CLARENCE THOMAS AND THE FIFTH AMENDMENT: HIS PHILOSOPHY AND ADHERENCE TO PROTECTING PROPERTY RIGHTS

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I. INTRODUCTION

Since the appointment of Clarence Thomas by President Bush in 1991, there has been a significant amount of scholarly writing devoted to the nation's second African–American Supreme Court Justice. Most of this scholarship, however, seems devoted either to the writings and views of Justice Thomas on race relations[1] or to the controversy surrounding his confirmation hearings.[2] Surprisingly, little has been written regarding his opinions on other issues, including his key role in creating the growing body of Supreme Court case law regarding the constitutional rights of private property owners.

The goal of this article, therefore, is to analyze the written opinions, voting record and interpretive scheme of Justice Thomas concerning the protection of this important civil right. This article concludes that Justice Thomas is an emerging proponent of property rights on the highest Court.

Instructive in this analysis is a review of three key constitutional decisions Justice Thomas has authored, one regarding the limitations on federal power to regulate under the Commerce Clause, *United States v. Lopez*,[3] one involving the Tenth Amendment, *U.S. Term Limits v. Thornton*,[4] and one regarding the applicability of the Fifth Amendment Just Compensation Clause to the imposition of retroactive financial liability, *Eastern Enterprises v. Apfel*.[5] Each of these decisions reveals a strict constructionist approach to constitutional decision–making and Justice Thomas's willingness to apply the plain language of the

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1 *See, e.g.*, Hon. Julian Abele Cook, Jr., *Thurgood Marshall and Clarence Thomas: A Glance at Their Philosophies*, 73 MICH. B.J. 298 (1994); Scott D. Gerber, *Justice Clarence Thomas: First Term, First Impressions*, 35 HOW. L.J. 115 (1992).

2 *See, e.g.*, Donald P. Judges, *Confirmation as Consciousness–Raising: Lessons for the Supreme Court From the Clarence Thomas Confirmation Hearings*, 7 ST. JOHN'S J. LEGAL COMMENT. 147 (1991); Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443 (1993).

3 514 U.S. 549 (1995).

4 514 U.S. 779 (1995).

5 524 U.S. 498 (1998).

Constitution. This approach, when applied to the Fifth Amendment, bodes particularly well for vigorous protection of property rights. Indeed, much of the erosion of property rights protection that has occurred in the past few decades[6] results from judicial decision making that ignores the plain language of the Just Compensation Clause.[7] This crucial portion of the Fifth Amendment requires government to pay the costs of programs that effectively take private property and holds Congress accountable by testing its willingness to pay the full cost of its programs. This accountability is sometimes deemed undesirable by activist judges. Justice Thomas has helped strengthen governmental accountability through strict adherence to the Constitution's plain meaning.

Justice Thomas has also written two opinions in cases involving the due process rights of property owners when their property is seized through civil actions by the government in connection with criminal proceedings. Although in both *United States v. James Daniel Good Real Property*[8] and *Bennis v. Michigan*,[9] the facts were insufficient to support the property owner's claims, Justice Thomas's written opinions again reflect his willingness to adhere to the plain meaning and original purpose of the Due Process Clause.[10]

With respect to property rights cases, Justice Thomas took the extraordinary step of dissenting from the Court's denial of *certiorari* in a case that involved the question of land use permit exactions.[11] His dissent is consistent with his decisions construing the Due Process and Commerce Clauses and the Tenth Amendment, in that it evidences a strong commitment to applying the plain understanding of the text of the Constitution as written. Consistent with his written decisions, Justice Thomas has voted in favor of property rights protection in every takings case that has come before the Court during his tenure.[12] This

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[6] *See, e.g.*, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[7] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[8] 510 U.S. 43 (1993).

[9] 516 U.S. 442 (1996).

[10] "[N]or be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[11] *See* Parking Ass'n v. City of Atlanta, 515 U.S. 1116 (1995).

[12] *See* Suitum v. Tahoe Reg. Planning Agency, 520 U.S. 725 (1997); Babbitt v. Youpee, 519 U.S. 234 (1997); Bennis v. Michigan, 516 U.S. 442 (1996); City of Edmonds v. Oxford House Inc., 514 U.S. 725 (1995); Dolan v. City of Tigard, 512 U.S. 374 (1994); United States v. James Daniel Good Real Property, 510 U.S. 43 (1993); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The one exception not discussed herein is a case in which Justice Thomas joined a unanimous Court in rejecting a physical occupation takings case. *See* Yee v. City of Escondido, 503 U.S. 519 (1992). In *Yee*, mobile home park owners asserted that a rent control ordinance operated as a forced occupation of their

support has been particularly crucial since several landmark regulatory taking cases, such as *Lucas v. South Carolina Coastal Council*[13] and *Dolan v. City of Tigard*,[14] have risen to the Supreme Court during his tenure.

II. THE COMMERCE CLAUSE AND THE TENTH AMENDMENT

During the 1994 Supreme Court Term, Justice Thomas wrote a concurrence and a dissent in two key constitutional decisions; in both instances, he employed a plain meaning interpretation of the Constitution that resulted in upholding the constitutional scheme of a federal government with limited powers.

A. The Commerce Clause—United States v. Lopez

In *United States v. Lopez*,[15] the Court struck down the Gun Free School Zones Act of 1990 (GFSZA)[16] as a violation of the Commerce Clause.[17] The GFSZA made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[18] The defendant in *Lopez* was a high–school student in San Antonio, Texas charged with carrying a concealed handgun onto school property in violation of the GFSZA.[19] The United States Court of Appeals for the Fifth Circuit reversed the conviction of the trial court, holding that "Section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause."[20]

The Supreme Court affirmed the decision of the Fifth Circuit. The majority, speaking through Chief Justice Rehnquist, held that Congressional enactments are justified under the requirements of the Commerce Clause only when they regulate activities having a "substantial effect" on interstate commerce. Applying the "substantial effect" test to the GFSZA, the Court held that the GFSZA did not meet this standard, because

> [the regulation of gun possession] has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define

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property in violation of the Just Compensation Clause. *See id.* Because the court disposed of the primary property rights issues on procedural grounds, a closer look at this case is not useful for purposes of this discussion.

13 505 U.S. 1003 (1992).

14 512 U.S. 374 (1994).

15 514 U.S. 549 (1995).

16 18 U.S.C. § 922(q)(1)(A) (1990).

17 *See Lopez*, 514 U.S. at 551.

18 18 U.S.C. § 922(q)(1)(A).

19 *See Lopez*, 514 U.S. at 551.

20 Lopez v. United States, 2 F.3d 1342, 1367–68 (5th Cir. 1993).

> those terms. . . . It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[21]

Justice Thomas concurred with the majority, but wrote separately to emphasize a strict adherence to the text of the Commerce Clause:

> [O]ur case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.[22]

According to Justice Thomas, the "substantial effect" test currently used by the Court impermissibly exceeds the grant of authority contained in the Commerce Clause, because it renders many of the other enumerated powers in Article I, Section 8 superfluous: "Put simply, much if not all of Art. I § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct."[23]

In addition, Justice Thomas brings out another constitutional flaw with the "substantial effects" analysis:

> Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.[24]

Justice Thomas further objected that "the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession."[25] Justice Thomas found this expansive reading of Congress' power under the Commerce Clause clearly at odds with the plain text of Article I: "But it seems to me that the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 states."[26]

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[21] *Lopez*, 514 U.S. at 561.

[22] *Id.* at 584 (Thomas, J., concurring).

[23] *Id.* at 589 (Thomas, J., concurring).

[24] *Id.*

[25] *Id.* at 585 (Thomas, J., concurring). Justices Stevens, Souter, and Breyer each wrote dissenting opinions.

[26] *Id.*

In deciding how the Commerce Clause should be construed, Justice Thomas also took into account the fact that the Framers understood the term "commerce" to "consist of selling, buying, and bartering, as well as transporting for these purposes."[27] Justice Thomas was impressed with the fact that the Founding Fathers were aware that many other activities substantially affected these particular "commercial" activities, including activities specifically listed under the enumerated powers section of Article I:

> Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other. . . . Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affect commerce, the founding generation did not cede authority over all these activities to Congress. . . . Indeed the Framers knew that many of the other enumerated powers in § 8 dealt with matters that substantially affected interstate commerce. Madison, for instance, spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." Likewise, Hamilton urged that "if we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavor as soon as possible to have a navy." In short, the Founding Fathers were well aware of what the principal dissent calls "economic realities."[28]

Following his review of both the text and history of the Commerce Clause, Justice Thomas urged the majority to go back to the language of the text of the Constitution to test whether the exercise of federal power exceeded the Commerce Clause:

> [T]he Court [in *Gibbons*] was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could never be said to be commerce "among the several States."[29]

Because the Commerce Clause is often the authority for federal regulatory programs that affect property rights,[30] a less expansive interpretation of the Commerce Clause reduces the federal government's ability to regulate real property that has traditionally been left to state government on a local level.

B. The Tenth Amendment—U.S. Term Limits, Inc. v. Thornton

Just as Justice Thomas looked to the express language of the Constitution's Commerce Clause in *Lucas,* his opinion in *U.S. Term*

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[27] *Id.*

[28] *Id.*, at 590–92 (Thomas, J., concurring) (citations omitted).

[29] *Id.* at 595 (Thomas, J., concurring).

[30] *See generally* Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1988); Endangered Species Act, 16 U.S.C. § 1536 *et seq.* (1988).

Limits, Inc. v. Thornton[31] looked directly to the text of the Tenth Amendment to determine its meaning.[32] In *Term Limits,* the Arkansas Constitution, amended in 1992, prohibited the name of an otherwise eligible candidate for Congress from appearing on the general election ballot if that candidate had already served three terms in the House of Representatives or two terms in the Senate.[33] The League of Women Voters of Arkansas challenged the amendment in state court, alleging that it violated the United States Constitution. Both the trial court and the Arkansas Supreme Court[34] agreed, holding that Amendment 73 violated Article I of the Constitution.

The United States Supreme Court, in a 5–4 decision, affirmed the decision of the Arkansas Supreme Court and struck down Amendment 73 on constitutional grounds.[35] Justice Stevens wrote the majority opinion and concluded that "the power to add qualifications is not within the 'original powers' of the States, and thus is not reserved to the States by the Tenth Amendment."[36] The Court held that "electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution."[37]

Justice Stevens' artificially narrow interpretation of the Tenth Amendment provoked a stinging rebuke from Justice Thomas in his dissenting opinion, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Scalia. Justice Thomas took issue with the aspect of the majority opinion that appeared to render meaningless the plain language of the Tenth Amendment:[38]

> These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States "are reserved to the States respectively, or to the people." With this careful last phrase, the Amendment avoids taking any position on the division of power between the state governments and the people of the States: it is up to the people of each State to determine which "reserved" powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from

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31 514 U.S. 779 (1995).

32 *See id.* at 847 (Thomas, J., dissenting).

33 *See id.* at 783–84.

34 *See* U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994).

35 *See Term Limits*, 514 U.S. at 783.

36 *Id.* at 800.

37 *Id.* at 805.

38 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

> that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State. . . . The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.[39]

Since the people of the several states acting through their state government have all powers not prohibited to the state government or delegated to the federal government by the Constitution, the next step in Justice Thomas's analysis was to determine whether, in fact, states have a "reserved" power in modifying the qualifications for their members of Congress. In analyzing the question of reserved powers, Justice Thomas again looked at the text of the Tenth Amendment to reach his decision:

> Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled. . . . [T]he Tenth Amendment's use of the word "reserved" does not help the majority's position. If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it . . . [the Tenth Amendment] does not prevent the people of the States from amending their state constitutions to remove limitations that were in effect when the Federal Constitution and the Bill of Rights were ratified.[40]

In short, Justice Thomas returned to the text of the Constitution to conclude that the restrictions on Congressional membership are not fixed and immutable but merely mandatory minimum qualifications that may be augmented through the action of the people of the several states at their own choosing.[41]

By enforcing the plain meaning of constitutional provisions in these two important interpretive cases, Justice Thomas gave property rights advocates powerful precedent with which to hold government accountable to the Just Compensation Clause of the Fifth Amendment.

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[39] *Term Limits*, 514 U.S. at 848 (Thomas, J., dissenting).

[40] *Id.* at 851–52 (Thomas, J., dissenting).

[41] Justice Thomas's decision is consistent with leading decisions of the Court, such as *New York v. United States*, 505 U.S. 144 (1992), which recognized the Tenth Amendment as an important check on the power of the federal government. This emerging line of cases recognizes that the Tenth Amendment limits the federal government to those powers delegated by the Constitution. This infers that the powers of the states and their citizens are far more expansive, consisting of the entire universe of actions not specifically delegated or prohibited by the Constitution.

III. CIVIL ASSET FORFEITURE AND THE DUE PROCESS CLAUSE

In the context of civil asset forfeiture,[42] Justice Thomas adheres to the rule of law while acknowledging the importance of preserving private property rights. Although bound by generations of strong common law precedent establishing the constitutionality of civil asset forfeiture, Justice Thomas voiced his concern that its abuse will undermine legitimate private property rights.

In *United States v. James Daniel Good Real Property*,[43] Justice Thomas disagreed with the majority that seizure of property before final judgment in a civil asset proceeding violates the Due Process Clause of the Fifth Amendment.[44] James Daniel Good pleaded guilty to promoting an illegal drug after state officers found marijuana and drug paraphernalia in his house. The federal government seized his house under the Comprehensive Drug Abuse Prevention & Control Act of 1970[45] before the final judgment of the forfeiture proceeding. The majority of the Court affirmed the Ninth Circuit's holding that the Fifth Amendment's Due Process Clause required a pre–deprivation hearing. Because Justice Thomas felt that the Court's prior case law had already properly answered the narrow question of pre–deprivation,[46] he wrote a separate opinion dissenting in the result.[47]

Justice Thomas concurred, however, with the majority's concern over the potential breadth of the forfeiture statute[48] in question: "Indeed, it is unclear whether the central theory behind *in rem* forfeiture, the fiction 'that the thing is primarily considered the offender,' can fully justify the immense scope of § 881 (a)(7)."[49]

Three years later the Court heard the case of *Bennis v. Michigan*.[50] A wife had her jointly owned automobile seized and sold after her husband was convicted of having sex with a prostitute inside the car. In Justice Thomas's concurring opinion upholding the seizure, he again deferred to precedent and a correct interpretation of the Constitution but

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[42] Several federal statutes allow the government to seize property in certain narrow circumstances. For example, the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Controlled Substances Act) permits the government to seize private property used in the manufacture and distribution of narcotics, as well as property purchased with proceeds earned from narcotic sales. 21 U.S.C. §§ 801–971 (1988 & Supp. IV 1992).

[43] 510 U.S. 43 (1993).

[44] *See James Daniel Good Real Property*, 510 U.S. at 80.

[45] 21 U.S.C. §§ 801–971 (1988 & Supp. IV 1992).

[46] *See* Calero–Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[47] *See James Daniel Good Real Property*, 510 U.S. at 82–83.

[48] 21 U.S.C. § 881(a)(7) (1988).

[49] *James Daniel Good Real Property*, 510 U.S. at 82 (citation omitted).

[50] 516 U.S. 442 (1996).

this time he strongly cautions the majority of the problems with the statute:

> Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.[51]

Most importantly, Justice Thomas made clear in *James Daniel Good Real Property* his clear commitment to private property rights:

> In my view, as the Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property. Although I disagree with the outcome reached by the Court, I am sympathetic to its focus on the protection of property rights—rights that are central to our heritage.[52]

Although Justice Thomas voted against the property owner in these cases, his rationale makes clear that it was a vote for jurisprudential integrity, not against property rights.

IV. PROPERTY RIGHTS AND THE JUST COMPENSATION CLAUSE

Since Justice Thomas joined the Supreme Court in 1991, he has participated in four major property rights cases involving regulatory takings under the Just Compensation Clause of the Fifth Amendment. His voting record in three of these cases is consistent with his approach to constitutional decision–making in that it reflects a plain reading of the Fifth Amendment, favoring payment of just compensation for the taking of private property.[53] In *Parking Association v. City of Atlanta*[54] he left no doubt that he favors a plain reading of the Just Compensation Clause similar to the analysis he employed with respect to other constitutional provisions.

A. Lucas v. South Carolina Coastal Council

Lucas v. South Carolina Coastal Council[55] was the first regulatory takings case during Justice Thomas's tenure on the bench.[56] In *Lucas,*

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[51] *Id.* at 456–57 (Thomas, J., concurring).

[52] *James Daniel Good Real Property*, 510 U.S. at 81.

[53] *See* Suitum v. Tahoe Reg. Planning Agency, 520 U.S. 725 (1997); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[54] 515 U.S. 1116 (1995).

[55] 505 U.S. 1003 (1992).

the Supreme Court held that when "a regulation that declares 'off–limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."[57] Justice Thomas's vote provided the Court a five–Justice majority holding that the property owner was owed just compensation unless traditional nuisance principles would apply to the property development at issue. Given the 5–4 vote that occurred in *Lucas*, in just his first–term, Justice Thomas cast the decisive vote in favor of private property rights in a decision that may have set the stage for the next generation of Supreme Court takings decisions. Justice Thomas replaced Justice Thurgood Marshall, who retired at the end of the 1990 Term of the Court. Given Justice Marshall's general proclivity to side with the government in property rights cases,[58] it seems possible that Justice Marshall would have sided with the government in *Lucas*, thus depriving property owners with one of the strongest Supreme Court precedents for property rights.

Lucas involved the application of the Beachfront Management Act (BMA), passed by the South Carolina legislature in 1988.[59] The BMA flatly prohibited, without exception, construction of any structures in areas of the South Carolina coast designated by the Coastal Council as subject to beach erosion.[60] The Coastal Council, subsequent to Mr. Lucas' purchase of two building lots, defined this construction prohibition to include Lucas's two beachfront lots.[61] As a result, Mr. Lucas filed suit in state court alleging that the application of the BMA to his property resulted in a taking of his property without just compensation in violation of the Fifth Amendment.[62] The trial court agreed, and awarded compensation to Mr. Lucas.[63] The South Carolina Supreme Court, however, reversed the trial court on the grounds that the BMA was designed to prevent the "serious public harm" of beach erosion and did not require compensation to affected landowners.[64]

The U.S. Supreme Court reversed the South Carolina Supreme Court and remanded the case to the trial court for a determination whether the "background principles" of common law nuisance applied to

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[56] *See id.*

[57] *Id.* at 1030.

[58] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[59] *See Lucas*, 505 U.S. at 1008.

[60] *See id.*

[61] *See id.*

[62] *See id.* at 1009.

[63] *See id.*

[64] *See id.* at 1009–10.

the BMA regulation of Mr. Lucas' property.[65] Justice Scalia wrote the opinion for the majority and was joined by Chief Justice Rehnquist and Justices Thomas, White, and O'Connor.[66]

In *Lucas,* the Court announced a *per se* rule to apply whenever all of the beneficial and productive uses of land have been destroyed by government regulation:

> regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.[67]

Significantly, the Court unequivocally acknowledged an analysis consistent with the plain language of the Just Compensation Clause. The Court rejected the traditional *ad hoc* balancing of interests that it had espoused in the past that almost always resulted in no compensation for the property owner.[68] Indeed, the significance of this decision was not lost on Justice Blackmun who, in dissent, accused the majority in *Lucas* of launching "a missile to kill a mouse,"[69] and openly expressed his fear "that the Court's new policies will spread beyond the narrow confines of the present case."[70] In fact, the majority, which included Thomas, sent a clear message that the Constitution provided for nothing less than just compensation whenever government action deprives owners of their beneficial use of their private property.

B. Dolan v. City Of Tigard

The next takings decision considered by the Supreme Court after the *Lucas* decision was *Dolan v. City of Tigard.*[71] *Dolan* addressed takings in the context of regulatory permit exactions. Like *Lucas, Dolan* was decided by a 5–4 margin in favor of the property owner. Thus, the

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[65] *See id.* at 1031–32.

[66] Justice Kennedy wrote a concurring opinion while Justices Blackmun and Stevens wrote dissenting opinions and Justice Souter filed a separate statement questioning the granting of *certiorari.*

[67] *Id.* at 1018.

[68] *See, e.g,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 124 (1978) (identifying three factors to guide courts in determining on an *ad hoc* basis whether the Fifth Amendment has been violated: (1) the character of the government's actions, (2) the reasonableness of the owner's investment–backed expectations, and (3) the economic impact of the regulation).

[69] *Lucas,* 505 U.S. at 1036 (Blackmun, J., dissenting).

[70] *Id.* (Blackmun, J., dissenting).

[71] 512 U.S. 374 (1994).

presence of Justice Thomas in the majority, as in *Lucas,* constituted the 'deciding' vote in the case.[72]

The property owner in *Dolan* applied to the city of Tigard, Oregon for permission to expand an existing plumbing supply store.[73] The city responded by imposing several conditions on the granting of a permit.[74] These conditions included the requirements that the property owner dedicate to the public a portion of her land to be used for floodplain control and complete a bicycle path in exchange for a building permit.[75] The property owner refused to comply without just compensation and appealed from the planning appeals board to the state court of appeals, and then to the state supreme court, alleging that the conditions constituted an unconstitutional taking of the property.[76]

Although the state courts denied relief to the property owner, the U.S. Supreme Court held that the city failed to show the necessary degree of connection between the required dedication and the impact that expanding the plumbing supply store would have upon flood control and traffic.[77] In so holding, the Court held that exactions must be "roughly proportional" to the impact of the proposed use for which permission is being sought.[78] Further, the Court held that government must make "particularized findings" that this rough proportionality exists before the exactions may be constitutionally imposed.[79]

The Court's new test to determine the constitutionality of regulatory exactions is consistent with the plain meaning of the Fifth Amendment: "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would not have occurred."[80] In other words, the *Dolan* Court developed the rough proportionality test to prevent governments from using the land use permitting process as a "back door" method of gaining

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[72] Here, as in *Lucas*, Justice Thomas voted in the opposite direction that his predecessor on the Court, Justice Thurgood Marshall, would likely have done. In fact, this "change" in the outcome of the case is even easier to predict in *Dolan*, since Justice Marshall voted with the dissent against the property owner in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the case that established the "essential nexus" analysis for regulatory permit exactions upon which the *Dolan* Court built its "rough proportionality" analysis.

[73] *See Dolan*, 512 U.S. at 379.

[74] *See id.* at 380.

[75] *See id.*

[76] *See id.* at 382.

[77] *See id.* at 394–95.

[78] *See id.* at 391.

[79] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[80] *Dolan*, 512 U.S. at 384.

title to desired property and thereby avoiding the Fifth Amendment's requirement of just compensation for the taking.

Further, the majority opinion provided evidence that the Court is beginning to rethink its *Carolene Products*[81] distinction between "fundamental" rights and "economic" rights, at least within the context of "takings" law, and the differing scrutiny to which government actions affecting these rights are subject:

> Justice Stevens' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights . . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.[82]

C. Exactions—Parking Association of Georgia v. City of Atlanta

During the 1994 Supreme Court Term, Justice Thomas wrote an opinion specifically on the Fifth Amendment Takings issue. In *Parking Association v. City of Atlanta*,[83] the Court denied *certiorari* in a case involving the application of the Court's landmark decision in *Dolan v. City of Tigard*.[84] Justice Thomas took the extraordinary step of writing a dissent to the denial of *certiorari* in order to argue that the "rough proportionality" test announced by the Supreme Court in *Dolan* applied to legislative enactments just as it did to administrative processes.[85]

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[81] In *United States v. Carolene Products, Inc.*, 304 U.S. 144, 152–53 n.4 (1938), the Court established that regulations directed at "discrete and insular minorities," i.e., religious, national or racial minorities, would receive a stricter level of constitutional scrutiny than regulations targeted at other "economic" rights, such as property and contract rights. As a result, regulations affecting "economic" rights need only have a "rational basis" in order to be held valid, with the burden placed on a regulated party to show that no rational basis exists for the regulation.

[82] *Dolan*, 512 U.S. at 392 (citations omitted). Justice Stevens objected to the Court's holding requiring government to make particularized findings whether there is "rough proportionality" between the required exaction and the impact of the proposed land use, essentially arguing that this requirement shifts the "burden of proof" in these cases from the property owner to the government. According to Justice Stevens, government should not have to make these preliminary findings because land use regulation is mere economic regulation that is given a "strong presumption of validity." *Id.* at 402–03 (Stevens, J., dissenting).

[83] 515 U.S. 1116 (1995).

[84] 512 U.S. 374 (1994).

[85] *See supra* Part IV.B.

The exaction deemed unconstitutional in *Dolan* was imposed through an administrative agency, and not by action of a legislative body in the city of Tigard.[86] In cases involving exactions imposed through legislative action, courts interpreting *Dolan* have split on whether the "rough proportionality" test may also be applied to exactions mandated by legislative bodies.[87]

In *Parking Association,* at issue was an Atlanta ordinance that required certain existing surface parking lots to include landscaped areas equal to at least ten percent of the paved area and to have at least one tree for every eight parking spaces.[88] The ordinance covered approximately 350 parking lots and would cost landowners approximately $12,500 per lot in compliance costs. Further, the ordinance would have significantly reduced revenue to the owners of the lots due to reduced parking and advertising space available because of the increased landscaping.[89]

A group of parking lot owners filed suit in Georgia state court seeking declaratory and injunctive relief on the ground that the ordinance was an uncompensated taking of property in violation of the Fifth Amendment.[90] Both the trial court and the Georgia Supreme Court ruled in favor of the city.[91] The property owners petitioned the U.S. Supreme Court to review the case, but were denied writ of *certiorari* in a memorandum decision.

Justice Thomas wrote a separate opinion dissenting from the Court's denial of *certiorari.* In it, he provided a clear indication that he plainly interprets the requirements of the Just Compensation Clause to apply any time the government denies an owner the beneficial use of his private property for public use:[92] "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can."[93]

In short, Justice Thomas saw no basis in the text of the Fifth Amendment for distinguishing between legislative and administrative

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[86] *See Dolan*, 512 U.S. at 385.

[87] *See* Home Builders Ass'n v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997) (holding that *Dolan* did not apply to legislatively imposed impact fees); Schultz v. City of Grants Pass, 884 P.2d 569 (Or. App. 1994) (holding that *Dolan* applied to legislatively created dedication requirement).

[88] *See Parking Ass'n*, 515 U.S. at 1116.

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[93] *Parking Ass'n*, 515 U.S. at 1117 (Thomas, J., dissenting).

exactions.[94] Although created by different means, functionally they are the same and therefore should be subject to the same type of scrutiny.

> Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[95]

D. Suitum v. Tahoe Regional Planning Agency

In contrast to *Lucas* and *Dolan* where Justice Thomas joined the majority opinions, he joined the concurring opinion in the most recent "takings" case to be decided by the Court, *Suitum v. Tahoe Regional Planning Agency*.[96] *Suitum* addressed the issue of jurisdictional "ripeness" in the context of transferable development rights (TDR).[97] Justice Thomas's decision to join the concurrence in *Suitum* further demonstrates his support for a reading of the Fifth Amendment that faithfully adheres to the text and avoids interpretations that provide government leeway to convert private property to public use without paying just compensation to the owners.

In *Suitum*, the property owner acquired a building lot in a developed, residential subdivision located in the Lake Tahoe region of Nevada.[98] The owner submitted a building permit application with the Tahoe Regional Planning Agency (TRPA) seeking permission to build a house on the lot.[99] TRPA denied the application because the owner's land had been included in a "Stream Environment Zone" (SEZ).[100]

The regional plan that prohibits any "additional land coverage or other permanent land disturbance" within an SEZ, rendered the owner's land ineligible for development.[101] However, under the regional plan, owners of property in a SEZ are eligible through a lottery system for

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[94] *See id.* at 1116 (Thomas, J., dissenting).

[95] *Id.* at 1118 (Thomas, J., dissenting).

[96] 520 U.S. 725 (1997).

[97] Transferable development rights (TDRs) have emerged as a popular "free market" alternative to compensation for a taking. TDRs arise when the government offers a property owner an alternative forum to pursue a desired action in place of the property owner acting on the current parcel. *See* ROGER J. MARZULLA & NANCIE G. MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 122–23 (1997).

[98] *See Suitum*, 520 U.S. at 730.

[99] *See id.* at 731.

[100] *Id.*

[101] *Id.* at 729.

certain TDRs.[102] Thus, in the *Suitum* case, the owner was potentially eligible to transfer development rights, subject to TRPA approval.[103]

After exhausting all her administrative remedies, the property owner filed suit in federal district court, alleging that TRPA had taken her property rights without payment of just compensation under color of state law in violation of 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments.[104] The district court awarded summary judgment in favor of TRPA on the ground that the case was not ripe for adjudication because the property owner had not attempted to transfer development rights before filing suit.[105] The U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the district court on the ground that a TDR is a "use" of property, and because the property owner had not attempted to exercise that "use," the property owner's case was not ripe for review.[106]

The Supreme Court, in a unanimous opinion written by Justice Souter, held that the case was ripe for review.[107] The majority opinion, however, did not address the issue of whether a TDR is a "use" of the property to which it attaches (as the Ninth Circuit thought it to be), or whether it is actually a form of compensation given by the government in return for the loss of beneficial and productive use of property. Instead, the majority opinion focused its inquiry merely on whether the failure to exercise TDRs renders a takings claim unripe for review. The majority held that it did not.[108]

Justice Scalia's concurring opinion, joined by Justices Thomas and O'Connor, agreed with the majority opinion only in so far as it held the case to be ripe for review.[109] The concurring justices took issue, however, with the Ninth Circuit's holding, not addressed by the majority, that TDRs can be a "use" of the underlying land to which they are attached.[110] According to Justice Scalia, TDRs are simply one form of compensation to a landowner who has lost the beneficial and productive use of his

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[102] *See id.* at 730.

[103] *See id.*

[104] *See id.* at 731.

[105] *See id.* at 733.

[106] *See id.*

[107] *See id.* at 744.

[108] The Court held that the ripeness requirement exists to fully determine the maximum level of use of property that government will allow. In *Suitum*, however, there was no further discretion for TRPA to exercise regarding the use of Mrs. Suitum's property, since it was undisputed that the land in question could not be built on and there was certainty as to the valuation of the TDRs afforded Mrs. Suitum, an issue that did not render the case unripe for review, since valuation is one of the primary questions faced by a court in a takings case.

[109] *See id.* at 745 (Scalia, J., concurring).

[110] *See id.*

property. Therefore, it would be absurd to require a landowner to attempt to exercise TDRs prior to bringing a claim for just compensation.

> If money that the government–regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. . . . The cleverness of the scheme before us here is that it causes the payment to come, not from the government but from third parties—whom the government reimburses for their outlay by granting them . . . a variance from otherwise applicable land–use restrictions.[111]

According to the concurrence in *Suitum*, the government was engaged in a thinly veiled attempt to redefine property "use" in such a way as to "render much of [the Supreme Court's] regulatory takings jurisprudence a nullity."[112] Justice Thomas, by joining this concurrence, further evidences a dissatisfaction with the use of such schemes that circumvent the Fifth Amendment's plainly written requirement that just compensation be paid whenever government regulation takes private property for public use.

E. Eastern Enterprises v. Apfel

In *Eastern Enterprises v. Apfel*,[113] the Court faced the question of whether the imposition of severe, retroactive financial liability worked an uncompensated taking of private property in violation of the Fifth Amendment. Four justices answered this question in the affirmative.[114] Justice Kennedy, in a concurring opinion, found that no taking had occurred but held that the scheme in question violated "essential due process principles."[115] Justice Thomas cast a decisive vote in favor of protecting property rights, and in a concurring opinion, advocated a re–examination of the Court's ex post facto clause jurisprudence.[116]

Eastern Enterprises, an energy company, had been in the coal mining business until 1965.[117] From 1947 to 1965, Eastern participated in a benefit plan for the miners it employed. The plan was a "defined–contribution" scheme in which Eastern paid a fixed royalty on the coal it mined into a plan managed by the coal miner's union.[118] Eastern made

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111 *Id.* at 748 (Scalia, J., concurring).
112 *Id.* at 750 (Scalia, J., concurring).
113 524 U.S. 498 (1998).
114 *See id.* at 503–04 (O'Connor, J., plurality opinion).
115 *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).
116 *See id.* at 538 (Thomas, J., concurring).
117 *See id.* at 516.
118 *See id.* at 505.

no express commitment to fund specific levels or types of benefits, and the plan's benefits were determined by the union–appointed plan trustees, not Eastern.[119] The plan trustees adjusted benefits from time to time in order to keep expenditures within the available income from the coal royalties.

Eastern sold its coal mining operations in 1965. In 1974, Congress enacted the Employee Retirement Security Act (ERISA), which required modifications to plans of the sort to which Eastern had previously been a party. Changes made in the 1970's, following ERISA, significantly expanded the benefits provided by the plan and included a number of new obligations for employers. Eastern was not a part of these expansions, which included a commitment of lifetime health insurance for retirees, disabled mine workers, and their spouses.[120]

The plan experienced worsening financial difficulty in the 1980's, and by the early 1990's it was threatened with insolvency. To preserve the miners' benefits, Congress passed the "Coal Act," which attempted to shore up the plan by imposing financial obligations on companies that employed miners in the past, but had withdrawn from the plan and/or left the industry.[121] Some of these employers had signed post–ERISA plans that included specific benefit commitments including the health insurance benefit. Eastern, on the other hand, participated in the plan decades prior to the expansion of benefits, when the character of the plan was entirely different. Eastern left the coal industry entirely in 1965. Nevertheless, the Coal Act allocated up to $100 million in liability to Eastern, representing the health insurance costs for some of Eastern's former employees and their survivors.[122] Eastern challenged the Act, arguing that it never made health insurance commitments to the people in question, whom it had employed decades before when it was in the coal business. Eastern charged that the Act worked an uncompensated taking of private property and violated its substantive due process rights.

Four members of the Court, including Justice Thomas, joined an opinion written by Justice O'Connor, who concluded that the imposition of severe retroactive civil liability could, under some circumstances, violate the Just Compensation Clause. Justice O'Connor applied the three–factor test articulated by the Court in *Connolly v. Pension Benefit Guaranty Corp.*, a test that balances "the economic impact of the regulation, the extent to which the regulation interferes with

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[119] *See id.*

[120] *See id.* at 509–10.

[121] *See id.* at 515.

[122] *See id.* at 529 (noting "[t]he parties estimate that Eastern's cumulative payments under the Act will be on the order of $50 to $100 million.").

investment–backed expectations, and the character of the governmental action,"[123] and concluded that the application of the Coal Act to employers such as Eastern violated the Just Compensation Clause.[124] Justice O'Connor found that the financial impact of the requirement was "substantial, and the company is clearly deprived of the amounts it must pay" under the Coal Act.[125] Justice O'Connor also found a significant interference with investment–backed expectations, noting

> The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability on Eastern based on the company's activities between 1946 and 1965. Thus, even though the Act mandates only a payment of future health benefits, it nonetheless "attaches new legal consequences to [an employment relationship] completed before its enactment." Retroactivity is generally disfavored in the law in accordance with "fundamental notions of justice . . . ."[126]

On the third part of the *Connolly* test, Justice O'Connor characterized the nature of the government action as "quite unusual," noting that the allocation of liability was "based on employers' conduct far in the past, and unrelated to any commitment the employers made or any injury they caused," implicating "fundamental principles of fairness underlying the Takings Clause."[127]

Justice Thomas joined the plurality opinion, agreeing that the Just Compensation Clause was implicated by the Coal Act. In a fascinating concurrence, however, Justice Thomas argued that the Act might also violate the *ex post facto* clause of the Constitution.[128] Justice Thomas noted that the *ex post facto* clause has traditionally been considered to apply only in the criminal sphere. This view found its origin in *Calder v. Bull*, a 1798 case which concluded that the civil application of the *ex post facto* clause would render the Just Compensation Clause redundant.[129] While several cases in the nineteenth century applied the *ex post facto* clause to invalidate severe, retroactive application of civil sanctions,[130] twentieth century doctrine has confined the clause's application strictly

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[123] Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[124] *See Eastern Enter.*, 524 U.S. at 537 (O'Connor, J., plurality opinion) (concluding that "the Coal Act's application to Eastern effects an unconstitutional taking.").

[125] *Id.* at 529.

[126] *Id.* at 532 (citation omitted).

[127] *Id.* at 537.

[128] *Id.* at 538–39 (Thomas, J., concurring).

[129] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798) ("The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of vested rights to property; or the provision 'that private property should not be taken for public use without just compensation' was unnecessary.").

[130] *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–2, at 633–635 (2d ed. 1988).

to the criminal context.[131] Justice Thomas stated he had "never been convinced of the soundness of this limitation," expressing a willingness "to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause."[132]

Justice Thomas's willingness to re–examine the Court's *ex post facto* doctrine is good news for property rights. Justice Chase's assumption that civil application of the *ex post facto* clause would render the Just Compensation Clause redundant has been undercut by the erosion of property rights protection in the latter part of the twentieth century.[133] If modern takings jurisprudence permits government to do things that were not thought constitutional when *Calder* was decided, then the redundancy argument loses much of its force. A reinvigorated *ex post facto* clause could restore some of the original context of the Just Compensation Clause.

At root, the *ex post facto* and Just Compensation clauses address the same basic problem, the need to protect citizens from government actions that change the present legal consequences of past actions, disappointing well–founded expectations and divesting legal rights. Government actions that take private property reach back in time, changing the nature of the property interests created in the past by impairing or destroying some or all of the sticks in the "bundle of rights" that make up a property interest. Takings of private property and *ex post facto* criminal laws disappoint the justified expectations of citizens—attaching new and unforeseen consequences to past behavior. Concern for the stability and predictability of the legal order underlies both the Just Compensation Clause and the *ex post facto* clause.

Justice Thomas's willingness to revisit *ex post facto* doctrine in the *Eastern Enterprises* case demonstrates his strong commitment to applying the Constitution as written and as understood by the Framers. Civil application of the *ex post facto* clause has the potential to give property owners an additional measure of protection against arbitrary government deprivations of property, deprivations which violate the plain meaning of the Takings Clause but which would nonetheless sometimes be permitted under the Court's current interpretation of the Just Compensation Clause. The reinterpretation suggested by Justice Thomas has the potential to restore some of the substance of

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[131] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (stating "it has always been considered that that which [the *ex post facto* clause] forbids is penal legislation.").

[132] *Eastern Enter.*, 524 U.S. at 538–39 (Thomas, J., concurring).

[133] *See supra* note 6 and accompanying text.

Constitutional protections that has been eroded over the past several decades.

V. CONCLUSION

In less than a decade on the bench, Justice Thomas's jurisprudential legacy already casts a long shadow over the events leading to his confirmation. Viewed collectively, Justice Thomas's written opinions and voting record in key property rights and constitutional cases demonstrate a faithful adherence to the text and historical roots of the Constitution. Justice Thomas has demonstrated a commitment to restoring the integrity of crucial constitutional provisions involving federalism, property rights, and other matters. He has shown a willingness to revisit past decisions when doctrines have developed in ways which undermine important constitutional provisions. Justice Thomas's adherence to the framers' vision offers great promise from the highest court in the land as society moves forward to greater protection of individual liberty in the next millennium by remaining faithful to our constitutional roots.