SUBSTANTIVE DUE PROCESS AS RECOURSE FOR FLINT WATER CRISIS PLAINTIFFS

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Law students. Lawyers. Law professors. Politicians. Radio and television commentators. Some paid to talk. Some talk for free.

None of them wants to talk about *Johnson v. M'Intosh*. To them, the story is more than dead. Crazy Horse and Pontiac. Sitting Bull and Leopold Pokagon. At least they are movies and books, we say, and we can learn from those. Almost all of us would say the Indians did not deserve what happened to them. If that is true—that the Indians were wronged—*Johnson v. M'Intosh* is a lie. It is wrongly decided. You may not kill people and destroy what they are and call it legal and fair play.

Can you?

The story of *Johnson v. M'Intosh* now is this: we refuse to listen, to learn. The story, like all stories, has unlimited life and power, but we do not respect that power.

Maybe you *can* kill people and destroy what they are and call it legal and fair play.

Fletcher[1]

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1. Matthew L.M. Fletcher, *Listen*, 3 MICH. J. RACE & L. 523, 529–30 (1997).

I. INTRODUCTION

On April 25, 2014, the City of Flint, Michigan, switched its drinking water source from the system used by the City of Detroit[2] to the closer-to-home and (more important to Flint's decision makers at the time[3]) less expensive Flint River.[4,5] Within months, Flint residents began to complain about their water.[6] It was discolored, coming out of their taps brown.[7] It tasted wrong.[8] It had a foul smell.[9] It gave children rashes after

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2. The City of Detroit sources its water from the Detroit River and Lake Huron. *See* CITY OF DETROIT WATER AND SEWAGE DEPARTMENT, 2016 WATER QUALITY REPORT 1 (2016), http://www.detroitmi.gov/Portals/0/docs/DWSD/Water%20Quality%20Reports/2016%20water_quality_report_web.pdf.

3. Pursuant to Michigan's Local Financial Stability and Choice Act, the Governor can appoint an "emergency manager" (EM) for municipalities experiencing a financial emergency. Mich. Comp. Laws Ann. § 141.1549 (2018). According to the law, the EM "shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government," effectively supplanting democratically-elected leaders with political appointees. *Id.* At the time Flint's water was switched, the City of Flint was under the control of an Emergency Manager, Darnell Earley, who was appointed by and "serve[d] at the pleasure of the governor." *Id.* Earley made the final decision to switch Flint's water source from Detroit to the Flint River. *See* Merrit Kennedy, *2 Former Flint Emergency Managers, 2 Others Face Felony Charges Over Water Crisis*, NPR NEWS (Dec. 20, 2016), https://www.npr.org/sections/thetwo-way/2016/12/20/506314203/2-former-flint-emergency-managers-face-felony-charges-over-water-crisis. He did so in hopes of cutting costs for the City of Flint. *See* John Counts, *Flint Water Crisis Got Its Start As A Money-Saving Move in Department of Treasury*, MLIVE (May 3, 2016), http://www.mlive.com/news/index.ssf/2016/05/flint_water_crisis_got_its_sta.html. Earley and his successor, Gerald Ambrose, now face criminal charges for their involvement in the water crisis. *Id.* Gov. Snyder has not been charged. *See* Leonard N. Fleming & Jonathan Oosting, *Health chief, 4 others get Flint manslaughter charges*, DETROIT NEWS (June 14, 2017), https://www.detroitnews.com/story/news/michigan/flint-water-crisis/2017/06/14/flint-water/102838154/. For a more comprehensive examination of Michigan's emergency manager law, see Julie Bosman & Monica Davey, *Anger in Michigan Over Appointing Emergency*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html.

4. Abby Goodnough, Monica Davey & Mitch Smith, *When the Water Turned Brown*, N.Y. TIMES (Jan. 23, 2016), https://www.nytimes.com/2016/01/24/us/when-the-water-turned-brown.html?rref=collection%2Fnewseventcollection%2Fflint-water-crisis&action=click&contentCollection=us&region=stream&module=stream_unit&version=latest&contentPlacement=36&pgtype=collection.

5. For a comprehensive understanding of the complex sociopolitical circumstances precipitating the Flint water crisis, 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, 672 (2017).

6. *Id.* at 700–01.

7. *Id.* at 657.

8. *Id.*

they bathed.[10] In the summer of 2014, Legionnaires' disease (a water-borne illness similar to pneumonia) broke out in the community, ultimately sickening eighty-seven people and killing twelve.[11] Flint water repeatedly tested positive for *E. coli* contamination, and officials instructed residents to boil their water.[12]

Flint's residents were concerned—especially its mothers.[13] Many people seemed to be affected by the water switch, but none more so than Flint's children.[14] They frequently suffered from rashes, which doctors alternately diagnosed as ringworm, fungal infections, or scabies.[15] Some experienced other mysterious symptoms such as abdominal pains[16] and mental fogginess.[17] Led by the mothers of these sick children, Flint residents assembled in marches, organized committees,[18] brought bottles of contaminated water to public meetings, and demanded that their water be tested.[19] They understood their water was not healthy, but many could not afford to purchase bottled water for daily use.[20]

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9. *Id.* at 653.

10. *Id.* at 657.

11. Adding chlorine to municipal drinking water typically prevents such outbreaks; but "when Flint's water source changed, the chlorine level dropped, and cases of Legionnaires' disease spiked." Rebecca Hersher, *Lethal Pneumonia Outbreak Caused by Low Chlorine In Flint Water*, NPR NEWS (Feb. 5, 2018), https://www.npr.org/sections/health-shots/2018/02/05/582482024/lethal-pneumonia-outbreak-caused-by-low-chlorine-in-flint-water. The Legionnaires outbreak is just one piece of evidence pointing to the ways in which government officials mismanaged Flint's water system following the cost-driven decision to switch its source. *Id.*

12. Goodnough et al., *supra* note 4.

13. *Id.*

14. For example, many Flint residents, including adults, experienced hair loss after drinking the tap water. *See id.*

15. *Id.*

16. *See* Julia Lurie, *Meet the Mom Who Helped Expose Flint's Toxic Water Nightmare*, MOTHER JONES (Jan. 21, 2016), https://www.motherjones.com/politics/2016/01/mother-exposed-flint-lead-contamination-water-crisis/.

17. *See* Laura Bliss, *For Flint Kids, Lead Exposure Doesn't Have to Spell Destiny*, CITY LAB (Mar. 22, 2016), https://www.citylab.com/equity/2016/03/flint-water-crisis-lead-mental-damage/474849/.

18. *See* Mitch Smith, *A Water Dilemma in Michigan: Cloudy or Costly?*, N.Y. TIMES (Mar. 24, 2015), https://www.nytimes.com/2015/03/25/us/a-water-dilemma-in-michigan-cheaper-or-clearer.html.

19. Lurie, *supra* note 16.

20. For example, one Flint family of five spent about $400 per month on their bottled water needs. *See* Smith, *supra* note 18. Many Flint residents, however, could not afford this expenditure "or make the trek to obtain it—the city of 100,000 only has one major grocery store, on the far side of town." *See* Lurie, *supra* note 16.

Officials denied that there was a problem and actively dismissed citizens' concerns.[21] Meanwhile, on an educated hunch that water from the Flint River was too corrosive to pass through lead pipes without causing lead to leach into the drinking water, Virginia Tech professor Dr. Marc Edwards tested hundreds of Flint households for lead poisoning.[22] The ninetieth percentile lead concentration of this sampling was 25 parts per billion (ppb)[23]— 10 ppb higher than the action level under the Safe Drinking Water Act's (SDWA) Lead and Copper Rule.[24] Further, "[s]everal samples exceeded 100 ppb, and one sample collected after 45 seconds of flushing exceeded 1000 ppb."[25] Dr. Edwards' study concluded simply and emphatically: "Flint has a very serious lead-in-water problem."[26]

Dr. Mona Hanna-Attisha, a Flint pediatrician, subsequently conducted her own study and found that the number of Flint children with elevated levels of lead in their bloodstream had at least doubled and even tripled in some parts of the city.[27] On September 24, 2015, Dr. Hanna-Attisha held a press conference in hopes of disseminating her findings to the public, but officials dismissed her as an "unfortunate researcher" setting out to cause mass hysteria.[28] Yet only five days later, state officials finally publicly recognized that Flint had a lead problem.[29] In January 2016, with a federal investigation looming, Governor Snyder declared a state of emergency in Flint.[30]

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21. *See, e.g.*, Lurie, *supra* note 16 ("Throughout most of 2015, the city and state maintained there was nothing to worry about. 'I want to assure everyone that the city is sensitive to the public's concerns,' Dayne Walling, then Flint's mayor, declared at a press conference that January. 'The city water is safe to drink. My family and I drink it and use it every day.'").

22. Sherwin, *supra* note 5.

23. Marc Edwards, *Our Sampling of 252 Homes Demonstrates a High Lead in Water Risk: Flint Should be Failing to Meet the EPA Lead and Copper Rule*, FLINT WATER STUDY (Sept. 8, 2015), http://flintwaterstudy.org/2015/09/our-sampling-of-252-homes-demonstrates-a-high-lead-in-water-risk-flint-should-be-failing-to-meet-the-epa-lead-and-copper-rule/ [https://perma.cc/4S93-W95L].

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Dr. Sanjay Gupta, Ben Tinker & Tim Hume, *'Our Mouths Were Ajar': Doctor's fight to Expose Flint's Water Crisis*, CNN (Jan. 22, 2016), https://www.cnn.com/2016/01/21/health/flint-water-mona-hanna-attish/index.html.

29. *See A Timeline of the Water Crisis in Flint, Michigan*, U.S. NEWS & WORLD REPORT (June 14, 2017, 12:20PM), https://www.usnews.com/news/best-states/michigan/articles/2017-06-14/a-timeline-of-the-water-crisis-in-flint-michigan.

30. *Id.*

The crisis is ongoing; the extent of the damage caused by the poisoning of Flint's water is unclear, but its effects will be felt most by Flint's youngest.[31] Children are uniquely impacted by lead contamination because growing bodies both absorb more of it and are more vulnerable to damage by it.[32] Lead poisoning is linked to a litany of health problems in children; indeed, "[e]ven low exposures to lead can result in developmental and life-long problems for children such as behavior and learning problems, a lower IQ, hyperactivity, slowed growth, hearing problems, and anemia."[33] To date, thousands of Flint children have been exposed to lead-contaminated water.[34] Moreover, fetuses exposed to lead-contaminated water in utero are acutely impacted by lead poisoning, which can cause "fetal death, prenatal growth abnormalities, reduced gestational period, and reduced birth weight."[35] Indeed, from November 2013 through March 2015, "between 198 and 276 more children would have been born had Flint not enacted the switch in water."[36]

Flint residents took their case to court. In 2016 and 2017, the U.S. District Court for the Eastern District of Michigan dismissed two class actions on the grounds that claims brought pursuant to 42 U.S.C.A. § 1983 were preempted by the comprehensive scheme of the Safe Drinking Water Act (SDWA).[37] The two cases were consolidated on appeal, and in July 2017, the Sixth Circuit upended expectations and held that a class of plaintiffs from Flint, Michigan could proceed with § 1983 claims alleging constitutional violations stemming from the Flint water

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31. *See* Goodnough et al., *supra* note 4.

32. *See* World Health Organization, *Lead Poisoning and Health*, http://www.who.int/mediacentre/factsheets/fs379/en/ (last updated Aug. 2017). Malnourished children are particularly vulnerable to the detrimental effects of lead poisoning. When a child's body craves minerals it lacks, it is especially susceptible to the effects of lead because it absorbs the heavy metal more quickly. *See id.*

33. Sherwin, *supra* note 5, at 674.

34. Lauren Camera, *After Water Crisis, Flint Students to Be Screened for Disabilities*, U.S. NEWS & WORLD REPORT (Apr. 9, 2018), https://www.usnews.com/news/healthiest-communities/articles/2018-04-09/flint-students-to-be-screened-for-disabilities-after-water-crisis.

35. Daniel S. Grossman & David J.G. Slusky, *The Effect of an Increase in Lead in the Water System on Fertility and Birth Outcomes: The Case of Flint, Michigan*, Working Papers Series in Theoretical and Applied Economics 3 (2017) (unpublished manuscript) (on file with the University of Kansas).

36. *Id.* at 32.

37. *See* Mays v. Snyder, No. 15-14002, 2017 WL 445637, at *2 (E.D. Mich. Feb. 2, 2017) ("[T]he court concludes that Plaintiffs' *federal* remedy is under the SDWA, regardless of how their legal theories are characterized in the complaint."), *aff'd in part, rev'd in part sub nom.* Boler v. Earley, 865 F.3d 391 (6th Cir. 2017); Boler v. Earley, No. 16-10323, 2016 WL 1573272, at *1 (E.D. Mich. Apr. 19, 2016), *aff'd in part, rev'd in part sub nom.* Boler v. Earley, 865 F.3d 391 (6th Cir. 2017).

crisis.[38] In *Boler v. Earley*,[39] the Sixth Circuit examined the SDWA's statutory construction to conclude that the plaintiffs' claims under § 1983 made pursuant to the Fourteenth Amendment were not preempted by the SDWA. No Circuit Court of Appeals had yet made such a ruling, and none have since. The Supreme Court, however, denied certiorari in *Boler*, thus leaving the Sixth Circuit's rule intact.[40]

The First Circuit had previously gone the opposite way; it heard *Mattoon v. City of Pittsfield*[41] in 1992 and held that the SDWA preempted actions under § 1983. In *Mattoon*, the plaintiffs argued that the city violated the SDWA and their constitutional rights when it failed to provide clean drinking water.[42] However, the First Circuit concluded that the SDWA preempted § 1983 claims because it "authorized the Environmental Protection Agency (EPA) to regulate contaminants in the public drinking water supply [. . . and therefore] it was within that agency's province to determine which contaminants to regulate,"[43] not the judiciary's. Similarly, in 2016, a California District Court heard *Nitao v. Pacific Gas and Electric Company*[44] and held that the SDWA precluded the plaintiff's § 1983 claims because SDWA "specifically regulated the precise harm alleged in [the] action, namely, contaminants in public water systems that failed to comply with the national water regulations."[45]

Given this circuit court split, this Note argues that the SDWA does not preempt claims for violations of due process made pursuant to the Fourteenth Amendment, via 42 U.S.C.A § 1983.[46] Such claims allow the

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38. *See* Boler v. Earley, 865 F.3d 391, 406 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays, 138 S. Ct. 1281 (2018), and *cert. denied sub nom.* Wyant v. Mays, 138 S. Ct. 1285 (2018), and *cert. denied sub nom.* City of Flintv. Boler, 138 S. Ct. 1294 (2018).

39. 865 F.3d 391 (6th Cir. 2017).

40. Wright v. Mays, 138 S. Ct. 1281 (2018).

41. 980 F.2d 1 (1st Cir. 1992).

42. *Id.* at 5.

43. Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Safe Drinking Water Act's Provisions Related to Public Water Supply Enforcement, 42 U.S.C.A. §§ 300g to 300g-5 and Related Regulations*, 19 A.L.R. Fed. 3d Art. 6 (2017).

44. No. CV 16-2532-GHK (KK), 2016 WL 4154932, at *1 (C.D. Cal. Aug. 4, 2016).

45. Buckman *supra* note 43.

46. 42 U.S.C.A. § 1983 (West 2018). For purposes of this Note, analysis will be focused solely on the merits of substantive due process claims. Flint plaintiffs also seek redress on Equal Protection grounds. For a comprehensive treatment of the Equal Protection Clause as a remedy for environmental injustices, *see* David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice As Equal Protection*, 111 NW. U. L. REV. 879 (2017) ("This Essay conceptualizes the Flint water crisis as an archetypical case of underenforcement--that is, a denial of the equal protection of laws guaranteed by the U.S. Constitution.").

courts to more adequately address environmental justice and provide inroads for the establishment of more secure environmental rights for low-income communities and communities of color. Addressing environmental injustice is especially critical within a statutory scheme such as that of the SDWA, which authorizes a certain amount of lead to *legally* enter drinking water systems:[47] "The lead action level is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period conducted in accordance with 40 C.F.R. § 141.86 is greater than 0.015 mg/L."[48] Thus, this regulation allows lead to enter public drinking water systems, despite the fact that there is no level of lead that is safe for children to ingest.[49] The Lead and Copper Rule thus allows for the possibility that up to 9.99% of tap water users could have lead in excess of 0.015 mg/L *legally* flowing into their homes; these users would have no remedy under SDWA.[50] Therefore, § 1983 claims are a necessary tool for challenging the current status quo, which disproportionately allows for the poisoning of low-income communities of color.[51]

Part II of this Note establishes the SDWA's contours and lays the groundwork for understanding the Fourteenth Amendment and 42 U.S.C.A. § 1983's role in addressing environmental injustices. Part III concurs with the Sixth Circuit's approach to addressing the SDWA preemption issue and assesses the merits of substantive due process claims. Finally, this Note concludes that, in holding that the SDWA does not preempt substantive due process claims, courts will allow plaintiffs to make inroads towards achieving environmental justice where it has been sorely lacking.

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47. EPA Lead and Copper Rule, 40 C.F.R. § 141.80 (2018).

48. *Id.*

49. Sherwin, *supra* note 5, at 672–73.

50. *Id.* The legal contamination of public drinking water beneath a certain threshold is the direct consequence of cost-benefit analyses which place monetary value on human life to determine how much pollution is too much pollution. For a full treatment of this issue, see Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39 (1999).

51. *See generally* Kristen Lombardi et al., *Environmental Justice, Denied: Environmental Racism Persists, and the EPA Is One Reason Why*, CENTER FOR PUBLIC INTEGRITY (Sept. 4, 2015), https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why.

II. BACKGROUND

A. The Fourteenth Amendment: Protecting Citizens From Harmful State Action

In the years immediately following the Civil War, American lawmakers were faced with a newly-claimed responsibility: protecting the civil rights of Black Americans.[52] As many Southern states made efforts to keep recently manumitted slaves on the margins of society, the need to establish the rights of Black people in the United States became urgent.[53] In June of 1866, Congress sent the Fourteenth Amendment to the states for ratification.[54] This new Amendment defined American citizenship and dictated citizens' rights in broad, sweeping language, declaring:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[55]

This language has both confused courts and inspired advocates to use the Amendment to bolster a variety of civil rights.[56]

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52. *See generally* Howard University Library System, RECONSTRUCTION ERA: 1865-1877, https://www.howard.edu/library/reference/guides/reconstructionera/ (last visited Nov. 20, 2018).

53. *See generally* TULANE UNIVERSITY LAW SCHOOL, HISTORY OF LAW: THE FOURTEENTH AMENDMENT, https://employment.law.tulane.edu/articles/history-of-law-the-fourteenth-amendment (last visited Nov. 19, 2107). Scholars note that Northerners' motivations for wanting to enfranchise and protect Black people were not entirely pure. *See generally* Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 377 (2009) ("The most difficult political problem facing the Thirty-Ninth Congress was the question of suffrage for freedmen, a question on which northern public opinion was divided, but which, if left unaddressed, would result in southern congressional delegations elected by entirely by whites hostile to Reconstruction and its advocates.").

54. ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY 491 (Lory Frankel, et al., eds., Seagull ed. 2006).

55. U.S. CONST. amend. XIV, § 1.

56. *See* FONER, *supra* note 54, at 491.

Due process claims are commonly subdivided into two major categories: (1) substantive due process and (2) procedural due process.[57] Substantive due process claims prevent government from treating its own citizens unlawfully.[58] Under a substantive due process regime, state action against an individual cannot be unreasonable, arbitrary, or capricious.[59] In effect, substantive due process "prohibits the government from engaging in conduct that shocks the conscience or that interferes with rights implicit in the concept of ordered liberty."[60] Over 150 years after the Fourteenth Amendment's ratification, successful substantive due process arguments have been made for the right to marry a person of a different race,[61] to access and use birth control,[62] to engage in consensual sexual activity without intervention of government,[63] and to control the education of one's own children.[64]

B. § 1983: Enforcing Federal Rights

42 U.S.C.A. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[65]

Under § 1983, individuals and private parties can, therefore, bring suit against defendants who have acted under color of law in violating federal statutory or constitutional rights.[66] This statute was originally a component of the Civil Rights Act of 1871, commonly referred to as the

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57. *See* Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 324 (1987).

58. 16C C.J.S. Constitutional Law § 1821 (2017).

59. *Id.*

60. *Id.*

61. *See* Loving v. Virginia, 388 U.S. 1 (1967).

62. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

63. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

64. *See* Pierce v. Society Sisters, 268 U.S. 510 (1925). *See generally* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999).

65. 42 U.S.C.A. § 1983 (West 2012).

66. *Id.*

"Ku Klux Klan Act."[67] A "forefather of much of our modern civil rights legislation,"[68] the Act addressed the threat posed by the Ku Klux Klan in the post-Civil War South.[69]

For a time, the postbellum sociopolitical landscape had allowed the Klan to wage violence with near impunity; while state governments too infrequently intervened to protect citizens targeted by the Klan, the federal government lacked the ability to enforce the decrees of the Reconstruction Amendments—particularly those of the Fourteenth Amendment[70]—against it. The Ku Klux Klan Act thus sought to rectify this lack of enforcement power.[71] It included a provision that would become § 1983, allowing for civil liability for a deprivation of constitutional rights committed under color of law.[72]

However, this provision "lay dormant"[73] until 1961, when the Supreme Court decided *Monroe v. Pape*.[74] In *Monroe*, the Court clarified the scope of liability under § 1983 when it ruled that "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, *whether they act in accordance with their authority or misuse it.*"[75]

Further, in turning to the statute's legislative history, the *Monroe* Court found that "[i]t was not the *unavailability* of state remedies but the *failure of certain States to enforce the laws* with an equal hand that furnished the powerful momentum" to pass the Ku Klux Klan Act. [76] The Court concluded from this that federal relief under § 1983 ought to be available even to plaintiffs whose rights had been infringed in violation of existing state law.[77]

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67. MARTIN A. SCHWARTZ AND KATHRYN R. URBONYA, SECTION 1983 LITIGATION 1 (Federal Judicial Center, 2d. ed. 2008).

68. Lisa J. Banks, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449, 475 n.17 (1994).

69. *Id.* at 451.

70. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961) ("Its purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,"), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978).

71. Banks, *supra* note 68, at 451–52.

72. Kenneth L. Lewis, *Section 1983: A Matter of Policy-Current Overview of Municipal Liability*, 70 MICH. B.J. 556, 556 (1991).

73. *Pape*, 365 U.S. 167.

74. *Id.* at 172.

75. *Id.* at 171–72 (emphasis added).

76. *Id.* at 174–75 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

77. *Id.* at 180.

In light of many states' indifference to, or inadequacy in, addressing constitutional violations, the Court recognized that without such a federal cause of action enforcing the Constitution, "state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[78] *Monroe*'s clarifications of § 1983 gave the statute the teeth it lacked in the previous century and allowed for an influx of § 1983 filings in federal courts.[79]

In addition, in 1978, the Court interpreted § 1983 to include municipalities in the scope of "person[s]"[80] that can be held liable under the statute, concluding that "[l]ocal governing bodies ... can be sued directly under § 1983 for monetary, declaratory, or injunctive relief when ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[81] This inclusion of municipalities in § 1983's definition of "person[s]" expanded the statute's scope further.

Together, the decisions in *Monell* and *Monroe* rendered § 1983 a significant tool in a civil rights litigant's toolbox, empowering those whose constitutional rights had been violated by powerful actors to take matters into their own hands and seek redress in federal court. In 1966, the Administrative Office of the United States Courts recorded 218 cases that had been filed under § 1983.[82] Not three full decades later, in 1992 alone, 26,824 § 1983 lawsuits were filed.[83] Fourteenth Amendment claims are frequently asserted via § 1983; in fact, the title of the original Ku Klux Klan Act described it as "An Act to Enforce the Provisions of

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78. *See* SCHWARTZ & URBONYA, *supra* note 67; Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 563 (1985) ("As a result of *Monroe*, § 1983 emerged as the principal modern remedy for the private enforcement of federal law against state and local defendants, and the volume of federal court § 1983 litigation has increased sharply.").

79. Steinglass, *supra* note 78.

80. *See* 42 U.S.C.A. § 1983 (West 2012).

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (emphasis added).

Id.

81. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

82. BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 1–2 (1995).

83. *Id.* at 2.

the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[84]

C. Preemption: A Plaintiff's Predicament

Together, the Fourteenth Amendment and § 1983 allow many constitutional tort plaintiffs' claims to be redressed; however, some plaintiffs are prevented from asserting their Fourteenth Amendment rights via § 1983 because of preemption. Environmental plaintiffs are particularly impacted.[85] In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[86] the Supreme Court held that when statutory schemes provide their own remedial devices, "[the statute] may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[87] This decision has precluded plaintiffs from filing § 1983 actions against government entities for violations of various administrative schemes, including employment law violations under FICA,[88] Title IX violations,[89] and violations of various environmental statutes, including the SDWA.[90]

Sea Clammers was not the last time that the Court undercut a plaintiff's ability to confront state action that threatened environmental justice. In *Alexander v. Sandoval*, the Court similarly found that there was "no private implied cause of action to enforce disparate-impact regulations"[91] promulgated by the EPA in accordance with Title VI of

84. REBECCA N. STRANDBERG, 42 U.S.C. § 1983 AND CONSTITUTIONAL LAW ISSUES, in MARYLAND EMPLOYMENT LAW DESKBOOK (2016).

85. *See, e.g.*, Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

86. 453 U.S. 1 (1981).

87. *Id.* at 20.

88. *See* J. Aaron Ball, *The Sea Clammers Doctrine: Reeling in Private Employment Tax Claims in Worker Misclassification Cases*, 1 DEPAUL BUS. & COM. L.J. 215, 218 (2003).

89. Though this is no longer the case, plaintiffs in some circuits were preempted from bringing their claims over a nineteen-year period. *See, e.g.*, Pfeiffer by Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) ("Former student's federal constitutional claims arising out of dismissal from National Honor Society after she became pregnant were subsumed within her suit for violation of Title IX.") *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

90. 42 U.S.C.A. §§ 300f–j (West 2012); Mattoon v. City of Pittsfield, 980 F.2d 1 (1st Cir. 1992).

91. *See generally* David J. Galalis, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 61 (2004).

the Civil Rights Act of 1964.[92] These cases are considered two of the greatest obstacles to the legal movement for environmental justice today.

III. ANALYSIS

A. Is Preemption Proper?

Courts disagree about whether § 1983 claims can be brought to address potential constitutional violations when drinking water has been contaminated.[93] This circuit split centers on whether the reasoning of *Middlesex County Sewerage Authority v. National Sea Clammers Association* applies to cases of contaminated drinking water, wherein the scheme of the SDWA typically would govern drinking water grievances. In *Mattoon v. City of Pittsfield*, the First Circuit relied on the Court's reasoning in *Sea Clammers* that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"[94] and concluded that the SDWA was sufficiently comprehensive to provide remedies to plaintiffs whose water was contaminated.[95]

Twenty-five years later, in *Boler v. Earley*, the Sixth Circuit conversely held that "the SDWA does not preclude § 1983 claims as pled by the *Boler* and *Mays* Plaintiffs,"[96] reasoning that the statute's language and remedial scheme, as well as the rights and protections it provides, significantly diverge from the Fourteenth Amendment and its corresponding rights and protections.[97] The Sixth Circuit's approach best comports with the SDWA's scope, Congress' intent in enacting it, and the rights and protections provided within it compared to those provided by the Fourteenth Amendment; further, the *Mattoon* court relied on *Sea Clammer*s, which was made in reference to a different statutory scheme than that of the SDWA and thus does not instruct courts in regards to the specific question of SDWA preclusion.

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92. Alexander v. Sandoval, 532 U.S. 275 (2001).

93. *See, e.g.*, Boler v. Earley, 865 F.3d 391, 409 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays, 138 S. Ct. 1281 (2018), and *cert. denied sub nom.* Wyant v. Mays, 138 S. Ct. 1285 (2018), *and cert. denied sub nom.* City of Flint v. Boler, 138 S. Ct. 1294 (2018); Mattoon v. City of Pittsfield, 980 F.2d 1 (1st Cir. 1992).

94. Middlesex Cty Sewerage Auth v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

95. *Id.* at 21.

96. Boler v. Earley, 865 F.3d 391, 409 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays, 138 S. Ct. 1281(2018), and *cert. denied sub nom.* Wyant v. Mays, 138 S. Ct. 1285(2018), *and cert. denied sub nom.* City of Flint v. Boler, 138 S. Ct. 1295 (2018).

97. *Boler*, 865 F.2d at 409.

In *Mattoon*, the First Circuit concluded that the SDWA preempted the plaintiffs' § 1983 claims because "[l]ike the statutes at issue in *Sea Clammers* ... the SDWA establishes an elaborate enforcement scheme which confers rights of action on both the government and private citizens."[98] The *Sea Clammers* plaintiffs, however, did not sue on the basis of contaminated drinking water.[99] Rather, the *Sea Clammers* plaintiffs brought claims related to the enforcement of the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA) after they "alleg[ed] damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste."[100] The *Mattoon* court analogized the facts before it to *Sea Clammers,* concluding that "[c]omprehensive federal statutory schemes, such as the SDWA, preclude rights of action under section 1983 for alleged deprivations of constitutional rights in the field occupied by the federal statutory scheme."[101] In doing so, the *Mattoon* court ignored a key principle of *Sea Clammers*: that "[w]hen the remedial devices provided *in a particular Act* are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[102]

In *Fitzgerald v. Barnstable School Community*, the Supreme Court underscored the necessity of examining the particular statute in question when deciding an issue of preemption.[103] In *Fitzgerald,* the Court laid out the proper manner in which courts should analyze whether statutes preempt constitutional claims brought pursuant to § 1983.[104] *Fitzgerald* instructs courts to compare the rights provided by the statute to those in the Constitution, and examine the language of the statute, the context in

98. Mattoon v. City of Pittsfield, 980 F.2d 1, 5 (1st Cir. 1992).

99. Middlesex Cty. Sewerage Auth v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 4 (1981).

100. *Sea Clammers,* 453 U.S. at 4.

> Respondents (an organization whose members harvest fish and shellfish off the coast of New York and New Jersey and one individual member) brought suit in Federal District Court against petitioners (various governmental entities and officials from New York, New Jersey, and the Federal Government), alleging damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste. Invoking a number of legal theories, respondents sought injunctive and declaratory relief and compensatory and punitive damages.

Id.

101. Mattoon, 980 F.2d at 6.

102. *Sea Clammers*, 453 U.S. at 20.

103. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256 (2009).

104. *Id.* at 252; *see also* Boler v. Earley, 865 F.3d 391, 406 (6th Cir. 2017) (discussing *Fitzgerald*, 555 U.S. 246), *cert. denied sub nom.* Wright v. Mays, 138 S. Ct. 1281 (2018), and *cert. denied sub nom.* Wyant v. Mays, 138 S. Ct. 1285 (U.S. Mar. 19, 2018), and *cert. denied sub nom.* City of Flint v. Boler, 138 S. Ct. 1295 (2018).

which it was enacted, and the kind of remedial scheme it contains.[105] The Court ruled that "[w]here the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights."[106] Thus, when deciding whether § 1983 claims are preempted by the SDWA, a court should consider the specific remedial devices provided therein and the congressional intent that produced them.

Given *Sea Clammers* and *Fitzgerald*, the Sixth Circuit's analysis of the preemption issue best comports with binding precedent and with the canons of statutory construction. Looking to the plain language of the statute is the first step in determining preemption.[107] Here, as the Sixth Circuit stated in *Boler*, "the SDWA does not use language related to constitutional rights, or codify legal standards that appeared in prior cases to enforce rights guaranteed by the Constitution."[108]

Next, courts should consider "legislative history and other traditional aids of statutory interpretation to determine congressional intent."[109] Congressional intent, the *Sea Clammers* Court underscored, is "[t]he key to the inquiry" of preemption by any given statute.[110] As the Sixth Circuit acknowledged in *Boler*, "[t]he language of the SDWA centers on instructions to the EPA to establish the requirements for national drinking water standards."[111] The SDWA's purpose is to limit the quantity of pollutants that can legally enter public drinking water systems.[112] Its purpose is *not,* however, to foreclose the possibility of constitutional claims following water crises such as the one in Flint. After all, as the *Boler* court noted, the SDWA was enacted in accordance with Congress' Commerce Clause powers.[113] If Congress had intended the SDWA as a remedy for constitutional violations of due process, Congress would have enacted it under the enforcement provisions of the Fourteenth Amendment.[114]

That the SDWA was not intended to preclude constitutional claims brought pursuant to § 1983 is especially true where the remedial scheme of the SDWA substantially differs from the remedies afforded to successful plaintiffs who bring § 1983 suits following violations of due

105. *Fitzgerald*, 555 U.S. at 252.
106. *Id.* at 252–53.
107. *Sea Clammers*, 453 U.S. at 13.
108. *Boler*, 865 F.3d at 404.
109. *Sea Clammers,* 453 U.S. at 13.
110. *Id.*
111. *Boler*, 865 F.3d at 404.
112. *Id.*
113. *Id.*
114. *See id.*

process. The SDWA's remedial scheme provides (1) for the enforcement of the Act where its limits on certain pollutants have been violated, (2) for judicial review of agency actions, (3) and a "citizen-suit provision allowing a private action against any person in violation of the statute for injunctive relief."[115] Substantive due process claims are, however, constitutional and not statutory in nature. The SDWA makes no mention of precluding such claims. The statute does, however, contain a savings clause which makes plain that "[n]othing in [the SDWA] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief."[116] This clause provides clear support for the notion that Congress did not intend for the SDWA's remedial scheme to preclude claims such as those brought by plaintiffs in Flint.[117]

In short, Flint plaintiffs in *Boler* have not founded their claims on any violation of the SDWA, but rather on violations of their rights to due process and equal protection. Their claims are thus not preempted by the SDWA.

B. Can Plaintiffs Win Under § 1983?

After dealing with the issue of preemption, Flint plaintiffs must show that their constitutional rights were, in fact, violated. If more courts hold that claims for violations of a plaintiff or plaintiff class' substantive due process rights can be brought in regard to drinking water, plaintiffs will be able to proceed with challenges to state actions that infringe on life, liberty, or property. There are several species of claims under the umbrella of substantive due process; claims for contaminated drinking water in Flint have produced Fourteenth Amendment substantive Due Process claims of violations of bodily integrity[118] and claims of state-created danger.[119]

Courts can impose liability when a group of defendants deliberately and knowingly breaches the constitutionally protected bodily integrity of the plaintiffs by creating and perpetuating an ongoing exposure to contaminated water, with deliberate indifference to the known risks of

115. *Id.* at 405.
116. 42 U.S.C.A. § 300j–e (West 2018).
117. *See Boler*, 865 F.3d at 404.
118. Guertin v. State of Michigan, No. 16-cv-12412, 2017 WL 2418007, at *21 (E.D. Mich. June 5, 2017).
119. *Id.* at *20.

harm.[120, 121] In Flint water litigation, at least one court has already held that plaintiffs "have a fundamental interest in bodily integrity under the Constitution, and ... defendants violated plaintiffs' fundamental interest by taking conscience-shocking, arbitrary executive action, without plaintiffs' consent, that directly interfered with their fundamental right to bodily integrity."[122]

It "is well established that persons have a [F]ourteenth [A]mendment liberty interest in freedom from bodily injury."[123] Further, "[i]t would be readily apparent to any reasonable executive official [...] that a government actor violates individuals' right to bodily integrity by knowingly and intentionally introducing life-threatening substances into such individuals without their consent, especially when such substances have zero therapeutic benefit."[124] In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Supreme Court ruled that "where state regulation imposes an undue burden on a woman's ability to [obtain an abortion,] the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause."[125] At the heart of this liberty, the Court stated, is the right to bodily integrity.[126]

As was evident in *Casey*, government actors may violate a person's right to bodily integrity by enacting policies that impact a person's ability to make decisions regarding their own body and health. The Supreme Court underscored this point in *Cruzan by Cruzan v. Dir., Missouri Dep't of Health,* an assisted suicide case, when it stated that the right to bodily integrity "is [not] reducible to a protection against batteries undertaken in the name of treatment, or to a guarantee against the infliction of bodily discomfort. Choices about death touch the core of liberty."[127] So too do decisions about a person's health and wellbeing.

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120. For a theoretical treatment of bodily integrity, see Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 201–02 (1995).

121. *See Guertin*, 2017 WL 2418007 at *21.

122. *Id.*

123. Doe v. Claiborne Cty.,103 F.3d 495, 506 (6th Cir. 1996) (internal quotation marks omitted).

124. *Guertin*, 2017 WL 2418007 at *23.

125. Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).

126. *Id.* at 915; *see also* Albright v. Oliver, 510 U.S. 266, 271–72 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.").

127. 497 U.S. 261, 343 (1990).

Flint plaintiffs will thus likely continue to succeed in characterizing the harm done to them as an unconstitutional invasion of bodily integrity.[128]

Further, Flint plaintiffs have also argued that their substantive due process rights have been violated on grounds at state-created danger.[129] This line of argument will present greater challenges to Flint plaintiffs than a bodily integrity theory of liability.[130] By its name, the state-created danger doctrine would seem to protect individuals from harms produced by the state itself. However, in practice, the rule typically functions to protect individuals from harm when government actors "created or increased the risk that the plaintiff would be exposed to an act of violence *by a third party*."[131]

A court is likely to apply the doctrine in light of its history and development. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion *by private actors*."[132] Lower courts typically understand that *Deshaney* established two general exceptions to this rule: "First, a government has a duty to protect a person if he or she is physically in government custody," and second, "a government must provide protection if the government is responsible for creating the danger."[133] This second exception— based on the *DeShaney* court's finding that "[w]hile the State may have been aware of the dangers that he faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them"[134] and thus did not violate the Due Process clause—has formed the basis of state-created danger theory. Insofar as the state-created danger doctrine was developed as an exception to the government's responsibility to protect the rights of its citizens from infringement by private actors, it will be difficult for plaintiffs to argue that the doctrine applies to actions by the government, instead of interceding private parties.

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128. Flint plaintiffs' bodily integrity claims against the majority of defendants have, as of the date of this Note's completion, successfully survived a motion to dismiss. *See Guertin*, 2017 WL 2418007 at *24.

129. *See id.* at *20.

130. Indeed, in *Guertin*, the plaintiffs' state-created danger claim did not survive a motion to dismiss. *See Guertin*, 2017 WL 2418007 at *20.

131. Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003) (citing Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) (emphasis added)).

132. 489 U.S. 189, 195 (1989) (emphasis added).

133. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 3 (2007) (citing *DeShaney*, 489 U.S. at 200).

134. *DeShaney*, 489 U.S. at 190.

It is also possible for plaintiffs to argue for a broadening of the state-created danger doctrine. Courts could be open to expanding the doctrine to include dangers created by government actors, who subsequently caused harm without the intercession of a private third party, as some circuits "have not limited the doctrine to cases where third parties caused the harm."[135] For example, in *Kneipp v. Tedder*, the Third Circuit found that the plaintiff properly stated a claim for relief under a state-created danger theory when police officers left an intoxicated woman to walk home alone on a cold night which resulted in her falling down an embankment and suffering permanent brain damage.[136] Despite the absence of any private third party to blame, the court explicitly stated that because of the government's *direct* culpability, the government actors could be held liable under a state-created danger theory.[137]

Other precedent exists for expanding the boundaries of state-created danger. In *Lombardi v. Whitman*, EPA officials informed 9/11 first responders that the air at Ground Zero was safe to breathe in the absence of respiratory protection; the air was, in fact, contaminated with harmful pollutants.[138] To fashion a state-created danger claim, the plaintiffs framed the air pollution itself as the third-party "wrongdoer," and argued that "the defendants, with knowledge of the serious health risks posed by [the air pollution], falsely represented to the public that it was safe from any such risks."[139] The Second Circuit decided the issue on other grounds, but granted that "a substantive due process violation can be made out when a private individual derives a false sense of security from an intentional misrepresentation by an executive official if foreseeable bodily harm directly results and if the official's conduct shocks the conscience."[140]

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135. Estate of Smith v. Marasco, 318 F.3d 497, 506 (3d Cir. 2003).

136. Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996).

137. *See also Estate of Smith*, 318 F.3d at 510 (holding "a reasonable jury could find that there was a constitutional violation" when plaintiffs' decedent suffered a heart attack brought on by stress following events directly involving state troopers); Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087 (9th Cir. 2000) (finding police officers liable for danger creation when they "affirmatively ejected Munger from a bar late at night when the outside temperatures were subfreezing," Munger was wearing only a t-shirt and jeans, was not allowed to reenter his truck or the bar, and was seen walking away from other open establishments nearby); Van Orden v. Borough of Woodstown, 5 F. Supp. 3d 676, 679 (D.N.J. 2014) (holding plaintiffs properly asserted a claim for state-created danger "after officials opened floodgates to the Veterans Memorial Lake Dam in anticipation of the arrival of Hurricane Irene without closing the affected road," resulting in the drowning of plaintiff decedent).

138. 485 F.3d 73, 75–78 (2d Cir. 2007).

139. *Id.* at 80.

140. *Id.* at 81. The court reasoned:

Finally, at least one other court in a strikingly similar situation has found that a group of plaintiffs properly stated a claim for relief under a theory of state-created danger when the government defendants "subjected [the plaintiffs] to contaminated water."[141] In *Rietcheck v. the City of Arlington*, the city switched the plaintiffs' household water supply from a clean source to a line contaminated by pesticide and fertilizer use, thus sickening the plaintiffs after they ingested the contaminated water.[142] The *Rietcheck* court did not find the lack of an identifiable private third party problematic in holding that the defendants could be held liable for state created danger.[143]

To prevail on a claim of state-created danger, plaintiffs must also show "a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large."[144] A plaintiff can properly allege this kind of "special danger" when the danger is posed to "to a discrete class of individuals,"[145] and "the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large."[146] Though the Flint water crisis affected a large group of people, its risked were not posed to just anyone. Throughout Sixth Circuit state-created danger caselaw, "the government [actor] could have specified whom it was putting at risk, *nearly to the point of naming the possible victim or victims.*"[147] Naming the victims of the lead contamination in Flint is entirely possible by researching who subscribed to Flint's water during the contamination period. It was, therefore, possible for government actors to have foreseen not only the outcomes of their actions, but also who exactly would be harmed.

Thus, it is appropriate to hold government actors accountable for harms they knowingly created in the Flint water crisis via a state-created danger theory. After all, holding government responsible for state-created dangers is an even smaller logical step within the Due Process

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> Depending on the circumstances, [there is] some support for the idea that a substantive due process violation can be made out when a private individual derives a false sense of security from an intentional misrepresentation by an executive official if foreseeable bodily harm directly results and if the official's conduct shocks the conscience.

Id.

141. Rietcheck v. City of Arlington, No. 04-CV-1239-BR, 2006 WL 37843, at *4 (D. Or. Jan. 4, 2006).

142. *Id.* at *1.

143. *Id.* at *6.

144. Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003).

145. Schroder v. City of Fort Thomas, 412 F.3d 724, 729 (6th Cir. 2005).

146. Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

147. Jones v. Reynolds, 438 F.3d 685, 696 (6th Cir. 2006).

Clause context than holding government responsible for the actions of private citizens. If courts are willing to hold government accountable for state-created danger that causes private citizens to hurt other private citizens, it is logical to hold government accountable for state-created danger that directly inflicts injuries on private citizens.

IV. CONCLUSION

The Supreme Court denied certiorari in *Boler*, thus allowing the legal fight for Flint residents and other victims of similar environmental injustices to continue within circuits that hold that the SDWA does not preempt constitutional claims.[148] The question will become how, and to what extent, constitutional claims can help plaintiffs whose drinking water has been dangerously contaminated. By allowing plaintiffs to frame environmental damages and disparities as due process violations, constitutional claims brought pursuant to § 1983 will provide inroads for plaintiffs to address issues that would otherwise go unaddressed within the schema of particular statutes, including the SDWA.

In *Boler v. Earley*, the Sixth Circuit properly construed the SDWA to not preempt the Flint plaintiffs' claims for violations of due process brought pursuant to § 1983, as revealed through review of Supreme Court precedent and thorough statutory analysis.[149] This will allow Flint residents affected by lead poisoning to bring constitutional claims pursuant to § 1983, and open the door for other victims of environmental justice to similarly address their claims in a court of law. Finally, Flint plaintiffs have their best shot at recovery by characterizing their claims as violations of bodily integrity, which will allow them to achieve a semblance of justice through the legal system.

148. Wright v. Mays, 138 S. Ct. 1281 (2018). .

149. Boler v. Earley, 865 F.3d 391, 409 (6th Cir. 2017), *cert. denied sub nom.* Wright v. Mays, 138 S. Ct. 1281 (2018), and *cert. denied sub nom.* Wyant v. Mays, 138 S. Ct. 1285 (2018), *and cert. denied sub nom.* City of Flintv. Boler, 138 S. Ct. 1294 (2018).