
John W. Navarra
FIFRA Data-Cost Arbitration and the Judicial Power:
*Thomas v. Union Carbide Agricultural Products Co.*

105 S. Ct. 3325 (1985)

INTRODUCTION

The use of chemical pesticides by American agriculture has increased dramatically in recent decades.\(^1\) Increased use of pesticides has enhanced productivity, but has also increased the risk of harm to people and the environment.\(^2\) To confront the problems posed by pesticides, Congress passed the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in 1947.\(^3\) The basis of regulation under FIFRA is registration. FIFRA requires that pesticides\(^4\) be registered with the United States Environmental Protection Agency (EPA) before a manufacturer can sell them in the United States.\(^5\)

As a prerequisite to registration, pesticide manufacturers must submit vast amounts of research data concerning the health, safety, and environmental effects of their pesticides.\(^6\) FIFRA authorizes EPA to use data previously submitted by one manufacturer when considering an application for registration of the same or similar product by another manufacturer\(^7\) (colloquially known as the "me too" or "follow-on" registrant). EPA can consider data previously submitted by another

---


\(^2\) See S. REP. No. 838, supra note 1, at 4; H.R. REP. No. 511, 92d Cong., 2d Sess. 3-7 (1972).


\(^4\) Under FIFRA, the term "pesticide" includes insecticides, rodenticides, fungicides, herbicides, and plant regulators. See FIFRA, § 2(t), (u), 7 U.S.C. § 136(t), (u) (1982).

\(^5\) FIFRA, § 3(a), 7 U.S.C. § 136a(a) (1982).

\(^6\) 40 C.F.R. §§ 162.6(b)(2)(B), 162.8 (1985); see also FIFRA, § 3(c)(1)(D), 7 U.S.C. § 136a(c)(1)(D) (1982) (FIFRA provision empowering the EPA Administrator to require data).

registrant when evaluating follow-on applications only if the follow-on registrant first offers to compensate the original data submitter for use of the data.\textsuperscript{8} Once the follow-on registrant offers compensation, the original data submitter's permission is not required for the data use.\textsuperscript{9} In 1978, Congress amended FIFRA\textsuperscript{10} to provide for binding arbitration when the registrants cannot agree on the amount of compensation.\textsuperscript{11} The arbitrator's decision is subject to judicial review only for "fraud, misrepresentation, or other misconduct."\textsuperscript{12}

In \textit{Thomas v. Union Carbide Agricultural Products Co.},\textsuperscript{13} decided during the 1984-85 Term, the United States Supreme Court rejected the argument that the FIFRA data-sharing and compensation provision violated article III, section 1\textsuperscript{14} of the Constitution, which limits Congress' authority to establish quasi-judicial forums for "adjudication," by allocating to arbitrators the functions of judicial officers and by limiting review by an article III court.\textsuperscript{15}

This Note considers the Supreme Court's decision in \textit{Union Carbide} against a background of the history of the FIFRA data-sharing and compensation provision and the district court's decision. The discussion emphasizes the developing judicial doctrines regarding article I and article III courts. Part I provides a brief history of FIFRA, focusing on the data-sharing and compensation provision, and reviews the lower court proceedings. Part II summarizes the Supreme Court decision. Part III discusses the Court's reasoning in reaching its decision and suggests that the Court has still not developed a satisfactory test for determining when Congress may employ article I courts to resolve disputes involving federally created rights.

\textsuperscript{8} \textit{Id.}

\textsuperscript{9} \textit{Id.}


\textsuperscript{12} \textit{Id.}


\textsuperscript{14} Article III, section 1 provides:

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 establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

\textsuperscript{15} 105 S. Ct. at 3340. An "article III court" is one that is established under article III and complies with the requirements of that article, i.e, its judges must have lifelong tenure and undiminishable salaries. In contrast, "article I courts" (or "legislative courts") are courts that are established by Congress under its power conferred by article I. FIFRA arbitrations clearly were "article I courts" because the arbitrators did not have the tenure and salary protections of article III.
I
BACKGROUND OF THE CASE

A. The Regulatory Scheme

As enacted in 1947, FIFRA was basically a licensing and labeling statute. FIFRA required all pesticides to be registered with the Secretary of Agriculture prior to their sale in interstate and foreign commerce.\(^{16}\) The Act specified what information was required on the label of a registered pesticide.\(^{17}\) The Secretary could request registration applicants to submit test data to support labeling information.\(^{18}\)

Prompted by concerns about the safety of pesticides and their effects on the environment,\(^{19}\) Congress extensively revised FIFRA in 1972.\(^{20}\) These amendments transformed FIFRA into a comprehensive regulatory scheme. One new prerequisite to registration was that EPA\(^{21}\) had to determine that the pesticide would not cause "unreasonable adverse effects on the environment."\(^{22}\) To that end, EPA was empowered to require manufacturers to submit research data concerning the health, safety, and environmental effects of pesticides.\(^{23}\)

The 1972 amendments also included the forerunner of the current data-sharing and compensation provision.\(^{24}\) Congress believed that this provision would equitably allocate research costs among present and future pesticide producers.\(^{25}\) Congress also believed that this provision would streamline the registration process,\(^{26}\) encourage market entry by competitors who otherwise might be discouraged by the high costs\(^{27}\) of producing health and safety data,\(^{28}\) and at the same time, preserve incen-

---

\(^{16}\) FIFRA, ch. 125, § 4a, 61 Stat. 163, 167 (1947) (current version at 7 U.S.C. § 136a(a) (1982)).


\(^{22}\) 1972 Amendments, sec. 2, § 3(c)(5)(C), (D), 86 Stat. 973, 980-81 (1972) (current version at 7 U.S.C. § 136a(c)(5)(C), (D) (1982)).


\(^{27}\) The average cost of data required to support initial registration of a food-use pesticide was $7 million in 1977. S. Rep. No. 334, supra note 1, at 30.

\(^{28}\) See S. Rep. No. 970, supra note 19, at 12.
tives for companies to engage in research and development.\textsuperscript{29} Under the 1972 provision, if the original data submitter and the follow-on registrant failed to agree on the amount of compensation, EPA would make that determination.\textsuperscript{30} The original data submitter could appeal EPA’s determination to a federal district court.\textsuperscript{31}

The 1972 data-sharing and compensation provision proved to be problematic. FIFRA had no data-evaluation guidelines, and both data submitters and follow-on registrants disputed EPA’s methods of determining compensation. Problems also arose concerning the definition of “trade secrets” under FIFRA.\textsuperscript{32} The trade-secret controversy resulted in court decisions\textsuperscript{33} that prevented EPA from disclosing much of the data used in its registration decisions and from using data submitted by one applicant in considering the application of a later applicant.\textsuperscript{34} The combination of the trade-secret controversy, EPA determination of compensation, and judicial review of EPA decisions produced “an administrative nightmare in which the process of registering new pesticides simply ground to a halt.”\textsuperscript{35}

In response to the problems created by the 1972 amendments, Congress amended FIFRA again in 1978.\textsuperscript{36} Congress abolished the 1972 prohibition on EPA consideration of trade-secret data because it discouraged small potential competitors from entering the market.\textsuperscript{37} Congress also believed, however, that recognizing a limited proprietary interest in data submitted to support registrations would provide additional incen-

\begin{itemize}
\item \textsuperscript{29} See S. REP. No. 838, supra note 1, at 6.
\item \textsuperscript{30} 1972 Amendments, sec. 2, § 3(c)(1)(D), 86 Stat. 973, 979-80 (1972) (superseded by 7 U.S.C. § 136a(c)(1)(D)(ii)).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Data regarded as trade secrets could not be publicly disclosed by EPA or used in support of follow-on registrations without the original submitter’s consent. 1972 Amendments, sec. 2, § 10(b), 86 Stat. 973, 989 (1972). Firms submitting data consequently designated large amounts of their data as trade secrets to avoid subsequent disclosure; in contrast, EPA maintained that exemption from disclosure applied to a much smaller amount of data. See, e.g., Mobay Chem. Corp. v. Costle, 447 F. Supp. 811, 819, 824 (W.D. Mo. 1978); Chevron Chem. Co. v. Costle, 443 F. Supp. 1024, 1025-27 (N.D. Cal. 1978).
\item \textsuperscript{35} Chevron Chem. Co. v. Costle, 641 F.2d 104, 111 (3d Cir. 1981).
\item \textsuperscript{36} 1978 Amendments, supra note 10. Congress had previously amended in FIFRA 1975 to resolve a controversy about the effective date of section 3(c)(1)(D) and the data to which that section applied. Act of Nov. 28, 1975, Pub. L. No. 94-140, 89 Stat. 751.
\item \textsuperscript{37} See S. REP. No. 334, supra note 1, at 8, 30-31. The 1978 amendments overcame the problems presented by the court decisions that restricted EPA’s use of trade-secret data by abolishing the prohibition on disclosure of such data. For data to be characterized as “trade secrets,” manufacturers must have a reasonable expectation that their data will not be disclosed. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2873 (1984). Because there no longer can be such an expectation under the 1978 amendments, data submitted in support of registrations can no longer qualify as “trade secrets.” Id. at 2875.
\end{itemize}
tive beyond patent protection for research and development of new pesticides.\textsuperscript{38} Congress was convinced that data sharing was essential to the registration process,\textsuperscript{39} but the EPA Administrator had admitted that the Agency lacked the expertise necessary to determine proper compensation.\textsuperscript{40} Consequently, the 1978 amendments relieved EPA from its data-evaluation duties and established a system of negotiation and binding arbitration to make compensation decisions.\textsuperscript{41} Under the 1978 amendments, if the original data submitter and the follow-on registrant cannot agree on the amount of compensation, either party can initiate binding arbitration.\textsuperscript{42} The arbitrator’s decision is subject to judicial review only for “fraud, misrepresentation, or other misconduct.”\textsuperscript{43}

\textbf{B. The Proceedings Below}

\textit{Union Carbide} began in 1976 when appellees—thirteen large firms engaged in the development, manufacture, and marketing of chemicals used to make pesticides\textsuperscript{44}—brought suit challenging the FIFRA data-sharing and compensation provision. Each of the appellees had submitted data to EPA in support of pesticide registrations.\textsuperscript{45} When the 1978 amendments went into effect, appellees were challenging the FIFRA data-sharing and disclosure provisions under article I and the fifth amendment.\textsuperscript{46} After the 1982 United States Supreme Court’s decision in \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.},\textsuperscript{47} appellees brought suit challenging the FIFRA disclosure provisions as amended in 1972 and 1975. Jurisdictional Statement at 4, \textit{Union Carbide}. After the 1978 amendments, appellees amended their complaint to allege that the data-sharing and disclosure provisions effected a taking of their property without just compensation and without due process. 105 S. Ct. at 3330 n.2. The district court granted a preliminary injunction against use of data submitted prior to 1978. Amchem Prods., Inc. v. Costle, 481 F. Supp. 195 (S.D.N.Y. 1979). The court of appeals reversed, however, for a lack of a showing of a likelihood of success on the merits. Union Carbide Agric. Prods. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980), \textit{cert. denied}, 450 U.S. 996 (1981). Appellees then amended their complaint to allege that Congress’ failure to provide valuation standards rendered the arbitration provision an unconstitutional delegation of legislative authority in violation of article I. 105 S. Ct. at 3330 n.2. At the same time, appellees stipulated to dismissal, without prejudice to a Court of Claims action, of their due process claims. \textit{Id.}

\textsuperscript{39} S. Rep. No. 334, \textit{supra} note 1, at 7.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. In 1976, appellees brought suit in the United States District Court for the Southern District of New York challenging the FIFRA disclosure provisions as amended in 1972 and 1975. Jurisdictional Statement at 4, \textit{Union Carbide}. After the 1978 amendments, appellees amended their complaint to allege that the data-sharing and disclosure provisions effected a taking of their property without just compensation and without due process. 105 S. Ct. at 3330 n.2. The district court granted a preliminary injunction against use of data submitted prior to 1978. Amchem Prods., Inc. v. Costle, 481 F. Supp. 195 (S.D.N.Y. 1979). The court of appeals reversed, however, for a lack of a showing of a likelihood of success on the merits. Union Carbide Agric. Prods. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980), \textit{cert. denied}, 450 U.S. 996 (1981). Appellees then amended their complaint to allege that Congress’ failure to provide valuation standards rendered the arbitration provision an unconstitutional delegation of legislative authority in violation of article I. 105 S. Ct. at 3330 n.2. At the same time, appellees stipulated to dismissal, without prejudice to a Court of Claims action, of their due process claims. \textit{Id.}
\textsuperscript{47} 458 U.S. 50 (1982). The Court held that the defendant could not be compelled to adjudicate a state-created contract claim in a federal forum unless that forum was an article III court. \textit{Id.} at 89-91 (Rehnquist, J., concurring). See \textit{infra} note 84.
lees amended their complaint to allege that the FIFRA binding-arbitration provision violated article III by allocating judicial power to arbitrators with only limited review by an article III court. 48

In 1983, the District Court for the Southern District of New York granted appellees’ motion for summary judgment on the article III claims. 49 The district court first held that the statutory compulsion to seek relief through arbitration constituted a constitutionally sufficient case or controversy. 50 The district court also held that article III barred the assignment of judicial power to arbitrators with such limited review by an article III court. 51 Rather than striking down the statutory limitation on judicial review, the district court enjoined the entire data-use and compensation scheme. 52 EPA filed a direct appeal to the Supreme Court. 53 The Supreme Court vacated the judgment and remanded 54 for reconsideration in light of the Court’s supervening decision in Ruckelshaus v. Monsanto Co. 55

On remand, appellees amended their complaint to reflect the fact that their data had been used by EPA in considering follow-on registration applications. 56 Appellees stated that EPA had considered data submitted by appellee Stauffer Chemical Co. in registrations of PPG Industries, Inc. and Drexel Chemical Co. 57 Furthermore, appellees averred that Stauffer had invoked the FIFRA arbitration provision against PPG, and appellees alleged that the arbitrator’s award was far less than the compensation to which Stauffer was entitled. 58

50. 571 F. Supp. at 122 n.2.
51. Id. at 124.
52. Appendix to Jurisdictional Statement at 25a-26a.
53. EPA’s appeal to the Supreme Court was pursuant to 28 U.S.C. § 1252, which provides:

any party may appeal to the Supreme Court from an . . . order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

55. 104 S. Ct. 2862 (1984). The Supreme Court held that Monsanto’s “taking” challenge to FIFRA would not become ripe until after EPA had used Monsanto’s data in a follow-on registration, an arbitrator had made an award, and Monsanto had exhausted its remedies under the Tucker Act. Id. at 2882. The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

56. Joint Appendix at 23.
57. Id.
58. Id. Stauffer was awarded nearly $1.5 million plus a royalty of 15 cents per pound of
The district court held that the claims presented by Stauffer challenging the constitutionality of section 3(c)(1)(D)(ii) were ripe for resolution under the criteria established by the Supreme Court in *Monsanto*. The other plaintiffs, the district court held, were aggrieved by the clear threat of having to submit to unconstitutional arbitration. The district court reinstated its prior judgment, and EPA again appealed to the Supreme Court.

II
THE SUPREME COURT OPINION

A. The Majority Opinion

In an opinion by Justice O'Connor, the United States Supreme Court first held that the claims of Stauffer and the other appellees demonstrated sufficient ripeness to establish a case or controversy. Unlike the unripe "taking" claim in *Monsanto*, appellees' article III injury was not a function of whether the arbitrator awarded reasonable compensation but of the arbitrator's authority to adjudicate. Thus, appellees did not have to engage in arbitration before their claim was ripe: 

"[I]t is sufficient for purposes of a claim under Article III challenging a tribunal's jurisdiction that the claimant demonstrate it has been or inevitably will be subjected to an exercise of such unconstitutional jurisdiction."

In deciding the ripeness issue, the Court considered the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Union Carbide* presented an issue that was purely herbicides sold by PPG for 10 years. *Id.* at 54. This was approximately $50 million less than the amount sought by Stauffer. Brief for Appellees at 7.

59. Appendix to Jurisdictional Statement 3a-4a. The district court found that Stauffer did not have to exhaust any Tucker Act claim because such a claim would resolve only the liability of the United States regarding the taking of Stauffer's property; it would not resolve the liability of PPG on whose behalf the property was taken. *Id.* at 3a. Further, follow-on registrants, such as PPG, are the parties Congress intended to have pay for the data. *Id.*

60. *Id.* at 4a.

61. *Id.*

62. Justice O'Connor's opinion was joined by Chief Justice Burger, Justice White, Justice Powell, and Justice Rehnquist.

63. The Court considered only appellees' article III claims. The article I claim was not adequately briefed or argued before the Court; consequently, the Court left that issue open on remand. 105 S. Ct. at 3340. Justice O'Connor, however, implied that such a challenge would fail. See *id.* The Court, also, did not decide appellees' due process claims because the companies stipulated to abandon those claims. *Id.* at 3339.

64. 105 S. Ct. at 3333.

65. *See supra* note 55.

66. 105 S. Ct. at 3333.

67. *Id.* at 3332.

68. *Id.*

69. *Id.* at 3333.
legal and would not be clarified by further factual development. The Court found that requiring the pesticide industry to proceed while not knowing if the registration scheme was valid would impose a considerable hardship on the industry. Furthermore, resolution of the constitutionality of the arbitration scheme would serve the public interest.

The Court found that appellees had standing because they alleged an injury from the follow-on registration procedure—the injury was the compulsion to choose between engaging in an alleged unconstitutional adjudication or relinquishing any right to compensation. And this alleged injury was likely to be redressed by the requested relief, i.e., striking down the restrictions on judicial review or enjoining EPA from issuing or keeping in force follow-on registrations pursuant to section 3(c)(1)(D)(ii).

Finally, and most importantly, the Supreme Court held that section 3(c)(1)(D)(ii) did not contravene article III, section 1. Contrary to appellees' contentions, the Court found that any right to compensation from follow-on registrants was created by FIFRA and did not depend on or replace a right to such compensation under state law. The Court thus distinguished its holdings in Crowell v. Benson and Northern Pipeline Construction Co. v. Marathon Pipe Line. In Crowell, the Court held that when a common-law action in admiralty—a matter within the jurisdiction of article III courts—was replaced by a workers' compensation statute that employed adjuncts to determine claims, the use of those adjuncts did not contravene the limits of article III. Although, in Crowell, the Court did not articulate all the limitations imposed by

70. Id.
71. Id.
72. Id.
73. Id. at 3333-34. Justice Stevens concurred in the judgment, but did not reach the merits of the case because he concluded that appellees lacked standing. Id. at 3346 (Stevens, J., concurring). Justice Stevens reasoned that because appellees made no claim that the Administrator had used any of their data without obtaining the consent required by the statute, the statute provided no basis for relief against EPA. Id. He also concluded that declaring section 3(c)(1)(D)(ii) unconstitutional would not support an injunction against the Administrator's use of appellees' data. Id.
74. Id. at 3334.
75. Id. at 3340.
76. Id. at 3335. The Court noted, however, that individuals who submitted data prior to 1978 may have a claim that section 3(c)(1)(D)(ii) results in a taking of property interests protected by state law and that compensation for any uncompensated taking is available under the Tucker Act, 28 U.S.C. § 1491. Id.
77. 285 U.S. 22 (1931).
78. 458 U.S. 50 (1982).
80. The adjuncts in Crowell were deputy commissioners of the United States Employees' Compensation Commission. The deputy commissioners made initial factual determinations of work-related injury claims under the statute. See 285 U.S. at 42-44.
81. See 285 U.S. at 55-57.
article III, it found that one limitation was that the statute had to allow for *de novo* review of "fundamental or jurisdictional facts." In *Northern Pipeline*, the Court held that the defendant could not be compelled to defend a state-created contract action—a matter also reserved to the judiciary by article III—in a federal forum that was not an article III court.

In *Union Carbide*, the Court also rejected appellees' alternative contention that FIFRA conferred a "private right" to compensation, requiring either article III adjudication or greater review by an article III court than provided for in FIFRA. Appellees' private-right argument rested on the distinction between public and private rights adopted by the plurality in *Northern Pipeline*. The plurality had interpreted the Court's prior opinions as permitting three exceptions to the rule of article III adjudication: courts-martial, territorial courts, and decisions involving public rights. The plurality defined "public rights" as "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." A "private right" was defined as "the liability of one individual to another under the law as defined."

The *Union Carbide* majority repudiated the public/private rights distinction for use as a bright-line test for determining the requirements of article III, noting that this distinction did not command a majority in *Northern Pipeline*. The Court did not believe, as appellees argued, that there is a right to an article III forum whenever the federal government is not a party to a suit. The identity of the parties alone should not be determinative of whether the litigants are entitled to an article III forum for a particular case.

---

82. Id. at 62.
83. See 458 U.S. at 84 (plurality opinion); id. at 90 (Rehnquist, J., concurring).
84. Id. at 89-91 (Rehnquist, J., concurring). *Northern Pipeline* involved the constitutionality of the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The Act established a United States bankruptcy court in each judicial district as an adjunct to the district courts. 458 U.S. at 53. The bankruptcy judges did not enjoy the tenure and salary protections of article III. *Id.* The Act did, however, grant the bankruptcy judges broad jurisdiction: Their jurisdiction now extended "over all civil proceedings arising under title 11 [bankruptcy title] or arising in or related to cases under title 11." *Id.* at 54. After filing a petition for reorganization in a bankruptcy court, *Northern Pipeline* filed in that court an action for breach of contract against Marathon Pipe Line. *Id.* at 56. The Supreme Court affirmed dismissal of that suit on the ground that the Bankruptcy Act unconstitutionally conferred article III judicial power upon non-article III adjuncts. *Id.* at 87 (plurality opinion).
85. 105 S. Ct. at 3335.
86. 458 U.S. at 64-67.
89. 105 S. Ct at 3336.
90. *Id.*
In any event, the Court believed that the FIFRA right to compensation was not a purely "private" right: it had characteristics of a "public" right—the data-sharing scheme served the public interest as an integral part of a program safeguarding public health.

The Court noted several aspects of FIFRA that persuaded it that the arbitration scheme did not contravene article III. First, considering Congress’ reasons for choosing an article I forum, the Court found the data-sharing scheme to be a pragmatic, timesaving solution to the difficult problem of allocating the costs of producing adequate data regarding the health, safety, and environmental effects of potentially dangerous products. Second, the Court concluded that Congress could authorize EPA to charge follow-on registrants fees for the cost of data and to directly subsidize data submitters. Under section 3(c)(1)(D)(ii), Congress has merely taken the additional step of removing the valuation task from EPA and placing it with arbitrators. Third, the Court regarded registrants as voluntary participants in the registration process, and the danger of Congress or the Executive encroaching on the judiciary is at a minimum when no unwilling defendant is subject to judicial enforcement power as a result of an agency “adjudication.” The only potential object of judicial enforcement power under FIFRA is the follow-on registrant, who explicitly consents to arbitration. Finally, FIFRA limits but does not preclude review by an article III court. FIFRA does not prevent review of constitutional error, including whatever review might be required by due process. In these circumstances, the Court believed that the review provided for in section 3(c)(1)(D)(ii) was sufficient to preserve the appropriate exercise of the judicial function.

B. Justice Brennan’s Concurring Opinion

Justice Brennan reached the same result as the majority, but would have maintained the framework of analysis employed in the

91. Id. at 3337.
92. Id. Accordingly, the Court certainly would have upheld section 3(c)(1)(D)(ii) even if it had endorsed the public/private rights distinction.
93. Id. at 3338.
94. Id.
95. Id.
96. Id. at 3338-39.
97. Id. at 3338.
98. Id. at 3339. The Court expressly left open the question whether a private party could initiate an action in court to enforce a FIFRA arbitration. Id.
99. Id.
100. Id. Because the parties stipulated to abandon any due process claims, the Court did not decide to what extent due process may require review of arbitrator determinations. Id.
101. Id.
102. Justice Brennan’s opinion was joined by Justice Marshall and Justice Blackmun. Justice Stevens concurred separately. See supra note 73.
Northern Pipeline plurality opinion,\textsuperscript{103} which he authored. Thus, in Justice Brennan’s view, the question in Union Carbide was whether evaluating the amount of compensation for test data under FIFRA could be characterized as a public rights dispute that need not be adjudicated from the outset in an article III court.\textsuperscript{104}

Contrary to the majority’s interpretation, Justice Brennan believed that the Northern Pipeline plurality opinion made clear that the presence or absence of the government as a party is not sufficient to distinguish “private rights” from “public rights.”\textsuperscript{105} Nor does the approach of the Northern Pipeline plurality prevent judicial review whenever the government is a party.\textsuperscript{106} Even in public rights disputes, the judiciary may review constitutional challenges to governmental action and, perhaps, challenges of impermissible accumulation of power in the other governmental branches.\textsuperscript{107}

Though expressing some doubt, Justice Brennan concluded that the FIFRA arbitration scheme should be viewed as a matter of public rights as that term was articulated in the line of cases culminating with Northern Pipeline.\textsuperscript{108} Justice Brennan recognized that in one sense the question of proper compensation for a follow-on registrant’s use of test data is, under the FIFRA scheme, a private rights dispute—the liability of one individual to another under the law.\textsuperscript{109} But he concluded that the question of compensation was a matter of public rights because the dispute arises in the context of a federal statutory scheme that virtually occupies the field.\textsuperscript{110} Furthermore, Union Carbide involved not only a statutory rule of decision but also the active participation of a federal regulatory agency in resolving the dispute.\textsuperscript{111}

III

DISCUSSION

Although the Supreme Court properly concluded in Union Carbide that section 3(c)(1)(D)(ii) did not contravene article III, the Court failed to provide a clear test for determining the extent to which article I forums may be used for resolving disputes concerning federally created rights. Justice Brennan restated his test for when article I forums may be used, but the Court rejected his public/private rights distinction for use as a bright-line test. Instead, the Court focused its inquiry on four

\begin{itemize}
\item \textsuperscript{103} 105 S. Ct. at 3343.
\item \textsuperscript{104} Id. at 3342. See supra text accompanying notes 86-87.
\item \textsuperscript{105} 105 S. Ct. at 3342.
\item \textsuperscript{106} Id. at 3343.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\end{itemize}
factors: (1) the origin of the right at issue, (2) whether or not the statute subjected an involuntary defendant to judicial enforcement power, (3) Congress' reasons for selecting an article I forum for dispute resolution, and (4) the extent to which the statute provided for judicial review.

The first of the four factors, the origin of the right, has been a significant consideration in the Court's decisions interpreting article III. In *Crowell v. Benson*, involving a traditional federal common-law right that was replaced by a federal statute, the Court found that the new adjudicatory scheme was subject to the limitations of article III. In *Northern Pipeline v. Marathon Pipe Line*, which involved a state-created common-law right, the Court found that article III prohibited Congress from compelling the resolution of such a right in an article I forum. In contrast, in *Union Carbide*, involving a right created purely by federal statute, the Court held that article III did not prohibit the use of an article I forum for resolution of that right.

The theory underlying the distinction in the Court's decisions between traditional common-law rights—whether state or federal in origin—and rights created purely by federal statute is based on the doctrine of separation of powers. According to this theory, when federal statutory rights concern matters the resolution of which could have been exclusively determined by the executive or legislative branch, providing an article I forum for resolution of such rights does not encroach on duties reserved to the judiciary by article III. The distinction is reasonable if article III was intended to reserve to the judiciary only those matters that were within the judiciary's purview when the Constitution was adopted. If, however, article III was intended to reserve to the judiciary all matters that are capable of or suitable to judicial resolution, the source of the right would be an inappropriate distinction because such rights, regardless of their origin, could constitutionally be resolved only by article III courts. Historically, the Court has preferred the former interpretation of article III, which allows Congress to determine which forum will be used for resolution of rights that it creates. This interpretation is also more reasonable: if Congress could create new rights but could not prescribe the means for resolving those rights, this would be an anomalous situation.

The second factor the Court relied on in reaching its decision was that there are no involuntary defendants in FIFRA arbitrations, but

112. See 285 U.S. at 53, 55-57. See supra text accompanying notes 81-82.
113. See supra text accompanying note 84.
114. See 105 S. Ct. at 3337; 458 U.S. at 67-68 (plurality opinion).
116. See supra text accompanying note 96.
the Court failed to explain why this was significant. The Court might have recognized that disputes that have involuntary defendants traditionally have been reserved to the judiciary; such disputes, therefore, were likely meant to be encompassed by article III. The Court probably would not have upheld section 3(c)(1)(D)(ii) if involuntary defendants could have had their rights conclusively determined by arbitrators. Such disputes, in addition to being traditionally reserved to the judiciary, are in great need of impartial, independent decisionmakers and involve due process issues typically proper only for article III court adjudication.

Next, the Court deferred to Congress' reasons for choosing an article I forum for determining compensation.117 The Court found that the data-sharing and compensation scheme was a pragmatic solution to a difficult problem and it was necessary to expedite the registration process.118 The Court suggested, though, that it might not closely examine the reasons behind Congress' decision: "Congress for reasons of its own decided upon the method for protection of the 'right' which it created."119 Consequently, when Congress creates new rights, the Court might generally defer to Congress' judgment in establishing dispute resolution forums.

Finally, the Court briefly addressed the question of how much judicial review of a FIFRA arbitration is required by article III. The Court found that the FIFRA standard of review—"fraud, misrepresentation, or other misconduct"—was constitutionally sufficient.120 Consequently, the Court did not reach the question of whether section 3(c)(1)(D)(ii) would be constitutional if it failed to provide for any judicial review. If the underlying rationale of the Court's decision was that the right to compensation could have been exclusively determined by the executive branch, judicial review logically would not be compelled by article III. This does not mean, however, that all judicial review would be foreclosed. Other provisions of the Constitution (for example, the due process clause) might compel review on constitutional grounds other than article III. review on constitutional grounds other than article III. In any event, the section 3(c)(1)(D)(ii) standard of review may not add anything beyond what is required by due process because acts that would constitute "fraud, misrepresentation, or other misconduct" might also violate due process. judicial review of FIFRA arbitrations. In any event, the section 3(c)(1)(D)(ii) standard of review may not add anything beyond what is required by due process because acts that would constitute "fraud, misrepresentation, or other misconduct" might also violate due

117. See supra text accompanying note 93.
118. Id.
119. 105 S. Ct. at 3337 (quoting Switchmen v. Nat'l Mediation Bd., 320 U.S. 297, 300-01 (1943)).
120. See supra text accompanying note 101.
process. Even if section 3(c)(1)(D)(ii) failed to provide explicitly for any judicial review, the Court probably would have still upheld it because the Court seems most willing to defer to Congress the choice of how to resolve conflicts regarding federal statutorily created rights.

Justice O'Connor's approach to the article III question in *Union Carbide* suggests a balancing test. In *Northern Pipeline*, Justice White stated that a balancing test should be used to determine when article III adjudication is required. Justice White also believed that, historically, the Court had implicitly employed a balancing test in such matters. Justice White's balancing approach, however, is of little use because it provides no clear guidelines. Justice O'Connor's approach, on the other hand, though similar to Justice White's balancing approach, provides greater guidance because she articulates specific factors to be considered in determining the constitutionality of article I forums.

Justice Brennan's concurring opinion is noteworthy because he believed that his opinion for the *Northern Pipeline* plurality could be reconciled with the majority's approach. Justice Brennan believed that the majority misinterpreted the *Northern Pipeline* plurality opinion. According to Justice Brennan, the plurality made clear that the presence or absence of the government as a party was not sufficient to distinguish public from private rights. Although Justice Brennan stated in *Northern Pipeline* that he was not defining the precise scope of public rights, he did say that "a matter of public rights must at a minimum arise 'between the government and others.'" On the other hand, "matters of private rights involved 'the liability of one individual to another under the law.'" Thus, according to the *Northern Pipeline* plurality opinion, the FIFRA right to compensation would appear to fall within the scope of private rights rather than public rights. In *Union Carbide*, however, it seems that Justice Brennan redefined public rights to include the FIFRA right to compensation.

Justice Brennan failed to explain why he felt it was necessary to maintain the public/private rights distinction. Most likely, he wanted to provide as clear a test as possible and felt that the majority's approach was too indefinite. The public/private rights distinction, however, no

121. 458 U.S. at 113, 115 (White, J., dissenting).
122. Id.
123. Id. at 113-14.
124. See supra text accompanying note 105.
125. Id.
126. 458 U.S. at 69 (plurality opinion).
127. Id. at 69-70 (quoting Crowell v. Benson, 285 U.S. at 51).
128. See 105 S. Ct. at 3343 (Brennan, J., concurring).
longer provides a much more useful test than the Union Carbide majority approach. Justice Brennan expanded the definition of public rights to include matters involving a federal statutory rule of decision that governs a private dispute that also has "the active participation of a federal regulatory agency in resolving that dispute." How much an agency has to be involved in order for a matter to be considered one of public rights by Justice Brennan also will ultimately involve some balancing, similar to the majority's approach.

CONCLUSION

In Union Carbide, the Supreme Court concluded, correctly, that article III did not require that FIFRA compensation be adjudicated in an article III court. The Court disposed of the public/private rights dichotomy advocated by the plurality in Northern Pipeline for use as a bright-line test, a test of limited value because it had been endorsed by only four justices. The Court affirmed Congress' power to provide article I forums for rights that it creates.

With the decision in Union Carbide, the controversial FIFRA data-sharing and compensation scheme has once again withstood constitutional attack. The constitutionality of the provision has not been completely resolved, however, because the appellees did not pursue their challenges under the first amendment and the due process clause. Hints provided by the Court, though, suggest that these challenges would also fail.

John W. Navarra

129. See id.