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CURBING THE RECALCITRANT POLLUTER: POST-DECREE JUDICIAL AGENTS IN ENVIRONMENTAL LITIGATION

Stuart P. Feldman*

I. INTRODUCTION

In a recent suit brought by the United States Justice Department to enjoin the cleanup of a hazardous chemical waste site, the defendants presented several remediation plans to the court for review.1 By the defendants' estimates, the proposals' costs ranged from $210,000 to $75,500,000,2 a staggering expense that threatened financial hardship to the smaller defendant companies. Beyond the defendants' calculus but essential to the court's decree, however, was the inestimable risk to neighboring communities and natural resources should the abatement fail to halt fully the contamination's spread.

This case illustrates that a court's choice of a remedy may be as critical to the litigants' interests and the public weal as the substantive conduct rules that establish polluters' liability. Whether acting pursuant to centuries-old common law doctrine3 or recently enacted environmental statutes,4 federal courts,5 using their equitable pow-

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2 Id.

3 See infra note 30 and accompanying text.

4 See infra notes 43–54 and accompanying text.

5 This Comment focuses on suits brought in the federal courts. State courts, however, hold similar statutory and equitable powers and may take an even more active role in environmental policymaking and enforcement than the federal courts. See, e.g., Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS §§ 691.1201–1207 (1970) (MICH. STAT. ANN. §§ 14.528(201)-(207) (Callaghan 1989)) (authorizing Michigan courts to grant injunctive relief,
ers, must forge appropriate remedies to proven and continuing violations of law.  

To assure meaningful redress, federal courts may appoint judicial agents, such as special masters and post-decree monitors, to gather information impartially that a court may use either to craft injunctions or to survey defendants' compliance with a decree. Courts have supervised, through judicial delegates, state and municipal facilities to protect individuals' federal constitutional rights to fair housing, unprejudiced public education, and humane treatment in custodial institutions. Complex environmental suits, dominated by concerns for the public welfare, also present compelling grounds for continuous judicial supervision of a recalcitrant polluter's operations. Nonetheless, courts have hesitated to adopt such an active manner in environmental enforcement. As non-majoritarian and generalist bodies, courts are unwilling to intrude on the institutional prerog-

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review administrative standards, and direct the adoption of new standards if needed to protect the state's natural resources); see also West Michigan Environmental Action Council v. Natural Resources Comm'n, 405 Mich. 741, 752, 275 N.W.2d 538, 541 (1979) (holding that trial judge erred in deferring to state agency on likelihood of impairment to natural resources because court had a duty under the environmental protection act to perform an independent de novo determination), cert. denied, 444 U.S. 941 (1979); Eyde v. Michigan, 82 Mich. App. 531, 539, 267 N.W.2d 442, 447 (1978) (upholding master's appointment to oversee restoration of plaintiff's land in suit brought under the environmental protection act); Lakeland Property Owners Assoc. v. Township of Northfield, 2 Envtl. L. Rep. (Envtl. L. Inst.) 20,331, 20,336 (Mich. Cir. Ct., Livingston Cty. 1972) (ordering state Resources Commission to adopt water quality standards crafted by the court).


7 Special masters are judicial adjuncts who help a court, in part, to form an injunction. Post-decree monitors, in contrast, serve as a court's eyes and ears after a decree has been issued. Courts may appoint special masters under the Federal Rules of Civil Procedure (Rules). FED. R. CIV. P. 53(a). Monitorship, in contrast, is not expressly recognized in the Federal Rules. Rather, the term was crafted by commentators and the courts. See Ruiz v. Estelle, 679 F.2d 1115, 1169-70 (5th Cir.) (upholding district court's reference to a special master under Federal Rule 53, and to monitors under the court's general equity powers), aff'd in part, vacated in part, reh'g. denied in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1043 (1983).

8 See infra notes 64-149 and accompanying text.


10 Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 743-46 (6th Cir. 1979).


atives of administrative agencies, which have been designated by Congress in many statutes as the primary authors of environmental policy. Some courts, therefore, have limited their role to reviewing procedural fairness in agency rulemaking and adjudication.

When courts have exercised continuous guidance in the post-judgment resolution of environmental disputes, they may have acted at the request of a regulatory agency or a regulated entity. Several municipalities, for example, have conceded their inability to operate their sewage treatment plants in compliance with federal Clean Water Act pollutant discharge standards and have invited judicial supervision as a palliative to the political bickering that stymied remedial efforts. In other cases, polluters have attempted to evade environmental liabilities by transferring assets to subsidiaries or shell corporations or otherwise have displayed their unwillingness to adhere to the court’s orders. In these egregious circumstances, courts have supplanted the defendants’ management by imposing receivership.

More commonly, however, the defendants’ environmentally injurious operations have high social value, or produce goods or services that are essential to the local or national economies. The equities (discussing courts’ reticence to review deeply legislative and agency environmental policies because of courts’ lack of technical and scientific expertise, but rejecting this self-imposed judicial restraint and urging a more active judicial role in substantive environmental decision-making).


19 See infra notes 29–31 and accompanying text.
of these cases dictate against immediate or total abatement. Rather, they suggest the need to revamp the polluters' procedures. In other environmental suits, litigation may reveal that state or federal regulatory agencies failed to restrain defendants' proven wrongful conduct and that defendants' operations raise the specter of recurring harm. The value of prospective injunctions and judicial oversight through court-appointed agents is most visible in these instances. By maintaining an active posture in the post-judgment phases of litigation, courts insure effective relief to injured plaintiffs and to the public, thereby performing their statutory duties and acting within their traditional equitable role.

This Comment first explores the courts' equitable discretion and the nature of injunctions. Section III reviews the functions served by special masters, post-decree monitors and receivers in environmental litigation. Section IV compares these judicial adjuncts to administrative agents and suggests the need for greater procedural safeguards in judicial references to court-appointed officers.

Prior to the accident, an elaborate legislative and administrative framework had been created to ensure timely response to large spills. Complaint at 11–13, State of Alaska v. Exxon Corp., No. 3AN-89-06852 CIV (3d Judicial Dist., Sup. Ct., Alaska filed Aug. 15, 1989). To allay public concerns and facilitate the granting of needed authorizations, the owners and operators of the vast Trans-Alaskan pipeline system had promised regulators that they would take preventive steps, including the maintenance of a 24-hour task force in Valdez, to assure response readiness. Id. at 13. Instead, the operators of the pipeline network apparently acted in continual disregard of agreements made with regulators. Id. The responsible agencies failed to detect breaches of administrative standards or enforce statutory compliance. See Davidson, Exxon Not The Only Culprit In Oil Spill, Boston Globe, Mar. 4, 1990, at 69, col. 4.

The State of Alaska and other plaintiffs have asked the Alaskan and federal courts to award monetary judgments and to order environmental restoration. Complaint at 40–42, State of Alaska v. Exxon Corp., No. 3AN-89-06852 CIV (3d Judicial Dist., Sup. Ct., Alaska filed Aug. 15, 1989); see also Complaint at 32, National Wildlife Fed’n v. Exxon Corp., No. 3AN-89-2533 CIV (3d Judicial Dist., Sup. Ct., Alaska filed Aug. 17, 1989). In supervising this litigation, the courts will review the conduct of the industry defendants and of federal and state environmental regulatory agencies. If the evidentiary record reveals a pattern of agency inaction in curbing continuing defendant misconduct, the courts may determine that economic damages and terrestrial restoration alone are insufficient remedies. See Z. Plater, Judicial Remedies for the Prevention of Future Oil Spills 3 (Dec. 1989) (report for the use of the State of Alaska Oil Spill Commission).

Rather, the courts may issue equitable decrees to alter corporate behavior fundamentally within the Alaskan oil industry. Judicial agents could aid the courts in understanding the industry's workings and in implementing and overseeing the court's decrees. Id.
II. JUDICIAL EQUITABLE DISCRETION

A. Injunctions

Whether seeking redress for harm to private property or complaining on behalf of the general public, environmental plaintiffs often request injunctive relief from the courts. Injunctions are judicial orders that require defendants to perform specific acts or to refrain from particular acts, under threat of fines or imprisonment. Plaintiffs desire these tailored commands because they believe that monetary compensation will not vindicate injuries to their interests or prevent defendants' further misconduct.

Injunctions are attractive to environmental plaintiffs because of their strength and flexibility. Backed by a court's criminal contempt powers and crafted to address specific past and future harm, injunctions can be molded to halt a defendant's operations completely, to reform the most injurious aspect, or to establish performance

21 D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.9, at 98–103 (1973). Regardless of whether an injunction is mandatory or prohibitory in form, a defendant's future conduct will be altered by the order in some way, and the issuing court will retain jurisdiction to alter and enforce its decree. United States v. Fisher, 864 F.2d 434, 436 (7th Cir. 1988). In actions "at law," by comparison, a plaintiff seeks money for its injuries. If the plaintiff succeeds, the court will award a judgment and authorize a sheriff to execute the award by attaching property. Id. § 1.3, at 10. The court is relatively unconcerned with the execution process. Id.


In his book Defending the Environment, Professor Sax promoted citizen participation in environmental suits. Sax contrasted injunctive relief with legal damages:

Lawsuits seeking money damages for the public, by and large, are of secondary importance in environmental controversies. Most of the interests sought to be protected could not be easily compensated in damages in any event. Clean air and water for public use, scenic vistas, and the maintenance of fisheries and recreation areas, even where demonstrably harmed, rarely matter in significant dollar amounts to any particular identifiable citizen. The effects of environmental conditions are diffuse both in space and time, and rarely will a damage suit achieve the results sought. This is not to assert that such suits should be banned—only that they are not appropriately at the cutting edge of the movement for environmental quality. The prospect of damage suits may have some deterrent effect, but they tend to drag on interminably, with little result. Our attention need not be focused on them. Of course, damage suits brought by particular individuals who have suffered personal harm, such as those commonly brought by landowners against neighboring factories, will continue. Relief against such damage has always been available at law; it is only remedies sought on behalf of the community at large that is under inquiry here.


25 Plater, supra note 6, at 544.

standards. In contrast to statutory remedies, which necessarily are designed for wide application, permanent injunctions are granted after an adversarial hearing and the development of an evidentiary record. Compared to administrative remedies, injunctions are subject to fewer political and bureaucratic pressures. Creative injunctions ultimately may spawn legislative or administrative guidelines.

B. The Public Welfare as an Element in Equitable Balancing

Another distinctive characteristic of equitable remedies is judicial concern for the effect of a court’s decree on community interests. After determining liability, a court faces two difficult decisions: first, whether to grant injunctive relief; and second, how to tailor the terms of its order and the scope of the order’s intrusiveness. In both decisions, a court will balance the social value of the tortious or unlawful activity against the complained-of injury.

Because the courts believed that the public generally benefited from defendants’ enterprises, however offensive, traditional equity doctrines hindered private actions to enjoin defendant businesses.
Courts still recognize that socially encouraged commercial ventures incidentally may present environmental dangers, or that municipal agencies that fulfill necessary functions may operate, at least temporarily, outside of statutorily mandated standards.31

Some early equity cases recognized, however, that the public’s right to a clean environment may outweigh even large commercial projects. In Georgia v. Tennessee Copper Co.,32 the state of Georgia asked the United States Supreme Court to enjoin two copper smelting factories located near the Georgia-Tennessee border.33 Gases emitted from the plants created acid rain that killed Georgia forests and orchards.34 The Court found the defendant liable for the pollution, but hoped that the parties would stipulate to a workable solution.35 When, after seven years, the parties had failed to agree, the Court dictated environmental operating standards designed to allow commercial activity while reducing the threat to Georgia lands to acceptable levels.36

The Court limited the sulphur content percentage permitted in defendant’s waste fumes and specified the maximum allowable amount of emissions.37 The Court further ordered the defendant to keep detailed daily records, and to provide unfettered access to its facilities to a Court-appointed inspector.38 The inspector reviewed the defendant’s operations biweekly and measured the continuing impact of the pollution on Georgia farmland.39 Based on these obser-

33 Georgia v. Tennessee Copper Co., 206 U.S. at 231.
34 Id. at 236. The original action focused on Georgia’s standing to bring suit because it owned little of the damaged lands. The Court, through Justice Holmes, held that a state “has an interest independent of and behind its citizens, in all the earth and air within its domain.” Id. at 237. Had defendant been located within Georgia, the state could have brought public nuisance criminal charges and civil claims. Id. at 232. Instead, the state was forced to turn to the Court, which exercised its original jurisdiction and reasoned that injunctive relief was proper because Georgia’s sovereign interests could not be reduced to money. Id. at 238. Using the same facts but performing a more traditional balancing of the equities, the Tennessee Supreme Court determined that the defendant factory’s smelting was a continuing nuisance to nearby farmers, but denied injunctive relief, holding that the plaintiff farmers could be adequately compensated for the destruction of their lands. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 366–67, 83 S.W. 658, 666–67 (1904).
35 Georgia v. Tennessee Copper Co., 206 U.S. at 239.
36 See Georgia v. Tennessee Copper Co., 237 U.S. 474, 478 (1914), modified, 240 U.S. 650 (1916). The compromise decree sought to “diminish materially the present probability of damage” to Georgia and its inhabitants. Id. at 477.
37 Id. at 477–78.
38 Id.
vations, the inspector made recommendations to the Court for future equitable relief. The Court also maintained the case on its docket to enable the parties to apply easily for modifications to the decree.

_Tennessee Copper_ illustrates the judiciary's willingness to become deeply involved in a corporate defendant's business when less intrusive solutions are unlikely to achieve the court's desired balance, or the interests of the public welfare are impugned. The _Tennessee Copper_ decision predates the advent of our current legislative and administrative environmental regulatory regime. Federal environmental laws, however, are founded largely on common law doctrine.

In codifying the common law causes of action, Congress retained the federal courts' traditional equitable remedies.

Indeed, Congress established statutory grounds for the courts' expansion of judicial equitable discretion to address violations of environmental laws. Most environmental statutes contain injunctive enforcement provisions. Some, like the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), direct the federal courts to balance the equities, including the public interest.

CERCLA, as well as many other federal environmental statutes, also provide for Environmental Protection Agency (EPA) civil enforcement actions to prevent "imminent en-

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40 Id.
41 Id. at 651.
42 Equity courts will go "much farther . . . in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. v. System Fed'n No. 40, Ry. Employees Dep't of the Am. Fed'n of Labor, 300 U.S. 515, 552 (1937).
44 See, e.g., United States v. Waste Indus., Inc., 734 F.2d 159, 165 (4th Cir. 1984); United States v. Price, 688 F.2d 204, 211 (3d Cir. 1982); see also Comment, Environmental Restoration Orders, 12 B.C. ENVTL. AFF. L. REV. 171, 197 (1985).
45 See, e.g., Price, 688 F.2d at 211.
48 Id. § 9606(a) (1988) (abatement actions).
49 Id. In addition to EPA enforcement actions, many federal environmental laws authorize citizen suits against the government and polluters, to guard against EPA laxity in enforcing its orders and regulations. See, e.g., RCRA, 42 U.S.C. § 6972(a) (1988); Clean Air Act, 42 U.S.C. § 7064(a) (1988). Only the government may seek injunctive relief, however, under CERCLA's imminent hazard provisions. United States v. Cannons Eng'g Corp., 720 F. Supp.
dangerment” to the “public health or welfare or the environment.” Courts broadly interpret the quoted phrases, responding to the scientific and medical uncertainty inherent in evaluating potential environmental hazards. For example, courts may issue injunctions when the EPA has demonstrated a risk of harm, rather than the more stringent requirement of threatened irreparable harm. Additionally, statutory provisions for compensatory remedies will not preclude a court’s grant of injunctive relief, altering an equity maxim that courts do not issue equitable orders when adequate legal remedies exist.

Having decided that equitable relief is necessary or appropriate, a court may maintain jurisdiction over the dispute to review sua sponte any changed facts or the terms of its order. A court does not need to reserve explicitly its jurisdiction over the controversy. Just as a court will not force a plaintiff to bring numerous claims for money damages in response to an ongoing tort or statutory violation, it will not issue an injunction that can be enforced only by a fresh suit or a formal reopening of the action. Rather, federal courts can enforce their injunctions under their continuing jurisdiction through supplementary or contempt proceedings. Additionally, changes in law or the facts, or in the defendant’s attitude and behavior, may lead a court to modify or dissolve its order.

During the time between a court’s decision actively to oversee the enforcement of the remedy and the court’s determination that future defendant misconduct is unlikely to occur, a court may turn to its agents for help. To effectuate its decree a court may desire impartial fact-finding or a judicial representative’s presence within the de-
fendant's organization. Indeed, a court may decide to usurp manage
gement of the defendant's business. Judicial references to court-
appointed agents, like all equitable orders, are flexible and tailored
to the circumstances. Because the functions performed by special
masters, monitors, and receivers vary in their intrusiveness into a
defendant's operations, these agents occupy places along a spectrum
that lacks bright line boundaries. A court's aim in any reference is
to enlist aid in ensuring that defendants comply with statutes or the
common law, or to structure the substantive changes that the court
feels are equitable.

III. COURT-ApPOINTED ADJUNCTS

A. Special Masters

1. General Applications

Faced with the daunting task of resolving complex environmental
disputes, and driven by the need to remedy the public endangerment
often posed by environmental hazards, federal courts have called
upon special masters for aid at every stage of environmental litiga-
tion. Special masters perform a variety of judicial duties, including
pretrial case management, fact-finding, and the development of
equitable remedies both before, and after, liability has been estab-
lished.

Historically, the special master was a frequently employed agent
of the equity courts. Courts long assumed an inherent power to

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67 Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L. REV. 1297, 1322 (1975); see also W.D. Brazil, Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule, in MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS 305, 337–64 (W. Brazil, G. Hazard & P. Rice eds. 1983).
appoint special masters before the federal equity rules, and later, the Federal Rules of Civil Procedure (Federal Rules), codified the courts' discretionary reference authority. Indeed, judicial references to special masters were common in the Elizabethan English Chancery courts. Reference procedures were incorporated into United States federal judicial practice at the time of the federal judiciary's creation.

Traditionally, the special master was the most benign of an equity court's agents. Appointed by nineteenth-century courts to relieve the judge of the courts' most routine duties, the special master originally performed clerical functions. Gradually, courts delegated greater responsibilities to masters, ostensibly to expedite litigation. By the late nineteenth century, masters routinely were authorized to take evidence and to issue non-binding recommendations to the court.

By the beginning of the twentieth century, general dissatisfaction with the highly formalized federal equity practices sparked a reform movement that greatly restrained the frequency with which courts assigned tasks to special masters. This movement culminated in the adoption of the Equity Rules of 1912, which emphasized the use of in-court oral testimony to force judges to assume a central adjudicatory role. Equity Rule 59 established the requirement, later incorporated into Federal Rule of Civil Procedure 53(b), that references to masters be justified by an "exceptional condition."

The promulgation of the Federal Rules, while continuing the exceptional condition restriction, had other impacts on courts' references to masters. The vastly expanded discovery process prompted

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69 FED. R. CIV. P. 53(a).
70 Silberman, supra note 67, at 1321–22.
73 Brazil, supra note 67, at 338–40.
74 Id. In contrast to the increased restrictions on references to masters, courts continued to assign judicial tasks freely to bankruptcy receivers. The courts' need for these referees, to relieve overcrowded dockets, insured their survival. See Kaufman, Use of Special Pre-trial Masters in the "Big" Case, 23 F.R.D. 572, 575 (1960).
75 226 U.S. 627, 666–69 (1912).
76 Brazil, supra note 67, at 337.
77 FED. R. CIV. P. 53(b).
78 Id.
renewed interest in using masters to manage pretrial case development. Moreover, the addition of the Rule 53(e) command that, in non-jury actions, a master’s findings must be accepted unless “clearly erroneous” raised the relative weight of a master’s report and narrowed the scope of acceptable judicial delegations of power. In effect, the master’s report became no longer simply advisory and judicial scrutiny of the report was reduced to appellate-type review.

Rule 53 does not provide standards for the satisfaction of the “exceptional condition” requirement. It does, however, furnish the federal courts with discretionary authority to appoint masters despite a party’s objections. In 1957, the Supreme Court handed down its only recent interpretation of the limits of a court’s discretionary reference power in La Buy v. Howes Leather Co. Judge La Buy had appointed a special master to make both factual determinations and conclusions of law in resolving two antitrust actions. The judge cited calendar congestion, complex issues, and lengthy trial time as justification for his reference. In rejecting these reasons as improper, the Court warned trial courts against “abdicating their judicial functions” or “depriving the parties of trials before the court on the basic issues involved in the litigation.”

The La Buy decision indicated that references of substantive legal issues for a master’s determination would rarely, if ever, be proper. Undeterred by La Buy’s proscription, however, courts continue to delegate broad tasks. Judges are often reluctant to become mired too deeply in litigational thickets and feel unable to interpret, without expert assistance, the overwhelming data that underlie many complex suits.

79 Kaufman, supra note 74, at 578.
80 FED. R. CIV. P. 53(e).
82 Id.
83 FED. R. CIV. P. 53(b).
84 352 U.S. 249 (1957).
85 Id. at 253–54.
86 Id. at 254.
87 Id. at 256.
88 Id.
Appellate courts, too, are not unsympathetic to the caseload burdens shouldered by the trial courts. On review, an appellate court may focus on the scope of authority delegated rather than on the satisfaction of the "exceptional condition" requirement. The necessity of a reference will be examined in terms of its practicality under the facts and circumstances present in the particular case.

2. Environmental Application of Special Masters: Managing Complex Superfund Litigation

In several recent actions brought by the United States government under CERCLA to compel corporate defendants to clean up hazardous waste sites, trial judges have pointed to the "imminent public endangerment" present at these sites and the need for a speedy resolution as justification for references of pretrial duties to masters. Courts broadly interpret CERCLA's imminent endangerment clause as statutory authorization for their exercise of equitable powers, including the appointment of equity officers, whenever the environment is endangered.

A court's reference may authorize a master to become involved in every aspect of the litigation. In addition to pretrial case management, which includes holding evidentiary hearings and ruling upon privilege motions, a master may have authority to determine dispositive pretrial motions, such as summary judgment and motions to dismiss. Additionally, masters have been given front-line re-
responsibility to determine and oversee the relief that may be implemented at the site.\textsuperscript{101}

In light of the cost and intrusiveness of such references, it is not surprising that defendants challenge the courts’ finding of imminent endangerment.\textsuperscript{102} The defendants’ argument is twofold: that the need for a prompt resolution cannot by itself satisfy the exceptional condition prerequisite to the appointment of a master, as courts frequently are called upon urgently to decide on matters in cases when life or property is threatened; secondly, that, within CERCLA, Congress already has provided sufficient governmental means to respond to the actual or threatened release of hazardous substances.\textsuperscript{103}

In essence, defendants argue that CERCLA both authorizes and requires the EPA to respond to the risk of danger by unilaterally beginning remedial operations,\textsuperscript{104} backed by the authority of the National Contingency Plan\textsuperscript{105} and the financial support of the Hazardous Substance Response Trust Fund.\textsuperscript{106} When the site is under supervision, the EPA then should sue the responsible parties for reimbursement. In contrast to these mechanisms, defendants argue, CERCLA fails expressly to refer to or provide for the use of a master to expedite the litigation.\textsuperscript{107}

Congress may curtail judicial references to equity agents fully, or merely limit the courts’ use of these officers to specific contexts.\textsuperscript{108} In a recent Department of the Interior appropriations act, Congress removed the district courts’ power to issue preliminary injunctions prohibiting the sale of timber from public lands, thereby discouraging suits by environmental groups.\textsuperscript{109} The statute also provides for expedited trials, however, and grants judges the express power to make broad references to special masters so that disputes may be resolved quickly.\textsuperscript{110}

Appeals for the Sixth Circuit denied a similar reference order by a trial judge. In re United States, 816 F.2d 1083, 1091 (6th Cir. 1987).

\textsuperscript{101} In re Armco, 770 F.2d at 105.


\textsuperscript{103} Appellant’s Brief at 8, In re Armco, 770 F.2d 103 (8th Cir. 1985) (No. 85-1598).

\textsuperscript{104} Id. at 9–10.


\textsuperscript{106} Id. § 9611(a).

\textsuperscript{107} Appellant’s Brief at 10, In re Armco, 770 F.2d 103 (8th Cir. 1985) (No. 85-1598).

\textsuperscript{108} Ex parte Peterson, 253 U.S. 300, 312 (1920).


\textsuperscript{110} Id.
1. General Applications

The equitable monitor surveys the defendant's remedial efforts and, through its findings, facilitates judicial evaluation of the defendant's capability and willingness to comply with a decree. A determination of liability for violations of environmental permitting standards, for example, may suggest to a court that its goal should be to enforce compliance with those standards. Still, the court must devise a method to force the defendant to achieve that end. Lacking the technical expertise to accomplish compliance when administrative agencies may have failed, the court may choose initially to institute a remedial plan that lacks the specificity of architectural blueprints. Instead, the court may choose a method to provide expert assistance for both itself and the defendant.

Monitorship is a means to elicit the defendant's cooperation in determining curative measures, to accomplish non-adversarial resolution of potential disputes concerning the remedy, and, importantly, to provide the plaintiffs and the court with a way to ascertain the defendant's good faith. To further these ends, the court may order a neutral observer placed within the defendant's entity or approve a monitoring committee chosen by the parties and representing their respective interests.

A monitor's presence acts as a reminder of the court's authority and of public concern that the defendant company or government facility operate in a responsible fashion. The monitor may inform the defendant's employees and the community of the dispute, or, if

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113 Gary W. v. Louisiana, 601 F.2d 240 (5th Cir. 1979).
116 See Note, supra note 114, at 104. Due to intra-board disagreements and self-interested evaluation of defendant's compliance, monitoring committees composed of the adversaries' representatives may be less effective at exposing and resolving disputes or in helping the court to forge a remedial strategy than non-partisan court-selected agents. See id. at 120; Note, Implementation Problems in Institutional Reform Litigation, 91 HARV. L. REV. 428, 442 (1977).
117 Note, supra note 114, at 119.
the defendant is a public agency, even invite community participation
in implementing the decree.\textsuperscript{118}

The monitor's mandate also may extend beyond surveillance for
the court. A court may instruct a monitor to recommend compliance
techniques to the defendant.\textsuperscript{119} A reference to a monitor to gather
information that is important to the court for adjusting the remedial
plan may allow the monitor to consult specialists, perform inspec­
tions, and conduct ex parte investigations.\textsuperscript{120}

Monitors lack independent enforcement powers and cannot direct
a defendant's conduct.\textsuperscript{121} It is the monitor's role neither to create
policy nor to assume operational control of an organization.\textsuperscript{122} A
monitor's reports may lead a court to apply sanctions or lift restric­
tions; but monitors are judicial agents, not judges.

2. Environmental Application of Monitors: Judicial Oversight of
Public Entities

Given its restricted coercive powers, monitorship represents a
measured exercise of equitable authority causing limited intrusion
into a defendant's internal affairs. Because many federal environ­
mental laws apply not only to private defendants but also, with equal
glor, to federal, state, and municipal entities,\textsuperscript{123} federal courts ad­
ministering statutory precepts may tread, although reluctantly, on
the operations of other branches of government. Monitorship is es­
pecially attractive to federal courts asked to rule upon the workings
of municipal corporations, or other government agencies, a situation
in which a federal court will be mindful of federalism and separation


Cir.), \textit{reh'g denied}, 539 F.2d 710 (5th Cir. 1976), \textit{rev'd}, 430 U.S. 322 (1977). In \textit{Morgan} the
court charged a 40-member monitoring council to "foster public awareness" and delegated to
it the primary responsibility for monitoring implementation of the court's school desegregation
order. 401 F. Supp. at 265–67. The court granted the council authority to hold public meetings,
make recommendations to the court and the defendant Boston School Committee, and identify
"unresolved problems" for consideration by the parties, the court, and "other appropriate
persons." \textit{Id}. The council, though, was not given managerial duties. \textit{Id}.

\textsuperscript{120} Morgan, 401 F. Supp. at 266; Wyatt v Stickney, 344 F. Supp. 387, 392 (M.D. Ala. 1972),
\textit{aff'd in part, remanded in part sub nom.} Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

\textsuperscript{121} See Note, supra note 114, at 113.

\textsuperscript{122} \textit{Id}.

\textsuperscript{123} See, \textit{e.g.}, Costle v. Pacific Legal Found., 445 U.S. 198, 201 (1980); Clean Water Act, 33
of powers concerns not present when the defendant is a private company. 124

United States v. City of Providence 125 illustrates a federal district court’s measured control over the public management of a community facility, even though Congress had created a justiciable action and administrative agencies had requested judicial intervention. The city, owner, and operator of a municipal sewage treatment plant had failed to comply with Clean Water Act 126 pollutant discharge standards, an EPA order, and two previously entered and judicially approved consent decrees. 127 The United States District Court for the District of Rhode Island was asked to find the city in contempt and to impose monetary and equitable sanctions. Rhode Island asked the court to appoint a receiver for the treatment plant. 128 Another plaintiff, a citizens’ action committee, requested that a special master examine the factual circumstances surrounding the defendant’s admittedly noncompliant activities. 129

The court rejected these suggestions. A master’s examination, the court held, would be limited to detailing the city’s violations of its operating permits and would not add to the court’s ability to enforce the outstanding consent decrees. 130 Yet, the court was not ready to assume active management of the facility and supplant public officials or their agents.

Instead, the court directed the Rhode Island environmental agency to monitor the treatment plant and ordered city officials to report monthly on their compliance efforts. 131 This solution achieved several ends. It stymied the political fallout that inevitably follows a federal court’s exercise of powers to influence local affairs. The decision also reinforced the state’s familiar administrative role. Lastly, the solution allowed the city an opportunity to establish its good faith efforts to achieve compliance. 132

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124 See generally Union Elec. Co. v. Environmental Protection Agency, 427 U.S. 246, 270 (Powell, J., concurring) (Clean Air Act’s legislative history demonstrates that Congress knew that its stringent air quality standards would lead to the closing of some businesses, but it is unlikely that Congress intended to force the shut-down of a public utility), reh’g. denied, 429 U.S. 873 (1976). See generally Comment, supra note 18, at 10,062.
128 Id. at 610.
129 Id.
130 Id.
131 Id. at 611.
132 Id. The court granted Providence, Rhode Island, officials 90 days to demonstrate their credible desire to comply with the law and thereby absolve the contempt sanctions. However,
Monitors thus serve an important function in overseeing court-ordered change and in gathering information from those who are affected by the court's decree, even if those individuals are not parties to the suit. In accomplishing their task, monitors generally play a less intrusive role than masters or receivers.

Nevertheless, litigants frequently challenge references to monitors. For plaintiffs, monitorship creates a procedural barrier to judicial decisionmaking and the possibility of a compromised remedy. Defendants typically bear the substantial fees charged by monitors, who are usually well-paid experts.

Additionally, defendants may question references that extend a monitor's investigatory powers to matters that are ancillary to the suit. Such broad mandates may facilitate the determination of the most efficacious means to achieve a court's goals, yet they likely will increase a defendant's compliance burdens as well. By so empowering its agents, a court may venture beyond the issues directly related to the case or controversy brought by the parties. This judicial assumption of an investigatory role, litigants argue, may tarnish the court's reputation of impartiality and tread on executive and legislative prerogative to redress systematically the wrongs perceived by those branches of government.

At times, courts hesitate to undertake broad factual determinations in matters normally regulated by administrative agencies, because of a self-imposed judicial restraint known as the primary ju-

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the court expressed its willingness to appoint a special master or receiver if the city continued to ignore the court's decree. Id. at 610. Other federal courts have used masters and receivers when monitorship and voluntary compliance techniques have failed. See Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (upholding receivership remedy for violation of court-ordered school desegregation); United States v. Detroit, 476 F. Supp. 512 (E.D. Mich. 1979) (continual flouting of federal environmental statutes).


136 Several commentators have pointed to the possible constitutional impropriety of broad investigatory references. See id.; Dobray, supra note 72, at 597–98. Several courts, too, have stressed that the litigants must retain their rights to challenge the equity agent's recommendations at a hearing before the court. E.g., Gary W. v. Louisiana, 601 F.2d 240, 245 (5th Cir. 1979). These considerations are equally relevant to references to special masters and other post-judgment court agents.

137 In Webster Eisenlohr, Inc. v. Kalodner the Court of Appeals for the Third Circuit struck a reference to a special master who was appointed to supervise discovery and examine the defendant company's "conduct, property, liabilities, financial condition, books, records and assets," on the grounds that the district court had exceeded its judicial powers by authorizing the master to investigate matters not raised by the litigation. 145 F.2d 316, 318 (3d Cir. 1944), cert. denied, 325 U.S. 867 (1945).
risdiction doctrine. In disputes suffused with technical or policy considerations, a court may acknowledge an agency's greater experience and expertise and the need for uniform application of the law, by deferring to the agency's fact-finding even though a plaintiff has brought a justiciable claim.

Yet, to help resolve complex disputes, courts do refer remedial tasks to equitable monitors and other post-decree agents. A court may seek and receive the litigants' consent to these appointments. For plaintiffs, monitorship provides ongoing judicial attention and the opportunity to shift the cost of post-liability fact-finding to the defendants. Defendants may acquiesce when more intrusive measures are threatened.

When the parties' consent has not been given, a court must invoke another source of authority to justify an appointment. Unlike references to special masters, procedurally codified in Federal Rule 53, or to receivers, authorized under Federal Rule 66, there is no specific legislative empowerment for the judicial use of monitors. In the absence of statutory proscription, however, courts assume an "inherent authority" to create the means deemed necessary to achieve the court's ends and to ensure compliance with its decree.

139 See MCI Communications, 496 F.2d at 220. But see O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981). The federal district court in O'Leary maintained jurisdiction in a suit brought under the Clean Water Act and the Resource Conservation and Recovery Act, as well as common law causes of action although a Pennsylvania environmental agency regulated defendant's operations. Id. at 647. The court held that its exercise of discretion under the enforcement provisions of these statutes would not disrupt the agency's regulatory authority and that the court was competent to rule on the issue presented. Id. Furthermore, the plaintiff's pleadings indicated that the agency had been ineffective in curtailing the dangers presented by defendant's landfill. Id.
140 See Note, supra note 114, at 116.
141 Id.
142 Id.
143 FED. R. CIV. P. 53(a).
144 FED. R. CIV. P. 66.
145 Perhaps for this reason, some courts appoint "special masters" rather than "monitors" to conduct investigatory tasks. One court, for example, created an elaborate judicial surveillance network in a case involving systemic reform of the state's prisons by directing monitors to report to a special master. See Newman v. Alabama, 559 F.2d 283, 290 (5th Cir.), reh'g denied, 564 F.2d 97 (5th Cir. 1977), rev'd in part, 438 U.S. 781 (1978).
146 Ex parte Peterson, 253 U.S. 300, 312 (1920). In an opinion by Justice Brandeis, the Court held that:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise
There are two bases underlying the judicial claim to inherent power to appoint monitors. The first is the notion that federal courts, to maintain the constitutional equilibrium, must be able to "check" the actions of states and other branches of the federal government. The second basis for this claim to judicial power is the pragmatic idea that, in order to function effectively, courts should be able to improve the efficiency of the adjudicatory process and to ensure respect for their orders.

C. Receivers

1. General Applications

Monitors and special masters aid the court in the adjudication of a suit. Courts charge receivers, in contrast, with the active custody and management of an entity. Receivership represents a judicial determination that the operator of an organization may be unwilling or incapable of acting in good faith toward compliance with a judgment. In this situation a court may take the unusual step of appointing an administrator to prevent imminent or irreparable harm to the parties' rights and interests. The receiver ensures certainty in the execution of a court's order.

See 75 C.J.S. Receivers § 151, at 794 (1952).


Id. at 312–13.

Brazil, supra note 67, at 364–76.

Id. at 364–65.


75 C.J.S. Receivers § 1166-67.
Insolvency receiverships are well-known and well-established. The receivership remedy has not been limited to the bankruptcy arena, however, and has been employed in many other contexts as well. Courts have used receivers to enforce federal statutes such as antitrust laws. Receivership is also an accepted practice in probate and estate dispute resolution.

Moreover, federal courts have used receivership to protect civil and political rights from state infringement. Changing judicial perceptions about the courts' role in the political and social process, and the expansion of personal rights, have facilitated the courts' exercise of their equitable powers to compel governmental compliance with fourteenth amendment rights. For example, courts have placed community school boards and state prisons under receivership.

Courts, however, originally were slow to accept receivership as a method of protecting the general welfare or individual constitutional rights. Traditionally, receivers protected litigants' property rights only. In the mid-nineteenth century, however, courts recognized that private property concerns might impugn the public welfare. Courts used this power to assist many small communities that had developed along active rail lines. When a railroad became insolvent and was threatened with dissolution, the courts realized, communities might face extinction. Lacking statutory or common law guidance, courts invoked their equitable powers to assume custody of rail properties and forestall creditors' liquidation.

The courts appointed receivers to administer a railroad while the insolvent company's debts were adjusted. Eventually the railroad's property was conveyed to new entities through judicial sales, and creditors' interests were enforced. The novelty of this judicial

162 Johnson, supra note 151, at 1166.
163 Id. at 1168.
164 Id.
165 Id.
166 Id.
167 Id. at 1169.
approach lay in the courts' use of the bankruptcy receiver to repair, rather than dissolve, corporations.\textsuperscript{168} This application of the courts' equitable powers was accepted easily because the public interest and the creditors' private concerns coincided.

The municipal bond default cases of the late nineteenth century were, at the time, far more controversial.\textsuperscript{169} These suits concerned the judicially compelled levying of local taxes to satisfy the interest and principal payments owed under municipal-revenue bonds.\textsuperscript{170} Towns that had issued railroad-aid bonds to induce rail extension to their communities often suspended payments when, for whatever reason, the railroad never came.\textsuperscript{171} To protect bondholders, the federal courts issued writs of mandamus to state officials, ordering the collection of taxes. Citizen resistance spurred the courts to place local treasuries under receivership and to charge federal marshals with responsibility for carrying out the court's judgment.\textsuperscript{172} For the first time, the federal courts used their equitable powers to supplant local government.\textsuperscript{173}

The judiciary's unprecedented intrusion in state and local affairs was not welcomed universally. In one case a decree was enforced only after President Grant indicated his willingness to use force.\textsuperscript{174} The courts, too, were uncomfortable in displacing elected officials. They rested their opinions on constitutional grounds, such as the contract clause, or on the national government's ability to borrow.\textsuperscript{175} In contrast, the courts had a clearer constitutional mandate and greater political support for their decisions in the school-desegregation and prison-reform cases of the past thirty years.\textsuperscript{176}

2. Environmental Application of Receivership

Only recently have courts imposed receivership on state and local agencies to enforce environmental statutes. Notwithstanding strong language in many federal environmental laws, which suggests Congress's intent to bind government entities as well as industry to the permitting procedures and standards laid down, federal courts are

\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 1170.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 1171.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{176} See Johnson, supra note 151, at 1176–89.
cognizant that constitutional violations provide a stronger rationale than statutory mandates for displacing local governments.\footnote{177}{See U.S. Const. art. VI, § 1}

Courts, as a result, often wait until the prospect of unending confrontation and delay dictates the need to place a state or municipal agency under receivership.\footnote{178}{See, e.g., Morgan v. McDonough, 540 F.2d 527, 530 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977).} Even clear evidence of a local government’s unwillingness to comply with federal and state environmental laws may not be sufficient to move a court to assume administrative control of a state or municipal entity.\footnote{179}{See United States v. City of Providence, 492 F. Supp. 602, 610–11 (1980).}

In United States v. City of Detroit,\footnote{180}{476 F. Supp. 512 (E.D. Mich. 1979).} however, the Michigan federal district court imposed receivership on a city agency, on the advice of the court’s monitor, to facilitate compliance with EPA orders and consent decrees.\footnote{181}{Id.; see also Town of Greenwich v. Department of Transp., 10 Envtl. L. Rep. (Envtl. L. Inst.) 20,178, 20,181 (D. Conn. 1980).} Concerned with the repercussions of summarily displacing public officials from their positions of authority, the court appointed Detroit’s mayor as receiver for the city’s waste treatment plant.\footnote{182}{Detroit, 476 F. Supp. at 515.} The court thereby avoided making any “radical change” in the city’s improving waste treatment administration.\footnote{183}{Id.} At the same time, the court freed the mayor from the bureaucratic morass and political bickering that had slowed refinancing and other remedial measures. The mayor’s decisions were immunized from review by the city council, as well as state governments.\footnote{184}{Id.} Hence, receivership facilitated statutory enforcement while treading lightly on the political process.

3. Further Environmental Applications

The considerations that constrain courts from placing public entities under receivership are not as compelling when a private company is the recalcitrant polluter. Because federalism notions are not involved, a court will balance only the potential harm to the corporation and its shareholders against the plaintiff’s claims and the public interest in remedying the environmental problems.\footnote{185}{See United States v. Vertac Chem. Corp., 671 F. Supp. 595, 623–24 (E.D. Ark. 1987), vacated without opinion, 855 F.2d 856 (8th Cir. 1988).} By placing private companies into receivership for violations of environ-

\begin{footnotes}
\footnotetext[177]{See U.S. Const. art. VI, § 1}
\footnotetext[178]{See, e.g., Morgan v. McDonough, 540 F.2d 527, 530 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977).}
\footnotetext[179]{See United States v. City of Providence, 492 F. Supp. 602, 610–11 (1980).}
\footnotetext[180]{476 F. Supp. 512 (E.D. Mich. 1979).}
\footnotetext[182]{Detroit, 476 F. Supp. at 515.}
\footnotetext[183]{Id.}
\footnotetext[184]{Id. at 516}
\end{footnotes}
mental statutes, a court fulfills two purposes. First, the receivership accomplishes its traditional function of protecting disputed property from fraud, misappropriation, or unnecessary diminution in value. Because the federal or a state government may be a judgment creditor, or may be owed response costs for having conducted a preliminary cleanup under CERCLA, government entities may hold valid pecuniary interests in a defendant's property. A second, closely related concern is that a company may attempt to avoid its environmental liabilities and responsibilities by transferring its assets to a subsidiary or a new corporate entity.

Because receivership consumes a large portion of a court's time and shifts the court from its traditional role as passive arbiter of the facts into a role as an active supervisor through its appointed manager, courts hesitate to impose receivership unless other remedies are clearly inadequate. There is no compelling reason, however, for a court to wait until severe environmental harm has transpired or a defendant has flouted statutes and consent decrees before the court exercises the full scope of its equitable power.

In the face of likely dangers to the ecosystem or the public welfare, a court may choose initially and immediately to place an entity under receivership. In CERCLA, Congress enacted one method of rapid response to an environmental hazard—the preliminary government cleanup and subsequent suit for cost recovery. The response fund is insufficient, however, to address even a small number of imminently dangerous sites. Furthermore, it is not the EPA's function to act as a super-landfill contractor. Arguably, though, statutory authorization of stringent equitable relief, through receivership, provides another, more efficient way to tackle environmental hazards.

IV. Improper "Abdication" or Appropriate Delegation? A Comparison of Post-Judgment Judicial References to Administrative Law Principles

Federal courts long have acted within the modern administrative state by scrutinizing agency decisions for procedural fairness to

189 See Comment, supra note 18, at 10,060.
regulated parties, and by ordering administrative action to prevent harm to the public welfare. Recently, some federal courts have supervised the remedying of complex environmental disputes by appointing delegates to implement and monitor the courts' decrees.

Commentators question whether judicial references tarnish a court's impartiality. Litigants, too, chafe at the expense involved, and doubt the courts' claimed gains in adjudicatory efficiency. Litigants' challenges mirror those made by regulated parties against administrative agency decisionmaking: they refute the delegation of binding authority; they question the standards that guide the agent's discretion; and they argue the absence of adequate procedural safeguards. Administrative law, which governs legislatures' assignment of police powers to legislative and executive agents, provides a focus to examine the sufficiency of procedural rights granted to litigants when a court refers post-decree tasks to an adjunct. The more binding a master's or a monitor's findings and recommendations, in essence, the greater is the need for trial-type process.

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191 See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining factors that courts must weigh to gauge the constitutional adequacy of procedures employed in administrative actions that infringe upon protected life, liberty, and property interests). Courts also desire minimum procedures in order to facilitate judicial review. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (to ensure adequate judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701, 706 (1988), of administrative action, agency must present a contemporaneous record, not "post-hoc rationalizations" of its decision, to the reviewing court). There is a limit, however, to the procedure that a court can require agencies to perform. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 523–24 (1978) (APA § 553 establishes both the minimum and the maximum procedural requirements that courts may impose on administrative agencies in conducting rulemaking proceedings).

192 See, e.g., Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 594–95 (D.C. Cir. 1971) (ordering the EPA to initiate public deregistration proceedings against the pesticide DDT); see also Oakes, supra note 12, at 506 & n.46 (the EPA's delay, while DDT continued to be sold to the public, denied opponents of the pesticide of an opportunity for judicial review of the agency's final decision).


194 See Dobray, supra note 72, at 596 n.87; Note, Force and Will, supra note 135, at 118–20 (1980).

195 In re United States, 816 F.2d 1083, 1086 (6th Cir. 1987) (plaintiff challenged the district court's satisfaction of Rule 53's exceptional condition requirement).

196 In re Armco, 770 F.2d 103, 105 (8th Cir. 1985) (upholding master's power to hear motions for summary judgment and dismissal).

A. Challenging Courts' Reference Authority

Although courts' reference authority has firm statutory and constitutional bases, litigants often contest particular delegations as an abuse of judicial discretion, and masters' and monitors' appointments at the remedial stage as violations of article III judicial responsibilities. These challenges, however, are unlikely to hinder post-judgment references by courts mired in complex litigation. Appointing and appellate courts' substantive review of agents' findings, moreover, may be limited. Litigants' concerns for procedural rights are therefore heightened.

Just as administrative agencies' powers are founded and often restricted in enabling legislation, judicial agents' advisory and investigatory authority is based in part on statute. Courts primarily look to Federal Rule 53 to ground their references, but additionally may rely upon an inherent power to appoint assistants to ensure compliance with their decrees. While reference authority based upon inherent powers speaks to the judiciary's constitutional responsibility to provide redress and to administer justice, courts' powers may be legislatively circumscribed and thereby subject to statutory procedural requirements.

Regardless of the source of delegation authority, Rule 53 poses barriers to judicial appointments that do not arise in congressional

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198 See Jenkins ex rel. Agyei v. Missouri, 890 F.2d 65, 67 (8th Cir. 1989).
200 The legislation that establishes an administrative agency is known as the agency's organic act. See, e.g., Interstate Commerce Act, 49 U.S.C. § 10,301 (1988) (creating the Interstate Commerce Commission). Organic acts often delegate broad adjudicatory and rulemaking powers. See Mistretta v. United States, 488 U.S. 361, 373 (1989). The Supreme Court, however, has not invalidated congressional establishment of an administrative agency on delegation grounds since 1935. See Panama Ref. Co. v. Ryan, 293 U.S. 388, 418–19 (1935). Indeed, the Court requires Congress to provide only an "intelligible principle" of control in its delegatory statute. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); see Mistretta, 488 U.S. at 373 (1989). Appellate courts reviewing trial court references to judicial agents, in contrast, occasionally strike such delegations as overbroad. See In re United States, 816 F.2d 1083, 1091–92 (6th Cir. 1987) (affirming special master's appointment but removing her power to rule on dispositive pretrial motions).
201 FED. R. CIV. P. 53(a).
202 E.g., Ex parte Peterson, 253 U.S. 300, 312 (1920); Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir. 1982), amended in part, vacated in part,reh'g denied in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir.), cert. denied, 352 U.S. 833 (1956).
203 Even Ex parte Peterson, the landmark opinion that voiced courts' inherent equitable powers to appoint assistants, recognized that the power may be statutorily restricted. 253 U.S. at 312.
delegations to administrative agencies. By its terms, Rule 53 allows a reference to a special master in an "exceptional condition." Against a long tradition of needless references under federal equity practice, La Buy v. Howes Leather Co. held that the "exceptional condition" limitation renders blanket delegations of particular judicial duties improper, and requires courts to retain the ultimate decisional responsibility. Notwithstanding La Buy, however, judges easily find circumstances to justify post-judgment references in complex cases. Courts have found "exceptional conditions" in the intricacy of planned remediation, in the need to supervise the implementation of a decree, and in the prospect of a defendant's noncompliance with an injunction. In requesting mandamus, moreover, an appellant faces the difficult burden of proving that the appointing court's reference was a clear abuse of judicial power.

Judicial delegations to post-decree monitors also are attacked as constitutionally infirm under article III, section one, which vests the federal judicial power in judges of undiminishable salary and tenure. Article III's purpose is to protect the judicial function

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204 FED. R. CIV. P. 53(b). In jury cases, in contrast, a reference may be made "when the issues are complicated" although a master's appointment still would be the "exception and not the rule." Id. In jury actions, moreover, a master's findings are admissible merely as evidence, without binding weight. FED. R. CIV. P. 53(e)(3). The distinction is grounded in the seventh amendment's requirement that the jury should be the primary fact-finder. See Note, supra note 81, at 792 n.89.

205 La Buy v. Howes Leather Co., 352 U.S. 249, 253 n.5 (1957) (noting that judicial references have been deemed an "inveterate enemy of dispatch in the trial of cases") (quoting VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1240–41 (1952), reh'g denied, 352 U.S. 1019 (1957); Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706–07 (1927) (discussing the expense and burden associated with traditional references to masters); Adventures in Good Eating v. Best Places to Eat, Inc., 131 F.2d 809, 815 (7th Cir. 1942) (decrying the "avoidable burden of costs and . . . inexusable delay" caused by references to special masters).

206 See La Buy, 352 U.S. at 258–59; In re United States Dep't of Defense, 848 F.2d 232, 239 (D.C. Cir. 1988).


208 Gary W. v. Louisiana, 601 F.2d 240, 244 (5th Cir. 1979).


210 Williams v. Lane, 851 F.2d 867, 884 (7th Cir. 1988), cert. denied, 488 U.S. 1047 (1989); In re Dept of Defense, 848 F.2d at 234–35.

211 See Jenkins ex rel. Agyei v. Missouri, 890 F.2d 65, 67 (8th Cir. 1989). The United States Constitution places the judicial power in judges whose salary and tenure are protected:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.
from encroachment by the legislative and executive branches.\textsuperscript{212} Using the Supreme Court’s decision in \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.},\textsuperscript{213} which partially invalidated the bankruptcy courts’ jurisdiction as established by the Bankruptcy Act of 1978,\textsuperscript{214} contestants claim that certain tasks performed by monitors are inherently judicial and therefore non-delegable.\textsuperscript{215}

Such challenges are misplaced. As with other suits concerning congressional attempts to create non-article III adjudicatory bodies, \textit{Northern Pipeline} focused on separation-of-powers issues and attempted to define the boundaries among governmental functions.\textsuperscript{216} \textit{Northern Pipeline} was distinguished in a recent Supreme Court opinion that upheld administrative agencies' powers to adjudicate state common law claims.\textsuperscript{217} Unlike judicial delegates, the bankruptcy judges under scrutiny in \textit{Northern Pipeline} held independent jurisdiction to rule on constitutionally recognized and state-created common law rights, and were guarded from the district courts' appointment and removal prerogatives.\textsuperscript{218}

Because judicial references do not entail separation-of-powers concerns, federal courts have rejected litigants’ article III-based challenges.\textsuperscript{219} Commentators note, however, that in reforming state institutions to safeguard federal constitutional rights, courts occasionally have issued vague decrees and subsequently delegated primary oversight to masters and monitors, allowing those agents to color enforcement of constitutional rights with their own values.\textsuperscript{220} Such ambiguous decrees are not generally at issue in environmental actions, in which the federal courts’ likely injunctive goals are satisfaction of statutory environmental standards and enforcement of consent agreements that have been fashioned by defendants and Congress’s agent, the EPA. Article III's primary mandate, like the judicial construct of Rule 53, requires appointing courts to retain decisionmaking authority.

\textsuperscript{213} 458 U.S. 50 (1982).
\textsuperscript{214} Id. at 76.
\textsuperscript{215} See Jenkins, 890 F.2d at 67.
\textsuperscript{216} \textit{Northern Pipeline}, 458 U.S. 50, 57-58 (1982).
\textsuperscript{218} \textit{Northern Pipeline}, 458 U.S. at 84-87.
\textsuperscript{219} See United States v. Raddatz, 447 U.S. 667, 681-84, reh'g denied, 448 U.S. 916 (1980); Jenkins, 890 F.2d at 67 n.4.
\textsuperscript{220} Dobray, \textit{supra} note 72, at 590; see Note, \textit{supra} note 135, at 116.
B. Procedural Due Process and the Scope of Judicial Review

The judicially sanctioned aggrandizement of adjudicatory powers to administrative agencies\(^\text{221}\) contrasts sharply with the courts' restraints on judicial references. Once a master's or a monitor's appointment is made, however, the supervising court likely will exercise limited review of the agent's findings. For litigants, therefore, the assurance of procedural rights in hearings before the agent is of primary importance.

There are statutory, and possibly constitutional, sources of procedural rights for parties who appear before post-judgment judicial adjuncts. Rule 53 is the principal guarantor of process, enabling parties to force special masters to act through formal proceedings that have many trial-type attributes.\(^\text{222}\) Through the master, litigants can subpoena witnesses\(^\text{223}\) and, upon a party's request, a master must record its evidentiary rulings.\(^\text{224}\) A master, moreover, must prepare a report of its factual and legal conclusions, ostensibly to preserve a meaningful record for judicial review.\(^\text{225}\) In its reference order, an appointing court additionally may specify or curtail a master's supervisory and investigatory powers.\(^\text{226}\)

The fifth amendment's due process clause\(^\text{227}\) also may be a fertile spring of procedural rights for litigants. In environmental suits, courts have used post-judgment judicial references most extensively to regulate public entities, and litigants, therefore, have not raised procedural due process challenges. Ongoing injunctive supervision of a corporate or individual defendant in suits brought by the government against private entities, however, may entail constitutionally cognizable deprivations of private property. Although defendants may have had their day in court during a suit's liability phase, the majority of defendants' property rights may be decided at the remedial stage.\(^\text{228}\) While all injunctions alter defendants' future conduct in some way, there is no single remedial method for a court to

\(^{221}\) See supra note 200.

\(^{222}\) FED. R. CIV. P. 53(e).

\(^{223}\) FED. R. CIV. P. 53(d)(2).

\(^{224}\) FED. R. CIV. P. 53(e).

\(^{225}\) Id. While presiding over hearings, a master may examine witnesses, subpoena documents, and rule on the admissibility of evidence. FED. R. CIV. P. 53(e). Administrative law judges hold similar powers under the APA, 5 U.S.C. § 556 (1988). Rule 53's reporting requirements, too, are echoed in the APA, 5 U.S.C. § 557.

\(^{226}\) FED. R. CIV. P. 53(e).

\(^{227}\) U.S. CONST. amend. V.

\(^{228}\) See supra text accompanying notes 1–2.
accomplish Congress's statutory goals or to satisfy common law standards.\textsuperscript{229} Courts may delegate initial responsibility for the determination of appropriate injunctive relief to an adjunct.\textsuperscript{230} A court's adoption of that adjunct's recommendations on injunctive relief may cause minor or possibly severe impacts on a defendant's business. These impacts may be sufficient to warrant constitutional protection.

The quantum of procedure owed to defendants in proceedings warranting constitutional protection, before a master or a monitor, would turn on three factors: the government plaintiff's concern for expeditious action, the extent of a decree's impact on a defendant's property, and technical and scientific uncertainty in remediying the environmental hazard.\textsuperscript{231} A court readily may find that an EPA suit for preliminary injunctive relief implicates stronger governmental interests than a cost recovery action and hence justifies less process in hearings before a master designated to help forge appropriate relief.\textsuperscript{232} Due process, however, should mandate that the parties ultimately retain an opportunity to object in an adversarial setting to a master's recommendations on a remedy.

The extensive procedural rights that should be afforded litigants in hearings before judicial adjuncts become more critical in light of the possibility that an appointing court may conduct limited substantive review of a master's or a monitor's report.\textsuperscript{233} Rule 53 directs courts to accept masters' factual findings in non-jury actions unless

\textsuperscript{229} See supra notes 23–54 and accompanying text.


\textsuperscript{231} Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In Mathews, the Court announced a three-part balancing test for determining the requisite amount of process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

\textit{Id.}

\textsuperscript{232} See United States Steel Corp. v. Fri, 364 F. Supp. 1013, 1021 (N.D. Ind. 1973). In Fri the United States District Court for the Northern District of Indiana refused to enjoin on due process grounds an EPA order that required the steel company to report its compliance with Clean Air Act standards. \textit{Id.} The court reasoned that "where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process . . . where it is essential that governmental needs be immediately satisfied." \textit{Id.} (quoting Philips v. Commissioner, 283 U.S. 589 (1931)).

the findings are clearly erroneous and thereby reduces the scope of courts' scrutiny to appellate-type review. The line that distinguishes factual determinations from legal conclusions, moreover, is often indistinct, and the depth of judicial review may be influenced as much by the reviewing court's estimation of its master's recommendations as by formulaic legal standards. Overwhelmed by crowded dockets, a court may have a strong interest in ending the fact-finding process, especially when liability has been adjudged and a court's remaining focus centers on the selection of a remedy. Because a master may assume a partisan, pro-plaintiff role, a court's greatest responsibility may be to restrain its adjunct's remedial zeal.

V. CONCLUSION

The courts are not the primary authors of environmental maxims. Congress has defined broadly the environmental responsibilities of commercial and governmental entities, and has given the initial tasks of interpreting and implementing its statutes to the states and to its agencies.

Congress also has recognized, however, the judiciary's traditional role in balancing the equities of particular controversies and fashioning precise, coercive remedies to abate the public endangerment posed by environmental hazards. Courts hold inherent constitutional powers, in addition to statutory authority, to review the environmental regulatory decisions of other branches of government and to furnish injured parties with meaningful redress. To satisfy these duties, courts may provide for themselves the means to ascertain and implement the most feasible decrees.

Although often decried by litigants, judicial references to special masters and post-judgment monitors do not tarnish the courts, but offer a mechanism through which the courts can assume oversight and supervision of recalcitrant polluters. The judiciary thus becomes


236 L. GREEN, JUDGE AND JURY 270–71 (1930).

237 See Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.), amended in part, vacated in part, reh'g denied in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); Little, supra note 16, at 469 n.270.
a viable supplement and alternative to administrative action for extensive and continuing environmental redress. As in administrative decisions, however, the creation of a remedy may be as critical to the litigants and the public as the determination of liability, and the fullest airing of the merits of a remedy may occur before an agent rather than a court.