

A NEW CONSTITUTIVE COMMITMENT TO WATER

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Abstract: Cass Sunstein coined the term “constitutive commitment” to refer to an idea that falls short of a constitutional right but that has attained near-constitutional significance. This Article argues that access to safe and affordable water for drinking, hygiene, and sanitation has attained this status and that national legislation is needed to realize this new constitutive commitment. Following the termination of water to thousands of households in Detroit, residents and community organizations filed an adversary complaint in Detroit’s bankruptcy proceedings seeking a six-month moratorium on the disconnections. The bankruptcy court dismissed the case, accurately finding that “there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages.” The widespread protests and outrage at the Detroit water shutoffs suggest, however, that people perceive access to water as a right. Although affordable access to water for essential needs falls short of a constitutional right, it *could* implicate substantive due process, which reflects its near-constitutional status. An analysis of American history, culture, and law demonstrates how access to water for drinking, hygiene, and sanitation could be protected under the right to life. This Article argues that legislation is needed to implement a new constitutive commitment to water and proposes numerous policy options that would not only make moral and economic sense, but also would ensure that all Americans have affordable access to safe water for drinking, hygiene, and sanitation.

INTRODUCTION

Does the United States Constitution limit a city’s ability to terminate its citizens’ access to water for essential needs? As long as some minimal procedures are in place, the answer is no. A constitutional right to affordable water

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for drinking, hygiene, and sanitation does not exist in the United States. However, the recent water shutoffs in Detroit, as well as other water crises around the nation, such as the lead contamination epidemic in Flint, Michigan,¹ suggest that at the very least, access to water should be treated as a “constitutive commitment”² worthy of protection through legislation.

Since 2013, the Detroit Water and Sewerage Department (DWSD) has terminated water service to over 50,000 households for failure to pay, and more shutoffs continue to take place.³ Although this was not the first time that the utility had disconnected water to large numbers of residents, the aggressive and widespread nature of the shutoffs in 2014 resulted in extensive media attention domestically and internationally. Shockingly, DWSD targeted households with outstanding bills of \$150 or more, but did not initially disconnect water to commercial enterprises with bills that totaled hundreds of thousands of dollars.⁴

In 2014, residents challenged these residential shutoffs through an adversary complaint, *Lyda et al. v. City of Detroit et al.*, in the then-ongoing Detroit bankruptcy proceedings.⁵ The bankruptcy court dismissed the com-

¹ See, e.g., Michael D. Shear & Julie Bosman, ‘I’ve Got Your Back,’ *Obama Tells Flint Residents*, N.Y. TIMES (May 4, 2016), http://www.nytimes.com/2016/05/05/us/flint-water-lead-obama.html?_r=0 [https://perma.cc/A4QK-PFQE]; Robin Erb, *Who Wants to Drink Flint’s Water?*, DETROIT FREE PRESS (Jan. 23, 2015, 7:51 PM), <http://www.freep.com/story/news/local/michigan/2015/01/22/water-woes-latest-hit-flint/22193291/> [https://perma.cc/3ECF-NSJW]; Luke Broadwater, *Protesters Call on Mayor to Stop Water Shut-offs over Unpaid Bills*, BALTIMORE SUN (Apr. 16, 2015, 8:31 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ci-water-shutoffs-20150416-story.html> [https://perma.cc/XU47-RDY6]; Matt Helms, *Judge Orders Highland Park to Pay \$20 Million for Water*, DETROIT FREE PRESS (Apr. 24, 2015, 10:24 PM), <http://www.freep.com/story/news/local/michigan/wayne/2015/04/24/highland-park-water-detroit/26337625/> [https://perma.cc/6F88-TNWL].

² CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 61–62 (2004).

³ Joe Guillen & Matt Helms, *Despite Detroit Efforts to Help, Water Shutoffs Loom for Thousands*, DETROIT FREE PRESS (Apr. 18, 2015, 11:22 PM), <http://www.freep.com/story/news/local/2015/04/18/detroit-water-shutoffs-duggan/25991563/> [https://perma.cc/VJB7-QJJU]; Alice Jennings, *Congressional Briefing: Trouble on Tap: Challenges to Affordable Water in the U.S.*, MICHIGAN COALITION FOR HUMAN RIGHTS, <http://www.mchr.org/2015/03/congressional-briefing-on-water-in-detroit-and-us-stories-of-shutoffs-and-possible-solutions/> [https://perma.cc/S4LG-YEFP] (last updated Mar. 12, 2015).

⁴ Joe Guillen, *Detroit Water Department Now Sending Shut-Off Crews to Commercial Customers*, DETROIT FREE PRESS (July 14, 2014, 3:57 PM), <https://web.archive.org/web/20150324181932/http://archive.freep.com/article/20140709/NEWS01/307090141/Detroit-water-shut-offs-companies-customers>.

⁵ Transcript of Hearing re Motion for TRO filed by Pls. and Motion to Dismiss Adversary Proceeding filed by Def., *Lyda et al. v. City of Detroit* at 5–6, No. 13-53846 (Bankr. E.D. Mich. Sept. 29, 2014) [hereinafter *Lyda Initial Ruling from Bench*]; Supp. Op. Clarifying the Court’s Bench Op. Denying Pls.’ Motion for a TRO and Granting Def.’s Motion to Dismiss; and Op. Denying Pls.’ (1) Mot. for Recons.; and (2) Mot. to file a Second Am. Complaint at 1, *Lyda et al. v. City of Detroit*, Adv. No. 14-04732 (Bankr. E. D. Mich. Nov. 19, 2014), ECF No. 107 [herein-

plaint, which sought a six-month moratorium on the shutoffs, the restoration of water service, as well as an order requiring that DWSD implement an affordability plan. The court held that it lacked authority under the Bankruptcy Code to issue an injunction and that, even if it had such authority, the claims did not survive a motion to dismiss. Despite finding that the residents would suffer harm without access to water, the court rejected a host of arguments on the merits, including due process and equal protection claims. As part of its rationale, the court held that “there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages.”⁶ The U.S. District Court for the Eastern District of Michigan affirmed the bankruptcy court’s decision, and the case is now pending before the Sixth Circuit.⁷

This Article does not dispute the bankruptcy court’s conclusion that no constitutional right to affordable water exists. Yet, that the Detroit water shutoffs sent shockwaves across the United States and the international community demonstrates that something is fundamentally wrong with the idea that a city can simply cut off a large swath of its population from access to water. This Article argues that access to safe and affordable drinking water has evolved into what Cass Sunstein describes as a “constitutive commitment.”⁸ Sunstein coined the term constitutive commitments to describe statutory rights that are treated as if they are constitutional rights because they have gained a special status in our society.⁹ Constitutional rights are those that are either expressly set forth in the Constitution or that have been found

after Lyda Supplemental Opinion]. Detroit filed for bankruptcy in 2013. Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1120 (2014).

⁶ Lyda Supplemental Opinion, *supra* note 5, at 15.

⁷ Lyda v. City of Detroit, 2015 WL 5461463, at *5 (E.D. Mich. Sept. 16, 2015); Notice of Appeal, Lyda et al. v. City of Detroit, No. 2:15-cv-10038, ECF No. 33 (E.D. Mich. Oct. 8, 2015). Because the U.S. District Court for the Eastern District of Michigan adopted the reasoning of the bankruptcy court in its September 2015 decision, the more detailed bankruptcy court opinion is analyzed and cited in this article.

⁸ SUNSTEIN, *supra* note 2, at 61–62.

⁹ *Id.* In *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More than Ever*, Sunstein invokes the term constitutive commitments to distinguish President Franklin Delano Roosevelt’s legislative efforts from the establishment of new constitutional rights. *Id.* at 61–62. Roosevelt believed that the exercise of civil and political rights depended on the fulfillment of economic and social rights. *Id.* In his 1944 state of the union address, Roosevelt outlined a “Second Bill of Rights,” stating, for example, that everyone has the right to adequate medical care and to education. Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=16518> [<https://perma.cc/YW7P-7FFP>]). Sunstein argues that Roosevelt was not seeking to amend the Constitution, but that instead he was aiming to pass legislation that would codify values consistent with the American ethos. He also explains how the U.S. Supreme Court almost recognized economic and social rights in the mid-twentieth century. However, that trajectory ended after President Richard Nixon appointed new justices to the bench, which changed the composition of the Court dramatically. See SUNSTEIN, *supra*, at 61, 107–08.

to exist through interpretation. Yet, there are also rights that Americans hold dear—and that many might believe are constitutional rights—that are created by statute. For example, many Americans likely believe that they have a constitutional right not to have private employers discriminate against them, but they do not. This is a statutory right codified in the Civil Rights Act of 1964.¹⁰ Similarly, Social Security has come to play such an important role in American society that it has attained a status akin to a constitutional right.¹¹ Sunstein describes these as constitutive commitments because they have “near-constitutional sturdiness” and are afforded a status above ordinary statutes and regulations.¹²

Access to affordable water for drinking, hygiene, and sanitation should be recognized as a constitutive commitment because it has “near constitutional sturdiness.”¹³ Water holds a special, but overlooked, place in our culture, history, and laws, and the widespread protests and outrage at the Detroit water shutoffs suggest that people perceive access to water as a right. In addition, although courts do not recognize access to water as a substantive due process right, the denial of affordable residential water service *could* implicate substantive due process. A newly asserted substantive due process right must be “so rooted in the traditions and conscience of our people as to be ranked as fundamental” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”¹⁴ Water played a seminal role in the founding of our nation, governing where and how settlers lived.¹⁵ Courts have also held that the withholding of water from prisoners can violate the Constitution.¹⁶ Although not a perfect analogy because incarcerated individuals are completely dependent on the state, the cases lend support to the idea that the denial of water amounts to a literal deprivation of life. The fact that children could be removed from a home without running water also shows how the denial of access to water could infringe on the fundamental right to family.¹⁷

¹⁰ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

¹¹ SUNSTEIN, *supra* note 2, at 62.

¹² *Id.* at 63 (quoting Louis Henkin).

¹³ *Id.*

¹⁴ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

¹⁵ See, e.g., *The History of Water in Boston*, BOSTON.COM (July 25, 2013, 11:28 PM), <http://www.boston.com/yourtown/boston/look-back-boston-water/H9TzK3VEhqw2St5Xv8PyL/article.html> [<https://perma.cc/3FLH-RSYA>].

¹⁶ *Atkins v. City of Chi.*, 631 F.3d 823, 830 (7th Cir. 2011).

¹⁷ See *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982); STATE OF MICH. DEP’T OF HUMAN SERVS., MANDATED REPORTERS’ RESOURCE GUIDE 14–15 (2013), https://www.michigan.gov/documents/dhs/Pub-112_179456_7.pdf [<https://perma.cc/Y7DE-4K2H>].

To realize this new constitutive commitment, national legislation needs to be enacted that ensures access to safe and affordable water for drinking, hygiene, and sanitation for *all* Americans. The massive water shutoffs in Detroit have revealed a critical gap in existing legal and policy frameworks. Although there are national programs to help low-income individuals access basic needs such as food, shelter, and medical care, as well as programs to assist with paying energy and telephone utility bills, no similar national program exists for household water.¹⁸ With water rates rising across the United States, Detroit is the proverbial canary in the coalmine. Ensuring that everyone has affordable access to water for drinking, sanitation, and hygiene makes moral and economic sense.¹⁹

This analysis benefits from empirical research conducted in Detroit during the summer of 2015. Nineteen semi-structured interviews were conducted with key stakeholders, including representatives from: the office of the Mayor of Detroit; the Detroit Water and Sewerage Department; the Detroit City Council; local law firms and public interest law groups, including several attorneys who represent the plaintiffs in the *Lyda* case; civil society organizations; a local church; the press; the Michigan Department of Environmental Quality; and the Michigan House of Representatives. Potential interviewees were initially identified through news articles and reports and by speaking with colleagues; others were identified via a snowball sampling methodology.²⁰

This Article proceeds in four parts. Part I examines why water rates across the United States have been skyrocketing, placing the recent water shutoffs in Detroit in a broader national and historical context. It also explores the underlying reasons for the water disconnections, which are closely tied to both Detroit's distressed economy and efforts to develop a regional water authority.²¹ Part II provides an overview of the bankruptcy court's decision not

¹⁸ NAT'L CONSUMER LAW CTR., REVIEW AND RECOMMENDATIONS FOR IMPLEMENTING WATER AND WASTEWATER AFFORDABILITY PROGRAMS IN THE UNITED STATES 12 (Mar. 2014), <http://www.nclc.org/images/pdf/pr-reports/report-water-affordability.pdf> [<https://perma.cc/2DCY-VG86>].

¹⁹ See JOHN E. CROMWELL III ET AL., WATER RESEARCH FOUND. & EPA, BEST PRACTICES IN CUSTOMER PAYMENT ASSISTANCE PROGRAMS 34–35, 50 (2010), <http://www.waterrf.org/publicreportlibrary/4004.pdf> [<https://perma.cc/N6AR-2YDJ>] (addressing moral hazard concerns and the business case for water affordability programs).

²⁰ Snowball sampling entails asking identified interviewees to provide the names of additional possible respondents. See *Nonprobability Sampling*, RESEARCH METHODS KNOWLEDGE BASE, <http://www.socialresearchmethods.net/kb/samplnon.php> [<https://perma.cc/JHT5-LGMC>] (last updated Oct. 20, 2006).

²¹ Transcript of Evidentiary Hr'g re Mot. for TRO filed by Pls. and Motion to Dismiss Adversary Proceeding re Inability to Grant Relief and Failure to State a Claim filed by Def. Before the Honorable Steven W. Rhodes, United States Bankruptcy Judge at 106–07, In re City of Detroit, No. 13-53846, *Lyda et al. v. City of Detroit*, Adv. No. 14-04732 (Bankr. E.D. Mich. Sept. 22, 2014) [*Lyda* Evidentiary Hearing]; Joe Guillen, *Detroit City Council Approves 8.7% Water Rate*

to place a temporary moratorium on the water shutoffs despite the court's finding that residents experienced significant harm without access to water.

Part III critiques the bankruptcy court's due process analysis. Section III.A analyzes the court's unnecessarily tentative conclusion that there "may" be a property or liberty interest in household water service. Section III.B argues that the bankruptcy court incorrectly concluded that procedural due process was not violated. Section III.C posits that the denial of residential water for essential needs *could* violate the right to life and fundamental right to family interests protected by substantive due process in the U.S. Constitution. International human rights law, although not necessarily binding on the United States, also provides normative guidance for carefully defining the contours of such a right. Even if the bankruptcy court is correct that there is no constitutional right to affordable water, the evidence suggests that it has attained "near-constitutional sturdiness."²²

The starting point for realizing a constitutive commitment to safe and affordable water for drinking, hygiene, and sanitation is the development of national legislation. Part IV addresses possible critiques of such efforts and explores various policy options that could be incorporated into such legislation, such as bill discounts, lifeline tariffs, and shutoff protections for vulnerable populations. It also identifies best practices for utilities and uses those criteria to assess DWSD's prior efforts to address non-payment. The Article concludes with a brief discussion of a new Water Residential Assistance Program launched on March 1, 2016, and of efforts by advocates in Detroit at the local, state, and national level to address water affordability. As this Article was going to press in the spring of 2016, a great debate continued to rage in Detroit over the best way to ensure access to water for all of the city's residents.

I. BACKGROUND

A. *Water Rates are Rising in the US*

Water rates have skyrocketed in recent years and are expected to continue to rise. From 1990 to 2006, costs for water and wastewater in the United States increased by 105.7 percent.²³ Costs are rising faster than inflation and household incomes, resulting in water bills being a higher proportion of a

Increase, DETROIT FREE PRESS (June 17, 2014, 7:33 PM), <http://web.archive.org/web/20141122112649/http://archive.freep.com/article/20140617/NEWS01/306170107/City-Council-water-rate-hike>; Joe Guillen, *Detroit Council To Reconsider Rejection of Water Rate Hike*, DETROIT FREE PRESS (July 7, 2015, 10:47 PM), <http://www.freep.com/story/news/2015/07/07/council-water-vote/29812001/> [<https://perma.cc/V23Y-KJ7N>].

²² SUNSTEIN, *supra* note 2, at 63.

²³ CROMWELL III ET AL., *supra* note 19, at 29.

household's budget.²⁴ According to a study of 100 municipalities conducted by *USA Today* in 2012, monthly water rates had at least doubled in the prior twelve years in nearly thirty percent of surveyed cities.²⁵ Rates are particularly high in communities with a large proportion of racial minorities.²⁶ The challenge of keeping water rates affordable is even more difficult in economically distressed cities such as Detroit. Over the past decade, water rates in Detroit have climbed nearly 120 percent.²⁷

Water rate increases are attributable to several factors. The United States' drinking water infrastructure is degrading and needs vast improvements. It has been given a "D" rating by the American Society of Civil Engineers (ASCE),²⁸ which estimates that there are 240,000 water main breaks per year in the United States.²⁹ The costs of the electricity, fuel, and chemical inputs into the water and wastewater treatment processes have also increased in recent years.³⁰ Further, many public utilities must cover rising expenses associated with pension and health care benefits for water agency workers. Concerns about the vulnerability of water infrastructure to terrorism attacks have also led many utilities to increase security for water systems.³¹ Another major cost for water utilities is taking measures to ensure compliance with clean water laws, such as the Clean Water Act and the Safe Drinking Water Act.³²

²⁴ *Id.* at 31–32 (noting that over a “10-year period, water and wastewater costs steadily increased to the point where a typical household was paying nearly 80% more (as a percentage of its income) for water and wastewater services than it had a decade earlier”).

²⁵ Kevin McCoy, *Nation's Water Costs Rushing Higher*, USA TODAY, Sept. 28, 2012, at A1.

²⁶ JASON AMIRHADJI ET AL., GEORGETOWN LAW HUMAN RIGHTS INST., TAPPED OUT: THREATS TO THE HUMAN RIGHT TO WATER IN THE URBAN UNITED STATES 47 (2013), <http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/upload/HumanRightsFinal2013.pdf> [<https://perma.cc/46A4-7TQT>]; see also KIMBERLY FOLTZ-DIAZ ET AL., MASS. GLOBAL ACTION, THE COLOR OF WATER: A REPORT ON THE HUMAN RIGHT TO WATER IN THE CITY OF BOSTON 2, 5, http://massglobalaction.org/projects/colorofwater/primary_report_shutoffs_pre-pub.pdf [<https://perma.cc/5VA8-6AHD>] (analyzing data on threatened water shut-offs from the Boston Water and Sewer Commission and determining through regression analysis that there is a “strong, persistent relationship between race and water access”).

²⁷ Press Release, NAACP Legal Defense Fund, LDF & ACLU of Michigan Ask for Immediate Moratorium on Detroit's Water Shut-Offs (July 18, 2014), <http://www.naacpldf.org/press-release/ldf-and-aclu-michigan-ask-immediate-moratorium-detroits-water-shut-offs> [<https://perma.cc/6MQC-BXZL>].

²⁸ AM. SOC'Y OF CIVIL ENGINEERS, 2013 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 5 (Mar. 2013), <http://www.infrastructurereportcard.org/wp-content/uploads/2013ReportCardforAmericasInfrastructure.pdf> [<https://perma.cc/DN4M-WZ6D>].

²⁹ *Id.*

³⁰ McCoy, *supra* note 25.

³¹ *Id.*; Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 824–25 (2009).

³² NAT'L CONSUMER LAW CTR., *supra* note 18, at 4.

Rates have continued to rise despite a drop in residential water usage across the past three decades as a result of conservation efforts.³³ An individual household can initially shrink its total bill through conservation and by repairing leaks.³⁴ Ironically, however, community-level reductions in water usage often result in higher water rates because utilities receive less revenue but still have the same fixed costs.³⁵

Water rates have historically been below cost in the United States because utility providers did not necessarily recoup the full costs of creating and running the systems through retail rates.³⁶ Additionally, federal grants have given way to revolving loans.³⁷ Federal funds are made available to capitalize state loan pools at below-market rates if states provide at least twenty percent of funding for local projects.³⁸ The funds are then used by state and local water systems to finance eligible infrastructure projects so that the water achieves certain health and environmental targets.³⁹ However, federal and state funding only comprises a fraction of overall water infrastructure expenditures, and demand far exceeds availability. The Environmental Protection Agency and the Congressional Budget Office have independently determined that tens of billions of dollars or more are needed over the next twenty years to improve our water and wastewater systems.⁴⁰

The cost of paying for much-needed infrastructure upgrades falls to municipalities who issue bonds and then incorporate the cost of debt service into the rates customers are charged.⁴¹ During the financial bubble of the 2000s, many water utilities engaged in risky financing activities that ultimately backfired when the economy collapsed. For example, the Detroit Water and Sewerage Department (DWSD) entered into an interest rate transaction on its municipal bonds on the assumption that interest rates would rise.⁴² However, the

³³ McCoy, *supra* note 25.

³⁴ NAT'L CONSUMER LAW CTR., *supra* note 18, at 17.

³⁵ McCoy, *supra* note 25.

³⁶ AMIRHADJI ET AL., *supra* note 26, at 20 (citing Sheila M. Olmstead et al., *Water Demand Under Alternative Price Structures*, 54 J. ENVTL. ECON. & MGMT. 181, 183 (2007)).

³⁷ 33 U.S.C. § 1383 (2006) (Clean Water Act state revolving loan fund); H.R. REP. NO. 104-741, at 3 (1996) (Safe Drinking Water Act revolving loan fund); AMIRHADJI ET AL., *supra* note 26, at 17.

³⁸ AMIRHADJI ET AL., *supra* note 26, at 17.

³⁹ *How the Drinking Water State Revolving Fund Works*, ENVTL. PROT. AGENCY, <http://www.epa.gov/drinkingwatersrf/how-drinking-water-state-revolving-fund-works#tab-1> [<https://perma.cc/X3M7-S3S2>]; *Learn About the Clean Water State Revolving Fund*, ENVTL. PROT. AGENCY, <http://www.epa.gov/cwsrf/learn-about-clean-water-state-revolving-fund-cwsrf> [<https://perma.cc/UR97-LFLW>].

⁴⁰ NAT'L CONSUMER LAW CTR., *supra* note 18, at 4.

⁴¹ McCoy, *supra* note 25 (noting that the cost of bond debt is passed to consumers as higher rates); see AMIRHADJI ET AL., *supra* note 26, at 21.

⁴² Letter from Kary L. Moss, Executive Director, ACLU Fund of Michigan, & Sherrilyn Iffil, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., to Mayor Mike Duggan,

value of the bonds crashed in 2008 after the financial crisis. DWSD then borrowed an additional \$530 million and now spends more on debt payments than on operations and maintenance.⁴³ These costs are then passed along to customers in the form of higher rates.

Although federal programs exist to help low-income households obtain basic needs such as food, housing, and medical, and afford utility expenses such as energy bills and telephone access, no national program exists to help households cover the rising costs of water.⁴⁴ Water payment assistance plans exist in many states and municipalities,⁴⁵ but “their programs of activity are usually ad hoc collections of practices” that arose “out of the politics of the moment, following bad economic times when disconnections [rose] to levels drawing negative attention.”⁴⁶ The recent water shutoffs in Detroit have drawn attention to the need for affordable access to water for drinking water, sanitation, hygiene, and other basic needs.

B. Water Shutoffs in Detroit

1. Detroit’s Water Affordability Challenges

Detroit has been experiencing an enormous water crisis. Since 2013, DWSD has terminated water service to over 50,000 Detroit residents, targeting those households whose payments were sixty days late or who had at least \$150 in arrears.⁴⁷ The shutoff campaign became especially aggressive in 2014 as DWSD cut off water to as many as 3,000 households per week.⁴⁸ The city initially defended its widespread disconnection drive on the grounds that it

City of Detroit, et al. (July 13, 2014) [hereinafter ACLU & NAACP Letter], http://www.aclumich.org/sites/default/files/201_DueProcess_WaterShutoffs_Letter.pdf [https://perma.cc/8DYB-GDH6]; Darrell Preston, *Detroit Shows Wall Street Never Loses on Bad Swaps: Muni Credit*, BLOOMBERG.COM (Sept. 13, 2012, 12:01 AM), <http://www.bloomberg.com/news/articles/2012-09-13/detroit-shows-wall-street-never-loses-on-bad-swaps-muni-credit> [https://perma.cc/58GM-FFVZ].

⁴³ ACLU and NAACP Letter, *supra* note 42, at 2; R. Craig Hupp, *The Detroit Water & Sewerage Department—On the Eve of a New Day*, 31 MICH. ENVTL. L. J. 10, 14 (2013).

⁴⁴ NAT’L CONSUMER LAW CTR., *supra* note 18, at 12.

⁴⁵ For more details about water assistance plans, see, *infra* Section III.

⁴⁶ CROMWELL III ET AL., *supra* note 19, at xx–xxi.

⁴⁷ Jennings, *supra* note 3. Although the media has widely reported that the water shutoffs began in 2014, the Director of DWSD admitted during an evidentiary hearing in the *Lyda* case that 24,000 individuals had their water terminated in 2013. See *Lyda Evidentiary Hearing*, *supra* note 21, at 75.

⁴⁸ Joe Guillen, *Water Shutoff Warnings on Way for Delinquent Detroiters*, DETROIT FREE PRESS (Mar. 20, 2015, 12:04 AM), <http://www.freep.com/story/news/local/michigan/detroit/2015/03/20/residential-water-shutoffs/25048153/> [https://perma.cc/9P4B-EKFU]; Scott Thuman, *Detroit Water Shutoff Controversy Igniting Nationwide Debate*, ASSOCIATED PRESS, ABC 7 NEWS (July 31, 2014), <http://wjla.com/news/nation-world/detroit-water-shutoff-controversy-igniting-nationwide-debate-105641> [https://perma.cc/Y74H-2HJ2].

was effective in improving payment rates.⁴⁹ However, of the 33,000 shutoffs that took place in 2014, approximately 15,000 households remained without water.⁵⁰ By February 2015, more than forty-three percent of Detroit homes were at risk of termination because their payments were at least sixty days late.⁵¹ After a winter hiatus, shutoffs resumed.⁵² DWSD indicated in the spring of 2015 that it was planning to terminate water service to 28,000 additional households.⁵³ As this article was going to press in the spring of 2016, DWSD had begun spring shutoffs again. During the first week of May, over 1,860 households had their water service discontinued, but eighty-five percent had it restored within a day;⁵⁴ however, another approximately 20,000 households remained at risk after defaulting on payment plans.⁵⁵ The city has also been prosecuting residents who have illegally reconnected their water, which is a felony under Michigan law.⁵⁶

Although DWSD aggressively went after delinquent households, it did not initially target commercial entities, which owed one-third of the water debt.⁵⁷ DWSD justified this targeted approach by pointing out that it had hired a contractor that apparently did not have the capacity to turn off the water for commercial enterprises such as stadiums.⁵⁸ Yet many commercial cli-

⁴⁹ See Brent Snively & Matt Helms, *Detroit Suspends Water Shutoffs for 15 Days*, DETROIT FREE PRESS (July 21, 2014), <http://web.archive.org/web/20151123000053/http://archive.freep.com/article/20140721/NEWS01/307210102/Detroit-water-shutoffs-lawsuit> (noting that, of the 15,266 accounts that DWSD initially terminated, “more than half were made current and had the water restored within 24 hours”).

⁵⁰ Jennings, *supra* note 3 (noting that this figure is based on “FOIA requests and reports from the Director of the DWSD”).

⁵¹ Curt Guyette, *With Detroit’s Water Payment Plan a Massive Failure, Mayor Duggan Plans Changes*, ACLU-MICHIGAN DEMOCRACY WATCH BLOG (Apr. 18, 2014), <http://www.d-rem.org/curt-guyette-with-detroits-water-payment-plan-a-massive-failure-mayor-duggan-plans-changes/> [<https://perma.cc/Y5KH-D8QF>].

⁵² Lyda Evidentiary Hearing, *supra* note 21, at 108; Guillen & Helms, *supra* note 3.

⁵³ Guillen & Helms, *supra* note 3.

⁵⁴ See Associated Press, *Thousands of Detroit Customers Avoid Water Shutoff*, DETROIT FREE PRESS (May 10, 2016, 8:56 AM), <http://www.freep.com/story/news/local/michigan/detroit/2016/05/10/thousands-avoid-water-shutoff-detroit/84175362/> [<https://perma.cc/8BJV-AMVK>].

⁵⁵ *Id.*; Matt Helms, *Detroit to Resume Water Shutoffs May 1; Help Available*, DETROIT FREE PRESS (Apr. 26, 2016, 5:27 PM), <http://www.freep.com/story/news/local/michigan/detroit/2016/04/26/detroit-resume-water-shutoffs-may-1-help-available/83542074/> [<https://perma.cc/S9ZT-JAFH>].

⁵⁶ Wayne County Prosecutor Is Prosecuting Detroit City Residents Who Are Found to Have Illegal Water Hook-ups, DETROIT AND MICHIGAN CHAPTER OF THE NAT’L LAWYERS GUILD, <http://www.michigannlg.org/2015/06/10/seeking-contacts-re-water-shut-off-felony-prosecutions/> [<https://perma.cc/AN6S-DGEG>]. The residents are being charged with “malicious destruction of utility property” under Michigan law. *Id.*

⁵⁷ See Laura Gottesdiener, *UN Officials “Shocked” by Detroit’s Mass Water Shutoffs*, AL JAZEERA AMERICA (Oct. 20, 2014, 3:00 PM), <http://america.aljazeera.com/articles/2014/10/20/detroit-water-un.html> [<https://perma.cc/U5L2-4M2Q>]; Guillen, *supra* note 4.

⁵⁸ Lyda Evidentiary Hearing, *supra* note 21, at 84–85 (DWSD Director testifying that the contractor, Homrich Wrecking, only cut service to pipes that were less than two inches in diameter, which excluded most commercial accounts).

ents had debt in the hundreds of thousands of dollars. In fact, a golf company had an outstanding water bill of \$437,714, and the state of Michigan owed \$70,246.⁵⁹ After much initial outcry, DWSD took steps to shut off delinquent commercial accounts in the summer of 2014.⁶⁰ The widespread household water shutoffs led to marches and protests across Detroit, with demonstrators calling for recognition of a human right to water.⁶¹ Some activists even blocked the trucks leaving from a dispatch center that sends out crews to perform the shutoffs, and were arrested for their civil disobedience.⁶² Local churches and community centers also set up water centers to distribute water jugs to their local communities. Residents without running water learned how to adapt to having very little water, often at the expense of their hygiene and health.⁶³ Families also expressed concern that Child Protective Services would take their children if their homes did not have running water.⁶⁴ Because DWSD spray-painted bright blue markings in front of homes after terminating service, Detroiters also expressed feelings of shame at being public-

⁵⁹ Guillen, *supra* note 4.

⁶⁰ *See id.*; Lyda Evidentiary Hearing, *supra* note 21, at 85–91; *see also* Kirk Pinho, *Businesses Plan United Challenge to DWSD's Surprise Runoff Fees*, CRAIN'S DETROIT BUSINESS, Apr. 29, 2013, at 6 (noting that many businesses have disputed these charges, which were largely due to storm water service fees that DWSD had not assessed properly); Helms, *supra* note 55 (noting that in early 2016, DWSD began "an aggressive campaign to target more than 1,400 commercial accounts with overdue balances, after criticism that business customers weren't being subject to shutoffs as aggressively as residents. More than 400 commercial accounts are now on payment plans . . .").

⁶¹ Dave Jamieson, *Detroit Water Shutoffs Prompt Mass Protest, More Calls for Moratorium*, HUFFINGTON POST (July 18, 2014, 4:56 PM), http://www.huffingtonpost.com/2014/07/18/detroit-water-shutoffs-netroots_n_5600493.html [<https://perma.cc/W69G-LDCM>]; *see also* "A Commercially Successful Human Rights Violation" in Detroit, REAL NEWS NETWORK (June 25, 2015), http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=12039 [<https://perma.cc/A4FV-8YNF>]; Bill Wylie-Kellerman, *The Detroit Water Struggle: A Story*, CRITICAL MOMENT BLOG (Sept. 30, 2014), <https://critical-moment.org/2014/09/30/the-detroit-water-struggle-a-story/> [<https://perma.cc/P28L-DHGW>].

⁶² Snaveley & Helms, *supra* note 49.

⁶³ *See* Gottesdiener, *supra* note 57.

⁶⁴ Alana Semuels, *Thousands Go Without Water as Detroit Cuts Service for Nonpayment*, L.A. TIMES (July 28, 2014, 7:11 PM), <http://www.latimes.com/nation/la-na-detroit-water-20140629-story.html> [<https://perma.cc/T3ZB-R52S>]; *see also* Gottesdiener, *supra* note 57 ("Many residents expressed fear about custody rights because having no running water is grounds for the city's child protective services to remove children"). Section III.C.2 discusses the applicable law that makes the removal of children from the home possible. However, in the wake of the Flint, Michigan lead water crisis, the Director of the Michigan Department of Health and Human Services Children's Services Agency stated that it does "not petition the court to remove a child solely for the lack of water in a family's home." *What Will Happen to My Kids if My Water Is Shut Off?*, DETROIT FREE PRESS (Feb. 28, 2016, 12:04 AM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/28/flint-water-crisis-water-shut-child-custody/80991060/> [<https://perma.cc/4J2W-4RV8>].

ly stigmatized for not being able to afford their water bills.⁶⁵ As Alice Jennings, lead counsel in the *Lyda* case, stated during an interview, “This is the civil rights issue of our time.”⁶⁶

The widespread and sudden termination of water to so many Detroit residents, especially in 2014, garnered national and international attention. Protesters and deliveries of water arrived from other states and across the border in Canada.⁶⁷ International organizations joined forces with community groups to file a petition with the United Nations Human Rights Council.⁶⁸ As a result, the United Nations Special Rapporteur on the right to adequate housing and the Special Rapporteur on the right to safe drinking water and sanitation visited Detroit and held a community hearing in 2014.⁶⁹ They argued that “[d]isconnection of water services because of failure to pay due to lack of means constitutes a violation of the human right to water and other international human rights.”⁷⁰ In addition, local advocates hosted an international summit to address the water crisis in Detroit and neighboring cities.⁷¹

Although the 2014 water terminations attracted significant media attention, this was not the first time that DWSD suddenly disconnected large numbers of residents at once. In 2000, DWSD cut water service provision to 45,000 persons.⁷² Between 2003 and 2004, an estimated 32,000 households also had their water service terminated.⁷³ As discussed below, DWSD has had a history of mismanagement and a poor collections record, and, at several points, it has taken aggressive steps to enforce billing without examining the underlying causes of nonpayment.

⁶⁵ Danny Wilcox Frazier, *In Detroit, Water Crisis Symbolizes Decline, and Hope*, NAT’L GEOGRAPHIC NEWS (Aug. 22, 2014), <http://news.nationalgeographic.com/news/special-features/2014/08/140822-detroit-michigan-water-shutoffs-great-lakes> [https://perma.cc/HH99-BGVR].

⁶⁶ Interview with Alice Jennings, Partner, Edwards & Jennings, in Detroit, MI (July 8, 2016).

⁶⁷ Matt Helms, *Canadians Roll into Detroit with 750 Gallons of Water to Protest Shutoffs*, DETROIT FREE PRESS (July 24, 2014, 7:03 PM), <http://web.archive.org/web/20140726155425/http://www.freep.com/article/20140724/NEWS01/307240185/>; Brent Patterson, *UN Special Rapporteur on Right to Water Now in Detroit*, THE COUNCIL OF CANADIANS (Oct. 20, 2014), <http://canadians.org/blog/un-special-rapporteur-right-water-now-detroit> [https://perma.cc/C6TA-NWTU].

⁶⁸ Patterson, *supra* note 67.

⁶⁹ UNTV, *Detroit’s Water—Not Flowing*, UNMULTIMEDIA.ORG (Jan. 21, 2015), <http://www.unmultimedia.org/tv/21stcentury/detail/3993059906001.html> [https://perma.cc/Y2JY-4MYD].

⁷⁰ Gottesdiener, *supra* note 57.

⁷¹ See *Social Movements Gathering in Detroit: The International Social Movements Gathering for Water and Affordable Housing*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/events/social-movements-gathering-detroit-international-social-movements-gathering-water-affordable> [https://perma.cc/A63G-U2JA].

⁷² Heather Cooley, *Municipal Water Use*, in *A TWENTY-FIRST CENTURY US WATER POLICY* 167, 191 (Juliet Christian-Smith & Peter H. Gleick eds., 2012) (including *The Fight for Affordable Water in Detroit*, Box 7.3 (Amy Vanderwalker)).

⁷³ AMIRHADJI ET AL., *supra* note 26, at 28–29.

The massive water terminations in 2014 were a public relations nightmare for the city.⁷⁴ Even the mayor acknowledged that “the aggressive shutoff policy has not reflected well on Detroit”⁷⁵ However, as discussed in the next section, DWSD may have had its own strategic motivations for disconnecting delinquent water accounts in such a public manner.

2. Reasons Underlying the Water Terminations

The reasons underlying the sudden and large-scale shutoffs of household water in Detroit are complex. They can primarily be attributed to Detroit’s distressed economy, the recent bankruptcy proceedings, longstanding management problems at DWSD, and new efforts to develop a regional water authority.

Detroit has an aging water infrastructure that was built to service its booming population during its heyday as “Motor City.”⁷⁶ However, since 1960, Detroit’s population has shrunk by almost one million people—from 1.6 million to 714,000.⁷⁷ Just in the last decade, the city’s population has decreased by twenty-five percent, and vast tracts in the city are vacant.⁷⁸ So-called “white flight” to the suburbs has been exacerbated by long-standing discrimination in lending and housing policies, often known as “redlining,” which prevented African Americans from leaving industrial urban Detroit.⁷⁹

⁷⁴ See MT Staff, *Duggan Introduces Revamped Efforts to Address Detroit Water Shut-Offs*, DETROIT METRO TIMES (Aug. 13, 2014), <http://www.metrotimes.com/detroit/duggan-introduces-revamped-efforts-to-address-detroit-water-shut-offs/Content?oid=2231820> [<https://perma.cc/84KP-5M33>].

⁷⁵ Joe Guillen, *Duggan: We’ll Make It Easier to Pay Overdue Water Bills; Late Penalties Waived*, DETROIT FREE PRESS (Aug. 7, 2014, 9:10 PM), <https://web.archive.org/web/20141013181606/http://archive.freep.com/article/20140807/NEWS01/308070075/Detroit-water-shutoff-collections>.

⁷⁶ *2012 Detroit Strategic Framework Plan*, DETROIT FUTURE CITY, 22–23 (2012), http://detroitfuturecity.com/wp-content/uploads/2014/12/DFC_Full_2nd.pdf [<https://perma.cc/3YF2-U8F3>].

⁷⁷ Anderson, *supra* note 5, at 1137–38; Michael A. Fletcher, *Detroit Files Largest Municipal Bankruptcy in U.S. History*, WASH. POST (July 18, 2013), https://www.washingtonpost.com/business/economy/2013/07/18/a8db3f0e-efe6-11e2-bed3-b9b6fe264871_story.html [<https://perma.cc/A7HV-86P8>] (“The city, which was the nation’s fourth-largest in the 1940s, with nearly 2 million inhabitants, has seen its population plummet to 700,000 as residents fled rising crime and deteriorating basic services, taking their tax dollars with them.”); Steven Gray, *Vanishing City: The Story Behind Detroit’s Shocking Population Decline*, TIME (Mar. 24, 2001), <http://newsfeed.time.com/2011/03/24/vanishing-city-the-story-behind-detroit%E2%80%99s-shocking-population-decline/> [<https://perma.cc/378D-4WDF>].

⁷⁸ AMIRHADJI ET AL., *supra* note 26.

⁷⁹ See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT*, at xvi–xvii, 8, 195–96 (1st Princeton Classic ed. 2005) (finding that racial violence, discrimination, and deindustrialization were the key drivers of urban poverty in Detroit).

Statistics paint a grim picture of the city.⁸⁰ The unemployment rate in Detroit was over eighteen percent as of June 2012.⁸¹ Nearly forty percent of the population lives below the poverty line, which is more than twice Michigan's average.⁸² Foreclosures have skyrocketed in recent years as a result of predatory lending practices and, according to allegations in a pending lawsuit, banks have specifically targeted low-income African-American homeowners in Detroit.⁸³ There has also been a huge increase in tax foreclosures by the city.⁸⁴ As of December 2013, Detroit was home to approximately 78,000 abandoned and blighted structures and 66,000 blighted vacant lots.⁸⁵ Between January 2006 and January 2013, home sale prices in Detroit plummeted over sixty percent, from approximately \$76,000 to \$25,500.⁸⁶

In a controversial decision,⁸⁷ Michigan's governor appointed an Emergency Manager to oversee Detroit's operations in March 2013.⁸⁸ The Emergency Manager recommended that the city file for Chapter 9 bankruptcy and

⁸⁰ See, e.g., Christine Sgarlata Chung, *Zombieland/The Detroit Bankruptcy: Why Debts Associated with Pensions, Benefits, and Municipal Securities Never Die . . . and How They Are Killing Cities Like Detroit*, 41 FORDHAM URB. L.J. 771, 773–76 (2014) (noting a declining population leading to a reduced tax base with pension and other obligations so onerous that Detroit cannot afford basic public services); Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html> [<https://perma.cc/MB2E-6D6M>] (listing factors in Detroit's decline including a shrinking tax base, huge health care and pension costs, and failed efforts to pay debts by borrowing).

⁸¹ *In re City of Detroit, Michigan*, 504 B.R. 97, 119 (Bankr. E.D. Mich. Dec. 5, 2013).

⁸² ACLU & NAACP Letter, *supra* note 42.

⁸³ See *Adkins v. Morgan Stanley*, No. 12 CIV. 7667 HB, 2013 WL 6585389 (S.D.N.Y. Dec. 13, 2013); *Adkins et al. vs. Morgan Stanley*, AMERICAN CIVIL LIBERTIES UNION (July 25, 2013), <https://www.aclu.org/cases/racial-equality/adkins-et-al-vs-morgan-stanley> [<https://perma.cc/HG6B-RHM2>].

⁸⁴ Eric D. Lawrence, *Wayne County Extends Tax Foreclosure Deadline*, DETROIT FREE PRESS (May 12, 2015, 5:22 PM), <http://www.freep.com/story/news/local/michigan/wayne/2015/05/12/wayne-county-extends-foreclosure-deadline/27186913> [<https://perma.cc/8GRB-NC8Y>]; Letter from Michael J. Steinberg, Legal Director, American Civil Liberties Union of Michigan, et al. to Raymond Wojtowicz, Treasurer, Wayne County, Michigan (May 12, 2015), <http://voiceofdetroit.net/wp-content/uploads/ACLU-Letter-to-WCT.pdf> [<https://perma.cc/LEM7-WD22>].

⁸⁵ *In re City of Detroit*, 504 B.R. at 120.

⁸⁶ Anderson, *supra* note 5, at 1143.

⁸⁷ See, e.g., *EM Facts*, DETROITERS RESISTING EMERGENCY MGMT., <http://www.d-rem.org/facts/> [<https://perma.cc/N4PX-HN83>] (last visited May 22, 2015); Davey & Walsh, *supra* note 80 ("All along, the state's involvement—including Mr. Snyder's decision to send in an emergency manager—has carried racial implications, setting off a wave of concerns for some in Detroit that the mostly white Republican-led state government was trying to seize control of Detroit, a Democratic city where more than 80 percent of residents are black."); John Cassidy, *Detroit Bankruptcy Filing Raises Big Questions*, NEW YORKER (July 18, 2013), <http://www.newyorker.com/news/john-cassidy/detroit-bankruptcy-filing-raises-big-questions> [<https://perma.cc/GB94-B9V9>] ("Many people in the Democratic city, where more than eighty per cent of the residents are black, believe that [the bankruptcy filing] represents an undemocratic political gambit by a Republican-controlled state government.").

⁸⁸ *In re City of Detroit*, 504 B.R. at 125.

the Governor of Michigan authorized the filing on July 18, 2013.⁸⁹ Although challenged on many grounds, the city ultimately was deemed eligible to participate in a Chapter 9 restructuring.⁹⁰ The city emerged from bankruptcy on December 10, 2014, at which time the Emergency Manager's term also ended.⁹¹ However, the city is still subject to oversight by a state Financial Review Commission.⁹²

DWSD has also been a troubled institution, plagued by cumbersome bureaucratic rules, mismanagement, and corruption. Due to Clean Water Act violations, DWSD was sued in 1977 and placed under court supervision.⁹³ For over three decades, the late Judge John Feikens of the U.S. District Court for the Eastern District of Michigan closely supervised the operations of DWSD. However, attempts by the court to remedy DWSD's structure, such as by temporarily placing the utility under the direct supervision of the mayor, were unsuccessful.⁹⁴ Under the reign of former Mayor Kwame Kilpatrick and former DWSD Director Victor Mercado, the utility also became embroiled in corrupt activities.⁹⁵

In the early 2000s, local organizations in Detroit, including the Michigan Welfare Rights Organization, Michigan Legal Services, and the Michigan Poverty Law Program, began organizing around the need to address the affordability of household water services. They hired a well-known expert on utilities and rate-setting, Roger Colton, to draft a Water Affordability Plan for DWSD.⁹⁶ In 2006, the Detroit City Council adopted this plan, which would have set water at rates between two percent and three percent of residents'

⁸⁹ *Id.* at 128.

⁹⁰ *Id.* at 190–91.

⁹¹ Nate Bomey & Matt Helms, *Detroit Emerges From Bankruptcy* (Dec. 10, 11:07 PM), <http://www.freep.com/story/news/local/detroit-bankruptcy/2014/12/10/detroit-bankruptcy-kevyn-orr-rick-snyder-chapter/20192347/> [<https://perma.cc/A7UD-6TS2>].

⁹² *Detroit Financial Review Commission*, MICH. DEP'T OF TREASURY, http://www.michigan.gov/treasury/0,4679,7-121-1751_51556_64472_66601_70240_70241---,00.html [<https://perma.cc/L8FJ-YYSK>].

⁹³ *Op. & Order at 1, U.S. v. City of Detroit et al.*, No. 77-cv-71100, ECF No. 2397 (E.D. Mich. Sept. 9, 2011).

⁹⁴ *See id.* at 16–19.

⁹⁵ Director's Compliance Report (Mar. 15, 2013), *U.S. v. City of Detroit et al.*, No. 77-cv-71100, ECF No. 2526 at 4 (E.D. Mich. Mar. 18, 2013); John Wisely, *Detroit, Suburbs Fall Short on Water Department Deal*, DETROIT FREE PRESS (Dec. 20, 2013), <https://web.archive.org/web/20151003190229/http://archive.freep.com/article/20131220/NEWS02/312200019/detroit-water-and-sewerage-department-suburbs-agreement-bankruptcy> ("The trial of former Mayor Kwame Kilpatrick exposed rampant corruption in the department's contracting practices, reinforcing suburban suspicious [sic] about its operation.").

⁹⁶ Lyda Evidentiary Hearing, *supra* note 21, at 123; AMIRHADJI ET AL., *supra* note 26, at 20; ROGER COLTON, A WATER AFFORDABILITY PROGRAM FOR THE DETROIT WATER AND SEWERAGE DEPARTMENT (DWSD) 1 (Jan. 2005), <http://www.fsconline.com/downloads/Papers/2005%2001%20Detroit%20Water.pdf> [<https://perma.cc/AE27-2WJW>].

income.⁹⁷ DWSD did not implement the Water Affordability Plan; instead, it created the Detroit Residential Water Assistance Program (DRWAP), which provided limited relief and was not carried out effectively.⁹⁸ It was poorly funded and relied heavily on funding from a non-profit that had been started by a member of the Detroit Board of Water Commissioners.⁹⁹ A 2010 report by the Auditor General to the Detroit City Council identified a variety of problems with DWSD, including: DWSD did not post timely payments to the clients' accounts once the customer was approved for DRWAP; it continued to send bills to customers enrolled in the program; and it did not properly account for customer donations to a water assistance fund.¹⁰⁰ The lack of an effective affordability program, combined with DWSD's mismanagement problems, meant that many residents continued to fall behind on their water bills.

As a result of DWSD's poor record-keeping and management challenges, the utility did not enforce collection of outstanding water bills in a timely or effective manner. Rather, DWSD converted overdue water bills to tax liens on residents' homes.¹⁰¹ Moreover, DWSD generally did not execute on the liens, which accrued interest at a rate of eighteen percent per year.¹⁰² Although DWSD developed Interim Collection Rules and Procedures in 2003, the utility did not necessarily follow its own rules.¹⁰³ As Detroit Mayor Mike Duggan admitted, DWSD encouraged customers to wait and see if the service would be terminated, which fostered a culture of non-payment.¹⁰⁴

Significant changes began to take place at DWSD after the Clean Water Act case was transferred to U.S. District Judge Sean Cox in 2010. In 2011, the court ordered DWSD to study the root causes of the ongoing permit violations.¹⁰⁵ The subsequently created Root Cause Committee recommended that

⁹⁷ Joe Guillen, *Detroit Water Shutoffs to Begin Tuesday*, DETROIT FREE PRESS (May 24, 2015, 6:59 AM), <http://www.freep.com/story/news/local/michigan/detroit/2015/05/24/detroit-water-shutoffs-poverty-unpaid-bills/27852135/> [<https://perma.cc/H4YT-JBA5>].

⁹⁸ AMIRHADJI ET AL., *supra* note 26, at 25–29; Cooley, *supra* note 72, at 191 (including The Fight for Affordable Water in Detroit, Box 7.3 (Amy Vanderwalker)).

⁹⁹ AMIRHADJI ET AL., *supra* note 26, at 25, 44; *Vision Statement*, WATER ACCESS VOLUNTEER EFFORT, <http://www.wavefund.org/#!vision-statement/c1r03> [<https://perma.cc/JD4F-U94X>] (last visited May 22, 2015).

¹⁰⁰ Press Release, NAACP Legal Defense Fund, *supra* note 27, at Attachment A (Memo from Auditor General dated Nov. 18, 2010).

¹⁰¹ MICH. COMP. LAWS § 123.162 (West 2014); First Amended Adversary Complaint for Declarative & Injunctive Relief, In re City of Detroit, Michigan, Ch. 9, No. 13-53846 (Bankr. E.D. Mich. July 30, 2014) ECF No. 3, ¶ 93.

¹⁰² *Greetings from the Treasurer*, WAYNE COUNTY, MI, <http://www.waynecounty.com/treasurer/index.htm> [<https://perma.cc/5UPZ-M8S3>] (last visited May 22, 2015).

¹⁰³ See *infra* Section III.B.

¹⁰⁴ Guillen, *supra* note 75.

¹⁰⁵ Op. & Order, U.S. v City of Detroit et al., No. 77-cv-71100, ECF No. 2397 at 44 (E.D. Mich. Sept. 9, 2011).

DWSD obtain greater autonomy from the city of Detroit to improve operational efficiency, and called for the creation of a public authority to oversee water services.¹⁰⁶ The court adopted the committee's Plan of Action, which led to several structural and management changes at DWSD and set in motion a process that would ultimately lead to the creation of the Great Lakes Water Authority (GLWA).¹⁰⁷ Meanwhile, the Emergency Manager had been examining different ways to monetize DWSD¹⁰⁸ and had also suggested creating a regional water authority as a way to help Detroit emerge from bankruptcy.¹⁰⁹

The city of Detroit, the State of Michigan, and several nearby counties (Oakland, Wayne, and Macomb) entered into a Memorandum of Understanding on September 9, 2014 and signed Articles of Incorporation formally creating the GLWA on November 26, 2014.¹¹⁰ The third-largest municipal water provider in the nation, DWSD currently provides retail water and wastewater services directly to the residents of Detroit and sells wholesale services to surrounding suburbs.¹¹¹ Under the terms of the GLWA lease signed on June 12, 2015, Detroit retains control of assets within city limits but leases out its system in the surrounding communities to the GLWA for \$50 million per year.¹¹² DWSD has been hired to operate the collective infrastructure and it also continues to provide retail water services directly to Detroit residents.

A series of conditions had to be met by January 1, 2016 in order for the GLWA to become operational.¹¹³ One critical requirement was securing the

¹⁰⁶ DETROIT BD. OF WATER COMM'RS, DETROIT WATER AND SEWERAGE DEP'T ROOT CAUSE COMMITTEE'S FINAL REPORT 5 (2013), http://www.dwsd.org/downloads_n/about_dwsd/bowc/presentations/dwsd_root_cause_committee_final_report_2013-03-13.pdf [<https://perma.cc/Z8EN-D3WS>]; Director's Compliance Report, *supra* note 95, at 22–23.

¹⁰⁷ Op. & Order, U.S. v. City of Detroit et al., No. 77-cv-71100, ECF No. 2512, at 6 (E.D. Mich. Dec. 14, 2012); Order, U.S. v. City of Detroit, No. 77-cv-71100, ECF No. 2410, at 4 (E.D. Mich. Nov. 4, 2011).

¹⁰⁸ *In re City of Detroit*, 504 B.R. at 126.

¹⁰⁹ Memorandum of Understanding Regarding the Formation of the Great Lakes Water Authority, Executed Copy 3 (Sept. 9, 2014), *available at* https://www.oakgov.com/exec/Documents/great_lakes_water_authority/Detroit_DWSD_Executed_MOU_Sept_9_2014_FINAL.pdf [<https://perma.cc/WDJ6-BDXM>]; *About Us*, GREAT LAKES WATER AUTHORITY, <http://glwater.org/about-us/> [<https://perma.cc/KN6U-43PK>].

¹¹⁰ GREAT LAKES WATER AUTHORITY, *supra* note 109.

¹¹¹ MICHIGAN FINANCE AUTH., LOCAL GOVERNMENT LOAN PROGRAM REVENUE BONDS, SERIES 2014D 74–82 (2014), http://www.dwsd.org/downloads_n/about_dwsd/financials/2014-09-11_2nd_Water_Refunding_Bond.pdf [<https://perma.cc/WM3Z-9DRG>]; *The History of DWSD*, DETROIT WATER AND SEWERAGE DEP'T, archive.dwsd.org/pages_n/history.html.

¹¹² GREAT LAKES WATER AUTH., REGIONAL SEWAGE DISPOSAL SYSTEM LEASE § 3.4 (June 12, 2015), http://glwater.org/wp-content/uploads/2015/06/Executed_Package-REVISED-6-12-15.pdf [<https://perma.cc/55XR-Z3F4>].

¹¹³ John Wisely & Joe Guillen, *Water Authority's To-Do List Before Jan. 1 Deadline*, DETROIT FREE PRESS (June 12, 2015, 10:36 PM), <http://www.freep.com/story/news/local/michigan/2015/06/12/water-deadline/71159590/> [<https://perma.cc/M6K8-MSFJ>].

support of a majority of DWSD's current bondholders,¹¹⁴ which was achieved.¹¹⁵ Despite significant management problems, DWSD had previously been a solvent entity with good access to capital markets. However, its bonds had been downgraded to junk bond status due to Detroit's economic woes.¹¹⁶ Because the creation of the GLWA reduced uncertainty over the management and governance of the water supply, DWSD's credit rating improved.¹¹⁷ DWSD also argued that savings in debt service could ultimately be passed on to consumers in the form of lower rates, or at least smaller rate hikes.¹¹⁸

This analysis suggests that the widespread household shutoffs that have occurred since 2013 are directly tied to Detroit's efforts to create the GLWA and successfully emerge from bankruptcy. The neighboring counties were reluctant to enter into the GLWA because they were afraid of being saddled with Detroit's unpaid water bills.¹¹⁹ DWSD wanted to signal to bondholders that it was getting its books in order, which is also why it pushed the City Council to approve water rate increases.¹²⁰ In retrospect, the very public way in which DWSD terminated water to thousands of households was a terrible public relations move because it brought national and international condemnation. Yet, at the time, DWSD, which was under the control of the Emergency Manager,¹²¹ was trying to show neighboring counties and the bond market that it was serious about enforcing its collection policies.

¹¹⁴ GREAT LAKES WATER AUTH., *supra* note 112, § 3.2.

¹¹⁵ John Turk, *Bondholders OK Detroit Debt Transfer of \$4 Billion to Great Lakes Water Authority*, OAKLAND PRESS NEWS (Dec. 4, 2015, 4:08 PM), <http://www.theoaklandpress.com/article/OP/20151204/NEWS/151209774> [<https://perma.cc/C2A6-P9N8>] (noting that DWSD obtained the consent of over sixty-seven percent of bondholders).

¹¹⁶ DETROIT BD. OF WATER COMM'RS, *supra* note 106, at 1.

¹¹⁷ *Detroit Water and Sewer Department Bond Rating Raised to 'A-' on Stabilizing Finances*, BONDS ONLINE, http://www.bondsonline.com/print/Todays_Market/Credit_Rating_News_php?DA=view&RID=44091 [<https://perma.cc/R45H-KLTJ>].

¹¹⁸ *Detroit City Council Session—Budget*, CITY OF DETROIT (July 8, 2015, 10:37 AM), <http://www.detroitmi.gov/Government/City-Council/Meeting-Video-Archives/ArticleID/375/Detroit-City-Council-Session-Budget> [<https://perma.cc/NC93-ZNSD>] (argument made by some city officials on behalf of DWSD).

¹¹⁹ John Wisely & Joe Guillen, *Great Lakes Water Authority OKs Lease of Detroit's System*, DETROIT FREE PRESS (June 12, 2015, 10:55 AM), <http://www.freep.com/story/news/local/michigan/detroit/2015/06/12/regional-water-vote/71088638/> [<https://perma.cc/R3CC-HQWS>] (noting that Macomb County voted against approving the GLWA lease because of concerns about Detroit's unpaid water bills). Several lawyers interviewed for this article believe that residents in customer communities blame Detroit for their rising water bills, when in fact, the higher costs they are experiencing could be due to their own municipality's increase in the retail rates to cover salaries, maintenance, energy costs related to pumping, or related expenses.

¹²⁰ Lyda Evidentiary Hearing, *supra* note 21, at 106–07; Guillen, *supra* note 21.

¹²¹ Lyda Evidentiary Hearing, *supra* note 20, at 100 (Director of DWSD testifying that the Emergency Manager transferred authority of DWSD back to the city on August 2, 2014); Guillen, *supra* note 48.

Many community leaders have expressed concern about the creation of the GLWA.¹²² The Detroit metropolitan region is highly racially segregated, and there is a deep-seated fear that the creation of a regional authority will give the predominantly white suburbs control over a key asset of the largest black-majority city in the nation.¹²³ It compounds concerns that the water shutoffs were designed to increase blight in black neighborhoods by making homes uninhabitable, thereby paving the way for revitalization projects, which are perceived as code for gentrification.¹²⁴ Some also believe that the creation of a state-wide authority is a form of privatization because such entities are not elected and are not directly accountable.¹²⁵

The Detroit City Council's Legislative Policy Division, which has expressed concerns over the impact of the GLWA on Detroit, succinctly characterized the debate as follows:

Those favoring such regionalization have long argued that DWSD has been plagued by mismanagement and even corruption, and that cost savings, efficiencies and improved public health, environmental protection and water quality will flow from a regional entity [T]he opposing view is that the move to "regionalization" tends more toward using the greater political and economic power of wealthier suburban interests to wrest away Detroit's greatest asset for private profit, than an equitable reordering of an unwieldy system.¹²⁶

¹²² See *Statement to GLWA on Affordability vs Assistance*, MICH. WELFARE RIGHTS ORG. (May 20, 2015), <http://www.mwro.org/2015/05/20/statement-to-glwa-on-affordability-vs-assistance/> [<https://perma.cc/QTC8-L2BM>].

¹²³ See, e.g., *A D-REM Public Comment on Michigan's State Water Strategy*, DETROITERS RESISTING EMERGENCY MGMT. BLOG (Apr. 22, 2015), <http://www.d-rem.org/a-d-rem-public-comment-on-michigans-state-water-strategy/> [<https://perma.cc/H4GT-BEJY>].

¹²⁴ See DETROITERS RESISTING EMERGENCY MGMT., DETROIT 2016: LINKING STRUGGLES FOR RACIAL AND ECONOMIC JUSTICE 2, 7–8 (May 8, 2016), <http://www.d-rem.org/wp-content/uploads/2016/05/Detroit-2016-FINAL-spread.pdf> [<https://perma.cc/9EU9-JRA7>]; Frederick Reese, *Detroit's Water Crisis a Symptom of Urban Shrinkage*, MINTPRESSNEWS (July 18, 2014), <http://www.mintpressnews.com/detroits-water-crisis-a-symptom-of-urban-shrinkage/194029/> [<https://perma.cc/434E-RSVS>].

¹²⁵ See, e.g., Sarah Cwiek, *Detroit Approves New Regional Water Authority*, MICHIGAN RADIO (Sept. 19, 2014), <http://michiganradio.org/post/detroit-approves-new-regional-water-authority#stream/0> [<https://perma.cc/E4MW-E653>]; DETROIT NEEDS A WATER AFFORDABILITY PLAN, FOOD AND WATER WATCH 1–2 (May 2015), <http://www.foodandwaterwatch.org/sites/default/files/Detroit%20Water%20Plan%20IB%20May%202015.pdf> [<https://perma.cc/7964-NFSL>].

¹²⁶ Letter from David Whitaker, Dir. Legislative Policy Div. Staff, to The Honorable Detroit City Council 8 (May 11, 2016), <http://www.detroitmi.gov/Portals/0/docs/Legislative%20Policy%20Reports/2016%20Reports%20to%20Council/GLWA%20and%20DWSD%20Issues.pdf?ver=2016-05-11-153558-390> [<https://perma.cc/WY6L-8HL7>].

The Great Lakes Water Authority officially began operating as a regional water authority on January 1, 2016 and the true impact that it will have on the region and the city of Detroit remains to be seen.¹²⁷

II. BANKRUPTCY COURT DECLINES TO ENJOIN WATER SHUTOFFS

In July 2014, residents and advocacy organizations intervened in the Detroit bankruptcy proceeding by filing a class action adversarial complaint for declarative and injunctive relief.¹²⁸ Given that Detroit was in the midst of bankruptcy proceedings, this was the only judicial forum available to hear these claims, which involved debts owed to the city. The complaint sought a six-month ban on residential water shutoffs, the restoration of service to all residents who had their water terminated, as well as an order requiring that Detroit implement an affordability plan for water service that ties rates to household income. The complaint also requested declaratory and equitable relief on a range of theories, including: violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the US Constitution; breach of executory contract; the public trust doctrine; the human right to water; public health emergency; and estoppel.¹²⁹

A. Initial Ruling from the Bench

In a ruling from the bench on September 29, 2014, the bankruptcy court granted the city's motion to dismiss and denied the plaintiffs' motion for a temporary restraining order.¹³⁰ The court found that it did not have core jurisdiction over the plaintiffs' claims because Section 904 of the Bankruptcy Code prohibited the court from granting the requested injunctive relief.¹³¹ Because Section 904 prevents the court from interfering with "any of the political or governmental powers of the debtor," the court's overwhelming con-

¹²⁷ See *The Great Lake Water Authority: A New Era Begins*, GREAT LAKES WATER AUTH., <http://www.glwater.org/> [<https://perma.cc/GGL7-9W8E>].

¹²⁸ Adversary Complaint for Declarative & Injunctive Relief, *In re City of Detroit*, Michigan, Ch. 9, No. 13-53846 (Bankr. E. D. Mich. July 21, 2014), ECF No. 1; First Amended Adversary Complaint for Declarative & Injunctive Relief, *In re City of Detroit*, Michigan, Ch. 9, No. 13-53846 (Bankr. E.D. Mich. July 30, 2014) ECF No. 3 [hereinafter *Lyda First Am. Adversary Compl.*].

¹²⁹ *Lyda Initial Ruling from Bench*, *supra* note 5, at 6.

¹³⁰ *Id.* at 5.

¹³¹ *Id.* Section 904 of the U.S. Bankruptcy code states:

Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—

- (1) any of the political or governmental powers of the debtor;
- (2) any of the property or revenues of the debtor; or
- (3) the debtor's use or enjoyment of any income-producing property."

cern was avoiding a violation of separation of powers.¹³² Finding that water provision fell within Detroit's policy domain, it determined that it was unable to interfere with the "choices a municipality makes as to what service and benefits it will provide."¹³³ It also found that the city's consent to the jurisdiction of the bankruptcy court did not extend to consent of the adversary proceeding.¹³⁴ The court then addressed three arguments that the plaintiffs had made to overcome the restrictions in Section 904.

First, the court held that while it had jurisdiction over executory contracts under Section 365 of the Bankruptcy Code—which is an exception to the Section 904 limits—the relationship between Detroit and its water customers did not fall within this category.¹³⁵ Instead, it determined that water service was "simply a part of the range of municipal services that the city has determined to provide pursuant to state law and local ordinance."¹³⁶ Michigan law and the Detroit City Charter allow for the provision of water service to residents, whose rates must be set at the reasonable cost of delivering the service.¹³⁷ Michigan law also allows for the disconnection of water or sewer service for failure to pay.¹³⁸ Because these legal obligations did not amount to an executory contract under Section 365 of the Bankruptcy Code, the court found that it did not have jurisdiction over the claims.¹³⁹

Second, the court held that the city's Plan of Adjustment that was filed with the bankruptcy court did not provide the necessary consent to overcome the restrictions in Section 904.¹⁴⁰ Third, the court generally rejected the idea that it had non-core jurisdiction over the plaintiffs' claims. While the court conceded that it had jurisdiction "related to" the bankruptcy case under 28 U.S.C. § 1334(b), it found that the plaintiffs' broad interpretation of that language "prove[d] way too much" because it essentially nullified the mandate of Section 904 of the Bankruptcy Code.¹⁴¹

¹³² 11 U.S.C. § 904; Lyda Initial Ruling from Bench, *supra* note 5, at 7.

¹³³ Lyda Initial Ruling from Bench, *supra* note 5, at 7 (citation omitted).

¹³⁴ *Id.* at 11.

¹³⁵ *Id.* at 8–9.

¹³⁶ *Id.* at 9.

¹³⁷ See MICH. COMP. LAWS § 123.141 (1981); Detroit City Charter § 7-1202, THE CITY OF DETROIT (Jan. 1, 2012), http://www.detroitmi.gov/Portals/0/docs/Publications/COD%20Charter/2_29_2012_CharterDocument_2_1_WITHOUT_COMMENTARY_1.pdf [https://perma.cc/PE5B-99YR].

¹³⁸ See MICH. COMP. LAWS § 123.166.

¹³⁹ Lyda Initial Ruling from Bench, *supra* note 5, at 8.

¹⁴⁰ *Id.* at 11; Lyda Supplemental Opinion, *supra* note 5, at 8 (rejecting Plaintiff's contention that the City's Seventh Amended Plan of Adjustment constituted the necessary consent because it stated, "The City may seek to implement a rate stability program for City residents which program may, among other things, (a) provide a source of funds to mitigate against rate increases, (b) enhance affordability and (c) provide a buffer against delinquent payment") (citation omitted).

¹⁴¹ Lyda Initial Ruling from Bench, *supra* note 5, at 11–12 (citation omitted) (finding that Section 904 is "so comprehensive that it can only mean that a federal court can use no tool in its toolkit").

Despite the court's concern about exercising non-core jurisdiction, it nevertheless addressed the plaintiff's constitutional claims and ultimately determined that they were without merit.¹⁴² The plaintiffs had argued that their procedural due process rights were violated because DWSD did not provide them with adequate notice prior to terminating their water service, did not sufficiently inform them about the possibility of a hearing, and did not comply with its own rules posted on its website.¹⁴³

The court held that the households did not have a property or liberty interest in water service that would give rise to a due process claim.¹⁴⁴ As a result, the court did not initially assess whether the procedures employed by DWSD were constitutionally sufficient.¹⁴⁵ In a subsequent order reconsidering the decision, the court conceded that the plaintiffs might have a property or liberty interest in water service, but nonetheless found that there were no procedural due process violations. This aspect of the court's decision is discussed and critiqued in Sections II.B and III of this Article.

The plaintiffs had also argued that their right to equal protection was violated when DWSD terminated the water service of households with delinquent water bills instead of targeting commercial clients.¹⁴⁶ The court rejected this argument, finding that the plaintiffs could not establish that they had a fundamental right to water service or that they were a suspect class for equal protection purposes. It held that the plaintiffs' allegations concerning DWSD's differential treatment of residential and commercial customers were merely legal conclusions couched as factual allegations, and that rational basis for the differential treatment existed because commercial service connections were more complex than residential ones.¹⁴⁷

Although the bankruptcy court noted that its decision to dismiss the complaint made consideration of injunctive relief moot, it nevertheless assessed whether there were alternative grounds for issuing a preliminary injunction. It considered four factors that courts balance when considering a preliminary injunction: the plaintiffs' likelihood of success; irreparable injury to the plaintiffs; whether substantial harm to others would result from an injunction; and the public interest.¹⁴⁸

First, the court determined that the plaintiffs would not be successful on the merits. In reaching this conclusion, it described the customer bills that had

¹⁴² *Id.* at 12.

¹⁴³ First Amended Adversary Complaint for Declarative & Injunctive Relief, *In re City of Detroit*, Michigan, Ch. 9, No. 13-53846 (Bankr. E.D. Mich. July 30, 2014) ECF No. 3, ¶ 124.

¹⁴⁴ Lyda Initial Ruling from Bench, *supra* note 5, at 14.

¹⁴⁵ *Id.* at 13–14.

¹⁴⁶ *Id.* at 14–15.

¹⁴⁷ *Id.* at 15–16.

¹⁴⁸ *Id.* at 16 (citing *McPherson v. Mich. High School Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997)).

been entered into the record. On the reverse side of each bill was a paragraph captioned “Complaints and Disputes,” which stated:

It is the customer’s responsibility to inform the utility of any billing dispute. A monthly billed customer may dispute a bill no later than 28 days after the billing date. After the period to dispute expires, the customer forfeits the right to dispute the bill. All amounts not in dispute are due and payable. For additional information, you may visit us on line [sic] at www.dwsd.org.¹⁴⁹

The court found that the plaintiffs and other residential customers rarely disputed their bills with DWSD. It determined that they failed to pay their bills because: (i) they have the ability to pay but decided not to; (ii) they had a temporary interruption in their income; or (iii) their income is so low that they are chronically unable to pay their bills.¹⁵⁰ Although DWSD did not know which residents fell into which category, it instituted a policy whereby customers in default over \$150 for more than two months would have their water terminated.¹⁵¹ The DWSD Interim Collection Rules and Procedures, which were available on its website, set forth the detailed complaint and shutoff procedures. However, DWSD no longer followed certain aspects of its rules, such as conducting personal visits prior to service termination.¹⁵² Moreover, customers with special needs, such as medical conditions or children in the house, did not avail themselves of exceptions in the policy that would have allowed for delays in water disconnection.¹⁵³ As discussed in Section III.B, these findings are also relevant to the procedural due process analysis.

Despite finding that the plaintiffs would be unlikely to succeed on the merits, the court urged DWSD to improve its recently created water assistance program, known as the “10-point plan.”¹⁵⁴ The judge expressed his doubts that the plan would be of long-term assistance to customers who are chronically unable to pay their bills, a group that he admitted was large given that forty to fifty-five percent of the population lives at or below the poverty line.

¹⁴⁹ *Id.* at 16–17.

¹⁵⁰ *Id.* at 18.

¹⁵¹ *Id.*

¹⁵² *Id.* at 17.

¹⁵³ *Id.* at 17–18.

¹⁵⁴ *Id.* at 19 (describing the 10-point plan as a “bold, commendable, and necessarily aggressive plan”). As discussed in Section IV, DWSD launched the Water Residential Assistance Program on March 1, 2016. See Press Release, City of Detroit, New Program to Assist Low-Income Water Customers (Feb. 26, 2016), <http://detroitmi.gov/Portals/0/docs/DWSD/News%20Release%20-%20WRAP%20Announcement%20-%202002262016.pdf?ver=2016-02-26-145432-977> [<https://perma.cc/LA6T-BK98>].

With respect to the second factor relevant to issuing a preliminary injunction, the court found that the discontinuation of household water service leads to irreparable harm, especially if it lasts for more than a few days. It concluded:

These harms include the risk of serious and even life-threatening medical conditions as well as adverse consequences in employment, in family and personal relations, and for children in their education. It cannot be doubted that water is a necessary ingredient for sustaining life. It is, however, important to pause here to emphasize that these findings about the irreparable harm that customers may suffer upon termination of their water service does not suggest that there is a fundamental enforceable right to free or affordable water. There is no such right in law just as there is no such affordable right to other necessities of life such as shelter, food, or medical care.¹⁵⁵

The court rejected the city's argument that the ability to purchase water at local stores meant that the harm was not irreparable.¹⁵⁶ Bottled water is significantly more expensive, especially given that impacted individuals are already living in poverty.¹⁵⁷ Moreover, it is time-consuming and difficult to obtain sufficient quantities of water, especially for single parents with young children or individuals with special needs.¹⁵⁸ The court dismissed the city's argument that official health department records failed to show that the water shutoffs were having a negative impact on public health, noting that those records were not designed to measure the impact of significant water terminations and that there was likely a time lag.¹⁵⁹ While the court determined that there would be irreparable harm to households without water service, this factor alone was not sufficient grounds for granting relief.

With respect to the third factor, the bankruptcy court concluded that the city of Detroit would experience irreparable harm if a six-month injunction was granted because the evidence suggested that there was "an impressively close correlation between shutoffs and collections"¹⁶⁰ However, as discussed in Section IV.C.1, more recent data shows that the policy was not actually effective. Moreover, at the *Lyda* evidentiary hearing, expert witness Roger Colton, who authored the 2005 Water Affordability Plan for Detroit,

¹⁵⁵ *Lyda* Initial Ruling from Bench, *supra* note 5, at 20.

¹⁵⁶ *Id.* at 20–21.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 20–21.

¹⁵⁹ *Id.* at 21.

¹⁶⁰ *Id.* at 22.

testified that, in his vast experience, payments generally remain constant during moratoriums.¹⁶¹

The court determined that “Detroit cannot afford any revenue slippage, and its obligations to its creditors requires it to take all reasonable and businesslike measures to collect the debts that are owed to it.”¹⁶² Moreover, the court emphasized the negative impact that a six-month moratorium would have on the continuing formation of the Great Lakes Water Authority because “many urban areas have found [regional cooperation] to be absolutely critical in their economic revitalizations.”¹⁶³ The bankruptcy court determined that the fourth factor on the consideration of public interest overlapped significantly with the third factor on irreparable harm to the city and region.¹⁶⁴ As a result, because Detroit would experience irreparable harm, the public interest would not be met if the court imposed a six-month injunction.¹⁶⁵

Balancing the four factors together, the court concluded that it could not grant the requested injunctive relief. Also motivating the court’s decision was the conclusion that a six-month injunction on water terminations would not solve the underlying problem, which is that a significant number of customers are consistently unable to pay their bills.¹⁶⁶

B. Supplemental Opinion

In a second written opinion issued on November 19, 2014 in response to a motion for reconsideration,¹⁶⁷ the court reached the same ultimate conclusion—that it could not grant the plaintiffs’ requested relief.¹⁶⁸ This supplemental opinion clarified its initial ruling in light of several arguments that the plaintiffs raised. For the most part, the court’s analysis was nearly identical to the reasoning in its September 19, 2014 ruling. For the same reasons described in the prior ruling, the court held that it did not have authority under Section 904 of the Bankruptcy Code;¹⁶⁹ that the relationship between the plaintiffs and the city was not an executory contract;¹⁷⁰ and that the city did

¹⁶¹ Lyda Evidentiary Hearing, *supra* note 21, at 134; AMIRHADJI ET AL., *supra* note 26, at 20; COLTON, *supra* note 96, at 1.

¹⁶² Lyda Initial Ruling from Bench, *supra* note 5, at 22.

¹⁶³ *Id.* at 23.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 24.

¹⁶⁷ Plaintiffs’ Motion for Rehearing and Reconsideration pursuant to E.D. Michigan L.R.7(1)(h) of the September 30, 2014 Order Granting Defendant’s Motion for Dismissal under 12(b)(6); and Plaintiffs’ Motion to File a Second Amended Adversary Complaint, In re City of Detroit, No. 13-53846, Lyda et al. v. City of Detroit, Adv. No. 14-04732, ECF No. 95 (Bankr. E.D. Mich. October 14, 2014).

¹⁶⁸ Lyda Supplemental Opinion, *supra* note 5, at 3.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 6–7.

not consent to jurisdiction.¹⁷¹ The court's analysis of the equal protection claims, as well as under the four-factored balancing test for issuing a preliminary injunction, was also essentially the same as the interpretation found in its September ruling.¹⁷² However, as discussed in Section III, the court's analysis of the plaintiffs' due process claim differed in a significant way. The court stated that:

[T]he arguments that the plaintiffs make in their motions for reconsideration persuade the Court that its previous conclusion on this issue was an overstatement. Based on the City's legal obligation to provide municipal water service to its residents, it is plausible that the plaintiffs could establish a liberty or property right to water service to which procedural due process rights apply.¹⁷³

Once the bankruptcy court concluded that a property or liberty interest could exist in household water service, it then proceeded to assess "whether the procedures that accompanied the interference were constitutionally sufficient."¹⁷⁴ As part of this assessment, the court found that the allegations concerning due process violations were insufficient under the *Twombly*¹⁷⁵ and *Iqbal*¹⁷⁶ standards because they were legal conclusions with an "everything but the kitchen sink" quality.¹⁷⁷ The court nevertheless concluded that it had the legal authority to assess the water service bills that were part of the evidentiary record. It found, however, that the content of the DWSD bills and notices were constitutionally sufficient because:

These bills and notices give notice of (1) the amount of the bill; (2) the payment due date; (3) the consequence of failing to pay the bill—that water service is subject to disconnection; and (4) the opportunity to dispute the bill by contacting the DWSD. In addition, after a failure to pay, a customer receives a shut-off notice advising the customer that the customer's water service is subject to termination.¹⁷⁸

The court also found that there was no basis for determining that the time allowed for payment was irrational, nor that a longer timeframe was constitutionally required.¹⁷⁹ It further concluded that the plaintiffs' due pro-

¹⁷¹ *Id.* at 7–8.

¹⁷² *See id.* at 16–23.

¹⁷³ *Id.* at 10 (citations omitted).

¹⁷⁴ *Id.* at 11 (citation omitted).

¹⁷⁵ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

¹⁷⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹⁷⁷ Lyda Supplemental Opinion, *supra* note 5, at 12.

¹⁷⁸ *Id.* at 14.

¹⁷⁹ *Id.*

cess rights were not violated by the failure either to provide notice about payment plans on the final notices, or to offer reasonable payment plans. The court observed that the “crux” of the plaintiffs’ due process claim was to “claim a constitutional right to water service at a price they can afford to pay.”¹⁸⁰ The court rejected that claim:

Michigan law does not permit a municipality to base its water rates on ability to pay. Rather . . . M.C.L. § 141.121 requires a municipality to set water rates at the reasonable cost of delivering the service. Nothing in the case law suggests that it is unconstitutional for state law to require a municipality to fix the price of a service according to the cost of providing it rather than ability to pay.

The Court therefore reaffirms its previous conclusion that there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages.¹⁸¹

The court further observed in a footnote that “the plaintiffs have never asserted a constitutional right to free water service, only a right to water service that they can afford.”¹⁸²

The court concluded that it was not arbitrary for the state of Michigan to require that municipalities set the rate of water service at the reasonable cost of delivery.¹⁸³ It observed that “[i]n a rate structure based on ability to pay, every dollar that a customer would not pay because of an inability to pay is one more dollar that other customers, or taxpayers, would have to pay.”¹⁸⁴

The bankruptcy court ultimately reached the same result in its supplemental opinion as it had in its September 29th order and denied the plaintiffs’ motion for relief as well as their motion to file a second amended complaint.

C. Appeal to District Court and Sixth Circuit

The plaintiffs appealed the decision to the U.S. District Court for the Eastern District of Michigan,¹⁸⁵ which affirmed the decision of the bankruptcy court and adopted its reasoning.¹⁸⁶ The plaintiffs have since appealed to

¹⁸⁰ *Id.* at 15.

¹⁸¹ *Id.*

¹⁸² *Id.* at 15, n.5.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 16.

¹⁸⁵ Notice of Appeal from Bankruptcy Ct., *Lyda et al. v. City of Detroit*, No. 2:15-cv-10038, ECF No. 1 (E.D. Mich. Jan 07, 2015).

¹⁸⁶ *Lyda v. City of Detroit*, 2015 WL 5461463, at *5 (E.D. Mich. Sept. 16, 2015).

the U.S. Court of Appeals for the Sixth Circuit, and, as of the writing of this Article, the case is still pending.¹⁸⁷

III. DUE PROCESS CLAUSE ANALYSIS

This section analyzes the bankruptcy court's rulings on the Due Process Clause—affirmed by the district court—which applies to constitutionally protected interests in “life, liberty, or property.”¹⁸⁸ The tentative nature of its determination that the Due Process Clause “may” apply is puzzling because there is no question that a property interest in household water exists.¹⁸⁹ A careful review of the plaintiffs' allegations and the Detroit Water and Sewerage Department's (DWSD) rules shows that, because an individual has a property interest in water and sewer services being provided to his or her residence, the bankruptcy court erred when it found that procedural due process was not violated. The bankruptcy court was correct that there is not a constitutional right to affordable access to household water under our existing laws. However, water is so vital to human existence, and holds such a unique place in our society, that it could be considered as having attained a near-constitutional status.

The near-constitutional status of water highlights why access to clean and affordable water *could be* considered a substantive due process right. Our nation's history and jurisprudence on prisoner rights demonstrate how the right to life could be implicated by access to water claims. Because children can be removed from a home without running water, the fundamental right to family could also be infringed when water service is cut to homes with children. Finally, international human rights law, although not necessarily binding on the United States, could help carefully define the contours of a new legislative proposal. Although courts may currently be reluctant to recognize a constitutional right to affordable water for basic household needs, water holds a special place in our culture, history, and laws. The right to water should be considered a constitutive commitment deserving of legislative protection.

A. Household Water Connections Are Property Interests

After a puzzling initial ruling, the bankruptcy court ultimately concluded in its supplemental opinion that water service is a property interest to which the Due Process Clause applies.¹⁹⁰ However, the language used by the court was unnecessarily tentative: “Based on the City's legal obligation to provide

¹⁸⁷ Notice of Appeal, *Lyda et al. v. City of Detroit*, No. 2:15-cv-10038, ECF No. 33 (E.D. Mich. Oct. 08, 2015).

¹⁸⁸ U.S. CONST. amend. V and XIV, § 1.

¹⁸⁹ See *infra* Section III.A.

¹⁹⁰ See *supra* Section II.B.

municipal water service to its residents, it is *plausible* that the plaintiffs *could* establish a liberty or property right to water service to which procedural due process rights apply.”¹⁹¹ This section explains why there is no question that residents have a property interest in continued water service.

The starting point for the analysis is state law. As the Supreme Court has observed: “Property interests are not created by the Constitution, ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”¹⁹² However, “federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.”¹⁹³ Under Michigan law, the extension of water and sewage distribution services automatically creates a lien on the property receiving the service, which serves as security for unpaid bills.¹⁹⁴ Municipalities may execute the liens in the manner in which tax liens are conducted, or by passing another local ordinance,¹⁹⁵ but not until at least three years have elapsed.¹⁹⁶ Michigan law also authorizes the municipality providing water and sewer services to terminate services for non-payment; doing so, however, does not release the lien on the property for unpaid amounts.¹⁹⁷ The Detroit City Charter incorporates this power, explicitly stating that “[u]nless otherwise provided by contract or state law, the unpaid charges for water, drainage, and sewerage services, with interest, shall be a lien of the City upon the real property using or receiving them.”¹⁹⁸ The DWSD website affirmed this by stating that “Detroit water and sewer customers with a past due balance must pay their water and sewer bill, otherwise state law permits DWSD to place the amount of any unpaid water

¹⁹¹ Lyda Supplemental Opinion, *supra* note 5, at 10 (emphasis added).

¹⁹² *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

¹⁹³ *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577).

¹⁹⁴ MICH. COMP. LAWS § 123.162 (West 2014).

¹⁹⁵ MICH. COMP. LAWS § 123.163 (West 2014); MICH. COMP. LAW § 141.121 (West 2014).

¹⁹⁶ MICH. COMP. LAWS § 123.162.

¹⁹⁷ MICH. COMP. LAWS § 123.166 (“A municipality may discontinue water service or sewage system service from the premises against which the lien created by this act has accrued if a person fails to pay the rates, assessments, charges, or rentals for the respective service, or may institute an action for the collection of the same in any court of competent jurisdiction.”); *Id.* § 141.121 (“In addition to any other lawful enforcement methods, the payment of charges for water service to any premises may be enforced by discontinuing the water service to the premises and the payment of charges for sewage disposal service or storm water disposal service to a premises may be enforced by discontinuing the water service, the sewage disposal service, or the storm water disposal service to the premises, or any combination of the services.”).

¹⁹⁸ THE CITY OF DETROIT, *supra* note 137, at § 7-1202.

and sewer bill on the City of Detroit Property Tax Roll as a lien for collection purposes.”¹⁹⁹

Under Michigan law and the Detroit City Charter, residents have a property interest in the household water service. Black’s Law Dictionary defines a lien as a “legal right or interest that a creditor has in another’s property lasting [usually] until a debt or duty that it secures is satisfied.”²⁰⁰ If the creditor, DWSD, automatically takes a property interest in a resident’s home as a result of the water service provision, then, by extension, that resident must necessarily have a property interest in the continuing service provision. Moreover, the Detroit City Charter provides an expectation of continued service, stating that “[t]he people have a right to expect city government to provide for its residents . . . safe drinking water and a sanitary, environmentally sound city.”²⁰¹

The case law supports the characterization of utility services as property interests. As the Supreme Court has stated: “Although the customer’s right to continued [gas and electric] service is conditioned upon payment of the charges properly due, [t]he Fourteenth Amendment’s protection of ‘property’ . . . has never been interpreted to safeguard only the rights of undisputed ownership.”²⁰² The Sixth Circuit—of which Michigan is a part—has also found that residents have a “constitutionally protected liberty or property interest in continued water service” because “[i]t is well settled that the expectation of utility services rises to the level of a ‘legitimate claim of entitlement’ encompassed in the category of property interests protected by the Due Process Clause.”²⁰³

Water service provision is a critical component of housing, and residents certainly have a property interest in the buildings in which they reside. Although owners have legal title to their property, tenants’ interests arise by virtue of their leases.²⁰⁴ Building codes require that homes have running water.

¹⁹⁹ *My DWSD Online Billing Services*, DETROIT WATER AND SEWERAGE DEP’T, archive.dwsd.org/pages_n/billpay.html.

²⁰⁰ *Lien*, BLACK’S LAW DICTIONARY (9th ed. 2009).

²⁰¹ THE CITY OF DETROIT, MICHIGAN, *supra* note 137, at Preamble and Declaration of Rights.

²⁰² *Memphis Light, Gas & Water Div.*, 436 U.S. at 11 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972)).

²⁰³ *Mansfield Apartment Owners Ass’n v. City of Mansfield*, 988 F.2d 1469, 1474 (6th Cir. 1993) (citations omitted) (finding no violation of procedural or substantive due process where a city held a landlord liable for tenants’ unpaid water bills).

²⁰⁴ *See, e.g.*, *JESSE DUKEMINIER ET AL.*, PROPERTY 222 (7th ed. 2010); *see also* DiMassimo v. City of Clearwater, 805 F.2d 1536, 1539–40 (11th Cir. 1986) (determining that a property interest exists under Florida’s Landlord and Tenant Act); *Turpen v. City of Corvallis*, 26 F.3d 978, 979 (9th Cir. 1994) (finding that a property interest exists under Oregon law); *Koger v. Guarino*, 412 F. Supp. 1375, 1386 (E.D.Pa. 1976), *aff’d without opinion*, 549 F.2d 795 (3d Cir. 1977) (holding that “a water user has a ‘legitimate claim of entitlement’ to continued water service which is a property interest to which the Due Process Clause of the Fourteenth Amendment applies”). *But see* *Golden v. City of Columbus*, 404 F.3d 950, 957 (6th Cir. 2005) (finding that a tenant did not

For example, homes in Michigan can be condemned as “unfit for human habitation” if they lack “plumbing,” which is further explained as lacking “running water furnished in sufficient quantity at all times.”²⁰⁵ If residences violate this provision, residents must vacate the premises within one to ten days.²⁰⁶ If a landlord or builder-vendor is responsible for water service provision, then a tenant or home-purchaser would certainly be able to bring a cause of action under seminal property law doctrines, such as the implied warranty of habitability²⁰⁷ and the breach of the covenant of quiet enjoyment.²⁰⁸ Finally, the Fair Housing Act also prohibits a municipality from denying water service on the grounds of race.²⁰⁹ In short, there should be little doubt that the household water service provision gives rise to a constitutionally protected property interest under the Due Process Clause.

B. Procedural Due Process

Procedural due process refers to the specific procedures that must be in place before a person can be deprived of a constitutionally protected interest.²¹⁰ Courts must balance the following factors when determining the procedures necessary to protect a particular property interest under the Due Process Clause:

First, the private interest that will be affected by the official action;
second, the risk of erroneous deprivation of such interest through

have a property interest in water under Ohio law where the tenant was “precluded from directly contracting for water service and from obtaining water service at all, due to nonpayment by both the prior tenant and the landlord” and where tenant did not rely on landlord-tenant law).

²⁰⁵ MICH. COMP. LAWS §§ 125.485, 125.472 (West 2014).

²⁰⁶ AMIRHADJI ET AL., *supra* note 26, at 33.

²⁰⁷ See, e.g., *Newkirk v. Scala*, 90 A.D.3d 1257, 1258 (N.Y. App. Div. 2011) (finding a landlord liable where a home’s tap water had a sickening smell); *Elderkin v. Gaster*, 288 A.2d 771, 777 (Penn. 1972) (holding that a vendor-builder had a duty to supply purchasers with potable water); *Wade v. Jobe*, 818 P.2d 1006, 1010–11 (Utah 1991) (noting that a failure to supply heat or hot water breaches the implied warranty of habitability).

²⁰⁸ See, e.g., *Cruz Mgmt. Co., Inc. v. Thomas*, 633 N.E.2d 390, 395 (Mass. 1994) (finding that a landlord breached the covenant of quiet enjoyment by not remedying inadequate heat and hot water and infestation of vermin).

²⁰⁹ Fair Housing Act, 42 U.S.C. § 3604(b) (2012) (stating that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race”) (emphasis added); see, e.g., *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 498 (S.D. Ohio 2007) (refusing to grant summary judgment on Fair Housing Act claims because a jury could find that a city’s explanations for not providing public water to plaintiffs was merely a pretext for racial discrimination); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 958–60 (W.D. Tenn. 2003) (holding that African-American plaintiffs could bring claims under the Fair Housing Act against a city and its engineer who had failed to provide plaintiffs with water service for fifteen months without explanation).

²¹⁰ See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²¹¹

The Sixth Circuit Court of Appeals has observed that "[i]t is undisputed that the private interest in receiving water service is strong, as is the City's interest in recovering the cost of providing this service. Therefore, the key inquiry . . . concerns the potential for erroneous deprivation of this water service."²¹² The risk of erroneous deprivation turns on the adequacy of the notice provided: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."²¹³ Constitutionally sufficient notice ensures that the customer is advised of the procedure for protesting an unjustified termination of utility service.²¹⁴

In *Memphis Light, Gas & Water Div.*, the Supreme Court found that the utility's "notification procedure, while adequate to apprise the [residents] of the threat of termination of service, was not 'reasonably calculated' to inform them of the availability of 'an opportunity to present their objections to their bills.'"²¹⁵ The notice contained in the utility bills simply stated that service would be discontinued if timely payment was not made, but did not describe the dispute procedure.²¹⁶ The Supreme Court found that this did not constitute sufficient notice, and for similar reasons, the notice provided by DWSD is also deficient.

The bankruptcy court in the *Lyda* case incorrectly determined that DWSD's notification procedures were constitutionally adequate under the Due Process Clause. The bankruptcy court's analysis centered on the notice provided in the water bill that customers received, which stated that customers could dispute their bills by contacting DWSD but did not apprise them of the opportunity for a hearing.²¹⁷ This notice could be considered to be constitutionally sufficient because it provides an informal opportunity to meet "with

²¹¹ *Id.* at 335 (citation omitted).

²¹² *Mansfield Apartment Owners Ass'n*, 988 F.2d at 1474; see *Memphis Light, Gas & Water Div.*, 436 U.S. at 20 ("Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

²¹³ *Memphis Light, Gas and Water Div.*, 436 U.S. at 13 (citing *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 314 (1950)).

²¹⁴ *Id.* at 14–15.

²¹⁵ *Id.* at 14 (citing *Mullane*, 339 U.S. at 314).

²¹⁶ *Id.* at 13.

²¹⁷ *Lyda* Initial Ruling from Bench, *supra* note 5, at 16–17; see *supra* Section II.AB.

a responsible employee empowered to resolve the dispute”²¹⁸ However, the lead plaintiff in the *Lyda* case alleged that, after receiving financial assistance from a local aid agency, she had tried to contact DWSD by telephone three times only to be placed on hold.²¹⁹ Further, and although not before the court, the media also reported that customers attempting to discuss their bills in person waited for long periods of time at the water department,²²⁰ a fact acknowledged by DWSD when creating its 10-point plan.²²¹

The bankruptcy court also neglected to consider another key piece of evidence—the DWSD Interim Collection Rules and Procedures, which are posted on the utility’s website.²²² The court only briefly addressed these rules as part of its evaluation of injunctive relief,²²³ but did not discuss them in its due process analysis. A comparison of these rules and the allegations in the complaint reveals that the notice and overall shutoff process should be considered constitutionally deficient.

According to the DWSD Interim Collection Rules and Procedures, households are billed quarterly and, if the bill is not paid within eleven days of the due date, a past due notice is sent.²²⁴ A final notice issues just one day later with a warning that the water will be terminated in ten days or more unless the customer takes appropriate action.²²⁵ The final notice is also supposed to inform the customer of the right to enter into a payment plan, the right to file a complaint disputing the bill, and the right to request a hear-

²¹⁸ *Memphis Light, Gas & Water Div.*, 436 U.S. at 16 n.17 (“The opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a ‘due process hearing’ in appropriate circumstances.”); *see also* *Manza v. Newhard*, 915 F. Supp. 2d 638, 647 (S.D.N.Y. 2013) (where homeowner met informally with the mayor to dispute his bills, and where mayor was empowered to correct the water billing mistake, constitutional due process was satisfied).

²¹⁹ *Lyda* First Am. Adversary Compl., *supra* note 128, ¶ 37.

²²⁰ *See, e.g.*, Alana Semuels, *Detroit Water Shut-Offs for Overdue Bills to Begin Once More*, L.A. TIMES (Aug. 26, 2014, 3:54 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-detroit-water-shut-offs-20140826-story.html> [<https://perma.cc/TD5E-6AMX>] (discussing how a Detroit resident, Nicole Hill, “has gone to the water department three times to try to puzzle through her bill; usually, she’s stood in line for three hours. When she waits on the phone for hours to get through, sometimes the person who answers hangs up without even talking to her.”).

²²¹ *See 10-Point Plan*, DETROIT WATER AND SEWERAGE DEPT., http://www.dwsd.org/downloads_n/announcements/general_announcements/DWSD-10-point-plan.pdf [<https://perma.cc/3C5R-E6U7>] (noting that DWSD has expanded its customer service hours and “added staff to reduce wait times”) [hereinafter *10-Point Plan*]; *infra* Section IV.C.1.

²²² DETROIT WATER AND SEWERAGE DEP’T, INTERIM COLLECTION RULES AND PROCEDURES (Jan. 22, 2003), http://www.dwsd.org/downloads_n/customer_service/customer_information/collection_rules.pdf [<https://perma.cc/9RC2-L65P>].

²²³ *Lyda* Initial Ruling from Bench, *supra* note 5, at 17; *Lyda* Supplemental Opinion, *supra* note 5, at 6 n.20.

²²⁴ DETROIT WATER AND SEWERAGE DEP’T, *supra* note 222, at 1, 3.

²²⁵ *Id.* at 3.

ing.²²⁶ The rules also state that DWSD “shall not shut off or refuse to restore service to a customer, if the shut off will aggravate a medical emergency of anyone residing in the home.”²²⁷ On the day of the water shutoff, a representative is supposed to identify him or herself to the customer and request payment of the delinquent amount.²²⁸

The process for obtaining an administrative hearing under the DWSD Interim Collection Rules and Procedures is also very cumbersome, requiring, for example, that residents fill out the request in person.²²⁹ Even if a resident successfully obtains a hearing, it is an uphill battle to obtain relief. As explained by an attorney with the Detroit City Council, “[I]t’s difficult to fight a water bill. [The water department] give[s] you an opportunity for a hearing, but there is no way you can fight a meter that you can’t determine or test its accuracy. Once the bill gets excessive, you can challenge it but you are out-matched in every way.”²³⁰ If the customer is found liable at the hearing for all or part of the disputed bill, then DWSD is supposed to consider the following factors when negotiating a payment plan: “(a) amount due[;] (b) ability to pay[; and] (c) other factors which may be relevant to the proposed extended Payment Plan Agreement.”²³¹

The complaint contains numerous allegations that these rules were violated. Several plaintiffs alleged that they did not receive individualized notice prior to the water being terminated,²³² that the shutoffs occurred prior to the date listed on the termination notice,²³³ that terminations occurred on the same day as notice,²³⁴ or that the terminations occurred while disputes were pending.²³⁵ In addition, many of the households included individuals with significant medical issues.²³⁶ The complaint alleged that several plaintiffs had difficulty with their payment plans because they were unaffordable,²³⁷ which is contrary to DWSD’s requirement that such plans consider the customer’s ability to pay. Indeed, two plaintiffs indicated that the payment plan amounts

²²⁶ *Id.* at 3–4, 13.

²²⁷ *Id.* at 13.

²²⁸ *Id.* at 9–10.

²²⁹ *Id.* at 5–6.

²³⁰ AMIRHADJI ET AL., *supra* note 26, at 45 (quoting Interview with Thomas Stephens, Attorney, Detroit City Council Legal Department, in Detroit, Mich., (Jan. 11, 2013)).

²³¹ DETROIT WATER AND SEWERAGE DEP’T, *supra* note 222, at 8.

²³² Lyda First Am. Adversary Compl., *supra* note 128, ¶¶ 40, 43, 50, 56.

²³³ *Id.* ¶ 47.

²³⁴ *Id.* ¶ 60.

²³⁵ *Id.* ¶ 43.

²³⁶ *Id.* ¶¶ 38–45, 49–56, 59–61; *see also* Plaintiffs-Appellants’ Brief on Appeal, Lyda et al. v. City of Detroit, No. 2:15-cv-10038, ECF No. 16 at 12 (E.D. Mich. Jan. 28, 2015) (stating that shut-offs included “households with medically fragile members with no apparent explanation of rights to a temporary medical hold on the account without payment and with a medical verification”).

²³⁷ Lyda First Am. Adversary Compl., *supra* note 128, ¶¶ 37, 39, 45, 50, 53, 58.

required that they spend more than twenty percent of their monthly income on their water bills.²³⁸

At the Temporary Restraining Order hearing, the Director of DWSD testified that the utility no longer adheres to some of the requirements set forth in its own rules, including the in-person visit prior to termination and the practice of ensuring that no one in the home suffers from a serious medical condition.²³⁹ As a result, DWSD's actions cannot be dismissed as simply the actions of subordinate, non-policymaking employees who are acting contrary to official policies.²⁴⁰

Arguably, the DWSD rules could be interpreted as providing more than is required by the Constitution. For example, in a recent case from the Southern District of New York, *Manza v. Newhard*, the court determined that a pre-termination evidentiary hearing was not required prior to terminating water service²⁴¹ because the U.S. Supreme Court had decided *Memphis Light, Gas & Water after Goldberg v. Kelly*.²⁴² The *Manza* case involved a homeowner who had refused to pay his water bill because he believed that, pursuant to an ancient deed, he had a right to free water service. The Southern District of New York held that “[u]nlike the termination of welfare benefits, the decision to terminate water service, although potentially posing serious health and safety concerns, did not render Manza immediately desperate or without the resources needed to seek redress.”²⁴³ Yet that is exactly what happened to Detroit residents who were living without water access: they faced serious health concerns and potentially risked losing custody of their children, as discussed below.

The bankruptcy court found that DWSD's procedures were constitutionally adequate because, in addition to the notice on the bill itself, “a customer receives a shut-off notice advising the customer that the customer's water service is subject to termination.”²⁴⁴ However, the complaint specifically alleged that the plaintiffs and other similarly situated persons did not receive

²³⁸ *Id.* ¶¶ 54, 56.

²³⁹ Lyda Evidentiary Hearing, *supra* note 21, at 93–94.

²⁴⁰ *Cf. Mansfield Apartment Owners Ass'n*, 988 F.2d at 1475 (finding that “the City is not liable for the conduct of its non-policymaking employees who act contrary to the policies of the City. Consequently, plaintiffs are bound by the procedures set forth in the City's Rules and Water Regulations”).

²⁴¹ *Manza*, 915 F. Supp. 2d at 648–50.

²⁴² *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970) (holding that, before the government could terminate welfare benefits, an evidentiary hearing was required).

²⁴³ *Manza*, 915 F. Supp. 2d at 649.

²⁴⁴ Lyda Supplemental Opinion, *supra* note 5, at 14.

the final shutoff notices.²⁴⁵ The court should have based its assessment on DWSD's actions—not its stated policy.²⁴⁶

Although the court did not address the plaintiffs' non-bankruptcy and non-constitutional law claims, the claim of estoppel²⁴⁷—i.e. that DWSD should be estopped from suddenly changing its practices—is vitally intertwined with the allegations of due process violations. Because DWSD did not enforce its collection policy and instead relied on tax liens, many residents had no incentive to dispute their bills. However, DWSD only allows customers to dispute the bill received the prior quarter (or month). Thus, if a bill is not disputed immediately, there is no way to challenge it at a later date. As a result, many customers now have astronomical bills. In other words, because of the change in policy, there was an even higher risk of erroneous deprivation, which merited more procedural safeguards.

If the court had considered the plaintiffs' allegations in light of DWSD's Interim Collection Rules and Procedures, it would have discovered that the complaint sufficiently alleged due process violations in regards to the manner in which the water was terminated. Proper notice of an impending shutoff would have provided residents with additional time to develop a back-up plan for living without water service (such as by relying on family and neighbors) or to cobble together the necessary funds to enter into a payment plan.

C. Substantive Due Process

The bankruptcy court correctly stated that “there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages.”²⁴⁸ The general outrage at the Detroit water shutoffs, in addition to other water crises around the nation, such as the Flint water lead poisoning epidemic,²⁴⁹ suggests that many people perceive access to water for essential needs as a right. An examination of how access to water

²⁴⁵ Lyda First Am. Adversary Compl., *supra* note 128, ¶ 67.

²⁴⁶ See *Brown v. City of Barre*, 878 F. Supp. 2d 469, 495 (D. Vt. 2012) (finding that “the City cannot rely on Vermont’s Disconnect Statute for procedural due process when it does not follow many of its mandatory requirements”). In *Brown*, the court “examine[d] the City’s Ordinance and the City’s actual practices and policies, independent of Vermont’s Disconnect Statute, to determine whether they afford[ed] Plaintiffs with procedural due process.” *Id.*

²⁴⁷ Lyda First Am. Adversary Compl., *supra* note 128, ¶ 134 (“Because it was the policy of the City of Detroit to allow the accumulation of large unpaid water bills without shut-offs, the City of Detroit should be estopped from suddenly and without warning changing its policy, when this change in policy is resulting in hardship to the residents of the City of Detroit who are having their water shut-off without notice or recourse.”).

²⁴⁸ Lyda Supplemental Opinion, *supra* note 5, at 15.

²⁴⁹ In November 2015, residents of Flint, Michigan who used municipal water contaminated with lead filed a class action lawsuit against local and state officials alleging violations of § 1983 and the Due Process Clause. *Mays et al. v. Snyder et al.*, No. 2:15-cv-14002-JCO-MKM (E.D. Mich. Nov. 13, 2015).

could implicate substantive due process provides further support for the idea that access to affordable residential water has acquired “near-constitutional sturdiness,”²⁵⁰ and thus, should be characterized as a constitutive commitment deserving of legislative protection.

Establishing that a substantive due process right to affordable water should exist is essentially a theoretical exercise. Under our existing jurisprudence, the assertion of any substantive due process claim—let alone a “positive” economic and social right²⁵¹—is an “uphill battle.”²⁵² Substantive due process “provides heightened protection against government interference with certain fundamental rights and liberty interests.”²⁵³ It “bars certain arbitrary, wrongful actions ‘regardless of the fairness of the procedures used to implement them.’”²⁵⁴

Although some courts have found substantive due process applicable when water service to a household has been conditioned on third-party debts, no case law supports the idea that residents are entitled to water at a price that they can afford. The most helpful jurisprudence is from the Fifth Circuit, which held that a city violated due process when it refused to provide new tenants with water service because prior unrelated tenants had outstanding debts.²⁵⁵ In that instance, however, the tenants seeking water access were not personally liable for the outstanding water debts.²⁵⁶ Moreover, other courts have found that substantive due process is not violated when a landlord is held accountable for water debts incurred by prior tenants.²⁵⁷

²⁵⁰ SUNSTEIN, *supra* note 2, at 63.

²⁵¹ See *id.* at 105–08, 197–202 (discussing historical reasons why the United States never adopted economic and social rights and the differences between so-called “negative” and “positive” rights).

²⁵² Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO LAW REVIEW* 1501, 1502, 1506 (1998–99) (explaining that the U.S. Supreme Court initially used substantive due process to strike down economic regulation in the early part of the twentieth century, but that “after 1937, the Court backed away from substantive due process in all of its forms, economic and otherwise”).

²⁵³ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted).

²⁵⁴ *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

²⁵⁵ *Davis v. Weir*, 497 F.2d 139, 144–45 (5th Cir. 1974) (holding that classifying water service applicants according to those whose residence is encumbered with a pre-existing debt, and those whose address is not so encumbered, violates the Due Process and Equal Protection Clauses). The Ninth Circuit adopted the *Davis* court’s rationale, but did so under the Equal Protection Clause; it declined to consider the due process argument. *O’Neal v. City of Seattle*, 66 F.3d 1064, 1068 (9th Cir. 1995) (applying rational basis review to an equal protection claim and determining that a city’s policy of “[r]efusing a new tenant water service because of the debt of an unrelated prior tenant is illogical”).

²⁵⁶ See *Davis*, 497 F.2d at 144.

²⁵⁷ See, e.g., *Mansfield Apartment Owners Ass’n*, 988 F.2d 1469 at 1478 (holding that the defendant city’s policy of holding landlords liable for delinquent water bills of their tenants did not violate procedural or substantive due process); *Chatham v. Jackson*, 613 F.2d 73, 78–79 (5th Cir. 1980) (holding that substantive due process was not violated by a municipal practice of termi-

The need for national legislation to ensure affordable water access is underscored by the rationale adopted by the Third and Sixth Circuits, which have held that substantive due process does not apply to the provision of water and sewer services because they are not federally protected rights.²⁵⁸ While the expectation of receiving water and sewer services rises to the level of a property interest such that procedural due process protections may apply, courts have found that this “does not transform the expectation into a substantive guarantee against the state in any circumstance.”²⁵⁹

Despite the fact that these legal hurdles exist in practice, there is value in examining how access to household water services *could* implicate substantive due process. This analysis seeks to demonstrate that a strong normative basis exists for national legislation to ensure that everyone has access to at least a basic amount of water necessary for survival. This section takes up this challenge by exploring how access to household water for basic needs is tied to the right to life and the fundamental right to family interests under the Due Process Clause, each of which is discussed in turn.²⁶⁰

History is a critical guide for understanding the contours of substantive due process.²⁶¹ The Supreme Court has held that we must first assess whether the newly asserted right is “so rooted in the traditions and conscience of our people as to be ranked as fundamental”²⁶² and “implicit in the concept of ordered liberty,”²⁶³ such that “neither liberty nor justice would exist if they were

nating water service to the landlord when the tenant's bills were delinquent); *Dunbar v. City of N.Y.*, 251 U.S. 516, 516–18 (1920) (holding that a landlord's substantive due process rights were not violated by enforcement of a lien against a landlord for a tenant's delinquent water bills).

²⁵⁸ *Mansfield Apartment Owners Ass'n*, 988 F.2d at 1476–77 (“Therefore, we reject the claim that conditioning the receipt of water and sewer service on the satisfaction of past due charges for services rendered to the applicant's residence raises the question of a substantive due process violation.”); *Ransom v. Marrazzo*, 848 F.2d 398, 411–12 (3d Cir. 1988) (disagreeing with an earlier district court opinion, *Koger v. Guarino*, 412 F. Supp. at 1375, 1386 (E.D. P.A. 1976), that had determined that the policy of requiring a tenant to pay a landlord's delinquent water bills in order to avoid termination of water service violated substantive due process). The Sixth Circuit further observed that “even if we were to find that a substantive due process right has been implicated, there has been no deprivation of that right in this case. Substantive due process would require only that the defendants show that its scheme is rationally related to the asserted legitimate governmental purpose of maintaining a financially stable municipal entity.” *Mansfield Apartment Owners Ass'n*, 988 F.2d at 1477 (citations omitted).

²⁵⁹ *Ransom*, 848 F.2d at 409, 412 (holding that utility service was a property interest, but that procedural due process claims were mooted by the city's recent adoption of new rules); see also *Mansfield Apartment Owners Ass'n*, 988 F.2d at 1476–77 (citing *Ransom*, 848 F.2d at 411–12).

²⁶⁰ While household water access is certainly a property interest that gives rise to procedural due process protections, it does not necessarily implicate substantive due process.

²⁶¹ *Glucksberg*, 521 U.S. at 720–21 (citations omitted) (noting that the court has “regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation's history and tradition’” (quoting *Moore v. East Cleveland*, 431 U.S., 494, 503 (1977) (plurality opinion))).

²⁶² *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

²⁶³ *Palko v. Connecticut*, 302 U.S. 319 (1937).

sacrificed.”²⁶⁴ Moreover, the fundamental liberty interest must be carefully described.²⁶⁵ The Supreme Court has also expressed its reluctance to expand the concept of substantive due process in such a way that it places “the matter outside the arena of public debate and legislative action.”²⁶⁶ Yet, at the same time, it has held that the Due Process Clause is “the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.”²⁶⁷

1. Right to Life

Substantive due process *could* be implicated simply because a minimum amount of water is so essential for life that withholding it amounts to a deprivation of life. This minimum amount includes water for drinking, hygiene, and sanitation, which is critical for disease control. The Supreme Court has observed that “[u]tility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.”²⁶⁸ In fact, the provision of piped water to people’s homes and of sewers rinsed by water was voted to be “the most important medical milestone since 1840” in a 2007 poll.²⁶⁹ In this respect, access to a sufficient amount of water for drinking, hygiene, and sanitation could be characterized as a fundamental right.

A reliable source of water has been essential to all civilizations throughout history, including in the founding of the United States.²⁷⁰ The origin of one of America’s first cities, Boston, is closely tied to water, with Puritan settlers deciding to reside there because fresh water was easily accessible.²⁷¹ However, inadequate sanitation polluted the water and led to disease outbreaks.²⁷² The best quality water from Jamaica Pond was sold to those who

²⁶⁴ *Id.* at 326.

²⁶⁵ *Glucksberg*, 521 U.S. at 721.

²⁶⁶ *Id.* at 720 (“We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” (quoting *Collins v. Harker Heights*, 503 U.S., 115, 125 (1992))).

²⁶⁷ *Griffin v. Illinois*, 351 U.S. 12, 20–21 (1956); see also *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153, 165 (6th Cir. 1973) (citing *Griffin* in analyzing an issue involving utility shut-offs).

²⁶⁸ *Memphis Light, Gas & Water Div.*, 436 U.S. at 18.

²⁶⁹ Annabel Ferriman, *BMJ Readers Choose the “Sanitary Revolution” as Greatest Medical Advance Since 1840*, 334 *BMJ* 111, 111 (2007) (noting that the “sanitation revolution” won over other significant medical advances, including antibiotics, anesthesia, vaccines, and the discovery of DNA).

²⁷⁰ See generally JAMES SALZMAN, *DRINKING WATER: A HISTORY* 10 (2012).

²⁷¹ *The History of Water in Boston*, *supra* note 15.

²⁷² ERIC JAY DOLIN, *POLITICAL WATERS: THE LONG, DIRTY, CONTENTIOUS, INCREDIBLY EXPENSIVE BUT EVENTUALLY TRIUMPHANT HISTORY OF BOSTON HARBOR—A UNIQUE ENVIRONMENTAL SUCCESS STORY* 11–13 (2004).

could afford it, but that was not a viable solution for the rest of the city.²⁷³ Thus, when Boston began piping drinking water into the city from a reservoir created in western Massachusetts in 1848, residents celebrated with grand festivities on the Boston Common.²⁷⁴ The expansion of the western part of the United States is similarly tied to water, but the recent droughts on the West Coast have highlighted the vulnerability of these communities.²⁷⁵ There have also been calls to rethink continued expansion of California, with some even suggesting that it may be time to depopulate the region due to the current strain on resources, in particular water.²⁷⁶ Water is an overlooked part of our history because, until recently, we have been able to take it for granted.

The recent economic water crisis in a water-rich area like Detroit and the drought in California highlight an often-overlooked fact: the founding and success of the United States has been intimately tied to water. In other words, water is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²⁷⁷ Moreover, beyond its necessity for survival, water is critical to many of our traditions, whether they be religious (i.e. baptismal water), recreational (i.e. swimming), industrial (i.e. water is critical for many manufacturing processes), or consumptive (i.e. agriculture depends on water). Steps have also been taken to ensure that children have access to sufficient water, with many states mandating that drinking water be made freely available in schools.²⁷⁸ In addition, the federal Healthy, Hunger-Free Kids Act of 2010 amended the National School Lunch Act to require that participating schools provide water to children for free, further underscoring the critical importance of access to water in our society.²⁷⁹

When considering whether water is essential to liberty or justice,²⁸⁰ it is instructive to consider jurisprudence in cases brought by incarcerated individuals. Numerous federal courts have underscored that the denial of drinking water to prisoners could amount to a constitutional violation. For example, the Seventh Circuit has held that a prisoner could state a claim of “constitu-

²⁷³ *The History of Water in Boston*, *supra* note 15.

²⁷⁴ DOLIN, *supra* note 272, at 28; *The History of Water in Boston*, *supra* note 15.

²⁷⁵ Timothy Egan, *The End of California?*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/03/opinion/sunday/the-end-of-california.html> [<https://perma.cc/VZ6X-Y8WB>].

²⁷⁶ Mike Adams, *California Wake-Up Call: Extreme Drought Will Lead to Migration Exit and Real Estate Collapse*, NATURALNEWS (Aug. 22, 2014), http://www.naturalnews.com/046289_California_extreme_drought_human_migration.html [<https://perma.cc/LCW5-2B9L>].

²⁷⁷ *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503).

²⁷⁸ See, e.g., ARK. ADMIN. CODE 005.15.15-11.04 (2012) (“Drinking water via water fountains or other service receptacle should be available”); 327 IND. ADMIN. CODE 8-3.3-4 (2013) (“All school buildings and related facilities shall be supplied with safe, potable water”).

²⁷⁹ National School Lunch Act, 42 U.S.C. § 1758(a) (2012); Healthy, Hunger-Free Kids Act of 2010, 124 Stat. 3183, § 304 (codified in scattered sections of 42 U.S.C.) (“Schools . . . shall make available . . . potable water”).

²⁸⁰ See *Glucksberg*, 521 U.S. at 721.

tional magnitude” for the denial of water and/or food.²⁸¹ Specifically, the court noted that “[d]epriving a person of food for four days would impose a constitutionally significant hardship; depriving him of all liquids for four days would be far worse.”²⁸² Citing a news article by the *New Scientist* and a website entitled “How Long Can You Survive Without Water?,” the court also observed that “[a] human can be expected to survive for weeks without food, but a thirsty person deprived of water would last [only] a matter of days.”²⁸³ District courts within the Seventh Circuit have affirmed this ruling in subsequent cases.²⁸⁴

Other courts have made similar findings.²⁸⁵ For example, the Sixth Circuit has “acknowledged that inadequate access to water and toilets can violate an inmate’s Eighth Amendment rights if it continues for an extended period.”²⁸⁶ It noted that other courts “have found shorter deprivations to violate the Constitution when they lack a penological purpose.”²⁸⁷ The Ninth Circuit has also held that “inedible food and inadequate drinking water for four days” and inadequate “access to toilets to avoid soiling themselves . . . would establish deprivations sufficiently serious to satisfy the objective component of an Eighth Amendment claim.”²⁸⁸ Even the Supreme Court has found that “prolonged thirst . . . and a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation” were factors that contributed to a cred-

²⁸¹ *Atkins v. City of Chi.*, 631 F.3d 823, 830 (7th Cir. 2011) (finding allegation that prisoner was denied liquids “highly implausible” because he was given milk to drink in order to stimulate defecation of a diamond earring he had swallowed).

²⁸² *Id.* (quoting *Reed v. McBride*, 178 F.3d 849, 853–54 (7th Cir. 1999); *Foster v. Runnels*, 554 F.3d 807, 814–15 & n.5 (9th Cir. 2009); *Simmons v. Cook*, 154 F.3d 805, 808 (8th Cir. 1998)).

²⁸³ *Id.* (quoting Jessica Hamzelou, *Nil by Mouth*, 206 NEW SCIENTIST 37, 37 (Apr. 16, 2010); *How Long Can You Survive Without Water?*, SURVIVALTOPICS, www.survivaltopics.com/survival/how-long-can-you-survive-without-water/).

²⁸⁴ *See, e.g.*, *McNeal v. Ellerd*, 823 F. Supp. 627, 632 (E.D. Wis. 1993) (noting that “the Seventh Circuit has also recognized a prisoner’s basic right to adequate nutrition, and thus implicitly potable water”); *Buchanan v. Ramos*, No. 10 C 1663, 2011 WL 4383117, at *2 (N.D. Ill. Sept. 20, 2011) (“An inmate must be provided adequate shelter, food, bedding, clothing, heat, hygiene, and sanitation.”).

²⁸⁵ *See, e.g.*, *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (“Water, fire protection, air and food are necessities of life.”).

²⁸⁶ *Barker v. Goodrich*, 649 F.3d 428, 434 (6th Cir. 2011) (finding that “for no legitimate penological purpose, Barker was denied adequate access to water and a restroom, and forced to maintain an uncomfortable position for an extended period of time, subjecting him to a significant risk of wrist and arm problems, dehydration and thirst, and pain and damage to the bladder” (citation omitted)); *see also Dellis v. Corrs. Corp. of Am.*, 257 F.3d 508, 512 (6th Cir. 2001) (finding that “[p]laintiff’s deprivation of drinking water allegation states a viable Eighth Amendment claim”).

²⁸⁷ *Barker*, 649 F.3d at 434 (citing *Ort v. White*, 813 F.2d 318, 325–26 (11th Cir. 1987)) (denying a nonresistant inmate water over a short period without justification would violate the Eighth Amendment).

²⁸⁸ *Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000).

ible violation of the Eighth Amendment in a case involving other serious allegations.²⁸⁹

Access to water for basic hygiene has also been recognized as important for prisoners. Many states have regulations that set forth minimum amounts of showers that inmates are entitled to on a weekly basis.²⁹⁰ Similar regulations exist for federal pretrial inmates.²⁹¹ The Seventh Circuit has held that segregated inmates are not constitutionally entitled to take three showers per week, but implicit in the court's analysis is that some access to water on a weekly basis for basic hygiene is essential.²⁹² The segregated inmates were allowed to shower once per week and the court further determined that any inmate "who wants to keep as clean as a free person can wash himself daily, or if he wants hourly, in the sink in his cell"²⁹³ Moreover, the case did not suggest that water was not available in the toilets, thus we can assume that there was adequate water for sanitary disposal of waste.

Additionally, the key treaties codifying the laws of war to which the United States is a party also require that sufficient drinking water and access to bathing facilities be supplied to prisoners of war and other detainees.²⁹⁴ Another treaty protects "objects indispensable to the survival of the civilian population" and specifically prohibits the destruction of "drinking water installations and supplies and irrigation works."²⁹⁵ In other words, even in war-time, access to water is considered essential.

²⁸⁹ *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (holding that prison guards "knowingly subject[ed] [petitioner] to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks"). Some states also have regulations mandating the number of drinking water faucets available in prisons. *See, e.g.*, 6 COLO. CODE REGS. § 1010-13:10.10 (2015) ("Drinking faucets shall be provided at a minimum ratio of one per cell block/level or in individual rooms and one in each exercise and day room.").

²⁹⁰ *See, e.g.*, ALASKA ADMIN. CODE tit. 22, § 05.180 (2015) ("Shower and bathing facilities must be made available at least three times weekly"); CAL. CODE REGS. tit. 15, § 1266 (2015) ("Inmates shall be permitted to shower/bathe . . . at least every other day or more often if possible.").

²⁹¹ 28 C.F.R. § 551.103(g)(3) (2015) ("Staff . . . shall establish procedures for admitting a pretrial inmate which include, but are not limited to . . . [o]pportunity for shower and hair care").

²⁹² *See Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988).

²⁹³ *Id.*

²⁹⁴ Geneva Convention Relative to the Treatment of Prisoners of War, arts. 20, 26, 29, and 46, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 85, 89, and 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* PIERRE THIELBÖRGER, THE RIGHT(S) TO WATER: THE MULTI-LEVEL GOVERNANCE OF A UNIQUE HUMAN RIGHT 57–58 (2013) ("International Humanitarian Law provides special protection during armed conflicts with respect to water").

²⁹⁵ Art. 54 Additional Protocol (I) to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (1977), U.N.T.S. 1125 (1979); Art. 5 and 14 Additional Protocol (II) Relating to the Protection of Victims of Non-International Armed Conflicts (1977), U.N.T.S. 1125 (1979).

Admittedly, the analogies used in this analysis are not perfect. Although water was essential to the founding of our country, so were many other things, such as adequate shelter and food, which are also not recognized as constitutional rights.²⁹⁶ Low-income residents may depend on certain forms of public assistance, but they are not completely dependent on the state in the way that incarcerated individuals are. The obligations of the state are also different in times of war than in times of peace, where there is an expectation that the average American can and should provide for him or herself.

As noted earlier, establishing that a substantive due process right to basic water services exists is an “uphill battle.”²⁹⁷ The goal of this analysis, however, is not to establish that access to affordable water is a constitutional right—it is not. Rather, the point is to show that there is a normative basis in our existing jurisprudence for finding that water is essential for life. Because water plays a unique role in our culture, history and laws, it should be treated as a constitutive commitment deserving of legislative protection.

2. Fundamental Right to Family

The denial of household water to a family with children also *could* infringe on the fundamental right to family, which is a liberty interest protected by substantive due process. When viewed under the lens of state law, the situation in Detroit highlights the importance of water to a family with children.

Like many states across the United States, children in Michigan can be removed from the home because of unsanitary conditions, including lack of water and sanitation.²⁹⁸ The definition of “child neglect” under Michigan law includes “the failure to provide adequate food, clothing, shelter, or medical care,” which would include access to water.²⁹⁹ For example, the Michigan Children Protective Services Program advises mandated reporters—such as teachers and social workers—to ask explicit questions about access to water and hygiene as part of a physical neglect inquiry.³⁰⁰ Although the Director of the Michigan Department of Health and Human Services Children’s Services Agency recently stated to the media that the agency does “not petition the

²⁹⁶ See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (“We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill.”).

²⁹⁷ *Chemerinsky*, *supra* note 252, at 1502.

²⁹⁸ MICH. COMP. LAWS § 712A.19b(3) (West 2014) (termination of parental rights is allowed for various factors, including if parent “fails to provide proper care or custody for the child” or if “the child will be harmed”); *id.* § 712A.14a (immediate removal of a child is warranted if “necessary to protect the child’s health and safety . . .”); *In re Alm*, 2009 Mich. App. LEXIS 550, at *6–7 (Mich. Ct. App. Mar. 10, 2009) (finding that termination of parental rights was proper where a home did not have critical utilities and was unsanitary).

²⁹⁹ MICH. COMP. LAWS § 722.622(i).

³⁰⁰ STATE OF MICH. DEP’T OF HUMAN SERVS, *supra* note 17, at 14–15.

court to remove a child solely for the lack of water in a family's home," a lack of water can create conditions that make the removal of children legally permissible.³⁰¹

Detroit citizens understand this risk. Several plaintiffs in the *Lyda* case sent their children to live with relatives and neighbors once their water was turned off.³⁰² A social worker also testified at the evidentiary hearing that she is often scrambling to make alternative living arrangements once a family is disconnected from water due to concerns that Child Protective Services would get involved.³⁰³

According to a report by the Georgetown Human Rights clinic, "twenty-one states define 'child neglect' in a manner that may include a parent's inability to provide water."³⁰⁴ However, a review of cases from across the United States suggests that this number is higher because of the way that even broader child neglect statutes can be interpreted.³⁰⁵ While a few states have explicit language relating to hygiene and sanitation,³⁰⁶ more states focus on a parent's ability to ensure that the child's basic needs are met.³⁰⁷ Some of these states—including Michigan—describe specific needs such as food, shelter, and medical care, which can be interpreted to encompass access to water.³⁰⁸ Many inquiries also turn on what is in the "best interests of the child"³⁰⁹ or focus on the safety and well-being of children³¹⁰—and access to water is critical to these goals. Even broad child neglect statutes have been interpreted by courts as requiring the provision of basic needs.³¹¹ Moreover, there are nu-

³⁰¹ *What Will Happen to My Kids if My Water Is Shut Off?*, *supra* note 64.

³⁰² *Lyda* First Am. Adversary Compl., *supra* note 128, ¶¶ 35, 45.

³⁰³ *Lyda* Evidentiary Hearing, *supra* note 21, at 187–88.

³⁰⁴ AMIRHADJI ET AL., *supra* note 26, at 34 n.182 (citations omitted).

³⁰⁵ *See, e.g., Adams v. Powe*, 469 So. 2d 76, 78–79 (Miss. 1985) (although the language of the child neglect statute was broad, the court stated "we would be remiss in our duties if we did not terminate the parental rights to safeguard the childrens' greater right to food, shelter, and opportunity to become useful citizens").

³⁰⁶ *See, e.g., OKLA. STAT. tit. 10A, § 1-1-105* (West Supp. 2015).

³⁰⁷ *See, e.g., ALA. CODE § 12-15-319(a)(9)* (2012). However, some statutes expressly exclude inability to provide for children if based on poverty alone. *See, e.g., KY. REV. STAT. ANN. § 625.090* (West 2014).

³⁰⁸ *See, e.g., VER. STAT. ANN. tit. 15A, § 3-504(b)(2)(C)* (2002).

³⁰⁹ *See, e.g., GA. CODE ANN. § 15-11-310(b)* (2015). The Convention on the Rights of the Child also adopts the "best interests" standard. *See* Convention on the Rights of the Child arts. 3, 9, 18, 20, 21, Nov. 20, 1989, 1577 U.N.T.S. 3 (stating in Article 3(1) that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration").

³¹⁰ *See, e.g., CONN. GEN. STAT. § 46b-129(b)* (2015).

³¹¹ *See, e.g., WIS. STAT. § 48.415(6)* (2013–2014); *In re K.C.*, WL 171854 at *1 (Wis. Ct. App. 1982) (in interpreting a broad child neglect statute, the court held that "what is 'necessary' for a child's 'health' is that which is reasonably required to prevent the child from suffering illness and injury: food, clothing, shelter . . . Children must be kept clean and must be fed regularly . . .").

merous cases involving the termination of parental rights—which is a higher bar than temporary removal of children from the home—where, among a constellation of troubling factors, the homes were filthy and had unsanitary conditions³¹² or had no access to utilities.³¹³

By failing to provide a minimum amount of water, DWSD is arguably preventing families from exercising their fundamental right to live together.³¹⁴ The Supreme Court “has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”³¹⁵ It has continually held that “the relationship between parent and child is constitutionally protected.”³¹⁶ Indeed, the right to conceive and raise one’s children has been deemed “essential,”³¹⁷ described as “far more precious . . . than property rights,”³¹⁸ and viewed as part of the “basic civil rights of man.”³¹⁹ The “custody, care and nurture of the child reside first in the parents,” and the state cannot “hinder” this “cardinal” right.³²⁰ In addition to the Due Process Clause, the Supreme Court has found support for the “integrity of the family unit” in the Equal Protection Clause and the Ninth Amendment, which protects unenumerated rights.³²¹

Conversely, this argument—that the deprivation of household water infringes on the fundamental right to family—may prove to be too much for courts to enforce. In child neglect cases, water is not treated any differently than housing, medical care, food, or other vital needs.³²² Thus, if the depriva-

³¹² See, e.g., *In re Daniel E.*, WL 2130433 at *6, 9 (Wis. Ct. App. 2008) (terminating parental rights due to unsanitary conditions and the parents’ failure to remedy the situation).

³¹³ See, e.g., *G.G.N. v. State Dep’t of Human Res.*, 634 So. 2d 552, 554, 556 (Ala. Civ. App. 1993) (upholding termination of parental rights because the parents had failed to maintain a sanitary environment for the children and because the heat was shut off).

³¹⁴ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 745 (1982) (finding that a parental rights termination proceeding interfered with that fundamental liberty interest); *Moore v. City of East Cleveland*, 431 U.S. 494, 495–96, 504–05 (1977) (striking down a zoning ordinance that limited occupancy of a dwelling unit to members of a narrowly defined nuclear family).

³¹⁵ *Moore*, 431 U.S. at 499 (quoting *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

³¹⁶ *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (citations omitted).

³¹⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted).

³¹⁸ *May v. Anderson*, 345 U.S. 528, 533 (1953).

³¹⁹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

³²⁰ *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

³²¹ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (arguing that the Ninth Amendment is relevant because “[t]he fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so”).

³²² See *supra* text accompanying notes 280–293.

tion of household water was found to violate the fundamental right to family, then any deficiency in the provision of basic necessities would also infringe upon this right. Perhaps the distinction is that water is usually provided through a municipal system. Once a household is disconnected from the municipal water supply, the only alternative is to purchase bottled water, which is prohibitively expensive, inconvenient, and difficult to use for bathing, flushing, cooking, and cleaning. However, the same argument could be made for other utilities, such as electricity and heat. Moreover, every denial of a government benefit, such as food stamps or public housing, could potentially be contested as a violation of the right to family. This would be a difficult argument to sustain under current constitutional jurisprudence.³²³ In addition, in some parts of the United States, households rely on private wells for water—not municipal supplies. In those instances, an interference with the water supply would not implicate the Due Process Clause unless there was some sort of state action involved.

Although it is difficult to establish that the disconnection of household water is in fact an infringement upon the fundamental right to family, the argument underscores the critical role of water in our daily lives and in child-rearing. That water is not constitutionally different from housing, food, medical care, or other utilities further suggests that water should at least have the same sort of legislative protections. National programs exist to help subsidize the costs of housing, food, medical care, and household energy for low-income populations; yet no similar program exists for water. A constitutive commitment to water demands a legislative solution to ensure that the termination of household water service does not threaten the integrity of families.

3. Describing the New Fundamental Right

The foregoing analysis establishes not that the denial of water for drinking, hygiene, and sanitation is a deprivation of the right to life or liberty, but that it has attained a near-constitutional status deserving of legislative protection. Because the substantive due process inquiry requires a “careful description” of the fundamental right, the contours of any new national program, including one establishing a right to water, need to be defined.³²⁴ In this context, it is helpful to look to international human rights law for guidance in defining the contours of the (theoretical) fundamental right to water.

³²³ See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (finding that the food stamps program classification of household members did not “‘directly and substantially’ interfere with family living arrangements and thereby burden a fundamental right” (citing *Zablocki v. Redhail*, 434 U.S. 374, 386–87 & n.12 (1978)); *Lindsey*, 405 U.S. at 74 (holding that a right to housing does not exist).

³²⁴ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The United States is not a party to the key treaty from which the human right to safe drinking water and sanitation is derived—the International Covenant on Economic, Social and Cultural Rights (ICESCR)—and this analysis is not intended to suggest that this convention is binding on the United States.³²⁵ Rather, much of the critical thinking about what constitutes an adequate amount of household water to ensure not only survival but also basic human dignity has occurred within the international human rights community, especially in recent years. As such, this body of international law serves as a useful guidepost when trying to carefully describe the nature of a right to affordable water for essential needs.

Although water is essential for survival, it was not explicitly referenced in the Universal Declaration of Human Rights or the two seminal human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)³²⁶ and the ICESCR.³²⁷ However, there is some evidence that existing articles implied a right to water;³²⁸ or alternatively, perhaps access to water was not considered a scarce resource at the time of drafting the treaties and its availability was taken for granted.³²⁹

In 2002, the committee responsible for interpreting and clarifying the provisions of the ICESCR³³⁰ issued General Comment 15, which determined that the right to water derived from the right to an adequate standard of living in Article 11 of the treaty and was inextricably related to the right to health enumerated in Article 12.³³¹ General Comment 15 defined the right to water as every person's entitlement to "sufficient, safe, acceptable, physically ac-

³²⁵ *But see* Amicus Brief in Support of the Plaintiffs-Appellants, *Lyda v. City of Detroit*, 2015 WL 5461463 (E.D. Mich. Sept. 16, 2015) (discussing the relevance of international human rights law to the *Lyda* case).

³²⁶ Scholars have argued that the "right to life" provision of the ICCPR includes the right to water because water is essential for life. *See* INGA T. WINKLER, *THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 50–55 (2012); THIELBÖRGER, *supra* note 294, at 61.

³²⁷ THIELBÖRGER, *supra* note 294, at 61; Sharmila Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy Over Privatization*, 31 *BERKELEY J. INT'L L.* 91, 91–92 (2013).

³²⁸ *See* MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 291–93 (1995).

³²⁹ WINKLER, *supra* note 326, at 42 (noting that, at the time that the Covenant was drafted, the right to water was not included most likely because "water was not perceived to be as scarce as a resource as it is today; its availability was taken for granted—water was considered to be available as freely as is the air to breathe").

³³⁰ *Id.* at 40 (noting that the Committee "does not have the authority to create new obligations, but rather interprets and clarifies the provisions of the ICESCR").

³³¹ U.N. Econ. & Soc. Council, Subcomm. on the Promotion and Prot. of Human Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 15* ¶ 2, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment 15*]; *see also* Murthy, *supra* note 327, at 100–05 (discussing the evolution of the right to water under international law).

cessible and affordable water for personal and domestic uses.”³³² In 2010, the United Nations (U.N.) General Assembly and the U.N. Human Rights Council recognized the right to safe drinking water and sanitation as a part of international human rights law.³³³

Applying the normative criteria of the human right to safe drinking water and sanitation to the U.S. context, it becomes clear that existing statutes and regulations can provide relevant context-specific content. Federal laws, such as the Safe Drinking Water Act, already regulate water quality.³³⁴ Due to variations in climate and water availability across the United States, the exact quantity of water available and accessible to households could be determined at the local level, with reference to some minimum standard. For example, the World Health Organization describes twenty liters per capita daily (lpcd) as basic access, fifty lpcd as intermediate access, and 100-200 lpcd as optimal access.³³⁵ In the United States, the average person uses about 300-380 lpcd (80-100 gallons), with the vast majority used to flush the toilet and take showers.³³⁶ However, due to drought-related water rationing, water use in California has decreased; for example, use in Santa Cruz has dropped to 167 lpcd (44 gallons).³³⁷ With respect to the normative criteria on acceptability, building codes could provide guidance in a given region. Finally, as discussed in Section IV, the Environmental Protection Agency (EPA) and numerous states already have water affordability policies and many other options exist.

Although access to an adequate amount of safe and affordable water for drinking, hygiene, and sanitation may not yet be a fundamental right under the U.S. Constitution, this analysis suggests that a strong basis exists in our

³³² *General Comment 15*, *supra* note 331, ¶ 12; *see also* Human Rights Council, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina De Albuquerque ¶¶ 15–36, U.N. Doc. A/HRC/15/31/Add.1 (July 1, 2010) (U.N. Special Rapporteur on the human right to safe drinking water and sanitation describing the five “normative criteria for good practices, namely: availability, quality/safety, acceptability, accessibility and affordability”).

³³³ Press Release, U.N. General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Rights, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions, U. N. Press Release GA/10967 (July 28, 2010), <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm> [<https://perma.cc/VC62-NKUC>]; Human Rights Council, Resolution Adopted by the Human Rights Council 15/9: Human Rights and Access to Safe Drinking Water and Sanitation at 1–2, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

³³⁴ *See* 42 U.S.C. § 300g-7 (2012).

³³⁵ WORLD HEALTH ORG., THE RIGHT TO WATER 13 (2003), <http://www.righttowater.info/wp-content/uploads/Right-to-Water.pdf> [<https://perma.cc/4CZ6-BN66>].

³³⁶ *Water Questions and Answers: How Much Water Does the Average Person Use at Home Per Day?*, U.S. GEOLOGICAL SURVEY, <http://water.usgs.gov/edu/qa-home-percapita.html> [<https://perma.cc/5T8K-YX6Q>].

³³⁷ Haeyoun Park et al., *How Has the Drought Affected California's Water Use?*, N. Y. TIMES (Apr. 1, 2015), <http://www.nytimes.com/interactive/2015/04/01/us/water-use-in-california.html> [<https://perma.cc/3WBN-P7A8>].

legal history for finding that such a right could exist. In other words, access to water for basic household needs has attained constitution-like status and this new constitutive commitment should be realized through legislation.

IV. REALIZING A CONSTITUTIVE COMMITMENT TO AFFORDABLE WATER ACCESS

Although national programs exist to help low-income households with housing, food, medical care, energy bills, and telephone (and now also broadband) access, no such program exists for water.³³⁸ Some programs exist at the state and local level, and there are strong reasons to extend these benefits to all Americans. As this article was going to press, the Environmental Protection Agency (EPA) released a new report on water customer assistance programs that underscored this point:

Many communities have decided that each resident should have the same access to clean and safe water that everyone else in the community enjoys, even if paying for the service is beyond their immediate means. It is water's special status as essential to public health that makes ensuring access more than a charitable cause.³³⁹

This section explores various policy options for creating water affordability legislation and concludes by discussing current legislative and policy efforts arising out of the events in Detroit.

A. Addressing Possible Critiques

Before launching into a discussion of the policy options that are available to make water affordable, the potential critiques of such a program need to be addressed. The first is the classic moral hazard problem: it incentivizes people to become free-riders and avoid contributing their fair share of costs. The risk of free-riding exists, but, as with any other government program, it can be structured in such a way so as to minimize this risk. Moreover, according to surveys, individuals whose water has been terminated want to pay their utility bills on time.³⁴⁰ It is often factors that occur just prior to disconnection, such as loss of work, illness, or unusually high bills, that prevent them from doing so.³⁴¹

³³⁸ NAT'L CONSUMER LAW CTR., *supra* note 18, at 12.

³³⁹ ENVTL. PROT. AGENCY, DRINKING WATER AND WASTEWATER UTILITY CUSTOMER ASSISTANCE PROGRAMS 3 (Apr. 2016), https://www.epa.gov/sites/production/files/2016-04/documents/dw-ww_utilities_cap_combined_508.pdf.

³⁴⁰ CROMWELL III ET AL., *supra* note 19, at 34–35.

³⁴¹ *Id.*

The second critique is that by charging lower-income people less money for water services, other people have to bear higher costs. However, any type of subsidy or tax break reduces the amount of public money available for other purposes. For example, if a local government incentivized a corporation to set up an office in its region by offering significant tax breaks, then there would simply be less proportional tax revenue for other programs; as a result, ordinary citizens would pay a higher proportion for other public expenditures (police, roads, etc.) than they otherwise would have paid. Moreover, contrary to popular belief, many social welfare policies benefit affluent Americans; for example, the nation's "most expensive social tax break" is the mortgage interest deduction that homeowners receive.³⁴² Very visible and deliberate cross-subsidies are easier to attack than those that are hidden in government policies, such as the tax code.³⁴³ Even in the water sector, cross-subsidies are often "buried away in the nuances of accounting and ratemaking."³⁴⁴ Rather than considering water affordability programs as "subsid[ies]," they should be considered "discount rates" similar to those offered to industrial customers.³⁴⁵

The third possible critique is that it does not make economic sense to subsidize water bills. In fact, a good business case exists for making water and wastewater services affordable.³⁴⁶ As the Water Research Foundation and the EPA noted:

When the payment troubles of chronically delinquent customers are reduced or resolved, the utility reduces a wide range of costs, ranging from the working capital associated with carrying arrears, to the bad debt associated with ultimate nonpayment, to the staff and transportation expenses associated with the credit and collection cycle.³⁴⁷

³⁴² SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 4 (2011) (coining the term "submerged state" to refer to the "conglomeration of federal policies that function by providing incentives, subsidies, or payments to private organizations or households to encourage or reimburse them for conducting activities deemed to serve a public purpose").

³⁴³ Emily Badger, *The Double-Standard of Making the Poor Prove They're Worthy of Government Benefits*, WASH. POST (Apr. 7, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/07/the-double-standard-of-making-poor-people-prove-theyre-worthy-of-government-benefits/> [https://perma.cc/9LKD-JM7J] (arguing that, because of the invisibility of government aid to more affluent Americans—such as through student loans, mortgage tax breaks, Medicare and farm subsidies—there is "less tolerance for programs that help the poor").

³⁴⁴ CROMWELL III ET AL., *supra* note 19, at 152.

³⁴⁵ NAT'L CONSUMER LAW CTR., *supra* note 18, at 32, 43.

³⁴⁶ CROMWELL III ET AL., *supra* note 19, at 42, 43, 50.

³⁴⁷ *Id.* at 69; *see also* ENVTL. PROT. AGENCY, *supra* note 339 at 4 ("Utilities can save on administrative and legal costs associated with collecting on debts, disconnection, and reconnection of water services.").

Utilities can produce more total revenue by investing in effective customer assistance programs, rather than pursuing a “relentlessly commercial one-size-fits-all approach to collections and terminations.”³⁴⁸ Over the long-term, a focus on affordability can break a “perpetual cycle of non-payment” and improve collections by the utility.³⁴⁹ As expert witness Roger Colton testified during the *Lyda* case, “it is better [for the utility] to collect 90% of a \$70.00 bill than to collect 60% of a \$100.00 bill.”³⁵⁰

The costs of inadequate access to household water, sanitation, and hygiene are also indirectly borne by society.³⁵¹ Families who struggle to pay water bills must make trade-offs with respect to other basic needs, and may forgo paying other utility bills, their rent or mortgage, medical bills, or other essential services.³⁵² Without water, people are more prone to disease and are less likely to attend school or work. Their children may be removed and their homes may be condemned. National data shows that it takes on average twenty hours for a customer to address a water disconnection, which includes talking to the utility, finding outside assistance and, in some instances, identifying a new place to live; this is especially difficult for low-wage hourly workers without paid leave.³⁵³ Society bears these costs in terms of lower economic productivity, more resources devoted to the social services system, and costs associated with evictions or foreclosures.³⁵⁴ A strong argument exists for treating basic household water access like any other public good.³⁵⁵ We collectively fund public services such as police and fire departments, street lighting, and libraries because they benefit the entire community.³⁵⁶ Similarly, it makes sense to ensure that everyone has access to sufficient water to adequately meet basic water, sanitation, and hygiene needs.

The fourth critique—that water affordability legislation would be illegal in many jurisdictions—may be a legitimate one. Many state or local laws prohibit utilities from offering any type of discount to the cost of water ser-

³⁴⁸ CROMWELL III ET AL., *supra* note 19, at 87, 91, 152.

³⁴⁹ *Id.* at 91.

³⁵⁰ *Lyda* Evidentiary Hearing, *supra* note 21, at 137.

³⁵¹ See, e.g., WORLD HEALTH ORG., GLOBAL COSTS AND BENEFITS OF DRINKING-WATER SUPPLY AND SANITATION INTERVENTIONS TO REACH THE MDG TARGET AND UNIVERSAL COVERAGE 4–5 (2012), http://www.who.int/water_sanitation_health/publications/2012/globalcosts.pdf [<https://perma.cc/Y3YK-U4UG>].

³⁵² CROMWELL III ET AL., *supra* note 19, at 27–28; NAT’L CONSUMER LAW CTR., *supra* note 18, at 11.

³⁵³ *Lyda* Evidentiary Hearing, *supra* note 21, at 139.

³⁵⁴ *Id.* at 140.

³⁵⁵ See Murthy, *supra* note 327, at 127–32 (noting that water is an “impure” public good because depending on circumstances, it exhibits characteristics of a public good and/or a private commodity).

³⁵⁶ See Detroit Free Press Editorial Bd., *OK Rate Hike, but Think Differently on Water*, DETROIT FREE PRESS (July 7, 2015, 5:39 PM), <http://www.freep.com/story/opinion/editorials/2015/07/07/water-detroit-rates/29834495/> [<https://perma.cc/9SX4-594W>].

vice provision.³⁵⁷ Utility rates are generally required to be reasonable.³⁵⁸ In general, rates cannot be unduly discriminatory, nor can they be used to subsidize one group of ratepayers over another.³⁵⁹ Because utilities often interpret these provisions as prohibiting water affordability programs, legislation specifically authorizing such assistance programs could ensure that they survive judicial scrutiny.³⁶⁰

In cases involving preferential rates to certain groups, such as low-income, elderly, or disabled individuals, state utility commissions and courts have come out on both sides. The determination depends on whether the commission or court focuses on the requirement that rates be “cost-based” or that the discounts be “unreasonable.”³⁶¹ Whether an undue preference exists for a group of customers is a fact-specific inquiry.³⁶² For example, state regulatory commissions have permitted low-income discount rates that make financial sense for the utility.³⁶³ Some states, including California, Massachusetts, New Mexico, Texas, and Washington, have enacted laws that specifically authorize, or even require, utilities to offer preferential rates for certain categories of vulnerable customers, such as low-income individuals, the elderly, and the disabled.³⁶⁴ Moreover, as the discussion of Michigan’s laws below suggest, utility rates are set with a variety of factors in mind, and laws allegedly prohibiting the consideration of affordability may not be clear-cut. As a result, there may be a way to structure water affordability programs in a way that does not run afoul of existing laws.

National legislation is needed to make this possible in every state. Water affordability policies cannot be effectively implemented unless water utilities are free to develop programs that make sound economic sense and fulfill their public health mission.

B. Policy Options

Different policy options exist for achieving the goal of safe and affordable household water access. These proposals are not mutually exclusive, and in fact, the most successful solution would probably combine several of the

³⁵⁷ CROMWELL III ET AL., *supra* note 19, at 50.

³⁵⁸ *Id.* at 93.

³⁵⁹ NAT’L CONSUMER LAW CTR., *supra* note 18, at 6; CROMWELL III ET AL., *supra* note 19, at 50, 93, 152; *see also* MICHIGAN FINANCE AUTH., *supra* note 111, at 44 (discussing Michigan law).

³⁶⁰ CROMWELL III ET AL., *supra* note 19, at xxii, 93–95, 150; NAT’L CONSUMER LAW CTR., *supra* note 21, at 6 (discussing how California passed legislation that explicitly required that water be made available at an affordable cost, which paved the way for the introduction of such programs).

³⁶¹ CROMWELL III ET AL., *supra* note 19, at xxii, at 93.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* at 93–94, 97–99; NAT’L CONSUMER LAW CTR., *supra* note 18, at 12 n.43.

options discussed. Given our federal system, national legislation could explicitly authorize differential rates to overcome potential legal objections, outline minimum criteria, and also authorize funding tied to particular outcomes, such as ensuring that no one is denied access to water for drinking, hygiene, and sanitation due to an inability to pay.³⁶⁵ However, to enable utilities to tailor their strategies to the needs and constraints of their own communities (i.e. rural versus urban or arid versus wet climates), they should be given some flexibility in the policy options available for them to implement.

1. Bill Discounts

Utilities can offer percentage or lump-sum discounts on the bills for vulnerable individuals, such as low-income households, the elderly, and the disabled.³⁶⁶ This discount can be applied to the total water bill, the fixed cost portion,³⁶⁷ or to the variable consumption charges.³⁶⁸ For example, the Boston Water and Sewer Commission offers a thirty percent discount off water bills for senior citizens and individuals with disabilities.³⁶⁹ Similarly, Seattle Public Utilities provides a fifty percent discount off water, sewer, and garbage bills to low-income customers, seniors, and adults with disabilities with incomes at or below seventy percent of the state median income.³⁷⁰

³⁶⁵ During the U.N. Special Rapporteur's visit to the U.S. in 2011, she observed that there was no federal statute or regulation mandating affordability standards for water and sanitation. See Human Rights Council, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina De Albuquerque 13, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011). In response, the U.S. stated that "a number of the issues [the report] raised may be most feasibly handled at the state or local level rather than through federal action." U.S. Statement at the HRC Dialogue on the Right to Drinking Water and Sanitation, UN Human Rights Council, 18th Sess., Geneva (Sept. 15, 2011), <https://geneva.usmission.gov/2011/09/15/u-s-statement-at-the-hrc-dialogue-on-the-right-to-drinking-water-and-sanitation/> [<https://perma.cc/5ZUL-BNFB>].

³⁶⁶ See NAT'L CONSUMER LAW CTR., *supra* note 18, at 12–14.

³⁶⁷ Many water utilities have high fixed costs due to operations and maintenance as well as capital improvements, which are allocated to all rate-payers on an equal basis. The higher the fixed costs, the less ability that low-income customers have to reduce their expenditures through water use reduction. If utilities "shifte[d] the recovery of fixed costs to the consumption charge" then households would be better able to reduce their water bills through conservation. CROMWELL III ET AL., *supra* note 19, at 54–55.

³⁶⁸ *Id.* at 51–52; NAT'L CONSUMER LAW CTR., *supra* note 18, at 14, 43.

³⁶⁹ *Discounts for Senior Citizens and Disabled Persons*, BOSTON WATER AND SEWER COMM'N, http://www.bwsc.org/SERVICES/billing_assistance/discounts.asp [<https://perma.cc/ET5C-P6EN>]; *Mayor Walsh Lays Out Plan to Build a Thriving, Healthy and Innovative Boston in State of the City Address*, CITY OF BOS. (Jan. 13, 2015), <http://www.cityofboston.gov/news/default.aspx?id=18938> [<https://perma.cc/R86E-QW3J>].

³⁷⁰ NAT'L CONSUMER LAW CTR., *supra* note 18, at 13; *Utility Discount Program*, SEATTLE.GOV (2015), <http://www.seattle.gov/light/assistance/> [<https://perma.cc/NCL8-GP3V>].

2. Lifeline and Inclining Block Tariffs

Utilities could also establish a “lifeline” rate, where water for essential needs would be free.³⁷¹ After the initial “lifeline” block of consumption, the price per 1000 gallons would increase to enable cost-recovery. The tariff could be targeted to low-income households or applied to everyone. The best known example of a universal lifeline policy is South Africa’s Free Basic Water policy, which provides each person a minimum quantity of potable water, defined nationally as twenty-five liters per capita per day, or six kiloliters per household per month.³⁷² Although the policy has been the subject of litigation³⁷³ and critiqued for not providing enough water to meet basic needs,³⁷⁴ it still represents a potential model.

In the United States, electric utilities have used lifeline rates since the 1970s and some water utilities, such as those in Los Angeles and Oregon City, have tariffs with characteristics of lifeline rates for low-income customers.³⁷⁵ The District of Columbia Water and Sewer Authority has also created a program that provides 400 cubic feet of free water to eligible low-income customers and approximately one-quarter of customers use less than this volume per month.³⁷⁶

A related idea to the lifeline tariff is the inclining block rate, under which the cost of an initial volume of water is low, the next volume of water has a higher per-unit cost, and so on.³⁷⁷ This would ensure that most households could afford enough water for basic needs,³⁷⁸ but they would pay more for discretionary water use, such as watering lawns and filling swimming pools. Inclining block tariffs are gaining traction as a way to promote conservation in water-scarce areas, and thus are increasingly referred to as “conservation rates.”³⁷⁹

³⁷¹ CROMWELL III ET AL., *supra* note 19, at 55; NAT’L CONSUMER LAW CTR., *supra* note 18, at 15.

³⁷² Government Notice (GN) R509 of 8 June 2001 (S. Afr.).

³⁷³ *Mazibuko and Others v. City of Johannesburg and Others*, 2010 (4) SA 1 (CC) (S. Afr.) at 4.

³⁷⁴ Jackie Dugard, *Civic Action and Legal Mobilisation: The Phiri Water Meters Case*, in *MOBILISING SOCIAL JUSTICE IN SOUTH AFRICA: PERSPECTIVES FROM RESEARCHERS AND PRACTITIONERS* 71, 73 n.4 (Jeff Handmaker & Remko Berkhout eds., 2010).

³⁷⁵ CROMWELL III ET AL., *supra* note 19, at 56; NAT’L CONSUMER LAW CTR., *supra* note 18, at 15.

³⁷⁶ *Customer Assistance Program*, D.C. WATER AND SEWER AUTH., https://www.dewater.com/customer-care/special_programs.cfm [https://perma.cc/4RUG-VUJV]; NAT’L CONSUMER LAW CTR., *supra* note 18 at 14.

³⁷⁷ NAT’L CONSUMER LAW CTR., *supra* note 18, at 15.

³⁷⁸ This would ideally be calculated based on per capita use within a household so as to not penalize large households.

³⁷⁹ CROMWELL III ET AL., *supra* note 19, at 56.

3. Income-Based Water Bills

Another alternative is that water bills could be tied to household income, such that a family does not spend more than a certain percentage of their budget on water bills. A guideline that has emerged in the water sector is that, in a given community, water bills should not be more than two percent, and water and wastewater bills combined should not be more than four percent, of median household income.³⁸⁰ Under the Safe Drinking Water Act, the EPA is required to determine whether proposed regulations would be affordable, which is generally defined as 2.5 percent of median household income, but in some instances is two percent.³⁸¹ Assistance programs to help customers usually become available once the affordability threshold is surpassed.³⁸² However, the EPA affordability standard has been criticized because it is determined based on median household income, and thus masks dramatic disparities in income levels within a given community.³⁸³ Median household income is approximately four times the income of families who make ends meet with the aid of public assistance programs.³⁸⁴ As a result, poor families spend a much larger proportion of their household income on water rates.³⁸⁵

To address the concerns about tying affordability thresholds to median household income, water bills could be linked to individual household income. Although this is more administratively burdensome, the strategy has been employed successfully by energy utilities.³⁸⁶ The so-called “Percentage of Income Payment Plan” (PIPP) is a rate tailored to a household’s income so that the energy utility bill does not surpass a fixed percentage of that income.³⁸⁷ Customers participating in a PIPP are often required to enroll in a

³⁸⁰ NAT’L CONSUMER LAW CTR., *supra* note 18, at 12; CROMWELL III ET AL., *supra* note 19, at 49.

³⁸¹ 42 U.S.C. § 300g-4(e)(7)(B) (2012); U.S. ENVTL. PROT. AGENCY, REPORT TO CONGRESS: SMALL SYSTEMS ARSENIC IMPLEMENTATION ISSUES 4 (2002), http://water.epa.gov/drink/info/arsenic/upload/2005_11_10_arsenic_congr_ars_mar_02.pdf [<https://perma.cc/9F7Y-5PVV>]; CROMWELL III ET AL., *supra* note 19, at 49; NAT’L CONSUMER LAW CTR., *supra* note 18, at 8 n.22.

³⁸² NAT’L CONSUMER LAW CTR., *supra* note 18, at 8; *see also* MICHIGAN FINANCE AUTH., *supra* note 111, at 44 (noting that Detroit has “affordability waivers in place with respect to certain aspects of environmental compliance to avoid excessive rate increases”).

³⁸³ U.S. CONFERENCE OF MAYORS, PUBLIC WATER COST PER HOUSEHOLD: ASSESSING FINANCIAL IMPACTS OF EPA AFFORDABILITY CRITERIA IN CALIFORNIA CITIES 3 (2014), <http://www.usmayors.org/pressreleases/uploads/2014/1202-report-watercostsCA.pdf> [<https://perma.cc/4GZF-N9QV>]; JULIET CHRISTIAN-SMITH ET AL., ASSESSING WATER AFFORDABILITY: A PILOT STUDY IN TWO REGIONS OF CALIFORNIA 2 (2013), <http://www.pacinst.org/wp-content/uploads/2013/08/assessing-water-affordability.pdf> [<https://perma.cc/9F8T-TMG7>]; NAT’L CONSUMER LAW CTR., *supra* note 18, at 8 n.22.

³⁸⁴ CROMWELL III ET AL., *supra* note 19, at 49.

³⁸⁵ NAT’L CONSUMER LAW CTR., *supra* note 18, at 9.

³⁸⁶ *Id.* at 32; CROMWELL III ET AL., *supra* note 19, at 52.

³⁸⁷ NAT’L CONSUMER LAW CTR., *supra* note 18, at 32; CROMWELL III ET AL., *supra* note 19, at 52.

conservation program to ensure that usage does not exceed a given level.³⁸⁸ A similar strategy could be employed in the water sector.

4. Federal Block Grants to States Modeled on LIHEAP

Another policy option would be to model a water program on the Low Income Home Energy Assistance Program (LIHEAP), which is a federal grant program that helps income-eligible households with expenses associated with seasonal heating and/or cooling.³⁸⁹ After the energy crisis of the 1970s, Congress created LIHEAP in 1981 to address high heating costs.³⁹⁰ The federal government provides funding to states, which in turn provide assistance to low-income households.³⁹¹ Through LIHEAP, states can provide one-time lump-sum funding to assist with basic energy costs and “crisis” energy assistance benefits if a household is at risk of a disconnection.³⁹²

While states cannot use LIHEAP funding for water bills,³⁹³ some states, such as Massachusetts, have enacted laws related to water that are modeled on this federal program.³⁹⁴ In 2003 and in 2009, the National Drinking Water Advisory Council (NDWAC) also recommended that a Low Income Water Assistance Program (LIWAP) based on LIHEAP be implemented to assist low-income customers in small systems with high rates.³⁹⁵ Although no such act has yet been passed, a similar program for water affordability could be developed that draws on the network and information infrastructure that has been developed by LIHEAP over the last thirty years.³⁹⁶

5. Reforming Collection and Disconnection Practices

The manner in which utilities operate billing and collection practices can also have a huge impact on water affordability. Many water utilities have found that customers are more likely to pay bills in a timely manner if they receive smaller monthly bills, as opposed to quarterly bills.³⁹⁷ “Levelized bill-

³⁸⁸ CROMWELL III ET AL., *supra* note 19, at 52.

³⁸⁹ *Id.* at 61.

³⁹⁰ CAMPAIGN FOR HOME ENERGY ASSISTANCE, INVESTING IN LIHEAP: WHY ENERGY ASSISTANCE IS MORE IMPORTANT THAN EVER 5 (2014), http://liheap.org/cms/assets/uploads/2014/06/Investing_in_LIHEAP_2014.pdf [<https://perma.cc/8LA3-K44T>].

³⁹¹ *LIHEAP Q & As for Consumers*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Jan. 19, 2016), <http://www.acf.hhs.gov/programs/ocs/resource/consumer-frequently-asked-questions> [<https://perma.cc/2NZL-UCXY>].

³⁹² CROMWELL III ET AL., *supra* note 19, at 61.

³⁹³ *Id.*

³⁹⁴ MASS. GEN. LAWS. ch. 23B, § 24B (2014); 220 MASS CODE REGS. § 25.03 (2015) (setting forth requirements of the “[l]ow-income sewer and water assistance program”).

³⁹⁵ NAT’L CONSUMER LAW CTR., *supra* note 18, at 37.

³⁹⁶ CROMWELL III ET AL., *supra* note 19, at 152.

³⁹⁷ *Id.* at 45; NAT’L CONSUMER LAW CTR., *supra* note 18, at 15.

ing,” in which customers receive an equal bill each month reflecting an average of yearly usage, can also help low-income households budget.³⁹⁸ Some energy utilities allow customers to choose their billing date to allow it to coincide with their receipt of income, which is an innovation that could be applied to the water sector.³⁹⁹ Such an approach could enhance revenue collection and produce better business outcomes for the utility.⁴⁰⁰

Design of payment plans and accrual of penalties also need to be carefully considered to help delinquent customers successfully maintain their payments and water service. Most regulations require that utilities develop reasonable payment plans, and as part of the “reasonableness” analysis, to consider the amount of the unpaid bill, the length of time it has been outstanding, the underlying reason for the arrearage, and the ability of the customer to pay.⁴⁰¹ In other words, payment plans should not be one-size-fits-all, but rather should be made on a case-by-case basis.⁴⁰² In most instances, they should be spread out over an extended time period, allowing for smaller, more frequent payments.⁴⁰³ Flexibility is also crucial because many low-income households experience changes to household income on a more frequent basis than those in higher income brackets. If a customer defaults on a payment plan, utilities should be willing to renegotiate the terms of the agreement.⁴⁰⁴

Strong policy reasons exist for waiving the disconnection, reconnection, and late payment fees that low-income customers accrue when they fall behind on their water bills. These fees are counterproductive to helping payment-troubled customers get back on track with their bills and remain connected to the water system.⁴⁰⁵ For these reasons, some states have enacted laws that exempt customers facing hardship from utility late fees.⁴⁰⁶ Following the example set in the energy sector, water utilities could also promote

³⁹⁸ CROMWELL III ET AL., *supra* note 22, at 45–46 (discussing benefits of levelized billing and its predictability, but also potential drawbacks, such as reducing “the price signal that customers receive during peak demand season” (citation omitted)); NAT’L CONSUMER LAW CTR., *supra* note 18, at 16.

³⁹⁹ NAT’L CONSUMER LAW CTR., *supra* note 18, at 36 (discussing policies of Oregon and Arkansas utilities commissions, as well as those of utilities in California, Wisconsin, and Pennsylvania).

⁴⁰⁰ CROMWELL III ET AL., *supra* note 19, at xxii, 150.

⁴⁰¹ *Id.* at 73, 94–5; NAT’L CONSUMER LAW CTR., *supra* note 18, at 34.

⁴⁰² CROMWELL III ET AL., *supra* note 19, at 73.

⁴⁰³ NAT’L CONSUMER LAW CTR., *supra* note 18, at 16.

⁴⁰⁴ CROMWELL III ET AL., *supra* note 19, at 76; NAT’L CONSUMER LAW CTR., *supra* note 18, at 34.

⁴⁰⁵ CROMWELL III ET AL., *supra* note 19, at 65, 77; NAT’L CONSUMER LAW CTR., *supra* note 18, at 35.

⁴⁰⁶ CROMWELL III ET AL., *supra* note 19, at 65 (discussing policies of Ohio, Minnesota, New Hampshire, Oregon, Wisconsin, Kentucky, and South Dakota); NAT’L CONSUMER LAW CTR., *supra* note 21, at 17, 35 (citing examples from the energy sector).

affordability and incentivize repayment by writing off and forgiving a portion of the outstanding debt if a customer remains current on a payment plan.⁴⁰⁷ When combined with an affordable fixed payment plan and budget counseling, such arrearage management programs have been successfully used by gas and electric utilities in several states.⁴⁰⁸

The traditional one-size-fits-all approach to bill collection—swift action coupled with the threat of service termination—“results in wasted effort for the subgroup of customers who simply cannot pay.”⁴⁰⁹ Rather, if water utilities seek to understand the underlying causes of non-payment and develop tailored strategies in conjunction with social service organizations, they are more likely to develop a consistent revenue stream and ensure that households remain connected to critical water and wastewater services.⁴¹⁰ Best practices for water utilities emphasize the need for customer service agents who are knowledgeable not only about the utility’s own programs, but also about other assistance programs.⁴¹¹ A utility also needs to develop a strategy for communicating the services available and be mindful of potential barriers to reaching vulnerable populations.⁴¹²

Although there are additional administrative expenses associated with providing these services, “[c]osts can be mitigated by reduced arrearage carrying costs, uncollectibles, and bad debt; reduced termination and reconnection costs; reduced costs of establishing new payment plans; reduced costs of collection and termination activities and notices; and reduced administrative and regulatory costs of resolving bill disputes and other complaints.”⁴¹³

6. Shutoff Protection for Vulnerable Populations

Sound policy reasons exist for protecting certain vulnerable populations from shutoffs even in the face of non-payment. Recognizing this, some states already have special protections in place for households with at-risk individuals. For example, in Massachusetts, electric, gas, and private water companies subject to state regulation cannot terminate or refuse to restore utility service because of financial hardship if “[i]t is certified to the company:

1. That the customer or someone living in the customer’s home is seriously ill; or

⁴⁰⁷ CROMWELL III ET AL., *supra* note 19, at 73, 78–80; NAT’L CONSUMER LAW CTR., *supra* note 18, at 32–33.

⁴⁰⁸ NAT’L CONSUMER LAW CTR., *supra* note 18 at 32–33 (discussing examples from Massachusetts, Pennsylvania, and Washington).

⁴⁰⁹ CROMWELL III ET AL., *supra* note 19 at 33, 87–91.

⁴¹⁰ *Id.* at 149–50.

⁴¹¹ *Id.* at 59–61, 101–03; NAT’L CONSUMER LAW CTR., *supra* note 18, at 18.

⁴¹² CROMWELL III ET AL., *supra* note 19, at 109–32.

⁴¹³ NAT’L CONSUMER LAW CTR., *supra* note 18, at 33–34.

2. That there is domiciled in the home of the customer a child under 12 months of age; or
3. Between November 15th and March 15th that the customer's service provides heat or operates the heating system and that the service has not been shut off for nonpayment before November 15th; or
4. That all adults domiciled in the home are age 65 or older and a minor resides in the home⁴¹⁴

While the Massachusetts regulations are a good start, they do not go far enough. As already discussed above, in many states children can be removed from their homes if their homes lack access to household water and sanitation. Households with elderly or disabled individuals tend to be disproportionately impacted by water shutoffs because they live on fixed incomes and/or are unable to address complicated billing procedures.⁴¹⁵ Programs such as Social Security Insurance and Supplemental Security Income exist because of recognition that certain groups of people need additional support. Similarly, legislation should be enacted that protects households with minor children, elderly individuals, disabled individuals, and individuals with serious medical illnesses from water disconnections.

7. Increasing Subsidies and Low-cost Loans to Utilities

The provision of more federal and state subsidies and interest-free or low-interest loans to municipal utilities would also help address water affordability by reducing reliance on bonds and other forms of market-based financing. Although municipal bonds can be issued on terms favorable to the city, there is inherent risk, sometimes with disastrous consequences, as illustrated by the calamitous interest rate swap entered into by the Detroit Water and Sewerage Department (DWSD).⁴¹⁶ Some efforts have been made to expand financing for water utilities. In 2012, the Clean Water Affordability Act was introduced in the Senate in order to authorize the EPA to make grants to help municipalities or regional authorities address problems associated with combined sewer overflows and sanitary sewer overflows.⁴¹⁷ Although the bill was

⁴¹⁴ 220 MASS. CODE REGS. §§ 25.01(2), 25.03(1) (2015); *see also* Charlie Harak, *Special Protections Against Shut-offs*, MASSLEGALHELP (Jan. 2014), <http://www.masslegalhelp.org/special-protections-against-shut-offs> [<https://perma.cc/83QL-QRWV>] (explaining the "special protections" against electric, gas, water, and telephone shut-offs available to Massachusetts customers).

⁴¹⁵ CROMWELL III ET AL., *supra* note 19, at 36.

⁴¹⁶ *See supra* Section I.B.

⁴¹⁷ Clean Water Affordability Act of 2012, S. 2094, 112th Cong. (2012), GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s2094> [<https://perma.cc/JLD2-PLA5>]; *Summary of S.*

unsuccessful, the need for greater financial assistance is beginning to be recognized.

Despite the fact that greater financing for utilities would avoid legal concerns about setting differential rates, it would not necessarily be the most targeted use of public funding because the subsidy would benefit even those in a position to afford higher rates.⁴¹⁸ For example, the Congressional Budget Office has observed that “[f]ederal aid to households could address distributional objectives with more precision and less loss of efficiency than can be achieved from aid for investment in water systems.”⁴¹⁹

8. Human Right to Water Legislation

Finally, the United States could follow the lead of California and enact legislation that codifies the human right to water, which as discussed previously, can be interpreted in a way that is consistent with substantive due process. In 2012, California enacted Assembly Bill 685, which recognizes that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”⁴²⁰ It directs state agencies to consider the human right to water when “revising, adopting, or establishing policies, regulations, and grant criteria” that impact water used for domestic purposes.⁴²¹ In other words, agencies must consider how their actions affect access to safe and affordable household water.⁴²² The act builds on section 739.8 of the California Public Utilities Code, which states that “access to an adequate supply of healthful water is a basic necessity of human life, and shall be made available to all residents of California at an affordable cost.”⁴²³ It also provides authority to “implement programs to provide rate relief for low-income ratepayers.”⁴²⁴ Given the current political climate, it is unlikely that legislation recognizing a human right to water would be passed at the national level, but it may be possible for individual

2094 (112th): *Clean Water Affordability Act of 2012*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s2094/summary#> [<https://perma.cc/6R5Y-JKQN>] (last visited Aug 4, 2015).

⁴¹⁸ NAT’L CONSUMER LAW CTR., *supra* note 18, at 37 (quoting the National Drinking Water Advisory Council stating: “When a water system is subsidized, all ratepayers benefit from taxpayer support, even those who are not low income.”).

⁴¹⁹ *Id.* (citing CONG. BUDGET OFFICE, *FUTURE INVESTMENT IN DRINKING WATER AND WASTEWATER INFRASTRUCTURE* 42–43 (Nov. 2002), <https://www.cbo.gov/sites/default/files/107th-congress-2001-2002/reports/11-18-watersystems.pdf> [<https://perma.cc/RF9D-THYB>]).

⁴²⁰ AB 685, ch. 524, 2012 Cal. Stat. 91 (codified at CAL. WATER CODE § 106.3 (West 2012)).

⁴²¹ *Id.*

⁴²² INT’L HUMAN RIGHTS LAW CLINIC, UNIV. OF CALIFORNIA, BERKELEY, SCHOOL OF LAW, *THE HUMAN RIGHT TO WATER BILL IN CALIFORNIA 2* (May 2013), https://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL%281%29.pdf [<https://perma.cc/4HY9-QHRJ>].

⁴²³ CAL. PUB. UTIL. CODE § 739.8(a) (West 2004); NAT’L CONSUMER LAW CTR., *supra* note 18, at 6.

⁴²⁴ CAL. PUB. UTIL. CODE § 739.8(b); NAT’L CONSUMER LAW CTR., *supra* note 18, at 6.

states to follow California's lead and incorporate a human right to water in their legislation.

C. Current Legislative Efforts Arising out of Events in Detroit

The events in Detroit and in other parts of the nation, such as Flint, have been a wake-up call to legislators. Although, as previously discussed, the bankruptcy court failed to recognize the right to water as a constitutionally protected right, the case has helped to initiate discussions about the status of the right to water and the role of legislatures in protecting affordable access to water as a basic human need. Policy-makers at the local, state, and national level have since taken steps towards ensuring access to water for drinking, sanitation, and hygiene.

1. Detroit's Response to the Water Affordability Crisis

Efforts to address water affordability in Detroit have continued to evolve. This section outlines the key initiatives that have been launched in the last few years, starting with the "10-point plan" created by the mayor's office at the start of the *Lyda* litigation and concluding with the new Water Residential Assistance Program (WRAP) developed by the Great Lakes Water Authority (GLWA).

a. The Mayor's 10-point plan

As the Detroit water shutoffs were gaining national attention, the bankruptcy court put pressure on the DWSD to develop a solution.⁴²⁵ At a hearing on July 15, 2014, Judge Rhodes told Deputy Director Darryl Latimer that "[t]here is much more you can do, and I encourage you to work with community leaders to come up with a whole list of initiatives to resolve this problem."⁴²⁶ After regaining control over DWSD from the Emergency Manager, DWSD halted shutoffs for fifteen days in order to develop a plan.⁴²⁷ The moratorium was announced on July 21, 2014, the same day that the *Lyda* complaint was filed.⁴²⁸ DWSD extended this initial moratorium for several more weeks until August 25, 2014 to allow itself more time to develop and

⁴²⁵ Semuels, *supra* note 220 ("It wasn't until Detroit bankruptcy Judge Steven Rhodes addressed the shut-offs that the city responded to the complaints.").

⁴²⁶ Zenobia Jeffries, *Detroit Water Department Places 15-Day Moratorium on Shutoffs*, NEW AMERICA MEDIA (July 23, 2014), <http://newamericamedia.org/2014/07/detroit-water-department-places-15-day-moratorium-on-shutoffs.php> [<https://perma.cc/Y83W-XJQZ>].

⁴²⁷ *Id.*; Thuman, *supra* note 48.

⁴²⁸ Snavely & Helms, *supra* note 49.

implement a new water assistance plan.⁴²⁹ Detroit Mayor Mike Duggan unveiled the “10-Point Plan” in early August 2014, which was discussed by the *Lyda* court and is still partially in effect today.⁴³⁰ It has since been complemented by the launch of the Water Residential Assistance Program in March 2016, which applies to customers living at or below 150% of the poverty line and which is discussed below.

Under the 10-point plan, DWSD expanded its customer service operations, which were previously described as “unacceptable” by local officials,⁴³¹ and altered its approach to provide greater notification to those who were facing water terminations.⁴³² Water bills were changed to more clearly explain a customer’s status and include information about assistance programs. Additionally, one week prior to a scheduled termination of water service, a worker had to hand-deliver a notice of termination to the home.⁴³³ DWSD also simplified the process of getting on a payment plan by only requiring one form of valid state identification, suggesting that the prior process was rather cumbersome.⁴³⁴ During the summer 2014 moratorium on water shutoffs, DWSD held several “water affordability fairs” to encourage residents to enter into payment plans. In addition, it waived water re-connection fees and late payment fees during the moratorium.⁴³⁵

A key feature of the 10-point plan was the “DWSD 10/30/50 Payment Plan.”⁴³⁶ Customers could enter into a two-year payment plan by putting down ten percent of the overdue balance, instead of thirty percent, as had been previously required.⁴³⁷ However, if customers missed a payment, the payment plan would expire. Customers could only enter into a second payment plan if they put down thirty percent of the outstanding amount.⁴³⁸ If they missed a payment again, they were only eligible to enter into a third payment plan if they could make a down payment of fifty percent of the past-

⁴²⁹ Press Release, City of Detroit, Mayor and DWSD to Release Full Plan on Water Shutoffs Thursday (Aug. 7, 2014), <http://www.detroitmi.gov/News/ArticleID/276/Mayor-DWSD-Announce-10-point-Plan-to-Help-Residents-Stay-Current-on-Their-Water-Bills> [<https://perma.cc/ZP4G-5WQX>]; Snively & Helms, *supra* note 49 (noting that the initial shut-off period was for fifteen days and thus would have ended by the first week of August 2014).

⁴³⁰ Guillen, *supra* note 75.

⁴³¹ *Id.*

⁴³² *Id.*; *10-Point Plan*, *supra* note 221.

⁴³³ *10-Point Plan*, *supra* note 221; Guillen, *supra* note 75 (showing a photo of the shutoff notice that DWSD will hang on peoples’ doors prior to water service termination).

⁴³⁴ City of Detroit, *supra* note 429.

⁴³⁵ *10-Point Plan*, *supra* note 221; City of Detroit, *supra* note 429.

⁴³⁶ *10-Point Plan*, *supra* note 221; *10/30/50 Plan*, DETROIT WATER AND SEWERAGE DEP’T, http://detroitmi.gov/Portals/0/docs/DWSD/DWSD_PlanFlyer.pdf [<https://perma.cc/24AK-D977>].

⁴³⁷ See *10/30/50 Plan*, *supra* note 436.

⁴³⁸ *Id.*

due balance.⁴³⁹ If customers missed a payment again (i.e. more than two times), they would no longer be eligible to participate.⁴⁴⁰

Until the creation of WRAP in March 2016, low-income customers who paid down ten percent of their outstanding bill and entered into a payment plan were then eligible to receive up to twenty-five percent assistance with their bill from the newly created Detroit Water Fund, subject to funding availability.⁴⁴¹ To be eligible, customers had to have an outstanding balance between \$300 and \$1000, had to maintain average water usage for their household size, and had to either be below 150 percent of the federal poverty line or be enrolled in the local LIHEAP program.⁴⁴² In addition, DWSD established relationships with other social service providers to help those who did not qualify under the 10-point plan.

Although the 10/30/50 Payment Plan was a step in the right direction, the data suggested that, by itself, it was simply not working. According to numbers reported by DWSD in the spring of 2015, of the 24,743 customers enrolled in a payment plan, 24,450 were at least sixty days behind on their payments, meaning that they were at risk of water disconnections.⁴⁴³ In other words, only about 300 households, or approximately one percent of the group enrolled in payment plans, had been able to adhere to the payment plan.⁴⁴⁴ The mayor's office acknowledged that the plan was not effective, which ultimately led it to support the creation of the Blue Ribbon Panel on Affordability discussed below.⁴⁴⁵

DWSD's initial approach to water affordability had elements of the policy options discussed previously. However, when assessed against the strategies on reforming billing, collection, and disconnection practices outlined previously in this Article, it is little surprise that the program failed.⁴⁴⁶ DWSD's approach to billing, repayment, and collection had largely a one-size-fits-all approach. All customers had to be able to put ten percent down and the debt had to be paid off within two years. While customers could obtain up to a twenty-five percent discount on their bills, the funding available through the Detroit Water Fund was not guaranteed. Indeed, a major concern

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* The Detroit Water Fund is administered by the United Way for Southeastern Michigan. See *Detroit Water Fund Low-Income Assistance Application*, UNITED WAY FOR SE. MICH., <https://www.aetnabetterhealth.com/michigan/assets/pdf/Events/Detroit%20Water%20Fund%20Application-United%20Way.pdf> [<https://perma.cc/7KAM-WR7C>].

⁴⁴² See *10/30/50 Plan*, *supra* note 436; *Low Income Self-Sufficiency Plan*, DTE ENERGY, <http://www.dteenergy.com/LSP> [<https://perma.cc/MP58-3U8S>].

⁴⁴³ Guyette, *supra* note 51.

⁴⁴⁴ *Id.*

⁴⁴⁵ Guillen & Helms, *supra* note 3.

⁴⁴⁶ See *supra* section IV.B.5; see also Lyda Evidentiary Hearing, *supra* note 21, at 129–32 (detailing utility expert Roger Colton's critique of the 10-point plan).

of community advocates was that it was an unreliable source of funding that depended heavily on charitable and private contributions.

DWSD offered customers the opportunity to re-enter into a payment plan if they missed payments—but on draconian terms. If low-income residents were not able to make a monthly payment due to financial stress, then how would they be able to come up with an even larger percentage of the outstanding arrears as a condition of entering into a new payment plan? The 10/30/50 model assumed that the only reason that customers missed a payment was because they did not want to pay, rather than recognizing that many simply could not pay the amount at the time it was due. As discussed previously, successful customer assistance programs are those that are flexible, with strategies tailored to the needs of individual households. In addition, the 10-point plan did not incorporate other “best practice” elements, such as arrearage forgiveness and the waiver of penalties such as late fees and reconnection fees (which were suspended temporarily during the summer 2014 moratorium).

According to a report on “Best Practices in Customer Payment Assistance Programs” funded by the Water Research Foundation and the EPA, DWSD’s initial response was a textbook case: “Too often, a utility and its governing board will respond to the negative impression of disconnection policies with some version of a customer payment assistance program, but seldom is it the comprehensive and continually improving approach advocated in this report.”⁴⁴⁷ The report argues that it is not enough for a utility to say, “‘We have a customer assistance program.’ Water utilities should aspire to be able to say, ‘We have a customer assistance program that reflects the standard of best practice in the industry and we are continually improving it.’”⁴⁴⁸ In addition to helping customers maintain access to a vital service, an effective approach to customer assistance makes business sense as it makes it more likely that customers will eventually pay their balances.⁴⁴⁹

b. The Debate Between “Assistance” and “Affordability”

Given that DWSD’s initial efforts to address water affordability through the 10/30/50 Payment Plan were insufficient, advocates and local officials have explored and debated other options. A great debate has been raging in Detroit about how a new plan can and should be structured.⁴⁵⁰ The main dispute is between “assistance” programs similar to the existing 10-point plan,

⁴⁴⁷ CROMWELL III ET AL., *supra* note 19, at 140.

⁴⁴⁸ *Id.* at xxi.

⁴⁴⁹ *Id.* at 140.

⁴⁵⁰ Curt Guyette, *Detroit’s Water Tug-of-War*, DETROIT METRO TIMES (June 3, 2015), <http://www.metrotimes.com/detroit/detroits-water-tug-of-war/Content?oid=2348110> [https://perma.cc/KH48-HKW9].

and “affordability” programs, which would base water bills on individual household income.⁴⁵¹

The mayor’s office and DWSD have taken the position that Detroit is legally unable to implement an affordability plan that charges customers different rates. Under Michigan law, municipalities that finance service provision through bonds must also ensure that the rates cover the costs of providing the service.⁴⁵² As a result, the bankruptcy court interpreted this provision as requiring municipalities “to set water rates at the reasonable cost of delivering the service,” and as prohibiting them from basing water rates on ability to pay.⁴⁵³ A DWSD subcontractor expressed the concern this way: “By state law, DWSD can only charge the cost of service, and if they implemented an affordability rate, they would be sued immediately, the next day by Oakland County and many other suburban wholesale customers.”⁴⁵⁴

The mayor’s office and DWSD have also argued that the Headlee Amendment to Michigan’s Constitution would prohibit the utility from charging differential rates because doing so would amount to an unlawful tax unless approved by voters. In 1978, Michigan amended its constitution to impose limits on state and municipal spending and to require voter approval before new taxes could be imposed.⁴⁵⁵ In *Bolt v. East Lansing*, the Supreme Court of Michigan invalidated storm water service charges on the grounds that they were improper taxes and not user fees.⁴⁵⁶

The Legislative Policy Division of the Detroit City Council issued a legal memo on October 21, 2015 that contradicted these arguments.⁴⁵⁷ It determined that a water affordability plan would not necessarily be illegal under existing Michigan law and that the “oft-claimed violation of the *Bolt* doctrine and the Headlee Amendment . . . rests on unfounded assumptions about the nature of the ratemaking process for the water and sewer systems”⁴⁵⁸ Because DWSD and the GLWA already adjust rates based on a number of factors, the Legislative Policy Division determined that “a reasonable and equitable adjustment to the rate structures in order to meet the systems’ reve-

⁴⁵¹ Guillen & Helms, *supra* note 3.

⁴⁵² MICH. COMP. LAWS § 141.121 (West 2014).

⁴⁵³ Lyda Supplemental Opinion, *supra* note 5, at 15.

⁴⁵⁴ Jeffries, *supra* note 426.

⁴⁵⁵ Matthew Clark, *Water Affordability in Detroit: A Legal Analysis*, 31 MICH. ENV. L. J. 42, 47, 55 (2013); *Budget FAQs*, MICH. STATE BUDGET OFFICE, <http://www.michigan.gov/budget/0,4538,7-157-21338-153206--F,00.html> [<https://perma.cc/CTU6-JWAV>].

⁴⁵⁶ *Bolt v. City of Lansing*, 587 N.W.2d 264, 272–73 (Mich. 1998); *see also* Clark, *supra* note 455, at 55–57 (analyzing the legality of water affordability plans under the Headlee amendment).

⁴⁵⁷ *See* Letter from David Whitaker, Dir. Legislative Policy Div. Staff, to The Honorable Detroit City Council 3 (Oct. 21, 2015), <http://www.detroitmi.gov/Portals/0/docs/Legislative%20Policy%20Reports/2015%20Report%20to%20Council/Legality%20of%20Water%20Affordability%20Plan%2010-21-2015.pdf?ver=2015-10-30-135355-663> [<https://perma.cc/AL62-5S2F>].

⁴⁵⁸ *Id.*

nue requirements for service to all customers, including those living on low incomes, would not violate any applicable legal requirement.”⁴⁵⁹

Advocates in Detroit have further argued that, without an affordability plan that ties water bills to household income,⁴⁶⁰ water will remain out of reach for many low-income residents of Detroit.⁴⁶¹ For example, many residents have already been unable to remain current with existing payment plans.⁴⁶² Moreover, funding for an assistance program would likely depend on charitable and private donations, and thus be less predictable.⁴⁶³

Concerns about water affordability have remained high in Detroit. In a divided vote, the Detroit City Council approved a 7.5% water rate increase in July 2015.⁴⁶⁴ Initially, the Council voted down the proposed rate hike.⁴⁶⁵ The mayor’s office, however, then informed the City Council that if they did not approve the rate hike, they would need to pass a new budget.⁴⁶⁶ If the city was unable to pass a balanced budget, then oversight by the state’s Financial Review Commission would also be extended.⁴⁶⁷ Moreover, the mayor’s office and DWSD expressed concern that, without the rate hike, the bond market would not have confidence that the utility would be solvent, placing the GLWA agreement at risk.⁴⁶⁸ The Council voted to reconsider the issue and ultimately approved the rate hike. However, four City Council members voted against the measure, expressing concern that DWSD had not adequately addressed concerns about affordability.⁴⁶⁹

c. Blue Ribbon Panel on Affordability

In October 2015, the City of Detroit convened the Blue Ribbon Panel on Affordability, which was comprised of national experts and local stakehold-

⁴⁵⁹ *Id.*

⁴⁶⁰ Although rates would ideally be tied to individual household income, even median income would be an improvement over the current rates. Guillen & Helms, *supra* note 3 (“Detroit’s median income, according to the most recent census figures, is \$26,325. An affordable water bill, based on the 2% standard, would be about \$526. The average Detroit water bill . . . costs \$848 annually.”).

⁴⁶¹ DETROITERS RESISTING EMERGENCY MGMT., *supra* note 124.

⁴⁶² Guyette, *supra* note 51.

⁴⁶³ DETROITERS RESISTING EMERGENCY MGMT., *supra* note 124.

⁴⁶⁴ Joe Guillen, *Detroit Council Approves 7.5% Water Rate Increase*, DETROIT FREE PRESS (July 21, 2015), <http://www.freep.com/story/news/local/2015/07/21/detroit-council-water-rate/30472377/> [https://perma.cc/DVF3-MJEP].

⁴⁶⁵ Joe Guillen & Sean Vichinsky, *Detroit Council Rejects Proposed Water Rate Hike*, DETROIT FREE PRESS (June 30, 2015), <http://www.freep.com/story/news/local/michigan/detroit/2015/06/30/detroit-water-rates/29521061/> [https://perma.cc/M6UW-V42A].

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ CITY OF DETROIT, *supra* note 118.

⁴⁶⁹ Guillen, *supra* note 464.

ers, to assess water affordability options.⁴⁷⁰ The group included Roger Colton, who, in conjunction with community organizations, authored the 2005 Detroit Water Affordability Plan, which had been adopted by the City Council but never implemented by DWSD.⁴⁷¹ In its final report issued on February 28, 2016, the Blue Ribbon Panel underscored the need for the City of Detroit to affirm that its citizens had a right to expect the city to provide water and a healthy environment, as provided by the city charter. It recognized the city's efforts thus far to provide assistance programs and argued that a strong business case exists for making water affordable. For example, in its 2016 budget, DWSD assumed that fifteen percent of its accounts, worth \$55 million, would be uncollectible. The utility also allocated an additional \$1.6 million for disconnections and other administrative costs.⁴⁷²

The Panel's recommendations were strongly influenced by the constraining legal environment in Michigan, which was considered to be "more acute . . . than in many other states."⁴⁷³ While the Panel acknowledged that there were different interpretations of the Headlee Amendment and the *Bolt v. Lansing* decision, it sought to avoid the possibility of a costly legal challenge.⁴⁷⁴ In addition to avoiding the risk of a legal battle, the other criteria used to evaluate options were: the number of households that could be reached, the extent of potential assistance in terms of durability, water resource efficiency, overall fairness, and the practicality of implementation and understanding.⁴⁷⁵

The Panel determined that a variety of measures would be needed to implement an effective water affordability program. With respect to changing the rate structure, the Panel recommended that GLWA adopt an inclining block tariff where the initial volume of water needed for basic services would be priced at a rate affordable even to low-income households.⁴⁷⁶ Although the 2005 Water Affordability Plan had recommended income-based water rates, the Panel decided not to tie tariffs to income because of concerns about the legality of such a program in Michigan.⁴⁷⁷ A lifeline tariff approach was

⁴⁷⁰ JANICE BEECHER ET AL., CITY OF DETROIT BLUE RIBBON PANEL ON AFFORDABILITY, FINAL REPORT 3 (Feb. 26, 2016), <http://www.detroitmi.gov/LinkClick.aspx?fileticket=CvRyrRYtH2c%3d&portalid=0> [https://perma.cc/89PL-47YY]; *Blue Ribbon Panel on Affordability*, CITY OF DETROIT, <http://www.detroitmi.gov/brpa> [https://perma.cc/9KQA-J5W9].

⁴⁷¹ CITY OF DETROIT, *supra* note 118; Parties' Joint Stipulation to Waive, for a Limited Purpose, Conflict of Interest Regarding Plaintiffs-Appellants' Expert Roger Colton, J.D., Lyda et al. v. City of Detroit, No. 2:15-cv-10038, ECF No. 31, at 2 (E.D. Mich. Aug. 20, 2015).

⁴⁷² JANICE BEECHER ET AL., *supra* note 470, at 13.

⁴⁷³ *Id.* at 4.

⁴⁷⁴ *Id.* at 12, 21.

⁴⁷⁵ *Id.* at 21–23.

⁴⁷⁶ *Id.* at 17, 22–24 (noting that the amount would likely be between four and eight percent of household income).

⁴⁷⁷ *See id.* at 3, 12, 23, 28, 30, 44.

ranked second by most Panel members, but it was ultimately not recommended because this minimum amount would be included as a fixed charge on the water bills and thus would over-charge those who consumed less than the included fixed amount.⁴⁷⁸ Finally, the Panel considered tying water prices to the value of the property to recover the costs of fire protection, but ultimately concluded that such an approach would be subject to legal challenge and also would be difficult to implement. Due to the complexity of revising the rate structure, DWSD estimated that it would take at least two years to implement any changes to the tariffs.⁴⁷⁹

The Panel urged Detroit to develop a program to assist low-income customers with their water bills and to help those with unusually large water bills with conservation measures. The Panel suggested that DWSD use non-rate funding sources, such as utility property lease receipts, to provide a steady stream of resources for bill assistance so that the program is not dependent on external fundraising.⁴⁸⁰ The Panel did not offer specific details about what the assistance program should look like, but it declined to endorse an “amnesty program,” which had been proposed by a local organization called the Detroit Water Brigade and would have provided a large amount of debt relief.⁴⁸¹ The Panel also considered different options for improving the billing and collection process. It recommended that DWSD continue its existing practice of avoiding water service disconnections when customers are on payment plans. Although the Panel also considered the possibility of tying payment plans to arrearage forgiveness, it did not ultimately endorse this approach due to concerns about legal challenges and overall perceptions of fairness.⁴⁸²

Finally, the Panel explored two different ways to modify the billing cycle in order to enhance affordability. Despite implementation concerns expressed by DWSD staff members, the Panel ultimately recommended that DWSD adopt budget-based billing, wherein projected water and wastewater bills would be averaged across the entire year so that customers would not suddenly face large bills as a result of changing water usage.⁴⁸³ The Panel also examined, but decided not to recommend, alternative billing approaches that would enable customers to select the date of payment to correspond to receipt of income or to skip a month of payment.⁴⁸⁴

In addition to recommending an inclining block rate, developing customer assistance and conservation programs, stopping disconnections for

⁴⁷⁸ *See id.* at 16, 22–23, 30.

⁴⁷⁹ *Id.* at 16.

⁴⁸⁰ *Id.* at 18.

⁴⁸¹ *See id.* at 18, 24, 44.

⁴⁸² *See id.* at 23, 44.

⁴⁸³ *See id.* at 20, 23, 44.

⁴⁸⁴ *See id.*

those on payment plans, and adopting budget-based billing, the Panel also urged Detroit to work collaboratively with community organizations because these groups are well-positioned to identify vulnerable customers and provide additional assistance.⁴⁸⁵ In addition, it encouraged DWSD to promote cultural change to ensure that these reforms are adopted. Lastly, the Panel also identified a score of research questions that merit further investigation, including about low-income communities and the effectiveness of proposed changes to customer assistance and billing options.⁴⁸⁶

The Blue Ribbon Panel's report has not resolved the debate between water affordability and assistance. The Detroit City Council's Legislative Policy Division, for example, has expressed reservations about the failure of the Blue Ribbon Panel's report to adopt "an income-based affordability rate structure, akin to the model envisioned by Roger Colton (Council's representative to the BRPA) and adopted by City Council more than a decade ago"⁴⁸⁷ The Legislative Policy Division underscored the need for rates to be affordable even in the face of rising infrastructure costs and debt burden, noting that this is "what the BRPA refers to as the 'affordability dichotomy'"⁴⁸⁸

Mr. Colton, who served on the Blue Ribbon Panel, also undertook his own independent assessment of the final report.⁴⁸⁹ He emphasized that the Panel did not conduct a serious analysis of the legality of an income-based water rate, nor did it consider the fact that uniform rate structures can disproportionately impact low-income households—a point highlighted by the EPA.⁴⁹⁰ Rather, the ultimate recommendations were driven by a fear of litigation, especially because the DWSD staff members on the Panel believed that Michigan law prohibited an income-based plan—a view that was not shared by everyone.⁴⁹¹ Although Mr. Colton acknowledged that litigation would delay the benefits of any affordability plan, he also expressed concern that the Panel's approach meant that an important matter of public policy had been held "hostage to the mere threat of litigation."⁴⁹² Mr. Colton underscored that

⁴⁸⁵ *Id.* at 24.

⁴⁸⁶ *Id.* at 25–27; see also Gary A. Brown, *Detroit Blue Ribbon Panel on Affordability Releases Its Report*, HUFFPOST DETROIT (Mar. 9, 2016, 11:33 AM), http://www.huffingtonpost.com/gary-a-brown/detroits-blue-ribbon-pane_b_9402776.html [<https://perma.cc/J5VM-SQSG>] (the Director of DWSD's summary of the Blue Ribbon Panel report).

⁴⁸⁷ Letter from David Whitaker, *supra* note 457, at 3.

⁴⁸⁸ *Id.* at 5.

⁴⁸⁹ ROGER COLTON, A REVIEW AND ASSESSMENT OF THE FINAL REPORT OF THE DETROIT BLUE RIBBON PANEL ON WATER AFFORDABILITY (May 2016) (on file with author).

⁴⁹⁰ *Id.* at 2 (citing Memorandum from Nancy Stoner, Acting Assistant Adm'r, Office of Water, and Cynthia Giles, Assistant Adm'r, Office of Enf't and Compliance Assurance, to Reg'l Adm'rs, Reg'l Water Div. Dirs., and Reg'l Enf't Div. Dirs., Env'tl. Protection Agency (Jan. 18, 2013)).

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 3.

“the City Council (and by extension through the DWSD), has a legal obligation to provide universal access to safe, clean and affordable water,”⁴⁹³ and that DWSD’s existing approaches were insufficient for the very poor.⁴⁹⁴ Importantly, the community-based movement for water affordability could use the Panel’s report to push DWSD to enact solutions now—and not allow years to elapse before any meaningful change occurs. He outlined a specific set of tasks for community advocates, including ensuring that the increasing block tariff structure is actually implemented in a way that promotes affordability.⁴⁹⁵ In short, although the Blue Ribbon Panel Report did not endorse an income-based water rate, it has many positive elements and laid a foundation for change, provided that local advocates keep the pressure on policymakers.

d. Water Residential Assistance Program

Although the extent to which the Panel’s longer-term recommendations are implemented remain to be seen, the assistance-based component has already been created. As part of a regional program through the Great Lakes Water Authority (GLWA), DWSD unveiled a new water assistance program known as the Water Residential Assistance Program (WRAP) on March 1, 2016.⁴⁹⁶ The program, which is being administered through the Wayne Metropolitan Community Action Agency in Detroit, is being offered in Detroit and in Wayne, Oakland, and Macomb counties. Under the GLWA, \$4.5 million has been set aside in the first year for WRAP, and thereafter, the amount of funding for the program will be equal to 0.5 percent of yearly operating expenses.⁴⁹⁷ About one-third of this funding, or approximately \$1.5 million has been allocated to Detroit, with the remaining \$3 million going to programs in 126 municipalities across seven southeast Michigan counties.⁴⁹⁸ A report by the Detroit City Council’s Legislative Policy Division, however, has indicated that \$4.5 million would be insufficient to help needy Detroit residents, let alone those in the whole region.⁴⁹⁹ The sufficiency of the funds allocated remains to be seen.

⁴⁹³ *Id.* at 4.

⁴⁹⁴ *Id.* at 5.

⁴⁹⁵ *Id.* at 11–17.

⁴⁹⁶ City of Detroit, *supra* note 154; Press Release, Great Lakes Water Auth., Great Lakes Water Authority Begins Enrollment for Water Residential Assistance Program (Feb. 29, 2016), <http://www.glwater.org/wp-content/uploads/2016/02/GREAT-LAKES-WATER-AUTHORITY-BEGINS-ENROLLMENT-FOR-WATER-RESIDENTIAL-ASSISTANCE-PROGRAM-.pdf> [<https://perma.cc/7FJG-N7RF>]; Community Action Alliance WRAP, COMMUNITY ACTION ALLIANCE WATER RESIDENTIAL ASSISTANCE PROGRAM, <http://www.waynemetro.org/wrap/> [<https://perma.cc/L487-XFST>].

⁴⁹⁷ City of Detroit, *supra* note 154, at 1.

⁴⁹⁸ *Id.*

⁴⁹⁹ Guillen & Helms, *supra* note 3.

The primary goal of WRAP is to reduce the “need to implement adverse billing and collection measures including utility service disconnections and lien placements.”⁵⁰⁰ The WRAP seeks to reduce monthly bills through bill credits, to freeze arrears, and to enhance customer service.⁵⁰¹ It applies to individuals with incomes at or below 150% of the federal poverty line.⁵⁰² When applicants enroll, they receive \$25 off their monthly bills (for a yearly total of \$300) and their arrearages are frozen for twelve months as long as they remain current with their monthly payments.⁵⁰³ After a year of successful payments, applicants then receive a \$700 credit towards the arrears.⁵⁰⁴ If water usage is twenty percent above the average consumption in the city, then residents may obtain a free conservation audit and up to \$1,000 to repair household plumbing.⁵⁰⁵ After the first year, customers can re-apply for an additional year.⁵⁰⁶ Residents who are on a payment plan and remain current with their payments will be exempt from having their water shut off. In addition, WRAP features so-called “wrap-around” services because eligible residents will be connected to social service organizations to address other poverty-related issues.⁵⁰⁷ For those who need to be on a payment plan longer than two years or who earn above 150% of the poverty line, DWSD will continue to offer the terms of the 10/30/50 Payment Plan.⁵⁰⁸

Although the WRAP program is an improvement over the prior program because it freezes outstanding debts and has an arrearage forgiveness component, it does not address core concerns raised by advocates and some Detroit City Council members. For example, in the spring of 2015, Council Member Raquel Castañeda-López noted that “the Water Affordability Plan, which was approved by the Council in 2006-7, [had] been overlooked as the GLWA developed the Water Residential Assistance Program,”⁵⁰⁹ a point that was more recently underscored by the Council’s Legislative Policy Division.⁵¹⁰ In May 2016, after DWSD began shutoffs again, Castañeda-López also asked DWSD

⁵⁰⁰ GARY BROWN & ERIC ROTHSTEIN, DETROIT’S WATER AFFORDABILITY PROGRAM: PRACTICAL, IMPLEMENTABLE SOLUTIONS 2 (Feb. 8, 2016), <http://www.detroitmi.gov/Portals/0/docs/DWSD/BRPA%20Presentation.pdf> [<https://perma.cc/283W-CRBQ>].

⁵⁰¹ *Id.* at 4.

⁵⁰² City of Detroit, *supra* note 154, at 1; Great Lakes Water Auth., *supra* note 496, at 1.

⁵⁰³ City of Detroit, *supra* note 154, at 1; Great Lakes Water Auth., *supra* note 496, at 2.

⁵⁰⁴ City of Detroit, *supra* note 154, at 1; Great Lakes Water Auth., *supra* note 496, at 2.

⁵⁰⁵ City of Detroit, *supra* note 154, at 1; Great Lakes Water Auth., *supra* note 496, at 1.

⁵⁰⁶ City of Detroit, *supra* note 154, at 1.

⁵⁰⁷ BROWN & ROTHSTEIN, *supra* note 500 at 4.

⁵⁰⁸ *Id.*

⁵⁰⁹ Memorandum from Council Member Raquel Castañeda-López to Council President Brenda Jones, Detroit City Council (March 23, 2015) (on file with author); *see also* Bre’Anna Tinsley, *Detroit City Council Member Lobbies for Replacement of Water Residential Assistance Plan*, WDET 101.9 FM (May 13, 2015), <http://wdet.org/posts/2015/05/13/80466-detroit-city-council-member-lobbies-for-replacement-of-water-residential-assistance-plan/> [<https://perma.cc/B5RN-KQVC>].

⁵¹⁰ Letter from David Whitaker, *supra* note 126, at 3.

to “place a moratorium on water shut-offs for households occupied by our most vulnerable populations” because such protections were not included in WRAP.⁵¹¹

The debate between affordability and assistance in Detroit is far from over and the long-term effectiveness of WRAP and the recommendations of the Blue Ribbon Panel remain to be seen. The real tests will be whether the massive shutoffs stop and access clean water becomes a reality for all of Detroit’s residents.

2. State Level Efforts

The team of pro bono attorneys that worked on the *Lyda* case, along with other advocates in Detroit, have been actively working on state-level water affordability reforms. As Alice Jennings, the lead attorney in the *Lyda* case, said in an interview, the plaintiffs’ motto is “agitate, litigate and legislate.”⁵¹² Together with several other Michigan legislators, State Representative Stephanie Chang, who was interviewed for this research, introduced several bills to address a range of issues related to the household water crisis in November 2015. The group of bills introduced to address the problem would:

- Establish water as a human right []
- [I]ncrease transparency about water rates and shut-offs []
- Ensure that water samples are collected using EPA procedures and prohibits the procedure of pre-flushing []
- Prohibit utilities from charging a customer for service during a period of time when the customer has not received a bill, has contacted the provider and has still not received a bill []
- Institute shut-off protections by creating categories of individuals protected from shut-offs and providing for clearer notices about potential shutoffs and create a state water affordability plan []
- Decriminalize the reconnecting of water pipes to regain access to water⁵¹³

⁵¹¹ Memorandum from Council Member Raquel Castañeda-López to Gary Brown, Dir., Detroit Water and Sewer Dept. (May 10, 2016) (on file with author) (specifically asking that water not be disconnected for households with “1. Children under the age of 18, 2. Senior(s) aged 62 and above, 3. Person(s) needing critical care or having a certified medical emergency, or 4. Person(s) who are disabled.”).

⁵¹² Interview with Alice Jennings, Partner, Edwards & Jennings, in Detroit, MI (July 8, 2016).

⁵¹³ *House, Senate Members Announce Water Quality, Affordability Bills: Bill Package Addresses Problems in Detroit, Highland Park, Flint*, MICH. HOUSE DEMOCRATS (Nov. 12, 2015), <http://housedems.com/article/house-senate-members-announce-water-quality-affordability-bills#sthash.0XSizFhv.dpuf> [<https://perma.cc/3ZZR-4DD7>].

The bills followed a hearing on June 3, 2015 that featured powerful testimony by approximately seventy-five attendees who discussed the water shutoffs in Detroit, as well as problems in the neighboring cities of Highland Park and Flint.⁵¹⁴

3. National Level Efforts

Coinciding with other water crises around the nation, such as the lead epidemic in Flint, the Detroit water shutoffs have helped to galvanize action at the national level. For example, in 2015, the US Human Rights Network began convening the National Human Rights to Water and Sanitation Coalition, which brings together a wide range of organizations and individuals working to make the human rights to water and sanitation a reality for all Americans.⁵¹⁵ As a result of the Coalition's efforts, the Inter-American Commission on Human Rights held a hearing on the right to water and sanitation in the United States in October 2015⁵¹⁶ and also heard testimony by impacted individuals during its regular session in April 2016.⁵¹⁷ Local advocates have also been organizing Congressional briefings,⁵¹⁸ and exploring how existing human rights and civil rights laws can be used to address inequalities in water and sanitation access.⁵¹⁹ They recently created a National Coalition for Legis-

⁵¹⁴ Stephanie Chang & LaTanya Garrett, *All Michiganders Deserve Clean Water*, DETROIT FREE PRESS (Feb. 2, 2016), <http://www.freep.com/story/opinion/contributors/2016/02/02/all-michiganders-deserve-clean-water/79641244/> [<https://perma.cc/GBT4-3KS9>]; *Legislators Listen to Detroit, Highland Park, Flint Residents on Water Issues*, HOUSEDEMS.COM (June 3, 2015), <http://housedems.com/article/legislators-listen-detroit-highland-park-flint-residents-water-issues> [<https://perma.cc/CLJ6-67AL>].

⁵¹⁵ #WaterIsAHumanRight: *Human Rights to Water and Sanitation*, US HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/our-work/project/waterisahumanright-human-rights-water-sanitation> [<https://perma.cc/A4EG-7BEE>].

⁵¹⁶ *International Human Rights Commission to Hold Hearing on Right to Water and Sanitation in U.S.*, US HUMAN RIGHTS NETWORK (Sept. 21, 2015), <http://www.ushrnetwork.org/resources-media/international-human-rights-commission-hold-hearing-right-water-sanitation-us> [<https://perma.cc/NVN9-E5RZ>].

⁵¹⁷ Press Release, Org. of Am. States, Inter-American Commission on Human Rights, IACHR Wraps Up its 157th Session (Apr. 15, 2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/049.asp [<https://perma.cc/9NTQ-QQLH>] ("A number of U.S. groups talked about problems related to access to drinking water and the lack of adequate sanitation, which disproportionately affect Afro-descendant and indigenous communities and people living in poverty.").

⁵¹⁸ Jessica L. Atcheson, *Water Affordability Spotlights on Capitol Hill*, UUSC (Feb. 27, 2015), <http://www.uusc.org/updates/water-affordability-spotlighted-on-capitol-hill> [<https://perma.cc/QQF4-N5B8>]; *Congressional Briefing: Trouble on Tap*, UUSC (Feb. 25, 2015), <http://www.uusc.org/congressional-briefing-trouble-on-tap-challenges-to-affordable-water-in-the-us> [<https://perma.cc/76TN-F9TP>]; Rep. John Conyers, *Drinking Water: A Human Right at Risk in America*, HUFFPOST POLITICS (Feb. 25, 2015, 3:35 PM), http://www.huffingtonpost.com/john-conyers/drinking-water-a-human-right_6754308.html [<https://perma.cc/GMV4-8H79>].

⁵¹⁹ Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, GEO. J. POVERTY L. & POL. (forthcoming 2016); *Violations of the Human Right to Water in the United States*, US HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/our-work/project/waterisahumanright-human-rights-water-sanitation>.

lation on Affordable Water to advocate for legislative change.⁵²⁰ As a result, in February 2016, the “Low Income Sewer and Water Assistance Act of 2016” was introduced into the House of Representatives—but its fate remained unknown as this article was going to press.⁵²¹

Numerous policy options exist at the local, state and national level to enhance water affordability. Legislation is needed to realize water’s status as a constitutive commitment and ensure that all Americans have access to this vital resource.

CONCLUSION

The widespread and aggressive water shutoffs in Detroit have highlighted the critical need to reassess our laws and policies regarding affordable access to water for drinking, sanitation, and hygiene. As a distressed city that recently emerged from bankruptcy, Detroit faces some unique challenges. However, water rates are rising across the nation as municipalities struggle to finance and upgrade deteriorating infrastructure. Detroit’s response to its water collection problems—massive shutoffs—offers a sobering lesson to the rest of the country.

Considering the nature of bankruptcy proceedings and the general reluctance of courts in the United States to recognize economic and social rights, it is not surprising that the bankruptcy court in the *Lyda* case found that there is no constitutional or fundamental right to water in the United States, including provisions for affordable access. The Detroit water shutoffs, however, raise the question of whether this right should be recognized. As the substantive due process arguments outlined in this article illustrate, water holds a special place in our history and legal culture, and should be considered to have near-constitutional status.

The media coverage and general outrage in response to the Detroit crisis suggest that Americans are beginning to consider access to safe and affordable water as a constitutive commitment. Numerous water affordability policy

ushrnetwork.org/sites/ushrnetwork.org/files/right_to_water_factsheets_1pager.pdf [https://perma.cc/63MF-Y4EM].

⁵²⁰ See Brett Walton, *Water Affordability is a New Civil Rights Movement in the United States*, CIRCLE OF BLUE (Mar. 22, 2016), <http://www.circleofblue.org/2016/water-policy-politics/water-rights-access/water-affordability-new-civil-rights-movement-united-states/> [https://perma.cc/U5Q4-PJHJ].

⁵²¹ Low Income Sewer and Water Assistance Program Act of 2016, H.R. 4542, 114 Cong. (2015–2016), <https://www.congress.gov/bill/114th-congress/house-bill/4542/text> [https://perma.cc/8WTG-KP8V]; *Congresswoman Marcia L. Fudge Introduces Legislation to Help Low-Income Families Pay Water and Sewer Bills with Members of the Ohio and Michigan Delegations*, MARTHA L. FUDGE (Feb. 12, 2016), <https://fudge.house.gov/press-statements/congresswoman-marcia-l-fudge-introduces-legislation-to-help-low-income-families-pay-water-and-sewer-bills-with-members-of-the-ohio-and-michigan-delegations/> [https://perma.cc/DE7X-38FT].

options exist that also make sound business sense. National legislation that provides for affordable access to household water for drinking, hygiene, and sanitation is needed to realize this new constitutive commitment.

