

THE TEXTUALISM OF CLARENCE
THOMAS:

ANCHORING THE SUPREME COURT'S
PROPERTY RIGHTS JURISPRUDENCE
TO THE CONSTITUTION

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I. INTRODUCTION

Justice Clarence Thomas has played an essential role in the Supreme Court's willingness to enforce the plain text of the Constitution, which has, in turn, directly led to the reinvigoration of property rights protection over the last decade.

Since his appointment to the Supreme Court in 1991, Justice Thomas' judicial fidelity to textualism has served, like a lighthouse on the shore, as a powerful beacon to the Rehnquist Court, constantly

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returning it safely to the original intent of the Framers. Thomas' reliance on the text of the Constitution, and when necessary, carefully supplemented by the history and context in which the Framers wrote and ratified the Constitution, has resulted in the resuscitation of the Just Compensation Clause of the Fifth Amendment¹ and property rights protection, rights which have been neglected for decades despite the plain mandate in the Constitution that they be protected.² Justice Thomas consistently applied the plain understanding of the text of the Constitution in every case that has come before him involving property rights protection. Moreover, he has voted in favor of property rights protection in every takings case that has come before the Court during his tenure.³

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

2. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (requiring a final agency decision about a developer's subdivision plans before determining whether any restrictions on property use violated his rights); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (finding constitutional a broad interpretation of wetland regulations to include wetlands adjacent to navigable waters); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (holding constitutional a government effort aimed at redistributing ownership of property from a small group of land owners as a matter of public interest); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (holding that a town ordinance regulating the operations of a sand and gravel pit is constitutional even when denying beneficial use of the property's previous use).

3. See *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725 (1997) (finding an agency decision to render land ineligible for development to be a valid takings claim for just compensation by the property owner); see also *Babbitt v. Youpee*, 519 U.S. 234 (1997) (holding an Indian Land Conservation Act provision unconstitutional because the provision sought to consolidate ownership of Indian lands by taking the property of deceased Indians without properly compensating the heirs of the property owner for loss of fractionalized property interests); *Bennis v. Michigan*, 516 U.S. 442 (1996) (Thomas, J., concurring) (holding that government does not require just compensation for taking property that was used for illegal purposes because the practice deters unlawful activity and imposes an economic sanction). Justice Thomas warned that "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused . . . than a component of a system of justice."; *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (Thomas, J., dissenting) (arguing that the plain language of the zoning statute restricts the maximum number of occupants of a designated single family dwelling); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (finding unconstitutional a city's conditional approval of a building permit in exchange for the commercial property owner to giving ten percent of the property for city efforts to prevent flooding and reduce traffic congestion); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81-83 (1993) (Thomas, J., concurring and dissenting) (agreeing that the defendant's due process rights were not violated, but expressing general concern about due process violations resulting from civil forfeiture statutes as applied to a defendant's involvement with federal drug offenses); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that government regulations that require a property owner "to leave his property economically idle" without just compensation constitutes a taking). 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

Some commentators have dismissed the role of Justice Thomas on the Court, complaining that he simply votes in tandem with other conservative justices on the bench.⁴ An examination of his written opinions and interpretive reasoning easily rebuts this criticism.⁵ Indeed, his judicial philosophy surprisingly reveals more parallels between his and former Justice Hugo Black's jurisprudence than any other member of the Court today. It was Justice Black who, after all, insisted that: "The United States is entirely a creature of the Constitution. Its power and authority have no other source."⁶ Justice Black's philosophy resisted the tendency of the Warren Court to create social policy out of "whole cloth."⁷ Similarly, Thomas' philosophy repeatedly steers the Rehnquist Court toward the plain meaning of constitutional protections of individual rights and liberty.

II. THE TEXTUALISM OF HUGO BLACK AND CLARENCE THOMAS

In *New York Times Co. v. United States*,⁸ a case that Justice Black heralded as the most important First Amendment opinion of his career, Justice Black's plain reading of the First Amendment is evident. Attempting to suppress the publishing of the notorious Pentagon Papers, the United States sought an injunction against the New York Times Company, which the Supreme Court denied. Justice Black outlined a different rationale from the majority's in his concurring opinion. The majority denied the injunction because a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," with the *per*

owners asserted that a rent control ordinance operated as a forced occupation of their property in violation of the Just Compensation Clause. *See id.* (explaining that 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).

4. *See generally* Scott Douglas Gerber, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (N.Y. Univ. Press 1999).

5. *See generally id.*

6. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (rejecting the notion that citizens tried by U.S. military courts for crimes abroad are not protected by the Bill of Rights).

7. Two cases, one involving the First Amendment, *New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring) (rejecting the idea that "courts should take it upon themselves to 'make' a law that ignores First Amendment protections intended by the Framers), and the other concerning the incorporation of the Fifth Amendment under the Fourteenth Amendment, *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting) (submitting a legislative history of the Fourteenth Amendment to show that the plain language of the Framers intended the Bill of Rights to apply to citizens of states), illustrate Black's textual approach to constitutional interpretation.

8. 403 U.S. 713 (1971) (holding that the government did not meet its burden of showing justification for restraining First Amendment rights).

curiam opinion concluding that “the Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint,’” that it failed to meet.⁹ Justice Black, on the other hand, cared little for the Government’s inability to support its case. Instead, in his concurring opinion, he stated that the very nature of the Government’s goals conflict with the actual text of the Constitution.¹⁰ Essentially, “the federal courts are asked to hold that the First Amendment does not mean what it says,”¹¹ and for Justice Black, this one point alone was dispositive.

Unlike other members of the Court who questioned whether the “President of the United States possesses vastly greater constitutional independence in” the “two vital areas” of national defense and international relations,¹² Justice Black directed his attention to the actual text of the First Amendment and the original intent of the Framers, observing that the First Amendment was written “in language that [Madison and the Framers] believed could never be misunderstood: ‘Congress shall make no law . . . abridging the freedom . . . of the press’”¹³ Embodying his brand of judicial restraint, Justice Black’s concurring comments warned against:

[T]he bold and dangerously far-reaching contention that the courts should take it upon themselves to ‘make’ a law abridging the freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.¹⁴

His philosophy is remarkably lucid: when the constitutional provision offers clear guidance, the Court must enforce that language. Likewise, Justice Black’s dissenting opinion in *Adamson v. California*,¹⁵ a case involving the Due Process Clause,¹⁶ employed a

9. *Id.* at 714 (noting that there is a heavy burden on the government to show justification for suppressing rights under the First Amendment).

10. *Id.* at 717 (Black, J., concurring) (stating that instead of condemning newspapers they “should be commended for serving the purpose that the founding fathers saw so clearly”).

11. *Id.* at 715 (holding that the courts must be very careful when not allowing the government to publish important news as this might be a violation of the First Amendment).

12. *Id.* at 728 (Stewart, J., and White, J., concurring) (stating that the Executive Branch of the U.S. Government “is endowed with enormous power in the two related areas of national defense and international relations”).

13. *Id.* at 717 (arguing that the press must clearly and unequivocally be given freedom to publish news, without censorship).

14. *New York Times Co. v. United States*, 403 U.S. 713, 718 (1971) (noting that “the government does not even attempt to rely on any act of Congress”).

15. 332 U.S. 46 (1947) (finding the defendant guilty of murder despite

plain meaning interpretation of the Constitution and ultimately found the majority's decision in *Adamson* inconsistent with earlier cases that prohibited states to engage in offenses that originally pertained to the federal government, such as coerced confessions from criminals.¹⁷ While other members of the Warren Court were content with merely judging the case on its merits, Justice Black, driven by his fidelity to the constitutional purpose, examined the history of the Fourteenth Amendment itself to reach his decision:

I would follow what I believe was the original purpose of the Fourteenth Amendment — to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution This I would do because of reliance on the original purpose of the Fourteenth Amendment.¹⁸

Admittedly, some question the reliability of Justice Black's historical studies.¹⁹ Yet, what is most important is the dynamic approach he took in making sure that his decisions were consistent with the original intent of the language of the Constitution.

Similarly, Justice Thomas' concurring opinion in *McIntyre v. Ohio Elections Commission*²⁰ employed a plain meaning interpretation of the Constitution that upheld the protection of anonymous campaign literature under the First Amendment. Like Justice Black, however, Justice Thomas reaches his decision through a different line of reasoning than found in the majority opinion. Deciding that anonymous campaign literature falls under the protection of the First Amendment, Justice Thomas' opinion employs a meticulous, historical analysis and a focus on the original understanding of the

objections regarding Fifth and Fourteenth Amendment protections).

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

17. In subsequent cases, the Court has held that the Fourteenth Amendment bars "all American courts, state or federal, from convicting people of crime on coerced confessions." See, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940) (holding that there is "[n]o higher duty . . . than . . . maintaining this constitutional shield" to protect a defendant's due process rights); *Ashcraft v. Tennessee*, 322 U.S. 143, 154-55 (1944) (holding that a continuous thirty-six hour cross examination led to a coerced confession and violated a defendant's rights).

18. 332 U.S. at 89.

19. See, e.g., DWIGHT L. TEETER & MARYANN YODELIS SMITH, *Justice Black's 'Absolutism': Notes on His Use of History to Support Free Expression*, in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT (Everette E. Dennis et al. eds., 1978).

20. 514 U.S. 334, 360-61 (1995) (Thomas, J., concurring) (advocating that the Framers use of "anonymous political writing . . . indicates that founding-era Americans" supported freedom of anonymous communication).

Constitution that resulted in upholding the First Amendment.

In *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio statute that banned the distribution of anonymous political campaign literature.²¹ Margaret McIntyre distributed unsigned political leaflets opposing a referendum on a proposed school tax. The superintendent of the school district filed a complaint with the Ohio Elections Commission claiming that Mrs. McIntyre's actions violated the Ohio Code. A fine of \$100 was imposed and later reversed by the Franklin County Court of Common Pleas. The Ohio Supreme Court then affirmed the decision of the Court of Appeals to reinstate the fine. Justice Thomas' concurring opinion in *McIntyre* illustrates a similar method of judicial review to Justice Black's, a restraint bounded by an attempt to stay true to the Constitution. Unlike the majority opinion, Thomas relied on the text of the First Amendment as well as the use of history in determining the original intent of the Framers when drafting the Constitution, ignoring the "extraneous" concerns of the majority.

Thomas' approach is apparent from the outset of his concurrence:

Instead of asking whether "an honorable tradition" of anonymous speech has existed throughout American history, or what the "value" of anonymous speech might be, we should determine whether the phrase "freedom of speech, or of the press," as originally understood, protected anonymous political leafletting.²²

In a rather conclusory fashion, the majority opinion catalogued numerous examples of individuals writing under anonymity, from Mark Twain to Voltaire, explaining that "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."²³ In sharp contrast, however, Justice Thomas, began his opinion by quoting the First Amendment, "the government 'shall make no law . . . abridging the freedom of speech, or of the press.'"²⁴ From Thomas' perspective, the historical practice of authors using pen names is in and of itself, irrelevant to constitutional decision-making. Rather, to him the appropriate inquiry is "whether the First Amendment, as originally understood, protects anonymous writing."²⁵

21. OHIO REV. CODE ANN. § 3599.09(A) (West 1988).

22. *McIntyre*, 514 U.S. at 358 (Thomas, J., concurring) (stating that he agrees Ohio election law is inconsistent with the First Amendment, but would have applied a different standard).

23. *Id.* at 342.

24. *Id.* at 359 (Thomas, J., concurring) (citations omitted).

25. *Id.* at 360.

Thus, the relevance of history in this context is to discern the understanding of those who drafted the First Amendment. For this reason, Thomas reviewed the history of the protection of anonymous writing beginning with the 1735 Zenger trial through to the ratification of the Constitution, drawing upon a plethora of sources and incidents to describe the protection accorded to “anonymity and the freedom of press . . . [in] . . . the early American mind.”²⁶ Thomas noted that even James Madison and Alexander Hamilton had “resorted to pseudonyms in the famous ‘Helvidius’ and ‘Pacificus’ debates over President Washington’s declaration of neutrality in the war between the British and French.”²⁷ Justice Thomas further noted “the historical evidence indicates that founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the ‘freedom of the press.’”²⁸ Surprisingly, the majority did not bother to ask itself the same question when determining its decision. In fact, the history of the protection of anonymous American political literature was largely ignored as the majority opinion attempted to define the “value” of such literature.²⁹

In the end, Thomas agreed “with the majority’s result, but not its reasoning.”³⁰ Thomas’ reasons for concurring clearly arise from his opposition to their methodology.

I cannot join the majority’s analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text. Whether “great works of literature” — by Voltaire or George Eliot have been published anonymously should be irrelevant to our analysis, because it sheds no light on what the phrases “free speech” or “free press” meant to the people who drafted and ratified the First Amendment. Similarly, whether certain types of expression have “value” today has little significance; what is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights. And although the majority faithfully follows our approach to “content-based” speech regulations, we need not undertake this analysis when the original

26. *Id.* at 361.

27. *Id.* at 369.

28. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

29. *See id.* at 359 (Thomas, J., concurring) (arguing the majority should have relied on the original interpretation of the Speech and Press clauses of the Constitution).

30. *Id.* at 370 (Thomas, J., concurring).

understanding provides the answer.³¹

Thomas' approach is remarkably similar to Justice Black's. When the Constitution provides unambiguous direction, the Court need not seek another means of interpretation.³²

Justice Thomas' dissent in *U.S. Term Limits, Inc. v. Thornton*,³³ applies the same textual approach used in *McIntyre* to determine the meaning of the Tenth Amendment. In *Term Limits*, the Arkansas Constitution, amended in 1992,³⁴ 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.³⁵ The League of Women Voters of Arkansas challenged the amendment in state court, alleging that it violated the United States Constitution.³⁶ Both the trial court and the Arkansas Supreme Court agreed, holding that Amendment 73 violated Article I of the Constitution.³⁷

The United States Supreme Court, in a 5-4 decision, affirmed the ruling of the Arkansas Supreme Court and struck down Amendment 73 on constitutional grounds.³⁸ In an artificially narrow interpretation, Justice Stevens wrote for the majority, concluding "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."³⁹ The Court's assertion that "electing representatives to the National Legislature was a new right, arising from the Constitution itself"⁴⁰ ignored the plain language of the Constitution

31. *Id.*

32. *See id.* (Thomas, J., concurring) (expressing his belief that the Supreme Court is bound by the text of the Bill of Rights).

33. 514 U.S. 779 (1995) (upholding Arkansas Supreme Court decision invalidating a state law that prohibited a persons name from being placed on a ballot because the law violated the Tenth Amendment).

34. ARK. CONST. amend. 73, § 3 (repealed 1995).

35. *See U.S. Term Limits, Inc.*, 514 U.S. at 783-84 (quoting the preamble of the "term limitation amendment" of the Arkansas state constitution).

36. *See id.* at 784-85 (stating plaintiffs sought a "declaratory judgment" that ARK. CONST. amend. 73, §3 is unconstitutional).

37. *See United States Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 360 (Ark. 1994) (deciding "whether the [a]mendment expresses such a legitimate and sufficient state interest that the rights of the supporters and the incumbents must yield [to it]").

38. *See U.S. Term Limits, Inc.*, 514 U.S. at 783 (explaining that "[a]llowing individual states to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a National Legislature representing the people of the United States").

39. *Id.* at 800.

40. *Id.* at 805.

according to Justice Thomas, who reacted against erecting judicial barriers to the rights of states:

Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on the question. And where the Constitution is silent, it raises no bar to action by the States or the people.⁴¹

Justice Thomas looks specifically to the text of the Tenth Amendment in deciding the merits of the case:

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 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.⁴²

Having concluded that the people of a state, acting through their state government, have all the powers not prohibited to the state government or delegated to the federal government by the Constitution, Justice Thomas next turned to the question of whether states have a “reserved” power to modify qualifications on congressional membership:

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

41. *Id.* at 845 (Thomas, J., dissenting).

42. *Id.* at 848 (Thomas, J., dissenting).

in effect when the Federal Constitution and the Bill of Rights were ratified.⁴³

III. CLARENCE THOMAS: THE EMERGING CONTOURS OF HIS PHILOSOPHY

Perhaps the most illuminating example of the way in which Justice Thomas is emerging as a proponent of property rights on the Supreme Court can be found in his refusal to engage in judicial lawmaking. In both *Lewis v. Casey*⁴⁴ and *Wilson v. Arkansas*,⁴⁵ Justice Thomas acknowledges the constitutional role of the Court is to interpret, not make law.

In *Lewis v. Casey*, a group of Arizona inmates brought a class action suit against various officials of the Arizona Department of Corrections, charging that the Department was not offering adequate legal facilities and thereby violating their right of access to the courts as recognized in an earlier Supreme Court decision, *Bounds v. Smith*.⁴⁶ The district court agreed with the prisoners, issuing an injunction that mandated extensive, system-wide changes to be carried out by the Department.⁴⁷ The majority opinion contended that a violation of *Bounds* existed only if the inmates could demonstrate widespread actual injury “and the inmate therefore must go one step further [than merely proving the existence of inadequate facilities] and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.”⁴⁸ Because the district court only identified two instances of actual injury, a majority of the Supreme Court determined that an injunction was not warranted.⁴⁹ The Supreme Court reversed the court of appeals’ ruling and found that the Department had violated

43. *Id.* at 851-52 (Thomas, J., dissenting).

44. 518 U.S. 343, 364 (1996) (Thomas, J., concurring) (stating that the federal system cannot tolerate an overreach into the states domain in this case).

45. 514 U.S. 927, 929 (1995) (holding a common law principle formed a part of the reasonableness inquiry into the Fourth Amendment).

46. 430 U.S. 817, 828 (1977) (holding that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law”).

47. *See Lewis*, 518 U.S. at 346 (holding that the “United States District Court for the District of Arizona erred in finding them in violation of *Bounds*, and that the court’s remedial order exceeded lawful authority.”).

48. *Id.* at 351.

49. *See id.* at 349 (agreeing with the respondent that the District Court did not find enough instances of “actual injury”).

Bounds.⁵⁰

Justice Thomas' concurring opinion expressed less concern with whether a systematic violation of *Bounds* had occurred, and instead questioned the "constitutional source of the supposed right" of access to courts articulated in *Bounds*.⁵¹ Justice Thomas urged the Court to return to the most fundamental principles of the Constitution:

In no instance, however, have we engaged in rigorous constitutional analysis of the basis for the asserted right. Thus, even as we endeavor to address the question presented in this case — whether the District Court's order 'exceeds the constitutional requirements set forth in *Bounds*,' — we do so without knowing which Amendment to the Constitution governs our inquiry.⁵²

For Justice Thomas, judicial review is not the mere evaluation of a case based on its merits, but rather a constant evaluation of the issues at hand against the backdrop of the text Constitution.

It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.⁵³

As to whether *Bounds* creates an affirmative obligation for states, Justice Thomas concluded that "Quite simply, there is no basis in constitutional text, pre-*Bounds* precedent, history, or tradition for the conclusion that the constitutional right of access imposes affirmative obligations on the States to finance and support prisoner litigation."⁵⁴

Moreover, Justice Thomas reminded the Court that the "Constitution is not a license for federal judges to further social policy goals that prison administrators, in their discretion, have declined to advance."⁵⁵

In *Wilson v. Arkansas*,⁵⁶ Justice Thomas authored a unanimous decision denying certiorari in a case involving a Fourth Amendment challenge to the common law "knock-and-announce" rule. A

50. See *id.* at 364 (Thomas, J., concurring) (describing the Federal District Courts' imposition of detailed plan to assist inmates with lawsuits).

51. *Id.* at 367 (Thomas, J., concurring).

52. *Id.*

53. *Lewis v. Casey*, 518 U.S. 343, 367 (1996).

54. *Id.* at 384-85 (Thomas, J., concurring).

55. *Id.* at 388.

56. 514 U.S. 927, 931 (1995) (observing the rights embodied in the Fourth Amendment at the time the Framers drafted the Bill of Rights).

unanimous decision with no concurring opinions, *Wilson v. Arkansas* illustrates the direction in which Justice Thomas has led the Court since his appointment. The fact that the intent of the Framers will animate the ultimate decision of the Court becomes apparent in the first words of the opinion: “[a]t the time of the framing, the common law of search and seizure recognized a law enforcement officer’s authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority.”⁵⁷

The cornerstone of Justice Thomas’ reasoning is the text of the Fourth Amendment, which provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁵⁸ Given the conservative leanings of the Supreme Court, Justice Thomas could very possibly have used *Wilson* as a springboard to strengthen the rights of police officers at the expense of the right to reasonable search and seizure. But instead, under Justice Thomas’ leadership, the Court examined Anglo-American common law dating back to 1275, concluding, that “we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.”⁵⁹ Drawing upon a plain meaning interpretation of the Constitution, Justice Thomas left the text of the Fourth Amendment undisturbed, regardless of the important competing social objectives.

IV. THE IMPLICATIONS OF TEXTUALISM FOR PROPERTY RIGHTS

Since he joined the Supreme Court in 1991, Justice Thomas has participated in five major property rights cases involving regulatory takings under the Just Compensation Clause of the Fifth Amendment.⁶⁰ In two of these decisions,⁶¹ Justice Thomas cast the deciding vote, joining the majority in favor of payment of just compensation for the taking of private property. In every decision that he has joined, the opinion is consistent with the judicial

57. *Id.* at 929.

58. U.S. CONST. amend. IV.

59. *Wilson*, 514 U.S. at 934.

60. See U.S. CONST. amend V (stating that under the just compensation clause, private property cannot “be taken for public use, without just compensation.”).

61. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007 (1992) (deciding whether an act’s “dramatic effect on the economic value of the lot was a taking of private property”); see also *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding the taking was unconstitutional).

philosophy expressed in his written decisions.

For example, in his dissent in *Parking Association v. City of Atlanta*,⁶² Justice Thomas employs his plain reading of the Constitution to the Just Compensation Clause to reach his decision.⁶³ Likewise, in two cases in which Justice Thomas joined the majority but also wrote a concurring opinion, *Suitum v. Tahoe Regional Planning Agency*⁶⁴ and *Eastern Enterprises v. Apfel*,⁶⁵ Justice Thomas' analyses in both of these cases leave no doubt but that his same fidelity to textualism and original intent seen in other areas of the law apply with equal force to protection of property rights.

The significance of Justice Thomas' presence on the Court becomes most apparent in two early property rights cases where his vote provided the Court with a five-justice majority supporting property rights that would have been impossible before his appointment.⁶⁶ Not surprisingly, in both cases, the Court employed a plain meaning interpretation of the Just Compensation Clause similar to that used by Thomas.

A. *Lucas v. South Carolina Coastal Council*

*Lucas v. South Carolina Coastal Council*⁶⁷ was the first regulatory takings case during Justice Thomas' tenure. In *Lucas*, the Supreme Court held that when "a regulation that declares 'off-limits' all

62. 515 U.S. 1116 (1995) (denying certiorari for rehearing by the Supreme of Georgia concerning whether an Atlanta City Council ordinance requiring that parking lots have ten percent of the paved lot landscaped and one tree for every eight parking spaces violated the just compensation clause of the Fifth Amendment).

63. *See id.* (arguing that the petition for rehearing should have been granted because of the confusion over regulatory takings and because sweeping legislative takings and specific administrative takings are not constitutionality different).

64. 520 U.S. 725, 744-48 (1997) (Thomas, J., concurring) (stating that a claim that a regulatory taking occurred when the regional planning agency determined her lot was not eligible to be developed was ripe for review and stating that "once there is a taking the constitution requires just i.e., full compensation").

65. *See* 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring) (agreeing with the plurality that the Coal Industry Retiree Health Benefit Act, which required that a former coal operator fund the health benefits of his former miners, was unconstitutional but citing the *ex post facto* clause of the constitution as clearly stating that retroactive laws are not just).

66. Justice Thomas replaced Justice Thurgood Marshall, who retired at the end of the 1990 Term of the Court. Given Justice Marshall's tendency to side with the government in property rights cases, it is possible that Justice Marshall would have sided with the government in *Lucas*, thus depriving property owners of one of the strongest Supreme Court precedents for property rights. *See, e.g.,* *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *see also* *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

67. 505 U.S. 1003 (1992).

economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”⁶⁸ Thus, in his first term, Justice Thomas cast a decisive vote in favor of private property rights in a decision that set the stage for an entirely new era of Supreme Court takings decisions.

Lucas involved the application of the Beachfront Management Act (BMA),⁶⁹ passed by the South Carolina legislature in 1988.⁷⁰ The BMA prohibited, without exception, the construction of any structures in areas of the South Carolina coast that had been designated by the South Carolina Coastal Council as being subject to beach erosion.⁷¹ Subsequent to Mr. Lucas’ purchase of two building lots, the Coastal Council identified Lucas’ property as an area in which construction was prohibited.⁷² 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.⁷³ The trial court agreed with Mr. Lucas, and awarded him compensation.⁷⁴ 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.⁷⁵

The U.S. Supreme Court reversed the South Carolina Supreme Court and remanded the case to the trial court for a determination of

68. *See id.* at 1030 (finding that the Takings Clauses is applicable when a regulation prohibits all beneficial uses of particular land, and in such a case, just compensation must apply).

69. *See* S.C. CODE ANN. § 48-39-280(A)(2) (Law Co-op., Supp. 1988) (requiring that a baseline be established along eroded portions of the Isle of Palms within which habitable structures could not be built).

70. *See Lucas*, 505 U.S. at 1008 (stating that the BMA directed the Council “to establish a ‘baseline’ connecting the landwardmost ‘points of erosion . . . during the past forty years’ in the region of the Isle of the Palms that includes Lucas’ lots”).

71. *See id.* at 1008-09 (prohibiting construction of improvements by the baseline, which included Lucas’ property).

72. *See id.* (explaining that Lucas planned to construct houses within the established baseline, construction that was prohibited under the BMA).

73. *See id.* at 1009 (alleging that such a taking violated the Fifth Amendment’s Just Compensation Clause).

74. *See id.* (concluding that Lucas’ properties were “taken,” and ordered the city to pay “just compensation” for his loss).

75. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010 (1992) (stating that while the trial court found that the BMA deprived Lucas of economic use of the land and constituted a taking, the South Carolina Supreme Court stated that, while the BMA seeks to avoid “serious public harm,” no compensation was required under the Takings Clause).

whether the “background principles” of common law nuisance applied to the BMA regulation of Mr. Lucas’ property.⁷⁶ Justice Scalia wrote the opinion for the majority and was joined by Chief Justice Rehnquist and Justices Thomas, White, and O’Connor.⁷⁷ The line of reasoning used by the majority examined the merits of *Lucas* within the context of the Constitution, a similar approach to that used by Justice Thomas in other interpretive decisions:

[I]t was generally thought that the Takings Clause reached only a “direct appropriation” of property, or the functional equivalent of a “practical ouster of [the owner’s] possession.” Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, “the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.”⁷⁸

The Court further announced a *per se* rule applicable whenever government regulation has destroyed all beneficial and productive use of property:

[R]egulations 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.⁷⁹

The Court concluded that “the notion pressed by the Council that title is somehow held subject to the ‘implied limitation’ that the state may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”⁸⁰

76. *See id.* at 1031-32.

77. Justice Kennedy wrote a concurring opinion while Justices Blackmun and Stevens wrote dissenting opinions. Justice Souter filed a separate statement questioning the granting of *certiorari*. *See id.* at 1005.

78. *Lucas*, 505 U.S. at 1014 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

79. *Id.* at 1018.

80. *Id.* at 1028.

B. Dolan v. City of Tigard

In *Dolan v. City of Tigard*,⁸¹ Justice Thomas cast another “deciding” vote in a 5-4 decision concerning regulatory permit exactions.⁸² The property owner in *Dolan* applied to the city of Tigard, Oregon to obtain permission to expand an existing plumbing supply store.⁸³ However, the granting of the permit was conditional upon the property owner meeting a certain set of mandates, which 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.⁸⁴ The property owner’s request for just compensation was denied.

In addition, the state courts denied relief to the property owner.⁸⁵ However, 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 the expanding the plumbing supply store would have upon flood control and traffic.⁸⁶ In so holding, the Court held that the exactions must be “roughly proportional” to the impact of the proposed use for which permission is being sought.⁸⁷ Further, the Court held that government must make “particularized findings” that this rough proportionality exists before the exactions may be constitutionally imposed.⁸⁸

The Court’s test for determining the constitutionality of regulatory exactions was derived from a plain meaning interpretation of the Fifth Amendment:

The Takings Clause of the Fifth Amendment of the United States

81. 512 U.S. 374 (1994).

82. 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*, 483 U.S. at 825, the case that established the “essential nexus” analysis for regulatory permit exactions upon which the *Dolan* Court built its “rough proportionality” analysis.

83. *See Dolan*, 512 U.S. at 379.

84. *See id.* at 380 (finding that the Commission’s mandates required the property owner to dedicate a substantial percentage of her property to the city’s needs).

85. *See id.* at 383 (concluding that the Commission’s conditions imposed upon the property owner reasonably related to the property owner’s expansion plans, therefore the conditions were valid).

86. *See id.* at 394-95 (determining that the state did not meet its burden of proof to show a reasonable relationship between the conditions it imposed and the property owner’s development plans).

87. *See id.* at 391 (finding that the city was required to make an individualized determination into whether the required dedication was related to the impact of the development that was proposed).

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

Constitution, made applicable to the States through the Fourteenth Amendment, provides: “[N]or shall private property be taken for public use, without just compensation.” One of the principal purposes of the Takings Clause is “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.” 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. Such public access would deprive petitioner of the right to exclude others, “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁸⁹

The rough proportionality test developed by the *Dolan* Court provided the government with a “back door” method of gaining title to desired property. The Fifth Amendment’s requirement of just compensation could thereby be avoided merely through the rough proportionality test. The Rehnquist Court, however, realigned itself with the plain language of the Fifth Amendment that clearly requires just compensation when the Government has taken property.

Finally, the 5-4 majority of the Court affirmed its commitment to the importance of the Constitution as a mechanism of change, insisting that, “[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁹⁰ Thus, the Rehnquist Court, relying on Justice Thomas’ brand of textualism, has reverted to the plain language of the Fifth Amendment, resulting in upholding property rights against the encroachments of the Government.

Justice Thomas’ written opinions in three other key property rights cases also reveal a textual approach to property rights protection, dissenting in *Parking Association of Georgia v. City of Atlanta*,⁹¹ and concurring with the majority as in *Suitum v. Tahoe Regional Planning Agency*⁹² and *Eastern Enterprises v. Apfel*.⁹³

89. *Dolan*, 512 U.S. at 383-84 (citations omitted).

90. *Id.* at 396 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

91. 515 U.S. 1116 (1995) (Thomas, J., dissenting) (finding in favor of certiorari since the petition concerned the issue of regulatory takings).

92. 520 U.S. 725 (1997) (Thomas, J., concurring) (joining Scalia, J., O’Connor, J., in concluding that it was irrelevant whether the petitioner’s takings claim was ripe for judicial review for purposes of satisfying the “final decision” requirement).

93. 524 U.S. 498 (1998) (Thomas, J., concurring) (finding in favor of the possibility that a retroactive civil law that does not violate the takings clause may violate the ex post facto clause, and therefore be rendered unconstitutional).

C. Parking Association of Georgia v. City of Atlanta

In *Parking Association of Georgia v. City of Atlanta*,⁹⁴ Justice Thomas wrote a dissenting opinion that went beyond the majority's denial of *certiorari*, suggesting that the rough proportionality test announced by the Supreme Court in *Dolan* applied to legislative enactments just as it did to administrative processes. An Atlanta ordinance 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. The ordinance covered approximately 350 parking lots and would cost landowners approximately \$12,500 per lot in compliance costs. Furthermore, 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.

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. Both the trial court and the Georgia Supreme Court ruled in favor of the city.⁹⁵ The property owners petitioned the U.S. Supreme Court to review the case, but the Court denied *certiorari* in a memorandum decision.⁹⁶

Justice Thomas wrote a separate opinion, dissenting from the Court's denial of *certiorari*. In his opinion, he sharply criticized the majority for considering the source of the government regulation in its denial of *certiorari*: "It is not clear why the existence of a taking should turn on the governmental entity responsible for the taking. A city council can take property just as well as a planning commission."⁹⁷ Because of his insistence on the actual text of the Constitution, Justice Thomas saw no basis for distinguishing between legislative and administrative exactions. Regardless of the actual

94. 515 U.S. 1116 (1995) (arguing that takings can be made by both legislative and administrative bodies and as such the rough proportionality test may apply to both situations).

95. See *id.* at 1116-17 (explaining that the state trial court decided in favor of Atlanta, as did the state supreme court, in a divided opinion, by finding the ordinance constitutional because legitimate governmental interests were advanced in conjunction with an economical use of property).

96. See *id.* at 1116 (denying the writ of *certiorari*).

97. See *Parking Ass'n*, 515 U.S. at 1117-18 (Thomas, J., dissenting) (arguing that the Court should have granted *certiorari* because of the confusion in the lower courts concerning "whether *Dolan's* test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature," as was the case here. According to the *Dolan's* test, there must be a "rough" proportionality between the conditions imposed and the impact of the owner's developments. . .").

organization responsible for the exaction, they would both be carrying out the same act, which is essentially a violation of the plain language of the Fifth Amendment.⁹⁸ For Justice Thomas, “[t]he distinction between sweeping legislative takings and particularized administrative takings [made by the majority] appears to be a distinction without a constitutional difference.”⁹⁹ Just as Justice Black saw no exceptions to the freedom of speech, even in alleged cases of national security, Justice Thomas’ dissent reveals his commitment to a textual interpretation of provisions designed to protect property rights.

D. *Suitum v. Tahoe Regional Planning Agency*

Justice Thomas’ philosophy is also evident in *Suitum v. Tahoe Regional Planning Agency*,¹⁰⁰ a case in which he joined in a concurring opinion. In *Suitum*, the property owner acquired a building lot in a developed, residential subdivision located in the Lake Tahoe region of Nevada.¹⁰¹ The owner submitted a building permit application with the Tahoe Regional Planning Agency (TRPA) seeking permission to build a house on the lot.¹⁰² TRPA denied the application because the owner’s land had been included in a “Stream Environment Zone” (SEZ).¹⁰³

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.¹⁰⁴ However, under the regional plan, owners of property in a SEZ were only eligible through a lottery system for certain TDRs.¹⁰⁵

After exhausting all her administrative remedies, the property owner filed suit in federal district court, alleging that TRPA had

98. See *id.* at 1118 (stating that “[t]he distinction between sweeping legislative takings and particularized administrative takings [made by the majority] appears to be a distinction without a constitutional difference”).

99. *Id.*

100. 520 U.S. 725 (1997) (reversing the District Court’s grant of summary judgment because plaintiff’s claim was in fact ripe).

101. See *id.* at 730 (discussing the different Transferable Development Rights (TDR) in the Lake Tahoe region).

102. See *id.* at 731 (requiring approval of the development of an as yet unused land to ensure its suitability for development).

103. See *id.* at 729 (quoting the Tahoe Regional Planning Agency Code of Ordinance (TRPA), Ch. 37, § 37.4A(3)).

104. See *id.* (citing the Tahoe Regional Planning Agency Code of Ordinance (TRPA), Ch. 37, § 20.4).

105. See *id.* at 730 (indicating that all property owners, including SEZ owners, could apply for a Residential Allocation, which would be awarded based on random drawings).

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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

In a unanimous opinion written by Justice Souter, the Supreme Court held that the case was ripe for review.¹⁰⁹ Integral to the Court’s decision was the question of whether the failure to exercise TDRs renders a takings claim unripe for review. The Court disagreed with the lower court’s contention that “there remains a ‘final decision’ for the agency to make: action on a possible application by Suitum to transfer the TDR’s to which she is indisputably entitled.”¹¹⁰ Instead, the Court held that “[t]he demand for finality is satisfied by Suitum’s claim,” and that Suitum’s failure to exercise TDRs did not, by default, render her takings claim unripe for review.

Justice Scalia’s concurring opinion, joined by Justices Thomas and O’Connor, agreed with the majority opinion to the extent that they held the case was ripe for review. The justices focused their attention, though, on an issue left largely unaddressed by the majority, namely whether a TDR is a “use” of the property to which it attaches (as the Ninth Circuit had contended), 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.¹¹¹ The

106. See *Suitum v. Tahoe Reg’l Plan Agency*, 520 U.S. 725, 731 (1997) (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).

107. See *id.* at 732-33 (finding that “[a]s things now stand, there is no final decision as to how [Suitum] will be allowed to use her property”).

108. See *id.* at 733 (affirming the district court’s decision because the impact of the regulations could not be determined on Suitum’s expectations without a TDR application).

109. See *id.* at 744 (finding that the final decision Suitum received from the agency complied with *Williamson County*’s ripeness standard, under which a plaintiff must show a final decision from the agency and that he or she sought compensation through the provided means).

110. See *id.* at 739 (distinguishing between the “final decision” concerning Suitum’s possible TDR transfer application and the “final decision” required under *Williamson County*, which concern determinations of permissible developments subject to approval by a regulatory body, who has yet to exercise its discretion).

111. See *id.* at 747 (Scalia, J., concurring) (arguing that a TDR has no impact on

concurring opinion disagreed with the Ninth Circuit, concluding that TDRs are simply one form of compensation to a landowner who has lost the beneficial and productive use of his property. The Ninth Circuit's contention that a landowner must attempt to exercise TDRs prior to bringing a claim for just compensation was not well-received by Justice Scalia, who stated that:

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 for 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.¹¹²

The concurrence in *Suitum* was clearly disturbed by the “cleverness of the scheme” that would attempt to redefine property “use” in such a way as to “render much of [the Supreme Court’s] regulatory takings jurisprudence a nullity.”¹¹³

By joining in this concurrence, Justice Thomas helped reconcile the majority’s decision with the original understanding of the Constitution.

E. Eastern Enterprises v. Apfel

In *Eastern Enterprises v. Apfel*,¹¹⁴ the Court addressed the question of whether the imposition of retroactive liability resulted in the uncompensated taking of private property in violation of the Fifth Amendment.¹¹⁵ The Court held that such an action did constitute an unconstitutional taking.¹¹⁶ Justice Thomas did not agree with this holding, but in his concurring opinion, he advocated a reexamination of the Court’s ex post facto clause jurisprudence.¹¹⁷

whether a “final decision” was reached and that it relates to compensation, not to taking).

112. *Suitum*, 520 U.S. at 748 (Scalia, J., concurring).

113. *Id.* at 750 (Scalia, J., concurring).

114. 524 U.S. 498 (1998).

115. *See id.* at 503-04, 522-23 (stating that economic regulations, such as the Coal Act, may constitute a taking even though they are not the typical takings that involve a physical invasion of property by the government).

116. *See id.* at 504 (holding that “Coal Act as applied to petitioner Eastern Enterprises, effects an unconstitutional taking”).

117. *See id.* at 538 (Thomas, J., concurring) (agreeing that the retroactive liability

Eastern, an energy company, was in the coal mining business until 1965.¹¹⁸ From 1947 to 1965, Eastern participated in a benefit plan for the miners it employed.¹¹⁹ Under the “defined-contribution” plan, Eastern paid a fixed royalty on the coal it mined into a plan managed by the coal miner’s union, the United MineWorkers of America.¹²⁰ All the plan’s benefits were determined by the union-appointed trustees and adjusted from time to time in order to keep expenditures within the available income from the coal royalties.

Eastern sold its coal mining division in 1965.¹²¹ In 1974, Congress enacted the Employee Retirement Security Act (ERISA),¹²² requiring modifications to the sort of plans to which Eastern had previously been a party.¹²³ Changes made in the 1970s, following ERISA, significantly expanded the benefits provided by the plan and included a number of new obligations for employers.¹²⁴ However, Eastern was not a part of these expansions, which included a commitment of lifetime health insurance for retirees, disabled mine workers, and their spouses.¹²⁵

As more and more employers pulled out, the plan experienced worsening financial difficulty in the 1980s, and by the early 1990s, it was threatened with insolvency.¹²⁶ To preserve the miners’ benefit, Congress passed the “Coal Act,” which attempted to shore up the

assigned under the Coal Act violated the Takings Clause but arguing that the *Ex Post Facto* Clause, which the Court only considered in a criminal context, very clearly states that laws with a retrospective application are not proper).

118. *See id.* at 516 (explaining that Eastern was heavily involved in coal mining in both Pennsylvania and West Virginia until 1965).

119. *See id.* at 516 (indicating that Eastern contributed over sixty million dollars to the United Mine Workers of America Welfare and Retirement Fund between 1947 and 1964).

120. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 510-11 (1998) (requiring that coal operators pay a specific royalty amount to ensure the availability of benefits for retired miners).

121. *See id.* at 516.

122. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

123. *See Eastern Enters.*, 524 U.S. at 509 (changing the “pay-as-you-go” benefit system to a system with vesting and funding requirements, thereby creating new trusts and benefit plans for the coal miners).

124. *See id.* at 510-11 (explaining that under the 1978 National Bituminous Coal Wage Agreement (NBCWA) signatory employers became responsible for health care of both active and retired employees, signatories faced mandatory contribution requirements for the duration of their time in the coal industry, and employers were required to pay a benefit obligation for specific benefits, not simply for predetermined royalties).

125. *See id.* at 509-10 (1998) (providing broader coverage of benefits to mine workers).

126. *See id.* at 511 (describing the numerous employers who withdrew from the NBCWA because of increasing costs and financial troubles).

plan by imposing financial obligations on companies that employed miners in the past, but had withdrawn from the plan and/or left the industry.¹²⁷ Some of these employers signed post-ERISA plans that included specific benefit commitments including the health insurance benefit. Eastern did not.¹²⁸ On the contrary, it participated in the plan decades prior to the expansion of benefits, when the character of the plan was entirely different.¹²⁹ Eastern left the coal industry entirely in 1965.¹³⁰ 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.¹³¹ 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.¹³² Eastern charged that the Act constituted an uncompensated taking of private property and violated its substantive due process rights.

The Court of Appeals for the First Circuit disagreed with Eastern:

In the Court's view, the retroactive liability imposed by the Act was permissible "as long as the retroactive application . . . is supported by a legitimate legislative purpose furthered by rational means," for "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."¹³³

The Supreme Court, however, concluded that the imposition of severe, retroactive civil liability could, under some circumstances, violate the Just Compensation Clause.¹³⁴ Moreover, Justice Thomas extended his understanding of the plain language of the Constitution to call for a reexamination of the Court's *ex post facto* clause

127. *See id.* at 515 (stating that the Coal Act merged the 1950 and 1974 benefits plans).

128. *See id.* at 535 (noting that Eastern never agreed to the health benefit plans because they were developed after its departure from the industry).

129. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 535 (1998) (explaining that lifetime medical benefits were not part of the plan when Eastern was an active miner).

130. *See id.* at 530 (stating that Eastern contributed to the funds but stopped mining in 1965, after which time it neither negotiated nor agreed to contribute to subsequent benefit plans).

131. *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.").

132. *See id.* at 535 (explaining that Eastern did not agree to the lifetime medical benefits requirement imposed by revisions to the 1947 and 1950 W&R Funds, revisions that were made after Eastern was no longer in the coal industry, and that Eastern was not bound by them).

133. *Id.* at 536.

134. *See id.* at 537 (finding that fundamental fairness with respect to the takings clause is implicated when one employer is singled out, because of past actions, to bear a substantial burden).

jurisprudence.¹³⁵ This call for a reexamination of the *ex post facto* clause bodes particularly well for property rights.¹³⁶

While Eastern's liability under the Coal Act does not represent the "classic taking" that occurs when "the government directly appropriates private property for its own," the Court concluded that "[b]y operation of the Act, Eastern is 'permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to the [Combined Benefit Fund]'.¹³⁷ The Court insisted upon the importance of remaining faithful to the Constitution and reiterated "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."¹³⁸ Clearly, the evaluation of the Coal Act was to be reached by means of constitutional interpretation and not by the dictates of social policy.

The Court reached its decision by applying the three-pronged test developed in *Connolly v. Pension Benefit Guaranty Corp.*,¹³⁹ a test that determines whether an unconstitutional taking has taken place based on three factors, including "the economic impact of the regulation, its interference with reasonable investment-backed expectation, and the character of the governmental action."¹⁴⁰ With regard to the first factor, the Court found that the financial liability imposed upon Eastern by the Coal Act was "substantial and the company is clearly deprived of the amounts it must pay the Combined Fund."¹⁴¹ Moreover:

[T]he Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965. Thus, even though the Act mandates only the 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

135. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring) (citing the fact that the language of the *Ex Post Facto* clause clearly indicates disfavor for retrospective laws and that its application should be reconsidered).

136. See *id.* (arguing that retroactive civil laws that are acceptable under the takings clause, such as property takings, may not fare so well under a re-examination and extension of the *Ex Post Facto* clause to civil laws).

137. *Id.* at 544.

138. *Id.* at 545.

139. 475 U.S. 211 (1986).

140. *Eastern Enters.*, 524 U.S. at 546.

141. *Id.* at 499.

“fundamental notions of justice” that have been recognized throughout history.”¹⁴²

Lastly, with regard to the character of the governmental action, the Court found it to be “quite unusual.”¹⁴³ Understandably, Congress was attempting to remedy the problems of the miners. The Court found that a problem arises, however, when “that solution singles out certain employers to bear a burden that is substantial in amount” and “unrelated to any commitment that the employers made or to any injury they caused.”¹⁴⁴ In these instances, “the governmental action implicates fundamental principles of fairness underlying the Takings Clause.”¹⁴⁵

In a dynamic concurrence, Justice Thomas emphasized “that the Ex Post Facto Clause of the Constitution, Art. I, § 9, cl. 3, more clearly reflects the principle that ‘retrospective laws are, indeed, generally unjust.’”¹⁴⁶ The ex post facto clause had, since *Calder v. Bull*¹⁴⁷ in 1798, been limited to criminal cases. However, the plain language of the clause itself makes no such limitations. Instead, Justice Thomas maintained that he had “never been convinced of the soundness of this [judicial] limitation, which in *Calder* was principally justified because a contrary interpretation would render the Takings Clause unnecessary.”¹⁴⁸ Justice Thomas indicated that he was “willing 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.”¹⁴⁹

F. *Palazzolo v. Rhode Island*

The most recent victory for property rights, *Palazzolo v. Rhode Island*,¹⁵⁰ is again consistent with Justice Thomas’ judicial philosophy of textualism. In *Palazzolo v. Rhode Island*, Justice Thomas joined the majority, which held that Palazzolo’s wetlands takings case was ripe

142. *Id.* at 532.

143. *Id.* at 537.

144. *Id.* at 569.

145. *Id.*

146. *Eastern Enters.*, 524 U.S. at 571 (Thomas, J., concurring).

147. 3 U.S. 386, 390 (1798) (holding that a “prohibition in the Constitution against the passage of *ex post facto* laws applies exclusively to penal or criminal cases”).

148. *Id.*

149. *Id.*

150. 121 S. Ct. 2448, 2555 (2001) (holding that “acquisition of title after the effective date of the regulation did not bar regulatory takings claim”).

for review, thereby reversing the Rhode Island Supreme Court.¹⁵¹

In 1959, Palazzolo and a group of associates joined to form Shore Gardens, Inc. (SGI) in order to acquire a waterfront parcel in Rhode Island.¹⁵² Failure to pay property taxes caused SGI's corporate charter to be revoked in 1978.¹⁵³ The title to the property passed on to Palazzolo, the sole shareholder.¹⁵⁴ Palazzolo's proposals to develop on the land were rejected by the Rhode Island Coastal Resources Management Council, an agency created to protect the State's coastal properties.¹⁵⁵ The Council had designated a series of lands, such as Palazzolo's, as protected "coastal wetlands," on which a landowner needed a "special permit" to develop.¹⁵⁶ To secure a special exception, the proposed activity was required to serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests."¹⁵⁷ Palazzolo's proposal to develop a beach club did not, in the Council's opinion, satisfy the condition of serving a "compelling public purpose."¹⁵⁸

Palazzolo filed suit, claiming that the "Council's action deprived him of 'all economically beneficial use' of his property, resulting in a total taking requiring compensation under *Lucas v. South Carolina Coastal Council*."¹⁵⁹ The Rhode Island Superior Court rejected his suit and was affirmed by the Rhode Island Supreme Court. The court held that Palazzolo's claim was unripe and that the claim of deprivation of all economically beneficial use was "contradicted by undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property."¹⁶⁰ Lastly, the court concluded that Palazzolo had no right to challenge regulations

151. See *id.* at 2459 (finding that the Council's decision's "to bar . . . any filing or development on the wetlands" to be a final decision rendering the claim ripe for review).

152. See *id.* at 2445 (purchasing three undeveloped parcels of land bordering Winnapuag Pond and near the Atlantic Ocean).

153. See *id.* at 2456.

154. See *id.* at 2550 (following procedures mandated by state law).

155. See *id.* (following legislative requirements, the Council is "charged with the duty of protecting the State's coastal properties").

156. Rhode Island Coastal Management Program § 210.3.

157. *Id.* at § 130A(1).

158. See *Palazzolo*, 121 S. Ct. at 2456 (stating that CRMP § 130(A)(1) requires a benefit to the whole public rather than "individual or private interests"). The Council report suggested that Palazzolo's proposal did not "inspire the reader with an idyllic coastal image" with its description of a gravel parking lot, dumpsters, porta-johns and concrete barbecue pits.

159. See *id.* (seeking \$3,150,000 in damages based on an appraised value of the proposed development).

160. *Id.* at 2457.

predating 1978 because he took on ownership of the land after the regulations were in effect.¹⁶¹ The U.S. Supreme Court disagreed with two of the Rhode Island Court's claims, only affirming that Palazzolo's property had not been stripped of all economic value because of the \$200,000 remaining in development value.¹⁶² The case was remanded for further investigation.¹⁶³

The Supreme Court found Palazzolo's claim ripe for review.¹⁶⁴ The ripeness of Palazzolo's claim rested on the question of "whether petitioner obtained a final decision from the Council determining the permitted use for the land."¹⁶⁵ In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,¹⁶⁶ the Court held that in order for a takings claim to be ripe, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue" as to whether or not "the regulation has deprived a landowner of 'all economically beneficial use' of the property."¹⁶⁷ Palazzolo had submitted two proposals to the Council. The first, in 1983, proposed to fill the entire wetlands area and was rejected.¹⁶⁸ The second reduced the proposed area for filling to 11 acres. The Rhode Island Supreme Court had contended that a final decision had not been made because of Palazzolo's "failure to explore 'any other use for the property that would involve filling substantially less wetlands'" than the first two proposals.¹⁶⁹ The U.S. Supreme Court, however, disagreed, concluding that the Council had not granted the special exception because Palazzolo's proposed beach club did not constitute a "compelling public service."¹⁷⁰ The Court held that a final decision had already been granted:

On the wetlands, there can be no fill for any ordinary land use.

161. *See id.* (recognizing that the Council was created in 1971, which was six years before Palazzolo became the sole property owner).

162. *See id.* (finding that the claim was ripe for review, and that the timing of Palazzolo's ownership did not impact the claims).

163. *See id.* (requesting the lower court to reconsider the claim under the three-part test identified in *Penn Central*).

164. *See Palazzolo*, 121 S. Ct. at 2458.

165. *Id.* at 2458.

166. 473 U.S. 172 (1985).

167. *See Palazzolo*, 121 S. Ct. at 2458 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)).

168. *See id.* (denying Palazzolo the right to fill in the marsh land area because the proposal was vague; would impact the wetlands; and conflicts with the CRMP).

169. *See id.* at 2459 (suggesting that a reduced-scale proposal might be approved as an acceptable use of the property).

170. *Id.*

There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.¹⁷¹

As for the Rhode Island Supreme Court's claim that Palazzolo's failure to submit a proposal for the upland parcel precluded any final decision, the U.S. Supreme Court decided that Palazzolo need not have submitted a proposal for development of land where there was no "uncertainty as to the land's permitted use."¹⁷² More importantly, the Court examined the "theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause" and held that the "Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation."¹⁷³ Merely because Palazzolo was aware of the regulation did not preclude his ability to bring a takings suit against the government.¹⁷⁴ The Just Compensation Clause makes no distinction or limitations on the rights of a landowner to challenge the eminent domain of the Government.¹⁷⁵ The far-reaching consequences of ignoring the plain language of the Just Compensation Clause could destroy property rights. As the majority held:

Were we to accept the State's rule, the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.¹⁷⁶

Palazzolo v. Rhode Island appears to be a critical case in determining the future of property rights. Through a plain meaning interpretation of the Just Compensation Clause, the Court rendered a decision designed to preserve the right of future generations to

171. *Id.* at 2460.

172. *Id.* at 2462.

173. *Palazzolo*, 121 S. Ct. at 2462.

174. *See id.* (rejecting the State's claim that precludes a subsequent owner from making any claim of lost value because "they purchased or took title with notice of the limitations").

175. *See id.* at 2463 (finding it unfair to bar a claim by a subsequent owner because "the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

176. *Id.* at 2462-63.

challenge governmental takings.

V. CONCLUSION

Justice Thomas is, first and foremost, an individualist on the Court dedicated to an interpretative philosophy based on the text of the Constitution and its context. His fidelity to the principles of restraint and textualism has helped anchor the Supreme Court's property rights jurisprudence, much as Justice Black did in the area of First Amendment protection. After decades of decisions that have ignored the plain language of the Just Compensation Clause, Justice Thomas' influence on the Court has guided it toward a strict construction of the Just Compensation Clause, and thus avoided a result wherein the desirability of the objective, environmental protection, would overshadow the carefully crafted protections contained in the Constitution. Justice Thomas' willingness to reexamine past cases in an attempt to restore the integrity of the Constitution and his drawing on the original vision of the framers with the text of the Constitution in hand will continue to secure the protection of both property rights and individual liberty for generations to come.