

ESCHEWING THE SUPERLEGISLATIVE PREROGATIVE: TAX OPINIONS OF JUSTICE CLARENCE THOMAS

Darlene Addie Kennedy *

I. INTRODUCTION

In the days that followed President Bush's nomination of District of Columbia Circuit Court Judge Clarence Thomas to the United States Supreme Court, opponents labeled him a conservative activist who would strip individuals of their liberties and overturn cases for the purpose of promoting his own right-leaning agenda. Notwithstanding the stridency of that critique, itself largely a product of the Left's revulsion over Bush's refusal to name a liberal jurist-of-color to Thurgood Marshall's chair, a survey of Justice Thomas's writings since his appointment to the Court reveals little to substantiate those propositions. Instead, Thomas's approach to law is as President Bush advertised: to strictly interpret the plain language of the law as envisaged by the legislature and to adhere to judicial precedent of prior courts.

The Supreme Court is deluged each October with cases that arc across the spectrum of American law, taxation being among the more complex areas within the Court's purview. Lawyers who practice in this field encounter an Internal Revenue Code containing many thousands of pages filled largely with counter-intuitive and class-conscious regulations that are not easily comprehended by tax professionals, and much less by a public who are benumbed by its volume and *arcana*. Any jurist appointed to the highest American Court must attain a sure-footed mastery of this legal terrain. A task made more difficult by the relative infrequency of tax cases heard by the Court. Justice Thomas is not often asked to deliver the opinion on questions of tax law. The following tax-related cases within this brief survey are comprised of mixed issues of tax and other law. Apparent in a review of the following cases is Justice Thomas's adherence to his role as a jurist and his strict application of law to cases before the Court, as written by the legislature and set by case precedent.

II. TAXATION AND THE DUTIES OF A BANKRUPTCY TRUSTEE

One of the earliest tax cases argued before the Court in Justice Thomas's freshman term was *Holywell Corporation v. Smith*.¹ The Court

* Assistant Professor, Regent University School of Law; J.D., Syracuse University (1991); LL.M. (Taxation), University of Baltimore (1996).

¹ 503 U.S. 47 (1992).

was asked to determine whether a trustee appointed in a Chapter 11 bankruptcy is required to pay income taxes on behalf of the corporate and individual debtors of the bankruptcy estate.² Justice Thomas sought to determine the duty owed by the trustee, Fred Stanton Smith, to the corporate debtors, Holywell, Chopin, and Miami Center, and to the individual debtor, Theodore Gould. Pivotal to his analysis was determining Smith's standing in relation to the corporate and individual debtors. Based on the explicit language of the Internal Revenue Code, Justice Thomas concluded that, with regard to the corporate debtors, Smith was, in fact, an assignee whose duties included the payment of income taxes on behalf of the corporate debtors.³

Smith argued that his role as assignee should be defined by its "ordinary and legal usage" rather than by the term's statutory definition.⁴ He sought to limit the reach of the statute, asserting that it may only be applied in two instances: (1) when an individual "winds up the business of a dissolving corporation," or (2) when "a person stands in the place of management in operating the day-to-day business of a distressed corporation."⁵ Justice Thomas applied the plain language of § 6012(b)(3), which states in part:

where a receiver, trustee in a case under title 11 of the United States code, or assignee, by order of a court of competent jurisdiction . . . has

² See *id.* at 50. Miami Center Limited Partnership (MCLP) defaulted on a bank loan and, in 1984, along with four affiliated debtors (Holywell Corporation, Chopin Associates, Miami Center Corporation, and Theodore B. Gould), filed Chapter 11 bankruptcy. The bankruptcy court consolidated the five cases. The debtors represented their own bankruptcy estates as "debtors in possession," as provided under 11 U.S.C. § 1101(1). Thereafter, in August of 1985, a "Consolidated Plan of Reorganization" [hereinafter, "the Plan"] was created on behalf of the corporate and individual debtors (Holywell, Chopin, Miami Center and Gould). The Plan authorized the creation of a trust on behalf of all debtors and required the appointment of a trustee by the Bankruptcy Court. *Id.* Under the plan, Trustee was to "liquidate and distribute all of the trust property to the creditors of the various bankruptcy estates." *Id.* at 51. "All right, title and interest, of the Debtors in and to the Trust Property, including Miami Center, shall vest in Trustee, without further act or deed by the Debtors."

The Plan took effect in October 1985 and the Bankruptcy Court appointed Fred Stanton Smith as trustee, who then sold Miami Center and distributed all the assets to third-party creditors. One of the corporate debtors, Holywell Corporation, filed its tax return for the fiscal year ending July 31, 1985, and requested the trustee to pay the taxes owed. No other income taxes were filed on behalf of the other debtors (corporate or individual). Trustee Smith sought declaratory judgment from the Bankruptcy Court claiming he had no duty to file income tax returns or pay income taxes. The Bankruptcy Court held for the trustee. The District Court and Court of Appeals affirmed. *Id.* at 51. The United States along with debtors brought this action via writ of certiorari. *Id.* at 51-52.

³ See *id.* at 52 (applying the rule found in I.R.C. § 6012(b)(3)).

⁴ *Holywell*, 503 U.S. at 53.

⁵ *Id.* (citing *Louisville Property Co. v. Commissioner*, 140 F.2d 547, 548 (6th Cir. 1944)).

possession of or holds title to all or substantially all the property or business of a corporation . . . trustee or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.⁶

Justice Thomas dismissed Smith's restricted interpretation of "assignee" as too narrow, holding that the statute "does not make dissolution necessary; it applies whether the corporation transfers *all* or *substantially all* of its property."⁷ Justice Thomas also refuted respondent's argument that the section required "the assignee to manage the corporation's business after the transfer of property."⁸ Instead, he held that the statute "expressly requires the assignee to make a return 'whether or not [the assigned] property or business is being operated.'"⁹ As trustee of the corporate debtors' property, Smith's responsibilities did not cease once he disposed of the bankruptcy property. His duties also included the filing of tax returns which "the corporate debtors would have filed" had the property not been placed into a bankruptcy trust.¹⁰

Smith claimed that, as trustee, he had no fiduciary duty to the *individual* debtor, Gould. Therefore, he advocated a limited interpretation of the companion statute, § 6012(b)(4), which states, "[r]eturns of an estate, a trust, or an estate of an individual under Chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof."¹¹ Justice Thomas rejected Smith's argument and held that the statute clearly defined Smith's duty to Mr. Gould as being that of "fiduciary."¹² Still remaining was the question whether Smith was a fiduciary of a *trust* or of an *estate*.¹³ Justice Thomas concluded that Smith was serving as fiduciary of a trust.¹⁴ To support this conclusion,

⁶ *Id.* at 52.

⁷ *Id.* at 53.

⁸ *Id.* at 54.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Holywell*, 503 U.S. at 54 (quoting I.R.C. § 6012(b)(4)).

¹² *See id.* at 55-56.

"Fiduciary" is a term which applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers.

Id. at 56 (quoting 26 C.F.R. § 301.7701-6 (1991)).

¹³ *See id.* at 54. Petitioner, the United States, argued trustee was fiduciary of an estate. Debtors, also petitioners in this case, argued trustee was fiduciary to a trust. Respondent, trustee contended he was fiduciary to neither. *Id.*

¹⁴ *See id.* at 55.

The plan . . . 'declared and established' the new Miami Center Liquidating Trust. It then vested all of the assets of Gould's estate to the respondent Smith as trustee. The plan did not simply substitute the trustee for Gould

Justice Thomas turned to the Treasury Regulations contained in the Internal Revenue Code.¹⁵ He found that a *liquidating trust* exists if that trust is organized for the purpose of liquidating and distributing assets; and, the trustee designated to handle the transactions will be looked upon as a fiduciary of that trust.¹⁶ The bankruptcy court assigned Smith to be trustee of the Miami Center Liquidating Trust. As such, he had a duty to file returns and pay taxes on behalf of both the corporate debtors and the individual debtor, Gould.¹⁷

III. RETROACTIVE TAX LAWS

The issue before the Court in *Harper v. Virginia Dept. of Taxation*¹⁸ was whether newly stated tax laws could be applied retroactively. The Commonwealth of Virginia exempted state and local employees' benefits from taxation,¹⁹ but did not extend the exception to federal retirement benefits.²⁰ Virginia repealed its tax scheme and introduced a refund program in light of *Davis v. Michigan Dept. of Treasury*,²¹ which held the state exemption preference unconstitutional.²² Prior to this decision, taxpayers seeking refunds for taxes imposed before 1985 were barred.²³ According to Justice Thomas,

When [this] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be

as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the trustee control of this property. The Bankruptcy Code expressly permits this arrangement."

Id.

¹⁵ See *id.* at 55-56 (quoting Treasury Regulation 26 C.F.R. § 301.7701-4 (d)). Certain organizations which are commonly known as liquidating trusts are treated as trusts for purposes of the Internal Revenue Code. An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose.

Id.

¹⁶ See *Holywell*, 503 U.S. at 57.

¹⁷ See *id.* at 58.

¹⁸ 509 U.S. 86 (1993).

¹⁹ See *id.* at 90.

²⁰ See *id.*

²¹ 489 U.S. 805 (1989).

²² See *Harper*, 509 U.S. at 89 (quoting *Davis*, 489 U.S. at 817). "A state violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the Federal government but exempts from taxation all retirement benefits paid by the state or its political subdivision." *Id.*

²³ *Id.* at 97. See also *id.* at 90-91. Taxpayers could seek refunds for the years "1985, 1986, 1987, and 1988 for up to one year from the date of the final judicial resolution [which determined] whether Virginia must refund these taxes." *Id.* (citing VA. CODE ANN. § 58.1-1823(b) (Supp. 1992)). "Applications for tax refunds generally must be made within three years of the assessment." *Id.* at 91 n.3 (citing VA. CODE ANN. § 58.1-1825 (1991)).

given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate all announcement of the rule.²⁴

Unlike *Holywell*, whose result relied on statutory interpretation, the issue of retroactivity is a product of case law, which until the 1960s consistently favored retroactively applying a court's decision.²⁵ The Court carved out an exception to this rule in certain *criminal* cases.²⁶

Although the Court would later apply *Linkletter v. Walker* to create an exception to retroactivity in *civil* cases,²⁷ it acknowledged its errant usurpation of power two decades later by striking the *Linkletter* test in criminal cases. *Griffith v. Kentucky*,²⁸ set a new standard by eliminating the *Linkletter* "factors" which had been used to determine whether a new rule of law should be afforded retroactive treatment in criminal cases.²⁹ It was not until *James B. Beam Distilling Co. v. Georgia*³⁰ that a majority of the Court agreed that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law."³¹ Thus, *Linkletter's* application to civil cases was also struck down. The rule of retroactivity had come full circle in thirty years.

²⁴ See *id.*

²⁵ See *id.* at 94 (citing *Robinson v. Neil*, 409 U.S. 505, 507 (1973)). "Both the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court. . . . Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions . . . for near a thousand years.'" *Id.* (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

²⁶ See *Harper*, 509 U.S. at 94; see also *Linkletter v. Walker*, 381 U.S. 618 (1965). The test carved out in *Linkletter* stated, "[A] decision to confine a new rule to prospective application rested on the purpose of the new rule, the reliance placed upon the previous view of the law, and 'the effect on the administration of justice of a retrospective application' of the new rule." *Harper*, 509 U.S. at 94 (citing *Linkletter*, 381 U.S. 618 (1965)).

²⁷ See *id.* at 94-95. Retroactive treatment would be prohibited in applying "a new principle of law' if such a limitation would avoid 'injustice or hardship' without unduly undermining the 'purpose and effect' of the new rule." *Id.* (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

²⁸ 479 U.S. 314 (1987).

²⁹ See *Harper*, 509 U.S. at 95. *Griffith* held that any new rules declared by the Court must be applied retroactively to all "criminal cases pending on direct review." *Id.* (quoting *Griffith*, 314 U.S. at 328). The *Griffith* Court relied "on two 'basic norms of constitutional adjudication:' first, . . . that 'the nature of judicial review' strips us [the Court] of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit;" and second, that the "selective application of new rules violates the principle of treating similarly situated [parties] the same." *Id.* at 95 (quoting *Griffith*, 314 U.S. at 323).

³⁰ 501 U.S. 529 (1991).

³¹ *Harper*, 509 U.S. at 96.

In *Harper*, Justice Thomas reaffirmed the Court's mandate requiring that the decisions in civil and criminal cases be *retroactively* applied without exception.³² His opinion reflects a constancy that is ever on guard against incrementalism. Congress, not the Court, has been delegated power through the Constitution to legislate. Justice Thomas respects that authority.

IV. TAXATION AND THE COMMERCE CLAUSE

*Oregon Waste Systems, Inc. v. Department of Environmental Quality*³³ and *Associated Industries of Missouri v. Lohman*³⁴ presented issues involving tax law and the Commerce Clause.³⁵ The language of the Commerce Clause has been regarded as an especially potent means by which the Federal Government may intervene in state and private activities whose interstate "character" is largely a legal fiction. More precisely, the Commerce Clause prohibits a state from unjustifiably discriminating against or placing a burden upon the flow of commerce entering its borders (*negative* Commerce Clause).³⁶

In *Oregon Waste*, the state charged higher fees to dispose of solid waste generated outside the state.³⁷ Petitioner, an Oregon-based waste hauler, raised a Commerce Clause claim.³⁸ The Oregon Supreme Court held the surcharge was "not facially discriminatory 'because of [its]

³² See *id.* at 97. Justice Thomas observed "In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* (citing *Beam*, 501 U.S. at 543) "Our approach to retroactivity heeds the admonition that 'the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'" *Id.* (quoting *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 214 (1990)).

³³ 511 U.S. 93 (1994).

³⁴ 511 U.S. 641 (1994).

³⁵ The Commerce Clause states in part "Congress shall have Power . . . to regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

³⁶ See *Associated Indust.*, 511 U.S. at 647. "The Clause prohibits economic protectionism—that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)).

³⁷ See *Oregon Waste*, 511 U.S. at 96–97. Those seeking to dispose of waste generated from outside Oregon were required to pay two charges: the standard waste disposal fee (\$0.85 per ton) and, in addition, a surcharge (\$2.25 per ton) for transporting the waste across the Oregon border (a total cost of \$3.10). For waste that had been generated and disposed of within the state of Oregon, the legislature imposed a standard waste disposal fee of \$0.85 and an additional surcharge of only \$0.85 (resulting in a total cost of \$1.70 for waste generated in and disposed in the state). Thus, a higher charge was placed on those disposing of waste generated from outside the state's borders. *Id.*

³⁸ See *id.* at 97 (Petitioner's waste was generated both inside and outside Oregon's borders).

express nexus to actual costs incurred [by state and local government].”³⁹ Respondents raised two defenses: first, the surcharge was “compensatory” and “necessary to make shippers of such waste pay their ‘fair share’ of the costs imposed on Oregon by the disposal of their waste in the State;”⁴⁰ second, that the state “had an interest in spreading costs of the in-state disposal of Oregon waste to all Oregonians.”⁴¹

Rejecting the respondents’ *compensatory tax* argument, Justice Thomas articulated an approach favoring unfettered commerce, one that looks askance at state legislatures that view commerce as a ready source of tax revenue. “[U]nder a truly compensatory tax scheme,” he wrote, “the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.”⁴²

To persuade the Court of the need for a compensatory tax, a state must survive scrutiny that favors even-handed regulation “with only incidental effects on interstate commerce.”⁴³ The state must first “identify . . . the [intrastate tax] burden for which the State is attempting to compensate;” second, “the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce;” and finally it must determine “the events on which the interstate and intrastate taxes are imposed must be ‘substantially equivalent.’”⁴⁴

Oregon failed to demonstrate how its tax system advanced a legitimate local purpose that could not have been adequately served by a reasonable nondiscriminatory alternative:⁴⁵ “[E]ven if the surcharge

³⁹ *Id.* at 97.

⁴⁰ *Id.* at 102. Respondents raised this defense in light of *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992). The Court in *Chemical Waste* held that the state of Alabama could not impose a higher fee against other states seeking to use its landfills. However, the Court left open the possibility that such a fee could be allowed if the differential surcharge was based on actual costs incurred by the state for disposing waste generated in other states. *Id.*

⁴¹ *Oregon Waste*, 511 U.S. at 106. This resulted in cost shifting scheme which “requires shippers of out-of-state waste to bear the full costs of in-state disposal, but to permit shippers of Oregon waste to bear less than the full cost.” *Id.*

⁴² *Id.* at 103 (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937)).

⁴³ *Id.* at 99 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

⁴⁴ *Id.* at 103 (citation omitted).

⁴⁵ *See id.* at 100-01.

[T]he surcharge must be invalidated unless respondents can ‘show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Our cases require that justifications for discriminatory restrictions on commerce pass the “strictest scrutiny.” The State’s burden of justification is so heavy that “facial discrimination by itself may be a fatal defect.”

merely recoups the costs of disposing of out-of-state waste in Oregon . . . the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States."⁴⁶ The state surcharge on out-of-state waste "patently discriminate[d]" against interstate commerce and failed the strict scrutiny delineated by Justice Thomas.

Respondents had further argued that the surcharges were necessary to spread the costs of waste disposal. Calling such characterization a pretext for protectionism, Justice Thomas observed that states have the right to participate in and take advantage of the marketplace.⁴⁷ Therefore, a state must legislate in a manner that does not accord its own inhabitants a "preferred right of access over consumers in other States to natural resources located within its borders."⁴⁸ He concluded by writing that a State may not unduly exercise its police powers to impose taxes solely upon articles of interstate commerce without the strict scrutiny of the courts.⁴⁹

In examining Oregon's tax scheme, Justice Thomas looked not only to controlling case law, but also to the Constitution and the legislative intent of its Framers.⁵⁰ Justice Thomas recognized the right of states to "configure their systems of taxation as they deem appropriate" and the Court's obligation to afford broad latitude to those tax schemes as long as states complied within the parameters of the Constitution (i.e. Commerce Clause).⁵¹

The common thread running through cases upholding compensatory taxes is the equality of treatment between local and interstate

Id.

⁴⁶ *Id.* at 100.

⁴⁷ *See id.* at 106. "Our cases condemn as illegitimate . . . any governmental interest that is not 'unrelated to economic protectionism,' and regulating interstate commerce in such a way as to give those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere constitutes such protectionism." *Id.*

⁴⁸ *Oregon Waste*, 511 U.S. at 107 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)). "We recognize that 'the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce.'" *Id.* at n.9 (quoting *New Energy Co. of Ind. v. Limbach et al*, 486 U.S. 269, 278 (1988)).

⁴⁹ *Id.* (citing *Guy v. Baltimore*, 100 U.S. 434 (1880)).

⁵⁰ *See id.* at 98. "The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322 (1979)).

⁵¹ *See id.* at 108. "All we intimate here is that their [states'] discretion . . . is bounded by any relevant limitations of the Federal Constitution, in these cases the negative Commerce Clause." *Id.*

commerce. In *Associated Industries of Missouri v. Lohman*,⁵² the Missouri State legislature, which had established a multi-tiered revenue system consisting of sales and use taxes, authorized a 1.5 percent use tax for the “privilege of storing, using or consuming” personal property purchased outside the state.⁵³ The legislature delegated responsibility for setting the accompanying sales taxes to individual counties and municipalities. This resulted in sales taxes that ranged from 0.5 percent to 3.5 percent and use taxes that in certain jurisdictions exceeded the sales tax.⁵⁴

The Petitioner, a trade association of businesses, claimed that Missouri’s scheme inequitably burdened purchasers of out of state products in violation of the Commerce Clause.⁵⁵ Missouri’s Director of Revenue argued that, under the Commerce Clause, “discrimination in some parts of a state tax system may be permissible”⁵⁶ if the discrimination is limited and offset by countervailing preferential treatment for interstate trade in other aspects of taxation. Citing the preservation of a national “area of trade among the several states” as the central objective of the Commerce Clause, Justice Thomas declared Missouri’s “zero sum” or “overall impact” analysis unconstitutional. Manifestly differential tax treatment among a state’s subdivisions offends the *raison d’être* of the Commerce Clause.

Justice Thomas’s analysis mirrored the view he had expressed in *Oregon Waste*, and was similarly grounded on a strict reading of precedent, recognizing the Commerce Clause’s “negative command” prohibiting states from discriminating against interstate commerce.⁵⁷ Justice Thomas’s plain reading of the clause led him to conclude that its free market language was a balm against economic protectionism.⁵⁸ This clause warrants invalidating any statute that “tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.”⁵⁹ Such a scheme may be deemed valid only if the Court finds it to be part of a ‘compensatory tax’ designed simply to

⁵² 511 U.S. 641 (1994).

⁵³ *Id.* at 644. This system imposed a 4.255 percent tax on all sales of personal property purchased within the state. The sales tax was paired with a use tax of 4.225 percent for the “privilege of storing, using or consuming” personal property purchased outside the State. The State permitted an additional set of use and sales taxes. It is these taxes that are the focus of this case. *See id.* at 643–44.

⁵⁴ *See id.* at 644 n.2.

⁵⁵ *See id.* at 643.

⁵⁶ *Id.* at 649.

⁵⁷ *Id.* at 646.

⁵⁸ *See Associated Industries*, 511 U.S. at 647 (“The Clause prohibits economic protectionism—that is, ‘regulatory measures’ designed to benefit in-state economic interests by burdening out-of-state competitors.”).

⁵⁹ *Id.* at 647 (quoting *Armco, Inc.*, 467 U.S. at 642).

make interstate commerce bear a burden already borne by intrastate commerce.”⁶⁰

Although Justice Thomas held that Missouri’s sales and use taxes violated the Commerce Clause, he observed that reasonably apportioned sales and use taxes would survive scrutiny under the Commerce Clause. However, whether Missouri’s 1.5 percent use tax was equivalent to, or lower than, the local sales tax could not be predetermined: it depended “entirely upon the locality” in which the purchaser happened to reside. Interstate commerce is impermissibly burdened where the use tax exceeds the sales tax and intrastate goods are subjected to higher levies.⁶¹ Such disparities are incompatible with the Court’s “strict rule of equality”⁶²

V. TAXATION OF NATIVE AMERICANS

Justice Thomas has also written for the court on tax matters affecting Native American reservations.⁶³ The issue was whether the state of Minnesota could impose *ad valorem* taxes on reservation land that had been sold to non-Indians and eventually resold to the Chippewas.⁶⁴ Justice Thomas agreed that such an imposition was consistent with case law, precedents, and Congress’s ‘unmistakably clear’ intent to allow such taxation.”⁶⁵

Justice Thomas noted that pertinent caselaw⁶⁶ prohibited state and local taxation on Indian reservations unless Congress clearly intends such taxation⁶⁷ “We have consistently declined to find that Congress has

⁶⁰ *Id.* at 647 (citing *Oregon Waste*, 511 U.S. at 103). “Under the compensatory tax doctrine, a facially discriminatory tax that imposes on interstate commerce the equivalent of an ‘identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause.’” *Id.* (quoting Thomas, J.).

⁶¹ *See id.* at 648–49 (citations omitted) (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73 (1963)).

⁶² *Id.* at 649.

⁶³ *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

⁶⁴ *See id.* at 106 (Through treaties and executive orders the Federal Government was empowered to designate lands for use exclusively by Indians).

During the late 19th century, the Federal Government changed its policy of setting aside reservation lands exclusively for Indian tribes under federal supervision. The new “allotment” policy removed significant portions of reservation land from tribal ownership and federal protection, allotting some parcels to individual Indians in fee simple and providing for other parcels to be sold to non-Indians.

Id.

⁶⁵ *Id.*

⁶⁶ *See id.* at 110–11 (referring to *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992) and *Goudy v. Meath*, 203 U.S. 146 (1906)).

⁶⁷ *See id.* at 110. “State and local governments may not tax Indian reservation land ‘absent cession of jurisdiction or other federal statutes permitting it.’” *Id.* (quoting

authorized such taxation unless it has 'made its intention to do so unmistakably clear."⁶⁸ Clear intent exists in circumstances in which Congress authorizes reservation land to be distributed in fee, at which time, he remarked, the land becomes "freely alienable" and "withdrawn from federal protection."⁶⁹

In the case then before the Court, a proviso of the Burke Act⁷⁰ permitted Minnesota to assess an *ad valorem* tax on land repurchased by the Chippewa Indians. The proviso empowered the Secretary of the Interior to "authorize issuance of a fee simple patent to the land before the end of the usual trust period, and thereafter all restrictions as to sale, incumbrance, or *taxation* of said land shall be removed."⁷¹

In another tax-related case involving Native Americans, the Court was asked to determine whether a federal contractor is immune from a state's transaction privilege tax when the contractor provides services on an Indian reservation.⁷² Justice Thomas ruled that such services were not shielded from taxation because the contractor was neither Native American nor a "governmental entity," either of which would have triggered tax immunity.⁷³

Justice Thomas relied upon a strict reading of *United States v. New Mexico*⁷⁴ as the basis for his conclusion that the Court was unjustified in altering precedent. "For that immunity to be expanded beyond these narrow constitutional limits . . . Congress must 'take responsibility for the decision, by so expressly providing . . .'"⁷⁵ Any decision to exempt

Yakima, 502 U.S. at 258 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973))).

⁶⁸ *Id.* at 110 (quoting *Yakima*, 502 U.S. at 258).

⁶⁹ *Id.* at 110-11.

This was the case both in *Yakima* and *Goudy v. Meath* . . . in which this Court held that land, allotted and patented in fee to individual Indians and thus rendered freely alienable after the expiration of federal trust status, was subject to county *ad valorem* taxes even though it was within a reservation and held by either individual Indians or a tribe.

Id. (citation omitted).

⁷⁰ 34 Stat. 182, 25 U.S.C. § 349.

⁷¹ *Cass County*, 524 U.S. at 107.

⁷² See *Arizona Dept. of Revenue v. Blaze Const. Co.*, 526 U.S. 32, 119 S. Ct. 957 (1999). Blaze Construction Company did contracting work in Arizona on behalf of the Bureau of Indian Affairs. The Department of Revenue (Arizona) assessed a tax deficiency against Blaze because it had not paid the state's "transaction privilege tax" for the proceeds received from its work for the Bureau of Indian Affairs. The Tax Court granted the Department of Revenue summary judgement. The Court of Appeals reversed. The Arizona Supreme Court denied the Department of Revenue's petition for review. The Supreme Court granted certiorari. *Id.* at 959.

⁷³ See *id.* at 960.

⁷⁴ 455 U.S. 720 (1982).

⁷⁵ *Blaze*, 119 S. Ct. at 959 (quoting *New Mexico*, 455 U.S. at 737). In *United States v. New Mexico*, the Court held that "tax immunity is appropriate in only one circumstance:

the contractor from a state's transaction privilege tax, Thomas wrote, rests with that state and with Congress.⁷⁶

VI. CONCLUSION

Like most American law, the tax doctrines that Justice Thomas has thus far addressed have been vulnerable to incrementalism. They might have been susceptible, if Justice Thomas were so inclined, to the kind of creeping judicial expansionism that has characterized the Court over the past half-century. Justice Thomas could have forged new legal territory, either by casting aside precedents or by carving exceptions to them. Instead, Justice Thomas observed a policy of judicial restraint, refusing to engage in the sort of activism that many of his colleagues practice. His approach is refreshingly direct and unaffected by personal predilection or ideological bent, other than his championing the view that precedent and plain language meaning still matter. In his nine years as a justice, Clarence Thomas continues to approach his duties in the same sure-footed manner as when he served on the D.C. Circuit, and as he said he would during his confirmation hearings. This could not have been more galling to his detractors who, in the years since his confirmation, have all but given up their quixotic hope of exposing some "latent conservative agenda" in his Court writings. Insofar as his writings reveal, Justice Thomas is no more conservative than the legislative or constitutional language he assiduously interprets.

Some might argue that Justice Thomas has not yet been provided with a broad-enough canvas to make a mark. I do not agree. We may, based on the very limited survey of tax issues he has confronted, take measure of his judicial temperament. In so doing, we observe the workings of a deliberate, grounded, but confident legal approach. The extraordinary constitutional powers conferred upon Justice Thomas are enough for this man, he is content to serve in one branch of government at a time. His opinions evince no discernible longing to legislate from the bench; his only driving ambition, it seems, is to place his imprimatur firmly upon those statutes and regulations that pass constitutional muster, unfettered by personal predilection. This may smack of judicial sloth to some on the Left—whose excitable heroes, often without constitutional foundation, regularly veto the express will of the legislative branch—but such an appraisal would reveal as much about the appraiser as the appraised. Not without some measure of irony, one observes that were Justice Thomas to fail to adhere to the constitutional

when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being tax is concerned."

⁷⁶ See *id.* at 961.

limitations of his office, those same champions of a *Living Constitution* who revere their Holmsian super-legislators on the bench would rail against any attempt on his part to impose his personal views upon American law. This double standard might have given Justice Thomas cause for dismay were he inclined to impose his world-view on the rest of us. But as his fifteen-year tenure in the executive and judicial branches makes clear, Clarence Thomas's temperament is far more democratic than that of his detractors. Whether it falls upon him to read the plain language of a statute or warily regard the temptation of some of his colleagues to redefine and expand the boundaries of their constitutional charter, Clarence Thomas is unapologetically at the vanguard of self-disciplined jurisprudence. Justice Thomas, along with Chief Justice Rehnquist and Justice Scalia, is in counterpoise to those who believe in judicial legislation and the curious view that they honor the Constitution as a "living" document. Curious because any document whose provisions can so easily be altered and subverted is anything but "alive." The Constitution lives only so long as we honor the limitations it places on government power and the limitations that judges must place on themselves. Whether Clarence Thomas can continue to resist the omnipresent temptation to misuse his powers is not as compelling a question as whether he and his conservative brethren can persuade their colleagues to abandon their legislative proclivities and return to first principles.