

## FLINT OF OUTRAGE

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*Officials replaced safe water sources with contaminated water sources for tens of thousands of people living in Flint, Michigan, from April 2014 to October 2015. Overwhelming evidence indicates that the officials knew the water was potentially harmful to residents' health and property. This unfathomable disregard for the residents of Flint sparked national outrage and prompted criminal charges as well as multiple civil suits.*

*Residents' civil claims included two strands of substantive due process: that the actions infringed residents' fundamental liberty rights to bodily integrity and to state protection from harmful acts by third parties, and that the government actions "shocked the conscience." The litigants also raised equal protection arguments that government targeted the community based on race and poverty.*

*This Article makes three claims. First, it asserts that fundamental rights and equal protection arguments that challenge the denial of uncontaminated water face the serious, perhaps insurmountable obstacles that plague any call for new or expanded constitutional rights. Constitutional law is clunky and often formalistic. Doctrine and principles of judicial restraint here militate against categorically elevated judicial scrutiny—which we call thick rights strategies—of these and similar public officials' actions. Moreover, the thick rights strategies may entail liability questions that are not—as yet—judicially manageable.*

*Second, it asserts that "shocks the conscience" arguments offer a viable alternative to a thick rights strategy. Properly understood, this test enforces a liberty baseline, even absent a fundamental right or suspect classification. This thin rights test is properly reserved for worst-case scenarios, not for garden-variety government blunders. Flint qualified.*

*Third, it argues that this constitutional baseline liberty may apply to all environmental cases in which shocking government conduct elides established fundamental rights or suspect classification categories. Invoking it would not open judicial floodgates or risk undue judicial intrusion into regulatory matters better left to other government branches. It would maintain a difficult-to-flunk but critical liberty limit on extreme official disregard for human wellbeing and environmental justice. It also would provide space for the development of a potential fundamental right to uncontaminated water while allowing public airing of the serious harms to life, the failure of government processes, the citizen powerlessness, and the grave environmental harms that threaten multiple communities but impose their most horrific costs on the most vulnerable people. The Flint tragedy offers a constitutional cautionary tale that should be noted and heeded.*

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“The Flint water crisis is a story of government failure, intransigence, unpreparedness, delay, inaction, and environmental injustice.”<sup>1</sup>

## INTRODUCTION

Government officials<sup>2</sup> in Michigan engaged in shocking acts. In April 2014, they replaced safe public water supplied to Flint from Lake Huron with improperly treated water supplied from the polluted Flint River.<sup>3</sup> Contact with certain pollutants caused leaching in the pipes, and resulted in seriously contaminated water. The officials did this despite evidence that the Flint River water was unsafe,<sup>4</sup> despite the availability of the safe Lake Huron water source,<sup>5</sup> and despite a City resolution to secure future safe water from a new, alternative source as early as 2016.<sup>6</sup> The surrounding communities—which, unlike Flint, are predominantly white communities—continued to use the uncontaminated Detroit water.<sup>7</sup> Officials then intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint’s tap water,<sup>8</sup> and forwent treatment of the contaminated water that allegedly would have cost only \$150 per day.<sup>9</sup> Consequently, scores of Flint residents indisputably were exposed for eighteen months to water with unsafe lead levels and other corrosive elements that inflicted

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1 FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 1 (2016), [https://www.michigan.gov/documents/snyder/FWATF\\_FINAL\\_REPORT\\_21March2016\\_517805\\_7.pdf](https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf) [hereinafter FWATF FINAL REPORT]. The Flint Water Advisory Task Force (FWATF) was composed of five members who possessed public policy, public utilities, environmental protection, public health, and health care experience. It was appointed by Governor Rick Snyder on October 21, 2015, to conduct an independent review of the Flint water contamination problem. It issued its final report in March of 2016. *Id.* at 2.

2 The assignment of responsibility among the many government actors who played a role in the crisis is likely to vex the courts tasked with responding to the many legal claims that the crisis spawned. *See infra* Part I.

3 Amended Complaint & Demand for Jury Trial at 21, *Mays v. Snyder*, 2017 WL 445637 (E.D. Mich. Feb. 2, 2017) (No. 15-14002) [hereinafter *Mays* Complaint]; *see* Brie D. Sherwin, *Pride and Prejudice and Administrative Zombies: How Economic Woes, Outdated Environmental Regulations, and State Exceptionalism Failed Flint, Michigan*, 88 U. COLO. L. REV. 653, 661 (2017) (describing chronology of events in detail); Ryan Felton, *How Flint Traded Safe Drinking Water for Cost-Cutting Plan that Didn’t Work*, GUARDIAN (Jan. 23, 2016), <http://www.theguardian.com/us-news/2016/jan/23/flint-water-crisis-cost-cutting-switch-water-supply>; Jessica Trounstone, *How Racial Segregation and Political Mismanagement Led to Flint’s Shocking Water Crisis*, WASH. POST (Feb. 8, 2016) [https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/08/heres-the-political-history-that-led-to-flints-shocking-water-crisis/?utm\\_term=.5aaf3e946dde](https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/08/heres-the-political-history-that-led-to-flints-shocking-water-crisis/?utm_term=.5aaf3e946dde).

4 *See* FWATF FINAL REPORT, *supra* note 1, at 23–26.

5 *See id.* at 27 n.34.

6 *See id.* at 41 n.54.

7 *See Mays* Complaint, *supra* note 3, at 44–45.

8 *Id.* at 16, 19.

9 *See* Holly Fournier, *Snyder: “Career Bureaucrats” to Blame for Flint Crisis*, DET. NEWS (Apr. 11, 2016), <http://detne.ws/1N47y0a>.

health and property damage.<sup>10</sup> Indeed, the problems persisted into late 2016 when a federal district judge concluded residents were still drinking contaminated water and ordered government officials to immediately provide them with a minimum of ninety-six half-liter bottles of water per week and offer instructions in multiple languages regarding the lead levels of city water and how to install filters.<sup>11</sup>

These actions prompted criminal charges<sup>12</sup> and civil lawsuits<sup>13</sup> that alleged, *inter alia*, that the government actions violated Flint residents' substantive due process and equal protection rights. Plaintiffs sought an order declaring that defendants' conduct was unconstitutional, as well as injunctive relief, monetary damages, punitive damages, and attorneys' fees.<sup>14</sup> This Article addresses the constitutional claims raised against Michigan and various state actors in *Mays v. Snyder*,<sup>15</sup> and shows why the Flint nightmare illuminated both the strengths and many weaknesses of constitutional law as applied to complex cases like this one.

The United States Supreme Court has consistently refused to constitutionalize affirmative rights to basic human needs such as food, medical care,

10 See Mark Guarino, *New Crisis for Flint Residents: Cost of Home Damage Caused by City Water*, WASH. POST (Jan. 22, 2016), [http://wapo.st/1Qq6Z0w?tid=ss\\_mail](http://wapo.st/1Qq6Z0w?tid=ss_mail). Property damage included the cost of replacing water heaters, pipes, and some water service lines to homes. *Id.*

11 See Niraj Chokshi, *Judge Orders that Bottled Water Be Delivered to Residents of Flint, Mich.*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/11/us/flint-michigan-water-ruling.html?mwrsm=Email>.

12 See Felony Complaint, *State v. Rosenthal*, No. 16TA-168SFY (Mich. Dist. Ct. July 29, 2016); Scott Atkinson & Monica Davey, *5 Charged with Involuntary Manslaughter in Flint Water Crisis*, N.Y. TIMES (June 14, 2017), [https://mobile.nytimes.com/2017/06/14/us/flint-water-crisis-manslaughter.html?emc=edit\\_ne\\_20170614&nl=evening-briefing&nid=33605667&te=1&r=0&referer=](https://mobile.nytimes.com/2017/06/14/us/flint-water-crisis-manslaughter.html?emc=edit_ne_20170614&nl=evening-briefing&nid=33605667&te=1&r=0&referer=); Monica Davey & Mitch Smith, *2 Former Flint Emergency Managers Charged over Tainted Water*, N.Y. TIMES (Dec. 20, 2016), <http://www.nytimes.com/2016/12/20/us/flint-water-charges.html?emc=eta1>; Breanna Edwards, *6 Mich. State Employees Facing Criminal Charges in Flint Water Crisis*, THE ROOT (July 29, 2016), <http://www.theroot.com/articles/news/2016/07/6-mich-state-employees-facing-criminal-charges-in-flint-water-crisis/>; Elliott C. McLaughlin & Catherine E. Shoichet, *Charges Against 3 in Flint Water Crisis "Only the Beginning"*, CNN (Apr. 20, 2016), <http://www.cnn.com/2016/04/20/health/flint-water-crisis-charges/>.

13 See, e.g., *Mays* Complaint, *supra* note 3, at 1; see also Justin Cosgrove, *Michigan Judge Allows Lawsuit over Water Crisis*, JURIST: PAPER CHASE (Oct. 28, 2016) (reporting on developments and describing various pending lawsuits); Chad Halcom, *Flint Water Lawsuits Flood In*, CRAIN'S DET. BUS. (Feb. 7, 2016), <http://www.craindetroit.com/article/20160207/NEWS/302079983/flint-water-lawsuits-flood-in> (describing pending lawsuits).

14 *Mays* Complaint, *supra* note 3, at 57.

15 *Mays v. Snyder*, No. 15-14002, 2017 WL 445637, at \*1 (E.D. Mich. Feb. 2, 2017), *aff'd in part, rev'd in part sub nom. Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017). The federal trial judge determined that the federal constitutional claims were preempted by the Safe Drinking Water Act and then dismissed the federal statutory claims on the ground that the sixty-day notice requirement of the Act was not met. For virtually identical claims brought in the Michigan Court of Claims, see *Mays v. Snyder*, No. 16-000017, at 1-2 (Mich. Ct. Cl. Oct. 26, 2016).

education, and housing.<sup>16</sup> Constitutionalizing a right to clean water thus would be audacious. Knowing this, plaintiffs asserted ostensibly more restricted liberties: a right to bodily integrity and a right to freedom from third-party harms that were violated when the government knowingly funneled untreated, harmful water to them.<sup>17</sup>

But even these narrower claims are quaky and would have wide implications, given the prevalence of contaminants in water supplies in the United States, and the complexities of setting water quality standards. Courts thus may be chary of imposing elevated scrutiny on government decisions in this area of environmental law.

The “shocks the conscience” due process test likewise faced obstacles. The test is rarely satisfied and often critiqued for its subjectivity.<sup>18</sup> Courts are loath to second-guess official decisions based on this amorphous standard.

Finally, the equal protection claims were doctrinally fragile. The fateful government decisions involved a common public water source of an entire town. Multiple actors—not one with a clear, coherent, and hostile intent to harm all Flint residents—contributed to the water contamination crisis. Courts may be reluctant to confer suspect class treatment on “all residents” even though the community is poor, politically vulnerable, and predominantly composed of racial minorities.

And yet, the Flint water crisis was outrageous. Clean water is a basic human need. Flint water was grossly contaminated. This was a man-made disaster that could have been avoided with a minimum of foresight and at relatively little expense.<sup>19</sup> Flint residents had no meaningful political power over the fateful decisions.<sup>20</sup>

Not all outrageous government acts violate the Constitution, but the ones at stake in the Flint crisis did. That *everything* was wrong in Flint should not have meant that *nothing* was, as a matter of constitutional law.

This Article proceeds as follows. Part I describes the facts surrounding the Flint water crisis. Part II describes the due process and equal protection theories advanced by the plaintiffs in *Mays*, and the state actors’ responses to

16 See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203–04 (7th Cir. 1983) (“The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection . . . . The Supreme Court has refused to go so far . . .”).

17 *Mays* Complaint, *supra* note 3, at 1.

18 See generally Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307 (2010); Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437, 450 (2001) (arguing that the test “provides no more protection from government misconduct to people at large than convicted criminals in the midst of a prison riot” and that “[s]uch a result is difficult to defend”).

19 FWATF FINAL REPORT, *supra* note 1, at 1.

20 See *id.* (“The Flint Water crisis occurred when state-appointed emergency managers replaced local representative decision-making in Flint, removing . . . public accountability that come[s] with public decision-making.”).

them. Part III analyzes the plaintiffs’ due process and equal protection theories, and outlines the virtues and weaknesses of each of them. It concludes that “thick rights” theories—ones that involve fundamental rights and suspect classifications—were not the best claims in this case. However, it maintains that government officials should have been held accountable under the “thin right” theory that their conduct shocked the conscience in particularly egregious, unconstitutional ways. Part IV discusses the wider implications of the shocks the conscience test for future cases in which poverty, race, and government ineptitude impose disproportionate environmental harms on vulnerable communities.

## I. FAILING FLINT

Flint is a failing city. It suffers from a declining population, pervasive poverty, and very poor quality of life. In 1960, the population was over 200,000.<sup>21</sup> Today, fewer than 100,000 people reside there.<sup>22</sup> Over 40% of the population lives below the federal poverty line.<sup>23</sup> Crime rates are high.<sup>24</sup> Statistics that measure overall health are low.<sup>25</sup> Economic prospects are bleak.<sup>26</sup> And its multifaceted misery has a stark, racially disparate impact: over 50% of Flint residents are African American.<sup>27</sup>

Flint’s state and municipal stewards failed its residents in multiple ways. The failures were so glaring that the State took over emergency management of the city in 2011.<sup>28</sup> Yet these managers, too, failed Flint. The water crisis is a particularly sickening—in every sense—example of all of these failures.

### A. *Water Supply History*

The City purchased its water system from a private owner in 1903.<sup>29</sup> In 1965, it contracted with the Detroit Water and Sewerage Department (DWSD) to provide its water.<sup>30</sup> Water provided by DWSD was properly treated for corrosion control.<sup>31</sup>

The City also kept an emergency backup—the Flint Water Treatment Plant (FWTP)—to that water supply. The FWTP drew water from the Flint River, and was operated only four times each year to maintain its readiness.<sup>32</sup>

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21 *Id.* at 15.

22 *Id.*

23 *Id.*

24 *Id.* For a compelling report on the difficulties Flint law enforcement officials face, see Zackary Canepari & Drea Cooper, *Policing Flint*, N.Y. TIMES (Nov. 21, 2016), <http://www.nytimes.com/2016/11/21/opinion/policing-flint.html>.

25 FWATF FINAL REPORT, *supra* note 1, at 15.

26 *Id.*

27 *Id.*

28 *Id.* at 39.

29 *Id.* at 15.

30 *Id.* at 16.

31 *Id.*

32 *Id.* at 15.

In 2000, Flint's thirty-five-year contract with DWSD expired. It was thereafter renewed annually, subject to termination by either party.<sup>33</sup> Charges began to spike, with an average annual increase of over six percent.<sup>34</sup> The escalating cost of water aggravated Flint's already dire economic situation. In an effort to mitigate water costs,<sup>35</sup> or perhaps in an effort to stimulate the local economy with a new public works project,<sup>36</sup> the City looked for an alternative supply. It did so under the direction of its emergency managers.<sup>37</sup>

Michigan has an Emergency Manager Law,<sup>38</sup> which divests locally elected officials of decisionmaking power and places a state-appointed emergency manager in charge. The law is triggered when, as was true in Flint, a municipality is in dire financial straits.<sup>39</sup> The emergency manager assumes the responsibilities of elected officials for the city and has dramatic powers over past, present, and future city contracts.<sup>40</sup>

33 *Id.* at 16.

34 *Id.*

35 This was disputed. Some sources suggest DWSD cut off Flint from its water supply and refused to negotiate a cheaper price. Others suggest DWSD offered a competitive deal that was refused in favor of reviving FWTP. See Shikha Dalmia, *The Flint Water Crisis Is the Result of a Stimulus Project Gone Wrong*, REASON: HIT & RUN BLOG (Jan. 25, 2016, 4:33 PM), <http://reason.com/blog/2016/01/25/the-flint-water-crisis-is-the-result-of>.

36 See *id.*

37 See *id.*

38 MICH. COMP. LAWS §§ 141.1541–75 (2012). As of the end of April, 2015, the City of Flint moved from being under the control of an emergency manager to home rule order under the guidance of a Receivership Transition Advisory Board (RTAB). This board maintains the measures prescribed upon the emergency manager's exit. The Mayor and City Council have resumed their defined roles with regard to City business, yet major financial and policy decisions will be reviewed by the RTAB to ensure that they maintain fiscal and organizational stability as directed under Public Act 436. See *Receivership Transition Advisory Board (RTAB)*, CITY OF FLINT, <https://www.cityofflint.com/rtab/> (last visited Oct. 19, 2017).

39 MICH. COMP. LAWS §§ 141.1541–75.

40 See Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 581 (2012). Anderson described the law as a form of "democratic dissolution." *Id.* (internal quotation marks omitted). In other words, "changes that suspend local democracy, even though the city remains a legal entity. For an unbounded period of time, a city's corporate status is held in place while its charter and system of government are replaced by a single official acting with unprecedented . . . discretion." *Id.* As Anderson noted in 2012:

The impact of the law has disproportionately impacted the state's African-American population. The four cities already approved for intervention have proportionately large African-American populations: Benton Harbor is 91.4% African-American, Flint is 59.5%, Pontiac is 55.3%, and Ecorse is 48.6%. The press has widely and accurately reported that close to half of the state's African-American population will be governed by an emergency manager if Detroit is approved for state intervention, as threatened. . . . The cities selected for intervention are also very high poverty, with poverty rates ranging from a low of 32% in Pontiac to a high of 48.7% in Benton Harbor (compared to a 13.8% national average). Opposition to the law thus emphasizes that the displacement of elected local governments by emergency managers is taking place in poor and minority cities.

The appointment of an emergency manager complicates the assignment of accountability for key decisions and also raises serious questions of democratic authority. Not only were Flint residents given contaminated water, but they also had no real political say in the matter.

### B. From DWSD to FWTP

In April of 2013, the City Council voted to approve the Flint emergency manager's decision to join the Karegnondi Water Authority (KWA) instead of DWSD.<sup>41</sup> KWA was created to provide a water supply pipeline from Lake Huron.<sup>42</sup> The City's decision to use KWA prompted DWSD to provide notice of intent to end its contract with Flint in April 2014.<sup>43</sup>

The City of Flint and the City of Detroit, which were both under emergency management control during this time, could not agree on means of providing water service to Flint after April 2014 until KWA was fully operational.<sup>44</sup> Flint thus began using its emergency back-up water supplier, FWTP, on a full-time basis.<sup>45</sup>

The switch to Flint River water was done without adequate preparation of staff, proper testing of the water, or proper plant upgrades.<sup>46</sup> Sampling of the water to assure it met applicable water safety standards was done improperly, leading to likely violations of the Safe Drinking Water Act (SDWA).<sup>47</sup>

FWTP did not properly treat the water for corrosion under the standards outlined in 40 C.F.R. § 141.82.<sup>48</sup> The Michigan Department of Environmental Quality (MDEQ) erroneously decided the corrosion control standards set by the EPA Lead and Copper Rule and the Safe Drinking Water Act were not required of FWTP until after two six-month monitoring periods elapsed.<sup>49</sup> There were three main problems with FWTP's initial treatment after the switch to the Flint River supply was made. First, they failed to treat the water with an orthophosphate, which decreases corrosiveness and protects the nat-

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*Id.* at 590–91 (footnotes omitted); *see also* Lora Krsulich, Note, *Polluted Politics*, 105 CALIF. L. REV. 501, 526–28 (2017) (discussing emergency manager laws and disparate impact on minority communities).

41 FWATF FINAL REPORT, *supra* note 1, at 16.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *See id.* at 18; *see also* 42 U.S.C. § 300f-j (2012) [hereinafter SDWA]. Contrary to requirements of the Lead and Copper Rule (LCR), the Flint Utilities Department failed to select high-risk homes for testing. Flint also employed sampling techniques such as testing preflushed lines and using narrow-mouthed bottles, that while “possibly technically permissible,” failed to maximize the potential for detection. FWATF FINAL REPORT, *supra* note 1, at 29, 44. These sampling techniques were implemented under the guidance of MDEQ. *Id.*

48 *See* FWATF FINAL REPORT, *supra* note 1, at 22, 23 n.25, 44.

49 *Id.* at 16, 18.

ural mineral layer built over lead pipes that prevents leaching.<sup>50</sup> Second, they failed to properly monitor and treat the pH of the water, which decreased from 8 in December of 2014 to the more acidic value of 7.3 in August 2015; in comparison, the City of Boston maintains a pH of 9.6 as a part of its corrosion control plan.<sup>51</sup> Third, chloride based flocculants were added to a water source that already had a high concentration of chloride, which increased the corrosiveness of the water.<sup>52</sup>

The residents of Flint immediately complained that the FWTP water smelled, looked, and tasted bad.<sup>53</sup> Citizen complaints were ignored, and evidence of the water contamination was dismissed.<sup>54</sup> Even after there was no serious doubt of the water contamination, delays in addressing the dire situation persisted.<sup>55</sup>

### C. Contamination

The FWTP water *was* bad. In fact, it was outrageously bad. The contamination included *E. coli* and “disinfection by-products.”<sup>56</sup> Water corrosiveness leached lead from pipes and fixtures,<sup>57</sup> and increased the likelihood of *Legionella* contamination.<sup>58</sup>

The Lead and Copper Rule (LCR), promulgated by the EPA under the SDWA, regulates the quantity of lead in potable water.<sup>59</sup> The LCR does not provide a maximum contaminant level (MCL) for lead, because even miniscule amounts of lead in potable water are unsafe.<sup>60</sup> The LCR sets the lead action level, the concentration of lead at which corrective action is required,<sup>61</sup> at the point where more than 10% of samples collected during

50 Michael Torrice, *How Lead Ended Up in Flint’s Tap Water*, 94 CHEMICAL & ENGINEERING NEWS 7 (2016).

51 *Id.*

52 *Id.* The ferric chloride was added to coagulate organic matter in an attempt to reduce the levels of byproducts formed by chlorine disinfectant reacting with organic matter. *Id.*

53 FWATF FINAL REPORT, *supra* note 1, at 16.

54 *Id.* at 1.

55 *Id.* at 16–21.

56 *Id.* at 16.

57 See CHINARO KENNEDY ET AL., CTR. FOR DISEASE CONTROL AND PREVENTION, BLOOD LEAD LEVELS AMONG CHILDREN AGED <6 YEARS—FLINT, MICHIGAN, 2013–2016 (2016), <http://dx.doi.org/10.15585/mmwr.mm6525e1> (confirming elevated levels of lead in children after the shift to the Flint River water).

58 FWATF FINAL REPORT, *supra* note 1, at 24–26.

59 40 C.F.R. §§ 141.80–91 (1995); *see also* FWATF FINAL REPORT, *supra* note 1, at 22, 49. Michigan’s state Safe Drinking Water Act provides the state authority to regulate drinking water and enables the EPA to delegate implementation of the federal SWDA to MDEQ, but the EPA retains an obligation to act when a public water system fails to comply with federal standards. *Id.* at 48–49.

60 Sean Monaghan, *Lead in Drinking Water: Are We Looking in the Right Places?*, 2016 N.J. LAW. 42, 43 (2016).

61 *Id.* (citing 40 C.F.R. § 141.80(c)85).

any monitoring have a lead concentration exceeding 0.015 mg/L (fifteen parts per billion—“ppb”).<sup>62</sup>

A violation of the lead action level triggers requirements to implement applicable source water treatment, provide public education materials, and sample tap water upon a customer’s request.<sup>63</sup> If the concentration of lead does not fall below the lead action level after the implementation of corrosion control and source water treatment, then lead service lines must be replaced.<sup>64</sup> Large systems serving over 50,000 people either must follow corrosion control treatment steps set forth in 40 C.F.R. § 141.91(d),<sup>65</sup> or be deemed to have optimized corrosion control treatment under § 141.81(b)(2)<sup>66</sup> or (b)(3).<sup>67</sup>

MDEQ misinterpreted the requirements of the LCR.<sup>68</sup> It wrongly advised that corrosion control did not need to be implemented upon commencement of full-time FWTP operation.<sup>69</sup> Rather, it advised that corrosion control needed to be implemented only *after* the two six-month monitoring periods were completed.<sup>70</sup> Regardless of this initial mistake, the results of the first six-month monitoring period, which placed the ninetieth percentile lead sample at six ppb, would have disqualified the system from being deemed optimized for corrosion control without the implementation of steps set forth in § 141.81; yet MDEQ still failed to require the appropriate measures for Flint’s water.<sup>71</sup> Additionally, the sampling methods Flint used likely underestimated the lead concentration in the water.<sup>72</sup> The City instructed residents to pre-flush taps before collecting samples, which minimizes lead capture in the samples.<sup>73</sup> Although this is not explicitly prohibited in the LCR, “it negates the intent of the rule to collect compliance samples under

62 § 141.80(c)(1).

63 § 141.80(e)–(g); Monaghan, *supra* note 60, at 43.

64 § 141.84(a).

65 § 141.91(d).

66 The system must demonstrate “to the satisfaction of the State that it has conducted activities equivalent to the corrosion control steps.” § 141.81(b)(2).

67 § 141.81(b)(3) (citing § 141.89(a)(1)(ii)). Results of tap water and source water monitoring must demonstrate for two consecutive six-month monitoring periods that the difference between lead levels in tap and source water is less than the Practical Quantitation Level of 0.005 mg/L.

68 FWATF FINAL REPORT, *supra* note 1, at 16.

69 *Id.*

70 *Id.*

71 *Id.* at 28–29.

72 Memorandum from Miguel A. Del Toral, Regulations Manager, Ground Water and Drinking Water Branch, EPA on High Lead Levels in Flint Michigan—Interim Report to Thomas Poy, Chief, Ground Water and Drinking Water Branch, EPA (June 24, 2015) [hereinafter Del Toral Memo].

73 *Id.* The EPA expressed this concern to MDEQ, which “indicated that this practice is not prohibited by the LCR and continue[d] to retain the ‘pre-flushing’ recommendation in their lead compliance sampling guidance to public water systems in Michigan.” *Id.*

‘worst-case’ conditions.”<sup>74</sup> Flint did not properly select high-risk homes for sampling, as required by the rule.<sup>75</sup> The high corrosivity of the improperly treated Flint River water caused lead to leach into potable water distributed to residents.<sup>76</sup> Lead is a neurotoxin and probable human carcinogen that affects children more severely than adults;<sup>77</sup> children may absorb 40% to 50% of orally ingested water-soluble lead, whereas adults only absorb 3% to 10%.<sup>78</sup> Virginia Tech professor Marc Edwards’ survey of lead concentration in Flint’s water indicated lead levels in excess of the lead action level,<sup>79</sup> and water samples from the home of Flint citizen Lee-Anne Walters had extremely high lead concentrations ranging from 200 to 13,200 ppb, almost 900 times the action level of fifteen ppb.<sup>80</sup> The proportion of children with elevated blood lead levels increased after April 2014, when Flint switched from DWSD to FWTP.<sup>81</sup>

Although lead service lines are no longer installed, many remain in place in areas with older infrastructure.<sup>82</sup> Ten to eighty percent of the Flint water distribution system is estimated to contain lead service lines.<sup>83</sup> Optimal corrosion control measures are used to prevent lead and other harmful substances leaching from service lines into drinking water. For purposes of the LCR, the optimal corrosion control measure is defined as the “corrosion control treatment that minimizes the lead and copper concentrations at users’ taps while insuring that the treatment does not cause the water system to violate any national primary drinking water regulations.”<sup>84</sup> Corrosion control measures include adjusting alkalinity and pH and adding phosphate corrosion inhibitors, which are chemicals containing orthophosphate.<sup>85</sup> Phosphate corrosion inhibitors help form a passivation layer over the surface

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74 *Id.*; cf. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP’T OF HEALTH AND HUMAN SERVS., TOXICOLOGICAL PROFILE FOR LEAD 4 (2007) [hereinafter U.S. DHHS] (“If one is not certain whether an older building contains lead pipes, it is best to let the water run a while before drinking it so that any lead formed in the pipes can be flushed out.”).

75 FWATF FINAL REPORT, *supra* note 1, at 44.

76 *See id.* at 16.

77 U.S. DHHS, *supra* note 74, at 8–10.

78 Mona Hanna-Attisha et al., *Elevated Blood Lead Levels in Children Associated with the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response*, 106 AM. J. PUB. HEALTH 283, 284 (2016).

79 The ninetieth percentile of Edwards’ 252 Flint water samples was twenty-five ppb, with 100 samples containing concentrations exceeding five ppb. FWATF FINAL REPORT, *supra* note 1, at 51.

80 Del Toral Memo, *supra* note 72, at 4. The samples also contained very high levels of iron. *Id.* at 3.

81 FWATF FINAL REPORT, *supra* note 1, at 32; Hanna-Attisha et al., *supra* note 78, at 283.

82 Hanna-Attisha et al., *supra* note 78, at 284.

83 *Id.* at 283.

84 40 C.F.R. § 141.2 (2007).

85 EPA, OPTIMAL CORROSION CONTROL TREATMENT EVALUATION TECHNICAL RECOMMENDATIONS FOR PRIMACY AGENCIES AND PUBLIC WATER SYSTEMS 25 (2016) [hereinafter EPA

of the metal by reacting with lead to form insoluble compounds.<sup>86</sup> The effectiveness of orthophosphate depends upon factors such as the pH and ionic strength of the solution, and the presence of other metals in the existing corrosion scale.<sup>87</sup> DWSD water, which is considered optimized for corrosion control treatment, is treated with orthophosphate.<sup>88</sup> In order to cut costs, Flint water was not treated with an orthophosphate inhibitor.<sup>89</sup>

The Flint River water had a much higher chloride-to-sulfate mass ratio (CSMR) than the DWSD water.<sup>90</sup> CSMR is used to measure corrosivity to lead.<sup>91</sup> A high ratio represents a large concentration of chloride with respect to sulfate compounds and leads to higher rates of lead corrosion.<sup>92</sup> A lower ratio is preferable because sulfates combine with lead to form an insoluble protective layer on the inside of pipes, whereas chloride breaks down this protective layer by forming a soluble complex with lead.<sup>93</sup> The CSMR is positively correlated with ninetieth percentile lead concentration.<sup>94</sup> Corrosion is a significant concern when the CSMR exceeds 0.58.<sup>95</sup> The CSMR of Flint distribution system water was measured at 1.6 after the switch, as compared to a much lower ratio of 0.45 before the switch.<sup>96</sup>

In August of 2014, *E. coli* and total coliform bacteria were detected in violation of the SDWA.<sup>97</sup> In response to the bacterial contamination, FWTP

OCCT]; Marc Edwards et al., *Desktop Guidance for Mitigating Pb and Cu Corrosion By-products*, 91 J. AM. WATER WORKS ASS'N 66, 74 (1999).

86 EPA OCCT, *supra* note 85, at 25. The LCR defines *corrosion inhibitor* as “a substance capable of reducing the corrosivity of water toward metal plumbing materials, especially lead and copper, by forming a protective film on the interior surface of those materials.” 40 C.F.R. § 141.2.

87 EPA OCCT, *supra* note 85, at 25.

88 FWATF FINAL REPORT, *supra* note 1, at 16; *see also* Mark Edwards et al., RAPID: Synergistic Impacts of Corrosive Water and Interrupted Corrosion Control on Chemical Microbiological Water Quality: Flint at D-1 (2015), <http://flintwaterstudy.org/wp-content/uploads/2015/08/rapid-proposal-final.pdf>.

89 Edwards et al., *supra* note 88, at D-1.

90 Hanna-Attisha et al., *supra* note 78, at 283. The CSMR for Flint River water was 1.6, compared to 0.45 for DWSD. Edwards et al., *supra* note 88, at D-1; *see also* Torrice, *supra* note 50.

91 Edwards et al., *supra* note 88, at D-1.

92 *See* CAROLINE NGUYEN ET AL., WATER RES. FOUND., IMPACT OF CHLORIDE: SULFATE MASS RATIO (CSMR) CHANGES ON LEAD LEACHING IN POTABLE WATER XXIX (2010), <http://www.waterrf.org/publicreportlibrary/4088.pdf>.

93 *Id.*

94 *See* Marc Edwards & Simoni Triantafyllidou, *Chloride-to-Sulfate Mass Ratio and Lead Leaching to Water*, 99 J. AM. WATER WORKS ASS'N 96, 98 (2007).

95 *See id.* (noting that in a study of a subset of utilities, 100% of the utilities with CSMRs under 0.58 were in compliance with the lead action limit, compared to 36% of utilities with CSMRs above 0.58).

96 FWATF FINAL REPORT, *supra* note 1, at 17; *see also* Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016), <http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis>.

97 Kennedy, *supra* note 96.

began to use more chlorine disinfectant in the water.<sup>98</sup> In January of 2015, the level of total trihalomethanes (TTHM), a disinfectant byproduct created by a reaction between chlorine and organic matter, exceeded the MCL, which resulted in another SDWA violation.<sup>99</sup> To reduce the level of disinfectant byproduct in the water, the City of Flint used ferric chloride to coagulate organic matter.<sup>100</sup> The EPA recommends that utilities examine the potential impacts of treatment changes affecting the CSMR on lead concentration, citing systems with a CSMR of greater than 0.2 but less than 0.5 of significant concern and a CSMR of greater than 0.5 of serious concern.<sup>101</sup> The addition of ferric chloride to drinking water can increase the CSMR, leading to increased corrosion of lead.<sup>102</sup>

The switch to FWTP may also have increased the likelihood of *Legionella* contamination, contributing to Legionellosis outbreaks in 2014 and 2015.<sup>103</sup> Legionellosis, infections caused by *Legionella* bacteria, can range from a mild febrile illness to a severe form of pneumonia referred to as Legionnaires' disease.<sup>104</sup>

For several years preceding the water source change, the annual tally of Legionellosis cases in Genesee County remained below ten.<sup>105</sup> From June 2014 to March 2015 there were forty-five cases resulting in five deaths, and from May 2015 to October 2015 there were forty-three more cases resulting in four deaths.<sup>106</sup> Around a third of the patients were exposed to FWTP drinking water, and many were potentially exposed in healthcare facilities.<sup>107</sup> The conditions in self-contained air supply systems such as healthcare facilities can foster the growth of *Legionella*, and ill, advance-aged, or immune-compromised individuals are particularly susceptible to *Legionella* infections.<sup>108</sup>

The FWATF noted that “the pattern of an abrupt increase in cases of Legionellosis in Genesee County in 2014–15 that occurred after a shift to the Flint River strongly implicates the water source and treatment of the water as

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98 *Id.*

99 *Id.*

100 Torrice, *supra* note 50.

101 NGUYEN ET AL., *supra* note 92, at xxiv.

102 See Edwards & Triantafyllidou, *supra* note 94, at 108–09 (“A switch from sulfate-containing coagulants to those containing chloride can increase CSMR, which in turn can create a lead hazard in water. Problems can arise even in systems in which solder has been passivated over a period of decades with orthophosphate inhibitor.”); Del Toral Memo, *supra* note 72, at 2. Galvanic corrosion, a form of corrosion important in drinking water systems, occurs when metals with sufficiently dissimilar potentials couple. The anode, the more electronegative metal, is oxidized. EPA OCCT, *supra* note 85, at 9.

103 See FWATF FINAL REPORT, *supra* note 1, at 24–25.

104 WORLD HEALTH ORG., LEGIONELLA AND THE PREVENTION OF LEGIONELLOSIS 1 (Jamie Bartram et al. eds., 2007) [hereinafter WHO].

105 FWATF FINAL REPORT, *supra* note 1, at 24.

106 *Id.* at 24–25.

107 *Id.*

108 See WHO, *supra* note 104, at 2, 12, 95 (revealing elevated attack rate of Legionnaires' disease in hospitals); see also FWATF FINAL REPORT, *supra* note 1, at 24.

a potential cause of higher Legionellosis case incidence.”<sup>109</sup> A genetic link between *Legionella* bacteria found at Flint’s McLaren Hospital and three cases of Legionnaires’, along with other evidence, suggested a connection between the switch in water source and the outbreak.<sup>110</sup> The Michigan Department of Health and Human Services (MDHHS) and the Genesee County Health Department (GCHD) failed to notify the public of the Legionellosis outbreak in a timely manner.<sup>111</sup>

FWTP water may have contributed to the Legionellosis outbreak via multiple pathways. One suggested mechanism is the disruption of the biofilm on the surface of lines and structures during flushing of water mains conducted in response to complaints about water quality.<sup>112</sup> Biofilms are formed when microorganisms adhere to surfaces, typically through the secretion of a polysaccharide substance referred to as the glycocalyx.<sup>113</sup> The movement of water over the surface can cause parts of the biofilm to dislodge and resuspend in the water.<sup>114</sup> After receiving complaints regarding the color of the water, the Flint Utilities Department flushed water mains. This may have disrupted the biofilm on the surface of water mains and service lines and released bacteria, including *Legionella*, back into the water to recolonize other areas in the distribution system.<sup>115</sup>

The increase in water corrosivity may have played a role in the Legionellosis outbreak in addition to the lead contamination.<sup>116</sup> Scale and corrosion foster the formation of biofilms by increasing surface area.<sup>117</sup> This creates micro-niches that shield organisms from disinfectants, and leads to greater concentrations of nutrients such as iron.<sup>118</sup> Iron corrosion can also promote *Legionella* colonization by reducing the amount of chlorine available to kill bacteria.<sup>119</sup> The Larson Iron Corrosion Index, a measure of corrosivity to

109 FWATF FINAL REPORT, *supra* note 1, at 25.

110 See, e.g., Davit Otto Schwake et al., *Legionella DNA Markers in Tap Water Coincident with a Spike in Legionnaires’ Disease in Flint, MI*, 3 ENVTL. SCI. & TECH. LETTERS 311, 314 (2016); Karen Bouffard, *Hospital Ties Legionnaires’ to Flint Water*, DET. NEWS (Jan. 23, 2016), <http://www.detroitnews.com/story/news/politics/2016/01/22/legionnaires-bacteria-found-tests-mclaren-medical-centers-water/79183428/>; Steve Carmody, *New Tests Raise Questions About the Source of Legionnaires Disease Outbreak*, MICH. RADIO (Feb. 16, 2017), <http://michiganradio.org/post/new-tests-raise-questions-about-source-legionnaires-disease-outbreak>.

111 See FWATF FINAL REPORT, *supra* note 1, at 8.

112 *Id.* at 25; Del Toral Memo, *supra* note 72, at 2.

113 WHO, *supra* note 104, at 33.

114 *Id.*

115 FWATF FINAL REPORT, *supra* note 1, at 47.

116 WHO, *supra* note 104, at 36.

117 *Id.*

118 See *id.* (explaining that iron is a key nutrient for *Legionella* spp.); see also Schwake et al., *supra* note 110, at 313.

119 Schwake et al., *supra* note 110, at 313 (“Low levels of chlorine are consistent with expectations of corrosion-induced decay. . . . [I]t is well-known that disinfectant residual maintenance is critical for reducing risk of Legionnaires’ disease.”).

iron, was measured at 0.54 prior to the switch to Flint water and 2.3 after.<sup>120</sup> The Larson Index is the ratio of sulfate and chloride to bicarbonate,<sup>121</sup> with which the corrosion rate increases linearly.<sup>122</sup>

Other factors—such as water temperature and flow—can contribute to the presence of *Legionella* in water systems. Water temperature is a key factor to *Legionella* colonization of water distribution systems.<sup>123</sup> The distribution system water temperature of Flint River water was higher than that of DWDS water.<sup>124</sup> Low water flow and stagnation also affect the growth of *Legionella* in water distribution systems.<sup>125</sup> Water use dropped with Flint's population, which meant that water spent a relatively long time in the distribution system.<sup>126</sup> This stagnation likely fostered conditions conducive to *Legionella* growth in Flint's water.<sup>127</sup>

#### D. Blame

The MDEQ, the state-appointed emergency managers, and Michigan Governor Rick Snyder failed to stem the flow of contaminated water until October 2015, when Flint finally was reconnected to DWSD (now called the Great Lakes Water Authority) and safe water.<sup>128</sup> MDEQ continued to claim the FWTP water was safe, and the Governor's office ignored suggestions from senior staff members to act earlier.<sup>129</sup>

In early December 2015, the City began additional treatment of the water in the city system, in an attempt to mitigate effects of the contamination.<sup>130</sup> On December 14, 2015, the City declared a state of emergency.<sup>131</sup> On January 14, 2016, the Governor declared a state of emergency and requested federal aid.<sup>132</sup> On January 16, 2016, President Barack Obama declared a state of national emergency in Flint.<sup>133</sup> On January 21, 2016, the

120 Edwards et al., *supra* note 88, at D-1.

121 Mark W. LeChevallier et al., *Examining the Relationship Between Iron Corrosion and the Disinfection of Biofilm Bacteria*, 85 J. AM. WATER WORKS ASS'N 111, 120 (1993).

122 Edwards et al., *supra* note 88, at D-1.

123 See FWATF FINAL REPORT, *supra* note 1, at 33 (recommending temperatures for cold water distribution below 25°C and ideally below 20°C).

124 Schwake et al., *supra* note 110, at 313 (“It is noteworthy that distribution system water temperature increased during Flint River water use compared to prior experience with Detroit water (treatment plant effluent mean of 20.9°C in August 2013 versus 23.3–24.0°C the two following years).”).

125 See WHO, *supra* note 104, at 62.

126 See FWATF FINAL REPORT, *supra* note 1, at 47.

127 *Id.*

128 *See id.* at 38.

129 *Id.*

130 EPA, SDWA EMERGENCY ORDER FOR FLINT, MICH., EPA Doc. No. SDWA 05-2015-000, at 5 (Jan. 21, 2016), [https://www.epa.gov/sites/production/files/2016-01/documents/1\\_21\\_sdwa\\_1431\\_emergency\\_admin\\_order\\_012116.pdf](https://www.epa.gov/sites/production/files/2016-01/documents/1_21_sdwa_1431_emergency_admin_order_012116.pdf).

131 *Id.*

132 *Id.*

133 *Id.*

EPA issued an Emergency Order pursuant to the SWDA compelling state officials to take specific steps to assure the safety of the public water system.<sup>134</sup>

Isolating blame in this case was extremely difficult.<sup>135</sup> In terms of legal liability, it obviously matters what decisions caused the specific harms alleged. The decision to use Flint River water, for example, was not the same as the decision to use it without proper treatment, or the decision to continue using it in the face of accumulating concerns over its safety.

Other actors played a role in this debacle, including MDHHS, the City of Flint, GCHD, and the Federal Environmental Protection Agency (EPA), which exercises ultimate control over Michigan environmental standards enforcement.<sup>136</sup> At no level—local, county, state, or federal—did the relevant government actors assure adequate water quality safeguards were in

134 *Id.* at 11–15.

135 See, e.g., Lenny Bernstein, *EPA's McCarthy Stands Up to Claims Her Agency Is Responsible for Flint Water Crisis*, WASH. POST (Mar. 17, 2016), <http://wpo.st/Yb222> (reporting on McCarthy's testimony before Congress on EPA involvement in water crisis); Lenny Bernstein & Brady Dennis, *Flint's Water Crisis Reveals Government Failures at Every Level*, WASH. POST (Jan. 24, 2016), <http://wpo.st/s5a12> (discussing multiple levels of fault); Lenny Bernstein, *Michigan Governor to Blame State Environmental Agency for Flint Lead Water Crisis*, CHI. TRIB. (Mar. 16, 2016), <http://www.chicagotribune.com/news/nationworld/midwest/ct-flint-lead-water-crisis-rick-snyder-20160316-story.html> (reporting on Governor Snyder's statement that he would testify before Congress that "systemic failures" at Michigan's environmental protection agency led to the poisoning of Flint's water supply); Anna Clark, *The Struggle for Accountability in Flint*, BOS. REV. (Feb. 2, 2016), <http://bostonreview.net/us/anna-clark-flint-water-public-records> (discussing the complexities of blame and lack of transparency in Michigan); Karoun Demirjian, *Lawmakers Wrestle With Who Is Responsible for Flint Water Crisis*, WASH. POST (Feb. 3, 2016), <http://wpo.st/u3a12> (discussing congressional hearings on crisis); Louis Jacobson, *Who's to Blame for the Flint Water Crisis?*, POLITIFACT (Feb. 15, 2016), <http://www.politifact.com/truth-o-meter/article/2016/feb/15/whos-blame-flint-water-crisis/> (discussing the various actors and their alleged roles in the crisis); Merrit Kennedy, *Independent Investigators: State Officials Mostly to Blame for Flint Water Crisis*, NPR (Mar. 23, 2016), <http://www.npr.org/sections/thetwo-way/2016/03/23/471585633/independent-investigators-state-officials-mostly-to-blame-for-flint-water-crisis> (reporting on the findings of FWATF); Cameron McWhirter, *Michigan Officials Responsible for Flint Water Crisis, Panel Finds*, WALL ST. J. (Mar. 23, 2016), <http://www.wsj.com/articles/michigan-officials-responsible-for-flint-water-crisis-governor-appointed-panel-finds-1458762906> (reporting on FWA Task Force Report); Oliver Milman, *Flint Blame Game: Former EPA Manager Says State Officials at Fault for Water Crisis*, GUARDIAN (Mar. 15, 2016), [https://www.theguardian.com/us-news/2016/mar/15/flint-water-crisis-epa-michigan-congressional-hearing?CMP=share\\_btn\\_link](https://www.theguardian.com/us-news/2016/mar/15/flint-water-crisis-epa-michigan-congressional-hearing?CMP=share_btn_link) (reporting on EPA official's claim that Michigan officials ignored warnings from the EPA that the water may be unsafe); Josh Sanburn, "Series of Government Failures" Blamed for Flint Water Crisis, TIME (Mar. 23, 2016), <http://time.com/4269300/flint-task-force-report-water-crisis/?xid=emailshare> (discussing findings of FWATF); see also *Flint Drinking Water Documents*, EPA, <http://www.epa.gov/mi/flint-drinking-water-documents> (last visited Oct. 19, 2017).

136 See Amanda Emery, *EPA Didn't Respond to Flint's Water Crisis as Soon as It Could Have, Report Says*, FLINT J. (Feb. 18, 2016), [http://www.mlive.com/news/flint/index.ssf/2016/02/epa\\_didnt\\_respond\\_to\\_flints\\_wa.html](http://www.mlive.com/news/flint/index.ssf/2016/02/epa_didnt_respond_to_flints_wa.html).

place during the time the water supply was contaminated.<sup>137</sup> Coordination problems, improper testing and training, resource deficiencies, inadequate and improperly enforced legal standards, and extremely poor judgment combined to create a man-made environmental and health disaster.<sup>138</sup>

Moreover, Michigan law made it difficult to determine who was ultimately responsible for the actions of the emergency manager. Some blamed the City of Flint. Yet the City of Flint's authority—and thus its responsibility—was stripped by effectively placing it into receivership.<sup>139</sup> The City had no practical control over the emergency manager's decisions and was reduced to rubber-stamping rather than independent decisionmaking.<sup>140</sup> Citizens of Flint could also deny democratic accountability, since the Emergency Managers were imposed on them rather than voted into office.<sup>141</sup>

Plaintiffs alleged that blame should be assigned as follows:

- Defendants Wyant, Shekter Smith, Rosenthal, Busch, Cook, and Prysby “participated in the decisions that deliberately created, increased and prolonged the public health crisis at issue in this case and participated in the concealment of the harm.”<sup>142</sup>
- Defendant Wurfel “was responsible for the deliberately misleading and inaccurate communications that increased and prolonged the public health crisis at issue in this case and . . . [made] false statements and provid[ed] false assurances which caused harm to Plaintiffs.”<sup>143</sup>
- The MDEQ Defendants, among others, participated in the decisions to “(1) use the toxic Flint River as a primary drinking source; (2) conceal the resulting public health crisis; and (3) exacerbate and prolong the harm by failing to effectively remediate the public health crisis they created and attempted to conceal.”<sup>144</sup>
- The MDEQ Defendants (inferentially referenced as “the State”), each “created a dangerous public health crisis for the users of Flint tap water when . . . [they] and Kurtz and Earley ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the WTP was not ready.”<sup>145</sup>
- Further, for at least a year prior to June 2012, the State, including these MDEQ Defendants, knew that using Flint River water was dangerous and could cause serious public health issues. (“January 23, 2013: Mike Prysby/MDEQ e-mails colleague Liane Shekter Smith and

137 Demirjian, *supra* note 135.

138 *Id.*

139 *See supra* notes 37–38 and accompanying text.

140 *See supra* notes 37–38 and accompanying text.

141 *See supra* notes 37–38 and accompanying text.

142 *Mays Complaint, supra* note 3, at 8–9.

143 *Id.* at 11.

144 *Id.* at 4–5.

145 *Id.* at 21.

others about feasibility of Flint switching to Flint River, highlighting water quality concerns.”<sup>146</sup>)

- On April 16, 2014, Michael Glasgow, the City of Flint’s water treatment plant’s water quality supervisor informed the MDEQ that the WTP was not fit to begin operations. (“Glasgow wrote Prysby and Busch of the MDEQ, that ‘ . . . I have people above me making plans to distribute water ASAP. I was reluctant before . . . I do not anticipate giving the OK to begin sending water out anytime soon. If water is distributed from this plant in the next couple of weeks, it will be against my direction.’”<sup>147</sup>)
- On January 21, 2015, State officials ordered water coolers to be installed in State buildings operating in Flint yet did nothing to similarly protect the people of Flint. (“MDEQ staff (Prysby, Shekter Smith, Benzie, numerous others) communicate via e-mail re: decision to provide water coolers at Flint’s State Office building. Some discussion re: how this decision will affect Flint residents’ perceptions of drinking water safety, and how the decision will ‘make it more difficult . . . for ODWMA staff.’”<sup>148</sup>)
- By the end of January 2015, the Governor’s office was fully aware of the public health emergency caused by the rise in *Legionella* bacteria found in the Flint River and launched a cover-up of the public health crisis. (“January 30, 2015: Brad Wurfel/MDEQ e-mails Dave Murray, Governor Snyder’s deputy press secretary, re: *Legionella*, saying said he didn’t want MDEQ Director Wyant ‘to say publicly that the water in Flint is safe until we get the results of some county health department trace back work on 42 cases of Legionellosis in Genesee County since last May.’”<sup>149</sup>)
- On June 24, 2015, Miguel Del Toral of the EPA prepared a report warning of high lead levels in Flint water. This report was shared with Liane Shekter Smith, Patrick Cook, Stephen Busch, and Michael Prysby.<sup>150</sup> Yet these Defendants completely disregarded this critical information.<sup>151</sup>

A particularly helpful roadmap to determining who did what to whom was the report of an independent five-member body—the FWATF—which was appointed by Governor Rick Snyder to investigate the disaster and make recommendations. Its final report, issued in March of 2016, documented the multiple ways in which each of the foregoing government actors failed Flint.<sup>152</sup>

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146 *Id.* at 21 n.5.

147 *Id.* at 20 n.4 (first alteration in original).

148 *Id.* at 24 n.14 (alteration in original).

149 *Id.* at 25 n.17.

150 *Id.* at 29–30.

151 Plaintiffs’ Omnibus Response to the MDEQ Defendants’ Motions to Dismiss at 7–8, *Mays v. Snyder*, 2017 WL 445637 (E.D. Mich. Feb. 2, 2017) (No. 15-cv-14002).

152 FWATF FINAL REPORT, *supra* note 1.

The report concluded that the State of Michigan, under the leadership of Governor Rick Snyder, was “fundamentally accountable” because agencies charged with enforcing drinking water regulations and protecting public health had failed to do their job.<sup>153</sup> It specifically slammed the Michigan Department of Environmental Quality and the Michigan Department of Health and Human Services for working to “deride[ ] and dismiss[ ]” attempts to bring to light concerns over unsafe water, lead contamination, and a reported increase in cases of Legionnaires’ disease.<sup>154</sup>

Its recommendations included rewriting of water quality laws, tighter enforcement of existing standards, engagement of highly trained experts, and adoption of a coordinated governance framework for better identifying and responding to environmental emergencies.<sup>155</sup> Corrosion control measures alone, it noted, would not solve the problem of water contamination.<sup>156</sup> Lead service lines needed to be replaced, and private water consumers also would have to cooperate to assure water safety.<sup>157</sup>

## II. THE CIVIL LAWSUITS

Multiple civil lawsuits were filed in Genesee County Circuit Court,<sup>158</sup> the Michigan Court of Claims,<sup>159</sup> and the United States District Court in Detroit.<sup>160</sup> Claims included tort claims, claims of professional negligence, and constitutional arguments. In some of the cases, plaintiffs sought class action certification.<sup>161</sup> In all of them, plaintiffs faced formidable procedural and substantive obstacles.<sup>162</sup>

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153 *Id.* at 38.

154 *Id.* at 37.

155 *Id.* at 10–14.

156 *Id.* at 153–54.

157 *Id.* at 53.

158 *See, e.g.*, Class Action Complaint, *Mason v. Lockwood, Andrews & Newman, P.C.*, No. 16-106150 (Mich. Cir. Ct. Jan. 25, 2016). The firm is an engineering services and program management company that oversaw the refit of Flint’s aging Water Treatment Plant when it separated itself from the Detroit Water and Sewerage Department in 2014. *Id.* at 5. The lawsuit alleged that the company knew Flint River water needed anticorrosion treatment chemicals, yet did not require them or test the water coming out of taps before completing the switch. *Id.* Several related suits were filed in Genesee County Court. *See, e.g.*, *Walters v. Lockwood, Andrews & Newman, P.C.*, No. 16-106326 (Mich. Cir. Ct. Mar. 3, 2016); *Mays v. City of Flint*, No. 16-106112 (Mich. Cir. Ct. Jan. 19, 2016); *Collins v. Snyder*, No. 16-106077 (Mich. Cir. Ct. Jan. 7, 2016); Order Certifying this Action as Class Action, *Shears v. Bingaman*, No. 14-103476 (Mich. Cir. Ct. Aug. 31, 2015), available at <https://www.scribd.com/document/277278159/Flint-Water-Class-Cerf08312015>.

159 *Mays v. Snyder*, No. 16-000017 (Mich. Ct. Cl. Oct. 26, 2016).

160 *Mays* Complaint, *supra* note 3.

161 *See, e.g., id.*

162 Legal experts recognize this and some stated publicly that the suits were not likely to yield sufficient benefits for the parties or their counsel to be worth the expense and effort. *See* Lenny Bernstein & Brady Dennis, *Flint Water Crisis Victims Increasingly Turn to Courts but Face Big Obstacles*, WASH. POST (Feb. 10, 2016), <https://www.washingtonpost.com/national/health-science/flint-water-crisis-victims-increasingly-turn-to-courts-but-face>

The focus here is on *Mays v. Snyder*, which was filed in federal district court against government officials, including the governor and other state actors, and on the constitutional arguments made in these cases.<sup>163</sup> We analyze only the state actor claims because they had the greatest potential significance for other disputes, given the State's greater resources and ability to respond to water crises statewide. Yet we recognize that a web of actors created this crisis. We also discuss and critique the preemption argument based on the SWDA that ultimately—and incorrectly—persuaded the district judge to dismiss the civil rights claims. Finally, we acknowledge what many experts in civil rights litigation have stressed: principles of sovereign and official immunity as well as judicial reluctance to take on complex constitutional tort issues make it incredibly difficult to hold officials accountable in safe water cases,<sup>164</sup> even if the substantive constitutional arguments discussed here were to prevail. We explain why this reluctance is tragic and unnecessary in cases where the governmental default is this shocking and profound.

### A. Consensus

Central facts in the federal lawsuits were uncontested. Indeed, the broad and unqualified concession in the State's brief in *Mays* is worth quoting: “*No one disputes that the Flint drinking water situation has detrimentally affected Flint residents, businesses, and public entities, and sparked significant health and safety concerns.*”<sup>165</sup>

But of course, hindsight perfects vision, and the relevant law focuses on what the responsible officials knew or should have known *ex ante*.<sup>166</sup> The law also generally—though not entirely—insulates officials from harms that do not rise to the level of a fundamental right. Finally, even *ex ante* foreseeable harmful consequences that befall a suspect class may not be a basis for equal protection liability if a rational, nonarbitrary reason for choosing the

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big-obstacles/2016/02/10/92abc9a2-cf67-11e5-abc9-ea152f0b9561\_story.html (“On the face of it, the lead scandal in Flint, Michigan, looks like it should be a billion-dollar mass tort,” said Nora Freeman Engstrom, a professor and expert on tort law at Stanford University. “You have a clear villain . . . and you have very sympathetic plaintiffs.” But, she said, “the most likely thing that happens to you in this country when you are negligently injured is you never see a penny.” (alteration in original)).

163 *Mays* Complaint, *supra* note 3.

164 The State of Michigan as such was immune. The parties sought remedies under 42 U.S.C. § 1983 against the specific government officials and were required to satisfy the statutory requirements of that Act.

165 State of Michigan, Governor Snyder, Andy Dillon, and Nick Lyon’s Brief in Support of Motion to Dismiss at 1, *Mays v. Snyder*, 2017 WL 445637 (E.D. Mich. Nov 13, 2015) (No. 15-cv-14002) [hereinafter *Mays* Motion to Dismiss] (emphasis added); *see also* Bernstein & Dennis, *supra* note 162.

166 For a discussion of judicial struggles with hindsight bias in constitutional cases, see Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 403 (2014).

ultimately harmful course of action can be asserted *ex post*.<sup>167</sup> Thus the uncontested facts were hardly dispositive of plaintiffs' claims about constitutional liability.

### B. *Dissensus*

The State and state officials moved to dismiss on several grounds, including arguments that the injuries were not state-caused, that 42 U.S.C. § 1983 requirements were not met, that federal laws preempted the § 1983 claims, and that the Eleventh Amendment barred aspects of the action.<sup>168</sup>

The defendants also assured the court that political responsiveness had begun in earnest and judicial sanctions were thus unnecessary. Specifically, they noted that the following steps had already been taken by state officials:

- Declaring a state of emergency, activating the State's Emergency Operations Center, and calling up the National Guard to assist with measures including door-to-door provision of bottled water, filters, replacement cartridges, and testing kits;
- Seeking federal emergency and disaster declarations, resulting in federal resources and at least \$5 million in federal funds to assist the people of Flint;
- Facilitating Flint's return to the Detroit water system through \$9.35 million in state funds, and immediately implementing other response actions, including lead testing to city residents;
- Approving an additional \$28 million overwhelmingly supported by the Michigan Legislature to aid Flint in combating the water crisis, with a focus on services for children with lead poisoning;
- Proposing an additional \$195 million in the state budget toward the crisis in Flint and \$165 million to address aging infrastructure statewide;
- Providing funds toward replacing lead service lines; and,
- Most recently, appropriating \$30 million to reimburse Flint residents for their water bills.<sup>169</sup>

The federal funding alluded to by the defendants vastly exceeded the State's \$5 million request.<sup>170</sup> The United States Senate moved to amend national legislation to assist Flint and also provide support for harbor mainte-

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167 See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271–80 (1979) (holding that foreseeable disparate impact of veteran's preference in employment did not violate equal protection rights of female workers).

168 See *Mays Motion to Dismiss*, *supra* note 165, at 1–2.

169 FWATF FINAL REPORT, *supra* note 1, at 20–27.

170 Water Resources Development Act of 2016, S. 2848, 114th Cong. § 7404 (2016). This federal aid was stalled when the government removed funding for Flint in order to reach an agreement during budget negotiations to prevent a shutdown of the United States government. See Stan Collender, *Shutdown Averted but Flint Still Waits*, DEMOCRACY (Sept. 30, 2016), <http://democracyjournal.org/arguments/shutdown-averted-but-flint-still-waits/>.

nance, dam construction, and water quality measures.<sup>171</sup> A House Bill also passed that would provide \$170 million in funding to Flint, and the bills went to a conference committee for reconciliation and in December 2016 a final version was approved that included \$120 million for Flint.<sup>172</sup>

Finally, the state actors attacked the constitutional claims for relief under equal protection and due process as legally inadequate.<sup>173</sup> In the following sections, we outline the constitutional arguments.

### C. Constitutional Claims

Relying on 42 U.S.C. § 1983,<sup>174</sup> plaintiffs raised substantive due process and equal protection claims. The substantive due process claims were that the state actors violated the plaintiffs' fundamental rights to bodily integrity and protection from state-created danger, as well as their right to protection from government conduct that shocks the conscience. The equal protection claims alleged that the harms to Flint residents were targeted harms based on race and poverty.

#### 1. Fundamental Rights

Two primary strands of substantive due process rights are relevant to the civil cases. One involves fundamental rights. The fundamental rights alleged in the Flint cases are not enumerated in the Constitution, but are allegedly protected through the Due Process Clauses.<sup>175</sup> They are "penumbral" liberty rights, like the rights to marital privacy, reproductive autonomy, and child-rearing decisions, which have been deemed so fundamental to an American sense of liberty that the courts will closely scrutinize government interference with them. The scope of these fundamental rights is vague and contested, but the existence of unenumerated fundamental rights is settled law.<sup>176</sup>

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171 S. 2848; see Coral Davenport, *With Nod to Flint Crisis, Senate Weighs a \$9 Billion Water Infrastructure Bill*, N.Y. TIMES (Sept. 7, 2016), [www.nytimes.com/2016/09/08/us/politics/senate-water-bill.html](http://www.nytimes.com/2016/09/08/us/politics/senate-water-bill.html). The Senate Bill included the following features: (1) Authorized \$20 million a year for five years to test schools and child care centers for lead. (2) Directed the Centers for Disease Control and Prevention to establish a lead exposure registry and provide health consultations to citizens who may suffer the effects of high lead levels. (3) Authorized \$10 million for childhood lead poisoning prevention efforts. (4) Required a report on ongoing investigations into the Flint drinking water situation and the government response. (5) Allowed for previous water infrastructure loans made to Flint and other cities to be forgiven if a threat of lead in a drinking water supply has prompted an emergency declaration by the president. See S. 2848.

172 See Safe Drinking Water Act Improved Compliance Awareness Act, H.R. 4470, 114th Cong. (2016).

173 See discussion of these arguments *infra* Section II.C.

174 Civil Rights Act of 1871, 42 U.S.C. § 1983 (2012).

175 *Mays* Complaint, *supra* note 3, at 1–2.

176 See E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 134–54 (2013).

The litigants in the Flint cases argued that established unenumerated rights support an implied right to bodily integrity and to state protection from harms from third parties.<sup>177</sup> They further asserted that both fundamental rights were violated in this case.

a. Third-Party Harms

Plaintiffs first alleged that state defendants violated the Fourteenth Amendment by failing to protect them from “risks, dangers, [and] dangerous situations.”<sup>178</sup> The State, along with the web of actors with whom it dealt, profoundly defaulted in its duties.<sup>179</sup> Moreover, the State alone had primary control over the applicable actors and dangers.<sup>180</sup> Even the EPA, which had ultimate authority over the MDEQ, could claim that the federal laws assigned primary power to the State of Michigan, as a matter of cooperative federalism.<sup>181</sup> The acts that caused the danger to Flint residents also were not unpredictable acts of private third parties, but acts by the emergency managers, the Governor, and other officials under state control.<sup>182</sup>

The state actors responded that due process imposes only negative limits on government action; it does not establish a positive right to life, liberty, or property.<sup>183</sup> An actionable state-created danger arises only if (1) the plaintiff and the state actor have a sufficiently direct relationship giving rise to a duty not to subject plaintiff to danger from a private, third party; and (2) the state actors were sufficiently culpable to be liable under a substantive due process theory.<sup>184</sup> In this case, the alleged misconduct was by government officials alone; no private third party was involved.

Government actors cannot be held liable for inaction, except in a few well-defined situations.<sup>185</sup> Liability for inaction occurs only where the inaction is egregious and the government has special responsibility for the peril created. For example, if the government assumes an affirmative duty to act through promises or action on which the victim relies, this may be sufficient.<sup>186</sup>

The state actors insisted that these criteria were not met because exposure to toxic water by government, not actions of a private third party, caused

177 *Mays Complaint*, *supra* note 3, at 1, 41–42.

178 *Id.* at 38.

179 FWATF FINAL REPORT, *supra* note 1, at 20–27.

180 *See id.*

181 *See id.*

182 *Mays Complaint*, *supra* note 3, at 18–19.

183 *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (noting that “[t]he Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security”).

184 *See Sperle v. Mich. Dep’t of Corr.*, 297 F.3d 483, 491 (6th Cir. 2002); *see also Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006).

185 *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 758–68 (2005); *DeShaney*, 489 U.S. at 201–02.

186 *See Kircher v. City of Jamestown*, 543 N.E.2d 443, 444 (N.Y. 1989) (requiring a “special relationship”).

their harms.<sup>187</sup> The state actors also noted that the decision to use the contaminated water was made by an emergency manager.<sup>188</sup> Under state law, they argued, the emergency manager's decisions were attributable to local government, not the State.<sup>189</sup> Finally, the plaintiffs could not show that the specific plaintiffs or members of the class they sought to represent had been targeted by the State or placed at risk of special danger. Plaintiffs did not allege that the state actors knew of or should have known the switch to Flint River water would hurt them in particular.<sup>190</sup>

b. Bodily Integrity

The plaintiffs asserted that they were denied their fundamental right of bodily integrity.<sup>191</sup> The state actors conceded that fundamental rights under due process include a right to bodily integrity under *Washington v. Glucksberg*.<sup>192</sup> But they insisted that this right should be construed narrowly, lest due process become “a font of tort law.”<sup>193</sup> They noted that other courts addressing similar arguments have held the right to bodily integrity did not embrace a right to clean water or a healthful environment.<sup>194</sup> Nor did it include the right to be “free from the introduction of an allegedly contaminated substance in the public drinking water.”<sup>195</sup> Thus, the state actors allegedly had no duty to protect plaintiffs from contaminated water under the Fourteenth Amendment. If any such federal duty did exist, it arose from the Safe Drinking Water Act, not the Constitution.<sup>196</sup>

Finally, the state actors denied that they had “deliberately and knowingly” violated plaintiffs’ constitutional right to bodily integrity.<sup>197</sup> They

187 *Mays* Motion to Dismiss, *supra* note 165, at 16.

188 *Id.*

189 See *Kincaid v. City of Flint*, 874 N.W.2d 193, 201 (Mich. Ct. App. 2015) (rejecting defendant’s argument that an act of the emergency manager is an act of the governor).

190 *Mays* Motion to Dismiss, *supra* note 165, at 17.

191 *Mays* Complaint, *supra* note 3, at 40–41.

192 *Mays* Motion to Dismiss, *supra* note 165, at 17–18 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

193 *Paul v. Davis*, 424 U.S. 693, 701 (1976) (“[S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.”); see also *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (noting that “the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended”).

194 *Mays* Motion to Dismiss, *supra* note 165, at 18–19 (first citing *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); then citing *In re Agent Orange Prods. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979); then citing *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974); then citing *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972); and then citing *Coshov v. City of Escondido*, 34 Cal. Rptr. 3d 19, 30 (Cal. App. 4th 2005)); see also Paul Finkelman, *Why Access to Water Was Never a “Right”: Historical Perspectives on American Water Law*, 18 WILLAMETTE J. INT’L L. & DISP. RESOL. 168 (2010).

195 *Coshov*, 34 Cal. Rptr. 3d. at 31.

196 SDWA, *supra* note 47.

197 *Mays* Motion to Dismiss, *supra* note 165, at 20 (internal quotation marks omitted).

were entitled to a “presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces.”<sup>198</sup> Even if their decisions—in hindsight—were gravely wrong, there was no evidence the state actors acted with a harmful purpose.<sup>199</sup> The conduct thus did not meet the high standard of knowing and deliberate indifference set by the Sixth Circuit Court of Appeals.<sup>200</sup>

The defendants characterized plaintiffs’ claims as a right to uncontaminated water, which would mean they were asserting a new, unenumerated fundamental right. Plaintiffs vigorously denied that this was their claim. Instead, they argued that the defendants engaged in the following, detailed conduct:

[They] affirmatively misrepresented and then deliberately concealed the truth from the public regarding, among other things: (a) their racially discriminatory decision to foist the switch to the unsafe Flint River from the Detroit Water and Sewerage department (“DWSD”) solely upon a predominantly African-American community; (b) their unpreparedness for the switch to the Flint River; (c) their knowledge of the corrosiveness of Flint’s water; (d) their knowledge that the failure to treat such water with a corrosion-control agent would result in lead and other toxic contaminants leaching from the pipes in the water distribution system, and, despite this knowledge, their decision not to treat the water with a corrosion-control agent; (e) their knowledge regarding the contamination of the drinking water with lead and other toxic substances; (f) their failure to properly test the water for lead contamination and their criminal tampering with test results and false reporting of lead levels in order to conceal their findings from the public; (f) [sic] their knowingly over-treating of the water with chlorine, resulting in contamination by dangerous trihalomethanes (THMs); (g) their deliberate failure to prepare for and properly treat the Flint River water resulted in dangerous levels of Legionella and E. coli bacteria to which Flint residents were exposed; (h) their deliberate, misleading, and false discounting to the public of the accuracy and validity of water testing and reports issued by Dr. Mark Edwards regarding the presence of high levels of lead in Flint’s drinking water, as well as their misleading discounting and misrepresentation of Dr. Mona Hanna-Attisha’s published findings that the switch to the water from the Flint River caused the increase in blood lead levels of children in Flint; and (i) their deliberate misleading of the public regarding the hazards of the lead in Flint’s drinking water despite

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198 *Collins*, 503 U.S. at 128.

199 *Mays* Motion to Dismiss, *supra* note 165, at 20 (citing *Range v. Douglas*, 763 F.3d 573, 591–92 (6th Cir. 2014)).

200 *Id.* at 21 (citing *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 (6th Cir. 2002)); *see also* *Sperle v. Mich. Dep’t of Corr.*, 297 F.3d 483, 493 (6th Cir. 2002) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). The state defendants also argued that plaintiffs failed to distinguish adequately among the state actors or to specifically define the defaults of each. *Mays* Motion to Dismiss, *supra* note 165, at 22. Respondent superior alone did not support a constitutional claim against a supervisor under 42 U.S.C. § 1983. *Id.*

their knowledge of the serious hazards to the health of the Flint residents, especially the children, of such exposure.<sup>201</sup>

Key to the analysis of the fundamental rights plaintiffs asserted in *Mays* thus was whether the allegedly narrow rights asserted—freedom from third-party harms and the right to bodily integrity—were sufficiently distinguishable from an alleged right to clean water. No right to clean water has yet been declared by the United States Supreme Court. Moreover, to the extent the claim could be reduced to a claim for clean water, it risked preemption by the federal Safe Water Drinking Act.<sup>202</sup>

## 2. Shocks the Conscience

The second due process strand invoked in the Flint civil cases did not hinge on the existence of a recognized fundamental or specifically enumerated right. Plaintiffs asserted that the government actions were outrageous.<sup>203</sup> To succeed under this theory, plaintiffs needed to show that the government's conduct "shocks the conscience" even of those with the most "hardened sensibilities."<sup>204</sup>

This outrageousness claim rests on a theory that due process establishes a constitutional floor to provide a minimum of decency and order that the government must maintain in its varied activities. This test triggers highly deferential judicial review that provides a very light check on government power.<sup>205</sup>

The plaintiffs argued that the Michigan officials' conduct violated this baseline due process demand. It was constitutionally outrageous, and shocked the conscience of even hardened sensibilities.<sup>206</sup>

The substantive due process floor is enlisted when government officials engage in particularly egregious, arbitrary, or cruel acts that so violate principles of order and decency that due process is violated. The challenge typically—though not always—is not to a law or other sovereign act that appears irrational, but to conduct by a government official charged with enforcing or administering the laws.<sup>207</sup>

The state actors defended their actions on the ground that no bad faith or purpose was shown, that the financial receivership of Flint was warranted,

201 Plaintiffs' Omnibus Response to the MDEQ Defendants' Motions to Dismiss at 26–28, *Mays v. Snyder*, 2017 WL 445637 (E.D. Mich. Feb. 2, 2017) (No. 15-cv-14002) (footnotes omitted).

202 *Id.* at ix.

203 *Id.* at 24.

204 *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also* *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

205 *See Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir. 1995) (describing the burden of proving this violation as "a virtually insurmountable uphill struggle").

206 *Mays* Complaint, *supra* note 3, at 41.

207 Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 282 (2015).

and that the gross official errors visible in hindsight did not satisfy the test for constitutionally outrageous government conduct *ex ante*.<sup>208</sup>

### 3. Equal Protection

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>209</sup> A law that burdens a fundamental right or targets a suspect class triggers elevated scrutiny, under which the burden of proof is on the government to justify the classification. The end must be important or compelling, and the law must be narrowly tailored to advance that end.<sup>210</sup> Finally, the plaintiff must show that the injury to a protected class was intentional. A mere disparate impact on a protected class is not sufficient to trigger elevated scrutiny.<sup>211</sup> A law that neither implicates a fundamental right nor targets a suspect class triggers only rational basis review.<sup>212</sup> These equal protection claims interweave with due process claims, as explained below.<sup>213</sup>

Plaintiffs alleged that as Flint residents, they were treated differently than other Genesee County residents: only they were under the authority of the emergency managers.<sup>214</sup> The state actors replied that Flint residents were not similarly situated to these other county residents, because Flint had been properly declared to be in a financial emergency under Michigan law.<sup>215</sup> Given that all similarly situated persons were treated alike, there was no equal protection violation.

Plaintiffs also asserted race- and wealth-based violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>216</sup> The state actors denied that race or wealth played a role in the process of determining that Flint was in a state of emergency.<sup>217</sup> They noted that “*all* of the residents in the City of Flint—minority, non-minority, commercial, resi-

208 *Mays* Motion to Dismiss, *supra* note 165, at 15.

209 U.S. CONST. amend. XIV, § 1.

210 *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (applying intermediate scrutiny and demanding “exceedingly persuasive justification” for gender classification (internal quotation marks omitted)); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying strict scrutiny to racial classification that burdened fundamental right to marriage).

211 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

212 *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). The law “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

213 *See infra* subsection III.A.3.

214 *Mays* Complaint, *supra* note 3, at 54–55.

215 *Mays* Motion to Dismiss, *supra* note 165, at 42–43; *see also* MICH. COMP. LAWS. §§ 141.1544, 141.1545 (2015).

216 *Mays* Complaint, *supra* note 3, at 48, 56.

217 *Mays* Motion to Dismiss, *supra* note 165, at 26–30.

dential, and governmental—received the untreated water that is the basis for this claim. . . . This is not a protected class.”<sup>218</sup>

As the state actors further noted, the authority of the emergency manager was made pursuant to a facially neutral act, the Local Stability and Financial Control Act, Public Act 436 (P.A. 436).<sup>219</sup> Public Act 436 was race-neutral on its face. In such circumstances, plaintiffs must show that the government acted with racially discriminatory intent in adopting the law, or in implementing it.<sup>220</sup>

Five factors are relevant to determining whether facially neutral government action was motivated by a racially discriminatory purpose: (1) the impact on particular racial groups; (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes; (3) the sequence of events that preceded the action; (4) procedural or substantive departures from the government’s normal procedural process; and (5) the legislative or administrative history.<sup>221</sup> Plaintiffs allegedly could not satisfy this test.

As to claims of wealth discrimination, the state actors denied that Flint residents were treated adversely because they were poor.<sup>222</sup> In any event, wealth-based classifications trigger only rational basis review: poverty is not a suspect classification.<sup>223</sup> The state actors also denied, for reasons stated above, that a fundamental right was implicated. Consequently, only the low rational basis test again applied, and this liberal test was not violated.<sup>224</sup> Michigan had, the State argued, a legitimate government interest in addressing the insolvency of Flint. The insolvency threatened the health, safety, and

218 *Id.* at 33.

219 *Id.* at 44.

220 The state actors argued as follows:

Plaintiffs . . . allege that the “cost of continuing with the finished water product from the DWSD for all water users (both Genesee County and Flint) would have been substantially less than the cost of upgrading the Flint WTP in order to safely process the raw Flint water” and that “the clear difference in treatment between these two groups of similarly situated water users” demonstrates that the decision to switch to the Flint River was the product of racial discrimination. First, even if cost did not support the decision, it does not lead to the inference that race was in fact the motivation for the decision, much less that it was “unexplainable on grounds other than race.” Second, the decision to use the Flint River cannot be said to have a disparate impact as compared to Genesee County because, as noted above, Emergency Manager Kurtz’s authority was limited. His decision could only reach Flint. And Flint River water was delivered to all of Flint’s water system’s customers, regardless of their race. The fact that Genesee County customers—who are on a separate water system under different management and not subject to Flint’s Emergency Manager’s orders—could afford the rates required to stay with DWSD does not demonstrate race was a motivating factor.

*Id.* at 29 (citations omitted).

221 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

222 *Mays* Motion to Dismiss, *supra* note 165, at 37–39.

223 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17–18 (1973).

224 *Mays* Motion to Dismiss, *supra* note 165, at 30.

welfare of Flint residents and compromised Michigan's credit and overall economic condition.<sup>225</sup> Decisions made by state officials or local emergency managers addressing solvency issues, which led to the shift in water supply, were minimally rational and thus survived rational basis review.

The plaintiffs also alleged that the state actors conspired to violate their constitutional rights.<sup>226</sup> The state actors replied that, given the alleged weakness of the underlying equal protection claims, there could be no such conspiracy.<sup>227</sup> Moreover, the Eleventh Amendment shielded the state actors in their official capacities.<sup>228</sup>

### III. ANALYZING THE CONSTITUTIONAL CLAIMS

There was no perfect fit between the Flint debacle and any existing, formal constitutional category that protected the residents from such environmental harms. Each of the constitutional claims was a salmon argument, swimming upstream against multiple adverse doctrinal currents.<sup>229</sup> The plaintiffs initially lost the battle at the district court level on highly debatable preemption grounds, though the appellate court correctly reversed this ruling.<sup>230</sup>

225 See MICH. COMP. LAWS § 141.1543(a), (b) (2013).

226 *Mays* Complaint, *supra* note 3, at 18–19.

227 *Mays* Motion to Dismiss, *supra* note 165, at 50–52. A conspiracy claim under 42 U.S.C. § 1985(3) has the following elements: “(1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen.” *Iqbal v. Hasty*, 490 F.3d 143, 176 (2d Cir. 2007), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In addition, “there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

228 The state actors alleged that Emergency Manager Kurtz had authority to make decisions impacting Flint, but not to decide whether the remainder of Genesee County would switch to the Flint River supply. *Mays* Motion to Dismiss, *supra* note 165, at 46. The Genesee County Drain Commissioner was responsible for selecting the water supply in the majority of Genesee County communities. *Id.*

229 Indeed, a recent analysis of climate change litigation notes that constitutional arguments often are lodged *against* regulation, based on Dormant Commerce Clause or takings arguments. See JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 38–40 (2015). Proregulatory litigation often falters for standing, separation of powers, and other reasons. See *id.* at 269–78. Challenges to executive authority to mitigate environmental harms also have made headway in federal courts. See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.) (granting stay of enforcement of carbon emission guidelines, pending review by the D.C. Circuit); see also Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After NFIB v. Sebelius*, 43 *ECOLOGY L.Q.* 671 (2017) (discussing arguments against the Clean Air Act).

230 See *infra* text accompanying notes 328–31; see also Bambauer & Massaro, *supra* note 207, at 311–12.

The plaintiffs' arguments elided traditional constitutional categories because constitutional law is clunky, often formalistic, subject to multiple procedural hurdles, and ill-equipped to respond to the kind of harms inflicted on Flint. The injuries also were widely distributed and diffuse, and the relevant sources of those harms were multivectoral, structural, and contextual.

Constitutional law also requires isolating government actors and assigning specific blame to each. This was a confounding endeavor in the Flint cases, given Michigan law on emergency managers and the intersectional nature of government control of Flint's water quality. In addition, the defendants asserted potential preemption and official and sovereign immunity obstacles.

Finally, the Constitution protects against intrusions into rights—or negative liberties—rather than assuring any affirmative right even to basic needs. The line between a negative freedom from contaminated water and an affirmative right to clean water is not easily drawn or enforced.

We outline the theories and explain why each maps uneasily onto these plaintiffs. We nevertheless conclude that none was beyond the pale and argue that the truly horrific and extreme facts of the case made it a proper one for the shocks the conscience due process test in particular.

#### A. *Fundamental Rights*

Substantive due process protects fundamental and nonfundamental liberties. Fundamental rights often receive the most attention because they trigger elevated scrutiny, and therefore vest more power in the courts. Within the category of fundamental rights are two subtypes of rights: those derived from enumerated rights set forth in the Bill of Rights and selectively “incorporated” into the Fourteenth Amendment, and “unenumerated” rights deemed to be fundamental to ordered liberty.<sup>231</sup>

Most, but not all, of the first eight amendments have been deemed to be incorporated into the Fourteenth Amendment.<sup>232</sup> Thus, most of the specific constitutional rights that can be asserted against the states—such as freedom of speech or protection against unreasonable searches and seizures—are due process-based rights. When rights from the Bill of Rights are incorporated into the Fourteenth Amendment, they usually must be given the same meaning as they have in the Bill of Rights; an asymmetrical reading must be justified.<sup>233</sup> Therefore, the caselaw that defines freedom of speech under the First Amendment applies equally to freedom of speech under the Fourteenth Amendment Due Process Clause.<sup>234</sup>

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231 See SULLIVAN & MASSARO, *supra* note 176, at 134–54.

232 A notable exception is the Seventh Amendment right to trial by jury in a civil case. This has not been incorporated into the Fourteenth Amendment.

233 *McDonald v. City of Chicago*, 561 U.S. 742, 780–87 (2010).

234 Courts may describe such a claim against the state as a First Amendment claim even though it is technically a due process claim. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

Some courts believe that the Due Process Clauses protect only fundamental rights.<sup>235</sup> This is incorrect. A liberty interest that lacks fundamental right status should trigger rational basis review, with a very strong presumption in favor of government.<sup>236</sup> Some discussions of substantive due process miss this point, and treat all substantive due process cases as requiring the identification of a fundamental or enumerated right at the outset.<sup>237</sup>

Courts, too, have confused the liberty right of freedom from outrageous or irrational conduct with the due process principle that government behavior must burden a right that is “deeply rooted in this Nation’s history and tradition,” which is the standard to gain fundamental right status and trigger elevated scrutiny.<sup>238</sup>

Fundamental rights, however, do not exhaust substantive due process protections. The weak outrageousness and rational basis brakes apply to fundamental and *non*fundamental rights.<sup>239</sup> They both are interstitial due process protections reserved for the very worst forms of executive abuse of authority.<sup>240</sup> Like rational basis claims, shocks the conscience claims are difficult to win given the very high standard of proof and exceptionally strong presumption that government officials acted within constitutional parameters.

235 *Ill. Psychological Ass’n v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987) (calling substantive due process a “durable oxymoron” and suggesting it offers protection limited only to fundamental rights).

236 *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–89 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (noting that “[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry”).

237 *See, e.g., Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 816–17 (11th Cir. 2004) (construing *Lawrence v. Texas*, 539 U.S. 558 (2003), as failing to establish a fundamental right relevant to adoption and suggesting that fundamental rights provide the only route to a substantive due process victory); *MFS, Inc. v. DiLazaro*, 771 F. Supp. 2d 382, 441 (E.D. Pa. 2011) (describing steps and concluding government conduct did not shock the conscience in land use approval case); *cf. Steven G. Calabresi, Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008) (criticizing *Lawrence v. Texas* for protecting rights through substantive due process that are not deeply rooted in history and tradition).

238 *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (noting that a party alleging violation of substantive due process must include a “‘careful description’ of the asserted fundamental liberty interest,” and must establish that “neither liberty nor justice would exist if [it] were sacrificed” (first quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)) (internal quotation marks omitted)).

239 This does not mean that the relative importance of the liberty interest at stake is irrelevant. A court’s assessment of what is constitutionally outrageous or irrational is inevitably dependent upon the significance or weight of the liberty interest affected. But if only fundamental liberty interests—so identified by the courts—triggered even rational basis scrutiny, then the rational basis test would be superfluous: fundamental liberty interests trigger elevated scrutiny, by definition.

240 *See infra* Section III.B.

## 1. Third-Party Harms

The third-party harm theory was the second fundamental rights argument asserted by the plaintiffs. It too faced rocky shoals.

First, the general rule is that government is not liable under due process for inaction. In *DeShaney v. Winnebago County Department of Social Services*,<sup>241</sup> the Court held that the state had not deprived Joshua DeShaney of constitutionally protected rights by not removing him from the custody of an abusive stepparent.<sup>242</sup> The Court suggested that the result might have been different if the state had played a role in creating the dangers to which the plaintiff was exposed or if it had increased his vulnerability to these dangers.<sup>243</sup>

But *DeShaney* also made clear that the State's mere awareness of a risk of harm to an individual did not suffice to impose an affirmative duty to provide protection.<sup>244</sup> Likewise, the Court held that there is no substantive due process right to a safe work environment in *Collins v. City of Harker Heights*.<sup>245</sup> Constitutional liability may exist only where state officials deliberately or intentionally place public employees in a dangerous situation without adequate protection.<sup>246</sup>

Also, in all of these cases, actions of a third party—not of a government official—caused the alleged harms. Thus, some courts have restricted the narrow right to protection from third-party harms to contexts in which a private party produced the ultimate injuries.<sup>247</sup> Yet even were this an accurate statement of the principle, plaintiffs in Flint did focus on government actions, not private third parties' actions, in producing their injuries. By itself, the argument that third parties may have contributed to the debacle seems insufficient. Moreover, the plaintiffs' argument was that multiple government actions, not mere inaction, exposed them to the harms of contaminated water. Directing untreated Flint River water to them would seem to

241 489 U.S. 189 (1989).

242 *Id.* at 194–97.

243 *Id.* at 201–02.

244 *Id.* at 202.

245 503 U.S. 115 (1992).

246 *Id.* at 125–26; *see, e.g.,* *L.W. v. Grubbs*, 974 F.2d 119, 120–21 (9th Cir. 1992) (concluding that a registered nurse stated a constitutional claim against correctional officers who intentionally assigned violent sex offender to work alone with nurse despite knowing he was likely to become violent if alone with her); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 357, 359 (11th Cir. 1989) (holding that where defendants had put plaintiff, a town clerk, in a unique “position of danger” by causing inmates who were inadequately supervised to be present in town hall, then “under the special danger approach as well as the special relationship approach . . . the defendants owed [the plaintiff] a duty to protect her from the harm they created”). *But see* *Mitchell v. Duval Cty. Sch. Bd.*, 107 F.3d 837, 839 n.3 (11th Cir. 1997) (*per curiam*) (noting that “*Cornelius* may not have survived *Collins v. City of Harker Heights*”).

247 Michigan Court of Claims Judge Boonstra relied on these cases in granting the defendants' motion to dismiss plaintiffs' third-party harm claim. *Mays v. Snyder*, No. 16-000017, at 23–25 (Mich. Ct. Cl. Oct. 26, 2016).

satisfy the action requirement, despite the defendants' attempt to characterize this as mere inaction, i.e., failure to treat the contaminated water.

## 2. Bodily Integrity

Strong intuition and important caselaw undergird the argument that one has a fundamental right to control one's body.<sup>248</sup> The bodily integrity argument holds considerable appeal in the Flint cases, and survived a motion to dismiss in the Court of Claims.<sup>249</sup>

In *Lucero v. Detroit Public Schools*,<sup>250</sup> a federal district court judge addressed whether the decision to locate a public school on a contaminated site violated substantive due process on this basis. But she emphasized that exposing the children to high risks of bodily harm needed to be shocking, and based on "malice or sadism."<sup>251</sup> In other words, government officials are not subject to constitutional liability for garden-variety negligence. This implies that if the level of misconduct is sufficiently high, and the risk is sufficiently grave, courts may step in to redress the substantive due process harm.

Similar reasoning was given by the Michigan Court of Claims judge in denying defendants' motion to dismiss the bodily integrity argument in the Flint case before him. In his view, if the misconduct were shocking enough, then the officials would be responsible for the bodily harm to the plaintiffs.<sup>252</sup>

The risk of harm in Flint also was not abstract: exposure to unreasonable levels of lead contamination has well-known, irreparable physical dangers.<sup>253</sup> Exposure in this case also led to other harms, including psychological distress.<sup>254</sup> Scientific uncertainty thus did not dog this case as it does many others in which litigants seek to prevent or redress less clear, future, or contested environmental harms.

Nevertheless, as Gowri Ramachandran has stated, a general, unnuanced, and inalienable right to bodily integrity may be both descriptively and nor-

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248 See, e.g., *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (discussing the right to refuse medical treatment as being related to "rights to bodily integrity and freedom from unwanted touching").

249 *Mays*, No. 16-000017 at 26–44.

250 160 F. Supp. 2d 767 (E.D. Mich. 2001).

251 *Id.* at 799; cf. *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 814 (S.D. Ohio 1995) (discussing potential bodily integrity claim where government exposed non-consenting persons to military radiation experiments).

252 *Mays*, No. 16-000017 at 28.

253 See *supra* notes 56–89 and accompanying text. A particularly compelling brief on the merits of the due process and equal protection arguments was filed with the Court of Appeals for the Sixth Circuit, and makes excellent arguments that the problems with both theories can be overcome in this case. See Reply Brief of Appellants Melissa Mays et al., *Mays v. Snyder*, 2017 WL 2180444 (6th Cir. May 16, 2017) (No. 17-1144).

254 See FWATF Final Report, *supra* note 1, at 55–56; cf. SHYAMAL CHOWDHURY ET AL., ARSENIC CONTAMINATION OF DRINKING WATER AND MENTAL HEALTH 37 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2811583](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811583).

matively wrong.<sup>255</sup> “Bodily integrity” covers vast terrain and may include multiple contexts in which competing interests make even a right against physical intrusions into the body problematic.<sup>256</sup> The issue muddies quickly when one considers how one person’s assertion of a “right to bodily integrity” may be another’s exposure to serious communicable diseases, as compulsory vaccination cases show.<sup>257</sup> Or, it may be another’s right to dominion over one’s own body, which becomes a complex question with respect to laws against the sale of body parts.<sup>258</sup>

An additional problem with the reasoning of the Court of Claims’ ruling in the Flint case is that the judge seemed to require a fundamental right *plus* shocking conduct. Thus if an appellate or other court rejects the notion that a fundamental right to bodily integrity was violated, then even shocking official conduct may not violate the Constitution.

We maintain, however, that this is an incorrect reading of the shocks the conscience test.<sup>259</sup> Properly understood, this baseline due process test polices outrageous government conduct even when no recognized fundamental right has been violated. Indeed, it would be unnecessary if it hinged on the threshold determination of a fundamental right, given that these already trigger elevated judicial scrutiny without a threshold showing of outrageousness.

The liberty in play is the liberty to be free from outrageous government conduct. Like the rational basis test that holds government to a baseline expectation of rationality even absent a fundamental right,<sup>260</sup> the shocks the conscience test may require officials to observe baseline standards of decency even where no fundamental right has been violated.<sup>261</sup>

Moreover, we regard this as a virtue of the test. It enables courts to respond to gross misconduct without expanding fundamental rights to do so. As we explain below, the shocks the conscience test holds officials to minimum standards of decency and respect for valid public ends as a matter of basic liberty.<sup>262</sup>

255 Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U. L. REV. 1 (2009) (discussing ways in which such a right—if unnuanced and broadly construed—might interfere with important social and other goals).

256 *Id.* at 10–11.

257 *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See generally* Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 Nw. U. L. REV. 589 (2016).

258 *See* Ramachandran, *supra* note 255, at 10–11 (discussing these and other conflicts).

259 *See supra* notes 203–04 and accompanying text.

260 *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–89 (1955).

261 In fact, in cases where government decisions must be made rapidly and with a bare minimum of judicial second-guessing, the shocks the conscience test may set the outer boundary of unconstitutional conduct. *See* Bambauer & Massaro, *supra* note 207, at 310–15.

262 *See infra* Section III.B. For a fuller expression of this interpretation of the liberty baseline, see Bambauer & Massaro, *supra* note 207.

### 3. Thick Rights Versus Thin?

Fundamental rights constitutionalize closer judicial oversight of law and its administration. Seeing this, litigants often aim at fundamental rights status in order to secure meaningful scrutiny of government conduct, versus hands-off review. The Flint plaintiffs followed this pattern.

Close judicial oversight, however, may not always advance policy goals in the ways advocates imagine. As Professor Daniel Ho noted in his superb study of food safety regulation,<sup>263</sup> even very serious problems with arbitrary or uneven implementation of administrative regulations may not be solved with more process or judicial oversight.<sup>264</sup>

Close judicial review also has other, well-documented problems. To name just a few, it imposes high costs on state and federal officials, may interfere unduly with legislative and executive discretion, and risks nationalizing responses to problems better left to local and state management. It can also be imposed in contexts where no clear history of constitutional rights exists, which may prompt concerns that in expanding rights the judiciary has veered away from constitutional moorings and entered the realm of undemocratic judicial lawmaking.

Finally, it may make crafting a judicially manageable remedy impossible. Constitutionalizing a thick right works best when operationalizing the right involves a fairly straightforward remedy. In the same-sex marriage cases, to take one recent example, the judicial ruling required states to provide same-sex couples with equal access to marriage. As rights implementation goes, the judicial remedy was relatively straightforward even if the right itself was deeply controversial. Thorny peripheral consequences of the ruling have yet to be worked out, such as determining whether and when private resistance to the ruling on religious grounds must be allowed. Yet the remedy for the basic right merely required state officials to add same-sex couples to an existing category of individuals to whom the right to marry applied, across all relevant legal contexts.

The remedy for denying access to a fundamental right of bodily integrity is not so straightforward. First, the contours of the right itself are unclear, as noted above. Second, the remedy for violation of the right would require ongoing supervision of a host of government actors who control water quality, and judicial review of complex official economic, scientific, and policy decisions. Common, articulable judicial standards would need to be established to govern enforcement of the right as a matter of nationally applicable

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263 Daniel E. Ho, *Does Peer Review Work: An Experiment of Experimentalism*, 69 STAN. L. REV. 1 (2017) (discussing peer review as alternative to “more process” as a means of addressing inconsistent and inaccurate administration of public laws).

264 See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 194–209 (1983) (arguing that formal proceedings and judicial review may not cure problems in administering public laws); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 279 (1998) (discussing ways in which the modern administrative state defies conventional means of regulating exercise of discretion).

constitutional law. Moreover, the right would need to be expressed in negative liberty terms, given the Court's general resistance to affirmative constitutional rights to basic subsistence needs like food, housing, or education.<sup>265</sup> There is also no affirmative constitutional right to clean water.

In asserting that Michigan officials violated their fundamental rights, the plaintiffs thus faced formidable obstacles. The first was that neither the right to state protection from third-party harms nor the right to bodily integrity in the context of freedom from uncontaminated water occupies fundamental right status *per se*: both were attempts to expand existing doctrine, which is always a hard sell.<sup>266</sup> The second was that the asserted rights veered close to an affirmative argument that there is a constitutional right to clean water. The third was that the back-up liberty argument in the absence of a fundamental right triggers only low-level judicial scrutiny, which is exceedingly difficult to fail.

Yet the fundamental right argument was hardly far-fetched. Again, the argument that a fundamental right to bodily integrity was violated survived the defendants' motion to dismiss in the Court of Claims.<sup>267</sup>

Moreover, the Court may be willing to consider due process liberty rights as both evolving *and* located on a spectrum rather than only in rigid, historically recognized categories. Of course, new appointments to the Court may tilt it against such a theory and in favor of restraining constitutional liberties—at least in the realm of environmental law. Yet there currently is precedent—joined by five justices—that supports a broader, more evolving notion of liberty.

The same-sex marriage cases support this claim. The right named in the cases was neither thick nor thin *per se*. It triggered something in between the traditional rational basis test and the heightened protections typically offered to fundamental rights and suspect classes.<sup>268</sup> The majority also relied on equal protection-styled arguments about arbitrariness, political powerlessness, and historical discrimination, without declaring sexual orientation to be a suspect classification.<sup>269</sup>

Likewise, litigants may look to *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>270</sup> in which a local zoning ordinance excluded group homes for mentally disabled adults, but not other high-density uses like fraternities. This

265 Litigants nevertheless continue to urge courts to create a federal constitutional right to minimally adequate services such as education. *See, e.g.*, Complaint, Detroit Fed'n of Teachers v. Detroit Pub. Schs., No. 16-001178 (Mich. Cir. Ct. Jan. 28, 2016) (arguing that Detroit Public Schools failed to provide students with minimally adequate schools in violation of the Fourteenth Amendment).

266 *See supra* notes 240–57 and accompanying text; *see, e.g.*, *In re City of Detroit*, No. 15-cv-10038, 2015 WL 5461463, at \*5 (E.D. Mich. Sept. 16, 2015), *aff'd in part, vacated in part by In re City of Detroit*, 841 F.3d 684 (6th Cir. 2016).

267 *Mays v. Snyder*, No. 16-000017, at 26–44 (Mich. Ct. Cl. Oct. 26, 2016).

268 *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

269 *Id.* at 2602–05.

270 473 U.S. 432 (1985).

violated the rational basis test of equal protection,<sup>271</sup> even though housing is not a fundamental right<sup>272</sup> and disability is not a suspect classification.<sup>273</sup>

That is, liberty interests that are not fundamental per se may trigger meaningful scrutiny when powerless but not formally “suspect” groups are adversely affected. Clean water access claims, along with other environmental justice claims, thus may qualify for this hybrid form of judicial scrutiny in appropriate cases.<sup>274</sup> Public officials that deliver badly and indisputably contaminated water to residents whose government is failing them so badly that the state must intervene may violate this hybrid liberty test.

The argument would go as follows: First, access to clean water is important even if not fundamental under the United States Constitution. It has earned international human rights status,<sup>275</sup> and is beginning to make headway in state constitutional law.<sup>276</sup> Life—plainly protected by due process—is impossible without it. Water is also more critical to life—and thus liberty—than housing, and more critical to human survival than access to marriage.

Second, the water in Flint was not contaminated at only one location; the City’s entire water supply was compromised. The pervasive nature of the harm, and the fact that the public water supply was the sole water source for unsuspecting residents lends force to the claim that government created a profound risk to human life.

Third, the residents of Flint may not be a suspect class per se, but few would deny the multiple forms of structural and absolute political powerless-

271 *Id.* at 446–48.

272 *Id.* at 447–48.

273 *Id.* at 442–43.

274 They also may qualify as “constitutive commitments”—short of constitutional requirements but essential legislative responsibilities. *See* Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 159, 201 (2016) (“[T]here is a normative basis in our existing jurisprudence for finding that water is essential for life. Because water plays a unique role in our culture, history and laws, it should be treated as a constitutive commitment deserving of legislative protection.”).

275 *See* G.A. Res. 64/292, ¶¶ 1, 2 (July 28, 2010); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15 (2002) on the Right to Water, ¶ 3, U.N. Doc. E/C.12/2002/11 (Nov. 29, 2002); *see also* Catarina de Albuquerque (Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation), *Rep. on the Compilation of Good Practices*, ¶ 8, U.N. Doc. A/HRC/18/33/Add.1 (June 29, 2011).

276 Pennsylvania is leading the way on this and may cut a path for other states if not for the nation. Pennsylvania has a constitutional provision that states as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27. In *Robinson Township v. Commonwealth*, the Supreme Court of Pennsylvania invalidated a state law that would have allowed exploitation of the state’s natural gas resources on the ground that it violated this provision. 83 A.3d 901, 913 (Pa. 2013) (plurality opinion). The plurality opinion shows that courts can navigate the shoals of constitutionalizing “thick” environmental rights, if motivated to do so.

ness that they suffered. None of them voted for the emergency managers who controlled their water supply decisions. Most of them are poor. And over half of them are African American, which casts an equal protection shadow over the government actions even if the suspect classification fit here was imperfect.

Last, the fundamental rights argument was not for clean water per se, but for freedom from government actions that knowingly and recklessly compromise a baseline level of purity with absolutely foreseeable harms to life.

The grim realities of the Flint crisis combined in ways that should have made the liberty losses look—at the very least—important to an empathic court, as well as to the nation. That is, even absent creating a fundamental right to clean water per se, a court could have concluded that individuals have an important liberty interest in water without harmful contamination that was violated under the egregious facts of the case. The conduct of the Michigan officials with respect to this important interest was arguably constitutionally irrational, under the hybrid rights approach. Such a modified thick rights, or “rational basis with bite” strategy was thus plausible.

The constitutional right that would emerge from this effort to fit the right into existing law, though, would *not* be a right to clean water per se. At most, it would be a more narrowly defined right that focuses on the nature of the water contamination, its alleged harms, and the government’s role in producing these harms. It would also be highly context specific.

An important case pending in the District of Oregon shows how judges might bend to this doctrinal argument, despite its complexities. In a case in which future generations challenged a range of government action and inaction that threatens the environment on constitutional grounds, the judge stated the following in denying defendants’ motion to dismiss:

Defendants and intervenors contend plaintiffs are asserting a right to be free from pollution or climate change, and that courts have consistently rejected attempts to define such rights as fundamental. Defendants and intervenors mischaracterize the right plaintiffs assert. Plaintiffs do not object to the government’s role in producing *any* pollution or in causing *any* climate change; rather, they assert the government has caused pollution and climate change on a catastrophic level, and that if the government’s actions continue unchecked, they will permanently and irreversibly damage plaintiffs’ property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children’s) ability to live long, healthy lives. Echoing *Obergefell*’s reasoning, plaintiffs allege a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.<sup>277</sup>

That is, there may be a fundamental right to a minimum level of environmental protection. Yet as we have explained, distinguishing between a fundamental right to clean water and a fundamental right not to be given unreasonably contaminated water through gross disregard for residents’ well-being is extremely difficult: countless contextual variations would affect the

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277 *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

determination. Line drawing would entail scientific and other judgment calls that may be better left to agencies than to courts. Moreover, the fundamental right that is being developed is not violated unless the harms are catastrophic and—as the plaintiffs in Flint asserted—government’s conduct in producing the harms is shocking.

The firmer constitutional path, at least for now, thus may be the thinner rights strategy described in the following Section. It focuses more directly and exclusively on isolating procedural and other lapses by the relevant government actors in a given context that so violate hardened sensibilities that they shock the conscience. It does not require courts to assess or measure a proper level of water quality, clearly unacceptable water impurities, or environmental security per se, but to determine whether official disregard of the known science about water quality or other environmental harms was shocking.

To be sure, this is an incomplete and still-fuzzy constitutional solution to the underlying concern about access to clean water that is essential to human life. But it is not toothless and would have both expressive and practical consequences that may compel government actors to stop and think when making decisions with significant environmental consequences. It also maintains a clearer distinction between fundamental and nonfundamental rights, and the judicial presumptions that divide them.

### B. *Shocks the Conscience*

Flint was an outrage of *epic* proportion. Human life, liberty, and property were undeniably compromised by grossly irresponsible government acts. A whole city was effectively poisoned because of official decisions made with knowledge of the water’s contamination and its potential effects. The repercussions are still being felt and some—especially for lead-exposed Flint children—are likely to be life-lasting.

Baseline constitutional norms demand that government officials not act with such gross disregard for the public life, liberty, and property. This conclusion is particularly compelling given that Flint’s municipal government was placed in receivership by the state, such that its citizens were deprived of meaningful local political representation.

This outrage could be expressed in a constitutional register while treading carefully, making little new law, and preserving maximum legislative and administrative discretion to craft and enforce water quality standards. In this section, we explain how the court could have responded to the outrageous conduct in Flint without jimmying doctrine or creating potentially disruptive judicial oversight of environmental law enforcement.

## 1. Due Process Floors

As the foregoing section shows, substantive due process is a continuum—not discrete points of liberty.<sup>278</sup> It ranges from the classic examples of fundamental rights, to liberties in the hybrid category where equality and liberty concerns intersect, to a baseline expectation of rational and non-arbitrary government conduct.

One of us has previously explained why the shocks the conscience test is an important component of that continuum that protects individuals from outrageous abuses of government power.<sup>279</sup> It applies to the myriad actions of agencies and their individual agents, whose alleged abuses of power can be checked in extreme cases. The test applies only when the executive misconduct is intentional and deliberate,<sup>280</sup> and truly shocking. The test also is part of a broader constitutional rationality floor: neither due process nor equal protection is solely defined by fundamental rights and suspect class silos.<sup>281</sup>

The better view is that the shocks the conscience test may apply even if no formally identified fundamental right has been violated. Outrageous treatment may itself constitute a deprivation of liberty under due process. This is because due process’s “animating commitment . . . is captured by perhaps the most persistently recurring theme in due process cases: government must not be arbitrary.”<sup>282</sup>

278 As Justice Harlan noted in *Poe v. Ullman*,

This ‘liberty’ [guaranteed by the Due Process Clause] is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

279 See Bambauer & Massaro, *supra* note 207, at 289–91.

280 See, e.g., *Russo v. City of Bridgeport*, 479 F.3d 196, 210 (2d Cir. 2007) (noting that “[t]he state of mind of a government defendant is an integral aspect of any ‘shock the conscience’ standard” and requires more than negligence); *People v. Uribe*, 132 Cal. Rptr. 3d 102, 125 (Ct. App. 2011).

281 See SULLIVAN & MASSARO, *supra* note 176, at 166 (noting that “[d]ue process today is part of an astounding mosaic of reconceived constitutional rights, rights that are best read as reconstitutive and interdependent rather than as silos of protection, narrowly understood”).

282 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 322–23 (1993). For this reason, among others, equal protection arbitrariness is a subspecies of due process irrationality. The Court has also observed that due process and equal protection are “connected in a profound way, though they set forth independent principles. . . . [I]n some instances each may be instructive as to the meaning and reach of the other.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). Even more fundamentally, there is no equal protection clause in the Bill of Rights. Equal protection binds the federal government through judicial interpretations of the Fifth Amendment Due Process Clause and its dynamic relationship to the Fourteenth Amendment Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954); see also *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

## 2. *Rochin v. California*

The shocks the conscience test derives from *Rochin v. California*,<sup>283</sup> decided over sixty years ago. Los Angeles County sheriff deputies entered Rochin's house,<sup>284</sup> burst into his bedroom, and observed two capsules. When one of the deputies asked, "Whose stuff is this?" Rochin ingested the capsules.<sup>285</sup> The officials took Rochin to the hospital and forcibly pumped his stomach until he vomited the capsules.<sup>286</sup>

Justice Felix Frankfurter wrote that the official did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."<sup>287</sup> Frankfurter further stated that, "In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions."<sup>288</sup> Rather, this is a matter of judicial judgment, based on "considerations deeply rooted in reason and in the compelling traditions of the legal profession."<sup>289</sup> As he put it, a shocks the conscience due process boundary on executive conduct is "historic and generative."<sup>290</sup>

*Rochin* applies only to misconduct that nearly everyone would agree is wrong.<sup>291</sup> Arbitrary and irrational conduct is not necessarily outrageous under this test, but must *also* shock the conscience.<sup>292</sup>

283 342 U.S. 165 (1952).

284 *Id.* at 166.

285 *Id.*

286 *Id.*; see Bambauer & Massaro, *supra* note 207, at 288–90.

287 *Rochin*, 342 U.S. at 172. Justice Frankfurter was no judicial activist in this respect. He was quite wary of judicial extensions of substantive due process to include vague rights. See Wallace Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295 (1954) (discussing Frankfurter's judicially conservative, though not hidebound philosophy).

288 *Rochin*, 342 U.S. at 169.

289 *Id.* at 171.

290 *Id.* at 173; see Bambauer & Massaro, *supra* note 207, at 288–90 (discussing *Rochin*).

291 As one court has put it, "before a constitutional infringement occurs, state action must *in and of itself* be egregiously unacceptable, outrageous, or conscience-shocking." *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990).

292 See, e.g., *Pyles v. Vill. of Manteno*, No. 13-CV-2114, 2014 WL 793531, at \*5 (C.D. Ill. Feb. 26, 2014) (finding that a failure to disclose evidence in order to indict plaintiff satisfied the test).

In *Zotos v. Town of Hingham*, the federal district court noted that "in order to demonstrate conduct that 'shocks the conscience[.]' a plaintiff must present "'stunning" evidence of "arbitrariness and caprice" that extends beyond "[m]ere violations of state law, even violations resulting from bad faith" to "something more egregious and more extreme."<sup>4</sup> No. 12-11126, 2013 WL5328478, at \*12 (D. Mass. Sept. 19, 2013) (alterations in original) (quoting *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010)); see also *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir. 1995) (describing the test as a "virtually insurmountable uphill struggle").

For example, in *Collins v. City of Harker Heights*, the Court concluded the shocks the conscience standard was not violated when a city failed to train or warn city workers about

Despite its restrained use by judges, the shocks the conscience test has been much-criticized.<sup>293</sup> It aggravates in particular those who abhor tests that are unmoored in specific constitutional text and history, and that allow judges to exercise discretion.<sup>294</sup> Moreover, critics worry courts may overstep their institutional authority if they begin to second-guess government officials in other administrative or legislative settings that should not be subject to close judicial oversight.<sup>295</sup> The test thus often “lurks Boo Radley-like in the

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asphyxiation dangers, and a sewer worker died while attempting to clear an underground sewer line. 503 U.S. 115 (1992). In *County of Sacramento v. Lewis*, the standard was not violated when a deputy sheriff pursued a motorcyclist at 100 miles per hour through a residential neighborhood, at a distance of 100 feet. 523 U.S. 833, 836–37 (1998). See generally Bambauer & Massaro, *supra* note 207, at 290–97 (discussing applications of *Rochin*). Outrageousness claims also face a significant but obscure doctrinal obstacle derived from *Graham v. Connor*, 490 U.S. 386 (1989). For a discussion of *Graham* and an explanation of why it should not foreclose application of *Rochin*, see Bambauer & Massaro, *supra* note 207, at 318–21; Toni M. Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1086–87 (1998); see also Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 76–86 (2002).

293 See Bambauer & Massaro *supra* note 207, at 331–36 (discussing critiques).

294 See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Also, scholars and jurists who regard due process as properly about only procedural due process are, naturally, dubious about *all* of the caselaw that imposes substantive due process limits on the states—fundamental and nonfundamental rights, enumerated and unenumerated. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990) (calling it a “momentous sham”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (describing it as a “contradiction in terms”); Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1059 (1997) (stating that neither the text nor the intentions of the Framers supports substantive due process); see also *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (describing substantive due process as an “oxymoron”). The current Court has one substantive due process denier in Justice Thomas, who maintains that due process should only protect procedural and not substantive rights. *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part) (arguing that the Second Amendment applies to the States through the Fourteenth Amendment’s Privileges and Immunities Clause, not its Due Process Clause). Justice Scalia also held this view. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (“I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.”).

295 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 520–21 (1965) (Black, J., dissenting) (“[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court’s belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional . . . will amount to a great unconstitutional shift of power to the courts which . . . will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would . . . jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.”); see also LARRY D. KRAMER, *THE*

[doctrinal] shadows, [and is] very rarely called into service.”<sup>296</sup> Yet the test persists and is occasionally held to be satisfied.<sup>297</sup>

Some of these cases distinguish between scenarios in which executive officials must act rapidly and ones in which there is time for deliberation. When executive officers did not have time to deliberate, their actions will shock the conscience only if the officers acted with a purpose to cause harm that is unrelated to a legitimate law enforcement interest.<sup>298</sup> For example, officers in *County of Sacramento v. Lewis* were involved in a high-speed police pursuit that caused bodily harm, but did not have a realistic opportunity to deliberate.<sup>299</sup> The Court held that their actions did not violate substantive due process because they did not act with a purpose to cause harm which was unrelated to a legitimate law enforcement interest, and because the situation was one that called for “fast action.”<sup>300</sup> Where time to deliberate does exist, however, officials may violate the shocks the conscience test more readily.

Moreover, the rigid formalisms that pervade other due process and equal protection zones should not hobble the shocks the conscience test. It is an open-ended, but *last resort* emergency cord. It therefore offers an alternative to expanding unenumerated fundamental constitutional rights or suspect classifications that avoids concretizing results beyond the facts of the case.

### 3. Flint Outrage

The official actions in Flint met this high level of misconduct. Outrage was the uniform reaction to this debacle. The officials were not engaged in a

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PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that history indicates judicial review is not intended to be the primary means of interpreting the Constitution); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 155 (2006) (“Real-world decisionmakers, including judges, have limited capacity to understand and use even the information they do have. The problem of bounded information is amplified by bounded decisionmaking capacity.”).

<sup>296</sup> Bambauer & Massaro, *supra* note 207, at 342.

<sup>297</sup> For example, “an officer’s use of false evidence to secure a conviction is capable of shocking the conscience.” *White v. Smith*, 808 F. Supp. 2d 1174, 1242 (D. Neb. 2011). Law enforcement conduct likewise shocked the conscience where an arrestee extracted drugs from her own vagina, but only after police threatened that they would extract them involuntarily and claimed falsely that they had a search warrant to transport her to a local hospital for that purpose. *United States v. Anderson*, No. 5:13-cr-24, 2013 WL 5769976, \*5–6 (D. Vt. Oct. 24, 2013), *rev’d*, 772 F.3d 969 (2d Cir. 2014). And when a high school coach deliberately struck a student with a heavy object and blinded her in one eye, this shocked the conscience. *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1076 (11th Cir. 2000). Finally, “when a police officer *not faced with an emergency* drives his vehicle through a red light at sixty-four miles per hour on a dark and snowy winter night and kills an innocent seventeen year-old girl, such actions rise to the level of conscience-shocking.” *Terrell v. Larson*, 396 F.3d 975, 985 (8th Cir. 2005) (en banc) (Lay, J., dissenting).

<sup>298</sup> *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 852–53.

high-speed chase or other situation demanding split-second decisions. Flint also involved bodily harms, which have been described as a core liberty concern.<sup>301</sup>

Flint was a worst-case scenario. Recall that compelling Mr. Rochin to vomit shocked the conscience. Had the Flint residents been told by the City that their drinking water contained lead, surely they too would have contemplated vomiting to expel the contaminated water from their bodies. Parents of young children would have been even more distressed, given that elevated lead levels are more dangerous to children and can inflict permanent, serious damage. Indeed, it is difficult to imagine just how frightened and outraged the Flint parents felt after learning their children were so exposed. And of course they continue to live with the knowledge that their children may suffer lifelong injuries because of this debacle.

But there was more. That the injuries here were *so* structural and pervasive that they evaded the tidy silos of fundamental rights and suspect classes made this situation exceptionally horrifying. Again, that *everything* was wrong in Flint should not mean *nothing* was.

The more widespread a government-inflicted injury, the more sanguine courts usually can be that the political process is an adequate remedy. There is some constitutional safety in numbers. But in Flint the opposite was true.

All of the residents were affected, but all were effectively disenfranchised. Flint no longer was their town; recall that it was governed by the state-appointed, unelected emergency manager. Moreover, residents could not reasonably have expected that it was essential for them to be on alert from the government knowingly allowing poison to flow in the public drinking water. Such outré and devastating decisions should not be insulated from constitutional scrutiny on the ground that the political process was an adequate check on abuse.

When government actions elide existing formal categories yet inflict foreseeable and grave bodily, property, and psychological harms that could have been prevented with available, cost-effective measures, courts should pull the due process emergency cord. The shocks the conscience test empowers them to call out these officials on constitutional grounds even if they are unwilling to declare that the liberty at stake was a fundamental right.

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301 See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); see also *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (per curiam) (allowing a due process claim where plaintiff alleged that officer interfered with medical treatment of plaintiff while screaming in pain); *Bounds v. Hanneman*, No. 13-266, 2014 WL 1303715, at \*9 (D. Minn. Mar. 31, 2014) (holding that the plaintiff properly stated a claim of substantive due process where DRE officer trainees recruited citizens to smoke large amounts of marijuana for purposes of observational training of officers, where there were allegations that police threatened citizens with arrest if they did not participate, on grounds that this was invasion of bodily integrity that shocked the conscience); *Callaway v. N.J. State Police Troop A*, No. 12-5477, 2013 WL 1431668, at \*6 (D.N.J. Apr. 9, 2013) (noting that “conscience shocking” typically provides relief in cases of physical abuse).

### C. Equal Protection

The Equal Protection Clause issues intersect with the due process fundamental rights issues. Here again, the plaintiffs' claims confronted numerous doctrinal hurdles.<sup>302</sup>

#### 1. Intent

The first is the question of government intent. In the State's mind, this requirement was not met because the State had no *purpose to harm* Flint residents.<sup>303</sup>

The State was incorrect as a matter of doctrine. The State clearly had the intent to redirect Flint residents to Flint River sources. It is not the *intent to harm* that is key to equal protection analysis; it is the intent *to deploy a classification*.<sup>304</sup> The classification here was Flint residents.

That a harm ensued matters to an equal protection violation; but harms may flow from a classification without more, as is true of intentional government use of a racial classification.<sup>305</sup> And in the case of Flint, harm plainly occurred to the residents.

#### 2. Suspect Classifications

The next question is whether the government classification, with respect to this resource decision, implicated a suspect class or involved a fundamental right. If not, the government classification triggers only the flaccid rational basis test.<sup>306</sup>

The interdependence of fundamental rights analysis and equal protection analysis should lead the court to similar results under each test. If the right at stake is not fundamental or otherwise deserving of elevated judicial scrutiny, then only rational basis applies under due process. And if the

302 Experienced environmental justice advocates have concluded that equal protection claims are extremely difficult to pursue. *See, e.g.,* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526 (1994) (stating equal protection is a low priority theory in such cases).

303 *Mays* Motion to Dismiss, *supra* note 165, at 2, 29, 41, 45, 57.

304 KENNETH A. MANASTER & DANIEL P. SELMI, 1 STATE ENVIRONMENTAL L. § 5:15 (2016).

305 Intentional use of the classification by government triggers strict scrutiny, regardless of whether the goal was to assist underrepresented groups. *See, e.g.,* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

306 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–89 (1955) (describing the rational basis baseline). As the Court stated in *Nordlinger v. Hahn*, “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” 505 U.S. 1, 10 (1992) (citing *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The rational basis test is satisfied if there is “a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 11 (citations omitted).

residents of Flint are not a suspect class, then only rational basis applies under equal protection. The only caveat to this is that equal protection scrutiny rises as the liberty interest underlying due process becomes more significant, if not fundamental.

Put simply, plaintiffs thus need to show either that denial of clean water here implicated a fundamental (or at least hybrid) right, or that Flint residents are a suspect class, in order to trigger elevated scrutiny under equal protection. If plaintiffs cannot do so, then the rational basis test applies. This shifts the burden of proof to the plaintiffs to show there was no conceivable rational basis for the decision to use Flint River water for Flint residents.<sup>307</sup> This asserted rational basis need not have been the real reason for the decision: it may be asserted post hoc.<sup>308</sup>

All of the residents of a city—even one racially stratified and pocked by poverty, crime, and health risks—do not qualify as a suspect class. And a disparate impact is not enough to show intent to discriminate.<sup>309</sup> Perhaps they *should* qualify for suspect-class status under a theory of structural powerlessness and racism.<sup>310</sup> But at present, they do not. Thus the plaintiffs

307 See, e.g., *Heller v. Doe*, 509 U.S. 312, 319 (1993) (reaffirming that there is a “strong presumption of validity” that the party challenging the law must overcome).

308 See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (“[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”).

309 See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (finding that impact is relevant to, but not dispositive of intent); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that plaintiff must show a discriminatory purpose). Efforts to use equal protection in cases that involved the siting of environmentally harmful industries typically failed for this reason. See, e.g., *S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot.*, No. Civ.A. 01-702, 2006 WL 1097498 (D.N.J. Mar. 31, 2006); *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763, 2004 WL 2108253 (N.D. Tex. Sept. 22, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Cty. Planning & Zoning Comm’n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d*, 888 F.2d 1573 (11th Cir. 1989), *abrogated by* 896 F.2d 1264 (11th Cir. 1989); *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff’d without opinion*, 782 F.2d 1038 (5th Cir. 1986).

310 See Peter J. Hammer, *The Flint Water Crisis, KWA and Strategic-Structural Racism* (Wayne State Univ. Law Sch. Legal Studies Research Paper No. 2016-17, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2812171](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812171). See generally LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001); *THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES* (Daniel Faber ed., 1998); Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 25–44 (Justin D. Levinson & Robert J. Smith eds., 2012); *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* (Robert D. Bullard ed., 1993); Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219 (1998); Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775 (1998); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000); Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95 (2003); Gerald Torres, *Understanding*

must satisfy the demanding rational basis test requirements, or find another route to higher equal protection ground. The higher ground would depend on whether they succeeded in establishing a fundamental or hybrid right. As we have explained, this is very tough sledding.

Yet again, equal protection caselaw includes examples that defy categorization. Hybrid cases exist, and may offer plausible analogies here.<sup>311</sup> The disabled are not a suspect class per se, yet the Court struck down a zoning ordinance that affected them intentionally and adversely.<sup>312</sup> Sexual orientation is not a suspect classification per se, and marriage may traditionally include only opposite-sex couples, yet denying same-sex couples access to marriage violates due process given the intersection of liberty and equality.<sup>313</sup>

Moreover, even if access to uncontaminated water is not fundamental in the due process liberty sense, it is undeniably profound. And even if Flint residents are not a formal suspect class, their lives are hobbled by poverty, racial injustice, and political powerlessness in ways that contributed to the Flint water debacle. Stark differences in public services have in some cases been enough to trigger closer scrutiny and for courts to infer discriminatory intent.<sup>314</sup> So it may be here.

Also, as we have explained, the United States Supreme Court is slowly moving away from tradition-bound formalism as its guiding liberty principle in favor of an evolving-liberty spectrum in which inequality plays an important role.<sup>315</sup> Here too, the recent same-sex marriage cases are instructive and suggest that liberty and equality are intertwined: where the liberty denials also raise serious equality concerns they are more grave and potentially worthy of constitutional attention.<sup>316</sup>

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*Environmental Racism*, 63 U. COLO. L. REV. 839 (1992); cf. David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 Nw. U. L. REV. 879 (2017) (arguing that underenforcement of environmental laws should violate equal protection).

311 See Justice O'Connor's observation in *Lawrence v. Texas* that statutes based on animus may be subject to "a more searching form of rational basis review." 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment); see also Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014) (discussing rational basis review under equal protection caselaw and concluding it is a meaningful, nonaberrational form of judicial review).

312 *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

313 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

314 See Sten-Erik Hoidal, Note, *Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services*, 88 MINN. L. REV. 193 (2003) (discussing cases and how litigants might show the requisite intent).

315 See *Obergefell*, 135 S. Ct. at 2603 (noting that liberty and equality are intertwined).

316 *Id.*

Efforts to identify the poor as a suspect class are obviously not new,<sup>317</sup> but are no less powerful than when they were first advanced.<sup>318</sup> The Court has noted in the voting rights context that that “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”<sup>319</sup> Government action that falls directly, foreseeably, and harshly on the poor with respect to basic needs thus may ring equality alarms. Likewise, compelling work on the intersectionality of poverty and other suspect classifications, like race and gender,<sup>320</sup> offers insight into the structural discrimination Flint residents face.

Flint’s woes are particularly dreadful and notorious. Documentaries like *Roger & Me*, by Michael Moore,<sup>321</sup> have drawn national attention to the city’s plight for many years.<sup>322</sup> Moore’s focus there was on the withdrawal of the automotive industry from Flint and the adverse economic consequences thereof. But a miserable olio ails Flint—poverty, high crime, political powerlessness, poor physical and mental health outcomes, crumbling schools, high dropout rates, *and* economic desolation. These sociopolitical pathologies are not susceptible to clean doctrinal parsing. That is, a “rational basis with bite” test could have been applied to the Flint case.

Nevertheless, the doctrinal current runs briskly against elevated judicial scrutiny of any form when the offending classification is not crisp and has not formally been deemed to be “suspect.” The “whole town” and “many causes” aspect of the suspect class argument surely would worry a judge. Zip codes often send strong, determinative signals of inequality, but zip code-sensitive government conduct still does not trigger strict scrutiny.

Judges must also worry about precedent. Flint is in a wretched way, to be sure. But its exquisite municipal agony is not unique. Other American cities too are suffering from similar forms of structural injustice and some teeter

317 See, e.g., *Harris v. McRae*, 448 U.S. 297, 323 (1980); *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting); cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting argument that educational funding scheme based on local property taxes triggered strict scrutiny and had created a suspect class based on poverty).

318 See Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 11–53 (Thomas Pogge ed., 2007).

319 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (citation omitted) (striking down poll tax).

320 See, e.g., Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC’Y REV. 991, 991 (2011) (analyzing impact of intersectional demographic characteristics on odds of plaintiff victory). See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Williams Crenshaw, *Panel Presentation on Cultural Battery Speaker: Kimberlé Williams Crenshaw*, 25 U. TOL. L. REV. 891 (1994).

321 *ROGER & ME* (Dog Eat Dog Films 1989).

322 Moore also has focused on the Flint water crisis. See Michael Moore, *10 Things They Won’t Tell You About the Flint Water Tragedy. But I Will.*, <http://michaelmoore.com/10FactsOnFlint/>.

on the brink of failure.<sup>323</sup> Treating Flint residents as a suspect class per se thus may open a Pandora's box.

Third, the multiple-vectors aspect of Flint's agony—poverty *and* race *and* crumbling economic *and* water supply infrastructure, *and* more—compounded the complexities. Judges may lack the expertise to second-guess local and state decisionmakers in these cases, and may be unable to craft remedies to address the intricate causes. The more structural, political, and intersectional the social problem, the less useful courtroom tools often are to solve it. Also, other limitations are inherent in a judicial strategy, including the loss of democratic input into the content of rights.<sup>324</sup> The district judge sitting in Detroit surely knew this.

Last, municipalities with this level of poverty and other intersecting problems *should* be singled out and treated differently from others in order to assist them in reconstituting their government, rebuilding their community, and escaping their severe distress. Suspect-class status for Flint would have meant that all regulations that treat Flint differently from other Genesee County cities should trigger rigorous judicial scrutiny. If greater state benefits flowed solely to Flint, the argument would go, then other towns with arguably similar problems should have a plausible equal protection claim.

The potential boomerang effect of a zip-code victory in Flint should give those seeking environmental justice pause. The shelter of zip code—or even race and poverty—government classifications may be necessary in order to effectively redress environmental injustice that travels along zip code, race, and poverty lines. Strict scrutiny of such measures may do more harm than good to efforts to eradicate such injustice.<sup>325</sup>

For all of these reasons, elevated scrutiny under equal protection may be ill-fitting, if not unwise. The rational basis test is the applicable fall back standard. But again, the better place to locate the argument that baseline constitutionality requirements were not met in Flint was under the closely related

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323 See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014) (describing dozens of cities in receivership).

324 See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349–50 (2006) (arguing that judicial review makes citizens feel disconnected from critical decisions involving their rights). But see JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW 18 (2016) (offering an extended argument in favor of constitutionalism as a means of making public authority accountable “to the human dignity of each and every person subject to law’s authority”).

325 For a discussion of how government may use race—and poverty—conscious measures to redress environmental injustice without triggering strict scrutiny, see Sheila R. Foster, *Environmental Justice and the Constitution*, 39 ENVTL. L. REP. 10347, 10349 (2009) (noting “it may be true that courts would tolerate the ‘race-consciousness’ of environmental justice policies that express concern for the environmental health of racial minority populations and communities because they emanate from and are applied as a matter of core legislative or executive functions”); cf. Kim Forde-Mazrui, *The Canary-Blind Constitution: Must Government Ignore Racial Inequality?*, 79 L. & CONTEMP. PROBS. 53 (2016) (arguing that current doctrine may even prevent government from acting to redress racial inequality with race-neutral means).

shocks the conscience test, for reasons provided in the foregoing section.<sup>326</sup> It required the least structural change to doctrine and afforded nonjudicial government actors ample breathing room to develop sound environmental policy and to adopt poverty-conscious measures designed to relieve the misery of especially hard hit communities. It thus could have played an important role in enforcing a constitutional liberty/equality baseline without creating a fundamental right that would send courts into uncharted waters prematurely. More fundamentally, it may have worked where the other thicker rights theories failed.

#### D. Preemption

The district judge in *Mays* took another path. He concluded, as he did in a related action, that the Safe Drinking Water Act preempted the constitutional claims, on the theory that they were basically about insisting that government provide clean water.<sup>327</sup>

The district court erred and the Court of Appeals for the Sixth Circuit correctly reversed on this point.<sup>328</sup> In *Smith v. Robinson*,<sup>329</sup> the Supreme Court concluded that the “carefully tailored administrative and judicial mechanism” of the Education for All Handicapped Children Act (EAHCA) reflected congressional intent that the Act be “the exclusive avenue through which a plaintiff may assert . . . an equal protection claim to a publicly financed special education.”<sup>330</sup>

Courts have been reluctant to apply *Smith* in other contexts in which parties invoked Section 1983 to assert constitutional versus statutory argu-

326 Even had the shocks the conscience theory prevailed, as we suggest it should have, the plaintiffs faced several serious obstacles to recovery, including sovereign immunity, official immunity, and statutory preemption issues that arguably preclude application of 42 U.S.C. 1983. These procedural nuances are beyond the scope of this paper, but were reasons given by lawyers who declined to step in to represent plaintiffs in this context. See Bernstein & Dennis, *supra* note 162.

327 *Mays v. Snyder*, No. 15-cv-14002, 2017 WL 445637, at \*1 (E.D. Mich. Feb. 2, 2017), *aff'd in part, rev'd in part sub nom. Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017) (order of dismissal for lack of subject matter jurisdiction). According to the judge, “The essence of Plaintiffs’ constitutional claims is that Plaintiffs were injured as a result of exposure to contaminated water. Plaintiffs’ allegations are addressed by regulations that have been promulgated by the EPA under the SDWA,” and “the safety of public water systems is a field occupied by the SDWA. Accordingly . . . the court concludes that Plaintiffs’ *federal* remedy is under the SDWA, regardless of how their legal theories are characterized in the complaint.” *Id.* at \*2 (citations omitted). The judge relied upon his ruling in *Boler v. Earley* dismissing for lack of subject matter jurisdiction. *Id.* (citing *Boler v. Earley*, No. 16-10323, 2016 WL 1573272 (E.D. Mich. Apr. 19, 2016), *aff'd in part, rev'd in part*, 865 F.3d 391 (6th Cir. 2017)).

328 *Boler*, 865 F.3d 391 (consolidating *Boler* and *Mays v. Snyder*, dismissing the state defendants on immunity grounds, and remanding cases for further proceedings against remaining individual defendants).

329 468 U.S. 992 (1984).

330 *Id.* at 1009.

ments, despite the fact that *Smith* itself involved an equal protection claim.<sup>331</sup> Moreover, the Court cast doubt on whether *Smith* applies in cases where Section 1983 is invoked to assert constitutional rights in *Fitzgerald v. Barnstable School Committee*.<sup>332</sup> In any event, *Smith* requires that the statute that allegedly preempts a Section 1983 claim must secure rights that are “virtually identical”<sup>333</sup> to the constitutional right, and must provide a comprehensive remedial scheme.<sup>334</sup>

Most important is that the plaintiffs’ constitutional allegations went well beyond any claim that they were denied access to clean water in ways that the federal statutes enforce. They claimed that the government intentionally and outrageously provided contaminated water despite citizen outcries and actual notice that something was seriously wrong with the water. To lop off plaintiffs’ opportunity to raise these civil constitutional claims because federal environmental laws cover the subject matter of clean water would insulate the government actors from full accountability, no less than denying the state the right to proceed against some of these officials under criminal laws would insulate them from accountability. Also, the ultimate issue is one of congressional intent. There is no evidence that the SDWA can properly be read as congressional withdrawal of access to Section 1983 to assert violations of *due process and equal protection*. Finally, the SDWA and Section 1983 diverge in multiple ways that point against the virtual-identity requirement for preemption of Section 1983 claims.

#### IV. BEYOND FLINT

Identifying and judicially enforcing a due process baseline in environmental harm cases makes doctrinal and normative sense. Flint offered courts an opportunity to underscore and respect that baseline. Other courts have already indicated that they may be receptive to the claim that the shocks the conscience baseline should rein in authorities in environmental cases.<sup>335</sup>

The nuts and bolts of this strategy would be for the court to follow the FWATF Report’s outline of the key actors responsible for the crisis,<sup>336</sup> to state

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331 See *Employment Law—Age Discrimination—Seventh Circuit Holds that the ADEA Does Not Preclude § 1983 Equal Protection Claims.*—Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), 126 HARV. L. REV. 1414 (2013).

332 555 U.S. 246, 258 (2009).

333 *Smith*, 468 U.S. at 1003, 1009.

334 *Id.* at 992.

335 For example, in *Juliana v. United States*, Magistrate Judge Coffin refused to dismiss a suit alleging that the government’s action and inaction with respect to carbon pollution violated substantive due process rights on grounds that the government conduct may have shocked the conscience. Order and Findings & Recommendation, *Juliana v. United States*, No. 6:15-cv-1517 (D. Or. April 8, 2016) (noting that fundamental rights to life, liberty, and property may have been violated in manner that shocks the conscience, and also relying on the public trust doctrine). This ruling was upheld by the federal district court judge. See *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (ruling on Motion to Dismiss); see also *supra* note 277 and accompanying text.

336 See *supra* notes 135–57 and accompanying text.

why their knowing disregard of the water quality deficiencies shocked the conscience, and to impose the Flint-specific prospective remedies requested by the plaintiffs but with due regard for the steps already undertaken by the state. Duplicate efforts would not be required, but the court could have continued to monitor the crisis until the steps were completed. The judicial intervention would be more complex than ordering that a particular executive actor no longer engage in shocking acts with respect to an arrestee—as was the case in *Rochin*—but it would be no more judicially unmanageable to right the ongoing wrong in this specific context than to redress the harms in a mass tort case. The additional feature here was that the court would have labeled the government default appropriately: as a constitutional wrong of epic proportion, not merely a statutory or common-law tort wrong.

Doing so would not transform constitutional law into tort law. The severe limitations of the shocks the conscience theory make such arguments—which are routine in cases where tort and constitutional law may overlap—overwrought. The advantages of the shocks the conscience test include its limited applicability.

Doing so also would not mean that a fundamental right to some level of environmental security could not emerge, or that courts could not revisit notions of equal protection that better protect the poor and disenfranchised from foreseeable government inflicted harms. These arguments may continue to percolate and may eventually ripen into formal constitutional categories.

Nor would enforcing a liberty baseline ignore the urgent need for non-judicial remedies, or romanticize the effectiveness of courts versus these other strategies in fixing what ails Flint. The state actors in *Mays* argued that, “this *federal* lawsuit is the wrong vehicle to [solve Flint’s water crisis].”<sup>337</sup> But this facially appealing argument had two obvious flaws. First was that the judiciary can reinforce other remedies, as well as act interstitially when such remedies fail. Second was that the argument in favor of legislative and administrative remedies depends on legislative and administrative will to provide them.<sup>338</sup>

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337 *Mays* Motion to Dismiss, *supra* note 165, at 1 (emphasis added).

338 While President-elect Trump pledged the following immediate actions:

—[L]ift the restrictions on the production of \$50 trillion dollars’ worth of job-producing American energy reserves, including shale, oil, natural gas and clean coal. . . .

—[L]ift the Obama-Clinton roadblocks and allow vital energy infrastructure projects, like the Keystone Pipeline, to move forward. . . .

—[C]ancel billions in payments to U.N. climate change programs and use the money to fix America’s water and environmental infrastructure.

Amita Kelly & Barbara Sprunt, *Here Is What Donald Trump Wants To Do in His First 100 Days*, NPR (Nov. 9, 2016), <http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days>. He also pledged to “cancel every unconstitutional executive . . . order” signed by President Obama. *See id.*; *see also* Coral Davenport, *Donald Trump Could Put Climate Change on Course for ‘Danger Zone,’* N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/11/us/politics/donald-trump-climate-change.html>

President Trump ran on a platform of rejecting the environmental measures adopted by his predecessors.<sup>339</sup> Although he also pledged to address the nation's profound infrastructure concerns<sup>340</sup>—which obviously affect water quality, as Flint shows—the prospects of national overhaul may dim when the staggering price of such an overhaul is fully measured.<sup>341</sup> Cost and economic trade-offs are a bipartisan concern, as are the federalism implications of federal environmental regulation. On the other hand, there was overwhelming bipartisan support for the passage of the Water Infrastructure Improvements for the Nation (WIIN) Act, during the closing month of 2016.<sup>342</sup> Thus, much remains to be seen as to the direction of agenda-setting for environmental law at the national level. Yet regardless of the particular agenda embraced by the Trump Administration, courts will remain critical in redressing the worst environmental crises on a national level and will necessarily play a role in interpreting and enforcing the existing laws.

Of course, even the thin rights strategy we propose here will face stiff headwinds. Newly appointed Justice Gorsuch may join the justices who are skeptical of thin rights, as well as of evolving notions of liberty and equal protection. Lower court judges too may balk at this constitutional strategy, or fear its complexities in implementation. Nevertheless, we speculate that these thin due process claims will fare better before the Court than thicker, fundamental rights-based claims regarding uncontaminated water or “suspect classification”-based arguments on behalf of poor and disadvantaged

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(“Mr. Trump and other Republicans have attacked the Clean Power Plan as a ‘war on coal.’ As president, Mr. Trump would not have the legal authority to unilaterally undo the regulations, which were put forth by the E.P.A. under a provision of the 1970 Clean Air Act. However, Mr. Trump could target the rules by appointing an industry-friendly justice to the Supreme Court and then refusing to defend the plan when it goes before the court. He could also direct the E.P.A. to reissue the plan to be extremely friendly to industry.”).

339 See Michael D. Shear & Gardiner Harris, *Trump Wants to ‘Drain the Swamp,’ but Change Will Be Complex and Costly*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/11/us/politics/trump-government.html> (noting that Trump pledged to shut down the EPA while campaigning).

340 See David Harrison, *Donald Trump’s Infrastructure Plan Faces Speed Bumps*, WALL ST. J. (Nov. 11, 2016), <http://www.wsj.com/articles/donald-trumps-infrastructure-plan-faces-speed-bumps-1478884989?emailToken=JRRr8fvxzY3yUhNAXacww01shaqVNF/WUQ0vMaXHMNFLFr2DPvOm92r84wsOzqGXqS09x6stB9HYySDGUindvRNTUwuIgwQf0Jygn/w==>.

341 See Russell Berman, *Trump Tries to Bend Republicans on Infrastructure*, ATLANTIC (Nov. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/11/trumps-infrastructure-challenge-to-republicans/507656/>.

342 Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016). The WIIN Act aims to address the needs of America’s harbors, locks, dams, flood protection, and other water resources infrastructure. It includes the Water Resources Development Act (WRDA) of 2016, which supports the missions of the U.S. Army Corps of Engineers (USACE) in overseeing the nation’s water infrastructure. The WIIN Act includes provisions aimed at improving drinking water infrastructure around the country, addressing control of coal combustion residuals, and improving water storage and delivery to help drought stricken communities. The legislation included the critical funding for Flint, Michigan.

communities. In any event, they may be paired with the fundamental rights arguments, as plaintiffs attempted to do in *Mays*.

Finally, the shocks the conscience strategy may be well suited to a political culture that responds to issues that have emotional content.<sup>343</sup> Shocks the conscience cases that include vivid images of the sickeningly contaminated water, the ill communities (especially the children within them), and the hapless government actors who had knowledge but failed to act responsibly, might help inspire judicial action. Likewise, a well-told and widely publicized courtroom narrative that underscores not just the legal issues but also the outrageous human consequences of government default may propel lawmakers into action.

One thing is clear. The urgency of addressing clean water will be difficult for courts and policymakers to ignore. Flint is merely an ominous tip of a very large and growing iceberg.<sup>344</sup> One Natural Resources Defense Council (NRDC) report suggests that millions of Americans may be exposed to unsafe lead levels.<sup>345</sup> Lead poisoning and other serious water quality risks have been reported in East Chicago, Indiana,<sup>346</sup> Hoosick Falls, New York,<sup>347</sup>

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343 For an intriguing new analysis of how human emotions influence political predispositions in ways that may explain cultural divides as well as places of union, see JONATHAN HAI DT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

344 For a masterful analysis of the problem of distressed cities in the United States, and how their distress places pressure on their ability to provide basic public services like water, see Anderson, *supra* note 323. Anderson argues for a warranty of habitability of urban centers. *Id.* at 1197–99. Habitability requires, inter alia, attention to crumbling sewer systems. *Id.* at 1201–02; see also Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 *Geo. J. on Poverty L. & Pol’y* 355 (2016) (arguing for a civil rights approach to escalating concerns about equal access to clean water). Yet we should resist resorting to a misleading shorthand of referring to these problems as “inner city” problems. First, they are more pervasive. Second, not all cities are suffering or suffering in the same ways. See Emily Badger, *Actually, Many ‘Inner Cities’ Are Doing Great*, *N.Y. Times* (Oct. 12, 2016), <https://www.nytimes.com/2016/11/11/us/politics/trump-government.html>.

345 ERIK OLSON & KRISTI PULLEN FEDINICK, *NAT. RES. DEF. COUNCIL, WHAT’S IN YOUR WATER? FLINT AND BEYOND* (2016), <https://nrdc.org/sites/default/files/whats-in-your-water-flint-beyond-report.pdf> (reporting that EPA data show that 5363 water systems, which provide water to more than 18 million people, breached the federal Lead and Copper Rule in 2015, and that violations include the failure to properly test water for lead or inadequate treatment of water to prevent lead from leeching from old pipes into the drinking supply); see also Lecia Bushak, *A Brief History of Lead Poisoning in Major Cities*, *MED. DAILY* (June 8, 2016), 2016 *WLNR* 17656263; Joan B. Rose, *America’s Water Crisis Could Be Worse than You Know*, *TIME* (Mar. 22, 2016), <http://time.com/4266919/americas-water-crisis/?xid=email-share> (discussing widespread concerns about decaying infrastructure and effect on safe water supplies).

346 See Abby Goodnough, *Their Soil Toxic, 1,100 Indiana Residents Scramble to Find New Homes*, *N.Y. Times* (Aug. 31, 2016), <https://www.nytimes.com/2016/08/31/us/lead-contamination-public-housing-east-chicago-indiana.html>.

347 See Bennett Liebman, *Removing the Lead from Upstate New York*, *GOV’T REFORM* (Apr. 12, 2016), <https://governmentreform.wordpress.com/2016/04/12/removing-the-lead>



One may respond that the more routine and widespread such defaults become, the harder it will be for judges to deem the government actions shocking or targeted at any particular community. The bigger the dilemma, the less courts may seem to be the right institution to impose a particular policy outcome nationwide and to monitor government progress. Also, these widespread harms may further undermine any constitutional argument that requires a showing of specific intent to harm a particular group of people.

We recognize that fixing bad water pipes, like fixing bad roads and other aspects of crumbling infrastructure, *is* better suited to nonjudicial remedies.<sup>352</sup> The liberty baseline defined here is no panacea; by itself, it will not fix Flint or the nation. But without it, too little may stand between grossly inept government conduct and grave, remediless environmental harms.

Moreover, to indict the shocks the conscience test on the ground that judicial remedies may be anemic reaches too far. The same concern would doom constitutional remedies across a wide swath of liberty and equality concerns which have similar structural features, and which may be redressed by a combination of judicial, administrative, and legislative means. Constitutional arguments should be one sharp arrow in the liberty/equality quiver, not the whole set.

None of this, of course, is lost on thoughtful environmental lawyers and activists, on some elected officials, policymakers, judges, scientists, economists, business people, or even on most average citizens. They realize that nobody is insulated from hemorrhaging environmental disasters, past or impending, and that a host of steps must be taken to mitigate or avert them. And as to water quality in particular, the EPA published a Drinking Water Action Plan in late November 2016 that shows national resolve to do more to assure this basic need is met.<sup>353</sup>

Multipronged steps also are being considered in Michigan, and include establishing clean drinking water as a human right.<sup>354</sup> Proposed Michigan legislation would have the state adopt the strictest lead testing rules in the nation.<sup>355</sup>

As noted earlier, other states are likewise taking action to assure a right to environmental quality beyond what national constitutional law requires.<sup>356</sup>

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352 For an examination of the complexities of financing infrastructures, and the negative externalities infrastructure projects may impose, see INGO WALTER, WORKING GROUP ON INFRASTRUCTURE FIN., *THE INFRASTRUCTURE FINANCE CHALLENGE* (Sept. 20, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841281](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841281).

353 EPA, *DRINKING WATER ACTION PLAN* (Nov. 2016), [https://www.epa.gov/sites/production/files/2016-11/documents/508.final\\_usepa\\_drinking\\_water\\_action\\_plan\\_11.30.16.v0.pdf](https://www.epa.gov/sites/production/files/2016-11/documents/508.final_usepa_drinking_water_action_plan_11.30.16.v0.pdf).

354 Human Right to Water Act, H.B. 5101 (Mich. 2015); Human Right to Water Act, S.B. 643 (Mich. 2015).

355 See *Michigan Proposes Adopting Strictest Lead-Testing Rules in Country*, REUTERS (Apr. 15, 2016), <http://www.reuters.com/article/us-michigan-water-idUSKCN0XCIWI>.

356 See *supra* text accompanying note 276.

Thus, signs have emerged that the urgency of environmental protection can prompt significant and dramatic government responses.<sup>357</sup>

There also are promising signs that some policymakers will continue to advance environmental safety interventions and remedies that are context and culture sensitive,<sup>358</sup> and thus more effective and humane. Important work is being done to assure that environmental policy before and after harmful incidents takes into account the complexities of local, especially cultural, aspects of environmental justice.<sup>359</sup>

357 Those who fear liberty, economic, or other boomerang aspects of environmental regulation but appreciate the need for action may also favor legal measures that stop short of commands. Measures can incentivize better environmental practices with nudges and other means. See, e.g., CASS R. SUNSTEIN, *THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE* 159–86 (2016) (discussing the use of externality-reducing nudges rather than mandates in the environmental context, and noting that they are no panacea: among other things, they may impose disparate costs on poorer individuals).

358 See, e.g., proposed Senate Bill 2848, which states in section 7108 as follows: “The Administrator [of the EPA] shall appoint not fewer than 1 employee in each regional office of the Environmental Protection Agency to serve as a liaison to minority, tribal, and low-income communities in the relevant region.” Water Resources Development Act of 2016, S. 2848, 114th Cong. § 7404 (2016); see also Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 32,7629 (Feb. 16, 1994) (requiring federal agencies to make environmental justice part of their missions, as feasible). Of course, the status of these and other environmental policies at the federal level is uncertain under the new administration.

359 For example, policymakers and judges may learn much from work being done in the wake of a 2015 acid mine drainage spill in Colorado. During an EPA investigation of the Gold King Mine, approximately three million gallons of acid mine drainage were accidentally released. See Karletta Chief et al., *K’è bee da’ahíínítá: Strength Through the Diné (Navajo) Clan System to Respond to the Gold King Mine Spill*, University of Arizona Foundation Agnese Nelms Haury Program in Environmental and Social Justice Challenge Grant (Apr. 4, 2016) (on file with authors). The spill flowed into the Animas and San Juan Rivers and contained high concentrations of metals, such as lead and arsenic. *Id.* The effects involved the waterways of twelve Indian tribes and six states in the Colorado River Basin. *Id.* Some of the early responses to the disaster focused myopically on recreational users of these waterways and ignored that tribes subsisted on the water. *Id.* An interdisciplinary team of researchers, working with major funding from the Agnes Nelms Haury Program in Environmental and Social Justice, has reached out to the tribes to teach tribal health leaders about water quality testing and other means of mitigating the disastrous effects of the spill in ways that are attuned to tribal customs, languages, and ways of life. *Id.* Their work may produce a national model of how to make environmental interventions a more effective and just means of preventing and responding to environmental harms. *Id.*; see also PICTOU LANDING NATIVE WOMEN’S GROUP ET AL., ‘OUR ANCESTORS ARE IN OUR LAND, WATER, AND AIR’: A TWO-EYED SEEING APPROACH TO RESEARCHING ENVIRONMENTAL HEALTH CONCERNS WITH PICTOU LANDING FIRST NATION (2016). Although the Gold King Mine spill may have been one of the largest in recent history, the Department of Interior estimates that there are more than 500,000 abandoned mines throughout the United States. BUREAU OF LAND MGMT., *ABANDONED MINES: EXTENT OF THE PROBLEM*, [http://www.abandonedmines.gov/extent\\_of\\_the\\_problem](http://www.abandonedmines.gov/extent_of_the_problem) (last visited Aug. 23, 2017). Consequently, there is high potential for ongoing acid mine leaks or future large-scale spills. *Id.*

Finally, advances in technology and science can improve prevention and enforcement.<sup>360</sup> Interdisciplinary work is critical to designing effective policies in this increasingly vital area of global, national, and local concern.<sup>361</sup>

We do not purport here to outline all of the relevant concerns, or imagine we can map out all of the possible extralegal and legal measures that might be mobilized to respond to Flint and other unfolding environmental crises. Grasping and solving the public/private coordination, economic, scientific, technological, and human justice barriers to assuring uncontaminated water and a safe environment in other respects obviously are profoundly challenging concerns. A district judge in Michigan (or elsewhere) cannot be expected to solve this puzzle alone.

Our claim is this: the complexities of multiheaded strategies should not rule out properly calibrated judicial responses, including constitutional responses, to environmental disasters. Everything that makes crafting sound and humane environmental policy an inherently complex and multidisciplinary endeavor applies equally to crafting sound and humane economic, educational, health, and other policy. Judges can and should play a role in these policy matters, as all have constitutional liberty and equality dimensions. Environmental policy is no different in these respects.

#### CONCLUSION

Flint is a tragic, ongoing story that *should* teach this constitutional moral: government shall not ignore basic human liberty and equality in ways that shock the conscience. Baseline constitutional protections include this substantive due process shield.

We have outlined here how this baseline may be implemented and have underscored the normative reasons for a court to do so. We have not condemned thicker rights strategies in such cases, but regard the baseline liberty approach as more feasible and a descriptively compelling judicial response to shocking environmental disasters. By applying the latter test, courts can give constitutional voice to liberty and equality losses like the ones suffered by Flint residents, and can signal to the nation that courts can and will respond forcefully and meaningfully to the outrage these losses properly evoke.

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360 See generally Robert L. Glicksman et al., *Technological Innovation, Data Analytics, and Environmental Enforcement*, 44 *ECOLOGY L.Q.* 41 (2017) (noting that information technology may improve understanding of the state of environmental compliance and thus promote compliance through the combined efforts of government, regulated entities, and civil society).

361 See, e.g., MICHAEL E. WEBBER, *THIRST FOR POWER: ENERGY, WATER, AND HUMAN SURVIVAL* (2016).

