

April 2014

## Power to the People: Hydroelectric Utilities and the Need for Recognition of the Judicial Takings Theory

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### Recommended Citation

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# POWER TO THE PEOPLE: HYDROELECTRIC UTILITIES AND THE NEED FOR RECOGNITION OF THE JUDICIAL TAKINGS THEORY

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## I. INTRODUCTION

This article will discuss the theory of judicial takings and its applicability to decisions of state courts—specifically state court decisions involving public waterways and private property. Judicial takings have been only modestly recognized, but several members of the U.S. Supreme Court clearly admit the potential for a judicial taking exists.<sup>1</sup> *PPL Montana, LLC v. Montana*<sup>2</sup> presented a prime opportunity for the Court to clarify several issues surrounding the judicial takings theory. However, when the Court delivered its opinion in *PPL Montana*, it failed to address the judicial takings issue even though the facts of *PPL Montana* were similar to a case where a plurality declared the Takings Clause applied to the judiciary. This article will explain why the Court failed to address the judicial takings theory in *PPL Montana*, as well as discuss the factual circumstances and requirements that warrant designation as a judicial taking that requires just compensation under the Fifth Amendment.

This article will first provide a general overview of the Takings Clause of the Fifth Amendment to the United States Constitution. The article will then develop a working background of the judicial takings theory and the jurisprudence surrounding that theory of law. After introducing the Takings Clause and the judicial takings theory, the article will discuss the first Supreme Court plurality to adopt the judicial takings theory and arguments and discussions stemming from that decision. The article will then discuss the Supreme Court's decision in *PPL Montana, LLC v. Montana*, including the history, facts, arguments and discussions stemming from the case, and the implications of the Court's decision. Next, the article will demonstrate that no alternative theories of law protect property rights sufficiently enough to preclude an application of the judicial takings theory. The article will then provide a working background of the public trust doctrine, as well as its effect in *PPL Montana*, and the judicial takings theory as a whole. In closing, the article will provide an application of the judicial takings theory to *PPL Montana*, before discussing the circumstances and facts that would affect a judicial taking.

## II. THE TAKINGS CLAUSE

The Takings Clause of the U.S. Constitution provides that private property cannot be taken for public use without just compensation.<sup>3</sup> The Court has recognized two categories of government regulation of private property that are compensable as *per se* takings under the Fifth Amendment without a case-specific inquiry into the public interest advanced by the government action.<sup>4</sup> The first, physical takings, are “regulations that compel the property owner to suffer a physical ‘invasion’ of his property.”<sup>5</sup> Accordingly, no matter how small the governmental intrusion and

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1. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion), was the first plurality opinion acknowledging that the Takings Clause applies to the judiciary.

2. *PPL Mont., LLC, v. Montana*, 132 S. Ct. 1215 (2012).

3. U.S. CONST. amend. V.

4. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–17 (1992).

5. *Id.* at 1015.

no matter how great the public purpose behind the intrusion, physical invasion of private property by the government is always a taking requiring just compensation.<sup>6</sup> Regulatory takings also occur “where regulation denies all economically beneficial or productive use of land.”<sup>7</sup> In *Lucas v. South Carolina Coastal Council*, the Court held a regulatory taking had occurred when a government agency declared that the plaintiff could not develop residential lots he had purchased for that exact purpose—thus, all economically beneficial or productive use of the plaintiff’s land had been denied.<sup>8</sup> While the Court has never specified the rationale of this category of takings, the Court has hinted that deprivation of beneficial use is the same as a physical taking from a property owner’s perspective.<sup>9</sup>

Regulatory actions other than the two *per se* takings actions illustrated in *Lucas* are governed by *Penn Central Transportation Company v. City of New York*.<sup>10</sup> The *Penn Central* framework centers largely around two factors to determine whether a taking requiring compensation has occurred: 1) the economic impact of the regulations on the claimant and the extent of interference with the claimant’s investment-backed expectations by the regulations, and 2) the character of the government action.<sup>11</sup> Essentially, the Takings Clause does not prohibit the government from taking private property, but merely places a condition, namely just compensation, on the government’s exercise of its authority to interfere with the enjoyment of a landowner’s rights.<sup>12</sup>

#### A. The Rise of the Judicial Takings Theory

While it is clear that the Takings Clause applies to government intrusion upon property rights, nothing in the Takings Clause itself, or in the case law discussing the clause, suggests that only the executive and legislative branches of government can effect takings requiring just compensation under the Fifth Amendment.<sup>13</sup> Perhaps the central argument concerning the practical implications of excluding judicial action from the Takings Clause is that if state courts can avoid paying just compensation by designating the judiciary with condemnation authority, the Takings Clause is effectively null and void.<sup>14</sup> Accordingly, shortly after the turn of the twentieth century, and then again during the 1960s, the idea of the judiciary effecting a taking under the Fifth Amendment began echoing through judicial opinions.<sup>15</sup>

6. *Id.*

7. *Id.*

8. *See generally Lucas*, 505 U.S. at 1003.

9. *Id.* at 1016–17.

10. *See Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

11. *Id.* at 124.

12. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

13. Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 97 (2011).

14. Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL’Y 107, 110 (2011).

15. *See generally Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334–35 (1994) (Scalia, J., dissenting); *Hughes v. Washington*, 389 U.S. 290, 295–97 (1967) (Stewart, J., concurring); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 568 (1905); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1473–75 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); *Sotomura v. Cnty. of Haw.*, 460 F. Supp. 473, 477–83 (D. Haw. 1978).

As stated by Justice Stewart in *Hughes v. Washington*, judicial takings occur when a state court decision effects a “sudden change in state law, unpredictable in terms of the relevant precedents . . . .”<sup>16</sup> When determining whether such a change has occurred, Justice Stewart believed the relevant inquiry focuses on a state court’s actions, not what it says or intends to do.<sup>17</sup> Following the judicial inquisition into the theory of a judicially-enacted taking, the concept of judicial takings began to appear in law reviews early in the 1990s.<sup>18</sup>

The Supreme Court’s first, major acknowledgement of the possibility of a judicial taking, however, came in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.<sup>19</sup> In fact, a major factor for the Court’s grant of certiorari in *Stop the Beach* was to expound upon the issue of judicial takings.<sup>20</sup>

### III. THE *STOP THE BEACH* DECISION

In *Stop the Beach*, the Court defined the central inquiry regarding the judicial takings theory as “whether an action by the judicial branch of government can ever be a ‘taking’ requiring the payment of compensation.”<sup>21</sup> Because the Court’s decision in *Stop the Beach* was the first time the Court had directly addressed the problem of judicial takings, a working knowledge of that case is necessary to fully understand judicial takings and to apply the concept to *PPL Montana*.

The dispute in *Stop the Beach* primarily concerned Florida’s Beach and Shore Preservation Act, under which Florida is required to conduct projects to restore and nourish beaches that become critically eroded.<sup>22</sup> When a restoration or nourishment project is finished, title to any formerly submerged land that becomes dry land because of the project’s displacement of the previous water line vests in the state.<sup>23</sup> This practice sometimes deprives beachfront property owners of their previous ownership of land extending up to the mean high water mark.<sup>24</sup> In short, the projects sometimes create areas of dry land—which are owned by the state—in between private waterfront property and the water.<sup>25</sup> The particular project in this

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16. *Hughes*, 389 U.S. at 296 (Stewart, J., concurring).

17. *Id.* at 298.

18. D. Benjamin Barros, *Introduction to the Symposium on Judicial Takings*, 21 WIDENER L. J. 621, 625 (2012) (citing: David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487 (2004); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990); and Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379 (2001)).

19. Somin, *supra* note 13, at 91.

20. *See id.*

21. *Id.*

22. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2599 (2010).

23. *Id.*

24. While state property law defines “mean high-water line,” in Florida, it refers to the ordinary boundary between private beachfront property and state-owned beach. *Stop the Beach*, 130 S. Ct. at 2598. In Florida, state-owned beach consists of all beachfront below the average high tide line over the preceding nineteen years. *Id.*

25. *Id.* at 2598.

case created exactly this scenario for six individual property owners.<sup>26</sup> These property owners joined together to form Stop the Beach Renourishment, Inc., in order to bring an administrative challenge to the State's restoration project of the beach in front of their homes.<sup>27</sup>

In response to the administrative challenge, the District Court of Appeal for the First District of Florida found that the Act eliminated two of Stop the Beach Renourishment, Inc.'s littoral rights: 1) the right to receive accretions to their property; and 2) the right to have their property's contact with the ocean remain intact.<sup>28</sup> The District Court further believed that the Act unconstitutionally deprived "upland owners of littoral rights without just compensation," and certified that question to the Florida Supreme Court.<sup>29</sup>

In its opinion, the Florida Supreme Court answered the question in the negative, concluding the doctrine of avulsion<sup>30</sup> allowed Florida to "reclaim the restored beach on behalf of the public."<sup>31</sup> The Florida Supreme Court went on to state that the right of accretions<sup>32</sup> is a future contingent interest as opposed to a vested property right, and that no littoral right to contact with the water stems from the littoral right of access to the water, which is unaffected by the Act.<sup>33</sup> Significantly, Stop the Beach Renourishment, Inc. sought rehearing, claiming that the Florida Supreme Court's decision itself affected an unconstitutional taking of property.<sup>34</sup> The Florida Supreme Court denied the rehearing request, and the U.S. Supreme Court granted certiorari.<sup>35</sup>

Though unable to garner majority support for his opinion, Justice Scalia's plurality opinion, joined by Justices Alito, Thomas, and Roberts began with a discussion of "the classic taking" driven by eminent domain, but stated that the Takings Clause applies to other state actions that amount to the government's exercise of its eminent domain power.<sup>36</sup> Justice Scalia went on to state that under the Fifth Amendment, states effect a taking if they re-characterize as public property what was previously private property.<sup>37</sup> After further discussing the Takings Clause in general, Scalia's opinion goes on to acknowledge judicial takings:

The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . . There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property with-

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26. Somin, *supra* note 13, at 93.

27. *Stop the Beach*, 130 S. Ct. at 2600.

28. *Id.*

29. *Id.*

30. Avulsion refers to "[a] sudden removal of land caused by change in a river's course or by flood. Land removed by avulsion remains the property of the original owner." BLACK'S LAW DICTIONARY 157 (9th ed. 2009).

31. *Stop the Beach*, 130 S. Ct. at 2600.

32. Accretion refers to "[t]he gradual accumulation of land by natural forces . . . ." BLACK'S LAW DICTIONARY 23 (9th ed. 2009).

33. *Stop the Beach*, 130 S. Ct. at 2600.

34. *Id.*

35. *Id.* at 2600-01.

36. *Id.* at 2601.

37. *Id.*

out just compensation varies according to the branch of government effecting the expropriation . . . [i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.<sup>38</sup>

Additionally, Justice Scalia stated that the Court's own precedents do not support the idea that takings conducted by the judicial branch should be afforded any special treatment, leaving no doubt as to the meaning of his opinion by stating that if a court declares that a once established property right no longer exists, it has taken the property.<sup>39</sup> However, because "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established," Justice Scalia declined to hold that the Florida Supreme Court had effected a taking under the Fifth Amendment.<sup>40</sup>

#### A. Concurrences in *Stop the Beach*

Justices Kennedy and Sotomayor, concurring in part and concurring in the judgment, were not so willing to extend the Takings Clause to judicial action. Regarding the question of whether the Takings Clause is implicated when a court declares that a previously established property right no longer exists, Justice Kennedy answered in the negative.<sup>41</sup> Justice Kennedy focused on the Due Process Clause as a limitation to judicial decisions affecting established property rights.<sup>42</sup> Specifically, Justice Kennedy stated that if a court eliminated an established property right, its judgment could be set aside as a deprivation of property without due process of law—a violation of the Fourteenth Amendment.<sup>43</sup> Kennedy further contended that both the procedural and substantive aspects of the Due Process Clause preclude extension of the Takings Clause to the judiciary.<sup>44</sup>

Justices Breyer and Ginsburg, concurring in part and concurring in the judgment, were also unwilling to join in Justice Scalia's analysis of the Takings Clause implications raised in *Stop the Beach*.<sup>45</sup> Justice Breyer agreed that no unconstitutional taking of property occurred here, but declined to join in other aspects of the decision because he felt they concerned areas of constitutional law that did not warrant discussion in the case.<sup>46</sup> Notably, however, Justice Breyer expressed concern with the application of the Federal Takings Clause to judicial actions for the primary reason that property law is generally governed by states individually.<sup>47</sup> Also apparent in Justice Breyer's concurrence was a concern for creating a flood of litigation: "Losing parties in many state-court cases may well believe that erroneous

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38. *Id.*

39. *Stop the Beach*, 130 S. Ct. at 2602.

40. *Id.* at 2612.

41. *Id.* at 2614.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Stop the Beach*, 130 S. Ct. at 2618.

46. *Id.*

47. *Id.* at 2618–19.

judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims.<sup>48</sup>

Justice Stevens would have been the deciding vote in the case, but recused himself from taking part in the decision because he owns beachfront property in Florida.<sup>49</sup>

#### B. Where Does *Stop the Beach* Leave the Judicial Takings Discussion?

While the U.S. Supreme Court at least took the initiative to address the problem of judicial takings in *Stop the Beach*, none of the justices that participated in the opinion believed an unconstitutional taking had occurred.<sup>50</sup> More troubling is the fact that only four justices acknowledged that a judicial taking could occur.<sup>51</sup> However, some find great promise in the plurality opinion. Bradley Gould, a property attorney at Holland & Knight, LLP whose practice focuses on eminent domain and land use litigation, touted the decision as “very significant.”<sup>52</sup> Gould went on to say that although the decision is a plurality opinion, it would likely still be a persuasive argument for private property advocates and property owners to prevent the redefinition of private property into public property by state courts.<sup>53</sup> Gould also expressed some reservation with the Court’s explanation of accretion and avulsion, and stated, “if the government decides to improve property or property rights that they don’t own, then [sic] that should give rise to a taking and a requirement of compensation.”<sup>54</sup>

Additionally, John Echeverria,<sup>55</sup> noted that *Stop the Beach* “underscores the importance of the judicial selection process and how divided the [C]ourt is on the property rights question.”<sup>56</sup> Echeverria also expressed that the ideological split in the Court regarding property issues will put the judicial takings issue on the Supreme Court backburner for the near future.<sup>57</sup> It is worth noting that Echeverria authored an amicus brief in support of the State of Florida on behalf of the American Planning Association when the Court granted certiorari in *Stop the Beach*.<sup>58</sup>

#### C. Amicus Briefs in *Stop the Beach*

The plurality’s belief that the judiciary can effect a taking requiring just compensation drew extensive attention to *Stop the Beach* in the form of amicus briefs.

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48. *Id.* at 2619.

49. Nick Malinowski, ‘Judicial Takings’ Still Unresolved by High Court Ruling, FORDHAM LAW NEWSROOM (June 17, 2010), <http://law.fordham.edu/newsroom/18577.htm>.

50. *See supra* Part III.

51. *See supra* Part III.

52. Malinowski, *supra* note 49.

53. *Id.*

54. *Id.*

55. Echeverria is a Professor at the Vermont School of Law and has written extensively on takings and other natural resource issues. *Faculty Directory*, VERMONT SCH. OF L., [http://www.vermontlaw.edu/our\\_faculty/faculty\\_directory/john\\_d\\_echeverria.htm](http://www.vermontlaw.edu/our_faculty/faculty_directory/john_d_echeverria.htm) (last visited Nov. 22, 2013).

56. Malinowski, *supra* note 49.

57. *Id.*

58. *See infra* Part III.C.1.



Because the amicus briefs filed in *Stop the Beach* discuss an issue of near first-impression for the Court, the arguments presented by entities on either side of the issue are worth discussing.

### 1. Briefs Supporting Respondent (State)

Leading the discussion against the plurality's decision was John Echeverria's argument. In an amicus brief supporting Florida, Echeverria reminded the Court that it had never before held a judicial action to be a taking, and urged the Court to refrain from acknowledging judicial takings now.<sup>59</sup> Echeverria went on to argue that the Supremacy Clause in the federal constitution offered the Court a means of setting aside a state court ruling that vindicated a federal right,<sup>60</sup> and that private property owners could attack a state court ruling as lacking a fair and substantial basis if the owner contended that a ruling on state property law has precluded a federal taking claim.<sup>61</sup>

Echeverria further urged that the judicial takings argument should be discredited because the Court had rejected the theory more than one hundred years ago<sup>62</sup> and had followed that ruling up to *Stop the Beach*.<sup>63</sup>

Also claimed was that the judicial takings theory violated both the limitations on the Supreme Court's jurisdiction to federal inquiries and the correct reading of the Takings Clause.<sup>64</sup> Echeverria argued that judicial takings should be rejected because the word "property," as used in the Takings Clause, is defined by state law, not the federal constitution.<sup>65</sup> "When . . . the nature and scope of the property at issue has been defined by a state court under state common law, the state court ruling on the issue represents the final word . . ." and the Supreme Court lacks the authority to directly review the state court's decision under any theory.<sup>66</sup> Citing *Riley v. Kennedy*,<sup>67</sup> Echeverria correctly stated that a state's highest court is the ultimate authority on that state's laws—including property laws.<sup>68</sup> In addition, Echeverria cited *Herb v. Pitcairn*<sup>69</sup> for the principle that the Supreme Court will not review state court decisions that are based on adequate and independent state

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59. Brief for the Am. Planning Ass'n & the Florida Chapter of the Am. Planning Ass'n as Amicus Curiae Supporting Respondents, *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151), 2009 WL 3199617, at 2 [hereinafter Brief for the Am. Planning Ass'n].

60. *Id.*

61. *Id.*

62. See *Sauer v. New York*, 206 U.S. 536, 548 (1907). "[T]his court has neither the right nor the duty . . . to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th amendment is shown." *Id.* at 548. Echeverria finds *Sauer v. City of New York* highly relevant to the judicial takings debate. Brief for the Am. Planning Ass'n, *supra* note 59, at 7. However, it is worth noting that the Court found that no property existed, before it found that no taking had occurred. *Sauer*, 206 U.S. at 548.

63. Brief for the Am. Planning Ass'n, *supra* note 59, at 4.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Riley v. Kennedy*, 553 U.S. 406, 425–426 (2008).

68. Brief for the Am. Planning Ass'n, *supra* note 59, at 4–5.

69. *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945).

grounds.<sup>70</sup> Accordingly, the following statement sums Echeverria's arguments against federal courts interpreting state law property law:

Because the Takings Clause points to state law to define property, and because state courts are the final expositors of the meaning of state law, there is no basis for seeking review under the Takings Clause of a state court ruling on the nature and scope of a state property interest.<sup>71</sup>

Echeverria went on to argue that the language of the Takings Clause discredits the judicial takings theory: "the Takings Clause makes a distinction between 'property' and 'taking,' thereby establishing a two-step inquiry, focusing first on the property issue and then on the taking issue."<sup>72</sup> In line with this two-step takings inquiry, Echeverria found trouble with any reading of the Takings Clause that holds a state court's determination of whether or not a property interest exists to be a taking.<sup>73</sup> Also stemming from his two-step inquiry theory is Echeverria's argument that is centered on the idea that no evidence exists supporting the idea that the drafters of the constitution ever contemplated that a judicial common law ruling could constitute a taking.<sup>74</sup> Instead, Echeverria believed the drafters' primary goal in effecting the Takings Clause was to codify the practice of eminent domain in terms of roads over private lands, as well as address public concern for military sequestering of livestock.<sup>75</sup>

In his final attempt to derail *Stop the Beach Renourishment, Inc.*'s takings argument, Echeverria asserted the petitioners only argued that the Florida Supreme Court instituted a "bad faith" application of state law in attempt to defeat Federal Constitutional rights.<sup>76</sup> Echeverria correctly asserted that the validity of a takings claim rests on whether or not the government has acted for a "public use."<sup>77</sup> However, this assertion by Echeverria seems to ignore the fact that the Florida Supreme Court redefined petitioner's lands as public beachfront.

## 2. Briefs in Support of Petitioner

The petitioner's position on the takings issue in *Stop the Beach* was not nearly as well supported by amicus filings as was respondent's position. Several briefs in support of petitioner were filed, however, raising astute arguments regarding the effect of the Takings Clause on the judiciary's power. Perhaps the most striking of arguments in support of judicial takings was made in the Brief of Amici Curiae of the National Association of Home Builders and Florida Home Builders Association Supporting Petitioner (Home Builders Brief).<sup>78</sup>

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70. Brief for the Am. Planning Ass'n, *supra* note 59, at 5–6.

71. *Id.* at 6.

72. *Id.* at 12.

73. *Id.*

74. *Id.* at 13.

75. *Id.*

76. *Id.* at 14.

77. Brief for the Am. Planning Ass'n, *supra* note 59, at 14.

78. Brief for the Nat'l Ass'n of Home Builders & Florida Home Builders Ass'n as Amici Curiae Supporting Petitioner, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S.Ct. 2592 (2010) (No. 08-1151), 2009 WL 2574816 [hereinafter Home Builders Brief].

The arguments set forth by the Home Builders Brief rested on the premise that the Taking Clause must be applied to the judiciary as a result of the Fourteenth Amendment.<sup>79</sup> The Court has long held that the Fourteenth Amendment encompasses all state action, including state judicial action.<sup>80</sup> While the issue in *Shelley v. Kramer*<sup>81</sup> involved racially motivated restrictive covenants as a violation of the Due Process Clause of the Fourteenth Amendment, the Court did not limit the application of the Fourteenth Amendment to Due Process and Equal Protection issues, instead providing for a broad application of the amendment to state judicial action.<sup>82</sup> The Home Builders Brief supported this assertion with other instances where state court action has been found to violate various aspects of the Fourteenth Amendment, including: the Supreme Court of Alabama's libel judgment against the New York Times;<sup>83</sup> a state court's eviction of a tenant as retaliation for reporting housing code violations;<sup>84</sup> and a New York appeals court's infringement on a property owner's easement.<sup>85</sup> These instances all implicated an application of the Fourteenth Amendment, illustrating that the "state action" requirement of the Amendment applied to the judiciary in addition to the executive branch and legislature.<sup>86</sup>

Finally, The Home Builders Brief identified that the Takings Clause is applicable to the states through the Fourteenth Amendment.<sup>87</sup> Accordingly, the Fifth Amendment's Takings Clause applies to the individual states through the Fourteenth Amendment's Due Process Clause, requiring that a state government pay just compensation if it takes private property for public use.<sup>88</sup>

Justice Harlan also supported including the judiciary when applying the Takings Clause in *Chicago, B. & Q.R. Co. v. City of Chicago*:

If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment.<sup>89</sup>

Because of this incorporation of the Takings Clause into the Fourteenth Amendment, state courts can be held liable for affecting a taking.<sup>90</sup> Accordingly, the argument put forth in the Home Builders Brief can be logically summarized as

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79. *Id.* at 3.

80. *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948). "[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." *Id.*

81. *Id.*

82. Home Builders Brief, *supra* note 78, at 4.

83. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

84. *Edwards v. Habib*, 397 F.2d 687, 699 (D.C. Cir. 1968).

85. *See generally* *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544 (1905).

86. Home Builders Brief, *supra* note 78, at 7.

87. *Id.* at 8.

88. *Id.* (citing *Chi., B. & Q.R. Co. v. City of Chi.*, 166 U.S. 226, 336 (1897)).

89. *Chi., B. & Q.R. Co. v. City of Chi.*, 166 U.S. 226, 235 (1897).

90. *Id.* at 241.

follows: “judicial action is encompassed by the Fourteenth Amendment’s applicability to state action;”<sup>91</sup> the Court has established that the Takings Clause applies to the states through the Fourteenth Amendment.<sup>92</sup> Thus, “because the Takings Clause applies to state action through the Fourteenth Amendment—and judicial action is encompassed by state action—then the Takings Clause must apply to judicial action and decisions.”<sup>93</sup>

With an issue very similar to that in *Stop the Beach* arising in *PPL Montana*, and all nine justices participating in the decision,<sup>94</sup> the Court appears to have fumbled the chance to solidify judicial takings as a form of unconstitutional activity under the Takings Clause. This is especially true considering the fact that the Court made no mention of the Takings Clause in *PPL Montana*, despite the fact that several amicus briefs had addressed the topic in some detail.

#### IV. PPL MONTANA, LLC V. MONTANA

##### A. History and Background of PPL Montana

PPL Montana, LLC is a utility company that owns and operates hydroelectric facilities and dams throughout the State of Montana.<sup>95</sup> Several of its hydroelectric facilities are located on riverbeds, the subject of the underlying dispute between PPL and the state of Montana, under segments of the Upper Missouri, Madison, and Clark Fork Rivers.<sup>96</sup> PPL Montana acquired these facilities in 1999 from the Montana Power Company, although the facilities themselves have existed for decades, some for more than a century.<sup>97</sup> Although Montana became aware of the existence of these hydroelectric facilities at the time they were constructed, and various state agencies of Montana participated in federal licensing proceedings for the facilities, the State had never sought compensation for use of the riverbeds underlying the facilities from either the Montana Power Company or PPL Montana until 2003.<sup>98</sup> Rather, the understanding of both PPL Montana and the United States was that the utility company had always paid rents to the United States for use of riparian areas flooded by the company’s hydroelectric projects.<sup>99</sup>

The cause of the dispute between PPL Montana and the State of Montana came in 2003, when parents of Montana school children initiated a federal lawsuit, alleging that the riverbeds underlying PPL Montana’s hydroelectric facilities were

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<sup>91</sup> Home Builders Brief, *supra* note 78, at 3.

<sup>92</sup> *Id.* at 8–9.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> *See generally* PPL Mont., LLC v. Montana, 132 S. Ct. 1215 (2012).

<sup>95</sup> *Id.* at 1225.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

owned by the State, and part of Montana's school trust lands.<sup>100</sup> Montana joined the lawsuit seeking rents for PPL Montana's use of the riverbeds for the first time, although that lawsuit was dismissed for lack of diversity jurisdiction.<sup>101</sup>

In response to the parents' federal lawsuit, PPL Montana and two other power companies fired back, suing Montana in state court, arguing that Montana could not seek compensation for the company's use of the riverbeds.<sup>102</sup> The State counter-claimed, stating that it owned the riverbeds under the equal-footing doctrine,<sup>103</sup> and could seek compensation for PPL Montana's use of the riverbeds.<sup>104</sup> The trial court granted summary judgment to the State and ordered PPL Montana to pay the State almost \$41 million in rents said to have accrued between 2000 and 2007.<sup>105</sup>

On appeal, the Montana Supreme Court affirmed.<sup>106</sup> In determining who owned the land underlying the riverbeds, the court examined the navigability of the rivers at the time of Montana's statehood.<sup>107</sup> In its opinion, the Montana Supreme Court admitted that particular segments of the rivers in question were not navigable when Montana entered the Union.<sup>108</sup>

However, the Montana Supreme Court construed navigability for title purposes by assessing the navigability of the rivers as wholes, even though Lewis and Clark were forced to portage around the obstructions in the rivers utilized by PPL Montana.<sup>109</sup> The Montana court reasoned that short interruptions in navigability are insufficient as a matter of law to declare the rivers non-navigable because travelers had easily circumvented those stretches by overland portage.<sup>110</sup> The court also relied heavily on the present-day use of recreational crafts on the Madison River to find those river segments navigable.<sup>111</sup>

The effect of the Montana court's ruling was to force PPL Montana to pay rent for the use of riverbeds to the State of Montana.<sup>112</sup> By holding that the rivers in question were in fact navigable at the time of Montana's statehood, the Montana

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100. *PPL Mont.*, 132 S. Ct. at 1225.

101. *Id.*

102. *Id.*

103. The equal-footing doctrine can be summed as follows: "Upon statehood, the State gains title within its borders to the beds of waters then navigable.... It may allocate and govern those lands according to state law subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.' The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses." *Id.* at 1227–28 (citation omitted) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

104. *PPL Mont.*, 132 S. Ct. at 1225.

105. *Id.* at 1225–26.

106. *PPL Mont., LLC v. State*, 229 P.3d 421, 460–61 (Mont. 2010), *rev'd and remanded*, 132 S. Ct. 1215 (2012).

107. *Id.* at 444–50.

108. *Id.* at 469. A segment of the Missouri River, for example, consists of a series of cascades and rapids that drop over 400 feet in less than ten miles. The last of the "Great Falls," and the one that Lewis and Clark would have encountered first, is the tallest of the falls in that stretch at nearly ninety feet. The Madison River shares the turbulent nature of the Missouri River, and is one of its tributaries. Additionally, the Clark Fork River is "marked by 'many waterfalls and boxed gorges.'" *PPL Mont.*, 132 S. Ct. at 1222–24 (citing FED. WRITERS' PROJECTS OF THE WORKS PROGRESS ADMIN., *IDAHO: A GUIDE IN WORD AND PICTURE* 230 (2d ed. 1950)).

109. *PPL Mont., LLC v. State*, 229 P.3d at 448–50.

110. *Id.* at 449.

111. *Id.* at 435.

112. *PPL Mont.*, 132 S. Ct. at 1226.

Supreme Court ruled that the State of Montana may collect rent from utility companies, such as PPL Montana, for the use of riverbeds.<sup>113</sup> PPL Montana appealed the decision of the Montana Supreme Court; the United States Supreme Court granted certiorari and reversed.<sup>114</sup>

#### B. The U.S. Supreme Court’s Response to the Montana Court

In a unanimous opinion, the Supreme Court held that the Montana Supreme Court’s decision, giving Montana title to riverbeds throughout the State and the authority to charge for the use of those riverbeds, “was based upon an infirm legal understanding of this Court’s rules of navigability for title under the equal-footing doctrine.”<sup>115</sup> As a result, the Montana Supreme Court’s decision was reversed and remanded, freeing the utility company from liability for nearly \$41 million in back-payments of rent to the State.<sup>116</sup>

The Supreme Court found the Montana court had erred in its approach concerning the question of river segments and portage.<sup>117</sup> Three main factors caused the Court to disagree with the Montana court’s analysis: segment-by-segment analysis for navigability purposes; the Montana state court’s prior usage of the segment-by-segment analysis; and the Montana Supreme Court’s “short interruption” theory.<sup>118</sup>

#### 1. The Segment Analysis for Navigability

In order to determine riverbed title under the equal-footing doctrine, the United States Supreme Court employs a segment-by-segment analysis to assess the navigability of rivers and streams.<sup>119</sup> The Montana Supreme Court, however, examined the navigability of the rivers as a whole for its determination of riverbed title.<sup>120</sup> The United States Supreme Court noted that a main justification for sovereign ownership of navigable riverbeds is that a contrary rule would afford private riverbed owners the right to construct improvements on their section of riverbed that may interfere with the public’s right to use the waterway for commerce.<sup>121</sup> However, because no commerce could have taken place on segments that were not navigable at the time of statehood, there is no reason that the State should own those segments under the equal footing doctrine.<sup>122</sup>

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<sup>113</sup> PPL Mont., LLC v. State, 229 P.3d at 460–61.

<sup>114.</sup> *PPL Mont.*, 132 S. Ct. at 1226.

<sup>115.</sup> *Id.* at 1235.

<sup>116</sup> *Id.* at 1226, 1235.

<sup>117</sup> *Id.* at 1229–31.

<sup>118.</sup> *Id.*

<sup>119.</sup> *Id.* at 1229. Under the equal-footing doctrine, a state gains title to navigable waters within its borders when it enters the Union. *PPL Mont.*, 132 S. Ct. at 1227–28. If the rivers in question were navigable when Montana entered the Union, Montana gained title to those riverbeds.

<sup>120.</sup> *Id.* at 1229.

<sup>121.</sup> *Id.* at 1230.

<sup>122.</sup> *Id.* at 1230–31.

## 2. Montana's Prior Use of the Segment Analysis

The United States Supreme Court further noted that the physical impairments affecting navigability vary over the length of a stream, particularly in the mountainous areas of the West.<sup>123</sup> Additionally, the Court found that the segment approach is used to determine starting points and ending points of disputed river segments, and that Montana state courts have used the segment approach when dividing riverbeds in order to determine their value and chargeable rents, specifically the rents the State sought to charge PPL for its use of riverbeds.<sup>124</sup>

## 3. The Short Interruption Theory

The United States Supreme Court also had trouble with the Montana Supreme Court's "short interruption" theory.<sup>125</sup> The Court admitted that it might find some interruptions to navigation so minimal that they merit treatment as part of a larger, navigable stretch of river.<sup>126</sup> However, by analyzing portions of Lewis and Clark's journals, the Court concluded that the interruptions in the rivers at hand had required substantial portages that had seriously interrupted travel along the streams when Montana was admitted to the Union.<sup>127</sup>

By compounding the factors mentioned above, the Court reached its primary objection to the decision of the Montana Supreme Court: that when dealing with the "general subject" of title to riverbeds or streams, states cannot use rules to determine navigability retroactively, which enlarge what had passed to the state when it was admitted to the Union.<sup>128</sup> While the Court analyzed navigability of the rivers in *PPL Montana* with specificity, the Court failed to expand upon its recent discussion of the judicial takings theory, which it had discussed only one year prior in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.

The discussion below will demonstrate that the Court should have applied the judicial takings theory to the facts of *PPL Montana*, but ultimately concluded that the facts of the case did not support the conclusion that a judicial taking occurred.

## V. AMICUS BRIEFS FILED IN *PPL MONTANA* DISCUSSING TAKINGS AND ESTABLISHED PRIVATE PROPERTY RIGHTS:

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123. *Id.* at 1230.

124. *Id.*

125. *PPL Mont.*, 132 S. Ct. at 1230.

126. *Id.*

127. *Id.* at 1231.

128. *Id.* at 1235.

## A. Briefs in Support of the Utility Company

The Montana Supreme Court's decision left many advocates uneasy about the future of private property rights in the West—especially concerning title surrounding navigable waterways. Accordingly, numerous amicus briefs were filed when *PPL Montana* wound its way before the United States Supreme Court, urging the Court to discuss the judicial takings theory in the case, and arguing that a judicial taking had deprived PPL Montana of its private property rights.

The first in this line of amicus briefs directly attacked the Montana Supreme Court's decision as a judicial taking: "The Montana Supreme Court's reinvention of the navigability-for-title test functionally operates as a judicial taking without just compensation."<sup>129</sup> The argument focused on Scalia's words in *Stop the Beach* stating: "if a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."<sup>130</sup>

Along with its takings argument, the Creekside Brief also urged that the Due Process Clause prohibits judicial destruction of private property rights.<sup>131</sup> As urged in Justice Kennedy's concurrence in *Stop the Beach*:<sup>132</sup> "It is . . . natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights."<sup>133</sup> However, Justice Kennedy and the Creekside Brief both mischaracterized the protections afforded to private property owners in the Due Process Clause when a court departs from established property law.<sup>134</sup>

Another amicus brief in support of the utility company focused on the uncertainty surrounding title to riverbeds under the Montana court's present-day use theory.<sup>135</sup> Any future event, either natural or artificial, which transforms a non-navigable riverbed into a navigable riverbed, may transfer title of that bed to the state.<sup>136</sup> From a property owner's perspective, many concerns surround the redefinition of established property rights:

a landowner may reasonably believe that he owns title to a riverbed underlying a section of river that everyone assumed was non-navigable when the state was admitted into the Union. Based upon that reasonable belief, the landowner may have invested substantial sums of money in constructing water diversion facilities and may have used those facilities for dec-

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129. Brief of the Creekside Coal. et al. as Amici Curiae in Support of Petitioner, *PPL Mont. v. Montana*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 3947563 at \*27 [hereinafter Creekside Brief].

130. *Id.* at \*27 (citing *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2602 (2010)).

<sup>131</sup> Creekside Brief, *supra* note 129 at \*28.

132. *See supra* Part III.A.

133. Creekside Brief, *supra* note 129 at \*27–28 (citing *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2605 (2010)). For additional discussion of the Due Process Clause as adequate protection for property rights, see *infra* Part VI.A.

134. *See infra* Part VI.A.

135. Brief of Mountain States Legal Found. and the Utah Farm Bureau Fed'n as Amici Curiae in Support of Petitioner, *PPL Montana, LLC v. Mont.*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 3973564 [hereinafter Mountain States Brief] (discussing the navigability test used by the Montana Court as undermining private property rights).

136. *Id.* at \*32.



ades for irrigation purposes. But under the Montana Supreme Court's new interpretation of the Equal Footing Doctrine, present-day use of the river could trump the landowner's settled and investment-backed expectations and transfer ownership of the portion of the riverbed to the state. In other words, the Montana Supreme Court's decision allows present-day use of a river to upset certainty of title.<sup>137</sup>

Yet another amicus brief in support of the utility company argued that navigability, when presented as it was in this case, is necessarily a concept of private property rights, and that title is necessarily the most important “stick” in the “Lockean bundle” of property rights.<sup>138</sup> As Justice Scalia asserted in *Stop the Beach*, the Takings Clause was not intended to address any particular branch or branches of government to the exclusion of others.<sup>139</sup> Accordingly, a court takes property if it declares that a once-established private property right no longer exists.<sup>140</sup>

Additionally, a line of reasoning inconsistent with Scalia's argument in *Stop the Beach* would render the Takings Clause superfluous.<sup>141</sup> Moreover, because courts have articulated rules prohibiting the judiciary from “violating non-economic rights,” the judiciary must correspondingly be prohibited from “redefining, and in effect nullifying title to, private property rights.”<sup>142</sup> Referencing the Montana Supreme Court's action in *PPL Montana I*, the Farm Bureau Brief alleged that the court's redefinition of PPL Montana's title to the riverbed through the use of a “novel legal standard” is the definition of a court destroying rights by fiat.<sup>143</sup> Concluding that the Montana Supreme Court's justification for its decision was ineffectual at best,<sup>144</sup> the Farm Bureau Brief expressed the same concern for what such unbridled judicial declarations would do to established private property rights in the future.<sup>145</sup>

As illustrated, these briefs contain the most animated arguments calling for an application of the judicial takings theory to the Montana Supreme Court's decision in *PPL Montana, LLC v. Montana*. Underlying the arguments from each organization is a fear for the uncertainty created by judicial disregard for established property rights, as well as a call to curb the current state of open-ended judicial ability to redefine property rights. The arguments put forth by organizations opposing PPL

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137. *Id.* at \*32–33.

138. Brief of the Montana Farm Bureau Fed'n et al. as Amici Curiae Supporting Petitioner, *PPL Montana, LLC v. Mont.*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 3973565 at \*27–28 [hereinafter *Farm Bureau Brief*].

139. *Id.* at \*28.

140. *Id.*

141. *Id.* at \*29.

142. *Id.*

143. *Id.* at \*30.

144. The court relied heavily in its decision on the fact that PPL Montana, LLC is an “unregulated utility” and that no ceiling exists for the amount of profits that PPL may collect. *PPL Montana, LLC v. Montana* 229 P.3d 421, 460–61 (Mont. 2010), *rev'd and remanded*, 132 S. Ct. 1215 (2012). The court also relied heavily on the calculations and methodology of an expert who testified in the district court—Dr. Duffield. *Id.*

145. *Farm Bureau Brief*, *supra* note 138, at \*30.

Montana's position,<sup>146</sup> while powerful, fail to recognize the detrimental impacts of judicial interference with established private property rights.

### B. Briefs in Support of Montana

Surprisingly, only one major amicus brief in support of respondent, State of Montana, addressed the judicial takings argument so prominent in the amicus briefs in support of petitioner.<sup>147</sup>

The navigability arguments articulated in the California Sportfishing Brief focused primarily, and unsurprisingly, on the policy of the necessity of public access to navigable waterways.<sup>148</sup> In support of such arguments, the California Sportfishing Brief alleged that PPL Montana's "piecemeal" approach to navigability threatened to undermine the public trust rights of access to rivers and streams.<sup>149</sup> The California Sportfishing Brief went on to state that a ruling in line with PPL Montana's approach to navigability would initiate a flood of litigation as private entities attempt to "lay claim to riverbed resources."<sup>150</sup> If any of these lawsuits were successful, the public's right to use and enjoyment of waterways that were previously public property would be permanently lost.<sup>151</sup>

What this argument ignored, however, is the fact that PPL Montana, and other utility companies, have operated hydroelectric facilities on these riverbeds for over a century, and that state agencies had assisted with the licensing procedures for the facilities.<sup>152</sup> Moreover, without at least some possessory interest in the lands, including riverbeds, underlying and surrounding the hydroelectric facilities, the public would be at liberty to access and interfere, though likely unintentionally, with facility operations and hydroelectric production. Accordingly, public policy would dictate that at least some exclusionary ability exists for PPL Montana and other utility companies to protect utility facilities that provide direct benefit to the general public in the form of power. Thus, in this case it appears that the need for hydroelectric power to the people dictates a dampening of the adage "power to the people."

The California Sportfishing Brief's discussion of judicial takings centered on the assertion that PPL Montana has never had a private property interest in the riverbeds. The takings argument began by declaring that nowhere in PPL Montana's merits brief is it claimed that the decision of the Montana Supreme Court effected a taking.<sup>153</sup> Unremarkably, the California Sportfishing Brief called for the Court to disregard the contentions of addressing the Takings Clause in the case as "wast[ing] the Court's time."<sup>154</sup> While the California Sportfishing Brief accurately

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146. See *infra* Part V.B; see also *supra* Part III.C.1.

147. Brief of California Sportfishing Prot. Alliance et al. as Amici Curiae in Support of Respondent, PPL Montana, LLC v. Mont., 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 5317318 [hereinafter California Sportfishing Brief].

148. *Id.* at \*18.

149. *Id.* at \*19.

150. *Id.*

151. *Id.*

152. See *supra* Part IV.A.

153. California Sportfishing Brief, *supra* note 147, at \*23.

154. California Sportfishing Brief, *supra* note 147, at \*24.

stated that PPL Montana did not raise the takings issue in its merits brief, the argument overlooked the Court's precedent in *PruneYard Shopping Center v. Robbins* that holds that federal claims are "adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."<sup>155</sup> Accordingly, the Court had jurisdiction to address PPL Montana's takings claims because the Montana Supreme Court's decision was at the very least a departure from well-established property law precedent.

Irrespective of this oversight on the part of PPL Montana, the California Sportfishing Brief alleged that if Montana's navigability determinations were correct, then no private right to title of the riverbeds was created, and PPL Montana had no private property interest that could be taken.<sup>156</sup> In furtherance of this assertion, the argument pointed to a portion of *Stop the Beach* stating "insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right."<sup>157</sup> While the argument insinuated that this case concerns the clarification of property rights, it fails to consider the fact that PPL Montana, and its predecessors, operated utility facilities on the riverbeds in question with full consent of the State of Montana, and was never before made liable for rents due to the State.<sup>158</sup> Given these circumstances, it would be more appropriate to label the source of the underlying lawsuit as a "land grab" on the part of Montana, as it tries to decrease federal landholdings within its borders.

The Brief next discussed the appropriate venue for the articulation of property law. Citing *Board of Regents of State Colleges v. Roth*,<sup>159</sup> the Brief accurately asserted "property interests in general, are defined by state law."<sup>160</sup> In furtherance of Montana's position, *United States v. Cress*<sup>161</sup> was cited for the proposition that state law becomes even more important when flowing water and the land beneath it are at issue.<sup>162</sup> Thus, PPL Montana would only have private property rights in the riverbeds if that title had been granted under state law, and that "a property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but *accept the determination of the state court*."<sup>163</sup> Accordingly, the Montana Supreme Court's ruling that PPL Montana had no private

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155. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980) (allowing a federal procedural due process claim to proceed before the Court when not raised below because the state supreme court decision overruled a previously well-established precedent).

156. California Sportfishing Brief, *supra* note 147, at \*24.

157. California Sportfishing Brief, *supra* note 147, at \*24 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2609 (2010)).

158. *See supra* Part IV.A.

159. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

160. California Sportfishing Brief, *supra* note 147, at \*25.

161. *United States v. Cress*, 243 U.S. 316 (1917). "States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks." *Id.* at 319.

162. California Sportfishing Brief, *supra* note 147, at \*25.

163. California Sportfishing Brief, *supra* note 147, at \*25-26 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2608 (2010)) (emphasis in brief for respondent).

property interest in the riverbed under Montana state law disposes of any contention that a taking occurred in this case.<sup>164</sup>

This premise, however, rests on the assumption that the State of Montana had gained title to the riverbeds in dispute when it was admitted to the union.<sup>165</sup> Montana can only claim title to the beds of rivers and streams within its borders that were navigable at the time of its statehood.<sup>166</sup> Accordingly, the premise that no taking occurred is not nearly as convincing after the United States Supreme Court ruled that the Montana Supreme Court had misapplied the determinative tests for navigability.<sup>167</sup>

The California Sportfishing Brief also discussed the relationship between federalism and state property rulings, advocating that federalism precludes federal court “watchdogging” of state court decisions involving property rights.<sup>168</sup> The brief argued that the founding fathers delegated power of “the lives, liberties and properties” of the people to the individual states along with the “internal order, improvement and prosperity of the State.”<sup>169</sup> It is true that the U.S. Supreme Court will generally not interfere when state courts interpret their own property law.<sup>170</sup> However, while this theory correctly notes that principles of federalism require deference to state court decisions of property law, the theory stands squarely in contention with the “adequate and independent state grounds doctrine,” under which state court decisions of property law are left intact only if the decision rests on state property law.<sup>171</sup>

The California Sportfishing Brief also asserted that the Due Process Clause of the Fourteenth Amendment, discussed below, precluded PPL Montana’s claims.<sup>172</sup>

This cross-section of amicus briefs filed in *PPL Montana, LLC v. Montana* represents the primary arguments asserted by each position in the action. As previously noted, the California Sportfishing Brief represents the only comprehensive discussion of the takings issue in the briefs in support of Montana.<sup>173</sup> One possible explanation for other briefs’ silence on this topic could simply be that PPL Montana did not plead this theory in its merits brief to the Court. However, looking at the amicus filings in the case, it is clear that the parties with an interest in the action urged the Supreme Court to address the judicial takings issue.

As illustrated in the amicus briefs supporting the utility company, the departure from settled property law by the Montana Supreme Court is extremely unsettling for property owners. By implementing a new test for determining navigability, the court undermined the meaning of private property throughout the state of Montana. The result of this new standard of review regarding navigability is that proper-

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164. California Sportfishing Brief, *supra* note 147, at \*25–26.

165. See generally *supra* Part IV.B.

166. See *supra* note 103, discussing the equal footing doctrine.

167. See generally *supra* Part IV.B.

168. California Sportfishing Brief, *supra* note 147, at \*26.

169. California Sportfishing Brief, *supra* note 147, at \*27 (quoting *The Federalist* No. 45, at 292–93 (Clinton Rossiter ed., 1961)).

170. See *infra* Part VI.B.

171. See *infra* Part VI.B.

172. See *infra* Part VI.A.

173. See California Sportfishing Brief, *supra* note 147.

ty owners cannot be sure whether the streams or rivers underlying their property are now navigable or non-navigable.

Additionally, access to public trust lands was never threatened in this case.<sup>174</sup> Any ability to exclude the public from the riverbeds would encompass a very small area surrounding the hydroelectric facilities.<sup>175</sup> Also, the departure from settled property law by the court necessarily redefines property rights without an opportunity to be heard, as required under the Due Process Clause of the Fourteenth Amendment.<sup>176</sup> With so little consideration for private property rights, the arguments set forth in the California Sportfishing Brief are unconvincing.

#### VI. NO ALTERNATIVES EXIST THAT WOULD PRECLUDE THE NECESSITY OF THE COURT'S APPLICATION OF THE TAKINGS CLAUSE TO THE ACTIONS OF THE MONTANA SUPREME COURT

Just as many entities argued that the Montana Supreme Court's decision effected a taking under the Fifth Amendment, other entities with an interest in the outcome of the case at the United States Supreme Court level advocated that there are alternatives to the judicial takings theory,<sup>177</sup> which provide adequate protection for property rights. However, none of the alternatives urged by supporters of the Montana Supreme Court's decision provide the level of certainty regarding established property rights that is needed in American society. Accordingly, none of purported alternatives warrant a rejection of the judicial takings theory.

##### A. The Due Process Clause Does Not Offer Sufficient Protection to Property Owners to Warrant a Rejection of the Judicial Takings Theory

One of the primary alternatives that critics posit to the judiciary as precluding an application of the Takings Clause is the Due Process Clause.<sup>178</sup> In his concurrence in *Stop the Beach*, Justice Kennedy asserted that “[t]he Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power,” and that the Court has held the Due Process Clause can be used by higher courts to invalidate erroneous property regulations by lower courts.<sup>179</sup> Justice Kennedy went as far as saying that the “natural” reading of the Due Process Clause places limits on a court's ability to eliminate established property rights.<sup>180</sup>

However, not all property owners would agree that the Due Process Clause provides sufficient protection for their rights.<sup>181</sup> At least one amicus brief in support of the utility company accurately asserted that the same concerns underlying a judicial elimination of established property rights that arise under the Due Process

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174. See *infra* Part VII.

175. See *infra* Part VII.C.

176. See *infra* Part VI.A.

<sup>177</sup> See *supra* Part V.

178. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring); California Sportfishing Brief, *supra* note 147, at \*27–28.

179. *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, J., concurring).

180. *Id.*

181. Farm Bureau Brief, *supra* note 138, at \*30–31.

Clause also arise under the Takings Clause—namely, that “[b]oth are concerned with protecting and sustaining established rights.”<sup>182</sup> The redefinition of property rights by a court implicates the Due Process Clause, though property owners—whose rights have been “subsumed” by a court’s departure from established property law—cannot be said to have had their day in court.<sup>183</sup> The Montana Supreme Court’s redefinition of navigability for title purposes altered the established property rights of Montana landowners without giving them an opportunity to be heard. Accordingly, because the Montana Supreme Court, and other state courts, can effect changes in property law that redefine established property rights, without providing those affected with an opportunity to be heard, the Due Process Clause is not an adequate alternative to an application of the Takings Clause to the judiciary.

#### B. Deference to State Court Interpretations of Property Law Does Not Insulate State Courts From an Application of the Judicial Takings Theory

Many critics of the judicial takings theory assert the Takings Clause cannot apply to actions of state courts because state courts are generally given full deference to interpret property law.<sup>184</sup> This concern is well founded, as it is well settled that state courts are the appropriate venue for deciding matters arising under a given state’s laws.<sup>185</sup> In fact, in his concurrence in *Stop the Beach*, Justice Breyer’s primary concern with an application of the Takings Clause to judicial action was that property law is generally governed by states individually.<sup>186</sup> There is a strong argument that a state supreme court’s interpretation and application of state law is preferable over the same analysis conducted by a federal court, simply because of the state court’s greater familiarity with the laws of the state in which it sits.<sup>187</sup>

The U.S. Supreme Court will not review state court decisions that “rest on adequate and independent state grounds.”<sup>188</sup> Further, a state court decision that applies federal law is adequate and independent if the decision does not raise a federal question and rests on a state law that is adequate to support the judgment.<sup>189</sup> As stated in *Herb v. Pitcairn*, the limit on the Court’s ability to review adequate and independent state grounds is “found in the partitioning of power between the state

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182. *Id.* at \*30.

183. *Id.* at \*31.

184. See *Stop the Beach*, 130 S. Ct. at 2918–19 (Breyer, J., concurring).

185. See, e.g., *Murdock v. City of Memphis*, 87 U.S. 590, 636 (1874); *Fox River Paper Co. v. R.R. Comm’n*, 274 U.S. 651, 657 (1927) (“It is for the state court[s] . . . to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent”); *Broad River Power Co. v. South Carolina ex rel Daniel*, 281 U.S. 537, 541 (1930) (the Supreme Court “will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court”).

186. See *supra* Part III.A.

187. *Dogan & Young*, *supra* note 14, at 125.

188. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); see also *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

189. *Thompson*, 501 U.S. at 729.

and federal judicial systems and in the limitations of [the Court's] jurisdiction."<sup>190</sup> This rule governs irrespective of procedural or substantive state law grounds.<sup>191</sup>

State court decisions involving property law are given deference, however, only if the decision rests on an application of state property law.<sup>192</sup> The *Pitcairn* Court went on to state: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."<sup>193</sup> The reasoning of the *Pitcairn* Court fits squarely with Justice Stewart's candid and rational approach to the Takings Clause.<sup>194</sup> Justice Stewart's concurrence in *Hughes v. Washington* addressed a property dispute very similar to that in *PPL Montana*: property that an individual rightfully believed was hers was declared public domain by the state court.<sup>195</sup> Naturally, Justice Stewart explained, the state court never perceived that it had in effect taken Ms. Hughes' property.<sup>196</sup>

A state court's exercise of authority may impair established property rights without any intention of the court to do so.<sup>197</sup> Irrespective of a state court's intent, however, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does."<sup>198</sup> Stewart held the "State" in *Hughes* effected a taking without the use of its power of eminent domain by transforming private property into public.<sup>199</sup> Indeed, Justice Stewart's assertion that a state court can effect a taking just as a state legislature can resonates in Justice Scalia's plurality in *Stop the Beach*.<sup>200</sup>

As further articulated by Justice Stewart, judicial takings occur when a state court decision effects a "sudden change in state law, unpredictable in terms of the relevant precedents."<sup>201</sup> Moreover, in determining whether such a change has occurred, the relevant inquiry is what a state court does, not what it claims or intends to accomplish.<sup>202</sup>

At the very least, the Montana Supreme Court's decision represents a sudden change in state property law, unpredictable when compared with relevant precedents. The state court determined navigability in a manner wholly inconsistent with that advocated, and documented, by the U.S. Supreme Court—making it very unlikely that those with property interests affected by the state court's decision would have ever expected the outcome they received.<sup>203</sup> In its determination of navigability of the disputed waterways, the Montana Supreme Court admitted that some portions of the rivers were not navigable when Montana entered the Union.<sup>204</sup> Ignoring these "short interruptions" in navigability, the court decided to determine navigabil-

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190. *Pitcairn*, 324 U.S. at 125.

191. *Thompson*, 501 U.S. at 729.

192. *See id.*

<sup>193</sup> *Pitcairn*, 324 U.S. at 125–26.

194. *See generally* *Hughes v. Washington*, 389 U.S. 290, 294–98 (1967) (Stewart, J., concurring).

195. *Id.* at 298.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See supra* Part III.A.

201. *Hughes*, 389 U.S. at 296 (Stewart, J., concurring).

202. *Id.* at 298

203. *See supra* Part IV.B.

204. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1226 (2012).

ity by assessing the rivers as wholes.<sup>205</sup> This approach to determining navigability was completely rejected by the U.S. Supreme Court,<sup>206</sup> and accordingly cannot be said to be a predictable application of state law, in accord with relevant precedents.

Additionally, the state court in *PPL Montana I* cannot be said to have been developing state property law, which states have long been held to be able to do.<sup>207</sup> Instead, the Montana Supreme Court determined navigability of the disputed waterways by applying tests under federal law—deciding that title to the riverbeds vested in the state under the equal-footing doctrine.<sup>208</sup> The application of federal law by a state court for the benefit of that state,<sup>209</sup> in no way illustrates the normal course of a state developing its own property law: “[f]or 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.”<sup>210</sup>

Justice Stewart’s reasoning in *Hughes* seems eerily relevant after reviewing the facts of *PPL Montana*. Many of the facilities operated by PPL Montana and its predecessors have been in existence for decades, with no title-based objection by the State until the case was first filed in Montana District Court.<sup>211</sup> Additionally, multiple state agencies assisted in the various licensing procedures for the utility facilities.<sup>212</sup> While PPL Montana had been paying rents to the United States for the use of riverbeds and uplands that were flooded by its hydroelectric facilities,<sup>213</sup> causing the private property requirement of the judicial takings analysis to fail, the actions of the Montana Supreme Court represent an effort to subsume the property interests of riparian property owners throughout the state. The court applied tests under federal law in order to determine navigability for title purposes, and effected a change in the established navigability analysis.<sup>214</sup> Thus, the decision of the state court in *PPL Montana* does not represent adequate and independent state action grounds; the state court’s decision relied on federal law regarding the application of navigability tests, and no state law adequately supported the decision. Accordingly, because state court decisions regarding property law do not always rest on adequate and independent state grounds, such decisions should not be insulated from the judicial takings theory.

#### VII. THE PUBLIC TRUST DOCTRINE AS A CONSIDERATION IN *PPL MONTANA*

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205. *Id.*

206. *See supra* Part IV.B.

207. *See supra* Part VI.B.

208. *See supra* Part IV.A. For a summation of the equal-footing doctrine, *see supra* note 103.

209. *See supra* Part IV.A. Benefits derived by the State of Montana from the state court’s decision include increasing the amount of state lands, increasing access to waterways, and \$41 million in past due rents to the state.

210. *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring).

211. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1225 (2012).

212. *Id.*

213. *Id.*

214. *Id.* at 1229–31.



While there is no doubt that the primary dispute in *PPL Montana* concerned title to riverbeds and whether PPL Montana owed rent to the State of Montana,<sup>215</sup> another dispute—access to Montana’s streams and rivers—is present throughout the case and the Montana Supreme Court’s decision. Indeed, the central concern underlying the *amicus* briefs filed in support of Montana may be public access to rivers and streambeds in Montana. It may be that in the arid west, access to streams and other waterways is as valuable as the streams themselves. Thus, it should come as no surprise that those whose livelihoods depend upon access to streams and rivers would fight to keep their sources of livelihood intact. Accordingly, by analyzing arguments surrounding the public trust doctrine and access to Montana’s streams and rivers, the muddy waters of *PPL Montana* become clearer.

#### A. Background of the Public Trust Doctrine

Disputes regarding access to waterways are nothing new in the American judicial system or culture. While most contemporary disputes over stream access involve western waters, the value of stream access is not unique to the west, and for that reason access to navigable waterways has been deemed paramount throughout the nation for much of its history.<sup>216</sup> As a means of providing the public with access to the nation’s navigable waterways, the U.S. Supreme Court adopted the public trust doctrine.<sup>217</sup>

Fundamentally, the doctrine requires that the individual states of the union hold public resources in trust for the people of those states.<sup>218</sup> For instance, public access to the banks of a navigable river in Idaho is protected by the doctrine up to the ordinary high water mark.<sup>219</sup> While initially limited to navigable waterways, the doctrine’s scope has expanded to include: lakes, riparian banks, aquifers, marshes, wetlands, springs, groundwater, beach access, trees and forests, parks, wildlife, fossil beds, and entire ecosystems.<sup>220</sup> The doctrine has also been recognized as a flexible common law principle, which can be extended to meet changing needs of the public.<sup>221</sup> At least some state legislatures and agencies have used the obligations imposed by the public trust doctrine to limit development or use of lands encumbered by the doctrine.<sup>222</sup> As needs of the public change, the specific resources protected by the doctrine may be extended to meet those needs.<sup>223</sup>

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215. See *supra* Part IV.A.

216. *Martin v. Waddell’s Lessee*, 41 U.S. 367, 413 (1842).

217. See *id.*; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476–77 (1970).

218. Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 424 (2005).

219. *Heckman Ranches, Inc. v. Idaho ex rel. Dep’t. of Pub. Lands*, 589 P.2d 540, 543, 99 Idaho 793, 796 (1979). The ordinary high water mark is “the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.” IDAHO CODE ANN. § 58-104(9) (West 2013).

220. Julia K. Bramley, Note, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine*, 38 B.C. ENVTL. AFF. L. REV. 445, 456 (2011).

221. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

222. *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984).

223. See Bramley, *supra* note 220, at 457.

Primarily a state common law doctrine, the public trust doctrine is codified by most states in their statutes or constitutions.<sup>224</sup> In Montana, the public trust doctrine and the state constitution create an “instream, non-diversionary right” in the public to the recreational use of navigable surface waters in the state, and private parties are not permitted to interfere with the public’s recreational use of such surface waters.<sup>225</sup> The doctrine also places certain constraints on state action.<sup>226</sup> For example, a state cannot surrender the trust through a transfer of title to public trust lands because a state’s responsibilities under the doctrine are analogous to its responsibilities to preserve the peace and exercise its police powers—all are powers which cannot be abdicated by the state.<sup>227</sup>

### B. The Public Trust Doctrine and the Takings Clause

The public trust doctrine plays a noteworthy role in a takings analysis, as courts have restricted private property rights on public trust principles in disputes involving: beach access, water use, navigable waters, tidelands, forests, and oil reserves.<sup>228</sup> In *Phillips Petroleum Company v. Mississippi*,<sup>229</sup> the Court held that the state had acquired title to all lands subject to tides as opposed to only navigable waterways. In that case, the majority stated “individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”<sup>230</sup>

To fully grasp the limitations placed on a private property owner’s rights, an understanding of state law encumbrances of private property is needed. In order to determine whether a property owner has suffered a taking, a court must first determine whether any law encumbers the proscribed uses of the property.<sup>231</sup> If any laws prevent the property owner from using his land in a particular manner, the owner never had full title to the land in the first place.<sup>232</sup> Laws encumbering the title to private property have traditional basis in “background principles of the [s]tate’s law of property or nuisance.”<sup>233</sup> Accordingly, a regulation, or court decision, that takes away a property interest encumbered by a background principle of state law does not take anything that the property owner ever had to lose.<sup>234</sup>

While the *Lucas* Court failed to delineate the meaning of “background principle of state law,”<sup>235</sup> lower court decisions have helped solidify the term. The background principle must: 1) be a state law or doctrine; 2) not be newly enacted; 3) not restrict more than what could be achieved in court; 4) apply to all landowners; and

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224. See *id.* at 456–57.

225. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 184–85 (Mont. 2011).

226. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

227. *Id.*

228. See *Bramley*, *supra* note 220, at 457–58.

229. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

230. *Id.* at 475.

231. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

232. *Id.* at 1029.

233. See *id.*

234. See *Bramley*, *supra* note 220, at 454.

235. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

5) not have ambiguous application.<sup>236</sup> If these five factors are satisfied, then the property owner never had full title to the property in the first place.<sup>237</sup>

Many lower courts have recognized the public trust doctrine as a background principle of state law,<sup>238</sup> however the Supreme Court has never directly addressed that question.<sup>239</sup> Notably, there are some instances in which courts have declined to recognize the public trust doctrine as a background principle; namely, when: an established state regulation contradicts with the doctrine; property use is limited beyond the doctrine's boundaries; or a federal court decision depends on state law that is silent regarding the doctrine.<sup>240</sup>

In sum, the public trust doctrine is a state common law principle that protects the public's access to public resources. Generally, the doctrine protects public access to navigable waterways, though it can be broadened to cover other resources as well. Additionally, public lands encumbered by the doctrine generally cannot be transferred out of the state's trust, though the doctrine can impact private property rights. Because the doctrine may encumber the use of private property, it may invariably alter the extent of title to private property. Accordingly, government action that takes away a property interest encumbered by the doctrine may not take anything that the property owner ever had to lose—compelling consideration of the doctrine in any takings analysis.

### C. The Public Trust Doctrine's Effect in *PPL Montana*

The amicus briefs in support of Montana rightfully raised the public trust doctrine as an influential factor in the outcome of the case.<sup>241</sup> In *PPL Montana I*, the utility company was the party initially arguing the disputed riverbeds were public trust lands.<sup>242</sup> A major concern for those advocating on behalf of Montana was public access to Montana's rivers and streams.<sup>243</sup> Those advocating a discussion of the public trust doctrine in *PPL Montana* undoubtedly felt that a public right, access to Montana's rivers, was being stripped from the public.<sup>244</sup> Interest groups, such as the California Sportfishing Protection Alliance, which advocated a public need for fishing access, have a meritorious cause, as access to fishing has long been recognized as a protected right of the public under the doctrine.<sup>245</sup> The arguments set forth by such organizations follow the premise that because the Montana Supreme Court declared that the riverbeds were navigable at the time of Montana's statehood, the riverbeds fell into the state's trust and the public accordingly has a right of access to them.

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236. See Bramley, *supra* note 220, at 455.

237. *Lucas*, 505 U.S. at 1027–30.

238. See *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 986 (9th Cir. 2002); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003).

239. See generally *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010). While the Court discussed background principles of state law and the public trust doctrine, the two topics were never discussed in congruence with one another. *Id.*

240. See Bramley, *supra* note 220, at 461.

241. See, e.g., California Sportfishing Brief, *supra* note 147.

242. *PPL Mont., LLC v. State*, 229 P.3d 421, 450 (Mont. 2010), *rev'd*, 132 S. Ct. 1215 (2012).

243. California Sportfishing Brief, *supra* note 147, at \*13.

244. See *id.*

245. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); Sax, *supra* note 217, at 475.

However, the public trust argument fails to consider the extent of the utility company's interference with public access to rivers and streams. The public would only be excluded from accessing the lands underlying PPL Montana's utility facilities.<sup>246</sup> Additionally, PPL Montana could likely argue that it holds a right to exclude the public from the areas immediately surrounding its utility facilities, even though it rents the land, necessitated by considerations of public safety. A court would be unlikely to find that the public's right to access public trust lands warrants public access to the dangerous areas immediately surrounding a hydroelectric facility.

#### VIII. MOVING FORWARD WITH AN APPLICATION OF THE JUDICIAL TAKINGS THEORY

The discussion above demonstrates that there is a need for an application of the Fifth Amendment's Takings Clause to judicial actions affecting property. American government is fundamentally a system of checks and balances, ensuring that no single branch of government becomes unreasonably more powerful than the others.<sup>247</sup> In line with this premise, and as noted in amicus briefs supporting Montana's position, principles of federalism dictate limited government intrusion and authority over the citizens and states of the United States.<sup>248</sup> It is not difficult to see that the judiciary would have far too much power if it were deemed able to declare as public what was once private property by simply implementing a new interpretation of settled law. The judicial takings theory, including its underlying principles, provides the most effective protection of private property rights from judicial fiat. However, as of yet, no Court decision has collectively established the parameters of an application of the Takings Clause to the judiciary.

##### A. What Type of Court Action Constitutes a Judicial Taking?

While both sides of the judicial takings debate set forth many arguments, the standard of judicial action that would qualify as a taking is rarely discussed. Perhaps the most definitive articulation of what judicial actions comprise a judicial taking comes from Justice Scalia's plurality opinion in *Stop the Beach*, asserting that a court takes property if it declares that a once-established private property right no longer exists.<sup>249</sup> However, as this statement comes from a plurality, the question of what standard of scrutiny should be applied to judicial action under the takings analysis remains open.

In a concurrence in *Hughes v. Washington*,<sup>250</sup> Justice Stewart laid out an early articulation of what exactly constitutes a judicial taking. As long as a state supreme court's decision conforms to "reasonable expectations" of state property law, that

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246. See *PPL Mont.*, 132 S. Ct at 1225.

247. See THE FEDERALIST NO. 45, at 292–93 (John Jay) (Clinton Rossiter ed., 1961).

248. California Sportfishing Brief, *supra* note 147, at \*27.

249. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

250. *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring).

decision should be granted deference.<sup>251</sup> However, if that court's decision constitutes a sudden change in state property law that is unpredictable, no such deference should be given.<sup>252</sup> Accordingly, the relevant standard under this articulation of the judicial takings theory is foreseeability.<sup>253</sup>

The Reply Brief for Petitioner in *Stop the Beach* urges a different standard of review.<sup>254</sup> There, it was argued that the proper standard of review, as repeatedly applied to state court decisions on property law, is the "fair or substantial basis" standard.<sup>255</sup> If the state is interested in the outcome, the Court should exercise a more searching review of the state court's decision.<sup>256</sup>

Another standard of review was created when Justice Scalia departed from *Hughes* in *Stop the Beach*. Scalia's plurality opinion in *Stop the Beach* rejected the foreseeability test in favor of an "established property right" standard.<sup>257</sup> This stems back to Scalia's articulation that courts "effect a taking if they recharacterize as public property what was previously private property."<sup>258</sup> Though neither standard is afforded precedential value, the established property right standard may still require Justice Stewart's foreseeability standard from *Hughes*.<sup>259</sup>

The correct standard for determining judicial takings involves a combination of the established property right and foreseeability tests. Although neither test currently has precedential value, the foreseeability test closely follows Scalia's pronouncement in *Stop the Beach* that a judicial taking involves re-characterization of an established property right.<sup>260</sup> The language used in Justice Stewart's dissent—"sudden change in state law"—amounts to an equivalent of Scalia's re-characterization.<sup>261</sup> Accordingly, a combination of both standards of review is needed in order to provide an accurate assessment of whether judicial action has effected a taking.<sup>262</sup> Thus, the correct standard of review under the judicial takings theory involves a two-step inquiry, determining whether a court: 1) effected an unforeseeable change in state law; that 2) eliminated an established property right.

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251. *Id.* at 296.

252. *Id.*

253. *See* Bramley, *supra* note 220, at 453.

254. Reply Brief for Petitioner at 21–24, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151), 2009 WL 3495336.

255. *Id.* at 21 (citing *Broad River Power Co. v. S.C. ex rel. Daniel*, 281 U.S. 537, 540–43 (1930)); *Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990).

256. Reply Brief for Petitioner, *supra* note 254, at 22.

257. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

258. *Id.* at 2601.

259. *See* Bramley, *supra* note 220, at 453; *see generally* D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 934 (2011).

260. *Stop the Beach*, 130 S. Ct. at 2601.

261. Characterization is defined as "the act of describing the character or qualities of someone or something." *Characterization Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/characterization> (last visited Nov. 22, 2013).

262. *See* Bramley, *supra* note 220, at 453; *see generally* Barros, *supra* note 259, at 934.

### B. What Facts Would Affect a Judicial Taking?

Having identified the elements necessary to make judicial action a judicial taking, it is next necessary to delineate what type of factual setting would amount to a judicial taking.

As the Takings Clause only applies to private property,<sup>263</sup> a judicial taking would necessarily begin with a tract of private property—likely, a large tract of private land. Rights in that private property would also need to have been recognized by the State under property law precedent up until the applicable judicial action.<sup>264</sup> Additionally, the applicable judicial action must constitute an unforeseeable change in, or re-characterization of, property law that eliminates the property right that, at all times prior, had been recognized by the state.<sup>265</sup> This unforeseeable departure from state law, eliminating a previously recognized right in private property, would amount to a judicial taking and require compensation under the Fifth Amendment.

Accordingly, in order for the facts of a case to constitute a judicial taking, there must be: 1) private property; 2) recognition by the state of rights in that private property; 3) an unforeseeable change in, or re-characterization of, property law by a court; and 4) the change in state law must eliminate the previously recognized property right.

In order for the Court to have found a judicial taking in *PPL Montana*, the utility facilities would have first needed to be located completely within a tract of private land that completely surrounded the bed of a non-navigable stream or river. If the stream or river were deemed non-navigable at the time of Montana's statehood, then the title would not have passed directly to the state under the equal-footing doctrine. The State would need to have previously acknowledged the utility company's rights in the property, though this would likely be established by the State's collection of property tax on the property. If the Montana Supreme Court, under this factual scenario, were to then declare the stream on which the utility facility was located as navigable for title purposes at the time of Montana's statehood, the utility company's previously established private rights in the property would be completely eliminated.

Under such facts, the a federal court would be correct in finding that the state court had taken PPL Montana's property, and the court would then properly act either to reverse the state court, or order an award of just compensation.

## IX. FINAL THOUGHTS ON THE JUDICIAL TAKINGS THEORY AS APPLIED TO *PPL MONTANA*

While the factual setting of *PPL Montana* is similar to that in *Stop the Beach*, several complications preclude an application of the judicial takings theory to *PPL Montana*. In order for judicial action to constitute a judicial taking, there must be:

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263. U.S. CONST. amend. V.

264. The State's collection of property tax would likely constitute its recognition of rights in the property.

265. *Stop the Beach*, 130 S. Ct. at 2602.

1) private property; 2) recognition by the state of rights in that private property; 3) an unforeseeable change in, or re-characterization of, property law by a court; and 4) the change in state law must eliminate the previously recognized property right. The facts of *PPL Montana* are inadequate to support a conclusion that the utility company suffered a judicial taking.

To begin with, there is no private property in dispute in *PPL Montana*.<sup>266</sup> *PPL Montana* has never been held to own the riverbeds underlying its utility facilities. Rather, *PPL Montana* leased the riverbeds, paying rent to the federal government.<sup>267</sup> The effect of the Montana Supreme Court's decision can, perhaps, be better characterized as forcing *PPL Montana* to pay rent to a different landlord.

It is also unclear as to whether Montana, or the federal government, ever recognized that *PPL Montana* had rights in the riverbeds as private property. As a matter of public policy, and as noted earlier, *PPL Montana* may possess a limited ability to exclude the public from certain areas of its hydroelectric facilities for the sake of public safety. Various state agencies also assisted *PPL Montana* and its predecessors with federal licensing proceedings concerning the hydroelectric facilities.<sup>268</sup> However, the State's assistance with licensing and a limited ability to exclude the public are not definitive acknowledgments of any specific property right regarding *PPL Montana's* use of the riverbeds.

One factor of the judicial takings analysis that is present in *PPL Montana* is the requirement that a state court effect an unforeseeable change in, or re-characterization of, property law.<sup>269</sup> Prior to the lawsuits in this case, the riverbeds underlying *PPL Montana's* hydroelectric facilities had been deemed non-navigable at the time of Montana's statehood, which passed title to the riverbeds to the federal government.<sup>270</sup> When the Montana Supreme Court decided that the rivers under consideration were actually navigable when Montana became a state, the court departed from the previously settled application of law by looking at factors that had not been previously considered when determining navigability.<sup>271</sup> This re-characterization of property law can be characterized as unforeseeable because the state court's decision "was based upon an infirm legal understanding of this Court's rules of navigability for title under the equal-footing doctrine."<sup>272</sup>

However, the facts of *PPL Montana* do not support the conclusion that the Montana Supreme Court's decision eliminated an established property right.<sup>273</sup> Prior to the lawsuit in *PPL Montana*, the utility company had paid rent to the federal government for its use of the riverbeds.<sup>274</sup> Thus, *PPL Montana's* interest in the riverbeds can be analogized to that of a tenant's interest in an apartment. The effect of the Montana Supreme Court's decision required the utility company to pay rents to the state.<sup>275</sup> Thus, the underlying quarrel in *PPL Montana* really concerns a dis-

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266. See generally *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215 (2012).

267. *Id.* at 1225.

268. *Id.*

269. See *id.*

270. See *id.*

271. *Id.* at 1226.

272. *PPL Mont.*, 132 S. Ct. at 1235.

273. See *id.*

274. *Id.* at 1225.

275. *Id.* at 1226.

pute between landlords. The tenant, PPL Montana, was paying rents to its landlord, the United States, when suddenly another landlord, Montana, told the tenant to start paying it instead of the initial landlord.<sup>276</sup> The only change the utility company experienced was whom it paid rents to.<sup>277</sup> Accordingly, PPL Montana enjoyed the same rights to the riverbeds under the state court's decision as it had previously.<sup>278</sup>

With the absence of several requirements of a judicial taking in the facts of *PPL Montana*, the Court's failure to address the theory makes more sense. Justice Kennedy delivered the Court's opinion in *PPL Montana*.<sup>279</sup> He also moved strongly against the judicial takings theory in *Stop the Beach*.<sup>280</sup> Accordingly, it is not hard to see why Justice Kennedy failed to mention the judicial takings theory in *PPL Montana*.

However, Justice Scalia's failure to raise the issue in either a concurrence or a dissent is puzzling. A likely explanation could be because he too recognized that several requirements of a judicial taking were not contained in the case's facts. In any event, the Court's choice not to address the judicial takings theory in *PPL Montana* may signal the Court's reluctance to revive the theory until the perfect set of facts winds its way before the Court.

*Bradley D. Vandendries\**

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276. *See id.*

277. *See id.*

278. *See PPL Mont., LLC v. Montana*, 132 S. Ct. 1215 (2012).

279. *Id.* at 1222.

280. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2613 (2010).

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