Disastrous Disasters: Restoring Civil Rights Protections for Victims of the State in Natural Disasters

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"Our investigation revealed that Katrina was a national failure, an abdication of the most solemn obligation to provide for the common welfare. . . . Not even the perfect bureaucratic storm of flaws and failures can wash away the fundamental governmental responsibility to protect public health and safety."

A Failure of Initiative, Final Report, Bipartisan Committee, U.S. House of Representatives

Introduction

The recently released report entitled "A Failure of Initiative" describes repeated and tragic failures of government. The failure was played out graphically before a nation that watched news footage and viewed photographs from Hurricane Katrina. These images reminded us all that pervasive socio-economic, racial and ethnic inequality in our nation persists and inflicts vast disparities in public health prevention and protection for American populations of color and those living in poverty. The photographs and footage from the natural disaster showed the nation an overwhelmingly poor, and predominately Black and Brown population left behind in New Orleans, Mississippi and Alabama to suffer the public health disaster that remained after the storm itself had passed.

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How did this happen? The thesis of this article is that the American government, at local, state and federal levels, must be held accountable for its direct and primary role in causing the racially and economically disparate disasters that preceded and followed Hurricane Katrina.

After controlling for differences among the races in socioeconomic status, health insurance, and access to health care and geographic differences, we know that Blacks and Latinos receive fewer and inferior clinical services than Whites, whether those services are for treatment of cardiovascular disease, cancer, mental illness, prenatal care or HIV/AIDS. It is now well known that African Americans, Latinos and Native Americans suffer and die from diabetes at significantly higher rates than do White Americans, and that this is due, at least in part, to the fact that providers, as well as patients, manage the disease more poorly among minority patients. However, this article highlights discrimination at the population level, beyond the disparities that occur in individual clinical settings. This public health discrimination is particularly egregious because the federal, state and local governments that are responsible for exercising their constitutional and state police power to protect public health and safety are actually the cause of the inequitable distribution of public goods and services to the detriment of minority and poor citizens in times of natural disaster.

There are three reasons why the government’s role in natural disaster relief pro-

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3 See, e.g., Peter B. Bach, M.D., et. al., Racial Differences in the Treatment of Early-Stage Lung Cancer 341 NEW. ENG. J. MED. 1198 (1999); see Davis at 55.


5 See Kate M. Brett, Kenneth C. Schoendorf, & John L. Kiely, Differences Between Black and White Women in the Use of Prenatal Care Technologies, AM. J. OBSTETRICS AND GYNECOLOGY 170:41-6 (1994).

6 See, e.g., Martin F. Shapiro, M.D., Ph.D. et al., Variations in the Care of HIV-Infected Adults in the United States: Results from the HIV Cost and Services Utilization Study, 281 JAMA 2305 (1999); R.D. Moore, et al., Racial Differences in the Use of Drug Therapy for HIV Disease in an Urban Community, 330 NEW ENG. J. MED. 763 (1994); Davis at 61.

vides a telling lens through which to view public health disparities. First, by their sheer enormity, natural disasters magnify the Government’s contribution to public health disparities so that they are easy to identify and examine. Second, natural disasters are easily subject to chronological analysis, thereby allowing a view of Governments’ preferential protections granted to White and wealthy populations over poor and minority populations before, during and after a natural disaster occurs. Finally, because of the centrality of the Government’s responsibility to manage the impact of natural disasters, these crises allow for a focus on the legal solutions available to address government sponsored public health discrimination.

This article will begin with a brief survey of selected natural disasters that have hit the United States during the past 100 years. The selection of earthquakes, storms and floods presented in the first section demonstrates that while “Acts of God” may be random and indiscriminate, the ways in which governments prepare and respond to natural disasters are not. Throughout history, governments have blatantly discriminated against poor and minority communities during times of natural disaster. I call this phenomenon “government-sponsored public health discrimination.” The term connotes the fact that the discriminatory conduct is that of individuals and entities authorized to act in an official capacity. The second section of the article reviews the federal law available to address the government-sponsored discrimination of this nature. The section concludes that although several Civil Rights Laws proved useful in the fight against health care discrimination in the middle of the past century, the United States Constitution, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §1983 now stand dor-

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8 In the words of one commenter, “complex emergencies are the emergency rooms of public health.” Ronald Waldman, Responding to Catastrophes: A Public Health Perspective, 6 CHI. J. INT’L L. 553, 563-64 (Winter 2006).

9 Prior to the landmark legislation, popularly called the Civil Rights Act of 1964, Congress enacted two other major Civil Rights laws. Moreover, the Civil Rights Act contains provisions other than Title VI to provide redress for discriminatory conduct. These include 42 U.S.C. §§ 1981 (2006), 1983 (2006) and 1985 (2006) as well as Title VII, which addresses employment discrimination particularly. All these statutes are outside the scope of this paper except as they have impact on Title VI and 42 U.S.C. § 1983 litigation and enforcement.

10 42 U.S.C. § 1983 provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
mant and are apparently helpless to address public health discrimination. 11 These federal laws currently have a limited role in correcting public health disparities. However, the third section of this article explores two possible litigation strategies that may breathe new life into civil rights claims against governments that discriminate against vulnerable populations to the detriment of their public health. The first of these strategies involves private enforcement of Civil Rights claims in litigation to allege that government-sponsored public health discrimination is fraud. The second strategy advances state-based constitutional claims of equal protection and fundamental rights violations that may prove more useful in the fight against public health discrimination. These strategies borrow from a model that was successfully used to address school financing disparities and applies that model to public health inequality. The article concludes by recommending a litigation strategy that may be pursued to prosecute government-sponsored public health disparities.

I. Disastrous Disasters: 100 Years of Discrimination

Natural disasters know no race or class boundaries.12 Hurricanes, cyclones,

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11 Numerous other legal scholars have explored the reasons behind the current ineffectiveness of the Civil Rights laws in addressing health care disparities. This literature focuses primarily upon disparities that arise from the delivery of health care to individuals or “private” health care. Some point to the administrative shortcomings of agencies charged with civil rights law enforcement. See, e.g., Louise G. Trubeck, Achieving Equality: Healthcare Governance in Transition, 7 DePaul J. Health Care L. 245, 250 (2004) (stating OCR has hardly developed its Title VI enforcement program since 1980); Sara Rosenbaum & Joel Teitelbaum, Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of Alexander v. Sandoval, 3 Yale J. Health Pol'y L. & Ethics 215, 246 (2003) (noting the spending authority of OCR and cross-agency commitment to civil rights); see also, Rene Bowser, Racial Bias in Medical Treatment, 105 Dick. L. Rev. 365, 389 (2001) (holding OCR must take its enforcement obligations seriously); Daniel K. Hampton, Title VI Challenges by Private Parties to the Location of Health Care Facilities: Toward a Just and Effective Action, 37 B.C. L. Rev. 517, 524 (1996) (citing commentator who says under Reagan and Bush administrations, OCR virtually abdicated its Title VI health care monitoring and enforcement responsibilities). Others have discussed the need for reform in the content of these civil rights laws themselves. See, e.g., Joel Teitelbaum & Sara Rosenbaum, Medical Care as a Public Accommodation: Moving the Discussion to Race, 29 Am. J.L. & Med. No. 2 & 3 (2003) (recommending extension of public accommodation definition to include private health providers as under ADA); see also, Sidney D. Watson, Reinvigorating Title VI: Defending Health Care Discrimination – It Shouldn’t Be So Easy, 58 Fordham L. Rev. 939, 971 (1990) (noting “ unhitch” possible Title VI defenses from the standards set under Title VII law to make adverse impact cases more difficult to defend). In contrast to this body of literature, the contribution this article makes is to focus on disparities that arise from the government’s discharge of its duty to protect the population’s health, safety and general welfare.

12 See PAUL K. FREEMAN, INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS, INFRA-
floods, earthquakes, tornadoes, blizzards, and other forces of nature do not select their victims by the color of their skin or the size of their wallets; rather, natural disasters wreak havoc on the poor and the rich alike. Yet, in the past century, some of our nation’s most deadly natural disasters have been exacerbated by government-sponsored race or class-biases. In the face of nature’s absolutely egalitarian horrors, governments have developed a pattern of compounding the disaster’s devastation by adding a layer of societal disorder to skew the disastrous impact before, during, and after the physical disaster strikes. Before disasters strike, governments have sponsored racially segregated housing; governments have been responsible for disparate patterns of access to health care, law enforcement, and other social services within poor communities; and governments have engaged in shoddy advance rescue and evacuation planning for poor communities. During natural disasters, governments arrange for racially biased rescues and

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13 The Galveston Hurricane of September 8, 1900 is known as the deadliest natural disaster in the United States. This single storm killed between 8,000 and 12,000 Americans, in a city that lay fewer than 10 feet above sea level. Nevertheless, before the Hurricane, Galveston was a wealthy and prosperous city, sometimes called “The New York of the South.” Some of the mansions and other buildings that survived the Hurricane are now tourist attractions along the fashionable “Strand,” which attest to the fact that this natural disaster killed or ruined some of the wealthiest, White citizens of this country. John Edward Weems, Galveston Hurricane of 1900, THE HANDBOOK OF TEXAS ONLINE, available at http://www.tsha.utexas.edu/handbook/online/articles/GG/ydg2.html. (last visited December 13, 2006).

14 See Rachel D. Godsil, Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism, 53 EMORY L.J. 1807, 1834-51 (2004) (providing examples and summaries of literature that documents government conduct that promoted housing segregation). These included racial zoning ordinances that persisted through the 1940’s, court enforcement of racially restrictive covenants through 1948, federal loan “redlining” practices that excluded Black and Hispanic neighbors and neighborhoods from receiving favorable home loans that would allow them to relocate to attractive suburbs, discriminatory sitting practices employed by federal public housing programs that have concentrated the locations to house poor and racial minority residents in undesirable locations, and the segregationist impact of state-sponsored urban renewal projects. Id at 1828-43.

15 For example, the lack of medical personnel available in New Orleans prior to Katrina, delayed the availability of medical care to the most vulnerable populations – disabled, poor and institutionalized citizens – during and after the hurricane. See, e.g., A Failure of Initiative, supra note 2, at 267-302; see also Susannah Sirkin, The Debacle of Hurricane Katrina: A Human Rights Response, 30
recovery efforts, and governments favor the wealthy over the disadvantaged in the provision of relief and for the restoration of public utilities. Historically, after disasters, even our collective mourning has institutionally disadvantaged the poor and minority among us. Hurricane Katrina is, perhaps, the most recent example. But as this section reveals, the last century of American history contains numerous illustrative examples to confirm that the discrimination, which occurred during Katrina, is not new.

A. The Case of Hurricane Katrina

Government-sponsored discrimination was in place in Louisiana, Mississippi, and Alabama long before Hurricane Katrina. Louisiana, however, provides a poignant example. The low-lying areas of the city of New Orleans, such as the parishes around Lake Pontchartrain, which include Orleans, Plaquemines and St. Bernard, were the very areas of the city most dependent upon the network of concrete walls and levees that failed to hold back flood waters. Nevertheless, despite the critical vulnerability of these sections of the City, not only was evacuation of the population living there incomplete, but the levees surrounding these areas were poorly maintained. Local boards responsible for operating the levees had no warning system in place. Before the storm waters overflowed the levees and the flood waters filled New Orleans, there had been documented complaints from residents about trees and brush growing out of levee walls, leaks and seepage from the canals they contained, as well as instances of incomplete inspection and maintenance records.

Plans to evacuate this population of these areas were inadequate. For example,

FLETCHER F. WORLD AFF. 223, 225 (2006) (noting Louisiana was ranked the “least healthy” state by the United Health Foundation before the hurricane, registering large racial disparities in access to health care).

See, e.g., Michele L. Landis, Let Me Next Time Be Tried By Fire: Disaster Relief and The Origins of the American Welfare State 1789-1874, 92 NW. U. L. REV. 967, 1016-27 (explaining that historically, the United States Congress has favored sudden loss of class status by the wealthy that became poor during natural disasters to providing relief to those who were not blameless in their impoverished state because they failed to find employment or fortune before disaster struck). Landis points out the insipid connection between race and the denial of disaster relief. Id. at 1022-26. “Successful appeals for disaster relief must narrate the claimants as blameless victims of the vicissitudes of fate. Yet Blacks and other racial minorities have been denied, for reasons having nothing to do with disaster relief per se, the role of moral innocent.” Id. at 1023. Landis uses the 1927 Mississippi River flood to demonstrate disparate rescue provided to Black victims, and the plight of Sioux Native Americans denied payment owed by the United States Government according to treaties following loss due to war in 1862. Id. at 1024.

Davis, supra note 2, at 92. Trees growing out of the levee and leaks from the canals were reported by residents well before Katrina, but to no avail. Id.
school buses sat idle for lack of drivers, while the waters rose, stranding tens of thousands in the “soup-bowl” that had once been New Orleans. These citizens where wholly dependent upon the government for transportation out of harm’s way, shelter provisions once they were moved, and for medical care during their displacement. None of these needs were addressed. Instead of evacuation, they were transported to inhumane conditions in three locations throughout the city, called “shelters of last resort;” including the New Orleans Superdome sports arena and a highway intersection called the “Cloverleaf.” The conditions were horrid. The heat, lack of power, lack of food, absence of sanitation provisions and a total lack of preparedness led to conditions described at once as “horrible,” “unbearable,” and “miserable.”

Sadly, the Louisiana government had had advanced notice, not only of the devastating storm that Katrina proved to be, but also of the woeful inadequacy of the government’s preparedness to deal with that storm. In July 2004, the Federal Emergency Management Agency (FEMA) sponsored a simulation called “Hurricane Pam.” The exercise was run by a private contractor and cost over $500,000. It assumed a Category 3 storm that topped New Orleans’ levees, trapped hundreds of thousands in the New Orleans area, destroyed buildings, phone, sewer and 97% of all communications to the city. The Southeast Louisiana Catastrophic Hurricane Plan grew out of the Pam exercise and that Plan is credited with the success of evacuating 1.2 million Louisiana residents in the 48 hours prior to the time Hurricane Katrina made landfall. However, that same Hurricane Pam exercise revealed the likelihood that Louisiana’s poorest citizens would not be served by existing evacuation and rescue procedures. The Hurricane Pam exercise showed that in those locations where the median income of residents was below $27,200, evacuation plans were inferior to the plans in place for the “general population.” Yet no changes were made to these procedures after the exercise.

No single level of government appears wholly responsible, yet each and every level of government appears to have failed the people of New Orleans. Notwithstanding adequate and urgent advanced notice of the catastrophic implications of Katrina’s inevitable landfall, the Federal government delayed designating Principal Federal Officers to oversee the evacuation and manage a disaster that FEMA Director Michael Brown was ill-equipped to face. The Governor and the Mayor delayed ordering evacuation and then did so incompletely and incompetently with respect to all but the “general population” of the state. Law enforcement, state and parish alike, abandoned their constituencies.

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18 Davis, supra note 2, at 311.
19 Davis, see supra note 2, at 17 (saying that “evacuation worked well for the general population.”).
The outcome was inevitable. Over 1,300 people lost their lives; approximately half the dead were people of color.\textsuperscript{20} Over 600,000 were displaced from their homes:

"In terms of ethnicity, the dead in New Orleans were 62 percent Black, compared to 66 percent for the total parish population. The dead in St. Bernard Parish were 92 percent White, compared to 88 percent of the total parish population. . . . The comparison showed that 42 percent of the bodies found in Orleans and St. Bernard parishes were recovered in neighborhoods with poverty rates higher than 30 percent. . . . The median household income in neighborhoods where Katrina victims were recovered was about $27,000 a year, just under the $29,000 median for the overall area. One-fourth of Katrina deaths fell in census tracts with median incomes above $35,000."\textsuperscript{21}

It is difficult at this juncture to determine why the most vulnerable people in Katrina's path were left unprotected for the longest period of time. The disparities that lead to their plight pre-dated Katrina. Moreover, the disparate impact of the Hurricane will likely persist long after the flood waters recede. Affluent Louisiana and Mississippi communities saw the return of basic services such as electricity and sanitation, while the socially vulnerable communities all along the Gulf coastline remained dark and boarded up.\textsuperscript{22} These are the communities where the poorest of Katrina's victims reside. They were largely home to the Black, and to the undocumented aliens from Mexico and Honduras. For these victims, total death and injury tolls may never be known.\textsuperscript{23} However, the historical record does not suggest that we will learn from our mistakes during Katrina.

B: A Disastrous History: 100 Years of Government-Sponsored Discrimination

In 1906, a great earthquake struck two miles off the California coast, destroying 80% of the City of San Francisco. For four days after the earthquake, fires burned through the entire city. However, the California government grossly underreported the death toll from this disaster, ignoring the many thousands of Chinese residents of the city who lost their lives and property. Official death tolls were reported at nearly 500, while unofficial counts concur that the number of dead from the quake and resulting

\textsuperscript{20} Sirkin, supra note 16, at 225.
\textsuperscript{21} House Katrina Report, supra note 18, at 115 n. 96.
\textsuperscript{23} Sirkin, supra note 16, at 225.
fires was more likely 6,000. Perhaps the government under-reported because some of San Francisco's 25,000 Chinese residents living in the city were in the United States illegally and thereby escaped official notice. Other accounts suggest the government under-reported in order to prop up real estate values and boost recovery efforts. Whatever the reason, government officials largely ignored Chinese residents during the rescue effort, as workers preferred to rescue non-Chinese San Franciscans first. Their lives were not preserved, and their deaths were not recorded. Consequently, the public health impact of the natural disaster was multiplied for this minority community.

Compounding the disaster, in the immediate aftermath of the earthquake, the San Francisco city government's law enforcement and fire containment efforts were marked by racial bias. The California government used dynamite to destroy buildings in Chinatown, killing many Chinese residents in the process of containing the fires.24

Two decades later, in September of 1928, the Great Okeechobee Flood and Hurricane struck the Florida coast killing over 4,000 people. Original estimates set the number of Americans killed at just over 1,800. Recently, however, the National Hurricane Center raised the estimated number of deaths to 2,500. Over 75% of those killed in this storm were Black migrant workers who had no means of evacuation. As with Hurricane Katrina, wealthier White coastal residents had been evacuated before the storm made landfall. After the storm, the Florida government used mostly Black workers to clean up human remains and to help bury the dead. However, while both Black and White Floridians were buried in mass graves after the storm, the graves were racially segregated.25

The poverty and homelessness that resulted from America's "Dust Bowl" storms present a dramatic case of class-based bias and economic discrimination. From 1934 to 1939, a series of wind storms followed a prolonged drought, creating dust storms that would literally bury whole communities, topple houses and ravage farmers' crops and lands. However, this "natural" disaster was also the result of ineffective farm-

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ing techniques that left the land particularly exposed and vulnerable to winds. Over 500,000 people were left homeless during the Dust Bowl Storms, while some estimates range as high as 3.5 million. Most of the homeless were from poor, rural farm families in Texas, Oklahoma, Colorado, New Mexico and Kansas. As these displaced families trekked by foot across the nation’s mid-section in search of new homes and work, many starved and suffered illness.

During the Depression era, government assistance for these poor Americans was limited. Instead, these families relied upon private philanthropy and charity until the New Deal era legislation began appropriating funds to relieve homelessness. Some commentators have observed that this period of America’s philanthropic history tells much about the government’s view of who were the “deserving” and “blameless” poor. Those victims of the Dust Bowl Storms were apparently not eligible for help in the same way a previously wealthy business owner who lost everything in a storm may have been. These poor had never “made it” and so were not eligible for the government’s assistance prior to the New Deal.

In their book recounting the devastation of the 1969, Category 5, Hurricane Camille, Ernest Zebrowski and Judith Howard explain the role that the race and class of victims played in governmental emergency planning and rescue efforts. Camille was less devastating from a property and morbidity perspective than Katrina, killing approximately 259 people in Mississippi, Alabama, Virginia and Louisiana. However, the parallels between Camille, Katrina and other storms are impossible to miss. The authors draw similarities between the political corruption that plagued Katrina rescue efforts, and the governments’ rescues from Hurricane Audrey in 1957, and from Hurricane Camille in 1969. In all three hurricanes, evacuations occurred in segregated buses and Red Cross services were delivered to racially and economically segregated populations, while recovery efforts favored the wealthy and White.

More recent examples of similar discrimination are not difficult to find. In 1989, Hurricane Hugo touched down in North and South Carolina where 56 people lost

26 Michael L. Cooper, DUST TO EAT: DROUGHT AND DEPRESSION IN THE 1930’s (Clarion Books 2004).
27 See David W. Sar, Helping Hands: Aid for Natural Disaster Homeless vs. Aid for ‘Ordinary Homeless,’ 7 STAN. L. & POL’Y REV. 130 (Winter 1995-1996); but cf. Landis, supra note 17 (disputing Sar’s notion that the Federal government “shrank away” from relief efforts prior to New Deal).
28 Id.
their lives and these states suffered over $7 billion in property damage. Director of the Center for Environmental Justice, Robert Bullard, explains that Black residents received less shelter and assistance than similarly situated White victims. Bullard also points to class action litigation in which Black farmers alleged the United States Department of Agriculture discriminated against them when it distributed federal disaster relief after tornados in Arkansas and Georgia destroyed their farms back in 1998 and 1999. Similar charges and suspicions of discrimination surrounded Hurricane Andrew in 1992, the Northridge Earthquake that shook Los Angeles in 1994, and the Evansville Tornado of November 2005.

History provides evidence of disparate governmental responses not only to natural disasters, but also to man-made disasters that create public health hazards for poor and minority communities as well. For example, Professor Bullard contends that in 2000, when a train crash released deadly chlorine gases in Graniteville, South Carolina, the Black residents were systematically left as the last of the 5,500 evacuated by the city. In fairness, these accusations of discrimination remain merely accusations. However, it is abundantly clear that the government's conduct has gone un-checked and this century-old history of discrimination will not be stopped without legal intervention. Some federal laws might address this pattern and practice of government-sponsored race and class discrimination.

II. Federal Law and Public Health Disparities

This article proposes that the government's role in creating public health disparities arising from natural disasters constitutes actionable discrimination. The historical record raises a colorable claim that the government has violated underlying Civil Rights laws that prohibit racial discrimination. The plain language of anti-discrimination provisions found in the Title VI of the Civil Rights Act of 1964, and in 42 U.S.C. §1983 of that same statute, appear to prohibit the type of discrimination described in the previous section. Yet, these seemingly powerful prohibitions against bias have been eviscerated as weapons against public health discrimination by recent Supreme Court decisions that limit the ability of private parties to enforce these laws. This section reviews the current prospects for direct enforcement of Constitutional and federal Civil Rights laws to address public health disparities, and concludes that an alternative enforcement approach is sorely needed.

31 Id.
A. The Constitution and Public Health

The United States Constitution makes no direct mention of a right to public health or a governmental duty to provide for the public health.\(^3\) And while courts have found that there is no constitutionally protected right to a healthy environment\(^3\) or guaranteed access to health care services,\(^3\) the federal government has historically exercised its powers to tax and spend, and its power to regulate commerce in order to protect the public’s health.\(^3\) For example, the federal government has undertaken to provide for the general health, safety and welfare of the American public by financing public health research,\(^3\) providing public health information,\(^3\) delivering public health care directly to certain segments of the American population,\(^3\) and by funding the delivery of public health care.\(^3\) Moreover, when the federal government exercises its federal spending power to prepare for or respond to the public health emergencies that arise from natural disasters. In such circumstances the government is acting to protect and preserve the public health. In all these services and activities, the Equal Protection Clause of the Fourteenth Amendment clearly prohibits race or class discrimination by the government.\(^4\) Nevertheless, litigants have met with mixed results in courts when seeking to enforce the Constitution’s mandate for the government not to discriminate in providing for or protecting the public health.

For example, early attempts to rely upon the United States Constitution to address racial segregation in health care facilities failed. In *Johnson v. Crawfish*,\(^4\) a Black plaintiff sued the state-owned mental institution seeking declaratory and injunctive relief

\(^3\) See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (University of California Press 2001).
\(^3\) Id.
\(^3\) Id.
\(^3\) Id. at 34-46.
\(^4\) The Fourteenth Amendment provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
for the defendant hospital's refusal to admit him because he was a Negro. The Eastern District of Arkansas Court dismissed the *Johnson* case, rejecting the plaintiff's claims that the hospital had violated the due process and equal protection clauses of the Constitution or the laws of the United States. The Court said the plaintiff was denied admission because his condition was not severe — he was merely mentally defective, rather than suffering from psychosis that required hospitalization, and because there were no available beds for Negro patients specifically. Remarkably, the Arkansas Court concluded on these facts that the defendant hospital did not exclude the plaintiff because of his race alone. In fact, the *Johnson* Court affirmed that a state mental hospital could properly exercise its discretion not to accept patients beyond their capacity allotted to Negro patients without violating Constitutional prohibitions against discrimination. The Court rested its view on the fact that Negro patients were regularly admitted into the defendant hospital (when space allowed) and thus declined to find the exclusion in this case was based on race. Moreover, the *Johnson* Court declined to reach the question of whether the defendant's system of segregating patients by race was permissible under the U.S. Constitution, finding that the plaintiff did not properly bring the issue of segregation before the court in his Complaint.

Several lower court cases mirrored the *Johnson* court's ruling until the watershed case in which the United States Supreme Court addressed the Constitutionality of hospital segregation nearly a decade later. In *Simkins v. Moses H. Cone Memorial Hospital*, six African-American physicians, three African-American dentists and two African-American patients sued collectively to challenge the staffing and admissions procedures at two non-profit hospitals in Greensboro, North Carolina. The *Simkins* plaintiffs raised not only Fifth and Fourteenth Amendment challenges to the Constitutionality of the two defendant hospitals' segregation policies, but averred that the United States Congress' exercise of its spending power under the Hill-Burton Act of 1946 was unconstitutional.

The Hill-Burton Act was enacted as part of the Public Health Service Act, the "Hospital Survey and Construction Act" and required hospitals using federal funds for construction and renovation to meet two conditions: the "reasonable volume" and "community service" provisions. The first required federally funded hospitals to accept a reasonable volume of indigent care and the second required these facilities to provide

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42 *Id.* at 234.

43 *Id.* at 239.

44 See *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963) (challenging staffing and admissions procedures at the Long Hospital and the Cone Hospital, two non-profit hospitals, both located in Greensboro, North Carolina).
such care on a non-discriminatory basis as part of their “community service.”

However, both these apparently egalitarian provisions were qualified by an explicitly discriminatory exception written into the plain language of the Act:

[B]ut an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group.”

This provision statutorily affirmed the United States government’s role in funding segregated hospitals from 1946 until 1963. On November 1, 1963, the Fourth Circuit Court of Appeals declared the discriminatory separate but equal language of the Hill Burton Act unconstitutional in Simkins v. Moses H. Cone Memorial Hospital.

The Simkins court held that hospitals participating in the Hill-Burton program engaged in state action:

Here the most significant contacts compel the conclusion that the necessary ‘degree of state (in the broad sense, including federal) participation and involvement’ is present as a result of the participation by the defendants in the Hill-Burton program. The massive use of public funds and extensive state-federal sharing in the common plan are all relevant factors. . . . But we emphasize that this is not merely a controversy over a sum of money. Viewed from the plaintiffs’ standpoint it is an effort by a group of citizens to escape the consequences of discrimination in a concern touching health and life itself. As the case affects the defendants it raises the question of whether they may escape constitutional responsibilities for the equal treatment of citizens, arising from participation in a joint federal and state program allocating aid to hospital facilities throughout the state. . . . Our concern is with the Hill-Burton program, and examination of its functioning leads to the conclusion that we have state action here. . . . Such involvement in discriminatory action ‘it was the design of the Fourteenth Amendment to condemn.”

The Simkins Court concluded that Hill-Burton’s separate but equal provisions violated both the Due Process clause of the Fifth Amendment, and the Equal Protection

46 See also, 42 C.F.R. §53.112 (2005) (emphasis added).
47 Simkins, 323 F.2d 959, at 967.
Clause of the Fourteenth Amendment.

The success of the Simkins case and its progeny turned on the finding that federal spending provided the requisite state action to compel compliance with the Constitution. This same principle applies to compel equality when the government spends on other services that affect public health. Simkins stands for the proposition that government spending to build and maintain public housing, to prepare and execute natural emergency plans, to rescue and recover victims of natural disasters, and to provide for post-disaster reconstruction, must all be done without discriminating against any protected class. Nevertheless, the United States Constitution has not proved to be a nimble tool to address public health disparities.

In addition to its Constitutional pronouncements, the Simkins case gave rise to another federal anti-discrimination law: Title VI of the Civil Rights Act of 1964. Title VI initially proved a potent tool for fighting racial segregation in hospitals and health care institutions. However, recent Supreme Court decisions have limited this statute's usefulness as a weapon against public health disparities.

B. Title VI – The Anti-Segregation Weapon of Choice

Title VI provides that “[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Until 2001, the plain language of the statute provided private plaintiffs remedy for both “disparate treatment” and “disparate impact” claims. The former category of cases requires a plaintiff to allege the defendant violated Title VI by

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48 See, e.g., Cypress v. Newport News General Hospital, 375 F.2d 648 (4th Cir. 1967) (challenging exclusion of Black doctors from hospital medical staff); see also Marable v. Alabama Mental Health Board, 297 F.Supp. 291 (M.D. Ala. 1969) (winning challenge to end segregation and employment discrimination in mental health facilities based on Title VI non-discrimination provision and on Equal Protection clause of United States Constitution for Black patients); see also Coleman v. Humphreys County Memorial Hospital, 55 F.R.D. 507 (D. Miss. 1972) (enjoining “discriminatory practices” in a public facility because defendant County Hospital received Hill-Burton funds).

49 In 1965, the passage of the Medicare and Medicaid Acts infused the American health care system with taxpayer dollars to purchase health care for America's elderly, disabled and poor citizens. The increased spending power of the federal government provided ample leverage to attack overtly discriminatory system-level practices, such as those seen in the Simkins case. See Simkins, 323 F.2d 959.

50 See, e.g., City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003).

treat the plaintiff differently from other similarly situated individuals. The latter, "disparate impact" claims, allege that a practice or policy has had a disproportionately negative impact on a protected class of people. The procedural framework for each of these to causes of action was similar.

First, plaintiffs had to set forth prima facie evidence of discrimination. After the plaintiff made a prima facie showing, the defendant could rebut this evidence by offering any legitimate reason for the allegedly discriminatory practice. In disparate treatment cases, the plaintiff then had to prove the defendant's proffered reason was actually a pretext for intentional racial discrimination. Herein lies the most difficult aspect of proving a disparate treatment case. In order to prevail, the plaintiff must show the defendant had the specific intent to discriminate. Although intent may be demonstrated using circumstantial evidence, including statistical data, evidence of discriminatory intent is nonetheless, difficult to adduce. Until recently, therefore, plaintiffs preferred to bring disparate impact claims, rather than disparate treatment claims, in order to prosecute actionable discrimination under Title VI.

The procedure for disparate impact claims is similar to what has been described. First, the plaintiff must make out a prima facie case of discrimination. In disparate impact cases, this might be based upon statistical evidence that a practice or policy has had a disproportionately negative discriminatory impact. Some courts have reasoned that there is a statistical threshold required to support a claim of adverse impact under Title VI. Other courts have held that a minimal statistical showing, alone, is insufficient to establish a disparate impact claim. In either case, the defendant will then have an opportunity to show that a legitimate goal is served by the alleged discriminatory practice. Then the burden returns to the plaintiff to show that a less discriminatory alternative is plausibly available to the defendant. Plaintiffs' preference for Title VI litigation based

52 HAROLD S. LEWIS, JR. AND ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 313 (2nd ed. 2004). For example, rarely do plaintiffs uncover a "smoking gun," such as a deliberate or even unwitting admissions or racially biased statements.

53 See infra Part C.ii (discussing the Supreme Court's limitations now placed on disparate impact claims under Title VI).

54 See United States v. Virginia, 454 F.Supp. 1077 (E.D. Va. 1978) (considering not only the statistical evidence that height and weight requirements for State Trooper applicants disqualified more than 98% of all women and only 50% of all men, but also the evidence that Virginia had never hired a woman state trooper to conclude the "inexorable zero" established a disparate impact case under 42 U.S.C. § 2000e-2(a) (2003)).

55 See Guardians Ass'n v. Civil Service Commission of New York City, 463 U.S. 582 (1983) (holding that even without showing discriminatory intent, proof of discriminatory effect was sufficient to establish a Title VI violation).
on disparate impact allegations was based on the levels of proof required for each. Dis-
parate impact claims, unlike disparate treatment cases, did not require direct proof of in-
tentional discrimination. However, in 2001, the United States Supreme Court precluded
private plaintiffs from exercising this preference.56

C. The Supreme Court Limits Title VI Litigation

In Alexander v. Sandoval,57 the Supreme Court introduced a new reading of Title VI. The Court distinguished cases that rely on Section 601 of Title VI, from those relying on Section 602 of the same statute and read that distinction to prohibit private causes of action based on disparate impact of protected classes.

Section 601 of Title VI of the Civil Rights Act prohibits racial discrimination by programs that use federal funds.58 Section 602 of that Title authorizes federal agencies to “effectuate the provisions of [§601] . . . by issuing rules, regulations, or orders of general applicability.”59 Historically, the Supreme Court has also recognized that Title VI permitted federal agencies to promulgate regulations prohibiting discrimination due to the unintentional disparate impact of facially neutral practices and policies.60 However, in Alexander v. Sandoval, the Supreme Court held that while Title VI permits private individuals to sue to enforce Title VI’s prohibition against intentional discrimination, Title VI

57 Id.
58 The Supreme Court construed this section of Title VI to prohibit intentional disparate treatment on the basis of race or national origin. See Guardians Ass’n v. Civil Service Commission, 463 U.S. 582 (1983) (challenging disparate impact of examination on minority police department applicants; although no opinion commanded majority, all agreed that Section 601 prohibits intentional discrimination).
60 See Alexander v. Choate, 469 U.S. 287, 292-93 (1985) (confirming the holding in the Guardians case, which provided

... a two-pronged holding on the nature of the discrimination proscribed by Title VI ... First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts).
VI permits no private right of action to enforce disparate impact regulations promulgated under Section 602 of the Act, even where the regulations promulgated under Section 602 are valid prohibitions on activities imposing a disparate impact on the basis of race.

In Sandoval, non-English speaking citizens brought a class action suit alleging the Alabama DMV policy of issuing driver’s license exams in English-only had a disparate impact on their protected class in violation of Title VI. The Supreme Court reversed a lower court injunction and held the plaintiffs could not bring a private action to enforce disparate impact regulations under Title VI. According to Justice Scalia’s majority opinion in Sandoval, the challenged regulations did not involve the intentional discrimination expressly forbidden under §601 of Title VI.

The Supreme Court’s decision in Alexander v. Sandoval eliminates the private enforcement of Title VI disparate impact claims. Two enforcement alternatives remain, however. Either, private plaintiffs may prosecute intentional discrimination by bringing disparate treatment claims under Title VI, or plaintiffs may rely upon administrative enforcement through the Office for Civil Rights (“OCR”). Private plaintiffs may report discrimination to the OCR and rely upon that agency’s staff to enforce the disparate impact regulations promulgated under Title VI. Over the past decade, however, the OCR’s enforcement record has been lackluster, its staff has been reduced, and its budgets have been cut. Many commentators have written to confirm that where healthcare is concerned, Title VI enforcement to eliminate racial disparity and injustice is no longer a priority. According to Professor Vernilia Randall, the “timid and ineffectual enforcement efforts of the government through the Office of Civil Rights at the U.S. Department of Health and Human Services (HHS) have fostered, rather than combated the discrimina-
tion that continues to infect the nation's health care system."\textsuperscript{66}

In a report reviewing the Bush Administration's commitment to civil rights enforcement, the U.S. Commission on Civil Rights found:

"that President Bush has neither exhibited leadership on pressing civil rights issues, nor taken actions that matched his words. The report reaches this conclusion after analyzing and summarizing numerous documents, including historical literature, reports, scholarly articles, presidential and administration statements, executive orders, policy briefs, documents of Cabinet level agencies, federal budgets and other data. . . . This report finds that President Bush has not defined a clear agenda nor made civil rights priority."\textsuperscript{67}

An alternative to administrative enforcement of Title VI, explored in the next section, does exist.

\textbf{D. The Supreme Court Limits Private Civil Rights Enforcement Under 42 U.S.C. §1983}

Enacted for the purpose of "restraining federally unlawful state sponsored conduct,"\textsuperscript{68} 42 U.S.C. §1983 enables a private plaintiff to sue the government for deprivation of civil rights. This statute creates a private remedy for state-sponsored discrimination, providing that,

\begin{quote}
\textit{[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or}
\end{quote}


other proper proceeding for redress . . . .69

Plaintiffs wishing to vindicate a violation of their civil rights under this statute do not have to prove intent to discriminate. They may press their claims against either a government official or an entity defendant.

In the former case, plaintiffs must make a prima facie showing against an individual by alleging that the person deprived him or her of a right protected under the United States Constitution or under federal law. The defendant must have acted "under color of state law" - that is to say in an official capacity, and the defendant must have caused some harm that damages or that an injunction may remedy.70 In addition to these elements, and in order to recover against a government entity under 42 U.S.C. §1983, a plaintiff must show the entity’s policy caused the injury. Thus, a state or local government entity may be held liable for injuries that result from its deliberate, considered agenda, not its inadvertent conduct.71

There is no policy element required against an individual defendant. However, plaintiffs in these cases face the formidable affirmative defenses of absolute immunity (granted generally to judges, legislators, and prosecutors), and qualified immunity defenses, which attempt to distinguish culpable ministerial functions from protected exercises of discretion.72 Prevailing plaintiffs are entitled to compensatory and punitive damages where approved.73

On its face, 42 U.S.C. §1983 would seem ideally suited to prosecute the public health harms that result from government-sponsored conduct such as the implementation of the state levee board policies that systematically redirect maintenance funds while leaving vulnerable populations at great, known risk; or state police departments who selectively rescue disaster victims; or evacuation plans that deliberately abandon poor and minority citizens until the rich and White citizens are out of harms way. Section 1983 would seem the ideal statute to enforce the Constitution’s guarantee of equal protection for all citizens who depend upon community hospital workers to provide non-discriminatory care in a crisis or who rely upon the state to provide equally for adequate food, shelter and police protection during a natural disaster. However, the Supreme

71 Id. at 15.
72 Id. at 9.
73 Id. at 11-12.
Court, very much in the same way it acted to narrow the use of Title VI, decided in Gonzaga University et al v. Doe,74 to limit the private causes of action that plaintiffs may bring under 42 U.S.C. §1983,75 thus foreclosing the use of this law as a viable means to address state-sponsored public health disparities.

The plaintiff elementary school teacher in Gonzaga sued to enforce the privacy provisions of the Federal Family Educational Rights and Privacy Act (FERPA) under 42 U.S.C. §1983. The defendant university investigated and allegedly released the plaintiff's name in connection with a sexual misconduct claim. The Supreme Court held the plaintiff was precluded from enforcing FERPA's non-disclosure provision because, it reasoned, the federal statute creates no private right of action to enforce its provisions. Justice Rehnquist, writing for the majority, narrowed §1983 to be used to enforce only federal rights “secured elsewhere” by a Constitutional provision or federal statute that creates not only a right to recover, but also a remedy for those who recover as well.76

Taken together, the Sandoval and Gonzaga decisions appear to spell defeat for the viability of privately enforcing two of this nation's most effective civil rights laws within the federal courts. However, alternative enforcement vehicles for these laws may exist. Both are particularly suited to the problem of public health disparities that arise from discriminatory governmental practices in advance of, during, or in response to natural disasters.

III. Two Proposed Litigation Strategies

The practical impact of the Supreme Court's decisions in Sandoval and Gonzaga was to disarm private Civil Rights litigants. Nevertheless, civil rights abuses continue to occur, and continue to visit substantial injury and harm on private litigants. The discrimination that results from government actions towards and concerning America's most vulnerable citizens, at their most vulnerable hour, is perhaps the most invidious of all. Government-sponsored discrimination during natural disaster makes a mockery of the government's obligation to protect, not harm, the public health. It turns on its head, the notion of a benevolent government, committed to protecting equality and justice for all, and it multiplies the already unfathomable horror of being victimized by nature at its most extreme. Historically, the most effective method of holding our government accountable for ensuring equality and civil rights in this nation has been private litigation.77

75 See Id. at 290 (declaring that Congress' intent must be “in clear and unambiguous terms”).
76 Id. at 285.
77 See, e.g., Brown v. Board of Education, 349 U.S. 294 (1955); Bivins v. Six Unknown Agents of
Private litigants bring the passion of personal experience with discrimination to bear in civil rights litigation. They offer inside information about discrimination otherwise unavailable to administrative enforcers. Also, they add to the limited personnel and other resources available to administrative enforcers. Through these means, private litigants are not hindered by a “stake” in the very government against whom discrimination charges are being brought. With these advantages in mind, the two litigation strategies outlined in the remainder of this article are designed to create new opportunities for private Attorneys General to hold local, state and federal governments accountable for their role in creating certain public health disparities.

A. Enforcing Title VI And 42 U.S.C. §1983 Prohibitions against Public Health Discrimination via the Civil False Claims Act

This article proposes that private individuals file disparate impact claims, Title VI claims, and 42 U.S.C. § 1983 claims against government officials and entities indirectly, despite the Supreme Court’s recent holdings, by using a vehicle under the Civil False Claims Act (FCA) called a “false certification claim.” This has been a particularly successful vehicle for prosecuting violations of federal and state statutes that do not explicitly contain recognized private causes of action or remedies. The FCA-based false certification


78 See Civil False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). The FCA provides in pertinent part, as follows:

(a) Liability for certain acts. Any person who: (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspire to defraud the Government by getting a false or fraudulent claim allowed or paid...; (7) knowingly makes, uses or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government is liable to the United States Government for a civil penalty of not less than [$5,500] and not more than [$11,000], plus 3 times the amount of damages which the Government sustains because of the act of that person... 31 U.S.C. § 3729 (2000).

The **Thompson** court approved a plaintiff’s claim that the Civil False Claims Act could be violated by a defendant’s failure to comply with the Medicare Anti-kickback Statute, and with two statutes that prohibit physician self-referrals called the “Stark Laws.” Despite neither of these statutes providing for private enforcements or remedies, federal courts have now repeatedly approved private enforcement of the terms of these statutes, using the False Claims Act’s *qui tam* provision. I argue here, not only that the FCA may be used to enforce civil rights laws in the same way that the **Thompson** case and its progeny have approved enforcement of Anti-kickback and Stark Law provisions, but that civil rights cases provide a far superior application of the false certification claim described herein.

### i. An Overview of The Civil False Claims Act

The FCA statute prohibits a government contractor from knowingly submitting or causing to be submitted, a false or fraudulent claim for payment to the United States Government. In the public health context, providers of services (including government entities and officials who use the Federal Government’s funds, for example), under the Federal Emergency Management Agency (FEMA), Medicare or Medicaid, are government contractors whose conduct is controlled by the FCA. The claims for payment in public health care, or emergency response and disaster relief, are simply the requests for reimbursement for emergency rescue, or medical goods and services, submitted to the

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79 United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899 (5th Cir. 1997).
80 The Medicare and Medicaid Anti-Fraud Act, 42 U.S.C. § 1320a-7b (2000), contains a criminal provision referred to herein as the “Anti-kickback statute.”
81 42 U.S.C. § 1395nn (2000) [hereinafter The Stark Law will refer to Stark I and Stark II, which were enacted in 1989 and 1993 respectively, but which together prohibit the practice of physician self-referral]. The Stark Law, 42 U.S.C. § 1395nn(a)(1) provides: (A) the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise made under this subchapter, and (B) the entity may not present or cause to be presented a claim under this subchapter or bill to any individual, third party payor, or other entity for designated health services furnished pursuant to a referral prohibited under subparagraph (A).
83 See infra section iii, distinguishing FCA enforcement of Civil Rights claims from other uses of the statute.
84 The Civil False Claims Act, 31 U.S.C.§ 3729(c) (2000) defines the term “claim” but also provides information regarding the parties who make such claims, including “contractor, grantee, or other recipient” of federal funds.
These claims for reimbursement are the subject of the FCA.

Under this statute, three elements must be proven for a plaintiff to prevail on an FCA claim. First, the plaintiff must prove that a claim or statement for payment was made. Second, the claim for payment must have been false or fraudulent. Third, the plaintiff must prove the false claim or statement was made knowingly. Under this statute, "knowingly" may mean the defendant had actual knowledge that the claim was false, but it may also mean the defendant acted in "reckless disregard" or with "deliberate indifference" to the truth or falsity of the claim submitted. If proven, violation of the FCA will cost defendant providers a civil penalty ranging from between $5,500 and $11,000 for each individual claim for payment filed, plus three times the damages the government has incurred by paying the false or fraudulent claim.

The FCA's *qui tam* provision makes it particularly attractive as a vehicle to prosecute civil rights offenses. This provision of the FCA creates a private cause of action that allows individuals to bring suit on behalf of the United States Government, against those suspected of fraudulent billing against public funds. The FCA was originally enacted in 1863 and called "Lincoln's Law" because its objective was to stop fraudulent sales of inferior supplies to the government during the Civil War. The statute was intended to encourage private parties who knew of fraud, to help prosecute that fraud as private attorneys general, or more colloquially, as "whistleblower[s]." The private plaintiff who brings an action under the *qui tam* provision of the FCA is called the

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85 Id.
89 "Qui Tam" is a truncation of the Latin phrase, "qui tam pro domino rege quam se ipso in hac parte sequitur." BLACK'S LAW DICTIONARY (8th ed. 2004). This phrase describes actions brought by a private party, on behalf of the government. Id. The approximate translation of the entire Latin phrase is: "he who brings action for the king as well as for himself." Id.
90 See Civil False Claims Act, 31 U.S.C. §3730 (2000) (setting out the Private Cause of Action under the FCA). It reads:

(b) Actions by Private Persons. (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting … Id.

92 Id.
"relator" because that person relates facts that constitute a fraud against which the government can recover its own money. In exchange for the inside information about fraud and the prosecutorial assistance that the government receives, the FCA allows the qui tam relator to share in the proceeds of the litigation.93

Until 1986, few plaintiffs took advantage of the qui tam provision. However, in 1986, Congress substantially increased the percentage share of damages and judgments that a private plaintiff will receive in successful qui tam enforcement.94 Now, depending on whether the Government joins the relator’s lawsuit to take over the prosecution, or allows the relator to prosecute the suit independently, the plaintiff can receive between 15 and 30 percent of the trebled damages or settlement amount from a case.95 As a result, qui tam relators who successfully sue health care providers are regularly earning tens of millions of dollars for their assistance to the government.96 The same model might apply to bringing FCA suits against governments and their contractors who fraudulently provide emergency medical or rescue services in times of crisis.

95 See Civil False Claims Act, 31 U.S.C. §3730 (2000). Now the qui tam relator’s share under FCA reads as follows:

(d) Award to Qui Tam Plaintiff. (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim . . . (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount, which the court decides, is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses, which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant. Id.
96 See Whistleblowerlawyer.com, What Are the Rewards; available at http://www.whistleblowerlawyer.com/reward.htm. (last visited November 30, 2006) (sample recoveries such as $22 to the relator in a case against United Technologies, Inc. involving helicopter contract; $18.5 million paid to the relator who filed against Lucas Industries, Inc. to allege falsification of gear box records on Navy fighter jets and Army rocket launchers).
To illustrate, consider a parish official or local public works board charged with maintaining a city's floodwall system. Assume repeated violations in the funding, inspection, maintenance, and even original construction of the floodwall system. Assume further that the government's corruption proved to violate not only state and federal safety statutes, but also proved to be the result of gross misallocation of federal construction funds. If the state and local governments, or the contractors they engaged, overcharged for their sub-standard services in this way for a period of, say, five years, then as defendants in an FCA lawsuit, they could be fined a civil penalty for each and every instance when they submitted a claim to be reimbursed for the inflated cost of a single act of construction, maintenance or repair of the floodwall system during the entire relevant period. Moreover, if an FCA violation is proven, the defendant found liable under the FCA must pay treble the damages that the government suffered as a result of the false claims. This is measured as the difference between what the government paid to reimburse the defendant provider based on the claim submitted, and what the government would have paid had the claim not been false.

In my hypothetical example, if the cost of building a floodwall foundation was several millions of dollars, not only would the defendant construction contractors be held liable for $11,000 for each and every draw made to pay their construction costs during the relevant five-year period, but in addition the defendant could owe three times the damages the government suffered by paying for sub-standard construction. On large construction projects, or maintenance contracts, one can quickly see that the potential liability the defendant faces grows exponentially. As the defendant's exposure to liability under the FCA grows, so does the size of the private qui tam plaintiff's percentage share in proceeds from the suit. As a result, plaintiffs who have been active and creative in developing theories of recovery under the FCA, would turn their attention to holding city, state, and federal entities responsible for their public health discrimination. The false certification claim would be an available tool.

**ii. False Certification Claims under the FCA**

False certification claims are a specialized type of FCA claims that allow plaintiffs to bring otherwise unavailable underlying charges against the defendant because the underlying charges are literally wrapped inside a false claims allegation under the FCA.

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97 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (2000), §1.04 [E], The Increase to Treble Damages. (emphasis added).
98 Id. (emphasis added).
99 Id. at § 1.04 [G], Expanded Role, Protection, and Rewards for the Qui Tam Relator.
100 Id. at § 1.06[C], The “False Certification” Case.
Here is how the false certification claim works: the plaintiff first identifies an underlying statute, independent of the FCA itself that a defendant is alleged to have violated. For our purposes, that underlying statute will be either 42 U.S.C. § 1983, or Title VI of the Civil Rights Act. Next, the plaintiff identifies the claims for reimbursement that the defendant presented to the government during the period when the defendant was not complying with the letter and spirit of the underlying law – in our case, the Civil Rights laws, and accompanying regulations. The crux of the false certification claim is the plaintiff's assertion that the defendant certified, either expressly or impliedly, that it was compliant with all federal law in order to claim reimbursement for goods and services from the United States Government and that the government viewed such a representation as a condition for payment or reimbursement. If it turns out that the defendant did not, in fact, comply with the underlying law, then the defendant's certification and claim for payment submitted to the government are both false and actionable under the FCA.

The Thompson case discussed above is seminal and directly applicable in the Civil Rights context. The Fifth Circuit approved a version of the false-certification claim in Thompson that is instructive. In Thompson, the Fifth Circuit Court read the defendant's annual cost reports as express certifications that it had complied with all Medicaid and Medicare regulations. Notwithstanding this representation, the Court found the defendant had violated both the Stark Law and the Anti-kickback statute. The Anti-kickback statute's criminal provisions prohibit knowingly paying or receiving any remuneration in exchange for patient referrals and for goods and services paid for by federal health care programs. The Thompson court found the defendant's claims were false because they were inconsistent with the representation that the defendant had complied with the law. Thus, these claims were falsely certified as compliant when they in fact

101 Ideally, the plaintiff can identify a form or document the defendant submitted as part of the claim for payment, which contains an express representation, or certification that the defendant is in substantial compliance with all other controlling laws. In our hypothetical, that certification would apply to compliance with Title VI as well. In other contexts, plaintiffs have found such a certification when providers submit HCFA form UB-92'2 or HCFA 1500's to be reimbursed. If this is the case, then an express certification that the defendant is compliant with federal law will serve as the basis to satisfy the falsity element of an FCA claim. On the other hand, if no express certification of compliance is available, the plaintiff may argue the defendant impliedly certified compliance with Title VI and that the Government would not have reimbursed for medical goods and services if it knew the defendant was violating the Federal Civil Right Law at the time it requested reimbursement.

102 Thompson, 125 F. 3d at 902.

103 42 U.S.C. §1320a-7b(1)-(2). The civil portion of the Anti-kickback law, not at issue in Thompson, prohibits false statements or representations of material fact in application for federal health benefits. See, 42 U.S.C. §1320-7b(a).
were not, and this discrepancy made the claims actionable under the FCA. The Thompson Court emphasized the importance of the fact that the government had relied upon the defendant’s ultimately false representation in making its reimbursement payments.  

Applying the Thompson Court’s false certification analysis to prosecute civil rights violations of the United States Constitution, Title VI and 42 U.S.C. §1983 during natural disasters will require a similar showing of the government’s reliance on a representation that the defendant certified compliance with federal law. Forms required for payment of Federal Emergency Management Association funds likely require government entities and contractors to affirm their willingness to comply with federal law. This is the type of documentation that may evince the government’s general unwillingness to pay for discriminatory services. Although the FCA does not explicitly require the plaintiff to satisfy an injury element, as a practical matter, the government and qui tam relators will be attracted to prosecuting cases against defendants who have cost the government money. The treble damages provision of the FCA turns on showing the government was damaged by the alleged underlying violation. Therefore, the success of applying Thompson’s false certification theory to civil rights claims to prosecute government-sponsored public health disparities will depend upon convincing a fact-finder that the federal government relied upon and would not otherwise have paid to reimburse providers for goods and services delivered before, during and after natural disasters.  

Pogue v. American Healthcorp, Inc. provides another example in which a private qui tam relator filed a FCA suit to enforce Medicare anti-fraud laws that contain no private remedies. In Pogue, the plaintiff sued his former employer to prosecute the defendant physicians’ patient referrals to his own centers for treatment. The qui tam relator in Pogue could not have prosecuted this alleged violation of the Anti-kickback and self-referral laws directly because, as discussed, neither of these statutes creates a private

104 Thompson, 20 F.Supp.2d at 1035.
105 See also, United States ex rel. Augustine v. Century Health Services, Inc, 289 F.3d 409 (6th Cir. 2002) (implied certification theory of recovery under the FCA based on finding cost reports contained a certification that “to the best of its knowledge and belief, [the cost report] is a true, correct, and complete report prepared from the books and records of the provider in accordance with applicable instructions. . . .” thus defendants represented they would comply with Medicare regulations.” making costs reports false claims for payment under FCA); see also Mikes v. Straus, 274 F.3d 687 (2nd Cir. 2001) (where qui tam relator relied on the defendants HCFA-1500 forms to find the express certification that said “I certify that the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me ” in order to prosecute medical negligence claim).
107 Id. at 1508.
cause of action. Yet, in *Pogue*, the court reasoned that violations of the anti-fraud statutes were actionable under the FCA under the false certification theory because the government would not have paid Medicare reimbursements if it had known the defendants' conduct violated anti-fraud laws.\textsuperscript{108} Thus, the court concluded the defendant's claims for Medicare reimbursement filed, while in continuing violation of anti-fraud laws, were false.\textsuperscript{109}

This theory is directly applicable to Title VI and 42 U.S.C. §1983 claims. Although the Courts no longer recognize a private cause of action under Title VI, and despite the circumscribed ability to enforce non-discrimination laws under § 1983, those claims for payment are false and actionable under the FCA.\textsuperscript{110}

Applying the *Thompson* false certification and *per se* liability models to prosecute civil rights violations *via* the FCA will require civil rights advocates to satisfy the underlying substantive elements of either the Constitutional or statutory claim that is the basis for the fraud action. For example, where a directly prosecuted Title VI action employs a burden-shifting procedure, the evidence in an FCA suit must also support the Title VI elements. Thus, in an FCA-based disparate impact case, after a *qui tam* relator is able to show *prima facie* violation of Title VI's anti-discrimination provision, the relator will also have to show that it could discharge its subsequent burden to show there is not a feasible alternative policy that would have less of an adverse impact on racial and ethnic minorities.\textsuperscript{111}

There are several advantages to prosecuting civil rights claims by the FCA. First, the FCA will allow these claims for disparate impact to be brought by private parties, despite the Supreme Court's recent decisions narrowing private parties' access to these claims.\textsuperscript{112} Second, although the plaintiff will have to prove the elements of the underlying Title VI or §1983 claims are satisfied, this can be done without the administrative requirements to file a complaint, seek voluntary compliance, and exhaust all the

\textsuperscript{108} *Pogue* is somewhat limited in its reach; however, because of the Fifth Circuit's decision to imply falsity from an inference that the defendants in that case deliberately hid their Anti-kickback violations from the government with the intention of obtaining Medicare reimbursements the government otherwise would not have paid if the defendants' conduct had been revealed.

\textsuperscript{109} See supra note 105, at 1508.

\textsuperscript{110} See supra note 105, at 1518.


other administrative remedies required to enforce these statutes through the OCR.\textsuperscript{113} Third, the FCA's scienter requirement relaxes the intent requirement that a direct enforcement of both §1983 and Title VI might otherwise require.\textsuperscript{114} Fourth, the FCA claimant need not prove materiality or direct injury to state a colorable claim.\textsuperscript{115} However, the statute's objective is to redress fraudulent spending of public funds. Therefore, any cognizable FCA claim must serve this goal. Because there are many cases in which the FCA would be a poor substitute for existing laws that directly control the conduct of health care providers, the argument here that civil rights litigation should proceed under the FCA must be distinguished. First, the FCA is appropriate where the Federal enforcement authority has either lost or abdicated its ability to administratively address the violations of the underlying law. Second, the FCA is an apt substitute for direct enforcement where the precise objectives of the underlying law—in this case, the Civil Rights Act of 1964—are unambiguous and will be precisely served by FCA litigants. Finally, where the Federal Government expressly requires certification that government contractors comply with a federal law before receiving reimbursement, the FCA approach is particularly well suited for prosecuting violators of that certification.

\textit{iii. Distinguishing Civil Rights from Other False Certification Claims}

Notwithstanding the advantages of using the FCA as a mechanism for revitalizing civil rights litigation to address racial injustice in public health, the potential for misapplication of the FCA false certification claims warrants a word about the distinction between those claims that are suitable for FCA enforcement, and those that are not. The Thompson defendants cautioned that the FCA could not be the "stalking horse" for every statutory and regulatory violation, thus turning the anti-fraud statute into a "mega-remedy."\textsuperscript{116} This must be correct. For example, in \textit{United States ex rel. Joslin v. Community Home Health of Maryland, Inc.},\textsuperscript{117} a District Court refused to use the false certification claim proposed by a \textit{qui tam} plaintiff to enforce state licensing laws allegedly violated by a home health agency.\textsuperscript{118} Therefore, this section provides a list of features to

\begin{footnotesize}
\begin{enumerate}
\item Here, the plaintiff would still bear the burden of proving the civil rights violation under Title VI or § 1983, but then would pursue the case through the FCA rather than following the administrative requirement to exhaust remedies available through the Office of Civil Rights since there is no requirement under the FCA that all administrative remedies have been exhausted before filing a false certification claim.
\item John T. Boese, Civil False Claims and \textit{Qui Tam} Actions (2000), § 1.04[b], The Lowered Intent/Knowledge Requirement.
\item David C. Hsia, Application of \textit{Qui Tam} to the Quality of Health Care, 14 J. LEGAL MED. 301 (1993).
\item \textit{Id.} at 385.
\end{enumerate}
\end{footnotesize}
distinguish civil rights cases to equalize public health resources as claims that may be properly enforced through the FCA.

First, Title VI and 42 U.S.C. §1983 are federal statutes so that FCA enforcement would not preempt state law in any way. This is distinguishable from such cases as United States ex rel. Mikes v. Straus,119 which essentially cloaked a state law medical malpractice claim in FCA anti-fraud clothing. Second, the statutory and regulatory objectives and provisions of the civil rights laws state unambiguous remedies. Title VI violations do not arise from good faith efforts to interpret or apply a complex or changing body of detailed regulatory provisions. This distinguishes Title VI from attempts to use the false certification claim to prosecute error rather than fraud. Third, while the FCA is a general anti-fraud statute, using it to prosecute medical fraud in place of specifically drafted Medicare and Medicaid anti-fraud statutes is distinguishable from using the FCA to prosecute civil rights violations. Fourth, FCA enforcement will directly serve Congress’ intent in prohibiting the use of federal funds to provide discriminatory health care and treatment. Fifth, the FCA’s qui tam provision will appropriately allow the government to enlist the help of insiders to identify discriminatory policies that are subtle, complex and difficult to identify without the assistance of private participants in litigation.

Elsewhere120 I have objected to the use of private qui tam insiders under the Civil False Claims Act to prosecute Anti-kickback and other fraud statutes in part because of the very absence of a private cause of action within the terms of those statutes. This use of the FCA to prosecute civil rights violations is distinguishable from those to which I continue to object because the fraud statute never contained private action provisions while the Civil Rights Statutes did. The Medicare and Medicaid anti-fraud statutes never contained a private cause of action and were never meant to be privately enforced. On the contrary, Congress drafted the Civil Rights legislation to include private causes of action and the law has recognized a long history of private enforcement of these statutes. Therefore, enforcing Civil Rights statutes via FCA false claims actually restores rather than contravenes Congress’ original legislative intent. Moreover, the compensatory and punitive damages available for civil rights violations are consistent with damages available in all private litigation. This is markedly different from the complex penalty structure that is clearly meant for administrative enforcement only available under the Anti-kickback and Stark Laws. There, a range of discretion foreign to the civil jury fact finder is required to determine whether exclusion, civil penalties, imprisonment, imprisonment.

fines, compliance orders, consent agreements, or any number of other remedies are most appropriate. In civil rights cases, damages akin to any private litigation are at stake. Just as the government has sought to rely upon *qui tam* relators to help prosecute subtle and complicated schemes that violate the plain prohibitions of the Anti-kickback and Stark Laws, the FCA will prove an appropriate and useful tool to root out subtle forms of discriminatory conduct that plainly violate Civil Rights laws.

Rather than replacing an intricate existing legal regime of fraud law with new fraud laws under the FCA, this article proposes to enforce the precise terms of the Civil Rights laws under a substantively distinct legal provision. I do not propose to replace a properly functioning administrative regime, with private litigation intended to usurp the government’s existing exercise of enforcement authority. To the contrary, the FCA is proposed here as a tool to enforce civil rights provisions where those once vibrant statutes have essentially fallen into disuse where public health care is concerned.

B. School Finance Litigation – A Model for State Law Claims To Address Public Health Disparities

Private litigants have successfully challenged disparate financing of public schools in poor and minority neighborhoods by alleging that discrimination violated the equal protection and education articles of state constitutions. Their disparate impact claims have been based on the premise that when state education systems use property taxes to fund schools, they may not provide different educational opportunities for poor students than is provided for wealthy students.121 The school financing cases enforce both the equal protection clauses found in most state constitutions,122 and the articles of state constitutions that empower the state to provide for public education.123

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122 See AL. CONST. art. I §1; ARK. CONST. art. I, § 1; ARIZ. CONST. art. I, §13; CAL. CONST. art 1, §7; CONNECT. CONST. art. I, §20; FLA. CONST. art. I, §2; G.A. CONST. art. I, §2; HAW. CONST. art. 1, §5; IDAHO CONST art. I, §1; ILL. CONST. art I, §2; IND. CONST. art 1, § 1, §23; IOWA CONST. art I, §1; KAN. CONST. art. I, §1; KY. CONST. art. I, §1, §3; LA. CONST. art. I, §3; ME. CONST. art I, §1; MICH. CONST. art I, §2; MO. CONST. art I, §2; MONT. CONST. art I, §4; NEB. CONST. art I, §3; NEV. CONST. art. I, §3; N.H. CONST. art. I; N.J. CONST. art I, §5; N.M. CONST. art II, §18; N.Y. CONST. art I, §11; N.C. CONST. art I, §19; N.D. CONST. art I, §1; OHIO CONST. art I, §2; O.R. CONST. art I, §1; PA. CONST. art I, §28; R.I. CONST. art I, §2; S.C. CONST. art I, §3; S.D. CONST. art I, §18; TEX. CONST. art I, §3a; V.T. CONST. art I; VA. CONST. art I, §1; WASH. CONST. art I, §12; W. VA. CONST. art 3, §1; WIS. CONST. art. I, §1, §9, §15; WYO. CONST. art. I, §3.

123 See, e.g., Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (holding California State constitution equal protection clause as basis for invalidating disparately funded public school system).
Professor Robert J. Klee has applied the school financing litigation model to environmental injustice cases. Professor Klee has argued that the differential exposures to pollutants that minority and poor communities suffer from ("locally undesirable land uses" (LULU's)), are the result of unintentional discrimination, but discrimination nonetheless. Therefore, he recommends using the school financing litigation cases that have successfully challenged educational disparities, to attack environmental disparities as well. I propose here that the school finance "blueprint" is also one that private litigants can use to bring action against governmental entities and individuals responsible for the public health disparities arising from natural disasters. The government's role in the disparate treatment of Hurricane Katrina victims offers a hypothetical case to demonstrate how the school financing model might be applied.

i. A Hypothetical Lawsuit: Actionable Federal, State and Local State Action After Hurricane Katrina

A private resident of New Orleans, seeking redress for the state's role in creating a public health disaster, before, during, and after the Hurricane Katrina natural disaster made landfall, might file an equal protection claim based on the plain language of Louisiana's Constitution which provides, "No person shall be denied the equal protection of the laws. . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition or political ideas or affiliations." The plaintiff in this hypothetical case would have to show that she is a member of a suspect class, who suffered disproportionately as a result of the 1) state's management of the Katrina disaster, and that 2) the public health harms that resulted, violated a fundamental right under the Louisiana state constitution. The demographic profile of Hurricane Katrina's hardest hit victims make it abundantly reasonable to assume our hypothetical plaintiff is a poor, Black woman. By reason of her race, she is a member of a suspect class. Beyond that, however, this plaintiff has a colorable, albeit admittedly aggressive, argument that her poverty also makes her a member of a pro-

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124 Klee, supra note 120.
125 Klee, supra note 120, at n. 76. The author reports that thirty five state supreme courts have heard allegations that their states' school funding systems violated either the state's equal protection clauses, or the state's constitutional mandate to provide public education. Id. Of those cases, eighteen state courts found their school funding disparities unconstitutional, while sixteen struck down the plaintiffs' allegations. Id.
126 LA. CONST. art. I, §3.
127 Davis, supra note 2, at 20.
To find that poverty is a protected class, the Louisiana Court would have to hold as the California Supreme Court did in *Serrano v. Priest*[^135] rather than as the United States Supreme Court has decided on the question of whether poverty is a suspect class for equal protection analysis.[^130] To illustrate, take the following examples in relation to Hurricane Katrina: some New Orleans residents were absolutely unable to pay for any means of transportation to participate in the state's evacuation plan which only provided for residents who owned or had access to their own private transportation;[^131] because these plaintiffs' poverty deprived them of a meaningful opportunity to enjoy the benefit of safe housing away from dilapidated levees and floodwalls; because their poverty rendered them completely unable to pay for adequate food or rescue from the hurricane; and because these plaintiffs' lacked anything worthwhile, the government-created situation absolutely left them subject to conditions where there were inadequate protection from the putrid, sweltering, public health dangers found in the Superdome and other vastly under-prepared shelters of last resort, a Louisiana Court may find that poverty in this case is indeed a suspect class, even applying the United States Supreme Court's standards in making this determination.^^132

The next question then, is whether adequate protection from the public health disaster that followed Hurricane Katrina was a fundamental right. The plaintiff must begin by considering whether the Louisiana Constitution articulates a fundamental right to health and safety under the Louisiana state constitution. The Preamble to Louisiana's Constitution does express that the state's desire "to protect individual rights to life, liberty and property...[and] promote the health safety, education, and welfare of the people...." Moreover, Article XII §8 of Louisiana's Constitution does grant the legislature the authority to establish a system of public health.[^133] Beyond the text of this state Constitution, the structure of Louisiana's constitution provides further support for the finding that public health and safety from disaster is a fundamental right.^[134]

[^135]: See *Serrano*, 557 P.2d 929 (Cal. 1976). See also S. Burlington County NAACP v. Twp. of Mt. Laurel, 336 A.2d 713 (N.J. 1975) (describing how poor residents entitled to equal protection of health and general welfare were, through exclusionary zoning, left with no housing).


[^131]: Davis, *supra* note 1, at 83.

[^132]: Id.

[^133]: LA. CONST. art. 12, §8. The Constitution thus provides the authority for the legislature to promulgate statutes to create a public health infrastructure such as the emergency public health plan codified in LA. REV. STAT. ANN. §29:764 (2006).

[^134]: See *Id.*, *but cf.*, ARK. CONST. art. VII, §4, (stating that "The legislature shall provide for the promotion and protection of public health"); HAW. CONST. art. IX, § , (stating that "The State
In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, the Louisiana Supreme Court reviewed the state agency's grant of permits to allow construction and operation of a hazardous waste facility. The Court then determined that under the public trust doctrine mandated by Louisiana's Constitution, the state's government had a duty to protect and conserve the state's natural resources "insofar as possible and consistent with health, safety and welfare of the people." In the same way that the Court found state government's duty to protect the health of Louisianans from hazardous waste facilities, a Court construing Louisiana's laws and constitution, when faced with such massive public health violations, might also find state and local governments were obligated to protect the fundamental right of citizens to be free from flood waters that contained such a combination of debris, rodents, alligators, sewage and industrial waste that it was, at best, described as a "toxic soup."

Finally, the state court in the hypothetical equal protection case would be asked to consider whether the government's provision of public health protections to the poor and minority communities of Louisiana was so completely inadequate that it rose to constitutional proportions. The answer to this question may very well be "yes." The local levee boards in Louisiana may be found to have chronically underfinanced the maintenance of levees such as the 17th Street and London Avenue levees. The structural integrity of these floodwalls may be found to have been plagued by government corruption from their very inception with the use of inferior construction materials and substandard construction techniques. The Court may further find that state government officials awarded no-bid construction contracts to contractors and provided no oversight to prevent these contractors from taking shortcuts in constructing floodwalls, such as sinking pilings and metal underpinnings to a fraction of the depth called for in Army design specifications. The Court faced with this hypothetical lawsuit may find that

shall provide for the protection and promotion of the public health"; MICH. CONST. art. IV, §51 (stating that "The public health and general welfare of the people of the state are hereby declared to be matters of primary concern. The legislature shall pass suitable laws for the protection and promotion of the public health").

136 452 So.2d at 1154.
140 See http://southernstudies.org/facingsouth/2005/12/report-levees-not-built-to.asp. (last visited January 4, 2006). Also, at the time of its publication, the House of Representatives' final re-
the state’s repeated failure to provide a comprehensive evacuation plan to Congress, and the Federal governments decision to reject Red Cross assistance, Wal-Mart supply trucks, Coast Guard deliveries, and numerous other offers of rescue for poor and minority citizens trapped in New Orleans may rise to the level of constitutional violations for which our hypothetical plaintiff may recover.

The numerous procedural and evidentiary challenges of proving that government-sponsored public health disparities are equal protection violations have been recounted elsewhere. This notwithstanding, the school financing litigation model provides a viable alternative to obtain redress against states whose discriminatory practices create public health disasters.

IV. Conclusion and Recommendations

I have written before that “rumors of the demise of effective Civil Rights litigation in health care are premature.” In this article I continue to pursue new approaches to breathe new life into the laws and legal approaches that have historically served as useful and potent weapons against discrimination by reason of race and class in this nation. The impact of racial and economic injustice is magnified when the very governmental authority charged with protecting and promoting public health, instead takes the occasion of a devastating hurricane, flood, earthquake, tornado or storm that is completely out of its control, to impose differential policies and procedures that are fully within its control. And while doing so discriminate and deny services to the most vulnerable victims under its charge. The two litigation strategies outlined in this paper are without question, aggressive. This paper proposes to use the FCA to resurrect private enforcement of Title VI and 42 U.S.C. §1983. It also proposes to take the issue of civil rights violations to the state courts and seek enforcement of state constitution equal protection provisions. At the core of all these proposals is the hope that private advocates will once again bring local, state and federal government officials and entities back to a place of accountability for the public health, safety and welfare of all Americans.

142 See September 18, 2005 CNN.
144 Klee, supra note 120.