plantations have assumed that the water was theirs to use. According to the doctrine of adverse use (which says that if a person uses for 20 years property that belongs to someone else without their protesting, it becomes the property of the person who has been using it), the waters they have diverted should be theirs to keep. But it does not make sense for public property to become private property through adverse use and for those users to then demand that they be compensated for property that did not belong to them in the first place. The doctrine of adverse use really amounts to saying that if someone has been doing something long enough he may legally go right on doing it.

Presently, close to one-fourth of all irrigation water sold to sugar plantations is purchased from the State. If the Supreme Court decision stands, the State would become the seller of virtually all irrigation water obtained from surface waters. The added revenue to the State from these sales would be substantial. Moreover, since the State would become not only proprietor of surface waters, but owner as well, it could choose where to sell water and to whom and for what purposes. Even if the Court decides to relinquish actual ownership of the water and only retain stewardship over it, *the State would be given the power to determine not only the future of agriculture, but the future of any and all development in Hawaii dependent upon the use of surface water.* Of course, that power would mean nothing unless the State had sufficient vision to use it.

But first the Court must issue its final opinion. When that decision will be forthcoming is anybody's guess.

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