

Online Essay

AFTER FLINT: ENVIRONMENTAL JUSTICE AS EQUAL PROTECTION[†]

David A. Dana & Deborah Tuerkheimer

ABSTRACT—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. Viewed as such, the inadequacy of environmental regulation can be understood as a failure that extends beyond the confines of Flint; a failure that demands a far more expansive duty to protect vulnerable populations.

AUTHORS—David A. Dana, Kirkland and Ellis Professor of Law, Northwestern University Pritzker School of Law. Deborah Tuerkheimer, Professor of Law, Northwestern University Pritzker School of Law.

[†] This Essay was originally published in the *Northwestern University Law Review Online* on January 17, 2017, 111 NW. U. L. REV. ONLINE 93 (2017), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1241&context=nulr_online [https://perma.cc/T58D-K559].

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION 880
I. A BRIEF PRIMER ON FLINT 881
II. UNDERENFORCEMENT AS UNEQUAL PROTECTION 882
III. REFRAMING ENVIRONMENTAL JUSTICE AS UNEQUAL PROTECTION..... 884
 A. *Reallocation of Institutional Authority* 884
 B. *The Substance of Federal Action* 887
CONCLUSION 890

INTRODUCTION

The lead crisis in Flint, Michigan has captivated the nation, prompting calls for reform.¹ For its part, the United States Environmental Protection Agency (EPA) recently reaffirmed that environmental justice is a priority.² Even so, the discourse surrounding Flint’s aftermath has been surprisingly unimaginative. We offer a somewhat different way of understanding Flint than has been suggested to date: Flint as a paradigmatic case of unequal protection due to the state’s failure to enforce the laws. While tougher regulation of lead in water sources is clearly in order—federal testing requirements are notoriously underinclusive³—Flint is less a story of weak laws than a tragedy of underenforcement. We contend that the promise of equal protection must extend to the realm of environmental law enforcement.

Part I provides a concise background on Flint and the crisis that occurred there. Part II offers a legal framework for conceiving underenforcement of the laws as a denial of equal protection. Finally, Part III situates Flint within this frame and suggests several reforms to effectuate the promise of equal protection in vulnerable communities.

¹ See, e.g., Editorial, *The E.P.A.’s Civil Rights Problem*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/07/opinion/the-epas-civil-rights-problem.html?_r=0 [https://perma.cc/YD2L-M47J] (calling on the EPA to take a more assertive, energetic role in ensuring equal levels of environmental protection for poor, minority communities).

² EPA, EPA-300-B-1-6004, EJ 2020 ACTION AGENDA: THE U.S. EPA’S ENVIRONMENTAL JUSTICE STRATEGIC PLAN FOR 2016–2020 ii (2016) (quoting EPA Administrator Gina McCarthy calling environmental justice “at the core of the EPA’s mission”).

³ See Michael Wines & John Schwartz, *Unsafe Lead Levels in Tap Water Not Limited to Flint*, N.Y. TIMES (Feb. 8, 2016), <https://www.nytimes.com/2016/02/09/us/regulatory-gaps-leave-unsafe-lead-levels-in-water-nationwide.html> [https://perma.cc/2UW2-UMCQ] (“Both scientists and advocates say the rules governing contamination from lead pipes are riddled with loopholes. For example, the E.P.A.’s lead rule requires water systems to test in only a small number of homes with lead pipes—50 to 100 for large systems—and intervals between testing can stretch to three years.”).

I. A BRIEF PRIMER ON FLINT

The story of Flint is one of gross government failure—a failure impacting a population comprised of 57% of African-Americans and nearly 42% of citizens living below the federal poverty line.⁴ When it most mattered, officials opted not to enforce the rules designed to keep these residents safe from toxic hazards. Most striking in this regard was the failure to treat the contaminated Flint River water, which then flowed through and corroded lead pipes.⁵ As summarized by a report issued by the Governor’s Water Task Force in March 2016:

With the City of Flint under emergency management, the Flint Water Department rushed unprepared into full-time operation of the Flint Water Treatment Plant, drawing water from a highly corrosive source without the use of corrosion control. Though MDEQ [Michigan Department of Environmental Quality] was delegated primacy (authority to enforce federal law), the United States Environmental Protection Agency (EPA) delayed enforcement of the Safe Drinking Water Act (SDWA) and Lead and Copper Rule (LCR), thereby prolonging the calamity. Neither the Governor nor the Governor’s office took steps to reverse poor decisions by MDEQ and state-appointed emergency managers until October 2015, in spite of mounting problems and suggestions to do so by senior staff members in the Governor’s office, in part because of continued reassurances from MDEQ that the water was safe.⁶

The Task Force report makes clear that, from the time it began drawing water from the highly corrosive Flint River, MDEQ officials were under a legal obligation to implement corrosion control measures.⁷ Neglecting to do so caused “chronic toxic exposure of an entire population”—most troublingly, Flint’s children.⁸ A host of further missteps, like violating federal mandates to appropriately sample water quality,⁹ compounded the harm created by the initial decision not to treat the river water.

MDEQ appears to bear primary responsibility for the disaster.¹⁰ But across the board, governmental workers at the state Department of Health and Human Services, the Governor’s office, the county health department, and the EPA, among others, all fell short of their responsibilities to the citizens of Flint. The clear picture that emerges is one of systemic disregard

⁴ See FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 15 (2016).

⁵ See *id.* at 1.

⁶ *Id.*

⁷ See *id.* at 9.

⁸ *Id.* at 32, 55.

⁹ See *id.* at 8.

¹⁰ *Id.* at 6.

for the city's residents—again, residents who are disproportionately poor and predominantly African-American.¹¹ This disregard led officials charged with enforcing the law to ignore it.

The government failure in Flint is, in some sense, exceptional: Flint's finances are far worse than most localities', and, ostensibly because of that, the governance of the city had been assumed by the state as a receiver.¹² But while the lack of local control in Flint and the brazen indifference to community well-being may be unusual, the perils faced by the people of Flint are not. Scores of poor, often minority, communities across the United States bear extreme risks from lead and other hazards—risks that should not be tolerated in a civilized nation.¹³

II. UNDERENFORCEMENT AS UNEQUAL PROTECTION

Equal protection is not generally understood to implicate the underenforcement of the laws. Underenforcement on its face concerns inaction, and the Supreme Court has instructed that equal protection is primarily a problem of discriminatory government action.¹⁴ Yet a firm historical basis exists for conceiving of equal protection as a guarantee of protection against the underenforcement of protective laws.¹⁵

In the criminal justice context, the United States Department of Justice has recently embraced this meaning of equal protection. Under its authority to bring suits against law enforcement agencies engaged in a “pattern or practice” of unconstitutional conduct,¹⁶ the Justice Department has in recent

¹¹ *Id.* at 15.

¹² *Id.* at 39–40.

¹³ See, e.g., CTR. FOR DISEASE CONTROL & PREVENTION, LEAD: AT-RISK POPULATIONS (2015), <https://www.cdc.gov/nceh/lead/tips/populations.htm> [<https://perma.cc/R3RC-HRQR>] (identifying higher risk for lead exposure in children who are poor and members of racial or ethnic minority groups).

¹⁴ In a line of cases beginning with *Washington v. Davis*, 426 U.S. 229 (1976), continuing with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and culminating with *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court announced its insistence on a showing of “[d]iscriminatory purpose,” which necessitates that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Feeney*, 442 U.S. at 279. Compounding the effects of this crabbed understanding of discrimination, the state action requirement has tended to eliminate inaction as a concern. See generally Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 484 (2006) (describing that states may legally “sit and watch” private discriminatory action resulting in “racial subordination”).

¹⁵ See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1299–303 (2016) (explaining that Framers of the Equal Protection Clause were chiefly concerned with state failures to protect black citizens from violence).

¹⁶ 42 U.S.C. § 14141 (2012) (authorizing the Justice Department to bring suit against police departments engaged in a “pattern or practice” of unconstitutional conduct).

years begun to consider patterns of biased *underenforcement*. Most notably, a landmark 2013 settlement with the Missoula, Montana Police Department took aim at the Department's inadequate response to sexual violence.¹⁷ Law enforcement agencies are now on notice that discriminatory underenforcement violates the Equal Protection Clause.

Can the underenforcement of environmental laws be similarly understood? This is an old question, made widely salient by Flint. In the 1980s, legal scholars and activists called for what they coined "environmental justice"; a number of private suits alleged that federal and state governments were imposing disproportionate risks upon communities based on race or national origin.¹⁸ The suits focused on the siting of environmental hazards (such as waste incinerators) in poor, minority communities, challenging in part the underenforcement of existing environmental laws. These suits were generally dismissed at the pleadings stage, and, unlike in the sexual violence context, the Department of Justice never took it upon itself to intervene in a case involving a pattern and practice of underenforcing environmental protection laws.¹⁹

The fact that environmental injustice remains far too common²⁰ decades after the environmental justice movement emerged, and decades after the issuance of an executive order on environmental justice,²¹ creates a

¹⁷ See Memorandum of Understanding Between the U.S. Dep't of Justice and the City of Missoula Regarding the Missoula Police Dep't's Response to Sexual Assault 1 (May 15, 2013), http://www.justice.gov/crt/about/spl/documents/missoulapdsettle_5-15-13.pdf [<https://perma.cc/L6SW-PC9G>] (requiring the police department to "implement new or revise existing policies, provide training, and change practices, to improve its response to sexual assault").

¹⁸ See *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 675 (S.D. Tex. 1979) (challenging the location of a solid waste facility as racially discriminatory); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L.J.* 523, 523 (1994) (discussing environmental justice lawsuits, including *Bean*, which is known as the "parent of environmental justice litigation").

¹⁹ The Department of Justice perhaps has been unable to intervene because often the EPA had taken no action to formally object to the siting, and thus intervention would have put the Department of Justice at odds with another executive department. See, e.g., *Padres Hacia Una Vida Mejor v. McCarthy*, 614 F. App'x 895, 896–97 (9th Cir. 2015) (holding that the EPA had not abused its discretion in failing to respond to a discriminatory siting complaint despite a seventeen-year delay).

²⁰ See Kristen Lombardi et al., *Environmental Justice, Denied: Environmental Racism Persists, and the EPA Is One Reason Why*, *CTR. FOR PUB. INTEGRITY* (Aug. 3, 2015, 5:00 AM), <https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why> [<https://perma.cc/DNX5-LJB8>] ("In its 22-year history of processing environmental discrimination complaints, the [EPA's civil rights] office has never once made a formal finding of a Title VI violation."); see also EPA ENVTL. EQUITY WORKGROUP, *EPA-230-R-92-008, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 2–3* (June 1992) (documenting incidents of "higher environmental risk" in racial minority and low-income communities).

²¹ See Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended* in 42 U.S.C. § 4321 (2012) ("[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental

powerful impetus for importing into the realm of environmental risks and harms the idea of equal protection as underenforcement. Ordinary politics have not remedied environmental injustice—even the blatant injustice of being forced to consume dangerous water daily. The EPA’s draft environmental justice plan is long on aspiration and good intentions but short on specific legal and resource commitments.²² In our legal tradition, we turn to the Constitution and constitutional norms when politics—and legal enforcement driven by politics—remain unresponsive to the basic needs of particular groups. Flint should prompt us to consider a new response to environmental justice.

III. REFRAMING ENVIRONMENTAL JUSTICE AS UNEQUAL PROTECTION

Conceptualizing Flint as a problem of underenforcement leads us to ask, how could the federal government best realize the goal of achieving equality with respect to environmental protection? Two fundamental issues must be addressed if we are to relocate environmental justice within the equal enforcement paradigm: (1) the allocation of responsibility for addressing environmental justice within the federal government and (2) the substance of the legal actions available to the federal government for effectuating environmental justice. We identify these issues in the hope of encouraging further dialogue and debate.

A. *Reallocation of Institutional Authority*

At present, responsibility for environmental justice lies mainly with the EPA’s Office of Civil Rights, with the Justice Department serving merely a coordinating function.²³ This arrangement is an outgrowth of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance.²⁴ Although the Justice Department is charged with coordinating the overall implementation of Title VI,²⁵ primary enforcement obligations currently lie with the agency that provides funding to the program in question²⁶—in the environmental context, the EPA.

effects of its programs, policies, and activities on minority populations and low-income populations . . .”).

²² See EPA’s EJ 2020 ACTION AGENDA, *supra* note 2.

²³ Memorandum from the Assistant Att’y Gen. Thomas E. Perez to Fed. Funding Agency Civil Rights Dirs. (Aug. 19, 2010), https://www.lep.gov/titlevi_memo_tp.pdf [<https://perma.cc/ZC4C-L8UX>] (describing this coordinating function).

²⁴ 42 U.S.C. §§ 2000d–d (2012).

²⁵ See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

²⁶ See 28 C.F.R. § 42.401 (2016) (“Responsibility for enforcing title VI rests with the federal agencies which extend financial assistance.”).

Unfortunately, this arrangement has proven largely ineffectual.²⁷ Regardless of whether the EPA endeavors to improve its response, we urge a more structural remedy: namely, that the Justice Department assume a greater role in combatting the underenforcement of existing environmental laws.²⁸ While we cannot provide here a thorough account of the merits and drawbacks of this suggestion,²⁹ our contention is that an enhanced Justice Department presence in the environmental justice space would advance an understanding of underenforcement as unequal protection and produce corresponding benefits on the ground.

The Justice Department has proven expertise in redressing discriminatory underenforcement as a problem of constitutional dimensions. In its groundbreaking investigation of the Missoula Police Department, the Justice Department found that the biased application of the sexual assault laws deprived certain groups of citizens (i.e., female victims) of the right to equal protection.³⁰ The Justice Department accordingly insisted that the police department modify its practices and procedures to comply with constitutional guarantees.³¹

Given obvious parallels to situations where environmental laws go unenforced when poor, minority populations are at risk, the Justice Department's experience with correcting policing failures makes it a logical institutional choice to ensure that all groups are provided with legal protection from environmental harm. The Justice Department also has more political capital than the (often) beleaguered EPA with which to take on this task, even in the face of outcry by powerful regulated entities or state and local officials.³²

²⁷ See Lombardi et al., *supra* note 20. Just this summer, another case of underenforcement provoked widespread outrage: the press reported on the astonishing lead contamination in hundreds of homes that was allowed to go unaddressed for years in a low-income, largely minority housing complex in the City of East Chicago, leading public authorities to finally take action. Abby Goodnough, *Their Soil Toxic, 1,100 Indiana Residents Scramble to Find New Homes*, N.Y. TIMES (Aug. 30, 2016), <http://www.nytimes.com/2016/08/31/us/lead-contamination-public-housing-east-chicago-indiana.html> [https://perma.cc/CY3P-9DYJ].

²⁸ Our proposal assumes that the Department of Justice, as it has for decades, will continue to embrace in good faith the mission of enforcement of civil rights protections under federal law.

²⁹ See Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 787–803 (2013) (discussing an increased oversight role for the Justice Department).

³⁰ See Findings Letter from Thomas E. Perez & Michael W. Cotter, Assistant Att'ys Gen., Dep't of Justice, to Mayor John Engen Re: The United States' Investigation of the Missoula Police Department 5 (May 15, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf [https://perma.cc/3SZG-BNNQ].

³¹ See *supra* note 17 and accompanying text.

³² Leading politicians regularly call for the abolition, partial dismantling, or drastic defunding of the EPA. See, e.g., William D. Ruckelshaus & Christine Todd Whitman, Opinion, *A Siege Against the*

This move would have the added benefit of alleviating the siloing effects that result from the placement of Title VI enforcement responsibility on the EPA. Discrimination against vulnerable groups operates across systems³³: as demonstrated in Flint, the same population of children poisoned by the water was inadequately screened for lead,³⁴ in possible violation of Medicaid rules;³⁵ and non-English speaking residents were not provided with accessible instructions regarding safe water use,³⁶ in possible violation of Justice Department regulations.³⁷ Rooting the implementation of Title VI's antidiscrimination mandate in the EPA threatens to obscure these intersectional dynamics, yielding an impoverished vision of what justice requires.

Finally, relocating the core enforcement function to the Justice Department would command expressive value by underscoring that core constitutional norms cannot be treated as solely within the purview of a

EPA and Environmental Progress, WASH. POST (Mar. 24, 2011), https://www.washingtonpost.com/opinions/a-siege-against-the-epa-and-environmental-progress/2011/03/23/ABSuyeRB_story.html [<https://perma.cc/KU6G-CPDV>] (decrying “virulent attacks on the EPA”).

³³ Vanita Gupta, head of the Department of Justice Civil Rights Division, recently articulated this observation:

In communities across America today, from Ferguson, Missouri, to Flint, Michigan, too many people—especially young people and people of color—live trapped by the weight of poverty and injustice. They suffer the disparate impact of policies driven by, at best, benign neglect, and at worst, deliberate indifference. And they see how discrimination stacks the deck against them.

Vanita Gupta, *Keynote Remarks*, 21 MICH. J. RACE & L. 187, 187 (2016).

³⁴ FLINT WATER ADVISORY TASK FORCE, *supra* note 4, at 6 (“Too few children in Michigan are screened for lead through routine blood tests as recommended for children ages 1 and 2. Statewide screening goals for children enrolled in Medicaid are met in very few instances at the county level or within Medicaid health plans. This lack of information leaves parents, healthcare professionals, and local and state public health authorities uninformed about the possibility of lead poisoning for thousands of Michigan children.”).

³⁵ *See* INFORMATIONAL BULLETIN, DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICAID & MEDICARE SERVS., MEDICAID LEAD SCREENING AND EQRO PROTOCOLS (Mar. 30, 2012), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib-03-30-12.pdf> [<https://perma.cc/W68H-6DTL>] (describing lead screening protocol for low-income children); *see also* MICH. DEP’T OF HEALTH & HUMAN SERVS., LEAD TESTING/LEAD SCREENING PLAN FOR FLINT, MICHIGAN (Jan. 8, 2016), https://www.michigan.gov/documents/mdch/testing-screening071009_287511_7.pdf [<https://perma.cc/BWT2-H69E>] (requiring all children insured by Medicaid to receive lead testing).

³⁶ *See* FLINT WATER ADVISORY TASK FORCE, *supra* note 4, at 56 (“For non-English-speaking Flint residents, equally subject to the toxic effects of lead and related psychological trauma, communications and instructions regarding water use were not available, especially for those not literate in their native language.”).

³⁷ *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,457 (June 18, 2002) (requiring recipients of “Federal financial assistance” to “reduce language barriers that can preclude meaningful access by [limited English proficient] persons to important government services”).

regulatory agency.³⁸ Demonstration of a federal commitment to environmental justice would elevate its importance, serving as a powerful reminder that all citizens are entitled to protection under the law.

To be sure, a reallocation of responsibility for enforcing the promise of equal protection is no panacea. That said, we have good reason to believe that the institutional shift we advocate would help promote the norm of equal protection in the sphere of environmental justice.

B. *The Substance of Federal Action*

What would constitute effective federal action, by the Justice Department or otherwise? We offer three suggestions: (1) reaffirming reliance on an impact theory under Title VI, (2) including states in suits involving localities that underenforce, and (3) expanding the use of environmental statutes to target defendants who do not receive federal funding and thus remain outside the scope of Title VI.

1. *Disparate Impact*.—Soon after the Court began deciding equal protection cases, it dislodged the protection model that conforms to the Framers' original conception of equal protection. This conception arose as a response to state failures to protect black citizens from violence.³⁹ In place of the protection model, the Court substituted the familiar anticlassification approach that remains the hallmark of equal protection jurisprudence. In keeping with this approach, the Court crafted a set of limiting doctrinal parameters, including proscribing only those instances

³⁸ There are several ways that the Justice Department's expanded role could be structured. The Justice Department could create a task force to identify communities where underenforcement poses risks to vulnerable populations and to assess possible legal actions in response, acting as a lead with support from the federal EPA and, where they are cooperative, state agencies. The Justice Department also could become a clearinghouse for investigating some or all of the citizen complaints of civil rights violations involving environmental protection that are now reviewed by the EPA's ineffectual Office of Civil Rights, again with input from technical professionals at the EPA. The Justice Department, again with assistance from the EPA, also might initiate a formal review of state enforcement of federal laws, with a view to identifying and taking action with respect to states that are systematically slighting the needs of vulnerable communities. The U.S. Commission on Civil Rights has recognized that "EPA's deficiencies have resulted in a lack of substantive results that would improve the lives of people living in already overly-burdened communities" and that "[t]he EPA has a history of being unable to meet regulatory deadlines, delay in response to and addressing Title VI complaints." U.S. COMM'N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898, at 2, 4 (Sept. 2016), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf [<https://perma.cc/GTX4-PCQQ>]. As a partial solution, the Commission advocated additional staff and resources for the EPA, *id.* at 4, but a greater role for the Justice Department (which we suggest) and more resources for the EPA are not mutually exclusive responses to the problem of environmental underenforcement in vulnerable communities.

³⁹ See *supra* note 14 and accompanying text.

where a decisionmaker acted with the intent to discriminate against a protected group.⁴⁰ Because the intent requirement maps quite poorly onto the workings of bias,⁴¹ the jurisprudential movement directing “equal protection” away from protection has left most discrimination untouched.⁴²

The environmental justice context presents a significant alternative to this singular focus on discriminatory intent. In a meaningful advance on the idea of nondiscrimination, the EPA’s implementation of Title VI accepts disparate impact as a viable theory of liability.⁴³ While decades-old guidance to this effect is not immune from legitimate critique, the impact test is widely recognized as an improvement on the intent requirement.⁴⁴

Here we place the importance of redressing disparate impact against a different backdrop—again, that of underenforcement as unequal protection. As highlighted by the crisis in Flint, environmental regulators may be motivated by implicit biases that rest on both race and class. Such biases can lead to failures of enforcement that injure large, often marginalized, populations. We argue that regardless of discriminatory intent—a construct that continues to distort the dominant jurisprudential approach— withholding enforcement resources from a group of citizens violates equal protection.

As a practical matter, since the Court has held that individuals may not rely on a disparate impact theory in private suits,⁴⁵ it falls to the federal government to effectuate this more robust understanding of equal

⁴⁰ See *supra* note 14 and accompanying text.

⁴¹ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional . . . nor unintentional.” (footnote omitted)).

⁴² See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) (“Drawing on the pioneering work of Charles Lawrence in *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, recent studies support the assertion that most discrimination is not the result of malice, hatred, ill will, or bigotry: it is the result of unintended and unconscious stereotyping. Thus, a theory of discrimination liability that focuses on intentional wrongdoing will inevitably miss the mark” (footnote omitted)).

⁴³ Section 602 of Title VI orders agencies that distribute federal funds to promulgate regulations implementing the statute’s antidiscrimination mandate. 42 U.S.C. § 2000d-1 (2012). The EPA’s regulations, adopted in 1973 and later amended, prohibit fund recipients from using “criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex.” 40 C.F.R. § 7.35(b) (2004) (emphasis added).

⁴⁴ See, e.g., Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 834–39 (1993) (explaining that unlike equal protection, Title VI has the benefit of not requiring “a showing of discriminatory intent”).

⁴⁵ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that “[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602”).

protection.⁴⁶ Aggressive federal involvement in ensuring environmental justice can best ensure the protection of vulnerable communities.

2. *Including States in Combatting Local Underenforcement.*—As a historical matter, when a town or city fails to enforce environmental statutes—such as the Safe Drinking Water Act—any federal legal action taken is against the town or city and not the state in which the town or city is located. Yet many of the towns and cities with the largest populations of poor and minority residents, like Flint, lack the resources needed to address environmental risks. Because localities are creatures of state law, and their level of funding depends heavily on state law and politics, states should bear some responsibility for environmental underenforcement at the local level, including the responsibility to provide localities the resources they need to correct underenforcement. To hold states accountable in this way would constitute a legal innovation.⁴⁷ Unlike the EPA, however, the Justice Department has the legal expertise to devise and implement such legally innovative strategies aimed at combatting environmental justice as underenforcement.

3. *Moving Beyond Title VI.*—To date, efforts to secure environmental justice have centered on Title VI, which prohibits discrimination only by recipients of federal funding. But many sources of environmental risks in poor and minority neighborhoods, although subject to federal environmental regulation, do not receive federal funds.⁴⁸ It is thus unsurprising that half of the complaints brought to the EPA have been dismissed for want of a funding nexus.⁴⁹

Environmental justice as underenforcement, therefore, requires a litigation strategy that targets underenforcement of environmental statutes in all cases, rather than in only those cases involving federally funded

⁴⁶ Cf. Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1294, 1296 (2014) (calling Title VI a “sleeping giant” whose impact cannot be fully realized through private court enforcement).

⁴⁷ See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally-Protected Right*, 51 WM. & MARY L. REV. 1343, 1349–50 (2010) (providing an example of an innovative argument to apply federal equal protection principles to states to address their failure to fund localities); Wines & Schwartz, *supra* note 3 (explaining that unhealthy levels of lead in tap water have been found in quite a few cities in the United States, at least partially due to state budget cuts for drinking water).

⁴⁸ For example, the very high concentrations of pollution in poor communities near oil refineries and other industrial facilities in Louisiana warrant increased attention even though the owners and operators of those facilities may receive no federal funds. See generally STEVE LERNER, DIAMOND: A STRUGGLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA’S CHEMICAL CORRIDOR (2005).

⁴⁹ See Lombardi et al., *supra* note 20.

actors.⁵⁰ Such a strategy would require the assessment of enforcement patterns in vulnerable communities, including poor urban neighborhoods of large cities, poor small towns and cities, and Indian lands, to name a few. It would also prioritize areas where correcting underenforcement would have the greatest impact in reducing health risk. Much more research and on-the-ground investigation is needed to inform these inquiries. That research and investigation would be an important first step in the direction of targeted enforcement of substantive environmental statutes. This move, in turn, is key to achieving environmental justice.

CONCLUSION

Our focus on underenforcement as a core equal protection concern is not meant to fetishize currently applicable laws. Just the opposite: this reframing crystalizes how a dearth of legal regulation in the environmental and public health arenas creates substantial risks for vulnerable populations—risks functionally equivalent to the risk of private violence that motivated the Fourteenth Amendment. Viewed as such, the inadequacy of environmental laws can itself be understood as a failure of equal protection: a failure that extends beyond the confines of paradigmatic underenforcement of the sort at issue in Flint; a failure that demands a far more expansive understanding of the duty to protect enshrined in the Equal Protection Clause. The borders of this more expansive duty are less clearly defined, since it is far easier to identify a violation of equal protection where an underenforced law can be clearly identified. Nevertheless, a formalistic approach to environmental justice as equal protection must be only a starting point.

⁵⁰ See Lazarus, *supra* note 44, at 815–20, 842–43 (exploring the connection between federal and state enforcement priorities and inequities in the distributions of environmental risks).