THE JUSTICE FROM MONSANTO: THE ENVIRONMENTAL LIFE AND LAW OF CLARENCE THOMAS

*Scott W. Stern**

Ever since his controversial 1991 confirmation hearings, Justice Clarence Thomas has been the subject of ravenous popular and scholarly interest. Today, there is a veritable shelf of books and studies analyzing his biography, his ideology, and his jurisprudence. Yet one area has been missing from the existing literature: environmental law. Few scholars or Supreme Court-watchers would think of Thomas as a specialist in environmental law, but for many years that was precisely his area of expertise. Indeed, his only *private sector experience was almost three years working as a lawyer for Monsanto, an immense and powerful agrochemical corporation. This stint was followed by two years advising Senator John C. Danforth on environmental issues. According to two of Thomas's biographers, when members of the newly elected Reagan Administration sought to hire Thomas away from Danforth, their first offer was to be an advisor to the White House on environmental policy, as that was thought to be Thomas's specialty.*

This Article is the first to document or analyze Thomas's environmental experience and ideology in any depth. Drawing deeply on never-before-cited archival material, it argues that Thomas's environmental work was key to the development of his conservative political and judicial philosophy. As a young man, Thomas was fairly liberal; he grew more conservative precisely because of his experiences at Monsanto—a pioneer in anti-environmental lobbying and litigation—and then as a Senate aide, where he relentlessly lobbied his boss on behalf of corporate interests, including Monsanto's. Archival material reflects a clear through-line, connecting Monsanto's fierce opposition to government scrutiny to Thomas's legislative work and subsequent judging. As a Justice, Thomas has displayed a profound faith in the expertise and importance of untrammeled private enterprise and a deep skepticism of the administrative state. This can be observed in his many environmental opinions, not least those deciding in favor of Monsanto itself.

In short, Thomas judges like the chemical industry attorney he once was. This Article does not argue that Thomas's environmental experience is some sort of skeleton key for understanding his jurisprudence; rather, it argues that this experience represents an important, and previously ignored, part of his life that played a significant role in shaping his influential ideology. A more rounded analysis of Thomas's ideology is very much needed, especially as many of his once-fringe positions gain mainstream acceptance, as many of his former clerks assume positions of power or judgeships of their own, and as the climate crisis grows ever more acute.

---

* J.D., Yale Law School, 2020; B.A., M.A., Yale University, 2015. Thanks to the many professors, friends, and family that gave me feedback or advice, especially Douglas Kysar, Ellen Griffith Spears, Lisset Pino, Eric Stern, and Rhonda Wasserman. This is a much stronger piece because of the talented and hardworking staff of the *Harvard Environmental Law Review*. Finally, I owe a special debt of gratitude to the immensely generous archivists that assisted me on this project (both before and, especially, after COVID-19 impacted archives across the country): Elizabeth Engel and Tayana Shinn (State Historical Society of Missouri), Cynthia Franco (Southern Methodist University), Breanne Hewitt (Georgia Historical Society), Aimee Muller (Ronald Reagan Presidential Library), Kristen Nyitray (Stony Brook University), Miranda Rectenwald and Steven Vance (Washington University), and Jill Severn and Mazie Bowen (University of Georgia).

Table of Contents

Introduction

On January 14, 1980, the director of government relations at Monsanto—an immense agrochemical corporation—wrote to Clarence Thomas, a young legislative assistant in the office of Senator John C. Danforth, to ask for a favor.[1] Danforth was, at the time, a Republican senator from the state of Missouri,[2] and Monsanto, which had been founded in St. Louis and was still headquartered nearby,[3] was one of Danforth's wealthiest and most important corporate constituents. "Attached is the proposed letter . . . for Senator Danforth's signature," the Monsanto executive wrote, thanking Thomas for taking time out of his "busy schedule" to discuss "the issue" with them in person.[4] "Within the very near future let's plan on having lunch together to review old times and some of the other issues that may be of importance in this area of chemicals," the executive continued cordially.[5] "I would like very much to keep

1. Letter from E.C. Spurrier, Dir. of Gov't Rels., Monsanto Co., to Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth (Jan. 14, 1980) (on file in Illinois Mud Turtle Folder, Box 115, John C. Danforth Papers (Accession CA 5455), State Historical Society of Missouri [hereinafter Danforth Papers]).
2. *See Danforth, John Claggett (1936–)*, Biographical Directory of the U.S. Cong., https://perma.cc/2N6A-88AH.
3. In the early 1950s, Monsanto moved its headquarters from St. Louis to the nearby suburb of Creve Coeur. *See* Dan J. Forrestal, Faith, Hope and $5,000: The Trials and Triumphs of the First 75 Years 168 (1977). For a lyrical description of Monsanto's suburban headquarters, see Carey Gillam, The Monsanto Papers: Deadly Secrets, Corporate Corruption, and One Man's Search for Justice 1–2 (2021).
4. Letter from Spurrier to Thomas, *supra* note 1.
5. *Id.*

up with some of the pending legislative issues that you feel will be important to Monsanto as a corporation . . . ."[6]

The "issue" about which the executive was writing to Thomas was the U.S. Fish and Wildlife Service's recent proposal to protect the Illinois mud turtle by designating certain areas in Missouri, Illinois, and Iowa as "Critical Habitat" for the turtles, thus impeding Monsanto's ability to use and develop the land around one of its plants.[7] In response, Monsanto had commissioned its own study, purporting to demonstrate that the mud turtle was not in need of protection, and it wanted Danforth to communicate this to the Fish and Wildlife Service ("the Service").[8] Eleven days later, Danforth did just that, lambasting the Service for its "apparently shabby treatment of Monsanto."[9] And though the Service's director replied that it had sent Monsanto's study to nine turtle specialists, eight of whom had "severely criticized" its methods, within a few months the Service had dropped its proposal to protect the mud turtle.[10] Monsanto's director of environmental operations wrote to Danforth, thanking him and his staff—"especially Clarence Thomas."[11]

On its face, this might seem to be a rather unremarkable exchange. Lobbyists drafting letters for legislators was not uncommon at the time,[12] and the influence of the chemical industry on legislators and administrative agencies has been well-documented.[13] Yet this exchange has significance because of the leg-

6. *Id.*

7. *See Critical Habitat Reproposed for Illinois Mud Turtle, Desert Tortoise Population*, 5 ENDANGERED SPECIES TECHNICAL BULL. 10, 10 (1980) (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers); Press Release, John C. Danforth, A Bird in the Hand Is Worth Two Turtles in the Mud (Feb. 18, 1980) (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers).

8. *See* LGL ECOLOGICAL RSCH. ASSOCS., SUMMARY: MONSANTO AND THE ILLINOIS MUD TURTLE (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers); Draft Letter to Director of U.S. Fish & Wildlife Service (1980) (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers).

9. Letter from John C. Danforth, Sen., to Lynn Greenwalt, Dir., U.S. Fish & Wildlife Serv. (Jan. 23, 1980) (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers).

10. Letter from Will D. Carpenter, Env't Operations Dir., Monsanto Co., to John C. Danforth, Sen. (July 7, 1980) (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers).

11. *Id.*; *see also* Letter from Will D. Carpenter, Env't Operations Dir., Monsanto Co., to John C. Danforth, Sen. (Feb. 8, 1980) (on file in Illinois Mud Turtle Folder, Box 115, Danforth Papers) ("We certainly appreciate the efforts of Clarence Thomas, and the sympathy and assistance we received from your office.").

12. *See, e.g.*, *Allegations of Improper Lobbying by Department of Defense Personnel of the C-5B and B-1B Aircraft and Sale to Saudi Arabia of the Airborne Warning and Control System: Hearing Before the Investigations Subcomm. of the H. Comm. on Armed Services*, 97th Cong. 10–11 (1982).

13. *See, e.g.*, ELLEN GRIFFITH SPEARS, BAPTIZED IN PCBS: RACE, POLLUTION, AND JUSTICE IN AN ALL-AMERICAN TOWN 163–66 (2014); JACQUELINE VAUGHN SWITZER, GREEN BACKLASH: THE HISTORY AND POLITICS OF ENVIRONMENTAL OPPOSITION IN THE U.S. 111–12 (1997).

islative aide at its center: Clarence Thomas—the longest-serving Justice on the current U.S. Supreme Court. Indeed, this exchange exemplifies a more broadly important—and shockingly little-known—aspect of Justice Thomas's life: that his career and judicial philosophy are inextricably linked to the field of environmental law. Indeed, Thomas's *only* private sector experience was almost three years working as a lawyer for Monsanto, and this stint was followed by two years advising Senator Danforth on environmental and energy issues. When members of the newly elected Reagan Administration sought to hire him away from Danforth, their first offer was to be an advisor to the White House on energy and environmental policy, as that was thought to be Thomas's specialty.[14]

This Article is the first to document or analyze Thomas's environmental experience and ideology in any depth. Drawing on never-before-cited archival materials, it argues that Thomas's environmental work was key to the development of his conservative political and judicial philosophy. As a young man, Thomas was fairly liberal; he grew more conservative precisely because of his experiences at Monsanto—a pioneer in anti-environmental lobbying and litigation—and then as a Senate aide, where he relentlessly lobbied his boss on behalf of corporate interests, including Monsanto's. Archival materials document a clear through-line, connecting Monsanto's fierce opposition to government scrutiny to Thomas's legislative work and subsequent judging. As a Justice, Thomas has displayed a profound faith in the expertise and importance of untrammeled private enterprise and a deep skepticism of the administrative state. This can be observed in his many environmental opinions, not least those deciding in favor of Monsanto itself. In short, Thomas judges like the chemical industry attorney he once was. This Article does not argue that Thomas's environmental experience is some sort of skeleton key for understanding his jurisprudence; rather, it argues that this experience represents an important, and previously ignored, part of his life that played a not insignificant role in shaping his influential ideology.

Scholars have hardly paid short shrift to Justice Thomas over the years, and today there is a veritable shelf of books and articles specifically devoted to analyzing him. These include a number of biographies[15] and a series of studies

14. Kevin Merida & Michael A. Fletcher, Supreme Discomfort: The Divided Soul of Clarence Thomas 152 (2007).

15. *See id.*; Ken Foskett, Judging Thomas: The Life and Times of Clarence Thomas (2004); John Greenya, Silent Justice: The Clarence Thomas Story (2001); Andrew Peyton Thomas, Clarence Thomas: A Biography (2001) [hereinafter Thomas, Clarence Thomas]; Jane Mayer & Jill Abramson, Strange Justice: The Selling of Clarence Thomas (1994); *see also* David A. Kaplan, *The Right Flank*, *in* The Most Dangerous Branch: Inside the Supreme Court in the Age of Trump 134 (2018); Jeffrey Toobin, *Writing Separately*, *in* The Nine: Inside the Secret World of the Supreme Court 116 (2007). There is also a biography for young readers. *See* Norman L. Macht, Clarence Thomas: Supreme Court Justice (1995).

of his ideology.[16] In addition, Justice Thomas himself has written an autobiography, *My Grandfather's Son*,[17] for which he received a $1.5 million advance[18] and which reached number one on the *New York Times* nonfiction bestseller list.[19]

Yet none of these books or articles dwelt in any detail on Thomas's corporate work for Monsanto, his environmental work for Danforth, or his broader environmental philosophy. In writing about Thomas's life and jurisprudence, scholars have focused almost exclusively on his philosophy with respect to race. This scholarship is insightful and critically important, but it overlooks other significant sources of his ideology. Indeed, archival materials suggest that Thomas himself is frustrated by the relatively narrow scholarly focus in interpretations of him. A more rounded analysis of Thomas's ideology is very much needed, especially considering the breadth of his influence; an astounding number of Thomas's former clerks have recently assumed positions of power or

16. *See* Corey Robin, The Enigma of Clarence Thomas (2019); Myron Magnet, Clarence Thomas and the Lost Constitution (2019); Anders Walker, The Burning House: Jim Crow and the Making of Modern America 4–5, 223–29 (2018); Ralph A. Rossum, Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration (2014); Scott Douglas Gerber, First Principles: The Jurisprudence of Clarence Thomas (1999); Ronald Suresh Roberts, Clarence Thomas and the Tough Love Crowd: Counterfeit Heroes and Unhappy Truths (1995); William J. Aceves, *A Distinction with a Difference: Rights, Privileges, and the Fourteenth Amendment*, 98 Tex. L. Rev. Online 1 (2019); William S. Consovoy & Nicole Stelle Garnett, *"To Help, Not to Hurt": Justice Thomas's Equality Canon*, 127 Yale L.J. F. 221 (2017); Cedric Merlin Powell, *Justice Thomas,* Brown*, and Post-Racial Determinism*, 53 Washburn L.J. 451 (2014); Nicole Stelle Garnett, *But for the Grace of God There Go I: Justice Thomas and the Little Guy*, 4 N.Y.U. J.L. & Liberty 626 (2009); Steven B. Lichtman, *Black like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 Penn. St. L. Rev. 415 (2009); Hannah L. Weiner, Note, *The Next "Great Dissenter"? How Clarence Thomas Is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 Duke L.J. 139 (2008); Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas: The* Grutter v. Bollinger *Opinion*, 7 U. Pa. J. Const. L. 787 (2005); Kendall Thomas, *Reading Clarence Thomas*, 18 Nat'l Black L.J. 224 (2004); Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 J. Gender Soc. Pol'y & L. 351 (2002); Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. Cal. L. Rev. 117, 145–46 (1993); Lee Sigelman & James S. Todd, *Clarence Thomas, Black Pluralism, and Civil Rights*, 107 Pol. Sci. Q. 231 (1992). In 2000, there was also an entire issue of the *Regent University Law Review* dedicated to Thomas's jurisprudence. *See* 12 Regent U. L. Rev. 313 *et seq.* (2000).

17. Clarence Thomas, My Grandfather's Son: A Memoir (2007) [hereinafter Thomas, My Grandfather's Son].

18. Kevin Merida, *To Cite a "Mockingbird"*, Wash. Post (Oct. 1, 2007), https://perma.cc/Q2GB-RG49.

19. Dwight Garner, *Inside the List*, N.Y. Times (Oct. 21, 2007), https://perma.cc/QXW4-JGL6.

judgeships of their own.[20] Further, as the climate crisis becomes ever more acute, the Court is likely to decide many significant environmental cases; in this context, Thomas's background is highly relevant to environmental plaintiffs. Finally, his environmental ideology matters because, as numerous commentators have argued, Thomas—the senior Associate Justice on an increasingly conservative Court—is arguably the nation's most influential jurist.[21]

This Article proceeds as follows. Part I recounts the existing biographical accounts and ideological interpretations of Clarence Thomas, with a particular focus on what they omit—namely, his chemical industry background and environmental jurisprudence. Part II seeks to provide crucial context for Thomas's political and legal development by tracing the remarkable political and legal activities of Monsanto in the years when Thomas worked for the chemical firm. Part III shows the influence of the chemical industry on Thomas's subsequent career—first in his work for Senator Danforth, and then in his work as a judge and ultimately justice. Part IV briefly considers the real-world consequences of Thomas's environmental ideology—with an examination of the justiciability of environmental injustice in Thomas's own childhood home of Savannah. The conclusion considers whether, in light of the information discussed in this Article, Thomas should recuse himself more often than he does now.

Finally, a note on sources. This Article is based primarily on research in the papers of Senator Danforth, held by the State Historical Society of Missouri, as well as six archival collections held in libraries ranging from New York to Georgia to California; extensive research in newspapers, trade publications, and secondary sources; a database of millions of pages of once-secret chemical industry documents based at Columbia University and the City University of New York;[22] and an in-depth reading of Thomas's judicial opinions (from both

20. *See* Emma Green, *The Clarence Thomas Effect*, ATLANTIC (July 10, 2019), https://perma.cc/2T2X-T5WL ("The most significant part of Thomas's legacy, however, may take shape long after he has stopped writing opinions. Personnel is policy. Thomas's vast network, more than that of any other justice, has defined President Donald Trump's administration and the federal judiciary Trump has built. Through his clerks and mentees, the notoriously silent justice may end up with an outsize voice in the legal system for years to come.").

21. Jeffrey Toobin, *Clarence Thomas Is the New Chief Justice*, CNN (July 22, 2021), https://perma.cc/9PKJ-KLCM (arguing that Thomas's seniority on a Court with six Republican-nominated Justices has functionally made him Chief Justice); William McGurn, *God Save the Clarence Thomas Court*, WALL ST. J. (May 24, 2021), https://perma.cc/CK3F-XZK3 (arguing that recent "circumstances have now made it as plausible to speak of the Thomas court as the Roberts court"); Randall Kennedy, *The Apparatchik: The Rise of Clarence Thomas*, NATION (Oct. 29, 2019), https://perma.cc/R57L-94JF ("Thomas's influence is now poised to grow as the federal judiciary lurches to the right . . . ."); Jeffrey Toobin, *Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?*, NEW YORKER (Aug. 21, 2011), https://perma.cc/KB37-EY3D ("Thomas's views are now being followed by a majority of the Court in case after case." (quoting the legal scholar Akhil Amar)).

22. Merlin Chowkwanyun, Gerald Markowitz & David Rosner, *About*, TOXIC DOCS (2018), https://perma.cc/QF32-SKNX.

the Supreme Court and D.C. Circuit).[23] I relied on these sources in large part because other documents—which could potentially be even more revelatory—either no longer exist or are unavailable to researchers.[24] Although I do draw from many documents from Monsanto's archival records, held by Washington University in St. Louis, careful readers will note an absence of any Monsanto records related to Thomas's time at the company. This is because there are *no* files from the general counsel's office in the archival papers Monsanto gave to Washington University.[25] One scholar of chemical industry history told me that the Monsanto papers "have clearly been carefully culled."[26]

Further, even if these documents did exist in Monsanto's papers, access to this collection is tightly controlled by the company itself. To gain access to the Monsanto papers I cited in this study, I had to write to a representative of Bayer (the conglomerate that now owns Monsanto), identify specific files, and explain the purpose of my research.[27] Seeking to balance truth and vagueness, I wrote that I was doing research for "a paper about the early career of Clarence Thomas (who worked at Monsanto from 1977 to 1979)."[28] My request was promptly granted.[29] Finally, one other potentially fruitful source of documents initially appeared to be the Chemical Industry Archives, which, according to its creator, the Environmental Working Group ("EWG"), was, as of 2016, "a searchable database containing thousands of internal documents from chemical makers and their trade associations . . . ."[30] When I went looking for this database, however, it was nowhere to be found online. I wrote to EWG, asking "how I might be able to access this site—or, if it is no longer online, how I might be able to access the material in the Archive?"[31] EWG's general counsel replied, "Unfortunately, we no longer have the ability to share this informa-

23. Note, however, that because of the brevity of Thomas's time on the D.C. Circuit, nearly all of the analysis is of his Supreme Court opinions.

24. In his autobiography, Thomas mentions "digging through dusty boxes full of half-forgotten files," so it is possible that he possesses records of his time at Monsanto. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at ix.

25. E-mail from Miranda Rectenwald, Curator of Loc. Hist., Wash. U. Libr., to author (Oct. 14, 2019) (on file with author).

26. E-mail from Ellen Griffith Spears, Professor, Univ. Ala., to author (Nov. 6, 2019) (on file with author).

27. E-mail from Rectenwald to author, *supra* note 25.

28. E-mail from Scott W. Stern, author, to Ann Young, Principal Info. Scientist, Monsanto Co. (Oct. 16, 2019) (on file with author).

29. E-mail from Ann Young, Principal Info. Scientist, Monsanto Co., to author (Oct. 16, 2019) (on file with author).

30. Letter from Ken Cook, Thomas Cluderay, & Nneka Leiba to EPA Off. of Pollution Prevention & Toxics (Aug. 16, 2016), https://perma.cc/VRL9-U8PK.

31. E-mail from Scott W. Stern, author, to EWG Requests (Nov. 13, 2019) (on file with author).

tion."[32] It seems likely that this vital archive was shuttered under threat of litigation.

Such restrictions and limitations undoubtedly chill scholarly inquiry; it is no exaggeration to claim that they are contrary to the interests of justice.[33]

I. A Portrait of the Justice as a Young Man

The following Part explores the existing biographical (and autobiographical) accounts of Justice Thomas's life, as well as the existing interpretations of his fairly sudden turn to conservatism as a young adult. In spite of the ample biographical and other scholarly studies of Thomas, this Part shows that no scholar has focused on his years at Monsanto or as an environmental aide for Senator Danforth; nor has any scholar considered the role these years might play in explaining Thomas's conservatism. Yet without a deep analysis of the influence of the chemical industry on the Supreme Court's most conservative justice, these interpretations are incomplete.

A. Biographical Accounts of Thomas's Early Years

Clarence Thomas was born on June 23, 1948, in a wooden shack in Pin Point, Georgia, a small settlement about fifteen miles southeast of Savannah.[34] Thomas himself would describe Pin Point's residents as engaged in "a daily struggle for the barest of essentials,"[35] and these remarkably spare beginnings would form the foundational narrative of his life. Chroniclers of Thomas's life have focused on his Pin Point origins, in large part because his early years became central to overcoming the opposition to his Supreme Court nomination.[36] As Thomas's biographers Kevin Merida and Michael A. Fletcher have noted, "White House advisers were so enraptured by the idea of Thomas as a Jim Crow-era child of deprivation—his family's wooden shack insulated only with newspapers, the kerosene lamps, the outhouse shared with neighbors—that they decided the road to confirmation led straight through Pin Point."[37] Advisors dubbed this the "Pin Point strategy," and it would be enormously successful[38]—although, as Merida and Fletcher, as well as other Thomas biographers, Jane Mayer and Jill Abramson, have shown, most of Thomas's childhood was

32. E-mail from Caroline Leary to author (Nov. 14, 2019) (on file with author).

33. *See* Kirsten Weld, *No Democracy Without Archives*, Bos. Rev. (July 9, 2020), https://perma.cc/3W3J-5ZZ7.

34. Mayer & Abramson, *supra* note 15, at 33. For the most in-depth background of Pin Point and Thomas's roots, see Thomas, Clarence Thomas, *supra* note 15, at chs. 1–3.

35. Thomas, My Grandfather's Son, *supra* note 17, at 3–4.

36. "[W]ithout Pin Point, Thomas would never have made it to the Supreme Court." Merida & Fletcher, *supra* note 14, at 36; *see also* Mayer & Abramson, *supra* note 15, at 31.

37. Merida & Fletcher, *supra* note 14, at 36.

38. *Id.*

spent in relative privilege, in the comfortable Savannah home of his grandfather,[39] one of the area's wealthiest Black businessmen.[40]

Although Thomas's first year of schooling was spent in segregated Georgia elementary schools, his grandfather soon moved him to private school.[41] Thomas continued in local Catholic schools until the tenth grade, when he entered a formerly all-white Catholic boarding school.[42] After high school, Thomas initially attended a Catholic seminary in Missouri, intending to become a priest, but he left the fold after enduring the racism of his white classmates.[43] Thomas transferred to Holy Cross College in Massachusetts. He thrived in college, becoming involved in Black nationalist student organizations and excelling academically, eventually earning admission to Yale Law School.[44]

Thomas's time at Yale has been a subject of considerable interest for decades,[45] in part because of his well-known disdain for the elite law school[46] (at least until recently).[47] Thomas was a decidedly average student at Yale.[48] As he approached graduation, he desperately wanted to become a corporate lawyer, but, in part because of his unremarkable academic record and in part because of

39. According to Mayer and Abramson, Thomas moved to the home of his grandfather, Myers Anderson, after Thomas and his brother inadvertently burned their house to the ground. MAYER & ABRAMSON, *supra* note 15, at 36. Thomas himself claimed not to know "the whole story" of why he was sent to live with his grandfather but thinks the "main reason" was that his mother simply could not take care of him and his brother. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 8.

40. All four of these biographers have pointed out that neighbors, family, and subsequent observers disagreed with Thomas's characterization of himself. Indeed, one Savannah civil rights leader whom Thomas claimed to idolize watched him grow up and described his upbringing as "a select, pampered development that wasn't the experience of the vast majority of blacks." MAYER & ABRAMSON, *supra* note 15, at 37–41; *see* MERIDA & FLETCHER, *supra* note 14, at 36.

41. FOSKETT, *supra* note 15, at 52–54; THOMAS, CLARENCE THOMAS, *supra* note 15, at 63–69.

42. FOSKETT, *supra* note 15, at 72; *see also* Juan Williams, *A Question of Fairness*, ATL. MONTHLY, Feb. 1987, at 74. Interestingly, Thomas later disputed this account and minimized the hardships he faced in boarding school and seminary. *See* Thomas's handwritten annotations in Norman Macht, Clarence Thomas: Supreme Court Justice 36–37 (draft manuscript) (on file in Folder 34, Box 6, Series 3, Norman Macht Collection, DeGolyer Library, Southern Methodist University) [hereinafter Macht Draft].

43. FOSKETT, *supra* note 15, at 90–91; GREENYA, *supra* note 15, at 48–49.

44. THOMAS, CLARENCE THOMAS, *supra* note 15, at ch. 7; GREENYA, *supra* note 15, at 57–60. For more on Thomas's Holy Cross days, see DIANE BRADY, FRATERNITY (2012).

45. *See, e.g.*, Sarah R. Siskind, *Clarence Thomas Breaks Seven Years of Silence to Insult Yale*, HARV. CRIMSON (Mar. 8, 2013), https://perma.cc/H5WM-J3NN; *Justice Thomas Mocks Value of Yale Law Degree*, FOX NEWS (Oct. 22, 2007), https://perma.cc/YQ3A-QK4Q.

46. TOOBIN, *supra* note 15, at 105–06.

47. Joan Biskupic, *Clarence Thomas Reconciles with Yale After Bitter Years*, REUTERS (May 30, 2012), https://perma.cc/Y3RM-U5YC.

48. MAYER & ABRAMSON, *supra* note 15, at 60.

discriminatory employment practices, he could not get hired.[49] Yet, as Thomas's time in law school wound down, John C. Danforth—the ambitious, young attorney general of Missouri (and a Yale Law School graduate himself)—came to New Haven "expressly to recruit a black lawyer for his office."[50] A professor recommended Thomas, and soon the young lawyer had moved to St. Louis to begin working for Danforth in a tiny, windowless basement office, well aware that the compensation would be "$11,000 a year and all the gruel I could eat."[51]

Thomas served as an assistant attorney general in Missouri for three years, a position that, according to Mayer and Abramson, "provided him with his only real litigation experience."[52] Initially, he argued a number of criminal appeals, although his practice soon shifted to regularly representing the state Department of Revenue.[53] Late in 1976, Danforth was elected to the U.S. Senate, and Thomas, who could have taken a job in his legislative office in Washington, D.C., decided it was time to move on—and make some money.[54] Danforth helped his young employee secure a position in the general counsel's office at Monsanto,[55] a powerful Missouri-based conglomerate that was looking to hire Black attorneys.[56] Upon joining Monsanto in January 1977, Thomas immediately doubled his salary, becoming better paid than even lawyers at big firms in St. Louis.[57] He joined a staff of more than fifty lawyers, moving from his windowless basement workplace to a "comfortable office with glossy new furniture and company-provided artwork on the walls."[58]

Thomas's responsibilities at Monsanto included drafting contracts, advising managers on legal matters, dealing with "liability issues concerning the transportation and disposal of hazardous waste," and registering pesticides and

49. FOSKETT, *supra* note 15, at 130–31; THOMAS, CLARENCE THOMAS, *supra* note 15, at 147–48; MAYER & ABRAMSON, *supra* note 15, at 60. Decades later, Thomas claimed to still have the rejection letters from Atlanta firms. *See* GREENYA, *supra* note 15, at 70.

50. MAYER & ABRAMSON, *supra* note 15, at 62.

51. THOMAS, CLARENCE THOMAS, *supra* note 15, at 154.

52. MAYER & ABRAMSON, *supra* note 15, at 67.

53. *See* THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 108–09 (describing his years in the Missouri Attorney General's office quite fondly); THOMAS, CLARENCE THOMAS, *supra* note 15, at 155, 165–66; MAYER & ABRAMSON, *supra* note 15, at 67–68.

54. MERIDA & FLETCHER, *supra* note 14, at 145; FOSKETT, *supra* note 15, at 146–47; THOMAS, CLARENCE THOMAS, *supra* note 15, at 168. Thomas himself wrote, somewhat opaquely, "I thought I might feel more at home in the law department of a large corporation, where I'd be able to mix law and business . . . ." THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 109.

55. GREENYA, *supra* note 15, at 86–87.

56. THOMAS, CLARENCE THOMAS, *supra* note 15, at 169.

57. MAYER & ABRAMSON, *supra* note 15, at 68; THOMAS, CLARENCE THOMAS, *supra* note 15, at 170.

58. THOMAS, CLARENCE THOMAS, *supra* note 15, at 170.

herbicides with federal agencies—including Roundup, which soon became one of the company's best-known (and most-litigated) products.[59] As Mayer and Abramson wrote, "Thomas's experience at Monsanto enabled him to develop a useful expertise in the emerging field of environmental law."[60]

Few of Thomas's biographers have paid much attention to his years at Monsanto, and a number have overlooked his time there—his only experience in private practice—altogether.[61] Merida and Fletcher noted that he was one of only two Black lawyers in the office,[62] and Thomas would later recall complaining about the company's failure to advance "talented blacks."[63] Andrew Peyton Thomas, in his sympathetic account of Thomas's life, observed that the young lawyer was unprepared for "the tedium of corporate practice at Monsanto,"[64] and multiple biographers have documented Thomas's frustration with his failure to move through the ranks quickly enough.[65] Thomas himself described his years at Monsanto as among "the happiest times of my life," in large part because it was during this moment that he grew closer to his brother,[66] but he remembered initially feeling bored and stifled by the corporate work, though he grew to enjoy it more once he started working on "Monsanto's waste-disposal contracts."[67] Nonetheless, he soon came to view his move to Monsanto as "a mistake."[68]

Thomas left Monsanto in August of 1979, but his biographers differ on the question of who instigated that departure. According to Mayer, Abramson, and Foskett, Senator Danforth—"[a]nxious to integrate his Senate office"—sought out his former employee, offering him a job as a legislative assistant in Washington.[69] Thomas took the job on the condition that his assignments not be related to race.[70] According to more detailed accounts by Merida, Fletcher,

59. *Id.* at 171; *see also* MAYER & ABRAMSON, *supra* note 15, at 68.

60. MAYER & ABRAMSON, *supra* note 15, at 68.

61. Foskett skipped straight from Thomas leaving Danforth to his rejoining him almost three years later. *See* FOSKETT, *supra* note 15, at 147–49. Macht devoted to Monsanto a single sentence. *See* MACHT, *supra* note 15, at 76. Greenya devoted to it less than half a page of text, none of it substantive. *See* GREENYA, *supra* note 15, at 86–87. In addition, Angela Onwuachi-Willig, in a lengthy section of an Article analyzing Thomas's life, likewise does not mention Monsanto at all. *See* Angela Onwuachi-Willig, *Just Another Brother on the SCT: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 970–71 (2005).

62. MERIDA & FLETCHER, *supra* note 14, at 145.

63. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 114. Thomas added, "I still had a lot to learn about affirmative action." *Id.*

64. THOMAS, CLARENCE THOMAS, *supra* note 15, at 170.

65. FOSKETT, *supra* note 15, at 149; THOMAS, CLARENCE THOMAS, *supra* note 15, at 174–75.

66. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 110–11.

67. *Id.* at 113–14.

68. *Id.* at 116.

69. FOSKETT, *supra* note 15, at 149; MAYER & ABRAMSON, *supra* note 15, at 69.

70. MAYER & ABRAMSON, *supra* note 15, at 69.

and Andrew Thomas, the young lawyer had grown "restless" in corporate life and once again relied on a well-connected boss to find a new job[71] (Thomas himself claimed he was recruited by Danforth's chief of staff.)[72] He moved into Room 239 of the Russell Senate Office Building, returning to a far sparer government office.[73] "He arrived in the nation's capital a lowly staffer for a little-known senator," wrote Andrew Thomas.[74]

For the next two years, Thomas handled energy, environmental, and public works matters for Danforth, advising the senator on legislation related to these areas.[75] "These areas of public policy were not exactly of sizzling interest to most budding policy wonks," Andrew Thomas noted, but the Organization of Petroleum Exporting Countries ("OPEC")'s decision to raise oil prices—which sent the American economy plummeting into a recession—raised the stakes and the profile of his work.[76] Thomas was not considered an especially "gifted" member of Danforth's staff, but, wrote Mayer and Abramson, "his ambitions were extraordinary."[77] In a lunch with a St. Louis reporter, Thomas "announced that the spot he wanted was nothing less than a seat on the U.S. Supreme Court."[78]

In November of 1980, Ronald Reagan was elected President, an event that would change Thomas's life. The White House was aware of political shifts in the Black community, and wanted to elevate a number of Black conservatives to positions in the Reagan Administration.[79] A small but increasing share of Black voters were turning right in the late 1970s and early 1980s, and Reagan had carefully cultivated their votes.[80] Theirs was a "far more conservative" form of conservatism, "reject[ing] the old ideas of segregated economies and communities and argu[ing] for thoroughgoing engagement by blacks in larger capitalistic society."[81] Thomas fit neatly within this new coterie of "more conservative"

71. Merida & Fletcher, *supra* note 14, at 147–48; Thomas, Clarence Thomas, *supra* note 15, at 175.

72. Thomas, My Grandfather's Son, *supra* note 17, at 119–20.

73. Thomas, Clarence Thomas, *supra* note 15, at 177; Thomas, My Grandfather's Son, *supra* note 17, at 122.

74. Thomas, Clarence Thomas, *supra* note 15, at 177.

75. *See infra* Part III.

76. Thomas, Clarence Thomas, *supra* note 15, at 177.

77. Mayer & Abramson, *supra* note 15, at 69.

78. *Id.*

79. Foskett, *supra* note 15, at 155–56.

80. Leah Wright Rigueur, The Loneliness of the Black Republican: Pragmatic Politics and the Pursuit of Power 283–85, 291 (2014).

81. Christopher Alan Bracey, Saviors or Sellouts: The Promise and Peril of Black Conservatism, from Booker T. Washington to Condoleezza Rice 123–24 (2008). For a deeper look at individual Black conservatives, see Michael L. Ondaatje, Neither Counterfeit Heroes Nor Colour-Blind Visionaries: Black Conservative

Black conservatives.[82] In December 1980, just weeks after Reagan was elected, there was a historic gathering of Black conservatives at San Francisco's Fairmont Hotel, headlined by the Black economist Thomas Sowell and Reagan's "righthand man" Edwin Meese.[83] Many of the conference's attendees soon assumed positions of power in the Reagan Administration.[84] Thomas—identified as "a young aide to Sen. John Danforth" speaking "with barely controlled exhilaration"—was quoted in the *Washington Post* as saying, "It's really kind of good to be here because someone might agree with me for a change."[85] A day later, a lengthy profile of Thomas appeared in the *Post*, describing him as "work[ing] only on energy, environment and public works policy for Sen. Danforth, staying away from black issues . . . ."[86] This generated a lot of attention for the young staffer[87]—the "beginning of public exposure that would change [his] life and raise [his] blood pressure."[88]

A few months later, Thomas received a call from the Office of Presidential Personnel, with a job offer.[89] According to two of Thomas's biographers, the presidential staffers invited him to become an advisor to the White House on environmental and energy policy, but Thomas declined, apparently considering the position too junior.[90] The Administration quickly called back with a new offer.[91] Although Thomas had told the *Post* in 1980, "If I ever went to work for the [Equal Employment Opportunity Commission ("EEOC") or did anything directly connected with blacks, my career would be irreparably ruined,"[92] he accepted a job as assistant secretary for civil rights in the Department of Educa-

---

Intellectuals in Modern America (2007) (Ph.D. dissertation, University of Western Australia) (on file with author).

82. RIGUEUR, *supra* note 80, at 303–04.

83. *See* Ethel Payne, *Nob Hill Summitry of Black Conservatives*, AFRO-AM., Dec. 27, 1980, at 5; Herbert H. Denton, *A Different Look at Old Problems*, WASH. POST, Dec. 15, 1980, at A1; Vernon Jarrett, *Blacks Providing Input for Reagan*, CHI. TRIB., Dec. 12, 1980, at B4.

84. BRACEY, *supra* note 81, at 126.

85. Denton, *supra* note 83, at A8.

86. Juan Williams, *Black Conservatives, Center Stage*, WASH. POST, Dec. 16, 1980, at A21.

87. *See* Bill Kaufmann, *Freedom Now II: Interview with Clarence Thomas*, REASON (Nov. 1987), https://perma.cc/9SPW-CA83.

88. *Why Black Americans Should Look to Conservative Policies*, HUM. EVENTS, July 27, 1991, at 17.

89. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 137.

90. MERIDA & FLETCHER, *supra* note 14, at 152. Oddly, Thomas later told an audience, "I always found it curious that, even though that my background was in energy, taxation, and general corporate regulatory matters, I was not seriously sought after to move into one of those areas." *Why Black Americans Should Look to Conservative Policies*, *supra* note 88, at 12.

91. MERIDA & FLETCHER, *supra* note 14, at 152.

92. Williams, *supra* note 86, at A21.

tion, followed a year later by a position as chairman of the EEOC.[93] In these positions, he did work on race issues, but apparently felt some degree of "isolation" because "of the perceived anti-minority views of our Administration" and the "tremendous hostility toward Black appointees by other Blacks."[94] Nonetheless, he was finally on the fast-track to power.

After President George H.W. Bush nominated Thomas to the D.C. Circuit in 1989, Senator Strom Thurmond testified during Thomas's confirmation hearing to the nominee's "impressive background," noting that "[f]rom 1977 to 1979, he worked for Monsanto Co. handling corporate matters, such as antitrust, contracts, and governmental regulation," and that from 1979 to 1981 Thomas worked for Danforth on "issues relating to energy, environment, Federal lands, and public works."[95] A year later, after Bush nominated Thomas to the Supreme Court, an attorney at Baker & Hostetler, testifying before the Senate Judiciary Committee on behalf of a national organization of Black Republicans, lauded Thomas's "wealth of experience," adding, "having worked as an attorney for Monsanto Corp., he could be the only Justice to have worked in the corporation counsel office of a major company."[96] This experience was not, of course, the focus of Thomas's confirmation hearings; rather, credible allegations of sexual harassment by lawyer Anita Hill nearly stopped Thomas's ascent to the Court—and have dogged him ever since.[97] Nonetheless, the Senate confirmed Thomas in late 1991, and he has served on the Supreme Court ever since. He is its longest-serving current Justice.

---

93. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 138–50. For a sympathetic account of Thomas's time at the EEOC, see R. Gaull Silberman, *He Is Nothing If Not an Independent Thinker*, L.A. TIMES, July 7, 1991, at M1.

94. *See* Letter from Clarence Thomas to Ronald Reagan (July 10, 1984) (on file in Folder 133, Box 9, Presidential Handwriting File, Ronald Reagan Presidential Library). This feeling of isolation and hostility persisted. *See* Clarence Thomas, *A Right to Think for Myself*, ST. LOUIS POST-DISPATCH, Aug. 2, 1998, at B3; Clarence Thomas, *Rule of Law: The New Intolerance*, WALL ST. J., May 12, 1993, at A15.

95. *Confirmation Hearing on Clarence Thomas to Be a Judge on the U.S. Court of Appeals for the District of Columbia: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 4–5 (1990).

96. *The Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, Pt. 2*, 102d Cong. 1122 (1991) (statement of Edward Hayes, Jr.).

97. *See* Jill Abramson, *Do You Believe Her Now?*, N.Y. MAG. (Feb. 19, 2018), https://perma.cc/E3Y5-ZS3C; Nick Gass, *David Brock Penned Memo on Impeaching Clarence Thomas*, POLITICO (Aug. 31, 2015), https://perma.cc/T7TP-2YB6. For a scholarly analysis of Thomas's contentious confirmation hearings, see Adrienne D. Davis & Stephanie Wildman, *The Legacy of Doubt: Treatment of Race and Sex in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992). For a journalistic account, see TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION (1992).

B. Previous Interpretations of Thomas's Turn to the Right

Thomas and his many biographers agree that he spent the first several decades of his life as a liberal. At eighteen, he registered to vote as a Democrat, and well into his thirties he was still voting for that party's presidential nominees.[98] He noted in his memoir that his first trip to Washington, D.C., was to protest the Vietnam War.[99] In college, he read the autobiography of Malcolm X and became enthusiastic about Black pride and Black nationalism; he later wrote of himself, "I was an angry black man."[100] In his first years of law school, Thomas "devoted time to fighting discrimination and poverty by working at New Haven's Legal Assistance Association," spent a summer working for a civil rights law firm, and "planned to work on a study of racial discrimination in the grading of southern bar exams . . . ."[101] At the same time, he became more and more alienated from the Catholic faith of his youth.[102] Yet Thomas would later take care to emphasize that, even in his youth, he was no radical: "As much as I hated the injustices perpetrated against blacks in America, I couldn't bring myself to hate my own country, then or later."[103]

Thomas and his biographers also agree that his years at Yale marked the beginning of his political transformation.[104] Though he had read Ayn Rand in college and later reflected that "my political thinking was moving as my time at Holy Cross drew to an end,"[105] it was at Yale that what he viewed as the smug condescension of his privileged, white, dogmatically liberal classmates moved Thomas to the right.[106] "At least southerners were up front about their bigotry: you knew exactly where they were coming from, just like the Georgia rattlesnakes that always let you know when they were ready to strike," Thomas later wrote of his feelings at the time.[107] "Not so the paternalistic big-city whites who

98. MAYER & ABRAMSON, *supra* note 15, at 54. Mayer and Abramson have argued that even as Thomas "adopted the political liberalism of the day . . . his views on the role of women were distinctly old-fashioned." *Id.*

99. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 123.

100. GREENYA, *supra* note 15, at 60–61; THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 59.

101. MAYER & ABRAMSON, *supra* note 15, at 59; THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 80–81.

102. THOMAS, CLARENCE THOMAS, *supra* note 15, at 144.

103. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 59. In 1985, a profile of Thomas claimed, "Though involved with the civil rights movement, Mr. Thomas was repelled by its radicalization and its flirtation with 'socialism and other gibberish.'" *Black America Under the Reagan Administration: A Symposium of Black Conservatives*, 29 SURVEY 27, 29 (1985).

104. *See, e.g.*, THOMAS, CLARENCE THOMAS, *supra* note 15, at 143; MAYER & ABRAMSON, *supra* note 15, at 69–70.

105. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 62.

106. *Id.* at 74–80.

107. *Id.* at 75–76.

offered you a helping hand so long as you were careful to agree with them, but slapped you if you started acting as if you didn't know your place."[108] He came to view liberalism as a "dilettantish affectation,"[109] and, though he did not yet identify as a conservative, his classmates began to notice a shift in his thinking.[110] During law school, Thomas had a discussion with an acquaintance about mandatory motorcycle helmet laws that led him to the conclusion: "When the government assumes that responsibility, it takes away your freedom—and wasn't freedom the very thing for which blacks in America were fighting?"[111]

Still, Thomas had far to go on his journey to the right. He voted for George McGovern, the Democratic Party presidential nominee, in 1972,[112] and, when a professor recommended him to Danforth in 1974, the professor worried "that Thomas seemed too left-wing for the Republican attorney general."[113] It was in 1975, while he was working in the Missouri Attorney General's office, that a coworker handed Thomas a review of a book called *Race and Economics*, by Thomas Sowell, remarking, "It's about another black guy who thinks like you."[114] Reading the review literally left Thomas breathless.[115] "I felt like a thirsty man gulping down a glass of cool water," he later wrote.[116] In *Race and Economics*, Sowell argued that, throughout American history, various ethnic and immigrant groups had overcome prejudice and achieved wealth by depending on "self-reliance," rather than government aid or protection.[117] This thesis rang true for Thomas, reminding him of his self-reliant grandfather, and launching him "into a fresh round of soul searching."[118] Yet it is important to note that, according to Thomas, Sowell's writing did not actually move him to the right; reading *Race and Economics* "didn't turn me into a conservative, much

108. *Id.* Ironically, this echoed the Justice that Thomas replaced on the Court, Thurgood Marshall. When asked if the President should name a Black person to succeed him, "Marshall said that Bush should not use race as a 'ploy' to allow the 'wrong Negro' to get the job. 'I think the important factor is pick the person for the job not on the basis of race one way or the other.' Marshall quoted his father as once telling him that there was no difference between a white and black snake—'they both bite.'" JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 392 (2011).

109. FOSKETT, *supra* note 15, at 128.

110. THOMAS, CLARENCE THOMAS, *supra* note 15, at 143.

111. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 73.

112. *Id.*

113. THOMAS, CLARENCE THOMAS, *supra* note 15, at 149.

114. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 105. Sowell's work had apparently been recommended to Thomas while he was still in law school, but he later claimed he was too "indoctrinated" at the time to be receptive to it. Kaufmann, *supra* note 87.

115. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 105–06.

116. *Id.*

117. THOMAS SOWELL, RACE AND ECONOMICS (1975).

118. FOSKETT, *supra* note 15, at 143.

less a Republican," Thomas later reflected.[119] Rather, it gave him a vocabulary and a confidence to express positions he already held.[120]

In any case, his introduction to Sowell sent Thomas on a fast track to libertarian conservatism. After reading Sowell, he began to "read others—Hayek, Paul Johnson, there's a whole range of people. I've been through the Ayn Rand period."[121] He became more outspoken about his conservative beliefs at the office, fulminating against school integration, affirmative action, busing, federal intervention to ameliorate race relations, and the civil rights establishment,[122] "surprising Danforth with his zeal."[123] Meanwhile, representing the State of Missouri on criminal appeals helped to shift Thomas's thinking on the racism of the criminal justice system to the right. He used to believe that "most imprisoned blacks [were] political prisoners," but after opposing the appeal of a Black man convicted of raping a Black woman, he changed his mind: "Until then I had ignored the obvious implications of black-on-black crime rates. After I worked on that case, I knew better than to assume that whites were responsible for all the woes of blacks, and stopped throwing around the word 'oppression' so carelessly."[124] Thomas later claimed that when he began working at Monsanto in 1977, he thought of himself as "an independent."[125] Three years later, in the fall of 1980, he would officially change his party registration to Republican.[126]

The time in between—encompassing Thomas's years at Monsanto and a year working on environmental matters in Danforth's senate office—were thus pivotal to his political journey. Thomas's much higher salary at Monsanto almost certainly made him more sympathetic to the Republican Party's economic platform, and he came to see welfare, affirmative action, and the broader government safety net as undermining individuals' ability to help themselves.[127] Thomas would later recall a conversation during his Monsanto years in which he told his brother that his brother would get more conservative "as soon as he started paying the taxes to finance [the Democratic] party's pipe dreams."[128] A few years later, as a congressional staffer, Thomas met Sowell, who would, in

119. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 107.

120. *Id.* at 104–06.

121. GREENYA, *supra* note 15, at 84.

122. MERIDA & FLETCHER, *supra* note 14, at 144; THOMAS, CLARENCE THOMAS, *supra* note 15, at 165.

123. FOSKETT, *supra* note 15, at 146.

124. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 94–95.

125. *Id.* at 111.

126. *Id.* at 130.

127. THOMAS, CLARENCE THOMAS, *supra* note 15, at 174. Fittingly, Thomas's judicial opinions frequently express a deep skepticism of the federal government. *See* ROSSUM, *supra* note 16, at 33–36.

128. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 111.

turn, invite Thomas personally to the Fairmont conference[129]—his metaphorical "first visit to Mecca," according to one biographer.[130] In the years to come, Thomas would come to consider Sowell "not only an intellectual mentor, but my salvation."[131] Thomas also began forming connections with other well-connected Black political operators,[132] and, by the time Reagan ran for President in 1980, Thomas was ready to switch political parties.[133]

A number of scholars have put forth varying interpretations of the culmination of Thomas's stunning rightward journey. The legal scholar Angela Onwuachi-Willig, for instance, has argued persuasively that Thomas's ideology is grounded in Black conservative thought, distinct from white conservative thought.[134] This tradition "emphasize[s] the principles of black empowerment through self-reliance and self-help," rather than state support.[135] In a student note, Hannah L. Weiner argued that Thomas has "used the natural law principles of [Justice] Harlan and other nineteenth-century scholars to hone his equal protection philosophy" and "appropriated Harlan's colorblind Constitution to redefine the meaning of *Brown* to reflect his equal protection philosophy."[136] In a provocative recent book, the political scientist Corey Robin argued that Thomas is a "black nationalist," believing firmly in the inherent and ineradicable racism of American society, but concluding that the only means of salvation for Black Americans is a masculinist, hyper-capitalist, anti-government self-reliance.[137]

In spite of this abundance of interpretation, the existing accounts of Thomas's conservatism are incomplete—as are the accompanying analyses of his behavior on the Court. In part, this is because many of the most in-depth studies of Thomas's jurisprudence focus largely or exclusively on his philosophy with respect to race. For instance, Robin's valuable book set forth its argument

129. *Id.* at 125–26, 131–32.

130. GREENYA, *supra* note 15, at 89.

131. Kaufmann, *supra* note 87, at 32.

132. *See* MERIDA & FLETCHER, *supra* note 14, at 149–50; FOSKETT, *supra* note 15, at 150; THOMAS, CLARENCE THOMAS, *supra* note 15, at 180; MAYER & ABRAMSON, *supra* note 15, at 71–72.

133. THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 130.

134. Onwuachi-Willig, *supra* note 61; *see also* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to the Law School Five*, 46 HOW. L.J. 175 (2003) (arguing that Thomas's "jurisprudential views mirror the conventional politics and philosophies of black conservatives"); Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, *in* BLACK AND RIGHT: THE BOLD NEW VOICE OF BLACK CONSERVATIVES IN AMERICA 3 (Stan Faryna et al. eds., 1997).

135. Onwuachi-Willig, *supra* note 61, at 946.

136. Weiner, *supra* note 16, at 143.

137. ROBIN, *supra* note 16, at 2–16; *see also* Stephen F. Smith, *Clarence X: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583 (2009); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004).

about Thomas and his views on race, capitalism, and self-reliance, and showed how these views are reflected in his judicial opinions that most directly implicate race. Likewise, Onwuachi-Willig analyzed Thomas's opinions in "education and desegregation, affirmative action, and crime."[138] Yet the great majority of Thomas's opinions are *not* explicitly about race.

Thomas himself apparently feels that scholars overemphasize race in their interpretations of him. In his revealing handwritten annotations to a draft of a biography about himself, Thomas repeatedly stressed his frustration that the biographer was, in his view, dwelling too much on race and racism.[139] "Not everything I did had some racial ramification," he scrawled at one point.[140]

Political scientists have shown that Thomas is the most conservative justice on the Court in decades,[141] but they cannot explain *why*. Resentment of his privileged Yale classmates, immersion in the conservatism of Thomas Sowell and others, experience defending the carceral state, and Thomas's own growing wealth provide only part of this explanation. To more fully understand the conservative transformation—and the conservative jurisprudence—of Clarence Thomas, scholars must look to Monsanto and the rise of the industrial right.

II. Monsanto and the Rise of the Industrial Right

When Thomas arrived at the spacious, suburban offices of Monsanto in the first days of 1977, he was not simply starting a new job; he was entering a new world. Monsanto, in the late 1970s, was a company in flux—it was both rapidly growing and reorganizing but also straining to find new sources of business; it was both under assault from environmental activists and government regulators but also flexing its newfound political muscle with some assurance. Fundamentally, during the years Thomas worked at Monsanto, the chemical industry was among the most libertarian, most anti-environmental, and most politically active corporate sectors in the United States. The following Part thus provides crucial context for Thomas's swift turn to the right. During the years he began seriously considering conservatism, he was working for a company, and within an industry, that was beginning to lobby regularly, litigate fiercely, and affirmatively shape its public image for the first time. Although the details of what precisely Thomas did on a day-to-day basis at Monsanto are unlikely to be uncovered in the foreseeable future—as the relevant documents either no longer exist or are tightly controlled by Monsanto itself—this context is none-

138. Onwuachi-Willig, *supra* note 61, at 938. For additional information see *infra* Part III.

139. Macht Draft, *supra* note 42, at 36–40.

140. *Id.* at 40.

141. *See, e.g.*, Adam Liptak & Alicia Parlapiano, *How Clinton's or Trump's Nominees Could Affect the Balance of the Supreme Court*, N.Y. Times (Sept. 25, 2016), https://perma.cc/D2VH-CBT7 (discussing a study conducted by Lee Epstein, Andrew D. Martin, and Kevin Quinn); Steven J. Brams et al., *Coalition Formation on the U.S. Supreme Court: 1969–2009*, 158 Pub. Choice 525, 527 (2014).

theless revealing and highly explanatory. Without Monsanto—and his subsequent environmental work at the U.S. Senate—Clarence Thomas likely would not have become the most conservative Supreme Court Justice in modern history.

A. Learning Politics, 1901-1976

One day in 1901, John F. Queeny—a tall man with a red mustache and an undistinguished track record as a purchasing agent for various pharmaceutical companies—borrowed $3,500 and, together with $1,500 of his own funds, started the first company to manufacture saccharin, a synthetic sugar substitute, in the United States.[142] He christened the company Monsanto Chemical Works, after the maiden name of his wife, Olga, the daughter of Spanish aristocrats who, fittingly, had controlled Caribbean sugar plantations before moving to New York in the 1870s.[143] Even as he continued working as a pharmaceutical purchasing agent, Queeny oversaw the production and sale of the first batches of saccharin, and by 1905 the small company was making enough of a profit to expand into caffeine and vanillin, another artificial sweetener.[144] The company continued expanding ambitiously from there: first into curatives, sedatives, and other flavorings,[145] and then into numerous chemicals,[146] fertilizers, plastics, and, profitably, aspirin.[147] As revenue grew, so did Monsanto, and the company expanded geographically throughout the twentieth century, ultimately opening several foreign offices.[148] Yet even as it became ever richer and more powerful, Monsanto operated largely free from controversy—or scrutiny.[149]

But then came the 1960s—and what one Monsanto executive called "the era of the activists."[150] Although working-class activists had been demanding what we now call environmental justice for decades,[151] the environmental movement exploded into the mainstream in 1962 with the publication of *Silent*

142. FORRESTAL, *supra* note 3, at 11–17. For a detailed narrative of Monsanto's early years, see BARTOW J. ELMORE, *You Are Getting into Chemistry Now, Senator, on Which Subject I Am Rather Weak* and *A Coal-Tar War*, *in* SEED MONEY: MONSANTO'S PAST AND OUR FOOD FUTURE 21, 38 (2021).

143. Queeny apparently chose his wife's name instead of his own because he didn't want his employer to know he was starting his own company. FORRESTAL, *supra* note 3, at 13, 15.

144. *Id.* at 19, 22.

145. *Id.* at 23.

146. *Id.* at 24, 38.

147. *Id.* at 29.

148. *Id.* at 181, 191–92.

149. *Id.* at 193.

150. *Id.*

151. *See* Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809 (2018); Josiah Rector, Accumulating Risk: Environmental Justice and the History of Capi-

Spring, by Rachel Carson.[152] The book was a profound and lyrical indictment of the indiscriminate use of chemical pesticides, especially DDT, which Carson charged with causing cancer and other illnesses in both humans and non-human animals.[153] The chemical industry's response to *Silent Spring* was "vicious," according to the scholar Jensen Sass, "and serious attempts were made not only to discredit Carson's work but to attack her person."[154] Monsanto—which had been a major producer of DDT[155]—was among the first chemical companies to attack Carson, parodying her writing in its company magazine.[156] Other chemical firms threatened Carson's publisher with legal action, though to no avail.[157] In spite of these efforts, *Silent Spring* both reflected and engendered a growing wave of public pressure for environmental reform, and, by the early 1960s, the Nixon Administration had established the Environmental Protection Agency ("EPA"); Congress, in turn, passed such landmark environmental statutes as the National Environmental Policy Act ("NEPA"),[158] the Clean Air Act ("CAA"),[159] and the Clean Water Act ("CWA").[160] Quickly, environmental compliance came to consume some 5.5 percent of Monsanto's capital costs.[161]

The ascendant environmental movement, coupled with steeper competition from foreign chemical companies and brewing troubles with OPEC, led

talism in Detroit, 1880-2015 (2017) (Ph.D. dissertation, Wayne State University) (on file with author).

152. Rachel Carson, Silent Spring (1962).

153. *Id.*

154. Jensen Sass, Remaking Monsanto: Commodification as Corporate Strategy 51 (2015) (Ph.D. dissertation, Yale University) (on file with author); *see also* David Kinkela, DDT and the American Century: Global Health, Environmental Politics, and the Pesticide That Changed the World 122–24 (2011); Forrestal, *supra* note 3, at 194–95.

155. John H. Perkins, Insects, Experts, and the Insecticide Crisis: The Quest for New Pest Management Strategies 14, 26 n.66 (2012).

156. *The Desolate Year*, Monsanto Mag., Oct. 1962, at 4–9; Sass, *supra* note 154, at 51; Forrestal, *supra* note 3, at 195–96 (characterizing Monsanto's parody as "fight[ing] back"); Elmore, *supra* note 142, at 100.

157. Sass, *supra* note 154, at 53–54; *see also* Mark Hamilton Lytle, The Gentle Subversive: Rachel Carson, *Silent Spring*, and the Rise of the Environmental Movement 165 (2007).

158. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

159. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

160. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387).

161. Sass, *supra* note 154, at 54. One Monsanto executive estimated in 1976 that, between 1977 and 1979, environmental compliance would cost approximately $136 million. Forrestal, *supra* note 3, at 202.

Monsanto to embark on "a lengthy process of self-reinvention."[162] In response to these pressures, the firm began professionalizing its political activities and started focusing more attention and money on influencing the government.[163] For the first time, Monsanto committed considerable resources toward convincing federal legislators and regulators to, say, restrict cheaper foreign exports or stabilize domestic oil prices.[164] These interactions—though still fairly tame and informal by modern standards—led Monsanto executives to realize that they would have to exert greater control over the federal government in order to guarantee their "organizational autonomy."[165] Whereas the firm's response to *Silent Spring* had been "reactionary and largely *ad hoc*,"[166] its leaders realized that they would have to be less reactive and more proactive in their political activities.[167] This awakening coincided with the ascension of Jack Hanley, Monsanto's first "outsider" CEO and a confirmed member of "the new right that emerged in the mid-1970s," deeply skeptical of government regulation and intervention.[168]

By the mid-1970s, Monsanto was a somewhat more assured political force, and the environmental movement was in some flux. The movement's seminal achievements were behind it, and conservatives were becoming more organized in their opposition. Although, in years past, many conservative political figures had at least tentatively embraced the environmental cause,[169] the influence of industry—including Monsanto—had moved Republican politicians to become ardent opponents of government regulation of business, especially environmental regulation.[170] Environmental activists came to believe that Gerald Ford was "surrounded by doctrinaire anti-environmentalists" as the Republican President restored funding for massive water projects, vetoed strip-mining legislation, and tried to weaken environmental statutes.[171] Complementing these efforts, industry groups became savvier about the precise government offices on which to focus their lobbying efforts.[172] Nonetheless, what the scholar Judith Layzer called "an extremely motivated and proenvironmental

162. Sass, *supra* note 154, at 26.

163. *Id.*

164. *Id.* at 33–42.

165. *Id.* at 42.

166. *Id.* at 73–74.

167. *Id.* at 50.

168. *Id.* at 55–56.

169. Daniel A. Farber, *The Conservative as Environmentalist: From Goldwater and the Early Reagan to the 21st Century*, 59 Ariz. L. Rev. 1005, 1011–23 (2017).

170. *Id.* at 1024–41.

171. Judith A. Layzer, Open for Business: Conservatives' Opposition to Environmental Regulation 42 (2012).

172. Samuel P. Hays, Beauty, Health, and Permanence: Environmental Politics in the United States, 1955–1985, at 317 (1987).

Democratic Congress" was in power during Ford's presidency,[173] and, by 1976, the legislature had passed (and the executive had signed) the Safe Drinking Water Act,[174] the National Forest Management Act,[175] the Federal Land Policy and Management Act,[176] the Resources Conservation and Recovery Act,[177] and the Toxic Substances Control Act ("TSCA").[178]

It was around this time—far more than in the 1960s or early 1970s—that industry "threw itself" into an outright war with the environmentalists, intervening in numerous hearings and rulemakings and enhancing its lobbying and litigation efforts.[179] According to the environmental historian Samuel P. Hays, industry's "most fundamental tactic" during these years was attempting to limit the public's access to environmental data (including, they argued, industry "trade secrets").[180] In one notorious incident, Montana authorities were unable to warn citizens about the danger of deer meat potentially poisoned by pollutants, because the chemical industry had convinced the State Department of Agriculture that to release this information would be disseminating a trade secret.[181] This focus on preventing the public dissemination of corporate information became a hallmark of the industrial opposition to the environmental movement.

Although different segments of industry had different gripes with efforts to protect the environment, they found common cause in their antipathy for the green movement and the threat it posed to their bottom lines.[182] The chemical industry, in particular, began organizing against environmental legislation and quickly became perhaps the environmentalists' most ardent foe.[183] "Chemical manufacturers played a far more extensive role in the environmental opposition than did any other segment of industry," noted Hays.[184] The industry's trade organization, the Manufacturing Chemists Association ("MCA"), was one of

173. LAYZER, *supra* note 171, at 43.

174. Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. § 300f).

175. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600–1614).

176. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–1787).

177. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901–6987).

178. Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601–2629).

179. HAYS, *supra* note 172, at 315–17.

180. *Id.* at 319–20; *see also* MONSANTO CO., ANNUAL REPORT 7 (1976).

181. *Chemical Stocks Ride the Wave*, CHEM. WEEK, May 12, 1982, at 24, 27; Bill Schneider, *Endrin: The Politics of Poison*, MONTANA MAG., Apr.-May 1982, at 58–64; HAYS, *supra* note 172, at 579 n.51.

182. HAYS, *supra* note 172, at 307.

183. *Id.* at 310.

184. *Id.*

the first to publish a trade journal "devoted exclusively to environmental affairs."[185] Notably, Monsanto was actively involved in the MCA; Edwin Putzell, Jr., a Monsanto lawyer who would work closely with Thomas during his years at the company, was a member of the MCA's Legal Advisory Committee.[186] Monsanto also joined with Dow, Union Carbide, and other major chemical companies to create a "top executive group in Washington" to respond to the political threat of environmentalism.[187] Internally, Monsanto executives created an "environmental network" for the purpose of "interfacing with government agencies and interfacing with other chemical companies."[188] As one executive wryly recalled, the company would "comply with every regulation up there after we battled it as long as we have to."[189]

One of the most trying battles the chemical industry fought with environmentalists and government during the 1960s and 1970s involved a product that had been exclusively produced by Monsanto since 1935: polychlorinated biphenyls ("PCBs").[190] PCBs were highly stable and resistant to heat, and so they were quickly integrated into hundreds of industrial products and processes; by the early 1970s, an estimated 90 percent of large industrial capacitors used PCBs, as did a panoply of consumer products, from paints to paper.[191] For years, there had been scattered protests of "obnoxious gases, smoke and vapors" by the residents of the segregated Alabama town where Monsanto produced PCBs,[192] but the other shoe did not truly begin to drop for Monsanto until 1966, when a Swedish chemist discovered that PCBs were leaking into the environment and potentially poisoning wildlife and water.[193] Monsanto managers—who had been aware of PCBs' toxicity for decades[194]—desperately sought

185. *Id.* at 310, 578 n.38; *see also* SWITZER, *supra* note 13, at 111–12.

186. *Biographical Sketch of Edwin J. Putzell Jr.* (July 1972) (on file in Folder 74, Box 14, Series 14, Monsanto Records). On Putzell's work with Thomas, see THOMAS, CLARENCE THOMAS, *supra* note 15, at 169–70.

187. Interview by James E. McKee Jr. with John R. Eck, Monsanto Company Oral History 3 (Nov. 16, 1981) (on file in Folder 22, Box 5, Sub-Series 1, Series 10, Monsanto Records) [hereinafter Eck oral history].

188. Interview by James E. McKee Jr. with Winthrop R. Corey, Monsanto Company Oral History 4 (Dec. 30, 1981) (on file in Folder 22, Box 5, Sub-Series 1, Series 10, Monsanto Records) [hereinafter Corey oral history]; *see also* Eck oral history, *supra* note 187, at 3.

189. Corey oral history, *supra* note 188, at 5.

190. On Monsanto's early years with PCBs, see SPEARS, *supra* note 13, at 53–77; Joe Greene Conley II, Environmentalism Contained: A History of Corporate Responses to the New Environmentalism 103 (Nov. 2006) (Ph.D. dissertation, Princeton University) (on file with author).

191. Conley, *supra* note 190, at 103–04.

192. *See, e.g.*, SPEARS, *supra* note 13, at 120. Note the parallels between this environmental injustice and that in Thomas's hometown of Savannah. *See infra* Part IV.

193. Conley, *supra* note 190, at 112–13.

194. *See* SPEARS, *supra* note 13, at 120–40; Conley, *supra* note 190, at 107–12; ELMORE, *supra* note 142, at 111–15; *see also* Robert Brent Cissell, What Monsanto Chemicals Company

to cast doubt on this finding, especially after American scientists found the same in 1967.[195] Fearing their product might become the next DDT, Monsanto officials alternately told the public they were studying the problem and reassured them that PCBs were safe—something the company insisted, even in the face of growing evidence to the contrary, into the mid-1970s.[196] Witnesses would later claim that Monsanto "knowingly submitted flawed [PCB] data to the EPA," in spite of knowledge of its negative health effects.[197] Central to Monsanto's strategy was its exclusive control of the toxicological data; once again, secrecy was key.[198]

In part because of this dearth of data, EPA was slow to crack down on the use of PCBs.[199] Only in 1976—long after evidence regarding PCBs' toxicity had emerged[200]—did the agency propose regulations prohibiting the discharge of certain PCBs.[201] In the absence of regulatory intervention, Congress took a more aggressive approach. As legislators debated the TSCA throughout the early- and mid-1970s, PCBs came in for special criticism—as did their sole American manufacturer. One member of Congress emphasized that "there is only one company" that produces PCBs, but added, "the most important thing about PCBs . . . is that we have identified a mad dog—a known bad actor in the case of PCB . . . . [T]he time has come to get rid of it."[202] A scientist,

---

Knew About the Hazards and Effects of Polychlorinated Biphenyls (2000) (M.A. dissertation, University of Louisville) (on file with author).

195. Conley, *supra* note 190, at 113–18; ELMORE, *supra* note 142, at 112, 114–18.

196. SPEARS, *supra* note 13, at 143–46; Conley, *supra* note 190, at 117–27. In 1969, Monsanto voluntarily announced it would only sell PCBs to those who would use it in "closed systems," but even in these systems PCBs continued to leak into the environment. *See The Toxic Substances Control Act of 1971 and Amendment: Hearings Before the Subcomm. on the Env't of the S. Comm. on Com.*, 92d Cong. 100–01 (1971) (statement of Dr. Robert Risebrough) [hereinafter *TSCA Hearings*]; FORRESTAL, *supra* note 3, at 198.

197. Bill Richards, *Papers from Trial of Former IBT Officers Raise Many Questions on Product Safety*, WALL ST. J. (May 13, 1983), at 31; *see also* Robert Steyer, *Lab Falsified Monsanto PCB Data, Witness Says*, ST. LOUIS POST-DISPATCH, Oct. 29, 1991, at 5B; MARIE-MONIQUE ROBIN, THE WORLD ACCORDING TO MONSANTO: POLLUTION, CORRUPTION, AND THE CONTROL OF THE WORLD'S FOOD SUPPLY 9–30 (George Holoch trans., 2010).

198. Conley, *supra* note 190, at 126; *see also id.* at 141–42.

199. Env't Def. Fund v. EPA, 598 F.2d 62, 68 (D.C. Cir. 1978) ("[T]he history of EPA's PCBs proceedings is a history of frustration of a congressional mandate for action."). Environmentalists even sued EPA, attempting to compel the agency to promulgate regulations for PCBs. *See* Nat. Res. Def. Council, Inc. v. Train, 519 F.2d 287, 288–89 (D.C. Cir. 1975).

200. *See* Conley, *supra* note 190, at 127–35.

201. *Env't Def. Fund*, 598 F.2d at 70–71; Proposed Toxic Pollutant Effluent Standards for Polychlorinated Biphenyls, 41 Fed. Reg. 30,476 (proposed July 23, 1976) (to be codified at 40 C.F.R. pt. 129). The rule was finalized in 1977. Standards for Polychlorinated Biphenyls (PCBs); Final Decision, 42 Fed. Reg. 6531 (Feb. 2, 1977) (to be codified at 40 C.F.R. pt. 129).

202. 122 CONG. REC. H27186 (daily ed. Aug. 23, 1976) (statement of Rep. Guide).

testifying on their dangers, noted the absence of public information and added wryly, "I am sure the Monsanto Co. has considerable data on this matter."[203] In 1976, Congress passed TSCA, directing EPA to rapidly and completely eliminate PCBs (the only chemical so targeted).[204] Shortly thereafter—just months before Thomas started work there—Monsanto announced it would cease producing PCBs by the end of the following year.[205]

The debate over TSCA was Monsanto's first significant foray into legislative lobbying. One corporate vice president attempted to create a business coalition in opposition to the bill, and the company's director of regulatory management traveled to Washington, D.C., three or four times per month "to coordinate industry opposition."[206] Joined by the broader chemical industry, as well as the electrical industry, Monsanto lobbied against TSCA relentlessly throughout the 1970s.[207] "I have never seen such an effective lobbying effort as was done against this legislation," recalled the bill's primary Senate sponsor.[208] In interviews years later, Monsanto executives were proud of how the company had acquitted itself during the fight over TSCA.[209] Although Congress had, for the first time, banned an entire family of chemicals, the law did not require Monsanto to remove PCBs that were already in use, "leaving in circulation 750 million pounds of PCBs in the United States alone."[210] The chemical giant had become a political force to be reckoned with. This was the company at which

203. *TSCA Hearings*, *supra* note 196, at 102, 104.

204. 15 U.S.C. § 2605(e). Years later, Dow Chemical unsuccessfully sought to restrict the meaning of this provision of TSCA. Dow Chem. Co. v. Costle, 484 F. Supp. 101 (D. Del. 1980); *see also* Env't Def. Fund v. EPA, 636 F.2d 1267 (D.C. Cir. 1980) (environmental organization successfully challenging EPA regulations concerning PCB disposal for being too lax).

205. *Monsanto Decides to End PCB Fluid Production*, BALT. SUN, Oct. 6, 1976, at A8; MONSANTO CO., ANNUAL REPORT 8 (1976). Notably, one Monsanto executive claimed the firm decided to "withdraw" PCBs in 1976 of its own volition, failing completely to mention that it was required by both statute and regulation. FORRESTAL, *supra* note 3, at 198–99. The historian Bartow J. Elmore has noted that even after Monsanto halted PCB production in the United States, the company quietly "tried to eke out a few more years" overseas. ELMORE, *supra* note 142, at 125.

206. SPEARS, *supra* note 13, at 166.

207. *Id.* at 165–66. For a letter from one Monsanto plant manager, see Letter from R.T. Phelps to Strom Thurmond (Jan. 19, 1976), *in* 122 CONG. REC. S8,296 (Mar. 26, 1976). For another example of Monsanto's lobbying, see Letter from W.B. Papageorge to Sidney R. Galler (Feb. 21, 1974) (on file in Monsanto Folder, Box 1, Series 2, Record Group 3, Environmental Defense Fund Records, Stony Brook University [hereinafter EDF Records]).

208. 122 CONG. REC. S4,398 (daily ed. Mar. 26, 1976) (statement of Sen. Tunney).

209. SPEARS, *supra* note 13, at 172; *see also* Corey oral history, *supra* note 188, at 35 ("I believe we gained an awful lot of respect in the industry and in Washington [for how Monsanto handled itself during the fight over PCBs.]").

210. SPEARS, *supra* note 13, at 167; *see also* ELMORE, *supra* note 142, at 126 ("TSCA was in many ways a major victory for Monsanto.").

Clarence Thomas arrived in January 1977. Among his first tasks were negotiating contracts for PCB disposal.[211]

B. Learning Public Relations, 1977–1979

The inauguration of the conservation-minded Jimmy Carter in the first days of 1977 was, briefly, a moment of optimism for the embattled environmental movement, though the Administration's pro-enforcement bent was soon stymied by a national economic downturn.[212] This was also a moment of growing concern within industry about the power of environmentalists. "Single interest environmental groups have a proper place," one Monsanto vice president told the American Institute of Chemical Engineers in 1978, "but their role should be one of a 'watchdog' to observe and comment on the regulatory product, not to inject themselves into the 'nuts and bolts' of the process."[213] These were difficult times for Monsanto in particular. In 1976, after witnessing a cancer spike at a Massachusetts Monsanto plant, federal and state authorities began investigating the firm for health standard violations, and the story hit the press.[214] Similar disease spikes at plants in Missouri, Illinois, and Florida made headlines in 1978 and 1979.[215] One Monsanto report from this time noted that the firm had "weathered difficult conditions and some unexpected setbacks."[216] Speaking more candidly, one executive reminisced to a colleague that "during the Carter administration . . . the environmentalists really ruled the world and gave us all kinds of troubles."[217] Thus, Thomas joined the Monsanto legal department during a particularly contentious moment in its history, and in the broader history of industry and the environmental movement.

In spite of their determined opposition, by the end of the 1970s, many in industry had come to accept that the major environmental laws were here to stay. Rather than opposing the laws directly, business leaders instead began to argue that they should play a significant role in enforcing these laws—that "the

211. *See* Letter from Clarence Thomas to R. Lee Armbruster (Nov. 4, 1977) (on file with Toxic Docs, https://perma.cc/4QQG-UCFD); Memorandum from Clarence Thomas to R.A. Pohl (July 22, 1977) (on file with Toxic Docs, https://perma.cc/5DYE-5D6U).

212. Layzer, *supra* note 171, at 76–79; Hays, *supra* note 172, at 317.

213. Chemical Regulation Reporter, Nov. 17, 1978, at 1415; Hays, *supra* note 172, at 578 n.42.

214. Peter Freidland, *Cancer Hazard Probed at Monsanto*, Bos. Globe, Apr. 4, 1976, at 16.

215. William Freivogel, *Monsanto Process Led to 14 Deaths*, St. Louis Post-Dispatch, July 7, 1978, at 1; William R. Amlong, *Something in Air Infects Monsanto Workers*, Mia. Herald, Nov. 6, 1979, at 14-AW.

216. Monsanto Co., Annual Report 4 (1977); *see also* Eck oral history, *supra* note 187, at 5–7.

217. Interview by James E. McKee Jr. with R. Emmet Kelly, Monsanto Company Oral History 5–6 (Sept. 2, 1981) (on file in Folder 22, Box 5, Sub-Series 1, Series 10, Monsanto Records).

business community and its associated technical experts had the knowhow to implement programs and hence should play a greater role in that objective."[218] They promoted a largely voluntary system of compliance; industry leaders were even willing to accept "controls such as ambient air and water standards, but they were hostile to a more direct system of supervision . . . ."[219] Their hostility to regulation stemmed from their profoundly libertarian desire for secrecy and autonomy. In 1977, for instance, seeking to obviate direct federal research into toxicity, the chemical industry created its own toxicology research center in North Carolina.[220]

In light of its concerns about the environmental movement, and in the wake of TSCA's passage and a broader Carter-era crackdown by federal agencies, Monsanto began prioritizing a new strategy: public relations.[221] As Jensen Sass has written:

> [Monsanto executives] realized the new regulatory state was less a thing of elites than of popular sentiment, and that the negative public views of the chemical industry were an unbearable liability. For this reason, Monsanto set out, first alone, to transform the popular meanings surrounding the chemicals industry. Increasingly, public affairs came to be seen at Monsanto as a matter of strategic significance. From being a largely decentralized activity, public affairs was elevated to the highest reaches of the firm.[222]

In 1977, Monsanto launched a $4.5 million ad blitz, featuring the slogan, "Without Chemicals, Life Itself Would Be Impossible."[223] Deploying pamphlets, free educational materials, and hundreds of its own employees dispatched to public events, business groups, and Rotary Club meetings, Monsanto's public relations team sought to target "a range of audiences across the country."[224] Shortly thereafter, the chemical industry's trade group echoed Monsanto's message in its own enhanced public relations campaign, beseeching the public to gain "a more realistic approach to regulation and legislation."[225] Although it was barely mentioned in this campaign, Monsanto contributed more than $3.5 million toward the effort.[226] The firm claimed to spend tens of millions of dollars on environmental protection.[227] Monsanto even partnered

218. HAYS, *supra* note 172, at 314.
219. *Id.* at 324.
220. *Id.* at 326.
221. *See* SPEARS, *supra* note 13, at 169.
222. Sass, *supra* note 154, at 74.
223. Conley, *supra* note 193, at 190.
224. Sass, *supra* note 154, at 60–62.
225. Conley, *supra* note 190, at 190.
226. Sass, *supra* note 154, at 63.
227. MONSANTO CO., ANNUAL REPORT 40 (1976).

with an ostensible foe, the Environmental Defense Fund ("EDF"), to release a milquetoast anti-pollution advertisement—outraging many EDF members who noted that the organization was, at the same time, suing EPA and industry groups over PCBs.[228]

Monsanto's first significant public relations campaign—and the one that set the template for those that followed—concerned a federal crackdown on a profitable Monsanto plastic technology.[229] In early 1977, the FDA rescinded its approval of Monsanto's "Cycle-Safe" plastic soda bottle design,[230] claiming that the chemicals used in the bottle led to serious abnormalities in rats.[231] Believing this represented an immense financial loss and also exemplified "the threat of extreme and unforeseeable government restrictions,"[232] Monsanto's public relations team immediately launched a wide-ranging campaign, complete with community outreach, press management, and extensive public engagement.[233] Yet this was no ordinary corporate PR campaign. "Monsanto's response to the Cycle-Safe controversy illustrates the beginnings of a new orientation to public affairs," Sass has argued.[234] "Monsanto did not seek to rehabilitate the Cycle-Safe product, nor was it concerned with burnishing its own reputation. Rather, Monsanto's leadership took a long-term view—they sought to transform the attitudes the general public held towards the chemicals industry."[235]

---

228. *See* the voluminous correspondence on file in Folders 6–10, Box 2, Series 4, Record Group 3, EDF Records; Env't Def. Fund v. EPA, 598 F.2d 62 (D.C. Cir. 1978).

229. *See* Wade Kenneth Talley, A Documentation and Evaluation of Monsanto Company's Public Relations Effort During the Cycle-Safe Experience 85 (1978) (M.A. thesis, University of Missouri) (on file with author) (arguing that Monsanto's broader PR campaigns in the years to come were "a direct result of the Cycle-Safe experience").

230. *Id.* at 10.

231. Sass, *supra* note 154, at 58–59.

232. Talley, *supra* note 229, at 11 (quoting MONSANTO CO., POSITION STATEMENT: CYCLE-SAFE BEVERAGE CONTAINERS 8 (1978)).

233. *Id.* at 39, 53–65.

234. Sass, *supra* note 154, at 59.

235. *Id.* The firm's own staff presented another public relations problem. Throughout the mid- and late-1970s, Monsanto's lawyers were forced to defend the company against a rash of lawsuits contending that it had discriminated in a number of unlawful ways, *see, e.g.*, Walker v. Monsanto Co., No. N3 79 C 5556, 1979 U.S. Dist. LEXIS 12166 (N.D. Ill. May 24, 1979), including age discrimination, Connaughton v. Monsanto Co., 557 F.2d 635 (8th Cir. 1977), but especially for failing to appropriately advance or retain Black employees. Herbert v. Monsanto Co., 576 F.2d 77 (5th Cir. 1978); Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977); Sanders v. Monsanto Co., 529 F. Supp. 704 (S.D. Tex. 1981); *see also* Stallworth v. Monsanto Co., No. PCA 73-45, 1980 U.S. Dist. LEXIS 12858 (N.D. Fla. June 26, 1980); Stallworth v. Monsanto Co., No. PCA 73-45, 1979 U.S. Dist. LEXIS 8730 (N.D. Fla. Nov. 5, 1979); Hebert v. Monsanto Co., No. 74-G-173, 1976 U.S. Dist. LEXIS 15565 (S.D. Tex. Apr. 15, 1976). It is unclear if Thomas—as a Monsanto lawyer during these years—worked on any of these cases directly, but he was undoubtedly aware of Monsanto's issues with employment discrimination. He recalled in his memoir that he quickly noticed that the firm was failing to adequately advance its "talented blacks," and he claimed

Fundamentally, Monsanto's public relations efforts were about controlling information, and these were motivated by the firm's profound skepticism of governmental intrusion into its private affairs. In one speech in 1979, a Monsanto lawyer with whom Thomas worked closely told a friendly audience that the American business community should be skeptical of new federal laws that demanded that private companies submit data to government agencies or that allowed the public to access this data.[236] Another lawyer who overlapped with Thomas wrote an opinion column in the *St. Louis Post-Dispatch*, decrying federal attempts to obtain and reveal "Monsanto's trade secrets."[237] Speaking even more candidly, one Monsanto executive complained to a colleague of "the ridiculousness of this kind of intervention in our activities."[238]

During the precise time Thomas was at Monsanto, then, the firm rapidly transformed itself into a public relations juggernaut, one that sought not only to improve the image of the firm and its products but of the chemical industry more broadly. At the heart of this lionization of private industry was the implicit and explicit demonization of governmental intrusion into the sovereign realm of business.

C. Learning Litigation, 1979–1980

The end of 1979 signaled a profound shift in the chemical industry's anti-environmental activism. For its entire existence—even in the late 1970s—its trade group, the MCA, had rarely engaged in litigation (apparently concerned with violating antitrust laws).[239] "There was an awful lot of hoping that if we

---

to have gone to "the black manager in charge of affirmative-action compliance to complain." THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 114. (The manager claimed that Monsanto was "in full compliance with the law." *Id.*) In any case, the firm did apparently begin making at least superficial efforts at greater diversity. According to the historian Ellen Griffith Spears, by the late 1970s Monsanto had "grown self-conscious about the racial composition of the company's all-white, nearly all-male board," and it started seeking to diversify. SPEARS, *supra* note 13, at 169. According to the firm's 1977 annual report, "Women and minorities in the classification of managers and supervisors increased from 2.3 percent in 1972 to 5.9 percent in 1977." MONSANTO CO., ANNUAL REPORT 36 (1977); *see also* MONSANTO CO., ANNUAL REPORT 15 (1981); MONSANTO CO., ANNUAL REPORT 35 (1979). For a more contemporary internal assessment of diversity at Monsanto, see MONSANTO DIVERSITY REPORT (1997) (on file in Folder 4, Box 1, Series 12, Monsanto Records).

236. Richard W. Duesenberg & Allan Kramer, *Opening Remarks*, 34 BUS. LAW. 977, 977–78 (1979). On Duesenberg's work with Thomas, see THOMAS, CLARENCE THOMAS, *supra* note 15, at 170; MAYER & ABRAMSON, *supra* note 15, at 68.

237. W.W. Withers, Opinion, *Does Macy's Tell Gimbels?*, ST. LOUIS POST-DISPATCH, Apr. 9, 1984 (on file in Folder 13, Box 30, Series 14, Monsanto Records).

238. Interview by James E. McKee Jr. with Howard K. Nason, Monsanto Company Oral History 1 (July 24, 1981) (on file in Folder 22, Box 5, Sub-Series 1, Series 10, Monsanto Records).

239. Chris Murray, *CMA Charges Ahead Under New Mandate*, CHEM. & ENG'G NEWS, Aug. 13, 1979, at 17; SWITZER, *supra* note 13, at 112.

didn't do anything [about government regulation] it would go away," recalled one chemical executive.[240] But it quickly became clear that this approach was inadequate, and, in the fall of 1979, the MCA decided to take a more forceful tack. The organization changed its name—to the Chemical Manufacturers Association ("CMA")—and appointed an aggressive new president, Robert A. Roland.[241] Roland had previously run the National Paint and Coatings Association, and his work with this smaller trade group had brought him into contact with the heads of the various chemical giants: Union Carbide, DuPont, Dow, Monsanto.[242] The heads of these companies decided to hire Roland because they wanted to professionalize their anti-environmental work.[243] "[T]hey had been badly beaten on the Toxic Substances Control Act," recalled Roland (slightly at odds with Monsanto executives' own recollections).[244] "They got badly beaten because one, they weren't organized. They really didn't know advocacy."[245]

Upon taking the reins at the CMA, Roland embarked on this professionalization post haste. He immediately demanded that chemical makers figure out their precise positions on environmental hot-button issues, such as Superfund.[246] Roland also sought to make sure that chemical makers toed the CMA's line on these issues in public.[247] He personally lobbied the press.[248] When executives were preparing to testify before an agency, a court, or Congress, Roland sought to "train" them and run them before a "murderboard," an intensive simulated interview.[249] He began hiring staff away from the agencies and from Congress.[250] As a result of his fundraising efforts, the CMA's assets grew from $4 million to over $100 million in a decade-and-a-half.[251] By the time Clarence Thomas left Monsanto to work on environmental affairs at the U.S. Senate, in other words, the chemical industry was a powerful, well-organized, well-rounded anti-environmental force.

It had also become a litigious force. To be sure, chemical companies—including Monsanto—had been challenging federal environmental regulations

240. Murray, *supra* note 239, at 17.

241. *Id.*; SWITZER, *supra* note 13, at 112. For more on the name-change, see Oral history of Robert A. Roland, interview by James J. Bohning, at the Chem. Mfrs. Ass'n, Washington, D.C., Oral History Transcript #0138, at 16–17 (March 14, 1995) (on file in Chemical Heritage Foundation, Philadelphia, PA) [hereinafter Roland oral history].

242. Roland oral history, *supra* note 241, at 15.

243. *Id.* at 17.

244. *Id.* For the executives' recollections, see *supra* notes 208–10.

245. Roland oral history, *supra* note 241, at 17.

246. *Id.* at 18.

247. *Id.* at 20.

248. *Id.* at 19.

249. *Id.* at 23.

250. *Id.* at 24.

251. *Id.*

for years,[252] but they became far more reliant on litigation as anti-environmental activism increased around 1976, and certainly thereafter. Nationally, lawsuits challenging federal environmental statutes more than tripled between 1973 and 1979, and, of the 750 lawsuits against EPA in 1979, two-thirds were brought by industry.[253] Monsanto and other chemical companies eagerly challenged the gamut of federal environmental regulations and decision-makings,[254] as well as a number of state environmental regulations and decision-makings.[255] Monsanto seems to have challenged these regulations almost as a matter of course, but it also brought suit proactively to protect its most valuable products, such as AstroTurf[256] and Cycle-Safe.[257] Further, it brought one suit to the U.S. Supreme Court to (unsuccessfully) challenge the constitutionality of a federal law that sought to compel the firm to disclose what it considered "trade secrets."[258]

In the great majority of these cases, the courts ruled against Monsanto and the other industry petitioners. Often, courts were openly dismissive of Monsanto's shoddy legal reasoning. "It should be clear to commenters when they criticize a regulatory scheme that if the agency accepts those criticisms, a new scheme will be substituted. The commenters cannot claim they had no notice to propose and discuss alternatives," wrote the First Circuit in one case from

252. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975) (including Monsanto among petitioners).

253. LAYZER, *supra* note 171, at 79.

254. *See, e.g.*, Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844 (D.C. Cir. 1979) (including Monsanto among petitioners); BASF Wyandotte Corp. v. Costle, 582 F.2d 108 (1st Cir. 1978) (same); Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976) (same); Consumers Power Co. v. Fed. Energy Admin., 413 F. Supp. 1024 (E.D. Mich. 1976) (same); Nat. Res. Def. Council, Inc. v. EPA, 537 F.2d 642 (2d Cir. 1976) (including Monsanto among intervenors).

255. *See, e.g.*, Monsanto Co. v. Ill. Pollution Control Bd., 350 N.E.2d 289 (Ill. App. 1976), *rev'd*, 367 N.E.2d 684 (Ill. 1977).

256. Monsanto Co. v. Univ. of Tenn., 495 F. Supp. 126 (E.D. Tenn. 1980). The dispute between Monsanto and the competitor named in this case, SuperTurf Inc., was long-running. *See* SuperTurf, Inc. v. Monsanto Co., 660 F.2d 1275 (8th Cir. 1981). For background on Monsanto and AstroTurf, see FORRESTAL, *supra* note 3, at 207–10; MONSANTO CO., ANNUAL REPORT 26–27 (1976).

257. Monsanto v. Kennedy, 613 F.2d 947 (D.C. Cir. 1979). This dispute was very widely publicized. *See* Victor K. McElheny, *Technology: Plastic Bottles: Where the Battle Stands*, N.Y. TIMES, Nov. 9, 1977, at D1, D7; *FDA Bans Use of Plastic Bottle*, ATLANTA CONST., Sept. 21, 1977, at 4C; Robert Waters, *Group Favors Bottle Ban*, HARTFORD COURANT, Apr. 12, 1977, at 10; *Plastic Bottle Curb Stayed by U.S. Court*, N.Y. TIMES, Mar. 12, 1977, at 11. For more on the firm's response, see Letter from John W. Hanley, Chairman of the Bd. and President, Monsanto Chem. Co., to Shareowners (Mar. 21, 1977), *in* MONSANTO CO., ANNUAL REPORT 67–68 (1978); MONSANTO CO., ANNUAL REPORT 4 (1977); MONSANTO CO., ANNUAL REPORT 8, 63 (1976); MONSANTO CO., ANNUAL REPORT 13 (1975).

258. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). This suit originated during Thomas's years at Monsanto. *See* Withers, *supra* note 237.

1979.[259] Then, singling out one of the petitioners, it wrote: "Clearly Monsanto realized that the Agency would have to consider alternatives and was not finally committed to subcategories. Moreover, Monsanto's response indicates that the Agency had not misled petitioners into thinking that they need only state views on the desirability of more subcategories rather than the undesirability of fewer."[260] This appellate slap-down did not discourage Monsanto and the other petitioners from continuing the challenge and returning to the First Circuit the next year (when the court again ruled against them).[261] Significantly, the point of Monsanto's legal strategy was not necessarily to win; it was to make regulation so expensive and onerous a process that the regulators just might be dissuaded from doing more of it. Monsanto attorney Thomas likely assisted with much of this litigation, and he likely took note of the broader legal strategy.

At the same time, much of Monsanto's litigation during Thomas's years with the firm was defensive; indeed, he arrived just as the firm was being inundated with high-profile tort actions.[262] It is probable that this sense of onslaught shaped the young attorney's environmental legal perspective as well. For instance, between late 1976 and early 1977, thousands of individuals in Georgia, South Carolina, and Alabama filed multiple billion-dollar class action suits over PCB contamination.[263] Although many of these suits were dismissed,[264] the firm was eventually forced to settle one in 1979; the settlement was reportedly "the largest on record in an Alabama court."[265] During the same time, Monsanto faced many smaller suits over PCB contamination, brought by plaintiffs ranging from a group of mink farmers[266] to EPA.[267] Litigation over PCBs would continue for decades after Monsanto stopped manufacturing them—in large part because the firm's secrecy meant that information as to contamina-

259. BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 643 (1st Cir. 1979).

260. *Id.*

261. BASF Wyandotte Corp. v. Costle, 614 F.2d 21 (1st Cir. 1980).

262. *See, e.g.*, D'Hedouville v. Pioneer Hotel Co., 552 F.2d 886 (9th Cir. 1977); Feeders, Inc. v. Monsanto Co., No. 4-77-306, 1981 U.S. Dist. LEXIS 18159 (D. Minn. May 15, 1981); Johnson v. Monsanto Co., 303 N.W.2d 86 (N.D. 1981); MONSANTO CO., ANNUAL REPORT 61–62 (1980); MONSANTO CO., ANNUAL REPORT 66 (1979).

263. *See Suit Against Monsanto Asks $1 Billion Award*, WALL ST. J., Mar. 14, 1977, at 20; *New PCB Suits Names Monsanto*, ST. LOUIS POST-DISPATCH, Mar. 14, 1977, at 26; *21 Sue GE, Monsanto over Coosa*, ATLANTA CONST., Dec. 30, 1976, at 2A; *Monsanto Named in Suit*, ATLANTA CONST., Sept. 24, 1976, at 5C.

264. MONSANTO CO., ANNUAL REPORT 65 (1979).

265. *Coosa PCB Suit Is Settled*, ATLANTA CONST., Nov. 15, 1979, at 19D.

266. Rozansky Feed Co. v. Monsanto Co., 579 S.W.2d 810, 811–13 (W.D. Mo. 1979).

267. MONSANTO CO., ANNUAL REPORT 61 (1980).

tion came out only gradually.[268] By 1996, one Monsanto attorney would estimate the firm had faced some 452 separate suits over PCBs.[269]

Shortly before Thomas left, Monsanto was hit with even higher-profile litigation, brought by Vietnam veterans. The veterans filed a $40 billion class action suit against Monsanto, as well as Dow and a number of other chemical companies, for their role in manufacturing dioxin-contaminated chemicals used in Agent Orange.[270] The firm dismissed this as a "highly charged, emotional issue," unsupported by scientific data,[271] but the courts refused to dismiss the complaint.[272] Monsanto—the largest marketer of Agent Orange and the manufacturer of "the 'dirtiest' products"—decided to try a strategy of delay "and hope that plaintiffs' lawyers would run out of money."[273] The Agent Orange litigation would likewise end up dragging on for decades.[274]

By the early 1980s, much to the chagrin of the chemical industry, multiple public opinion polls found that Americans broadly trusted environmental groups and distrusted corporations.[275] A sense of grievance became palpable in the writing of conservative anti-environmentalists.[276] It was at this time that

268. *See* SPEARS, *supra* note 13, at 249; Laura Nation, *Class Action Suit Against Monsanto Proceeds*, ANNISTON STAR, Sept. 29, 1998, at 9.

269. Deposition of Thomas Michael Bistline 10 (Aug. 14, 1996) (on file with TOXIC DOCS, https://perma.cc/5URH-XYR2).

270. Jan Schafter, *Vietnam Vet Sues over Defoliant Use*, PHIL. INQUIRER, Sept. 25, 1979, at 15; Jay Branegan, *Viet Nam Vets Ask Billions in Defoliant Suits*, CHI. TRIBUNE, Feb. 22, 1979, at 1; *see also* Donald G. McNeil Jr., *Judge Allows Ill Veterans to Sue Defoliant Makers*, N.Y. TIMES, Nov. 21, 1979, at A16; MONSANTO CO., ANNUAL REPORT 66 (1979).

271. *Agent Orange . . . What Are the Facts? Monsanto Company Perspective*, MONSANTO NEWS BACKGROUNDER, Mar. 17, 1980, at 1 (on file in Monsanto correspondence folder, Box 15, Thomas Eagleton Papers, State Historical Society of Missouri).

272. *In re* Agent Orange Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979), *aff'd*, 635 F.2d 987 (2d Cir. 1980). For more background, see Bruce F. Meyers, *Soldier of Orange: The Administrative, Diplomatic, Legislative and Litigatory Impact of Herbicide Agent Orange in South Vietnam*, 8 B.C. ENV'T AFFS. L. REV. 159 (1979).

273. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 96–97 (1987).

274. *See* litigation documents on file in Folder 6, Box 4, Admiral Elmo R. Zumalt Jr. Collection, Vietnam Center and Archive, Texas Tech University; PETER SILLS, TOXIC WAR: THE STORY OF AGENT ORANGE (2014). Monsanto also faced other litigation closer to home because of dioxin contamination (the allegation in the Agent Orange suits). *See* Linda Elaine James, Missouri's Dioxin Contamination, 1968–1988: The Politics and Administration of a Hazardous Waste Catastrophe 54, 73 n.7, 151, 174 (1988) (Ph.D. dissertation, University of Missouri); Judith A. Zack & William R. Gaffey, *A Mortality Study of Workers Employed at the Monsanto Company Plant in Nitro, West Virginia*, *in* HUMAN AND ENVIRONMENTAL RISKS OF CHLORINATED DIOXINS AND RELATED COMPOUNDS 575 (Richard E. Tucker et al., eds., 1983).

275. HAYS, *supra* note 172, at 327, 579–80 n.63.

276. *See, e.g.*, Luke Popovitch, *Environmentalism and the New Conservatives*, AM. FORESTS, Mar. 1983, at 18–20, 50–51.

Clarence Thomas officially changed his voter registration and became a Republican.[277]

III. Judging Thomas[278]

It should come as no surprise to even a casual observer of the Supreme Court that Clarence Thomas is remarkably conservative in his environmental jurisprudence. Indeed, a 2000 analysis by the legal scholar Richard Lazarus revealed that Justice Thomas was the second-most anti-environmental justice ever.[279] The following Part seeks to demonstrate some amount of continuity in Thomas's environmental thinking, tracing his philosophy from his stint at Monsanto to his days as a Senate aide in the office of John Danforth to his tenure on the Supreme Court. To be sure, it would be simplistic to attribute Thomas's conservatism *just* to his experience with Monsanto or with Danforth. It is, rather, the contention of this Article that his anti-environmental experience is a single significant factor in forming his philosophy. Further, it would be simplistic to depict Thomas as *uniformly* anti-environmental. As a young Senate staffer, for instance, Thomas once agreed with environmentalists to oppose a bill that would have opened up wilderness areas to logging.[280] Nonetheless, he was and remains an overwhelmingly anti-environmental jurist.

In other words, Thomas judges like the chemical industry attorney he once was. To illustrate this, the following Part examines Thomas's sympathy toward industry and his skepticism toward the administrative state. It then uses Thomas's legislative work and jurisprudence with respect to Superfund to epitomize his anti-environmental ideology, demonstrating the lasting influence of Monsanto and the broader chemical industry on his advocacy and judging.

A. Justice Thomas's Sympathy to Industry

Perhaps the most obvious legacy of Thomas's Monsanto years is his deep and abiding sympathy with industry. As a lawyer, Thomas was at Monsanto during one of the most contentious moments in the history of the anti-environmental movement. As a Senate aide, Thomas was constantly receiving entreaties from lobbyists for corporations like Monsanto, as well as, repeatedly,

277. Thomas, My Grandfather's Son, *supra* note 17, at 130.

278. I have borrowed this title from Ken Foskett's Thomas biography, *see supra* note 15; Foskett, in turn, borrowed it from the biblical figure "Doubting Thomas."

279. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703, 729 (2000). The Justice that Lazarus calculated as being the most anti-environmental was Antonin Scalia. *Id.* at 727–29.

280. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Apr. 30, 1981) (on file in Wilderness S. 842 Folder, Box 5, Danforth Papers) (noting that Danforth "has received numerous letters from conservationists opposing this legislation" and recommending that Danforth "oppose this legislation").

Monsanto itself. As a Justice, Thomas is among the most pro-industry members of the Supreme Court in its history. For more than four decades, then, Thomas has shown a remarkable openness to the arguments of industry—that unfettered corporations promote the cause of liberty and do so best when allowed to operate independent of government scrutiny.

One illustrative example is the case of chlorofluorocarbons ("CFCs"), a class of chemicals used in foams and refrigerants that, scientists eventually discovered, were destroying the ozone layer.[281] CFCs were primarily produced and sold by DuPont,[282] which was both a competitor and chemical industry ally of Monsanto; undoubtedly, Thomas interacted with the rival firm during his years at Monsanto. As EPA began attempting to regulate CFCs in the late 1970s, industry quickly organized an effort to preempt the agency by convincing Congress to pass a bill to stymie EPA until an international agreement was in place.[283] It was a strategy of obfuscation, and legislative aide Clarence Thomas proved to be a very receptive audience. In early 1981, Thomas met with representatives from DuPont, as well as Emerson Electric, both of whom lobbied him to have Danforth convince the "EPA to slow down their headlong rush to regulate CFCs."[284] Shortly after these meetings, Thomas wrote a memorandum to Danforth. The reason EPA wished to regulate CFCs, he wrote, "is that theoretically they are responsible for depletion of the ozone."[285] But Thomas was skeptical, and he sought to convince Danforth to co-sponsor the industry bill, citing industry talking points, such as the "severity of the economic impact on those industries relying on CFCs" and "the lack of actual evidence that the ozone has actually deteriorated as a result of CFCs."[286] Just six years later, Congress passed a law declaring that "manmade pollution"—including, specifically, CFCs—"may be producing a long-term and substantial increase in the average temperature on Earth" and directing EPA to propose a "coordinated national policy on global climate change."[287] Although this law accomplished little on its own, it was a step on the path toward EPA's eventual regulation of greenhouse

281. James W. Elkins, *Chlorofluorocarbons (CFCs)*, GLOB. MONITORING LAB'Y (1999), https://perma.cc/G2TK-C69Q.

282. Debora MacKenzie, *Chemical Giants Battle over Ozone Holes*, NEW SCIENTIST, Apr. 23, 1987, at 22, 22.

283. *See generally* CFC Background Folder, Box 5, Danforth Papers.

284. Letter from Ralph B. Tilney to Clarence Thomas (Mar. 6, 1981) (on file in CFC Background Folder, Box 5, Danforth Papers). For the DuPont meeting, see Letter from Richard B. Ward to Clarence Thomas (Mar. 5, 1981) (on file in CFC Background Folder, Box 5, Danforth Papers).

285. Memorandum from Clarence Thomas, Legis. Assistant, Office of Sen. Danforth, to John C. Danforth, Sen. (Mar. 11, 1981) (on file in Clarence Thomas Memos Folder, Box 47, Danforth Papers).

286. *Id.*

287. Global Climate Protection Act, Pub. L. 100-204, tit. XI, 101 Stat. 1407 (1987) (codified as amended at 15 U.S.C. §§ 2901–2908).

gases, which led to the seminal climate change case, *Massachusetts v. EPA*[288] (discussed below)—from which Justice Thomas dissented.[289]

This dynamic held true beyond CFCs. For instance, at the request of a steel industry representative,[290] young Thomas lobbied Danforth to co-sponsor a bill to "stretch out" the period over which the CAA required "the steel industry [to] install pollution control equipment."[291] He repeatedly urged Danforth to support legislation deregulating the price of natural gas.[292] As the Senate was considering amendments to the Surface Mining Control and Reclamation Act,[293] Thomas conveyed the complaints of small coal mining operations to Danforth.[294] Several decades later, Justice Thomas has sided repeatedly with coal companies.[295] He has also shown a general tendency to side with anti-environmental corporate interests, having personally written decisions in cases decided in favor of Texaco[296] and Entergy,[297] among others.

Perhaps most notably, Justice Thomas has repeatedly ruled in favor of Monsanto's interests or Monsanto itself in cases involving the company's valuable patents. For instance, in *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International*,[298] a significant 2001 decision, Justice Thomas wrote for the majority that the seeds of newly developed plant breeds were patentable.[299] Given Monsanto's considerable stake in genetically modified seeds,[300] this was a decision of im-

288. *See infra* note 332.

289. 549 U.S. 497, 549–60 (2004) (Scalia, J., dissenting).

290. Memorandum from John M. Stinson, Nat'l Steel Corp., to Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth (Feb. 12, 1981) (on file in Memos Misc. Folder, Box 115, Danforth Papers).

291. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Feb. 24, 1981) (on file in Steel Industry Compliance Extension Act S.63 Folder, Box 50, Danforth Papers).

292. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (July 2, 1980) (on file in Natural Gas Incremental Pricing Folder, Box 59, Danforth Papers); Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Mar. 6, 1980) (on file in Natural Gas Incremental Pricing Folder, Box 59, Danforth Papers).

293. 30 U.S.C. §§ 1201–1328.

294. *See* Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Jan. 26, 1981) (on file in Bonding Requirements Folder, Box 59, Danforth Papers); *see also* Memorandum from Steve Hilton to "Judy" (Jan. 26, 1981) (on file in Bonding Requirements Folder, Box 59, Danforth Papers) (describing a meeting between coal mining executives, Thomas, and Danforth).

295. *See, e.g.*, Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002); E. Enters. v. Apfel, 524 U.S. 498 (1998) (Thomas, J., concurring).

296. Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

297. Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003).

298. 534 U.S. 124 (2001).

299. *Id.* at 127.

300. *See generally* ELMORE, *supra* note 142.

mense importance to Monsanto,[301] which had submitted an amicus brief in the case.[302] Interestingly, Thomas was an attorney at Monsanto when the Supreme Court decided *Diamond v. Chakrabarty*,[303] a case foundational to *Pioneer*, in which the Court first held that genetically modified organisms could be patented, and which was pivotal to Monsanto's emerging business model.[304] Years later, with Justice Thomas on the bench, the Court held for Monsanto in its first ruling on genetically engineered crops,[305] handing the company another significant win.[306] Notably, Justice Stephen Breyer had recused himself from the case—apparently because his brother, a district judge, had issued the original ruling in the case; environmental advocates called for Justice Thomas to recuse himself as well, given his history with Monsanto, but he refused and joined the majority.[307]

In 2013—in what one scholar called "the 'year of genes' at the Supreme Court"[308]—the Court (including Justice Thomas) ruled unanimously that a farmer infringed on Monsanto's patent when the farmer saved and grew patented Monsanto seeds without the company's permission.[309] Progressive critics again publicly questioned whether Justice Thomas should recuse himself from the case, but he declined to comment or do so.[310] Indeed, a month later, Justice Thomas wrote for the majority in *Association for Molecular Pathology v. Myriad Genetics, Inc.*,[311] a "much-publicized case involving the patentability of human genes,"[312] and another one of much significance to Monsanto, given the company's massive stake in patenting genetic sequences.[313] A global federation of plant science companies, including Monsanto, had submitted an amicus brief in

301. *See* Tempe Smith, Note, *Going to Seed?: Using Monsanto as a Case Study to Examine the Patent and Antitrust Implications of the Sale and Use of Genetically Modified Seeds*, 61 ALA. L. REV. 629, 630 (2010).

302. Brief for Monsanto Company as Amicus Curiae Supporting Respondent, *J.E.M. Ag Supply, Inc.*, 534 U.S. 124 (No. 99-1996), 2001 WL 674207.

303. 447 U.S. 303 (1980).

304. *See* Sass, *supra* note 154, at 10–14.

305. Jennifer Koons, *Supreme Court Lifts Ban on Planting GM Alfalfa*, N.Y. TIMES (June 21, 2010), https://perma.cc/56VJ-NUK3.

306. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

307. Nate Hausman, Monsanto Co. v. Geertson Seed Farms*: Breathing a Sigh of Equitable Relief*, 25 TUL. ENV'T L.J. 155, 175 (2011).

308. Samantak Ghosh, *Are All Genes Equal?*, 20 B.U. J. SCI. & TECH. L. 1, 1 (2014).

309. Bowman v. Monsanto Co., 569 U.S. 278 (2013).

310. Aviva Shen, *How One 75-Year-Old Soybean Farmer Could Deal a Blow to Monsanto's Empire Today*, THINKPROGRESS (Feb. 19, 2013), https://perma.cc/WH7Q-KBPJ; Janie Boschma, *Monsanto: Big Guy on the Block When It Comes to Friends in Washington*, OPENSECRETS (Feb. 19, 2013), https://perma.cc/9DFL-2XUL.

311. 569 U.S. 576 (2013).

312. Ghosh, *supra* note 308, at 1.

313. *See* Sass, *supra* note 154, at 10–15.

the case, arguing for a capacious right to patent genes.[314] Thomas wrote an opinion that essentially gave Monsanto and its fellow amici half of what they wanted. He wrote that, while naturally occurring DNA was not patentable, synthetically created DNA—"which contains the same protein-coding information found in a segment of natural DNA but omits portions within the DNA segment that do not code for proteins"—was patentable.[315]

Looking beyond the realm of patents, Justice Thomas once even joined the majority to rule that Monsanto was not liable to a man who claimed "that his exposure to PCBs 'promoted' his cancer."[316] A unanimous Court ruled for Monsanto (among other corporate defendants), holding that the district court had properly excluded supposedly speculative evidence establishing a link between the man's PCB exposure and his cancer.[317] Thomas did not recuse himself from this case, even though he had once worked for Monsanto, and even though extant documents show that his work involved personally negotiating contracts for PCB disposal[318]—which included "tough negotiations . . . in the areas of indemnity, transfer of title and risk of loss and warranty."[319]

B. Justice Thomas's Skepticism of the Administrative State

One natural corollary of Thomas's pro-industry stance is his profound skepticism of government regulation of industry. Thomas came of age as a lawyer (and as a conservative) at Monsanto, which was involved in an escalating war against federal oversight and scrutiny. This has clearly informed his political philosophy, as reflected in his work as a Senate aide and in his judging. Significantly, Thomas also came of age as a conservative during the heady days of the so-called Reagan revolution, when newly empowered Republicans giddily neutered federal agencies and deregulated as many industries as they could.[320] Thomas's conservatism was also informed by the Reagan revolution, as well as the reaction of firms like Monsanto to that revolution.

Just months after Thomas left Monsanto to go work as a Senate aide, Ronald Reagan announced his candidacy for President. A year later, Reagan

314. Brief for CropLife International as Amicus Curiae Supporting Respondents at 2, Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013) (No. 12-398), 2013 WL 1098260.

315. *Myriad Genetics*, 569 U.S. at 580.

316. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139–40 (1997).

317. *Id.* at 140–41.

318. *See supra* note 211.

319. Letter from Clarence Thomas to W.A. Blase et al. (July 28, 1977) (on file wth Toxic Docs, https://cdn.toxicdocs.org/mq/mqvVBdbdZb1O1DkLN4gaDLzKO/mqvVBdbdZb1O1DkLN4gaDLzKO.pdf).

320. *See* Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. Chi. L. Rev. 521, 527–32 (1990); *see also* Charles Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 132–71 (1991).

would win a decisive victory and defeat the incumbent president, Jimmy Carter, paving the way for Thomas to join the Administration (and, one day, the Supreme Court). The chemical industry eagerly greeted Reagan's election and the prospect of deregulation it seemed certain to usher in.[321] Even before his inauguration, Reagan's top aides were warning of the "ticking regulatory time bomb" that was environmental rulemaking, claiming that "a whole new mindset was needed at EPA," or else the agency "would practically shut down the economy."[322] Monsanto CEO Jack Hanley soon became an advisor to the new Reagan Administration as chairman of the Domestic Policy Review.[323] Under his leadership, a "central message of the Review was that regulation was suffocating the nation."[324] And Monsanto officials "played a key role" in instigating discussions regarding a rollback of the regulation of biotechnologies—discussions in which the Reagan Administration eagerly participated.[325] As Vice President George H.W. Bush famously told Hanley, "Call me. We're in the dereg business. We can help."[326]

As a Senate aide, Thomas excitedly began planning for the Reagan revolution in the law of the environment. Barely a week after Reagan was elected, Thomas wrote a memorandum for Danforth titled, "We have power—now what?"[327] With the election of a new President, as well as the success of Republicans in securing a majority in the Senate, "[t]he orientation and objectives of JCD's staff must be changed," Thomas wrote.[328] He suggested that Danforth seek to win a seat on the Environment and Public Works Committee, primarily in order to "limit the impact of the Clean Air and Clean Water Acts," which were both up for reauthorization in 1981.[329] Such a seat would also allow Danforth to shape "the scope and coverage" of the Superfund bill (a subject in which "[i]ndustry" had "demonstrated its keen interest"), and to fight for the

321. *See* W.C. Lowrey, *Chemical Industry Lobbying in Washington*, *in* REGULATORY AND LEGISLATIVE ISSUES AFFECTING THE CHEMICAL INDUSTRY 26 (Chem. Mktg. Rsch. Ass'n 1981); *Report to Reagan Favors Petrochemicals*, CHEM. WEEK, Nov. 26, 1980, at 15.

322. LAYZER, *supra* note 171, at 103.

323. Sass, *supra* note 154, at 55–56.

324. *Id.* at 56.

325. *Id.* at 129.

326. *Id.* at 130. This echoed other Reagan Administration officials speaking to chemical industry audiences. *See, e.g.*, Donald L. Bauer, *Overview of the Administration's Energy Policy*, *in* REGULATORY AND LEGISLATIVE ISSUES, *supra* note 321, at 60–65; Douglas G. Bannerman, *Regulatory Issues Affecting the Chemical Industry*, *in* REGULATORY AND LEGISLATIVE ISSUES, *supra* note 321, at 3.

327. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth and "AVN" (Nov. 13, 1980) (on file in Memos Misc. Folder, Box 115, Danforth Papers).

328. *Id.*

329. *Id.*

interests of Missouri industries,[330] which included Monsanto. Another memorandum that Thomas wrote a few weeks earlier underscored his belief that the reauthorization of the CAA and CWA "may be the most important legislation [considered in the] next Congress."[331] After all, reining in these laws could cripple the regulatory authority of EPA and liberate companies like Monsanto to operate unencumbered.

As a Justice, Thomas has been a consistent (if unsurprising) foe of administrative agencies, especially those that seek to protect the environment through regulation (most notably EPA). In 2007, he joined the other three reliably conservative justices in dissent in *Massachusetts v. EPA*, arguing that the CAA's language on motor vehicle pollution did not endow EPA with the authority to regulate greenhouse gases at all.[332] In a case in 2011, and again in 2014, Thomas was the only Justice to join with Justice Alito in continuing to argue this.[333] Apparently, Thomas had long held the CAA in some disdain. As a Senate aide, he had once drafted a speech for Danforth to give at a Missouri high school, telling the students that part of the reason more Missouri coal wasn't used was "the cost of complying with environmental laws, especially the Clean Air Act."[334] A year later, Thomas forwarded a colleague a letter from a constituent that lambasted the CAA language regarding motor vehicle pollution, writing, "Read this! It's amazing."[335]

Yet for Thomas, this also appears to be part of a broader push to limit the powers of federal agencies, especially EPA.[336] In a significant solo concurrence in *Whitman v. American Trucking Associations*,[337] for instance, Thomas wrote to question whether Congress had delegated too much legislative power to the Agency.[338] (Though, conceding that none of the parties had raised this issue, he professed himself willing to wait until "a future day.")[339] In another solo concur-

330. *Id.*

331. Memorandum from Clarence Thomas to John C. Danforth (Oct. 30, 1980) (on file in Memos Misc. Folder, Box 115, Danforth Papers).

332. 549 U.S. 497, 549–60 (2007) (Scalia, J., dissenting).

333. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 343–50 (2014) (Alito, J., concurring); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 430 (2011) (Alito, J., concurring).

334. Clarence Thomas, Draft, Senator Danforth's Speech to Clinton High School Students (Jan. 30, 1980) (on file in Coal Problem in Missouri Folder, Box 114, Danforth Papers).

335. Letter from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to "Kurt" (1981) (on file in Unlabeled Folder, Box 50, Danforth Papers).

336. For an early window into Thomas's thinking on EPA's jurisdiction over motor vehicle standards, see Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to "AVN" (May 6, 1980) (on file in Leaded Gasoline Folder, Box 59, Danforth Papers).

337. 531 U.S. 457 (2001) (Thomas, J., concurring).

338. *Id.* at 486–87.

339. *Id.* at 487. Since Justice Thomas wrote this concurrence, three other Justices have apparently adopted his position with respect to the non-delegation doctrine. *See* Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J.,

rence, in *Michigan v. EPA*,[340] Thomas wrote separately "to note that [the Agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[341] To Thomas, endowing agencies with too much authority is not merely a constitutional problem; it inhibits freedom, which is to say the ability of business to operate without government oversight.

This can come across as fairly run-of-the-mill libertarianism. For instance, as a Reagan Administration official in 1987, Thomas mused to an interviewer for a libertarian magazine, "Why do you need a Department of Labor, why do you need a Department of Agriculture, why do you need a Department of Commerce? You can go down the whole list—you don't need any of them, really."[342] When the interviewer pointed out that the EEOC issued mandates to private employers, Thomas replied that under his leadership it did "not really" do so anymore, as the Commission was past what he considered its "social engineering phase."[343] "When EEOC or any organization starts *dictating* to people, I think they go far beyond anything that should be tolerated in this society."[344]

Yet the political scientist Corey Robin has recently argued that deeper philosophical forces are at work, tracing Thomas's jurisprudence to a form of "black nationalism."[345] In Thomas's Commerce Clause opinions, Robin writes, one can observe the Justice's desire "to take away a tool of the regulatory state,"[346] which can be explained by his deeply held belief that "African Americans have nothing to gain—and everything to lose—from a national government set on improving their condition."[347] Further, in Thomas's Free Speech Clause opinions, Robin argues that one can observe the Justice's belief that

concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases."). Although these Justices have given "very clear and strong indications that [they were] interested in re-visiting [the Court's] approach to non-delegation," this has not yet happened. Alan B. Morrison, *The Supreme Court's Non-Delegation Tease*, YALE J. ON REG. NOTICE & COMMENT (2020), https://perma.cc/HF34-Y9ZJ.

340. 576 U.S. 743 (2015).

341. *Id.* at 760 (Thomas, J., concurring).

342. Kaufmann, *supra* note 87, at 32.

343. *Id.*

344. *Id.*

345. ROBIN, *supra* note 16, at 8.

346. ROBIN, *supra* note 16, at 122. The most famous of these opinions is likely *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (embracing a highly restrictive interpretation of "commerce," suggesting that much of what agencies do—justified by the Commerce Clause—is unconstitutional).

347. ROBIN, *supra* note 16, at 126.

"[t]he market must be emancipated from the state."[348] This, too, can be explained by Thomas's belief that "extraordinary black men" can only succeed "[i]n a market freed of government constraints."[349] While Robin's insights are undoubtedly salient, Thomas's distinctive libertarian race-pessimism is clearly not the only philosophical commitment underpinning his jurisprudence. Also present is Thomas's fundamental skepticism of the competence and expertise of government agencies, surely informed by his former employer's desire to be freed from governmental meddling or regulation.

It certainly appears that Thomas has held these views consistently for decades. In early 1981, for instance, Thomas apparently drafted a letter for Danforth to send to Reagan Administration official David Stockman, which began, "As you know, I am strongly supportive of the Administration's plans to make severe cuts in federal expenditures."[350] But even before Reagan's election, Thomas was deriding the expertise of agencies; in 1980, as he was helping Danforth prepare for Senate hearings involving the Army Corps of Engineers ("the Corps"), Thomas wrote a memorandum exuding disdain for the Corps' technical expertise: "Although details cannot be avoided in certain lines of questioning, it must be remembered that the Corps' prowess in the use of charts, numbers, graphs, etc. is unmatched," Thomas wrote to Danforth.[351] "Our strength is in generalities and yes/no answers not specific debates with the Corps. Should we find ourselves unwittingly engaged in a discourse on details, I suggest that we belittle the exchange and get back to more general questions."[352] This kind of language—while typical of a Reagan Republican—is not primarily explicable by Thomas's experiences with racism; it is, instead, explicable by his experiences with business, specifically Monsanto. Above all, to Thomas, federal administrative oversight was bad for business. In 1979, he once expressed frustration at the NEPA process, writing to Danforth that the law's requirements—and EPA's "questionable responses" to a draft environmental impact statement—had effectively cost the state of Missouri a plastics manufacturing plant.[353]

For Thomas the Senate aide, this skepticism of agencies translated directly into efforts to restrict the administrative state in the precise ways he would later

348. *Id.* at 127.

349. *Id.* at 131.

350. Letter from John C. Danforth, Sen., to David Stockman, Dir., Off. of Mgmt. and Budget (Feb. 12, 1981) (on file in Unlabeled Folder, Box 110, Danforth Papers).

351. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (July 25, 1980) (on file in Hydroelectric Power Folder, Box 48, Danforth Papers).

352. *Id.*

353. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Dec. 31, 1979) (on file in Borg-Warner Folder, Box 116, Danforth Papers). For context, see the rest of the documents in this folder.

advocate as a Justice. In 1980, for instance, he wrote to Danforth regarding a nuclear waste management reorganization bill being considered by the Senate; Thomas recommended that Danforth seek to dramatically pare back the bill by "[e]liminat[ing] the provisions for public review and comment," sharply restricting judicial review, and removing essentially any "unnecessary and time-consuming" provision that could delay the approval of nuclear waste sites.[354] A year earlier, after urging Danforth to support a bill establishing an Energy Mobilization Board,[355] Thomas drafted a statement decrying "the proliferation of burdensome and often unnecessary procedures" and adding, "It is my view that if we are to respond expeditiously to the energy emergency which exists in this country, we must have a way to simplify and coordinate the review process for non-nuclear-energy projects."[356]

It is possible to see a direct through-line from these anti-regulatory beliefs in the 1980s to Thomas's judging in subsequent decades. For instance, as a Senate aide, Thomas offered assistance to corporate executives seeking to sidestep full Federal Energy Regulators Commission ("FERC") adjudications.[357] As a Justice, Thomas has repeatedly written that FERC overstepped its regulatory authority by improperly construing statutory language.[358]

This through-line is even easier to observe in Thomas's CWA jurisprudence. Recall that, as an aide, he sought to "limit the impact" of the CWA.[359] As a Justice, he has sought to do the same thing. In a revealing dissent from a denial of certiorari, Thomas sharply criticized prosecutions under the CWA, arguing that "[a]lthough provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities" and "we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liabil-

354. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (May 1, 1980) (on file in Notes & Comments Folder, Box 114, Danforth Papers).

355. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Sept. 25, 1979) (on file in Memos Misc. Folder, Box 115, Danforth Papers).

356. Clarence Thomas, untitled memorandum (Oct. 30, 1980) (on file in Clarence Thomas Folder, Box 47, Danforth Papers).

357. *See* Letter from Alfred L. Price to Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth (Feb. 14, 1980) (on file in Energy Miscellaneous Folder, Box 116, Danforth Papers); Letter from Alfred L. Price to Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, (Sept. 28, 1979) (on file in Energy Miscellaneous Folder, Box 116, Danforth Papers).

358. *See, e.g.*, New York v. FERC, 535 U.S. 1, 28–42 (2000) (Thomas, J., dissenting); Tenn. Gas Pipeline Co. v. FERC, 926 F.2d 1206, 1213–14 (D.C. Cir. 1991) (Thomas, J., concurring).

359. *See supra* note 329.

ity for using ordinary devices to engage in normal industrial operations."[360] He has also sought to limit EPA's authority to enforce the CWA. In his dissent in *PUD No. 1 v. Washington Department of Ecology*,[361] Thomas declined to defer to EPA's interpretation of the CWA, adopting instead an interpretation of the statute based largely on his own "common sense."[362] According to the legal scholar Robert W. Adler, this interpretation had essentially no basis in science or law:

> His analysis does not rely, even to the slightest degree, on the environmental goals or ecological principles on which [water quality standards] are based. More pointedly, Justice Thomas's view that designated uses cannot be decoupled from water quality criteria is divorced from any understanding of the complexities of aquatic ecosystems, which render specific water quality criteria necessary but not wholly sufficient to protect *all* water bodies from *all* conceivable impacts. Justice Thomas bases his opinion on his own view of 'common sense,' apparently unguided by either legislative or expert agency understanding of the problem.[363]

Yet this interpretation is not, in fact, senseless. Rather, it is designed to neuter both EPA and the CWA.

C. Case Study: CERCLA

One clear illustration of Monsanto's influence on Thomas's thinking—both as a young Senate aide and as a Supreme Court Justice—can be found in the legislative wrangling and subsequent litigation over the Comprehensive Environmental Response, Compensation, and Liability Act, better known as CERCLA or Superfund,[364] which enabled EPA to compel dumpers of hazardous waste to clean up such sites (or do so itself). Superfund had come about in no small part because of well-publicized chemical industry disasters, especially the toxic dumping in Love Canal, New York.[365] As a legislative aide, Thomas conveyed chemical industry talking points to Danforth and fought against

360. Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting). This is not the only dissent in which Thomas expressed a desire to limit the CWA. *See* Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020) (Thomas, J., dissenting); Cargill, Inc. v. United States, 516 U.S. 955 (1995) (Thomas, J., dissenting).

361. 511 U.S. 700 (1994).

362. *Id.* at 730 (Thomas, J., dissenting).

363. Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 Vt. L. Rev. 249 (2003).

364. 42 U.S.C. §§ 9601–9675.

365. *See* Richard S. Newman, Love Canal: A Toxic History from Colonial Times to the Present 204–05 (2016).

many aspects of CERCLA, including its liability provisions; as a Justice, he has been able to limit these exact provisions.

After several toxic and hazardous waste cleanup bills were introduced into Congress in early 1979, the CMA initially questioned the need for such a bill at all, with President Robert A. Roland writing to Danforth, "We believe it is clearly wrong to attempt a one-shot panacea which lumps together such distinct problem areas as oil spills, spills of other types of potentially hazardous substances, and waste disposal."[366] After it became clearer that a Superfund bill would pass, however, the chemical industry began seeking to limit its scope.[367] In mid-1980, a Monsanto official wrote to Danforth, arguing that the main Senate bill (which was favored by environmentalists) was "too broad in scope" and "marks a radical change from traditional liability laws"; the official urged Danforth to support a more "reasonable" and "fair" alternative House bill.[368] In the months to come, the chemical industry, including Monsanto,[369] continued to object fervently to the Senate bill, especially its strict liability provisions for companies manufacturing or dumping toxic waste; the scope of incidents covered by the bill; and the source of the funding to pay for monitoring and maintaining closed sites.[370]

Thomas, for his part, conveyed these specific concerns directly from industry officials to Danforth, noting that the "chemical industry . . . will bear the brunt of the super-fund fees" and writing that these "problems . . . must be addressed."[371] With respect to strict liability for industrial firms, Thomas wrote, "Imposing strict liability will have a significant impact on the producers, disposers and transposers of hazardous waste. Before strict liability is imposed, should it prove necessary, its necessity should be fully examined and justified. The anecdotes and generalizations of the [Senate] Committee fall short."[372] With respect to post-closure liability, he conceded that the "rationale for a post-clo-

366. Letter from Robert A. Roland to John C. Danforth, Sen. (Oct. 2, 1979) (on file in Unlabeled Folder, Box 50, Danforth Papers).

367. DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 188 (1989).

368. Letter from Sam Packard to John C. Danforth, Sen. (July 18, 1980) (on file in Superfund Folder, Box 50, Danforth Papers). For background on these two bills, S. 1480 and H.R. 7020, see Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (Superfund) Act of 1980*, 8 COLUM. J. ENV'T L. 1, 1–21 (1982).

369. *See* Letter from Sam Packard to John C. Danforth, Sen. (Nov. 19, 1980) (on file in Unlabeled Folder, Box 50, Danforth Papers).

370. *See, e.g.*, Letter from Edmund B. Frost to Jennings Randolph & Robert T. Stafford (Nov. 19, 1980) (on file in Unlabeled Folder, Box 50, Danforth Papers); Letter from Edward Dunkelberger to Edmund B. Frost (Nov. 18, 1980) (on file in Unlabeled Folder, Box 50, Danforth Papers).

371. Memorandum from Clarence Thomas, Legis. Assistant, Off. of Sen. Danforth, to John C. Danforth, Sen. (Nov. 17, 1980) (on file in Unlabeled Folder, Box 50, Danforth Papers).

372. *Id.*

sure liability fund appear[s] to make sense," but concluded nonetheless, "there does not appear to be any real reason for including this fund in [the bill]. It is certainly not crucial to cleaning up abandoned sites."[373]

In spite of the efforts of both Thomas and the chemical industry, a compromise version of CERCLA passed "in the closing days of the lame duck session of an outgoing Congress," following a voice vote in the Senate.[374] This would prove to be a thorn in the side of Monsanto, which was especially targeted with Superfund litigation in the 1980s.[375] Nonetheless, the Supreme Court—with Justice Thomas among its members—has since restricted the reach of CERCLA by drastically limiting the scope of chemical distributors' liability[376] and also by limiting the liability of the parent companies of chemical plants.[377] Justice Thomas himself wrote a pair of opinions that limited the ability of individuals to recover contribution from liable parties.[378] Thus, as a Justice, he has voted to constrain the law he once personally lobbied to limit.[379]

IV. Justice for Savannah

Clarence Thomas's environmental work and jurisprudence is not some academic exercise; it has material impacts on real people. The following Part explores those material impacts by discussing one final environmental aspect of Thomas's life: he spent much of his childhood in Savannah, one of the most polluted areas of the Southeast. In his autobiography, Thomas claimed to have had a realization while at Monsanto, suddenly understanding that large industrial firms like the very one he was working for were responsible for the negative health impacts suffered by his childhood neighbors.[380] This realization, he wrote, sparked in him a deep desire to return to Savannah and advocate for his neighbors, who were living with the consequences of pollution and environ-

373. *Id.*

374. Grad, *supra* note 368, at 1, 29; Vogel, *supra* note 366, at 188–89. On the liability provisions of the bill that passed, see J.P. Sean Maloney, *A Legislative History of Liability Under CERCLA*, 16 Seton Hall Legis. J. 517 (1992).

375. *See* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984); Jamison Pike, The Market Response to Superfund Litigation (1998) (M.S. thesis, University of Wyoming) (on file with author); Kyle E. McSlarrow, David E. Jones & Eric J. Murdock, *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, 21 Env't L. Rep. News & Analysis 10367 (1991).

376. Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599 (2009).

377. United States v. Bestfoods, 524 U.S. 51 (1998).

378. United States v. Atl. Rsch. Corp., 551 U.S. 128 (2007); Cooper Indus. v. Aviall Servs., 543 U.S. 157 (2004).

379. *But see* Guam v. United States, 141 S. Ct. 1608 (2021) (Justice Thomas writing for a unanimous Court on a matter that related to CERCLA liability, though it more squarely concerned the statute of limitations for seeking contribution).

380. Thomas, My Grandfather's Son, *supra* note 17, at 115.

mental injustice every day.[381] Yet, as this Part points out, Thomas did not, in fact, return to Savannah, in spite of an opportunity to do so. Instead, he embarked on a political and judicial career that directly limited the ability of his neighbors in Savannah to bring suit to vindicate their environmental rights. His jurisprudence has had a profoundly damaging effect on the victims of environmental injustice; it is much harder for them to sue and prevail than it was before Thomas ascended to the bench.

Savannah's modern pollution problems originated with the timber and paper industries. In the mid-1930s, Union Bag and Paper Company opened "what would become the world's largest pulp and paper complex."[382] To keep this complex running twenty-four hours a day, seven days a week, the timber industry denuded the surrounding forests with an "almost inconceivable" appetite; ultimately, timber extraction replaced cotton production as Savannah's primary industry.[383] Just months after the Union Bag complex opened, however, local residents began raising concerns about the sheer tonnage of "industrial waste pollution" the paper mills were releasing into the water and air.[384] In the mid-1940s, the *Atlanta Constitution* reported on the "unpleasant odor" and the "chemical and other wastes dumped into the stream," though the newspaper dismissed these complaints as "comparatively minor in view of the vastly stepped-up income the mill means to the community."[385] By the 1960s, however, the problems of pollution had become so "acute"—with car accidents caused by impenetrably thick smog, schools of fish turning up dead, a pervasive "rotten egg" smell, and entire rivers "transformed into little more than industrial sewers" that sometimes *burned* the hands of small children—that even industry's "most ardent supporters" could no longer deny reality.[386]

Yet as community activists began demanding environmental protection in the region, the powerful timber industry, led by Union Bag (now called Union Camp), "mounted a well-orchestrated resistance to the so-called 'federalization' of pollution control," wielding the language of "states' rights" to oppose federal intervention.[387] New problems continued to emerge. In the 1970s and 1980s, EPA researchers discovered dioxin in fish downstream from the pulp and paper mills; scientists sent by Ralph Nader discovered that Union Camp and other

381. *Id.*

382. William Clarence Boyd, New South, New Nature: Regional Industrialization and Environmental Change in the Post-New Deal American South 41 (2002) (Ph.D. dissertation, University of California, Berkeley) (on file with author).

383. *Id.* at 42–43.

384. Walter J. Fraser, Savannah in the New South: From the Civil War to the Twenty-First Century 249–50 (2018).

385. Boyd, *supra* note 382, at 262; *see also* Christopher J. Manganiello, Southern Water, Southern Power: How the Politics of Cheap Energy and Water Scarcity Shaped a Region 153 (2015).

386. Boyd, *supra* note 382, at 262–63 & n.7; Fraser, *supra* note 384, at 250.

387. Boyd, *supra* note 382, at 262–64, 314.

companies were pumping groundwater at an unsustainable rate.[388] As the twentieth century came to an end, air quality in Savannah remained "among the worst in the Southeast."[389] (For some time, scientists apparently worried that PCBs—the toxic chemical manufactured by Monsanto—had contaminated the rivers of Savannah, but a 2016 analysis did not detect PCBs in the Savannah River or the Little Black River.)[390].

Clarence Thomas was well-acquainted with both Savannah's pollution problems and their source. "I grew up here in Savannah," he told an audience in 1985.[391] "I am a child of those marshes, a son of this soil."[392] As a young man, he spent one summer working at the Union Camp complex—"a paper company known for the pollution it spewed into the air and water around Savannah," he would write—and came away with a strong dislike for the company.[393] Thomas later wrote in his autobiography about an epiphany he experienced while working at Monsanto: For years, he had wondered about the mysterious paralysis suffered by one of his neighbors in Savannah who had worked at an industrial plant, treating utility poles with creosote, a wood preservative.[394] "As I learned more about the physiological effects of human exposure to toxic waste, I uncovered the answer," Thomas would write.[395] It was "the foul-smelling 'tar'" with which the man had worked, he realized.[396] This led Thomas to a broader realization: "How many other hardworking people, I wondered, had been robbed of their livelihoods because of the toxic chemicals manufactured by companies like Monsanto? The more I considered their plight, the more I longed to go back to Savannah and help them."[397]

It certainly is possible that Thomas experienced this sudden clarity while working at Monsanto, but it also seems likely he was rewriting his own history to some extent. Thomas would later claim that his "reason for going to law school in the first place was to return to Savannah to assist in righting the wrongs which I felt existed there throughout my childhood," but, as his biogra-

388. Fraser, *supra* note 384, at 249; Boyd, *supra* note 382, at 265; Georgia Conservancy, Air Pollution in Savannah: A Report on the State of the Air in Chatham County, Georgia and What Can Be Done to Improve It (1979); James M. Fallows, The Water Lords: Ralph Nader's Study Group on Industry and Environmental Crisis in Savannah, Georgia (1971).

389. Fraser, *supra* note 384, at 251.

390. Chelsea Lynn Parrish, Determining Trace Element and PCB Concentrations in Surface Sediments from the Savannah River and Little Black River in Savannah, GA, USA 35 (2016) (Ph.D. dissertation, Savannah State University) (on file with author).

391. Clarence Thomas, Opinion, *Climb the Jagged Mountain*, N.Y. Times, July 17, 1991, at A21.

392. *Id.*

393. Thomas, My Grandfather's Son, *supra* note 17, at 45–46; Thomas, Clarence Thomas, *supra* note 15, at 109.

394. Thomas, My Grandfather's Son, *supra* note 17, at 115.

395. *Id.*

396. *Id.*

397. *Id.*

phers Mayer and Abramson point out, he declined to do so, in spite of an offer from a Savannah law firm, apparently because he felt the pay was too low.[398] Besides, "his ambition lay elsewhere."[399]

In any event, what is most important to our inquiry is the degree to which Thomas's subsequent work would harm the very people he claims to have wanted to help. For residents of Savannah who wish to use the courts to prevent or ameliorate the pollution of their air or water, they might consider making use of the citizen suit provisions of the CAA, CWA, or other federal statutes.[400] Yet for decades Justice Thomas has used his position on the Supreme Court to directly limit these citizens' ability to vindicate their rights. Indeed, Thomas's jurisprudence has been disastrous for environmentalists (though, sadly, Thomas is far from alone on the Court in this respect).[401]

Conservative critics have long demonized environmental citizen suits, claiming they are frivolous actions brought by greedy or opportunistic meddlers.[402] In reality, however, very few environmental advocates have the time or resources to bring suit.[403] This is true in large part because of recent Supreme Court decisions. Over the last three decades, the Court—with Justice Thomas in the majority—has sharply restricted the "standing" of environmental plaintiffs to sue—that is, to be allowed to bring suit in the first place.[404] The

398. MAYER & ABRAMSON, *supra* note 15, at 61; *see also* THOMAS, MY GRANDFATHER'S SON, *supra* note 17, at 118 ("What I cared about more than anything else, I decided, was the condition of blacks in Savannah and across America. The only way I could hope to find personal fulfillment was to spend the rest of my life trying to make their lives better . . . .").

399. MAYER & ABRAMSON, *supra* note 15, at 61.

400. The residents of Savannah have, of course, brought suit to prevent or remedy pollution in the past. *See, e.g.*, Nat. Res. Def. Council v. Watkins, 954 F.2d 974 (4th Cir. 1992); Save the Bay Comm. v. Mayor, 181 S.E.2d 351 (Ga. 1971). This part is, however, hypothetical—considering future suits they might wish to bring, not past suits they actually did bring.

401. Ann Carlson, *The Most Anti-Environmental Court in the Modern Era*, HILL (Nov. 3, 2020), https://perma.cc/4JPN-NFSJ; *see also* Jennifer Hijazi & Niina H. Farah, *How a More Conservative Supreme Court Could Impact Environmental Laws*, SCI. AM. (Sept. 28, 2020), https://perma.cc/2696-A2PN; Dino Grandoni, *An Extra Trump Supreme Court Justice May Help Cement His Environmental Rollbacks*, WASH. POST (Sept. 21, 2020), https://perma.cc/LNC9-J5MS.

402. *See* Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891 (2014).

403. Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARV. ENVTL. L. REV. 169, 181 (2020); David E. Adelman & Robert L. Glicksman, *The Limits of Citizen Environmental Litigation*, 33 NAT. RES. & ENV'T 17, 18–19 (2019).

404. Lujan v. Defs. of Wildlife, 504 U.S. 555 (1995); Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENV'T L. & POL'Y F. 1, 42 (noting that in spite of a "line of cases since *Lujan* that has clearly eroded the essential injury-in-fact inquiry . . . [s]ince *Lujan* . . . the standing debate has taken place on Scalia's terms"); *id.* at 35 ("[A]s long as *Lujan*'s fundamental holding is intact, the utility of citizen suits hangs in the balance."); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992) (marveling at the "sheer number" of citizen suits *Lujan* would hinder).

Court—with Justice Thomas in the majority—has made it considerably easier for trial judges to dismiss a suit for "failure to state a claim" (i.e. failure to plead plausible facts constituting a cause of action with sufficient specificity),[405] which has proven to be a substantial hindrance to litigation,[406] especially environmental litigation.[407] The Court has also further limited the substantive claims potential environmental litigants can make, from federal common law nuisance claims[408] to challenges to environmental assessments conducted pursuant to NEPA.[409]

The statute under which the citizens of Savannah might most like to sue is the CWA, but here the Court's rulings—with, again, Justice Thomas in the majority—have been especially "damaging."[410] Recall that Thomas has long had a particular disdain for the CWA, as reflected in his advocacy and written opinions.[411] Even beyond this, the Court's standing decisions have "undermin[ed] the regulatory scheme" of the CWA.[412] More recently, the Court has signifi-

405. *See* FED R. CIV. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

406. Christina Boyd et al., *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253, 273–74 (2013); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2324–36 (2012); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

407. Gregory M. Gotwald & Brianna J. Schroeder, *Pleading Standards in Environmental Cases Following the Supreme Court's Decisions in* Twombly *and* Iqbal, 44 TRENDS 16 (2012); Scott Foster, *Breaking the Transsubstantive Pleading Mold: Public Interest Environmental Litigation After* Ashcroft v. Iqbal, 35 WM. & MARY ENV'T L. & POL'Y REV. 885 (2011). In a number of significant environmental suits, citizen-activists were unable to survive a motion to dismiss for failure to state a claim. *See, e.g.*, Chubb Custom Ins. Co. v. Space Sys./Loral, Inc., 710 F.3d 946 (9th Cir. 2013); Johnson v. City of Detroit, 446 F.3d 614, 616–19 (6th Cir. 2006); Taylor v. Denka Performance Ealstomer LLC, 332 F. Supp. 3d 1039, 1053 (E.D. La. 2018); J&P Dickey Real Estate Family L.P. v. Northrop Grumman Guidance & Elecs. Co., No. 2:11cv37, 2012 U.S. Dist. LEXIS 36497 (W.D.N.C. Mar. 19, 2012). In *Denka*, however, this was ultimately reversed. *See* Taylor v. Denka Performance Elastomer LLC, No. 17-7668, 2018 WL 5786051, at *1, *5 (E.D. La. Nov. 5, 2018).

408. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). On the impact of this decision, see Lauren Saad, Note, Chevron *and the Shrinking Judicial Role in Environmental Law: Why Now Is the Time to Reform* Chevron, 60 WAYNE L. REV. 329, 330 (2014).

409. Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991). Both of these decisions were written by Justice Thomas.

410. David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENV'T L. 267 (2009).

411. *See supra* notes 361–64.

412. John Echeverra & Jon Zeidler, *Barely Standing: The Erosion of Citizen 'Standing' to Sue to Enforce Federal Environmental Law* 15 (Env't Pol'y Project, Geo. Univ. L. Ctr. 1999).

cantly restricted federal regulatory authority under the CWA.[413] Even if plaintiffs prevail in a CWA citizen suit, the Court has seriously limited their ability to recover attorney's fees.[414] This is also true of environmental plaintiffs more broadly. One empirical study of fifteen years of environmental citizen suits showed that "[a]ttorneys' fees were granted in a relatively small proportion of cases—roughly a quarter of the cases during the Bush administration, and less than 10 percent during the Obama administration."[415]

In sum, because of the decisions of Justice Thomas and his conservative colleagues on the Supreme Court, victims of environmental injustice—the very people Thomas claimed he wanted to fight for—are increasingly unable to vindicate their rights in court.

Conclusion

Clarence Thomas's environmental jurisprudence has already had a profound impact on the scope of environmental regulation and the rights of environmental plaintiffs. In the years to come—as environmental injustice becomes even starker as the globe warms and the climate changes—his environmental jurisprudence will become even more significant. This Article has sought to show how central Justice Thomas's experiences at Monsanto and as a Senate aide were to the shaping of this jurisprudence. In light of these experiences, this Conclusion considers whether Thomas should recuse himself from certain environmental cases.

The judicial recusal statute directs a judge or Justice to recuse "himself in any proceeding in which his impartiality might reasonably be questioned."[416] In theory, this is an objective standard, not a subjective one; it requires an inquiry into what a proverbial reasonable person might think of the judge hearing the case, not a soul-searching by the judge. Yet, in practice, for a Supreme Court Justice, it is a nearly lawless exercise. It is up to the Justice whose recusal is sought to decide whether or not to do so, and their decision is unreviewable,[417] irreversible,[418] and requires absolutely no justification.[419]

413. Rapanos v. United States, 547 U.S. 715, 739 (2006); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). The Court has recently walked this line of cases back slightly in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

414. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001).

415. Adelman & Glicksman, *supra* note 403, at 20.

416. 28 U.S.C. § 455(a).

417. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 Hastings L.J. 657, 660 (2004).

418. Laurel A. Rigertas, *The Supreme Court and Recusal: A Response to Professor Lubet*, 47 Val. U. L. Rev. 939, 942 (2014).

419. Louis J. Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 Wis. L. Rev. 1181, 1202 (2011).

In the last decade, Supreme Court recusal has become a "hotly debated issue," as pundits, professors, and politicians have called for each Justice to recuse himself or herself in one case or another.[420] Many of the calls for Thomas to recuse himself have been in cases implicating his wife's (and his own) right-wing political activities.[421] Yet, as noted above, some have also called for Thomas to recuse himself in cases involving Monsanto.[422] Less well-known is the fact that certain litigants have apparently considered using Thomas's potential conflict of interest in cases involving Monsanto as a tactical advantage. In one PCB contamination case, a plaintiff's lawyer suggested as a possibly fruitful area for discovery: "Records related to Clarence Thomas' role at Monsanto (useful to induce settlement and/or head off appeal from final judgment). These relate to fraudulent . . . reports submitted to EPA while Clarence Thomas had supervisory authority at Monsanto."[423] In another lawsuit involving Monsanto's liability for PCB contamination, a lawyer for Monsanto asked a company representative about particular people present at company meetings to determine environmental policy: "How about Clarence Thomas?"[424] The representative replied, "He was gone by that time."[425] Clearly, it would appear that members of the public as well as litigants are questioning Justice Thomas's impartiality, or are at least well aware that others could raise such questions. Whether such questioning is "reasonable" is, per the statute, up to Justice Thomas himself.

Historically, it was not uncommon for Supreme Court Justices to recuse themselves liberally. According to the legal scholar Richard Lazarus, Justice Lewis Powell "strived to be known for being especially scrupulous on recusals."[426] Because of his extensive representation of industry while in private practice, Powell "sat out of many major environmental cases," which occasionally changed the result—and thus the law—for years to come.[427] More recently, Justice John Paul Stevens recused himself in cases involving cancer-stricken veterans suing the manufacturers of Agent Orange (including Monsanto), apparently because his son—a Vietnam veteran—died of cancer.[428]

Justice Thomas has not been receptive to calls to recuse himself. In part, this could be because he does not have any current financial ties to Monsanto;

420. *Id.* at 1182–84.

421. James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 130–36 (2013).

422. *See supra* note 310.

423. Memorandum from P. Merrell to Jones et al. 8 (Apr. 20, 1992) (on file with TOXIC DOCS, https://perma.cc/3LZH-AJME).

424. Deposition of William B. Papageorge 647 (Feb. 9, 1993) (on file with TOXIC DOCS, https://perma.cc/8RCL-4GJW).

425. *Id.*

426. Lazarus, *supra* note 279, at 730.

427. *Id.* at 729–31.

428. Tony Mauro, *Why Does Justice Stevens Recuse in Agent Orange Cases?*, LEGAL TIMES (Mar. 3, 2009), https://perma.cc/HX25-E2PZ.

studies show that judges are most likely to recuse themselves in cases involving potential financial biases.[429] Yet Justice Thomas's ties go far deeper. He joined a profoundly anti-environmental corporation at a particularly embattled, litigious moment in its history, and through that experience he gained sufficient expertise in environmental law that he devoted the next several years of his career to it. For decades, he has mirrored the views of the industrial right, evincing a deep faith in the expertise of private enterprise and a profound skepticism of the administrative state. It is not unreasonable to believe that certain environmental cases might arise in which the only reasonable thing he could do would be to recuse himself.

Nonetheless, it is difficult to argue that Thomas's anti-environmental experience—however formative it was—*must* be the basis for his recusal. Justices Thurgood Marshall and Ruth Bader Ginsburg worked for the National Association for the Advancement of Colored People and American Civil Liberties Union, respectively, for decades, and devoted their careers to the causes of civil rights and gender equality; it would be fairly radical to argue that they should have absented themselves from every rights-based case, or all of those involving their former organizations. Yet, at least with respect to the public debate surrounding judicial recusal, it matters that Marshall and Ginsburg's civil rights and civil liberties experience is quite well-known, whereas Thomas's environmental experience is not. As a result, the public is in a much better position to interrogate and debate the extent to which the former were influenced by their past experiences.

Today, Monsanto is frequently the subject of harsh criticism, stemming from its historic production of DDT, dioxin, Agent Orange, aspartame, Roundup, and genetically engineered seeds.[430] In 2013, it was the winner of a poll to determine the "most evil corporation in the world."[431] Certainly, this modern reputation may have informed Thomas's fairly bitter memories of his time at Monsanto; certainly, this modern reputation may also be why few of Thomas's supporters dwell on this experience in lionizing him. But the effect Monsanto and the broader chemical industry had *on him* was profound. The effect he, in turn, has had on the environment and on our environmental rights is undeniable.

429. Jeffrey M. Shaman & Jona Goldschmidt, Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes 1 (1995).

430. Patrick D. Murphy, The Media Commons: Globalization and Environmental Discourses 98–102 (2017).

431. *Id.* at 104; Ali M. Kanso & Alyssa Gonzales, *World's "Most Evil Corporation"? Evaluating Monsanto's Public Relations Response to Intense Negative Media Coverage*, 2 Q. Rev. Bus. Disciplines 251, 254 (2015).