

# The Burger Court Opinion Writing Database

## *Thomas v. Union Carbide Agricultural Products Co.*

473 U.S. 568 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

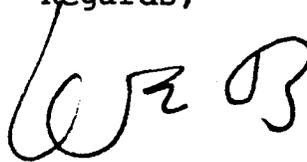
June 25, 1985

Re: No. 84-497 - Thomas, Acting Admin., EPA v.  
Union Carbide

Dear Sandra:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. O.', written in a cursive style.

Justice O'Connor

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.82 7M 52 6340

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 5, 1985

No. 84-497

Thomas v. Union Carbide

Dear Sandra,

I'll be circulating an opinion in  
the above in due course.

Sincerely,



Justice O'Connor

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82 64-2 6:14

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~~WLB~~  
Please join me in your opinion  
concurring in the judgment  
JTB

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: JUN 24 1985

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1985]

JUSTICE BRENNAN concurring in the judgment.

Our cases of both recent and ancient vintage have struggled to pierce through the language of Article III of the Constitution to the full meaning of the deceptively simple requirement that "The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. We know that those who framed our Constitution feared the tyranny of "accumulation of all powers, legislative, executive, and judiciary, in the same hands," The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison), and sought to guard against it by dispersing federal power to three interdependent branches of government. Each branch of government was intended to exercise a distinct but limited power and function as a check on any aggrandizing tendencies in the other branches. See *Buckley v. Valeo*, 424 U. S. 1, 122 (1976) (*per curiam*). The salary and tenure guarantees of Art. III—reflecting Hamilton's observation that "a power over a man's subsistence amounts to a power over his will," The Federalist No. 79, p. 491 (H. Lodge ed. 1888)—were thought essential to the judiciary's ability to function effectively as a check on Congress

*M*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 5, 1985

84-497 -

Thomas v. Union Carbide  
Agricultural Products Co.

Dear Sandra,

I join your opinion in this difficult case. At the same time, I would prefer that the claim of improvident delegation be rejected rather than put aside as your Part IV does. I see no reason to leave the issue hanging.

Sincerely,

*Byron*

82 11-2 6:11

Justice O'Connor

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 5, 1985

Re: No. 84-497-Thomas v. Union Carbide

Dear Sandra:

I await further writing.

Sincerely,

*J.M.*

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 24, 1985

Re: No. 84-497-Thomas v. Union Carbide

Dear Bill:

Please join me in your opinion concurring in the judgment.

Sincerely,

*T.M.*

T.M.

Justice Brennan

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 25, 1985

Re: No. 84-497, Thomas v. Union Carbide

Dear Bill:

Please join me in your opinion concurring in the judgment.

Sincerely,

*Larry*

Justice Brennan

cc: The Conference

.92 1/2 32 1/2 X 10

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 8, 1985

84-497 Thomas v. Union Carbide

Dear Sandra:

Your thorough opinion is persuasive both on the ripeness and the Article III issues.

As the case is a troublesome one for me, I will await further writing before coming to rest.

Sincerely,

*Lewis*

Justice O'Connor

lfp/ss

cc: The Conference

.92 JUN 10 1985

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 24, 1985

84-497 Thomas v. Union Carbide

Dear Sandra:

Please join me.

Sincerely,

*Lewis*

Justice O'Connor

lfp/ss

cc: The Conference

.82 1985 JUN 24 10 10

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 18, 1985

Re: No. 84-497 Thomas v. Union Carbide

Dear Sandra,

At Conference I took a different position on "ripeness" than the one you take in Part II of your presently circulating draft. But I must say you have done a good job of justifying the position you reach on that issue and I join your opinion in its entirety.

Sincerely,

Justice O'Connor

cc: The Conference

.82 10110 10107

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 21, 1985

Re: 84-497 - Thomas v. Union Carbide

Dear Sandra:

This is a copy of what I have just sent to the printer.

Respectfully,



Justice O'Connor

Copies to the Conference

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
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Justice O'Connor

June 21, 1985

From: Justice Stevens

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DRAFT 2--JPS [4\$0497i,4\$0497if]

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84-497 - Thomas v. Union Carbide Agricultural Products Co.

JUSTICE STEVENS, concurring in the judgment.

This appeal presents a question under Article III, but one which differs from that addressed by the Court and whose answer prevents me from reaching the merits of appellees' claims.

Appellees, plaintiffs in the District Court, challenge the constitutionality of an "arbitration procedure that [allegedly] violates their right to an adjudication that complies with" Article III insofar as it empowers civilian arbitrators to determine the amount of compensation they are entitled to receive for use of their research data. Amended Complaint for Declaratory Judgment and Injunction ¶¶ 20-21, Jt. App. 20, 23-24. The relief they claim against the Environmental Protection Agency and its Administrator (collectively referred to as EPA or the Administrator) is a declaration of unconstitutionality and an injunction against use of their data in the agency's processing of applications filed by third parties. See, id., at 24.

In §3(c) (1) (D) (ii) of the Federal Insecticide, Fungicide,

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To: The Chief Justice  
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Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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*Printed*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, APPEL-  
LANT *v.* UNION CARBIDE AGRICULTURAL  
PRODUCTS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1985]

JUSTICE STEVENS, concurring in the judgment.

This appeal presents a question under Article III, but one which differs from that addressed by the Court and whose answer prevents me from reaching the merits of appellees' claims.

Appellees, plaintiffs in the District Court, challenge the constitutionality of an "arbitration procedure that [allegedly] violates their right to an adjudication that complies with" Article III insofar as it empowers civilian arbitrators to determine the amount of compensation they are entitled to receive for use of their research data. Amended Complaint for Declaratory Judgment and Injunction ¶¶ 20-21, Jt. App. 20, 23-24. The relief they claim against the Environmental Protection Agency and its Administrator (collectively referred to as EPA or the Administrator) is a declaration of unconstitutionality and an injunction against use of their data in the agency's processing of applications filed by third parties. See, *id.*, at 24.

In § 3(c)(1)(D)(ii) of the Federal Insecticide, Fungicide, and Rodenticide Act,<sup>1</sup> Congress provided appellees with a contingent form of protection against the EPA's use of certain of

<sup>1</sup>The text of § 3(c)(1)(D)(ii) is quoted in full *ante*, at 4-5, n. 1.

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From: Justice Stevens

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7.3

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, APPEL-  
LANT *v.* UNION CARBIDE AGRICULTURAL  
PRODUCTS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1985]

JUSTICE STEVENS, concurring in the judgment.

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<sup>1</sup>The text of § 3(c)(1)(D)(ii) is quoted in full *ante*, at 4-5, n. 1.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: JUN 4 1985

Recirculated:

SDO  
I want further writing  
M

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires the Court to revisit the data-consideration provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U. S. C. § 136 *et seq.*, which was considered last term in *Ruckelshaus v. Monsanto Company*, — U. S. — (1984). *Monsanto* examined whether FIFRA's data-consideration provision effects an uncompensated taking in violation of the Fifth Amendment. In this case we address whether Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in FIFRA's pesticide registration scheme. We conclude it does not and reverse the judgment below.

I

The Court's opinion in *Monsanto* details the development of FIFRA from the licensing and labelling statute enacted in 1947 to the comprehensive regulatory statute of the present. This case, like *Monsanto*, concerns the most recent amendment to FIFRA, the Federal Pesticide Act of 1978, 92 Stat. 819 (1978 Act), which sought to correct problems created by

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document to be  
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Stylistic Changes Throughout

pp. 13, 14, 17, 18, 19, 20, 21

To: The Chief Justice  
Justice Brennan  
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Justice Stevens

From: Justice O'Connor

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JUN 17 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1985]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 24, 1985

Re: 84-497 - Thomas v. Union Carbide

Dear John:

Here is a copy of a paragraph regarding standing that I have sent to the printer to be added to my circulating draft in response to your circulation of June 21. It is to be inserted at the end of Part II.

Sincerely,

*Sandra*

Justice Stevens

Copies to the Conference

MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Justice Brennan  
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Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

**OPINION OF JUSTICE O'CONNOR**

**Thomas v. Union Carbide No. 84-497**

**addition to p. 12.**

From: Justice O'Connor

Circulated: JUN 24 1987

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In addition, appellees clearly have standing to contest EPA's issuance of follow-on registrations pursuant to what they contend is an unconstitutional statutory provision. They allege an injury from EPA's unlawful conduct - the injury of being forced to choose between relinquishing any right to compensation from a follow-on registrant or engaging in an unconstitutional adjudication. Allen v. Wright, \_\_\_ U.S. \_\_\_ (1984). Appellees also allege injury which is likely to be redressed by the relief they request. Ibid. The use, registration and compensation scheme is integrated in a single subsection that explicitly ties the follow-on registration to the arbitration. See §3(c)(1)(D)(ii) (EPA "shall deny" or "cancel" follow-on registration if arbitration section is not complied with). It is evident that Congress linked EPA's authority to issue follow-on registrations to the original data submitter's ability to obtain compensation. A decision against the provision's constitutionality, therefore,

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would support remedies such as striking down the statutory restrictions on judicial review or enjoining EPA from issuing or retaining in force follow-on registrations pursuant to §3(c)(1)(D)(ii).

pp. 12, 21-22

Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
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Justice Stevens

From: Justice O'Connor

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-497

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[June —, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires the Court to revisit the data-consideration provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U. S. C. § 136 *et seq.*, which was considered last term in *Ruckelshaus v. Monsanto Co.*, 467 U. S. — (1984). *Monsanto* examined whether FIFRA's data-consideration provision effects an uncompensated taking in violation of the Fifth Amendment. In this case we address whether Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in FIFRA's pesticide registration scheme. We conclude it does not and reverse the judgment below.

I

The Court's opinion in *Monsanto* details the development of FIFRA from the licensing and labelling statute enacted in 1947 to the comprehensive regulatory statute of the present. This case, like *Monsanto*, concerns the most recent amendment to FIFRA, the Federal Pesticide Act of 1978, 92 Stat. 819 (1978 Act), which sought to correct problems created by the Federal Environmental Pesticide Control Act of 1972, 86

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 25, 1985

MEMORANDUM TO THE CONFERENCE:

RE: 84-1500, Conticommodity Services, Inc. v. Schor, et al  
84-1519, Commodity Futures Trading Comm'n v. Schor, et al

These petitions were held for Thomas, Acting Director EPA v. Union Carbide Agricultural Products, Inc., et al., No. 84-417. Both arise from the same set of facts and concern the Commodity Exchange Act (CEA), 7 U.S.C. §18, reparations proceedings. For the reasons discussed below I will vote to grant, vacate and remand the petitions.

Respondent Schor traded on the futures market and Petitioner Conticommodity Services was his futures broker. Schor initiated a "reparations" action under §18 against Conticommodity before the Commodity Futures Trading Commission alleging violations of the Commodity Exchange Act. Conticommodity claimed Schor still owed \$90,000 on his account. It brought a counterclaim for this money, pursuant to a Commission rule allowing the Commission to hear any counterclaim "that arises out of the transaction or occurrence . . . set forth in the complaint." The counterclaim was based on state contract law. The ALJ ruled against Schor and Schor sought review in the CADC. The CEA provides for limited judicial review of factual findings and de novo review of legal conclusions. The CADC raised the Article III issue sua sponte.

To avoid a potential Article III infirmity, the CADC construed the CEA as not authorizing jurisdiction of state law counterclaims. 740 F.2d 1262 (1984). The CADC interpreted JUSTICE BRENNAN'S plurality in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), as casting doubt on jurisdiction of these claims because they could not be classified as "public rights" and the