

THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 97-42

EASTERN ENTERPRISES, PETITIONER v. KENNETH
S. APFEL, COMMISSIONER OF SOCIAL SECURITY,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

JUSTICE THOMAS, concurring.

JUSTICE O'CONNOR's opinion correctly concludes that the Coal Act's imposition of retroactive liability on petitioner violates the Takings Clause. I write separately to emphasize that the *Ex Post Facto* Clause of the Constitution, Art. I, §9, cl. 3, even more clearly reflects the principle that "[r]etrospective laws are, indeed, generally unjust." 2 J. Story, *Commentaries on the Constitution* §1398, p. 272 (5th ed. 1981). Since *Calder v. Bull*, 3 Dall. 386 (1798), however, this Court has considered the *Ex Post Facto* Clause to apply only in the criminal context. I have never been convinced of the soundness of this limitation, which in *Calder* was principally justified because a contrary interpretation would render the Takings Clause unnecessary. See *id.*, at 394 (opinion of Chase, J.). In an appropriate case, therefore, I would be 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. Today's case, however, does present an unconstitutional taking, and I join JUSTICE O'CONNOR's well-reasoned opinion in full.