

THE DANGERS OF WATER PRIVATIZATION: AN EXPLORATION OF THE DISCRIMINATORY PRACTICES OF PRIVATE WATER COMPANIES

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In a rural Midwestern hospital, a mother and father closely watch their three-month premature son; his parents watch in horror as the infant is resuscitated and kept alive by the help of a machine.¹ The little boy makes it home, but not without a heart monitor and a lifetime of concerning health issues.² Down the hall is a disabled mother who struggles to get by with onslaughts of blackouts, which have brought her to the hospital multiple times.³ Adding to her medical plate are her twelve-year-old daughter's alarming symptoms: clumping hair loss and burning sensations in her eyes during showers.⁴ Across town, a three-year-old child lays in a dentist office to have all of his teeth removed. During a five-hour procedure under anesthesia, each one of his rotten teeth are removed to prevent the spread of multiple infections throughout his mouth.⁵

These families all call Flint, Michigan home; a city that has been ravaged by the effects of lead poisoning.⁶ On January 29th, 2016 the city announced that recent testing found twenty-six locations in the city with at least ten times the federal limit of lead.⁷ These problems are only the

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¹ John Counts, *Faces of Flint: Eric Wilson*, MLIVE, http://www.mlive.com/news/index.ssf/page/faces_of_flint_eric_wilson.html.

² *Id.*

³ John Counts, *Faces of Flint: Rhonda Kelso*, MLIVE, http://www.mlive.com/news/index.ssf/page/faces_of_flint_rhonda_kelso.html.

⁴ *Id.*

⁵ John Counts, *Faces of Flint: Deborah Clark*, MLIVE, http://www.mlive.com/news/index.ssf/page/faces_of_flint_deborah_clark.html.

⁶ See, Jake May, *Still Standing: Flint Residents Tell Their Stories About Living with Poisoned Water*, MLIVE, http://www.mlive.com/news/index.ssf/page/still_standing_flint_residents.html.

⁷ Ron Fonger, *Pregnant Woman and Children Told to Stop Drinking Flint Tap Water Until Tested*, MLIVE, Jan. 29, 2016, http://www.mlive.com/news/flint/index.ssf/2016/01/flint_water_crisis_filter.html.

tip of the iceberg; health problems from drinking the lead laced water range from miscarriages to flu-like symptoms, to an outbreak of Legionnaires disease⁸ that claimed twelve lives.⁹

The poisoning of the people of Flint occurred when the city changed the water supply from Detroit to Flint River.¹⁰ Two private water companies were brought in to test and treat the water, in order to bring it into compliance with federal standards.¹¹ Somewhere along the line, things went horribly wrong, the people of Flint being left poisoned and alone. This is not the first time the change to private water has lead to the poisoning of the city, and unless the laws change, it will certainly not be the last.

This note will examine the discriminatory practices and impacts that come along with water privatization. The note will begin by exploring the history of government privatization and the United States waterworks industry; then it will discuss the current trends in the waterworks industry. Following the background of the water industry, this note will discuss the Equal Protection Clause, the disparate impact analysis, and how they apply to environmental arguments. This note will then apply the disparate impact analysis to water privatization and discuss how the analysis can be used in discrimination claims against private water companies.

I. BACKGROUND

A. Neoliberalism: The Move Away From Government Regulation

The trend towards water privatization began as part of the broad concept of neoliberalism; a political and economic theory based on curbing the power of labor, deregulating industry, agriculture, and

⁸ Legionnaires' disease is a serious type of pneumonia caused when legionella bacteria enters a water supply and is then inhaled through small droplets of water in the air. *Legionella (Legionnaires' Disease and Pontiac Fever)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 31, 2016), <https://www.cdc.gov/legionella/about/>.

⁹ May, *supra* note 6; see also, Karen Bouffard, *Flint Water Likely Legionella Cause, Expert Says*, DETROIT NEWS, Dec. 6, 2016, <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/12/04/flint-water-switch-bacteria-legionnaires/94979698/>.

¹⁰ *Timeline of Flint Water Crisis Since Gov. Snyder Took Office*, MLIVE (May 3, 2016), http://www.mlive.com/news/index.ssf/2016/05/timeline_of_the_flint_water_cr.html.

¹¹ *Id.*

natural resources and liberating the power of finance on national and international levels.¹² In a neoliberal economy, the sole role of the State is to create and preserve the proper foundation to support a free market, such as ensuring the integrity of money.¹³ The State must not get involved in the regulation and practices of industry because an underlying tenant of neoliberalism is that the State cannot know as much about the industry as the industry members themselves do.¹⁴

In the Western World, the Great Depression of the 1930s laid the foundation for what would later become the Neoliberalism Movement.¹⁵ Economists blamed overproduction and a surge in capitalism for the market crash and turned to government regulation to solve that problem.¹⁶ Increased regulation led to high employment and wage growth rates in the 1950s and 1960s, but a combination of high inflation rates and economic stagnation, known as stagflation, put an end to the brief period of economic prosperity.¹⁷ When President Reagan took office, policies were implemented that cured inflation but devastated the labor force; this, combined with Reagan's trickle-down economic policies, were the start of neoliberalism in the United States.

While the United States was starting down the path of neoliberalism, the United Kingdom was following suit under the lead of Margaret Thatcher, as was the rest of the Western World.¹⁸ What catches on in the Western World will inevitably make its way into the Third World, either by acceptance or force. International neoliberalism is seen to have started after the OPEC oil embargo in 1973, when the United States threatened military action against Arab states if they did not circulate their petroleum money through American investment banks.¹⁹ This started a trend of the International Monetary Fund and the

¹² David Harvey, *A Brief History of Neoliberalism*, 1-2 (Oxford Univ. Press, 2005).

¹³ *Id.* at 2.

¹⁴ *Id.* at 2.

¹⁵ Jason Hickel, *A Short History of Neoliberalism (And How We Can Fix It)*, NEW LEFT PROJECT, (Apr. 9, 2012), http://www.newleftproject.org/index.php/site/article_comments/a_short_history_of_neoliberalism_and_how_we_can_fix_it.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Harvey, *supra* note 12.

¹⁹ Hickel, *supra* note 16.

World Bank pushing neoliberal principles on third world countries by attaching conditions to the loans given to those countries.²⁰

B. From Neoliberalism to Privatization

The privatization of government functions and resources is a main tenant of neoliberalism as private ownership is believed to be the best way to prevent a tragedy of the commons.²¹ If a private market does not exist for a certain function or resource, it is the State's job to create one; and if a function is currently regulated by the State, it must be turned over to the private market.²² "Although there are various interpretations of the word 'privatization', it generally refers to the transfer of any government function or responsibility to the private section, whereas a transfer of ownership is more precisely called a 'divestiture' or 'asset sale.'"²³

The mass movement towards government privatization began in the 1970s, alongside the neoliberal movement.²⁴ As urban cities entered into a fiscal crisis, the perfect opportunity for contracting out public services arose and by the end of the decade, the tide was turning towards privatization.²⁵ Under President Reagan's neoliberal policies, the President's Commission on Privatization was created, which developed a comprehensive outline on how to privatize multiple government functions including housing, federal loans, the Postal Service, prisons, and education; many of those functions are known today as part of the private sector.²⁶ At this point in history, privatization was becoming a political strategy, supported by the conservatives and consistently shot

²⁰ *Id.*

²¹ Harvey, *supra* note 12, at 9; The Tragedy of the Commons is an economic theory that humans will act in a way that serves their self-interest. If population and demand continue to grow, unowned, or commonly owned, resources will inevitably be depleted. James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 334 (1992).

²² Harvey, *supra* note 12, at 63.

²³ See generally, Symposium, *Water Privatization Overview: A Public Interest Perspective On For-Profit, Private Sector Provision of Water and Sewer Services in The United States*, 14 J.L. SOCIETY 167 (2013) (discussing the background of water privatization) [hereinafter *Water Privatization Overview*].

²⁴ Donald Cohen, *The History of Privatization: How and Ideological and Political Attack on Government Became a Corporate Grab for Gold*, TPM Features, <http://talkingpointsmemo.com/features/privatization/one/>.

²⁵ Cohen, *supra* note 24.

²⁶ *Id.*

down by democrats, with corporate America taking a heavy stance in favor of privatization.²⁷ Corporate America favored privatization because it was believed to lead to an increase in efficiency and productive, an improved quality of goods, and reduced costs at every stage from production to consumption.²⁸

After Reagan left office, privatization took a political backseat until President Bill Clinton revived the movement.²⁹ During his time in office, President Clinton took time to identify which government programs could be “reinvented, terminated, privatized, or sold.”³⁰ The identification process was aided by the passing of the Federal Activities Inventory Reform Act of 1998, which requires government agencies to identify and report on activities they partake in that are not inherently government functions.³¹ The North American Free Trade Agreement [hereafter NAFTA] was a major turning point in international privatization that came to fruition under the Clinton Administration.³² NAFTA served to deregulate international commerce and aid the private market in gaining a multinational presence; NAFTA achieved this goal by restricting the government’s ability to regulate the private sector.³³ Under Clinton, the power to make decisions relating to public services were allocated to private management.³⁴

The George W. Bush Administration stepped up the privatization efforts and found targets that did not need congressional approval, such as the post-Katrina cleanup and the Forest Services.³⁵ During his time in office, President Bush cut nearly 21,000 forest services’ jobs by selling duties off to the private sector.³⁶

While publicly taking a stance in favor of government run services, the Obama Administration passed legislation that unfairly favors the private sector, such as The Water Infrastructure Finance and Innovation

²⁷ *Id.*

²⁸ Harvey, *supra* note 12, at 64.

²⁹ Cohen, *supra* note 24.

³⁰ *Id.*

³¹ Federal Inventory Reform Act, 31 U.S.C.A §§ 501-522 (1998).

³² Elaine Bernard, *What’s the Matter With NAFTA?*, RADICAL AMERICA, 1994, <http://www.law.harvard.edu/programs/lwp/nafta.pdf>.

³³ *Id.*

³⁴ Cohen, *supra* note 24.

³⁵ *Id.*

³⁶ Jenn Wiant, *Forest Service Plan Would Privatize Jobs*, BULLETIN (Mar. 6, 2006), http://www.traditionalmountaineering.org/News_USFS_Privatization.htm.

Act [hereafter, WIFIA]³⁷ The passing of WIFIA has only added fuel to the water privatization fire.

C. Forms of Government Privatization

Government privatization can take multiple forms, including: (1) complete privatization, (2) privatization of operations, (3) use of contracts, (4) franchising, and (5) open competition; with the privatization of the water industry falling into the first three categories.³⁸

The complete privatization of a government function involves “the outright sale of government assets to the private sector.”³⁹ In order to achieve complete privatization of a government run industry, the government can either sell all the shares of the government run company to be traded on the open market, sell the entire asset to an investor, or distributing shares to all citizens for a free or at a low price.⁴⁰ Complete privatization became more common in the 1970s as neoliberalism took hold of the world; developing countries used complete privatization on industries that were running at a loss and being subsidized by tax payers.⁴¹ The first international effort to completely privatize a government function took place in Chile under the influence of the infamous Chicago Boys.⁴² Margret Thatcher is credited with bringing completing privatization to the United Kingdom when she sold off pinnacles of the British economy including; British Airways, British Airways Authority, British Petroleum, and British Telecom.⁴³

³⁷ Cohen, *supra* note 24; Water Infrastructure Finance and Innovation Act, 33 U.S.C.S §§ 3901-3914 (2014).

³⁸ Commission on Government Forecasting and Accountability, *Government Privatization: History, Examples, and Issues*, ILLINOIS GENERAL ASSEMBLY, Oct. 2006, http://cgfa.ilga.gov/Upload/2006Gov_Privatization_Rprt.pdf. [hereinafter Commission]; see also *Water Privatization Overview*, *supra* note 23 at 169.

³⁹ Commission, *supra* note 38, at 1.

⁴⁰ *Id.*

⁴¹ Robert W. Poole Jr., *Privatization*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2nd Ed. 2008).

⁴² *Id.* at 41; the Chicago Boys were a group of Chilean economists who studied at the University of Chicago. They became proponents of a free-market economy and brought the ideas back to Chile where they were implemented under the Chilean dictatorship. Tania Opazo, *The Boys Who Got to Remake an Economy*, SLATE (Jan. 12 2016), http://www.slate.com/articles/business/moneybox/2016/01/in_chicago_boys_the_story_of_chilean_economists_who_studied_in_america_and.html.

⁴³ Poole Jr., *supra* note 41.

The privatization of operations occurs when a private entity takes control of the managerial and operational responsibilities of a government owned industry.⁴⁴ Operation privatization gained ground in the United States with the implementation of toll roads and the creation of the New York Subway system.⁴⁵ The idea of operation privatization died out, except in the utilities industry, until the mid-1900s when France and Italy revived the concept for use in their tolled road systems.⁴⁶ Within the water industry, this is often seen with the privatization of various services, such as meter reading, and various supplies, such as chemicals.⁴⁷

The most common form of privatization in the water industry is the creation of privatization contracts.⁴⁸ This occurs when contracts are created for the operation and maintenance of a plant or when a private firm is contracted to design, build, and operate a facility – known as a Design-Build-Operate or DBO contract.⁴⁹ The underlying theory behind contract privatization is that the government lacks the required expertise to make day-to-day decisions that a private organization will have.⁵⁰ Contract privatization also creates competition in the industry that is impossible when there is a government monopoly in the industry.⁵¹ In the water service industry, contract privatization is referred to as a public-private partnership, and rarely exceeds a twenty year time limit.⁵²

II. PROTECTION FROM DISCRIMINATION

A. The Equal Protection Clause

The Equal Protection Clause of the United States Constitution demands that “No State shall [...] deny to any person within its jurisdiction the equal protection of the laws,” and exists for the

⁴⁴ Commission, *supra* note 16 at 2; *see also see also Water Privatization Overview*, *supra* note 15 at 169.

⁴⁵ Poole Jr., *supra* note 41.

⁴⁶ *Id.*

⁴⁷ Commission, *supra* note 38 at 2; *see also Water Privatization Overview*, *supra* note 15 at 169.

⁴⁸ *Water Privatization Overview*, *supra* note 23, at 169.

⁴⁹ *Water Privatization Overview*, *supra* note 23, at 169.

⁵⁰ Poole Jr., *supra* note 41.

⁵¹ *Id.*

⁵² *Water Privatization Overview*, *supra* note 23 at 169.

protection of minority groups who are in danger of being politically marginalized by the majority.⁵³ According to Justice Miller, who delivered the majority opinion of the Supreme Court in the Slaughter-House Cases, the Equal Protection Clause served as a way to remedy the discrimination and injustice committed against African Americans as class.⁵⁴ Today the Equal Protection Clause stands as a way to prevent states from infringing on the privileges or immunities of any person within the United States.⁵⁵

In order to bring an Equal Protection claim, there must be an allegation that an official act treats one class of people differently from another; unlike the Due Process Clauses of the 5th and 14th Amendments, the different treatment need not rise to the level of a deprivation of liberty or property.⁵⁶ The person bringing the claim does not need to show that they are similarly situated, as that is a conclusion the court reaches upon applying the proper level of equal protection scrutiny, with racial groups being strongly assumed to be similarly situated.⁵⁷

The Equal Protection Clause on its own does not state a rule of decision on what ‘equal’ means, leaving the text essentially meaningless without judicial interpretation.⁵⁸ The anti-discrimination principle arises out of the need for this judicial interpretation.⁵⁹ “The anti-discrimination principle relies on the ability to reduce the principle of equality to the simple statement that similar things should be treated similarly and that if they are not the government must provide a rationale as to why.”⁶⁰

⁵³ U.S. CONST. amend. XIV, § 1; see also William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1240 (2009) (discussing the principles that support the Equal Protection Clause).

⁵⁴ *Slaughter-House Cases*, 83 U.S. 36, 81 (1972).

⁵⁵ *Id.* at 122.

⁵⁶ Scott E. Rosenow, *Heightened Equal Protection Scrutiny Applies to the Disparate-Impact Doctrine*, 20 TEX. J. ON C.L. & C.R. 163, 169 (2015).

⁵⁷ *Id.*

⁵⁸ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

⁵⁹ *Id.*

⁶⁰ “The construction of the antidiscrimination principle proceeds in three steps. The first is to reduce the ideal of equality to the principle of equal treatment – similar things should be treated similarly. The second step is to take account of the fact that even the just state must make distinctions, must treat some things differently from others [...]. The third step in the process [is] a general method [...] for determining the rationality and thus the permissibility of the lines drawn.” Fiss, *supra* note 58, at 108-109.

Therefore the Equal Protection Clause only prohibits arbitrary discrimination.⁶¹

At the time the Equal Protection Clause was incorporated into the Constitution, discrimination was habitual and apparent, and the Court could easily determine which laws violated the Fourteenth Amendment.⁶² In current times, it is not as easy to spot a discriminatory law as some are not discriminatory on their face, but only in application – that is where Title VII of the Civil Rights Act of 1964 comes into play.

B. Types of Discrimination

The disparate impact analysis was set in stone with the passing of the Civil Rights Acts in 1964.⁶³ Under Title VII of the Civil Rights Act [hereafter Title VII],

an unlawful [...] practice based on disparate impact is established [...] only if [...] a complaining party demonstrates that a respondent uses a particular [...] practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is [...] is necessary.⁶⁴

Interpretation of Title VII clarified that two types of discrimination are prohibited: disparate-treatment discrimination, an intentional act of unfavorable treatment against a person based on a protected trait, and disparate-impact discrimination, an act that creates a disproportionate effect on the basis of a protected trait.⁶⁵ Under disparate-impact discrimination, liability can attach without intentional discrimination.⁶⁶

Under the Roberts Court, Justice Kennedy delivered a majority opinion that calls for the inclusion of disparate impact claims in antidiscrimination laws, when the text of the law refers to the consequences of the action and not just the mindset of the actors.⁶⁷

⁶¹ Fiss, *supra* note 58, at 109.

⁶² *Strauder v. W. Va.*, 100 U.S. 303, 306 (1880).

⁶³ Civil Rights Act, 42 U.S.C.A § 2000e-2 (1964).

⁶⁴ Civil Rights Act, 42 U.S.C.A § 2000e-2(k) (1964).

⁶⁵ Scott E. Rosenow, *supra* note 56, at 169.

⁶⁶ *Id.*

⁶⁷ A Texas based nonprofit that works on fair housing brought suit under the disparate impact section of the Fair Housing Act, claiming that the Department of Fair Housing and Community Affairs have caused segregated housing patterns by allocating

While Justice Kennedy's decision specifically referred to the allocation of fair housing credits in Texas among African Americans, the decision outlined the burden in a disparate impact case; the burden of proving the challenged practice caused or predictably will cause a discriminatory outcome.⁶⁸ In order to allow for the free enterprise system, employers and other regulated entities must be able to make practical business decisions and therefore their actions are only deemed a violation of Title VII if the actor cannot prove there are no available alternatives and that there is no alternative practice that could be used which will have a less discriminatory outcome.⁶⁹

With two classifications of discrimination under Title VII, the Court must first determine if and what kind of purpose the act has; if an act has multiple purposes, only one of them needs to be suspect or quasi-suspect to invoke the use of equal-protection scrutiny.⁷⁰ There are four classifications that an act can fall into that gives it a discriminatory purpose; it can have (1) an express discriminatory purpose, (2) a discriminatory impact, (3) a discriminatory motivating factor, or (4) a predominant motivating factor.⁷¹ An act will be found to have an express discriminatory purpose when a written policy or statute facially imposes different treatment among similarly situated people or when an unwritten but commonly understood policy imposes different treatment among similarity situated people.⁷² If an act or policy does not facially discriminate, it can still be found to be discriminatory if it has an uneven impact.⁷³ Under Title VII, it is not the motivation, but the consequences of the actions that take precedent when analyzing a discriminatory impact.⁷⁴ If an act or policy in question is not facially discriminatory nor does it have a discriminatory impact, it may still be found to be

too many credits to African American neighborhoods and too few to white neighborhoods. *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty's. Project*, No. 13-1371, slip op. at 2 (2014).

⁶⁸ *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty's. Project*, No. 13-1371, slip op. at 4 (2014).

⁶⁹ *Id.*

⁷⁰ Rosenow, *supra* note 56, at 172.

⁷¹ *Id.* at 173.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ African American employees of Duke Power brought suit against their employer for discrimination based on the requirement of a high school diploma and a certain test score for jobs previously limited to white employees. The Supreme Court found that even without a discriminatory purpose a policy can still be discriminatory if it has a discriminatory effect. *Griggs v. Duke Power Co.*, 401 Us. 424, 433 (1971).

discriminatory based on underlying factors.⁷⁵ If any single motivating factor behind an act or policy is discriminatory, it shows a discriminatory intent; or if the predominant factor behind the act of policy is discriminatory it shows a discriminatory intent.⁷⁶ When the Court finds an act or policy to be either facially discriminatory or have a discriminatory motivating or predominant fact, the act or policy will fall into the category of disparate-treatment discrimination, while if the act or policy is found to have a discriminatory impact it will fall into the category of disparate-impact discrimination.⁷⁷

C. Disparate-Impact Discrimination

When the type of discrimination is established to be disparate-impact based, the Court must determine what level of equal protection is triggered; strict scrutiny, intermediate scrutiny, or rational basis.⁷⁸ It is based on the level of scrutiny that the necessary test is determined.⁷⁹ If the action in question treats people differently based on the grounds of race, national origin, or alienage, strict scrutiny will be applied and the action will only hold up if it is narrowly tailored to achieve a compelling state interest.⁸⁰ Discrimination based on gender or illegitimacy invokes intermediate scrutiny and the action will only hold up if it is substantially related to achieving an important state interest.⁸¹ Discrimination based on any other grounds is analyzed under rational basis which requires that the action be rationally related to achieving a legitimate state interest.⁸² Rational basis is the level of scrutiny triggered for socio-economic policies unless the complaining party can show both a discriminatory impact and a discriminatory intent.⁸³

⁷⁵ Rosenow, *supra* note 56, at 169.

⁷⁶ *Id.* at 169.

⁷⁷ *Id.* at 163.

⁷⁸ Rosenow, *supra* note 56, at 163; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

⁷⁹ Cleburne Living Center wanted to open a home for the mentally disabled in Cleburne. The city refused to issue the necessary permit under the zoning ordinance. Rational Basis was applied because the mentally disabled is not a suspect or quasi-suspect class. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

⁸⁰ *City of Cleburne*, 473 U.S. at 440-41 (1985).

⁸¹ *Id.* at 440.

⁸² *Id.* at 441-42.

⁸³ *Washington v. Davis*, 426 U.S. 229 (1976).

The probe into the discriminatory intent is one based on circumstantial and direct evidence.⁸⁴ One source of evidence to prove intent is the historical background of the decision, “particularly if it reveals a series of official actions taken for invidious purposes.”⁸⁵ Another source of evidence comes from the specific series of events that led up to the challenged, such as a sudden change in policy immediately before the action occurred.⁸⁶ Departures from the normal procedure can also be used to prove the intent behind the challenged action.⁸⁷ Legislative or administrative history behind a government action is highly relevant evidence when aiming to prove intentional discrimination.⁸⁸

Title VII provides a specific burden of proof that shifts between the plaintiff and defendant for disparate-impact discrimination claims.⁸⁹ At the onset of the action, the burden rests on the plaintiff to prove the action has a disparate impact on a protected class of people; after the plaintiff makes a prima facie showing of disparate impact, the burden shifts to the defendant at which point the defendant must show the actions is one of necessity.⁹⁰ If the defendant is able to overcome that burden, the burden then shifts back to the plaintiff to prove that the defendant refused to adopt an alternative action that would not have less of a discriminatory effect.⁹¹ The shifting of the burden aligns with the 3-pronged test used in disparate-impact cases: (1) is there a disparate impact on a protected class of people, (2) is the action causing the impact one of necessity, and (3) if it is one of necessity, is there a less discriminatory action that can be used instead.⁹²

While the disparate impact analysis is traditionally a tool of the civil rights movement, the environmental justice movement has recently

⁸⁴ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁸⁵ *Id.*

⁸⁶ An example given by the Supreme Court of the sequence of events leading up to a challenged decision is the sudden change in a zoning ordinance that occurs shortly before the town would have built integrated housing. This could be used to prove evidence of an intent to avoid integrated housing. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (S. Ct. 1977).

⁸⁷ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (S. Ct. 1977).

⁸⁸ *Id.*

⁸⁹ Rosenow, *supra* note 56, at 169.

⁹⁰ *Id.* at 169.

⁹¹ *Id.*

⁹² Todd B. Adams, *Environmental Justice and the Limits of Disparate Impact Analysis*, 16 T.M. COOLEY L. REV. 417 (1999).

turned to it as a way to invigorate their cause.⁹³ “In the face of strong political, theoretical, and legal opposition, the Clinton administration and the U.S. Environmental Protection Agency [hereafter, EPA] have endorsed and supported the use of the disparate impact analysis to evaluate the allegedly racially discriminatory effects of environmental permitting decisions.”⁹⁴ Clinton’s executive order declared that Title VI of the Civil Rights Act of 1964⁹⁵ can be used as a means to ensure that federally assisted programs do not discriminate against minority communities by subjecting them to a disproportionately high rate of adverse environmental effects, thereby incorporating the disparate-impact analysis of Title VII into Title VI.⁹⁶ Under this Executive Order, “each federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.”⁹⁷ As prescribed by statute, any environmental program or activity which receives financial assistance must take affirmative action to provide remedy to those who have been injured by discrimination caused by the program or activity.⁹⁸ The passing of these laws set the environmental civil rights movement into motion.

The environmental civil rights movement is focused on bringing about environmental justice and ending the disparity between races in

⁹³ See Todd B. Adams, *Environmental Justice and the Limits of Disparate Impact Analysis*, 16 T.M. COOLEY L. REV. 417, 417 (1999) (discussing the Clinton administration’s role in the environmental justice movement).

⁹⁴ “To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal Agency shall make achieving environmental justice part of its mission by identifying activities on minority populations and low income populations in the United States and its territories [...]” Adams, *supra* note 87 at 417; see also 59 F.R. § 7629 (1994).

⁹⁵ Title VI of the Civil Rights Act of 1964 provides that “no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Civil Rights Act, 42 U.S.C. §2000d (1964).

⁹⁶ Michael D. Mattheisen, *Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964*, 24 WM. & MARY ENVTL. L. & POL’Y REV.1 (2000); Exec. Order No. 12,989, 3 C.F.R. 859 (1995).

⁹⁷ Exec. Order No. 12,989, 3 C.F.R. 859 (1995).

⁹⁸ 40 C.F.R. § 7.35 (1973).

the field of environmental and health conditions.⁹⁹ The need for environmental justice arose out of the problem of environmental racism, the idea that minority and low-income populations are disproportionately exposed to pollution and environmental risk from both governmental and private actions.¹⁰⁰

III. DISCRIMINATION IN WATER PRIVATIZATION

The discrimination in the water industry provides the groundwork for disparate impact claims to be made against private water companies. Because these companies are private entities, the presence of state action must be proven.¹⁰¹ Once the existence of state action is established, discriminatory intent and discriminatory impact must be shown.¹⁰² If state action, discriminatory intent, and discriminatory impact can all be proven, an Equal Protection argument can be made to stop the private water companies' unchecked discrimination.

A. State Action

For an action to be subject to judicial scrutiny under the 14th Amendment, it must constitute a state action.¹⁰³ As clearly stated by the Supreme Court, private actions are immune from the restrictions of the 14th Amendment; the issue becomes determining when a private actor has the government connections to constitute a state actor.¹⁰⁴ "The ultimate issue in determining whether a person is subject to suit under [...]the 14th Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'"¹⁰⁵

Courts have applied many different tests when determining the presence of State Action, including; (1) the Public Function Test, (2) the State Compulsion Test, (3) the Nexus Test, (4) the State Agency Test, (5) the Entwinement Test, and (6) the Joint Participation Test.¹⁰⁶ The Public Function Test and the State Agency Test will not be useful in

⁹⁹ Mattheisen, *supra* note 96 at 2.

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

¹⁰² *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

¹⁰⁶ Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 560 (2008).

supporting the argument for finding state action in the actions of private water companies. The Public Function Test “requires that the private entity exercise powers which are traditionally exclusively reserved to the state.”¹⁰⁷ This is the most narrow category of state actors including only election administration, the operation of a company town, eminent domain, and preemptory challenges in jury selection.¹⁰⁸ The Supreme Court has not previously deemed utilities a public function under this test, therefore it cannot be used to support the claims of a state action linked to water privatization. The State Agency Test is used in very limited instances when a state agency controls a private entity and the state agency acts in a discriminatory manner.¹⁰⁹ While the Environmental Protection Agency does oversee the applications for the federal subsidies, the discriminatory practices are not committed by the state agency, so state action cannot be found on these grounds.

The Joint Participation Test, also known as entanglement, applies in situations where the state so closely encourages a private parties activities that the actor is cloaked with the authority of the state.¹¹⁰ The Joint Participation Test contains two parts; first, the deprivation must be caused by the exercise of some right or privilege created by the state, or a rule of conduct imposed by the state, or by a person for whom the state is responsible; second, the discriminatory action must be committed by an actor deemed to be a state official or an actor who acts with significant assistance from a state official.¹¹¹ In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court found entanglement existed because state officials participated in the seizure of private property alongside the private actor, and the property was seized under a

¹⁰⁷ *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

¹⁰⁸ Julie K. Brown, *supra* note 106, at 565.; *see also* *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

“While many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’ One such area has been elections. While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function.” *Pennsylvania v. Board of Dirs. of City Trusts of Philadelphia*, 353 U.S. 230 (1957). *See also* *Terry v. Adams*, 345 U.S. 461 (1953); *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹⁰⁹ Brown, *supra* note 106, at 560.

¹¹⁰ *Id.* at 567.

¹¹¹ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

state statute.¹¹² It is possible for a court to find entanglement between the private water companies and the state depending on the specific instance that is being looked at. This test would be useful in certain cases, such as Flint, where specific jobs were contracted to private companies under the supervision of state agents, but not in cases like Atlanta, where the entire waterworks system was sold.

A similar test to the entanglement, is the Entwinement Test. Entwinement examines the relationship between the state and the private entity by looking at factors such as; (1) how many of the private actors members are public officials, (2) whether private employees are treated like state employees, and (3) whether the duties performed by the public entity and private entity were interdependent on each other.¹¹³ In *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 290 (2001), the Supreme Court found entwinement existed because the association in question included public schools located in the state, actions committed by public school representatives, is largely funded by the dues from the public schools, and has historically regulated the public schools in place of the State Board of Education.¹¹⁴ Like entanglement, entwinement must be evaluated on a case by case basis, as it will change depending on the type of privatization present (complete privatization, DBO's, temporary contracts, etc.).

The two strongest ways to show the state action behind water privatization are the State Compulsion Test and the Nexus Test. The State Compulsion Test "requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actors is deemed to be that of the state."¹¹⁵ The approval of or acquiescence in the initiatives of a private it not enough to create a state action.¹¹⁶ In *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001), the Supreme Court determined that the State had not exercised enough of a coercive power or provided significant encouragement to the Tennessee Secondary School Authority Association [hereafter TSSAA] in order to a state action to be present.¹¹⁷ The State had not provided regulations relating the interscholastic sports, which was the main purpose of the TSSAA,

¹¹² *Id.*

¹¹³ Brown, *supra* note 106, at 567.

¹¹⁴ *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 290 (2001).

¹¹⁵ *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

¹¹⁶ *Blum v. Yaretsky*, 457 U.S. 991, 1004-5 (1982).

¹¹⁷ *Brentwood Acad.*, 531 U.S. at 288.

nor had the State encouraged or coerced the TSSAA in enforcing the discriminatory recruiting rule.¹¹⁸ This is unlike the government interference with the inner workings of private water companies. In Flint, Michigan, Governor Snyder's underhanded activities coerced the City of Flint to hire Veolia and LAN to test and filter the water from Flint River.¹¹⁹ Governor Snyder, along with multiple State Officials, are named in the law suit alongside Veolia and LAN for the negligent contamination of the drinking water.¹²⁰ The suit claims that the Governor and state officials chose to appoint an emergency manager for Flint rather than declare bankruptcy in an attempt to save money while disregarding public health, safety, and welfare; the suit also alleges mail fraud committed by city officials who continued to mail water bills that they knew misrepresented the safety of the water.¹²¹ If these claims are found to be true, government compulsion will be found to exist in the privatization of Flint's water supply.

While government misconduct will not likely be available as a showing of state compulsion in many cases, there is current legislation in place that coercive municipalities to sell their waterworks to private companies by making it the only feasible option. WIFIA promotes water privatization under the guise of building infrastructure.¹²² According to the Environmental Protection Agency, WIFIA establishes a federal credit program, administered by the Environmental Protection Agency, for water and wastewater infrastructure projects and serves the purpose of funding repairs or rehabilitation to revive the nations aging water facilities and systems.¹²³ The entities eligible for the federal credits are: corporations, partnerships, joint ventures, trusts, governmental entities, tribal governments, and state infrastructure financing authorities; but due to the provisions of the law, only private entities are likely to qualify.¹²⁴ Under WIFIA, the EPA is authorized to provide secured

¹¹⁸ *Id.*

¹¹⁹ Gary Ridley, *Gov. Rick Snyder Target of RICO Lawsuit Over Flint Water Crisis*, MICHIGAN LIVE, (Apr. 6, 2016), http://www.mlive.com/news/flint/index.ssf/2016/04/gov_rick_snyder_target_of_rico.html.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Water Infrastructure Finance and Innovation Act, 33 U.S.C.A. §§ 3904 (2014).

¹²³ Environmental Protection Agency, *Learn About the WIFIA Program*, EPA (Dec. 2016) <https://www.epa.gov/wifia/learn-about-wifia-program#overview>.

¹²⁴ Water Infrastructure Finance and Innovation Act, 33 U.S.C.A. §§ 3904 (2014).

loans to eligible entities once the entity has demonstrated their projects eligibility, financial creditworthiness, engineering feasibility, and alignment with the EPA's policy priorities.¹²⁵ Loans provided under WIFIA must be co-financed with another source of funding as WIFIA only covers up to 49% of the program costs.¹²⁶

The WIFIA program contains a specific organizational structure that provides a multi-level review system for funding applicants.¹²⁷ The top of the organizational structure is the program director who manages the WIFIA program and develops policies that incorporate the Credit Review Board, Credit Counsel, and EPA leadership.¹²⁸ The WIFIA Program Management Team provides comprehensive support to the entire WIFIA Program.¹²⁹ The Organization and Underwriting Team takes applicants through the application process and leads the negotiation stage of the application.¹³⁰ The credit analysis of each applicant is reviewed by the Credit Policy and Risk Management Team, whose job it is to assess the risk associated with each WIFIA loan.¹³¹ The feasibility of each project is assessed by the Engineering Team and the Legal Team overseas all legal issues faced by WIFIA and its applicants.¹³² Finally, the Portfolio Management Team monitors the financial compliance of approved projects. The structure of the WIFIA Program shows the focus is on the allocation of federal funding for the commercial development and private corporations, without the prioritization of public health, water quality compliance, or affordability.¹³³ Under WIFIA, funding can be allocated to both build new facilities and repair older ones.¹³⁴ The main benefits of WIFIA are

¹²⁵ The Environmental Protection Agency, *WIFIA Program Handbook*, EPA (Jan. 2017), https://www.epa.gov/sites/production/files/2017-01/documents/program_handbook_1-9-17_final.pdf.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Kate Fried, *Guess Who WIFIA is Really Going to Help? (Hint: It's Not Flint, Mich.)*, FOOD AND WATER WATCH, (Apr. 7, 2016), <http://www.foodandwaterwatch.org/news/guess-who-wifia-really-going-help-hint-it's-not-flint-mich>.

¹³⁴ Water Infrastructure Finance and Innovation Act, 33 U.S.C.A. §§ 3901-14 (2014).

felt by large scale development projects, the private sector, and locations with oil and gas development.¹³⁵

What Makes WIFIA an act of state compulsion is that in order to receive federal funding a project must be approved by a bond rating agency and must be deemed to be investment grade bond worthy.¹³⁶ This makes cities like Flint, Michigan ineligible for loans because their bond ratings are too low; this is just one way the language of WIFIA prioritizes private waterworks companies.¹³⁷ Not only does WIFIA require an investment grade bond, but it prohibits WIFIA funds from being combined with tax-exempt bonds, making it even more difficult for public waterworks to be eligible for the federal funding.¹³⁸ Without the availability of tax-exempt bonds, project sponsors will be required to fund the remaining 51% of the project with cash, taxable municipal debt, or private sources; the use of these funding sources as opposed to tax-exempt bonds increases the overall project cost and effectively undoing any savings provided by WIFIA.¹³⁹ WIFIA is a prime example of state compulsion that rises to the level of state action.

Lastly, the Nexus Test, or the Symbiotic Relationship Test, also supports a showing of state action. Under the Nexus Test, the action of a private party will be considered to be a state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity.¹⁴⁰ Factors that are not enough to meet this threshold by themselves are: (1) state regulation, (2) government subsidies, (3) the use of public property, (4) the presence of public officials on the board of the private entity, (5) state approval of private action, or (6) the use of public services by private actors.¹⁴¹

While waterworks and utilities are subject to heavy government oversight, the mere fact that a business is subject to extensive and detailed state regulation does not by itself bring a private action to the

¹³⁵ Fried, *supra* note 133.

¹³⁶ Fried, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ *WIFIA's Bond Prohibition Shuts of Water Project Finance Tool*, AMERICAN WATER WORKS ASSOCIATION, <http://www.awwa.org/Portals/0/files/legreg/documents/FlyInWIFIACorrection.pdf>. [hereafter Bond Prohibition]

¹³⁹ Bond Prohibition, *supra* note 138.

¹⁴⁰ Brown, *supra* note 106, at 566.

¹⁴¹ *Id.*

level of a state action.¹⁴² The determination of whether a utility company can be considered a state actor can consider facts relating to the government's oversight, such as if there is a government supported monopoly, but the inquiry must be whether there is a sufficiently close connection between the State and the challenged action.¹⁴³

The use of public property is not sufficient to show state action, but can be used to show significant government involvement.¹⁴⁴ In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the public ownership of the land the private restaurant was on was not the factor that created the state action, but it was at the core of the issue.¹⁴⁵ The restaurant was located in a publicly funded car parking structure in Wilmington, Delaware; the building being owned and operated by the Wilmington Parking Authority making a state agency the lessor of the property.¹⁴⁶ The cost of the land, construction, and maintenance of the property came from the city of Wilmington.¹⁴⁷ Not only did physical structure create a financial interdependence between the state agency and the restaurant, it also conferred mutual benefits based on the patrons; guests of the restaurant were given a convenient place to park making them customers of the parking structure as well.¹⁴⁸ It was the addition of these facts, on top of the physical structure being located in a public building, that lead to court to find a state action present in *Burton*. In the United States, public-private partnerships are more common than complete sales of waterworks systems, especially with the main provider of private water in the United States, Veolia Water.¹⁴⁹ In public-private waterworks partnerships, the state contracts out either the entire operation or specific tasks to private companies.¹⁵⁰ Public utilities often contract private firms to design, prepare bids, and manage construction of facilities; on the other side of operations public utilities often contract out billing and meter reading service, and maintenance and laboratory

¹⁴² *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

¹⁴³ *Id.*

¹⁴⁴ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 724.

¹⁴⁹ *Veolia Contracts in the U.S.*, GLOBAL EXCHANGE, (2011) <http://www.globalexchange.org/economicactivism/veolia/contracts>.

¹⁵⁰ National Research Council, *Privatization of Water Services in the United States: An Assessment of Issues and Experience*, 24 (National Academy Press, 2002).

tasks.¹⁵¹ In these types of contracts, the costs of construction, operation, and maintenance is funded by the state, just as the parking from *Burton*., creating a interdependent financial relationship between the state and the private actor.¹⁵² In cases where the property is leased from the state to the private actor, the relationship will be even stronger. This differs from the facts of *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)., in that the land is publicly owned and dedicated to public use, while the private club in *Moose Lodge* was on private land unowned by a public authority.¹⁵³ Based on *Moose Lodge*, if the proper type of contract is present, the court should find that a significant nexus exists.

Between the State Compulsion Test and the Nexus Test, state action should be found in nearly every instance of water privatization.

B. The Disparate Impact Analysis

Once state action is established, the discriminatory impact can be analyzed; the first step in the analysis is to determine what type of discrimination is present. As discussed previously, an action will be found to have a discriminatory impact when there is an uneven impact among similarly situated people even when no discriminatory purpose or motivation is present.¹⁵⁴ In order for the actions of a private water company to be found to have a discriminatory effect, an uneven impact must be shown.

The three populations being used to determine the uneven impact are Atlanta, Georgia; Flint, Michigan, and Indianapolis, Indiana. The factor that sets Indianapolis apart from the other two cities, is the racial demographic of the populations. Indianapolis' population of 853,173 people is 27.5% African American which differs drastically from Atlanta, with 54.0% of its 463,878 residents being African American, and Flint, with 56.6% of the 98,310 residents being African American.¹⁵⁵ Because the difference between the populations is based on race, they are assumed to be similarly situated.¹⁵⁶

¹⁵¹ National Research Counsel, *supra* note 150.

¹⁵² *Burton v. Wilimington Parking Auth.*, 365 U.S. 715 (1961).

¹⁵³ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

¹⁵⁴ Rosenow, *supra* note 56, at 173.

¹⁵⁵ See *Quick Facts: Indianapolis Indiana*, United States Census Bureau (2016) <https://www.census.gov/quickfacts/table/PST045216/18>, See also *Quick Facts: Atlanta Georgia*, United States Census Bureau (2016) <https://www.census.gov/quickfacts/table/INC110215/1304000>; See also *Quick Facts:*

Water privatization has had both major successes and major failures in the past. An example of a success of water privatization is Indianapolis, Indiana.¹⁵⁷ Indianapolis has gone through many changes in their water system since it was originally incorporated in 1869.¹⁵⁸ Just over a decade after the water systems initial incorporation, it was sold to the Indianapolis Water Company, making it the largest city served by an investor-owned water system.¹⁵⁹ In 1997, the system was purchased by a local gas company, but it quickly sold it in 2000 back to the city. For the next two years, the city was involved in an eminent domain dispute over the water system, before selling it back to a private company in 2002.¹⁶⁰ Sticking with the trend, Indianapolis sold the water system to Veolia Water North America, making it the largest public-private water partnership in the United States.¹⁶¹ The contract was the first to directly link performance with compensation, creating a new standard for the water industry; Veolia was given a twenty year contract valued at approximately one and half billion dollars.¹⁶² After only two years, Veolia was serving one-point-one million people in the greater Indianapolis area and complaints are poor taste and odor dropped by thirty-five-point-nine percent.¹⁶³ The privatization of the water system had a positive economic impact as well, as the partnership met the city's goal rate and a five year rate freeze was put in place.¹⁶⁴ Under city management the billing system was full of problems, but under Veolia, this problem had been solved and customer satisfaction increased.¹⁶⁵ In 2010, Indianapolis and Veolia severed their ties and the city sold the

Flint Michigan, United States Census Bureau (2016), <https://www.census.gov/quickfacts/table/PST045215/2629000>.

¹⁵⁶ Scott E. Rosenow, *supra* note 56.

¹⁵⁷ Veolia Water, *Success in Indianapolis: Public-Private Partnership Adds Value to the Indianapolis Community*, VEOLIA NORTH AMERICA, http://www.veolianorthamerica.com/sites/g/files/dvc596/f/assets/documents/2014/10/56413SuccessIndyAug2011_general-1.pdf.

¹⁵⁸ National Research Counsel, *supra* note 150.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *City of Indianapolis and Veolia Water Partnership*, THE NATIONAL COUNCIL FOR PUBLIC-PRIVATE PARTNERSHIPS (2004), <http://www.ncppp.org/resources/case-studies/operation-and-managementmaintenance-contracts/city-of-indianapolis-and-veolia-water-partnership/>. [hereinafter, Partnership].

¹⁶² Partnership, *supra* note 161.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

water system to Citizen's Energy Group, a public charitable trust that provides natural gas, chilled water, and steam services in Indianapolis, and they continue to serve the city's water needs today.¹⁶⁶

On the other end of the spectrum lies cities like Atlanta, Georgia and Flint, Michigan. Atlanta, Georgia is a prime example of a failure in the water privatization movement.¹⁶⁷ Atlanta relied on a municipal water system until 1998, when they granted a twenty-year contract to United Water who then gained control of the operations of the municipal water system.¹⁶⁸ After the contract with United Water was put in place, residents began to notice their water running a rusty brown color and many customers were cut off from their water supply.¹⁶⁹ Aside from a loss of quality in the water, the economic impact of the privatization contract was felt in Atlanta when the number of waterworks employees was cut from seven hundred to three hundred.¹⁷⁰ The cut in employees was felt by customers and employees alike, with a backlog of work orders increasing in every area and the completion rate for maintenance projects dropping to fifty percent.¹⁷¹ On top of the mess United Water made of the waterworks system, the company was also found to be billing the city improperly and using Atlanta funds to work on projects outside of the city; a possible cause of the increase in cost to the Atlanta taxpayer from twenty one million to forty million a year.¹⁷²

Flint, Michigan is a well-known example of a water privatization failure. Detroit began regulating water in 1824, when they built a pump

¹⁶⁶ Chris O'Malley, *Veolia Losing Water Contract, Will Get \$29M Termination Fee*, INDIANAPOLIS BUSINESS JOURNAL (Oct. 28, 2010), <http://www.ibj.com/articles/23102-veolia-losing-water-contract-will-get-29m-termination-fee>.

¹⁶⁷ Craig Anthony (Tony) Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785 (2009); see also Martha Carr, *The Story of United in Atlanta*, WATER INDUSTRY NEWS, June 29, 2003, <http://www.waterindustry.org/New%20Projects/atlanta-19.htm>; *The Water Privatization "Model": A Background on United Water's Atlanta Fiasco*, PRIVATE CITIZEN, <https://www.citizen.org/documents/atlantafiasco.pdf> [hereinafter, *The Water Privatization Model*].

¹⁶⁸ Arnold, *supra* note 167 at 786.

¹⁶⁹ *Id.*

¹⁷⁰ *The Water Privatization Model*, *supra* note 167.

¹⁷¹ *Id.*

¹⁷² *The Water Privatization Model*, *supra* note 167; see also Carr, *supra* note 167.

on the Detroit River that was funded by tax money.¹⁷³ Once the city outgrew this system, the water system was traded and sold among many different private companies.¹⁷⁴ Dissatisfaction with the private systems led to a municipal takeover in 1836.¹⁷⁵ In 1852, the city sold the system to a board of trustees consisting of five members, which later became the Board of Water Commissioners.¹⁷⁶ Detroit's water is currently run by the Detroit Water and Sewerage Department, a public entity.¹⁷⁷ Detroit's public waterworks had massive shortcomings, which led to the city of Flint separating from Detroit's Water and Sewage Department and starting relationships with two private waterworks companies, Veolia and LAN.¹⁷⁸ Veolia was contracted to prepare a report on the contaminant levels in the new water source, Flint River, and their final report stated the water was safe to drink.¹⁷⁹ Veolia misrepresented the quality of the water and recommended that ferric chloride¹⁸⁰ which increased the corrosion in the pipes, ultimately leading to lead in the water supply.¹⁸¹ LAN was hired to prepare a new water plant to treat the new source of water; in 2015 LAN issued a report stating that the water met federal safety requirements.¹⁸² LAN operated the water treatment facility without any corrosion control program, which sent the lead from the pipes directly into people's homes.¹⁸³ Once high levels of lead were discovered in the drinking water supply, the city cut ties with Veolia and LAN and went back to the Detroit Water and Sewerage Department and

¹⁷³ The Water Privatization Model, *supra* note 167.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Michael Daisy, *Detroit Water and Sewerage Department the First 300 Years*, DETROIT 300, http://dwsd.org/downloads_n/about_dwsd/history/complete_history.pdf.

¹⁷⁸ Ben Klayman, *Michigan Attorney General Sues France's Veolia in Flint Water Crisis*, REUTERS (Jan. 22, 2016), <http://www.reuters.com/article/us-michigan-water-idUSKCN0Z81PD>.

¹⁷⁹ *Id.*

¹⁸⁰ Ferric Chloride is an iron based compound used in the treatment of raw water to remove color, natural organic materials, and arsenic. *Drinking Water Treatment with Ferric Chloride*, CALIFORNIA WATER TECHNOLOGIES, LLC., <http://www.californiawatertechnologies.com/pdf/PotableBulletin.pdf>.

¹⁸¹ Merrit Kennedy, *They Made It Worse: Michigan Sues 2 Companies Over Flint Crisis*, NPR (Jun. 22, 2016), <http://www.npr.org/sections/thetwo-way/2016/06/22/483083095/they-made-it-worse-michigan-files-suit-against-2-companies-over-flint-crisis>.

¹⁸² Klayman, *supra* note 178.

¹⁸³ Kennedy, *supra* note 181.

the State of Michigan filed suit against both Veolia and LAN for negligence, fraud, and public nuisance.¹⁸⁴

The outcomes in the three aforementioned cities show the uneven impact of water privatization among similarly situated groups of people. As the Supreme Court has previously ruled, disparate impact is not enough to trigger the strict scrutiny based on racial discrimination, a discriminatory intent must also be shown.¹⁸⁵ While the statistical evidence supports a showing of discriminatory intent that is not enough to show intent for the purpose of an equal protection violation.¹⁸⁶ In an equal protection case, the defendant must prove that the decision makers involved in the action acted with discriminatory purpose.¹⁸⁷ Discriminatory purpose requires more than the awareness of discriminatory consequences; it requires decision maker to have taken a course of action because of the discriminatory consequences, not in spite of them.¹⁸⁸

Based on the test provided by the Supreme Court, the first place to look for evidence of intentional discrimination is the historical background of the action.¹⁸⁹ The private waterworks company, Veolia, involved in all three cities previously discussed has a long history in the waterworks industry, standing today as the largest private waterworks company in the world.¹⁹⁰ Veolia has been linked to multiple million dollar contamination events around the world after being found illegally dumping untreated sewage into waterways and the negligent upkeep of water treatment plants.¹⁹¹ Specific instances in the United States, other than those previously discussed, include; Richmond City, California, where Veolia settled with the city after dumping more than 17 million gallons of sewage into local waterways¹⁹²; Wilmington, Delaware,

¹⁸⁴ Kennedy, *supra* note 181; Klayman, *supra* note 178.

¹⁸⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁸⁶ *McCleskey v. Thompson*, 481 U.S. 279, 292 (1987).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 297.

¹⁸⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹⁹⁰ Works World Staff, *Reasons to Challenge Veolia*, WORKS WORLD, (Oct. 16, 2013) <http://www.workers.org/2013/10/16/reasons-challenge-veolia/#.WLipKHg-CCS>.

¹⁹¹ *Id.*

¹⁹² Richmond City, California has a lower minority population than Atlanta and Flint, but has a minority-majority population, meaning it is less than 50% white. *Quick Facts: Richmond City, California*, UNITED STATES CENSUS BUREAU, (2016) <https://www.census.gov/quickfacts/table/PST045216/0660620>.

where failures to upgrade and repair the waterworks treatment plant resulted in sewage spills which contaminated the area waterways¹⁹³; and in New Orleans, Louisiana, Veolia's negligence led to a backup of raw sewage into the Mississippi River costing the city \$5 million¹⁹⁴.¹⁹⁵ In contrast to the minority cities, cities like Danbury, Connecticut¹⁹⁶, had great success under Veolia's management; in their first year with Veolia, Danbury's wastewater treatment plant won multiple awards for the quality of their water and lowered the rates of nitrogen discharge which led to significant savings for the city.¹⁹⁷ While historical background does provide some evidence, a showing of an invidious history of racism is needed to strengthen that evidence.¹⁹⁸ Veolia has been accused of racist corporate policies in the past and it is not limited to just their waterworks subsidiaries.¹⁹⁹ In 2014, Veolia was hired by the city of Boston to run the cities school buses, and immediately after Veolia's takeover racist policies were implemented that locked out the predominately African American school bus driver's union.²⁰⁰ Professional Transit Management, which is wholly owned by Veolia, has faced sanctions from the Equal Employment Opportunity Commission and has been ordered to correct its unlawful and racist behavior; including an incident in 2007 where Professional Transit Management was ordered to pay just under half a million dollars to six

¹⁹³ Wilmington, Delaware has an African American population comprising of 56.4% of the population. *Quick Facts: Wilmington, Delaware*, INFOPLEASE, (2016) <http://www.infoplease.com/us/census/data/delaware/wilmington/>.

¹⁹⁴ New Orleans has an African American population comprising of 60.2% of the total population. *Quick Facts: New Orleans, Louisiana*, UNITED STATES CENSUS BUREAU, (2016). <https://www.census.gov/quickfacts/table/INC110212/2255000>.

¹⁹⁵ *Veolia's Other Offenses*, GLOBAL EXCHANGE, <http://www.globalexchange.org/economicactivism/veolia/otheroffenses>.

¹⁹⁶ The white population of Danbury, Connecticut makes up 68.2% of the total population, making it a majority population. *Quick Facts: Danbury, Connecticut*, UNITED STATES CENSUS BUREAU, (2016) <https://www.census.gov/quickfacts/table/Ind110210/0918430>.

¹⁹⁷ *Danbury, Conn.*, VEOLIA, <http://www.veolianorthamerica.com/en/danbury-connecticut>.

¹⁹⁸ *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

¹⁹⁹ Gerry Scoppettuolo, *Veolia's Long History of Racist, Anti-Worker, Union-Busting Activities*, WORKERS WORLD (Jan. 2, 2014), <http://www.workers.org/2014/01/02/veolias-long-history-racist-anti-worker-union-busting-activities/#.WLi5j3g-CCQ>.

²⁰⁰ *Id.*

transit workers in Colorado Springs for racial discrimination.²⁰¹ In a 2010 lawsuit, Veolia sued for the unlawful termination of an African American employee who was immediately replaced by a white employee – the suit is currently before the U.S. District Court of Appeals.²⁰² Veolia Water North America is also currently facing litigation stemming from racist employment practices.²⁰³ Six employees of Veolia have alleged a hostile and racist work environment stemming from Veolia's common practice of higher white employee's at hirer wagers and the passing over of African American employees for promotions.²⁰⁴ The incidents were not limited to racist policies, but also the tolerance of racist actions by higher level employees against lower level employees, including an incident where a supervisor compared African American employees to cotton-pickers.²⁰⁵ This history of invidious racial conduct provides a solid groundwork for showing a discriminatory intent.

Next, the Court must look to the specific sequence of events that led up to the discriminatory impact.²⁰⁶ The City of Flint's switch from Detroit Water to Flint River Water marked a departure from normal procedure, as Flint had been on Detroit Water for decades prior to the contracting of Veolia and LAN.²⁰⁷ Atlanta experienced the same sudden switch from municipal water to Veolia's control shortly before the city's water crisis began.²⁰⁸ Between the historical evidence and the sudden departure from ordinary procedure, a solid groundwork for proving intentional discrimination has been laid.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Zach Parker, *Bastrop Plaintiffs Allege Workplace Discrimination*, THE OUACHITA CITIZEN (Jan. 7, 2015), http://www.hannapub.com/ouachitacitizen/news/local_state_headlines/bastrop-plaintiffs-allege-workplace-racial-discrimination/article_bc8e26f4-9695-11e4-8884-13ace060cc14.html.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

²⁰⁷ Jason Stanley, *The Emergency Manager: Strategic Racism, Technocracy, and the Poisoning of Flint's Children*, THE GOOD SOCIETY, (2016) <https://campuspress.yale.edu/jasonstanley/files/2016/10/Flintgoodsocietyfinal-2lw8otv.pdf>.

²⁰⁸ Arnold, *supra* note 167.

VI. SOLUTION

The ravages of water privatization are being felt across the country, but the hardest hit are those who are already disadvantaged. Cities like Flint, Michigan and Atlanta, Georgia are targeted by water companies, sold like a commodity, and left poisoned. The trend towards less government regulation in the water industry is the cause of this problem, and only permanent solution is more government oversight. With the worldwide trend towards neoliberalism, expanding government oversight is unlikely and an unfortunately farfetched solution. The most practical way to fight the discrimination so deeply woven into water privatization, is through the courts.

Just as the inclusion of the disparate impact analysis in Title VII led major civil rights decisions in the realm of employment and housing, its inclusion in Title VI allows for the fight for civil rights to spread into the realm of environmental law.²⁰⁹ As a whole, discrimination is prevalent in water privatization, but the use of the disparate impact analysis will force individual companies to be held responsible for their discriminatory practices.

The state of Michigan is currently suing Veolia Water for negligence in relation to the poisoning of the people of Flint.²¹⁰ While this suit is enough to hold Veolia accountable for their actions in Flint, adding a discrimination claim can create an important trend in the environmental civil rights movement. Flint is the perfect place to start the use of discrimination suits in the environmental realm because the city is a focus of the public eye.

As discussed previously, state action can be found in Flint through the use of the State Compulsion Test and the Nexus Test. The actions of Governor Snyder were coercive to the point of creating a state action in private actions of Veolia. In cases other than Flint, compulsion can be found in laws like WIFIA that make it more affordable for cities to sell their waterworks to private companies. The Nexus Test will create the strongest showing of state action on Veolia's part. As in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the waterworks facility and piping were owned by the state.²¹¹ Veolia was not sold the

²⁰⁹ *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty's. Project*, No. 13-1371, slip op. at 4 (U.S. 2014).; *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985).

²¹⁰ Klayman, *supra* note 178.

²¹¹ *Id.*

entire waterworks system, instead they were contracted to test the contaminant levels in the water, working under the authority of the government.²¹² When the entire state action analysis discussed previously is applied to the situation in Flint, the Court will likely find state action to be present.

Discriminatory impact can be found by looking at the history of Veolia Water in the United States. As discussed previously, the situation in Indianapolis after the Veolia takeover looked much different than the situation in Flint.²¹³ Discriminatory intent will be the most difficult to prove, but it can be done by looking at the history of Veolia's discriminatory practices.²¹⁴ A sudden change in procedure immediately preceding the events in Flint would be the strongest proof of discriminatory intent.²¹⁵ The departure from Detroit water to Flint water can show a change in procedure, but more will likely be needed to prove discriminatory intent. If this information can be obtained from Veolia through legal process or during the court of a trial, it will be possible to prove discriminatory intent, which will trigger the Equal Protection Clause.

The disparate impact analysis can be used to solve the problems of discrimination in the water industry.

V. CONCLUSION

Neoliberalism has made its way into the realm of drinking and wastewater, leading to a surge in the privatization of the water industry. Companies like Veolia Water are buying out water systems around the United States, and they are leaving a trail of poison in their wake. Neoliberalism's grasp on the industry will make it nearly impossible for stronger regulation to solve this problem, and people must turn to the courts to ensure discrimination does not cause them to lose their basic human right to clean water.

Because the Equal Protection Clause only protects people from government based discrimination, the actions of the private companies must be linked to the state, state action must be found. Laws like WIFIA, which use the guise of infrastructure reform to promote

²¹² *Id.*

²¹³ Partnership, *supra* note 161; *See also* Kennedy, *supra* note 181.

²¹⁴ Gerry Scoppettuolo, *supra* note 199.

²¹⁵ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

privatization, must be looked at as an integral part of the state action analysis. These coercive laws create such a connection to the government, that the private action and state actions are entwined. Once state action is shown, the disparate impact analysis must be used to show the discrimination involved in the decision making of the private water companies. The court system is the best chance this country has at stopping private companies like Veolia Water from poisoning those who are already disadvantaged.