

# 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.

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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).



## 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> 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>

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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).

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.*



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 without 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>

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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.*

38. *Id.*

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



Justice Stevens would have been the deciding vote in the case, but recused himself from taking part in the decision because he owns beach-front 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

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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.



ory.<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 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.

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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).

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.



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 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.

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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).

<sup>90</sup> *Id.* at 241.

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

92. *Id.* at 8–9.

93. *Id.* at 3.

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



tion 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 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>

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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.

113. *PPL Mont., LLC v. State*, 229 P.3d at 460–61.

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



## 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.

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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.



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 decades 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

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(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.

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.



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 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 predeces-

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152. See *supra* Part IV.A.

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

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

155. *PruneYard Shopping Ctr. v. Robbins*, 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)).



volog 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 property 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>

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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.

174. *See infra* Part VII.

175. *See infra* Part VII.C.

176. *See infra* Part VI.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 independ-

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.



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 navigability 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 through-

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203. See *supra* Part IV.B.

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

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.*



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>

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 wa-

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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.

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.*



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.

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

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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.

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



ence.<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, de-

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.



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: 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 de-

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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.*

