Takings, *PASH*, and the Changing Coastal Environment

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INTRODUCTION

The topic of this portion of the Symposium is "Takings and the Changing Coastal Environment" and in this comment I focus on the "takings" part of that title, as well as offer some thoughts on our guiding subject, the Hawai'i Supreme Court's decision from a quarter-century ago in *PASH*,[1] which most famously noted "that the western concept of exclusivity is not universally applicable in Hawaii."[2] How might this statement be considered today through the lens of property law and property rights, especially if we account for the changes in the U.S. Supreme Court's approach to takings in the time since *PASH* was decided? And what implications does *PASH* have, if any, for property rights in the coastal zone?

This comment is in three parts. Section I summarizes the *PASH* opinion, and concludes that the jurisdictional questions presented in the case should have resolved the case, and the court should have avoided the takings questions, and the court reached out to resolve an issue it need not have. Next, Sections II, II, and IV offer up my three main criticisms of *PASH*: the first on the court's seemingly incomplete view of how Hawai'i property law treated the right to exclude; the second on whether defining "property" for purposes of federal takings analysis is only a matter of state law; and the third on separation of powers. Finally, Section V concludes with some thoughts about how courts should consider property rights in a changing coastal environment in light of these criticisms of *PASH*.

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[1] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[2] *Id.* at 447, 903 P.2d at 1268.

I. *PASH* AND "PRE-EXISTING LIMITATIONS" ON PROPERTY

Before I consider takings and separation of powers, a word about *PASH* itself. Even though it is best remembered as focusing on the specific issue of traditional and customary Hawaiian rights and their interplay with private rights in littoral property, I find the decision highly relevant to discussions about private property rights in general because the *PASH* opinion downplays the centrality of the right to exclude—a right the U.S. Supreme Court has described (in a case also involving Hawai'i property law) as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[3] Consequently, *PASH* has provided the analytic lens through which arguments about property rights in general are processed in our jurisdiction. The result in *PASH* turned on the "traditional and customary rights" provision in the Hawai'i Constitution, ratified by the people of Hawai'i after the 1978 Constitutional Convention:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[4]

It is easy to forget that in *PASH*, the court backed into the issue the opinion is most remembered for (how "traditional and customary rights" coexist—if at all—with the private rights attendant to of property ownership) because the case itself presented a rather straightforward question of appellate jurisdiction and third-party standing under the Hawai'i Administrative Procedures Act (HAPA).[5]

The case involved a littoral property owner who sought a shoreline development permit from the Hawai'i County Planning Commission to develop a resort complex.[6] Asserting that its members possessed a more

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[3] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 433 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (both quoting *Kaiser Aetna*).

[4] HAW. CONST. art. XII, § 7; *see also* HAW. REV. STAT. § 7-1 (2021) ("Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.").

[5] *See generally* HAW. REV. STAT. ch. 91 (2021).

[6] *PASH*, 79 Hawai'i at 429, 903 P.2d at 1250.

particularized stake in the outcome than the public at large, Public Access Shoreline Hawaii (PASH), an unincorporated community association, asked the Commission to allow it to intervene as a party, and demanded that the Commission conduct a "contested case"—essentially an agency trial—rather than the usual public hearing, to consider how the development application affected the rights of PASH's members.[7] PASH asserted its members had the right to access the land and the shoreline, and thus the coastal zone permit sought by the developer would affect those rights. The Commission concluded that PASH's members did not have any particularized interest in the outcome different from the general public, and consequently denied the request for a contested case for lack of standing.[8]

After the Commission granted the property owner's shoreline development permit, PASH sought judicial review under HAPA's grant of appellate jurisdiction to circuit courts to hear appeals from final decisions in agency contested cases.[9] It asserted the permit was invalid because the Commission's denial of PASH's request for a contested case tainted the result: without PASH at the table as a party the Commission could not adequately consider the permit application. Consequently, the dispute was one of jurisdiction—the property owner and the Commission asserted the circuit court lacked appellate jurisdiction under HAPA because the Commission had denied PASH's intervention and request for a contested case, and the circuit courts could only exercise HAPA's appellate jurisdiction if the agency had actually held a contested case.[10] They asserted that because the Commission had not held a contested case—only a public hearing—the only available method to challenge the Commission's conclusion that PASH lacked standing to demand a contested case was an original jurisdiction lawsuit.[11] PASH, on the other hand, argued that having been entitled to, but denied, an evidentiary agency hearing, the proper avenue for judicial review was under HAPA's appeal process.

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[7] *Id.* at 430, 903 P.2d at 1251.

[8] *Id.* at 429–30, 903 P.2d at 1250–51.

[9] *Id.* at 430, 903 P.2d at 1251; *see* HAW. REV. STAT. § 91-14(a) (2021) ("Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term 'person aggrieved' shall include an agency that is a party to a contested case proceeding before that agency or another agency.").

[10] *PASH*, 79 Hawai'i at 431, 903 P.2d at 1252.

[11] *Id.*

The Hawai'i Supreme Court agreed with PASH. It concluded that by considering the property owner's shoreline development permit application, the Commission had conducted a contested case.[12] That was probably news to the Commission, which had not treated its hearing like an administrative trial under HAPA with the presentation of evidence and argument, but more like a hearing in which any member of the public was permitted to testify for a limited time.[13] The court, however, concluded that the way to determine whether an agency held a contested case is not to look at how the agency labeled the hearing, but at the attributes of the hearing itself.[14] HAPA defines a "contested case" as a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."[15] Thus, the court held, if there was an agency hearing of some kind at which the rights of specific parties were determined, that hearing is a "contested case," and any person aggrieved by the agency's final decision may invoke the circuit courts' appellate jurisdiction under HAPA.[16] The Commission's own rules provided for a hearing on shoreline development permits, thus meeting the "agency hearing" requirement.[17] The big question the court reached out to decide was whether PASH's claimed "legal rights, duties, or privileges" to access the land and shoreline were "determined" in the course of that hearing. The Commission and the property owner argued no, the hearing on the owner's shoreline development permit determined *the owner's* rights.[18] The court rejected that argument, concluding instead that the rights of PASH members were also at stake in the Commission's proceedings considering the owner's shoreline development permit application.[19]

It is here that we get to the heart of the decision: the court held that PASH had standing and its members' interests were different than the general public because they were native Hawaiians who alleged—without challenge—that they had exercised their traditional and customary subsistence, cultural, and religious rights on these undeveloped lands.[20] The court held that PASH's request for intervention and a contested case

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[12] *Id.* at 432, 903 P.2d at 1253.

[13] *Id.* at 429, 903 P.2d at 1250.

[14] *Id.* at 434, 903 P.2d at 1255.

[15] HAW. REV. STAT. § 91-1 (2021).

[16] *PASH*, 79 Hawai'i at 431–32, 903 P.2d at 1252–1253.

[17] *Id.* at 429 n.2, 431–32, 903 P.2d at 1250 n.2, 1252-53 (citing Haw. Plan. Comm'n R. 9-11(B) (a "hearing shall be conducted within a period of ninety calendar days from the receipt of a properly filed petition [for a SMA permit] . . . [and] all interested parties shall be afforded an opportunity to be heard")).

[18] *Id.* at 434, 903 P.2d at 1255.

[19] *Id.*

[20] *Id.*

counted as participation in a contested case sufficient to invoke HAPA appellate jurisdiction.[21] The contested case had been held by the Commission without PASH as a party, but the Commission should have included PASH in that process. Indeed, the court sent the case back to the Commission to allow PASH to intervene and present detailed evidence.[22] The court could have stopped there because, having concluded that PASH had standing to intervene and a right to be included as a party in the Commission's contested case hearing, there was no need to go further and expand what would have been a significant, yet appropriately narrow ruling. But as we know, the court did not stop there. In its "go big or go home" moment, it reached out to preemptively address two additional issues.

First, the court determined that when reviewing shoreline development permit applications, the Commission—along with every other state and county agency—has a duty to require the applicant to protect traditional and customary Hawaiian rights.[23] Second, the court rejected the property owner's suggestion that traditional and customary rights as envisioned by the Hawai'i Constitution[24] could not be applied in a way that permitted non-owners to access private property. The owner asserted that allowing third parties to exercise those traditional and customary rights on private property would result in either a regulatory or a judicial taking by eviscerating the owner's right to exclude.[25] The court rejected the argument, relying on the so-called "*Lucas* exception" to categorical takings liability.[26] It concluded that when the government (including a court) imposes what amounts to a

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[21] *Id.* at 433–34, 903 P.2d at 1254–55 ("Having followed the procedures set forth by the HPC, PASH's participation in the SMA use permit proceeding amounts to involvement 'in a contested case' under HRS § 91–14(a). The mere fact that PASH was not formally granted leave to intervene in a contested case is not dispositive because it did everything possible to perfect its right to appeal.") (citations omitted).

[22] *See id.* at 452, 903 P.2d at 1273.

[23] *See id.* at 436–37, 903 P.2d at 1257–58. *See generally* David L. Callies & J. David Breemer, *The Right To Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. L. & POL'Y 39, 55 (2000) (citing *PASH* as an example of courts using customary rights and the public trust "to derogate from private property rights, and in particular, the right to exclude others").

[24] *See* HAW. CONST. art. XII, § 7.

[25] *See PASH*, 79 Hawai'i at 451, 903 P.2d at 1272. For the U.S. Supreme Court's views on the centrality of the right to exclude, see Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

[26] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

permanent or indefinite easement-like servitude on private property, it is not a taking if the servitude is based on a background principle of state property or nuisance law. Consequently, the court held that Hawai'i law imposing a traditional and customary right of entry was simply a "pre-existing limitation on the landowner's title."[27] In short, the court asserted that Hawai'i property law did not recognize—and, critically, *had never recognized*—the right of property owners to exclude third parties from exercising traditional and customary practices on the land, even though article XII, section 7 had only been added to the Hawai'i Constitution in 1978.[28] In a section of the opinion entitled "The development of private property rights in Hawai'i,"[29] the court set forth its vision of how Hawai'i's law and culture treated property rights generally (and the right to exclude specifically), and concluded with the most-oft-cited passage of the opinion:

> Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i.[30]

The eventual denial of a writ of certiorari by the U.S. Supreme Court[31] seems for the most part to have been the closing of the circle on any serious judicial criticisms of *PASH*'s approach or suggestions the court should revisit its decision. As in many Hawai'i controversies, resolution of the immediate case at hand by the Hawai'i Supreme Court somewhat settled the matter, and with a few exceptions, there has been little serious legislative or scholarly questioning.[32] However, I suggest the questions the court attempted to cut off by its *PASH* dicta are by no means settled, and in the next sections of this comment, I argue that *PASH* is subject to three main criticisms.

II. PASH*'s Incomplete Retcon of Hawai'i Property Law*

I remain less that fully convinced that the Hawai'i Supreme Court's efforts to retcon[33] the right to exclude out of Hawai'i property law is as

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[27] *PASH*, 79 Hawai'i at 452, 903 P.2d at 1273 (quoting *Lucas*, 505 U.S. at 1028–29).

[28] HAW. CONST. art. XII, § 7.

[29] *PASH*, 79 Hawai'i at 442–47, 903 P.2d at 1263–68.

[30] *Id.* at 447, 903 P.2d at 1268 (citing Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (1993), *cert. denied*, 510 U.S. 1207 (1994); United States v. Winans, 198 U.S. 371, 384 (1905)).

[31] Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996), *denying cert.* to *PASH*, 79 Hawai'i 425, 903 P.2d 1246 (1995).

[32] *But see*, *e.g.*, Callies & Breemer, *supra* note 23, at 55 (challenging *PASH*).

[33] Short for "retroactive continuity," the term "retcon" "is a literary device in which established diegetic facts in the plot of a fictional work (those established through the

accurate as the *PASH* opinion made it out to be. The *PASH* court rejected the idea that the imposition of what amounts to a public easement on all private property statewide may require the government to provide the owner of the servient estate with compensation.[34] It based this conclusion on the assertion that Hawai'i's traditional cultural and legal approach to private property never considered the right to exclude as essential.[35] However, I am not so sure that *PASH*'s essential foundation takes the entire picture into account. The concept of private property (or its cultural or legal analogue) has a long and established history in Hawai'i, and the line on one hand between "western concepts" of property law such as exclusivity, and Hawaiian law and culture on the other, was not as clearly delineated as the court in *PASH* suggested.

For example, under the pre-Māhele feudal system of land tenure that existed before 1848, private property was not formally recognized, but the land was not by any stretch of the imagination *terra nullius* or subject only to cultural practices.[36] Indeed, the pre-Māhele Kingdom practiced a very formalized and complex system of what we might call "property." The "right to exclude" (otherwise known as "keep out") while not formalized as such in pre-Māhele law or culture, was not by any means a foreign concept culturally.[37] Since at least the time of conquest and unification by Kamehameha I, land was "owned"—or at least possessed—by the King as sovereign,[38] with lesser chiefs and vassals having something akin to tenure-

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narrative itself) are adjusted, ignored, or contradicted by a subsequently published work which breaks continuity with the former." Wikipedia, Retroactive continuity, https://en.wikipedia.org/wiki/Retroactive_continuity (last visited May 30, 2021); *see also* Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 that Barred Takings Cases from Federal Court*, CATO S. CT. REV. 153, 159 & n.30 (2018–19) (discussing retconning in the context of legal arguments).

[34] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1993), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[35] *Id.* at 452, 903 P.2d at 1273.

[36] "Terra nullius" is "land without a sovereign." Kingman Reef Atoll Dev., L.L.C. v. United States, 116 Fed. Cl. 708, 746 (2014); *see also* New Jersey v. New York, 523 U.S. 767, 787–88 (1998) (mentioning the doctrine of *terra nullius* (land unclaimed by any sovereign) such as "a volcanic island or territory abandoned by its former sovereign").

[37] *See, e.g.*, State v. Akahi, 92 Haw. 148, 156 n.14, 988 P.2d 667, 675 n.14 (Ct. App. 1999) ("'Kapu' is a Hawaiian word which means '[t]aboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; sacred, holy consecrated; no trespassing, keep out.'" (quoting MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 132 (Rev. ed. 1986))).

[38] *See* Allan F. Smith, *Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law*, 7 U. HAW. L. REV. 1, 2 (1985) ("Kamehameha I (1758? –1819) by conquest became

by-possession with accompanying feudal and tax obligations.[39] This system presupposed some notion of "private" property, as limitations on the sovereign's exercise of eminent domain-type powers through the chiefs indicated.[40] Additionally, the Declaration of Rights of 1839[41] recognized a degree of protection of private property:

> Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, nothing whatever shall be taken from any individual, except by express provision of the law.[42]

The Great Māhele of 1848[43] and the subsequent Land Commission awards resulted in the formal recognition of private rights in property,[44] and the laws of the Kingdom of Hawai'i also recognized limitations on the sovereign's power to take private property.[45] The Constitution of 1852, for example, provided that property could not be taken or appropriated for

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monarch of all the islands and, by conquest, the owner of all land.").

[39] *Id.* at 2–3 (Land was divided "among his principal warrior chiefs, retaining, however, a portion of his lands, to be cultivated or managed by his own immediate servants or attendances. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again, after passing through the hands of 4, 5, or six persons from the King down to the lowest class of tenants.") (quoting LOUIS CANNELORA, THE ORIGIN OF HAWAII LAND TITLES AND THE RIGHTS OF NATIVE TENANTS 1 (1974)).

[40] *In re* Pa Pelekane, 21 Haw. 175 (Haw. Terr. 1912). As Professor Smith noted, Hawai'i's development of a feudal system was quite similar to England's property concepts. *See* Smith, *supra* note 38, at 2 ("The fascinating aspect of this is that in Hawaii, halfway around the world, a very similar feudal system arose in lands with no seeming connection with England and apparently for exactly the same societal purpose: land was governmental power, and it was used for that purpose.").

[41] KE KUMUKĀNĀWAI O KA MAKAHIKI CONSTITUTION 1839 (Haw.).

[42] *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (Haw. Kingdom 1864) (citation omitted). Hawai'i's notion of private property was also somewhat similar to English law as it moved from the feudal system to one of common law. *See* The Case of the King's Prerogative in Saltpetre, (1606) 77 Eng. Rep. 1294, 1294–95 (KB); 12 Co. Rep. 12, 12–13 (Lord Edward Coke noted that English homeowners could not prevent agents of the Crown from entering private property and removing saltpeter, an essential component of gunpowder, even if it resulted in damage to the property. But the sovereign's prerogative was limited, and the King's saltpetre men "are bound to leave the inheritance of the subject in so good plight as they found it."); *id.* at 1295–1296; 12 Co. Rep. 12, 12–13 ("They ought to make the places in which they dig, so well and commodious to the owner as they were before.").

[43] The "Great Māhele" was the division of law between King Kamehameha III and his chiefs in 1848. *See generally* JON J. CHINEN, THE GREAT MAHELE – HAWAII'S LAND DIVISION OF 1848 15–22 (1958).

[44] *See In re* Kamakana, 58 Haw. 632, 638, 574 P.2d 1346, 1349 (1978).

[45] *In re* Pa Pelekane, 21 Haw. 175 (Haw. Terr. 1912).

public use by the King unless "reasonable compensation" was provided.[46] This obviously seems modeled on the similar limitations in the U.S. Constitution (and the current Hawai'i Constitution), which recognizes the sovereign power to take or damage private property for public use or public benefit, as long as the owner is justly compensated for being forced to give up private rights for the public good.[47] Thus, the notion of private property—and the commensurate power to exclude others—was not merely a creature of "western" law imposed on the Kingdom, but was in a large sense a homegrown notion, ingrained in the culture and eventually the law.[48]

That private rights approach is very consistent with western concepts of private property; indeed, as one U.S. Supreme Court decision illustrates, it is extremely compatible. I am referencing, of course, *Kaiser Aetna v. United States*.[49] In that case, the owner of a loko kuapā fishpond on O'ahu dredged and filled it to create what is now known as Hawai'i Kai Marina.[50] The developer also removed an existing barrier beach, thus connecting the new Marina with the adjacent Maunalua Bay, resulting in the marina

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[46] *See* KINGDOM OF HAWAII CONSTITUTION June 14, 1852, art. 15 ("Each member of society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his proportional share to the expense of his protection; to give his personal services, or an equivalent, when necessary; but no part of the property of any individual, can, with justice, be taken from him or applied to public uses without his own consent, or that of the King, the Nobles, and the Representatives of the people. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore.").

[47] *See* U.S. CONST. amend. V ("[N]or shall private property be taken without just compensation."); HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged without just compensation").

[48] *See also* Damon v. Hawaii, 194 U.S. 154, 157–158 (1904) (holding that offshore fisheries, created and recognized by local law and custom, are private property: "The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months, and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right") (alteration in original) (citation omitted).

[49] 444 U.S. 164 (1979).

[50] *Id.* at 167.

becoming actually navigable from public waters of the Pacific Ocean.[51] A dispute arose between the owner—who wished to keep the marina private and exclude the boating public—and the federal government, which asserted that the act of converting the private fishpond to an actually-navigable marina by connecting it to the ocean resulted in a loss of the owner's right to exclude.[52] As the Court put it:

> The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.[53]

The Court rejected the government's argument, concluding that despite being actually accessible by public navigation, the marina never lost its pre-development character as private property, which included the right to exclude under Hawai'i property law. The Court did not take a formalistic approach that relied solely on Hawai'i property law's recognition of fishponds as private property. Instead, the Court noted that included in the analysis is the owner's "'economic advantage' that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'"[54] Hawai'i's law was squarely "in back of" the owner's assertion of privacy. More importantly, the Court recognized that certain elements, including long-standing governmental assurances, could lead to expectancies that, when backed with the owner's economic investment, the Court would call "property"—

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property

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[51] *Id.*

[52] *Id.* at 168–69.

[53] *Id.* at 176.

[54] *Id.* at 178 (quoting United States v. Willow River Co., 324 U.S. 499, 502 (1945)).

> right, falls within this category of interests that the Government cannot take without compensation.[55]

In *Kaiser Aetna*, the U.S. Supreme Court relied mostly on Hawai'i law to conclude that the fishpond never lost its character as private property. Thus, to require it to be opened to the public would be a taking requiring compensation. The Court's reliance on local property law should not be surprising because it has long held that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."[56]

III. THE U.S. SUPREME COURT MAY NOT AGREE WITH HAWAI'I'S VISION OF "PROPERTY"

That relates to my second criticism of *PASH*: that the Hawai'i Supreme Court's dismissal of takings liability under the U.S. Constitution is much too facile. As I noted earlier, *PASH*'s rejection of the property owner's takings argument was based on the notion from *Lucas* that preexisting restrictions in "background principles of the State's law of property and nuisance" may limit a property owner's rights without fear of a taking.[57] Viewing this as nearly a free hand (state law creates and defines property, after all), the *PASH* court concluded that Hawai'i property law had never recognized the right of property owners to exclude third parties from exercising traditional and customary practices on the land, [58] even though the provision requiring the state to protect and regulate traditional and customary practices was a relatively recent product of the 1978 Hawai'i Constitutional Convention.[59]

But state law has never been the be-all and end-all answer to the question of what constitutes "property," at least as far as what is a compensable

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[55] *Id.* at 179–80 (citing Montana v. Kennedy, 366 U.S. 308, 314–15 (1961); INS v. Hibi, 414 U.S. 5 (1973)).

[56] Board of Regents v. Roth, 408 U.S. 564, 408 U.S. 577 (1972); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law.").

[57] *Lucas*, 505 U.S. at 1029.

[58] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1993), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996) (citing Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (1993), *cert. denied*, 510 U.S. 1207 (1994); United States v. Winans, 198 U.S. 371, 384 (1905)).

[59] *Id.* at 452, 903 P.2d at 1273 (quoting *Lucas*, 505 U.S. at 1028–29).

property interest in takings.[60] In a critical footnote in *Kaiser Aetna*, the Court relied on federal law, not Hawai'i law, for the notion that the right to exclude is "universal" and "fundamental."[61] This means that local law cannot simply minimize or define such rights out of existence if owners have expectations of privacy backed by law. Federalism strains aside, the U.S. Supreme Court—not any state court—may be the ultimate arbiter of what qualifies as private property.

In that regard, the Court has traditionally been most protective of the right to exclude others, and it is one of the areas in which the Court has exhibited some "anti-federalism" leanings—by concluding that there are certain fundamental notions of private property in which state law may not intrude, even if state law for the most part defines and shapes property law. Justice Thurgood Marshall said it best in *Pruneyard Shopping Center v. Robins*,[62] where the Court considered whether a shopping center open to the public was a forum for public speech. The California Supreme Court had expressly changed its prior view of the California Constitution's free speech provision, overruled an earlier decision holding that it did not protect speech on shopping center property, and held that shopping centers therefore were fora for public speech.[63] The shopping center owner appealed to the United States Supreme Court, asserting what later became known as a judicial taking: the owner argued that when the California Supreme Court changed its speech jurisprudence to allow a physical invasion of its property by handbillers the owner wished to exclude, a taking resulted.[64] The U.S. Supreme Court held that the California Supreme Court's decision was not a taking, even though the California court acknowledged it had changed California law.[65] The change in law did not interfere with the shopping center owner's right to exclude because it had voluntarily opened its property to the public for shopping for the owner's commercial gain, it thus possessed only a limited right to exclude, and it had failed to demonstrate that allowing both handbillers and shoppers

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[60] *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) (state law defines property but that "is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property") (citing Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979)).

[61] *See Kaiser Aetna*, 444 U.S. at 180 n.11 (citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975); United States v. Lutz, 295 F.2d 736, 740 (5th Cir. 1961); Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[62] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

[63] Robins v. Pruneyard Shopping Center, 23 Cal.3d 889, 910 (1979).

[64] *Pruneyard*, 447 U.S. at 78–79.

[65] *Id.*

would interfere with whatever right to exclude remained.[66] Having invited the public in to shop, the owner could not be heard to complain that others entered as well. In short, the shopping center owner "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[67] Despite that holding, however, the Justices did not seem at all bothered by the notion that the takings doctrine might require them to make qualitive judgments about state property law.

Justice Marshall concurred in a separate opinion setting forth his view that property has a "normative dimension" which the U.S. Constitution protects from state court redefinition:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.[68]

Justice Marshall continued:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[69]

In *Stop the Beach Renourishment*, for example, six Justices agreed that "private property" is not a completely malleable concept that may be redefined at will by state courts.[70] The plurality noted that in *Lucas*, the

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[66] *Id.* at 77 ("The Pruneyard is open to the public for the purpose of encouraging the patronizing of its commercial establishments.").

[67] *Id.* at 84. In other words, the depriving the shopping center owner of its absolute right to exclude others was not the functional equivalent of an exercise of eminent domain, because the owner had affirmatively opened up its property to the public and had not shown that handbilling would interfere with whatever right to exclude remained.

[68] *Id.* at 93 (Marshall, J., concurring).

[69] *Id.* at 93–94 (Marshall, J., concurring). Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 94 n.3 (Marshall J., concurring) (quoting *Ingraham*, 430 U.S. at 672–73).

[70] Justice Scalia, writing for himself, Chief Justice Roberts, Justice Thomas, and Justice

Court had reserved for itself the determination whether the restriction in the regulation that was claimed to work a taking was inherent in title and a preexisting limitation on land ownership.[71]

The "core" common law property rights referenced by Justice Marshall include aspects of property such as interest following principal,[72] obtaining ownership of accretion,[73] the ability to transfer property,[74] and making reasonable use and development of land.[75] And, of course, the right to exclude others.[76] When these core rights are threatened, the U.S. Supreme Court has had little difficulty finding them to be fundamental property rights that transcend a state's ability to redefine them by regulating them out of existence without just compensation,[77] and without detailed reliance on state law.[78] But *PASH*'s approach is based on the tail wagging the dog:

Alito wrote that the State's argument that judges need flexibility to alter the common law has "little appeal when directed against the enforcement of a constitutional guarantee. . . ." *Stop the Beach Renourishment*, 560 U.S. at 727 (Scalia, J., plurality opinion). Justice Kennedy, writing for himself and Justice Sotomayor, stated that although "[s]tate courts generally operate under a common-law tradition that allows for incremental modifications to property law, but 'this tradition cannot justify a carte blanch judicial authority to change property definitions wholly free of constitutional limitations.'" *Id.* at 736 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis in original) (quoting Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 435 (2001)).

[71] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992). *See also id.* at 1014 ("[T]he government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.") (citation omitted).

[72] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980) (legislature may not simply declare that interest on principal is state-owned property); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (interest on lawyers' trust accounts is "property").

[73] Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68–69 (1874) (right to future accretions is a vested right and "rests in the law of nature").

[74] Hodel v. Irving, 481 U.S. 704, 716 (1987) (passing property by inheritance is a fundamental attribute of property).

[75] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[76] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); *see also* Palmer v. Atl. Coast Pipeline, LLC, 293 Va. 537, 583 (Va. 2017) (fundamental right to exclude may also be subject to certain common law privileges, such as the right of a potential condemner to enter the land for a survey to determine its suitability).

[77] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

[78] *See*, *e.g.*, *Lucas*, 505 U.S. at 1019; *Webb's Fabulous Pharmacies*, 449 U.S. at 155, 162; *see also Pruneyard*, 447 U.S. at 93-94 (1980) (Marshall, J., concurring); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 560 U.S. 702, 713 (2010) (plurality opinion) (noting "[s]tates effect a taking if they recharacterize as public property what was

an invocation of background principles (such as the public trust) is viewed as a nearly complete insulation of any changes a state court may want to make with property law, no matter how contrary that may appear to such core principles.

The Supreme Court recently reconfirmed the fundamental, federally-protected nature of the ability of property owners to say "keep out," otherwise known as the right to exclude. In *Cedar Point Nursery v. Hassid*,[79] the Court held that a California Agricultural Labor Relations Board regulation requiring agricultural employers to open their land to labor union organizers is a categorical taking, even though the resultant occupations are not permanent.[80] The Court emphasized that the regulation—which is framed as protecting the rights of agricultural employees to access union organizers, and allows the union access to an owner's property for up to three hours per day, 120 days per year—inflicts a special form of constitutional wrong. A "different standard applies" to analysis of these type of regulations than to other regulations that merely regulate use.[81] Leaning heavily on *Kaiser Aetna*'s view of the right to exclude as the stick in the property rights bundle "universally held the be a fundamental element of the property right" and "one of the most essential sticks," the Court held that physical invasions at the invitation of the government undermine the "central importance" of property.[82] Finally, the Court noted that a physical invasion may not be a categorical taking if the intrusion is "consistent with longstanding background restrictions on property rights."[83]

Will this reemphasis of "background principles" continue to insulate *PASH* easements from federal takings jeopardy? I conclude no, for two reasons. First, the Court noted that the background principles of property law exception is focused primarily on nuisance prevention, and "also encompass traditional common law privileges to access private property" such as necessity to avoid a public disaster or harm, or the police

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previously private property").

[79] 141 S. Ct. 2063 (2021).

[80] *Id.* at 2073 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred[.'").

[81] *Id.* at 2071 ("When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies.").

[82] *Id.* at 2073 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176, 179–180 (1979); Dolan v. City of Tigard, 512 U.S. 374, 384, 393 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (noting the right to exclude is the "sine qua non" of property)).

[83] *Id.* at 2079 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–1029 (1992)).

apprehending a suspect.[84] By contrast, *PASH* easements are not imposed to prevent harm and are the result of positive law with no Hawai'i common law roots, having only been added to the Hawai'i Constitution after the 1978 Constitutional Convention. Second, *Cedar Point* rejected the argument that state law alone defines "property," and can with the stroke of a pen—whether by amending the state constitution, or by issuing a judicial opinion—"manipulate" certain concepts inherent in the notion of the Court's conception of what it means to own property.[85] The Court noted that this conclusion is an "intuitive" one,[86] the product of "common sense" as much as Blackstone.[87] This reemphasized Justice Marshall's concurring opinion in *Pruneyard*, which asserted that "serious constitutional questions" would result if the "legislature attempted to abolish certain categories of common-law rights in some general way," and that "'core' common-law rights, including rights against trespass," cannot simply be abandoned.[88]

In sum, the *PASH* process remains subject to a federal constitutional analysis that it has not been seriously subject. Certiorari denied twenty-five years ago should not give much comfort that the present or future U.S. Supreme Court would respond similarly. We may prefer decisions about Hawai'i property law be made exclusively at Ali'iolani Hale, but like all important decision these days, we all know that the buck truly stops only at 1 First Street, NE, Washington, D.C.

IV. SEPARATION OF POWERS: WHY IS THE COURT LEADING THE CHARGE?

My final criticism of *PASH*'s rationale is related and is steeped in separation of powers. In *PASH*, the court "constitutionalized" the analysis by basing it on article XII, section 7 of the Hawai'i Constitution, which I view as an effort to insulate the result from any legislative tinkering or significant limitations by other parts of government, even while the court acknowledged that traditional and customary rights are subject, at least theoretically, to regulation by the other two branches.[89] That seems illusory

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[84] *Cedar Point*, 141 S. Ct. at 2079 (citations omitted).

[85] *Id.* at 2076 (citing Phillips v. Washington Legal Foundation, 524 U.S. 156, 164 (1998); *Lucas*, 505 U.S. at 1030; Horne v. Dep't of Agriculture, 576 U.S. 350, 365 (2015); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

[86] *Id.* at 2076.

[87] *Id.* at 2074.

[88] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

[89] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1993) ("In any event, we reiterate that the State retains the ability to reconcile competing interests under article XII, section 7. We stress that unreasonable or non-traditional uses are not permitted under today's ruling."), *cert. denied sub nom.*, Nansay

because by constitutionalizing the issue, the court made the essential point that the court reserved for itself the role of ultimate arbiter of questions of what practices constitute reasonable traditional and customary rights, whether to recognize those rights in any particular case, and whether any regulation by other branches is "reasonable." This approach held fast to the Hawai'i Supreme Court's established tradition of retaining for itself the role of gatekeeper for most decisions on resource allocation such as property development,[90] water law,[91] and environmental law.[92] For one rather seemingly-routine example, the common-law vested rights and zoning estoppel doctrines have been established by the court in such a way to avoid the more bright-line rules adopted by other jurisdictions.[93] Instead, Hawai'i law considers a particular use of land "vested" only after a property owner has relied "substantially" on official assurances by the government, after what is deemed by a court to be the "last discretionary action" in the applicable development process.[94] This standard results in the courts generally—and the Hawai'i Supreme Court specifically—retaining the final word on any remotely-controversial use of land statewide in any dispute in which vested rights are at issue. Allocation of water resources provides another example. After *PASH*, the Hawai'i Supreme Court extended that opinion's constitutional approach to curbing private rights to other areas of property law, most notably by expanding the notion of the public trust in water, concluding it is an overarching creature of Hawai'i constitutional law—and thus beyond the reach of mere legislation—which requires every agency in both state and municipal government to consider water allocation in every one of its decisions that might remotely affect the resource.[95]

Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[90] *See, e.g.*, Cnty. of Haw. v. Ala Loop Homeowners, 123 Hawai'i 391, 235 P.3d 1103 (2010) (holding that private parties may enforce state land use statutes).

[91] *See, e.g.*, Kauai Springs, Inc. v. Plan. Comm'n of Kauai, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) (holding that Hawai'i's version of the public trust doctrine requires every state and county agency to consider water resource allocation in every decision made).

[92] *See, e.g.*, Sierra Club v. Dep't of Trans., 120 Hawai'i 181, 197–200, 202 P.3d 1226, 1242–45 (2009) (holding that the legislature's reaction to the Supreme Court's earlier decision requiring environmental assessment of a highly-contentious interisland car ferry was unconstitutional special legislation).

[93] *See generally* Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17 (2004) (comparing Hawai'i's doctrines with other jurisdictions).

[94] Cnty. of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 325–29, 653 P.2d 766, 773–74 (1982).

[95] *See, e.g.*, *Kauai Springs*, 133 Hawai'i at 141, 324 P.3d at 951; Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 140 P.3d 985 (2006).

After recognizing the revolutionary nature of the *PASH* analysis (in what may be the most extreme understatement in any Hawai'i Supreme Court opinion, the court acknowledged, "this premise clearly conflicts with common 'understandings of property' and could theoretically lead to disruption"[96]), the court downplayed the conflict with the remarkable assertion that "the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances."[97] The court's baseless prediction seemed very much off the mark (which the court itself seemed to recognize a mere three years later): in a case reviewing a conviction for trespassing in which the defendant asserted a *PASH* privilege, the court had to "clarify" the ruling to categorically exclude "fully developed" lands from *PASH*'s reach:

> To clarify *PASH*, we hold that if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, improvements and infrastructure, it is *always* "inconsistent" to permit the practice of traditional and customary Native Hawaiian rights on such property. In accordance with *PASH*, however, we reserve the question as to the status of native Hawaiian rights on property that is "less than fully developed." [98]

This limitation was not based on any textual or explicit constitutional source, but was of the court's own invention in the earlier *Kalipi* case, in which the court based the curbing of traditional and customary rights on the court's own cultural notions of cooperation:

> In *PASH,* we reaffirmed the *Kalipi* court's nonstatutory "undeveloped land" requirement. We noted that "the *Kalipi* court justified the imposition of . . . [such a requirement] by suggesting that the exercise of traditional gathering rights on fully developed property 'would conflict with our understanding of the traditional Hawaiian way of life in which *cooperation*

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[96] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1993) (citing Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 7, 8–9, 656 P.2d 745, 749–750 (1982) ("The problem is that the gathering rights of § 7-1 represent remnants of an economic and physical existence largely foreign to today's world. Our task is thus to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title.")), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[97] *Id.*

[98] State v. Hanapi, 89 Hawai'i 177, 186–87, 970 P.2d 485, 494–95 (1998) (emphasis in original).

> *and non-interference with the wellbeing of other residents were integral parts of the culture.*'"[99]

The plethora of legal challenges in the quarter-century since that rely on *PASH*'s approach would seem stark evidence that the court's prediction did not bear out at all.[100]

This "judicializing" approach is antidemocratic and wrongly arrogates power in the least accountable branch. Property scholar Professor Thomas Merrill has written that by constitutionalizing the consideration of water resource allocations, the Hawai'i Supreme Court has shifted the "complex decisions" from the people's representatives (the legislature) to what may be the least democratic branch of government, the judiciary.[101] This same criticism can be leveled at *PASH* and its constitutionalizing of both traditional and customary Hawaiian rights, and inroads into property rights.[102] The essential question remains: do we want unelected judges, lawyers, and expert witnesses, and a narrow class of litigants alone shaping what qualify as traditional and customary rights, the limitations those rights may be subject to, and the extent of "the right of the state to regulate" these rights?[103] Or should these types of important decisions be made by "We the People?" I think this is uncharted territory, and even if the legislature has been content to avoid asserting its primary role in the past, it is worth reevaluating *PASH*'s conclusion that judges, and not the representatives of the people, make those calls. Courts are institutionally better equipped to consider restrictions on government actions that infringe on fundamental rights and enforcing the boundaries between other branches of government than they are at championing and enforcing positive assertions of government power. Until the debate on shoreline rights and responsibilities and *PASH* shifts from the courts to back to the branch most responsive to the people—the legislature—the legitimacy of *PASH*'s concrete should never be quite set.

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[99] *Id.* at 186, 970 P.2d at 494 (quoting *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271; *Kalipi* 66 Haw. at 9, 656 P.2d at 750).

[100] Westlaw, for example, shows the *PASH* case being referred to in no less than 84 reported cases, and cited to in secondary works such as law journal articles 169 times.

[101] *See* Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261, 282 (2016).

[102] Curiously, the court has never taken the same analytical approach with other Hawai'i constitutional mandates such as the imperative that the State "conserve and protect agricultural lands." *See* HAW. CONST. art. XI, § 3 ("The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.").

[103] HAW. CONST. art. XII, § 7.

V. PROPERTY RIGHTS IN A CHANGING COASTAL ENVIRONMENT

Finally, I arrive at some brief thoughts about how the above ideas can be applied in a changing coastal environment. In the coastal zone, we tend—wrongly, I believe—to think in absolutes.[104] After all, one of the major risks of owning real estate near a boundary that shifts due to natural forces is that the oceans will rise, and if so, well, that is just too bad. This is the idea that because sea levels are rising, littoral property owners just have to take the hit, and that they have no right to affirmatively protect their property from being consumed by the ocean or natural beach processes. And what of the science? Does it not inform us that shoreline hardening, seawalls, sandbags, and other artificial measures designed to protect littoral homes and property do more overall harm than good, and simply push the problems to neighbors?[105] I suggest that such references alone will not resolve the difficult legal questions posed by the changing coastal environment.

First, as I noted above, traditional Hawai'i law and culture recognized private rights—including ability to use, keep,[106] and modify property. These cultural and legal concepts were applied in the coastal environment as well, and Hawai'i law recognized what looks very much like private rights in littoral or even submerged land. For example, in In re *Kamakana*,[107] Chief Justice William S. Richardson, writing for the unanimous Hawai'i Supreme Court agreed that traditional fishponds—specifically loko kuapā, which are complex artificial structures engineered and built in the ocean adjacent to, and makai of, the shoreline[108] (much like a modern-day seawall)—are

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[104] *See, e.g.*, David Schultz, *A Dilemma For California Legislators: Preserve Public Beaches Or Protect Coastal Homes*, CLEAN TECHNICA (May 31, 2021), https://cleantechnica.com/2021/05/31/a-dilemma-for-california-legislators-preserve-public-beaches-or-protect-coastal-homes/ ("Often, these goals are mutually exclusive. If officials build a sea wall, they may end up sacrificing a public beach to protect the homes beside it. If they decline to build a sea wall, they may surrender the homes to preserve the beach. The conflicting dictates of the Coastal Act of 1972 have led to decades-long legal disputes with activists on one side, property owners on the other and the Coastal Commission caught in the middle.").

[105] *See generally*, Colin Lee, *Eliminating the Hardship Variance in Honolulu's Shoreline Setback Ordinance: The City and County of Honolulu's Public Trust Duties as an Exception to Regulatory Takings Challenges*, 43 U. HAW. L. REV. 464, 470 (2021) ("the City and County of Honolulu (the City) must remove the hardship variance for artificial shoreline hardening measures and properties that do not meet the coastal setback minimum on O'ahu's sandy beaches in Revised Ordinances of Honolulu Chapter 23 ("Chapter 23") to fulfill its duty under the public trust doctrine to protect O'ahu's sandy beaches").

[106] *See, e.g.*, Donald J. Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. ST. U. L. REV. 1021 (2018).

[107] 58 Haw. 632, 574 P.2d 1346 (1978).

[108] "'Makai' means 'on the seaside, toward the sea, in the direction of the sea.'" Bremer

"treated under our land system in the same manner as are the land areas."[109] In short, these artificial structures are considered part of the land, not part of the ocean, and treated legally as fast (dry) land, and private property. There, the court was presented with a Land Commission ruling that awarded the ahupua'a of Kawela by name only and without reference to metes-and-bounds (and with no express mention of the littoral fishpond).[110] The question was whether the grant, which described the boundary as "following the shore to the point of commencement" included or excluded the fishpond.[111] If the "shore" meant the mauka beach, then the fishpond was not part of the Land Commission award and was in the public domain because it was makai of the shore.[112] By contrast, if the fishpond existed at the time of the Land Commission award in 1854, it was considered by law and culture as part of, and inseparable from, the land—private and not open to anyone but the grantee—and the "shore" ran along the pond's makai wall, even if the grant and Land Commission award did not expressly mention it.[113] The court concluded that "[w]hen an ahupua'a was awarded by name, the grant was meant to cover all that had been included in the ahupua'a according to its ancient boundaries."[114] Because "both inland and shore fishponds were considered to be part of the ahupua'a and within its boundaries," the award and grant were presumed to include the fishponds as private property.[115] With private status came the right to exclude others.

These structures were prolific. For example, one survey estimated that on the island of Moloka'i, "[t]here are evidence of forty-one fish ponds along the section of the coast . . . between Kaunakakai and Kainalu."[116] And not just Moloka'i; the private nature of these artificial littoral structures was essential to the creation of much of urban Honolulu (for example, Hawai'i

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v. Weeks, 104 Hawai'i 43 n.3, 45, 85 P.3d 150, 152 n.3 (2004) (quoting MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 114 (Rev. ed.1986)).

[109] *Kamakana*, 58 Haw. at 640, 574 P.2d at 1351.

[110] *Id.* at 634, 574 P.2d at 1348–49.

[111] *Id.* at 634, 574 P.2d at 1348.

[112] *Id.* at 636, 574 P.2d at 1348 (citing State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 114, 566 P.2d 725, 731 (1977) (lands "overlooked" in the Māhele and not awarded were unassigned and part of the public domain)).

[113] *Id.* at 640, 574 P.2d at 1350.

[114] *Id.* at 638, 574 P.2d at 1340 (citing *In re* Boundaries of Pulehunui, 4 Haw. 239 (Haw. Kingdom 1879); *see also In re* Boundaries of Paunau, 24 Haw. 546 (Haw. Terr. 1918)).

[115] *Kamakana*, 58 Haw. at 639, 574 P.2d at 1350 (citing Harris v. Carter, 6 Haw. 195, 197 (Haw. Kingdom 1877); 1939 Haw. Op. Att'y Gen. No. 1689, at 456).

[116] Letter from James K. Dunn, Surveyor, Territory of Hawaii to Hon. Frank W. Hustace, Jr., Comm'r of Public Lands re: Molokai Fish Ponds 1 (Mar. 18, 1957) (on file with the author); *see also* CATHERINE C. SUMMERS, MOLOKAI: A SITE SURVEY (1971) (details on each then-existing or historical fishpond).

Kai, Wailupe, Niu, and Enchanted Lake are all former fishponds, dredged and filled by asserting private property rights). My point in all this is not to explicate the nuances of Hawai'i's law of fishponds, merely to suggest that the culture and law both accommodated and promoted substantial modifications to otherwise natural shoreline areas that substantially modified the natural beach condition and sand replenishment process, and also recognized private rights—including the right to exclude and the right to use and to keep and protect property—including in the littoral zone or in the shoreline. These may not be mere unilateral expectations, but those which have longstanding law "back of them."[117]

Second, many proposals to undermine these rights are based on the assumption that the baseline for analysis should be the properties in their "natural" condition, whatever that might be.[118] However, the search for a condition of an ever-changing and modified shoreline is a chimera. Land in Hawai'i is always changing, and it has been centuries since Hawai'i's shoreline was in what we might deem a pristine or unaltered condition. Referring to the building of littoral fishponds in Hawai'i, one researcher noted:

> Modifications of the environment by human beings have been going on for centuries in Hawaii. From the moment people first set foot on these islands the process of altering the environment to provide for their needs has continued.[119]

Did these historical and customary alterations of the shoreline noted above also alter the "natural" beach processes and create effects on the usual functioning of wave action and accretion and erosion? Undoubtedly. Thus, the courts should avoid taking positions based on what is supposedly a property's natural condition, as such baselines are both historically inaccurate, and often limited by the viewer's own temporal perspective.

Third, what of the government's obligation to affirmatively protect private property, and an owner's right to protect their land.[120] These are

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[117] Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (quoting United States v. Willow River Co., 324 U.S. 399 (1945)).

[118] *See* Lee, *supra* note 105 at 476 (noting that the City and County of Honolulu's ordinances seek to "better protect and preserve the natural shoreline, especially sandy beaches").

[119] MARION KELLY, LOKO I'A O HE'EIA: HE'EIA FISHPOND iii (1975) (describing the "environmental adaptations" made historically, and contrasting "those made today," and suggesting that although ancient littoral construction such as enclosing reefs with rock walls and altered the ecology, those changes were "implemented with conservation of the productive resources as the guiding principle").

[120] *See*, *e.g.*, Lauri Alsup, *The Right to Protect Property*, 21 ENV'T. L. 209, 216 (1991) (arguing that courts should recognize a property owner's fundamental right to protect her

hardly novel concepts. For one longstanding example, in *The Case of the Isle of Ely*,[121] Lord Coke concluded that the sewer commissioners possessed only the power to repair existing sewers, and not create new ones. In the course of the analysis, Lord Coke recognized that the sovereign has the obligation "to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted." The same should apply to littoral properties today.

Finally, I return to takings. The takings clauses of the Hawai'i and U.S. Constitutions do not, by themselves, act as direct limitations on the Hawai'i Supreme Court's ability to impose a *PASH* easement on private property or otherwise alter the longstanding common law of accretion and erosion (for example), but instead assign the price tag to those decisions which are made for the public's benefit. The clauses limit the ability to regulate only indirectly, under the idea that the cost of public benefits should not be placed solely on the individual owners who are called upon to contribute their rights, but should be borne, in the words of the U.S. Supreme Court, "by the public as a whole."

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[122]

Any analysis in *PASH* of regulatory inroads into private rights should have included a discussion of both the costs of that exercise of regulatory authority, and who, "in justice and fairness," bears those costs. And, most critically, who decides the public benefit. If we like public parks, then we should not mind paying the freight—the taxes—to acquire and maintain them, and to fully compensate the owners whose property is taken for them. The takings clauses democratize the costs of public uses and benefits, by forcing an evaluation of the actual cost of government action by distributing the economic burden to the benefitted public. They require the government to ask, "can we afford this?" Justice Holmes famously wrote in *Pennsylvania Coal Co. v. Mahon*, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[123] But when a court is doing the taking, that question is never asked.

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own property from waste).

[121] Isle of Ely, 77 Eng. Rep. 1139, 1139 (K.B. 1609).

[122] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[123] 260 U.S. 393, 416 (1922).

The compensation imperative is not limited to the paradigmatic government action triggering compensation—cases of actual physical invasion or seizure where the government recognizes its obligation to pay compensation. The Supreme Court has acknowledged that there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests[.]"[124] Compensation is not limited to those instances in which the government is affirmatively acquiring property. It also includes situations in which the government does not exercise eminent domain, but its actions to regulate for the public health, safety, and welfare under the police power affect the property's use and value nonetheless.[125] In these types of takings, the government does not acknowledge any obligation to provide compensation.[126] The compensation requirement is triggered when the effect of government action is "so onerous that its effect is tantamount to a direct appropriation or ouster."[127] For example, if the government causes private property to flood, it must pay compensation.[128] If a municipal ordinance requires the owners of apartment buildings to allow the fixture of cable television equipment, compensation is required.[129] If the government requires the owner of a private marina to allow public boating under the government's navigation power, compensation is required.[130] If environmental regulations require an owner to leave their property "economically idle," compensation is required.[131] And the same rules apply, at least theoretically, when a court so alters "background principles" of Hawai'i property law in a way that overturns long-established expectations.[132]

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[124] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

[125] *See, e.g.*, United States v. Cress, 243 U.S. 316, 318–19, 328 (1917) (citing United States v. Lynah, 188 U.S. 445, 470 (1903)) (finding that the character of the government's invasion may constitute a taking, even when it does not directly appropriate the title to property).

[126] *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019); Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) (rejecting the argument that no taking was possible because defendant had not exercised eminent domain power and was acting pursuant to the state's regulatory power).

[127] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

[128] *See, e.g.*, *Cress*, 243 U.S. at 328 ("Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the [Fif]th Amendment.") (quoting *Lynah*, 188 U.S. at 470).

[129] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 n.16, 441 (1982) (finding that even a de minimis permanent physical occupation is a compensable taking).

[130] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 165–66, 180 (1979).

[131] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–19 (1992).

[132] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 560 U.S.

CONCLUSION

Allow me to conclude with this: although it is good to remember *PASH*'s famous dictum "that the western concept of exclusivity is not universally applicable in Hawaii," we must also not forget that in the one court that ultimately matters—the U.S. Supreme Court—the western concept of constitutional property rights—including the paramount right to exclude—is universally applicable. *PASH* fans, take note.

702, 713 (2010) (plurality opinion).