

Environmental Justice in New Orleans: A New Lease on Life for Title VIII?

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I. INTRODUCTION

Hurricane Katrina, the broken levees that flooded New Orleans, and the equally broken government response afterward generated outrage and exposed troubling racial and class disparities. Yet two years later, with much of the national media attention having subsided in lockstep with the floodwaters, important environmental risks remain. As described by Dr. Robert Bullard, a seminal concern is that “[t]he way toxic cleanup in New Orleans neighborhoods is being handled is tantamount to a giant ‘human experiment.’”¹ The concern is that the communities left behind

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For Trudy.

1. Robert D. Bullard, Clark University, Env'tl. Justice Res. Ctr., *Let Them Eat Dirt: Will the "Mother of All Toxic Cleanups" Be Fair to All NOLA Neighborhoods, Even When Some Contamination Predates Katrina?* 4 (Apr. 2006), http://www.ejrc.cau.edu/Let_Them_Eat_Dirt.pdf; see also Julie Sze, *Toxic Soup Redux: Why Environmental Racism and Environmental*

after Hurricane Katrina may now face rebuilding on contaminated land,² and the related harms to the environment, public health, communities, and society itself that would follow.³ It seems obvious that a real “cleanup” would not leave behind unsafe levels of contamination, especially for those most at risk (children and pregnant women). Framing this as a cognizable legal theory, however, is the challenge. With that challenge in mind, this Article explores the extent to which Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)⁴ may compel an environmentally just reconstruction, with a focus on New Orleans.⁵

For at least the past fifteen years or so, Title VIII has been an area of some commentary in the environmental-justice movement.⁶ The lurking question has been whether it can fulfill the promise of Title VI of the Civil Rights Act of 1964⁷ and the Equal Protection Clause⁸ to promote environmental-justice principles.⁹ Community groups have certainly

Justice Matter After Katrina (June 11, 2006), <http://understandingkatrina.ssrc.org/Sze/> (noting that environmental-justice activists in the Gulf Coast “have argued that they are like ‘canaries in the mine’”).

2. See, e.g., Bullard, *supra* note 1, at 6 (“[E]nvironmental injustice may be compounded by rebuilding on poisoned ground.”).

3. See *infra* notes 161-164 and accompanying text.

4. Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (2000).

5. This Article’s focus on New Orleans allows for a more discrete analysis of the case law and facts, including documented environmental conditions. This focus is not intended, however, to diminish other such harms in the Gulf Coast states. See, e.g., Mike Keller, *Dioxin-Tainted Soil Found*, SUN HERALD (Biloxi, Miss.), Aug. 9, 2006, at 1 (reporting on a finding of elevated levels of dioxin in soils moved by Katrina tidal surge).

6. See, e.g., Gregory H. Meyers, *Developing a Cohesive Front Against Environmental “Injustice,”* 8 U. BALT. J. ENVTL. L. 27 (2000); Colin Crawford, *Other Civil Rights Titles*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 69 (Michael Gerrard ed., 1999); Terenia Urban Guill, *Environmental Justice Suits under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189 (1998); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U.L. REV. 221 (1997); Alice L. Brown & Kevin Lyskowski, *Environmental Justice Litigation: Environmental Justice and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)*, 14 VA. ENVTL. L.J. 741 (1995); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523 (1994); Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Efforts of Environmental Justice*, 87 NW. U.L. REV. 787 (1992).

7. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

8. U.S. CONST. amend. XIV.

9. See generally Clifford Rechtschaffen & Eileen Gauna, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 381 (2003) (noting that “commentators have proposed the possibility of using Title VIII . . . to remedy environmental inequities” (citing Crawford, *supra* note 6); see also MANUEL PASTOR ET AL., IN THE WAKE OF THE STORM: ENVIRONMENT, DISASTER, AND RACE AFTER KATRINA 7-8 (2006), available at <http://www.russellsage.org/news/katrinabulletin2> (identifying Title VIII as part of an environmental-justice framework including “[t]he right of all individuals to be protected from environmental degradation”); discussion *infra* note 6 (citing additional commentary on Title VIII’s environmental-justice potential).

asserted Title VIII in New Orleans post-Katrina. For instance, they challenged an ordinance that effectively keeps out low-income earners,¹⁰ as well as government decisions to raze public housing.¹¹ But in recent years, some courts have limited Title VIII's reach in cases involving more traditional environmental nuisances.¹² This Article probes a different application: whether Title VIII requires an environmentally just cleanup of contamination as part of new-housing development and reconstruction post-Katrina.

Part II provides an overview of some key facts and related issues underlying this analysis. Empirical data, and an in-depth discussion of the extent of contamination in various communities pre- and post-Katrina, is not this Article's purpose or focus. While important and touched on in Part II, this Article proceeds on the assumption that communities that are predominantly of color have faced historically greater (and unsafe) levels of contamination (particularly lead contamination) in urban centers, which at least persists post-Katrina, if not made worse. These post-Katrina studies (including studies showing contamination in excess of state cleanup levels), which Part II touches on and which are cumulative with historical data, all raise cause for alarm.

Part III then discusses the law. Because Title VIII obviously deals with "fair housing," it only applies to certain situations. This Part analyzes whether the facts here may provide an adequate "statutory hook," under 42 U.S.C. §§ 3604(b) or 3617, to remedy disparate and unsafe levels of contamination. It is perhaps debatable whether Title VIII may fulfill a broader environmental-justice promise in the context of toxics, and it is generally untested in this particular application, but it provides a thoughtful framework for considering such issues here. This Article makes the case for Title VIII here because an adequate reconstruction should go hand-in-hand with safe housing opportunities post-Katrina.

II. DISPARATE IMPACTS IN THE RECONSTRUCTION OF NEW ORLEANS

Though the Army Corps of Engineers pumped out most of the floodwaters within little more than a month after Hurricane Katrina,¹³ the

10. See *Greater New Orleans Fair Hous. Action Ctr., Inc. v. St. Bernard Parish*, No. 06-7185, slip op. (E.D. La. Oct. 3, 2006).

11. See *Anderson v. Jackson*, No. 06-3298, slip op. (E.D. La. Sept. 28, 2006).

12. See, e.g., *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 20 (2006).

13. *One Month Later, New Orleans Nearly Pumped Dry*, ENV'T NEWS SERVICE, Oct. 3, 2005, <http://www.ens-newswire.com/ens/oct2005/2005-10-03-03.asp>.

reconstruction of New Orleans seems likely to take years. “We’re going to have to clean probably the greatest environmental mess we’ve ever seen in this country.”¹⁴ This presents both opportunity and risk. “We will change South Louisiana entirely by what we do and don’t do in the next decade or so.”¹⁵ With that in mind, a central environmental-justice issue is whether the cleanup adequately addresses harmful environmental conditions in communities of color.¹⁶ “[T]he billion dollar question facing New Orleans is which neighborhoods will get cleaned up and which ones will be left contaminated.”¹⁷

Beyond the factual issue of whether and the extent to which flooding is to blame for distributing contaminants,¹⁸ it is clear that post-

14. Interview by Tim Russert with Michael Chertoff, Sec’y of the Dep’t of Homeland Sec. (Sept. 4, 2005), available at <http://www.msnbc.msn.com/id/9179790/>.

15. Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 68 (2006).

16. See, e.g., Interview by Steve Curwood with Beverly Wright, Dir., Deep S. Ctr. for Envtl. Justice, Dillard Univ. (Oct. 27, 2006), available at <http://www.loe.org/shows/segments.htm?programID=06-P13-00043&segmentID=4>.

17. Bullard, *supra* note 1, at 1. As stated by John Pardue, Co-Director of Laboratory Services at Louisiana State University: “You’ll never have an opportunity like that again, to address an urban problem on that kind of scale.” Matthew Brown, *Final EPA Report Deems N.O. Safe; Pockets of Contamination to be Monitored; Activists Disappointed*, TIMES-PICAYUNE (New Orleans), Aug. 19, 2006; see also Howard W. Mielke et al., *Hurricane Katrina’s Impact on New Orleans Soils Treated with Low Lead Mississippi River Alluvium*, 40 ENVTL. SCI. & TECH. 7623, 7626 (2006) (“With large sections of the city currently uninhabited, post-Katrina New Orleans presents an ideal situation to undertake an unprecedented primary prevention program for creating a health-based, [lead]-safe environment for children returning to the city.”).

18. For discussion on this issue, see, e.g., Mielke et al., *supra* note 17, at 7623-25 & tbls. 2-3 (discussing analysis of lead in areas monitored with clean soil under a pre-Katrina study and then tested in a post-Katrina phase); George Cobb et al., *Metal Distributions in New Orleans Following Hurricanes Katrina and Rita: A Continuation Study*, 40 ENVTL. SCI. & TECH. 4571, 4571 (2006) (discussing possibility of sediment deposition and heterogeneity of contaminant distribution (citation omitted)); Leslie Fields et al., NRDC, *Katrina’s Wake: Arsenic-Laced Schools and Playgrounds Put New Orleans Children at Risk* 10-11 (2007), <http://www.nrdc.org/health/effects/wake/contents.asp> (finding arsenic contamination in soil consistently higher post-Katrina); GINA M. SOLOMON & MIRIAM ROTKIN-ELLMAN, NRDC, *CONTAMINANTS IN NEW ORLEANS SEDIMENT: AN ANALYSIS OF EPA DATA* 12 (2006), <http://www.nrdc.org/health/effects/katrinadata/sedimentepa.pdf> (noting high lead levels as likely due to past use of paint and gasoline, or from industrial leakage; noting flooding as redistributing lead on surface soils).

Separately, as the Natural Resources Defense Council (NRDC) reported in a post-Katrina assessment, the hurricane impacted three Superfund sites in the area. KAID BENFIELD ET AL., NRDC, *AFTER KATRINA: NEW SOLUTIONS FOR SAFE COMMUNITIES AND A SECURE ENERGY FUTURE* 13 (2005), <http://www.nrdc.org/legislation/hk/hk.pdf>. One of these sites was reported as completely “submerged under water” as a result, “while the other two were flooded with their dangerous contents joining the sewage and household hazardous chemicals” in the floodwaters. DAVID M. DRIESEN ET AL., CTR. FOR PROGRESSIVE REFORM, *AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA* 5 (2005), available at http://www.progressivereform.org/Unnatural_Disaster_512.pdf. Additionally, over 500 sewage plants throughout Louisiana were “were damaged or destroyed in Louisiana, including 25 major ones.” *New Orleans Toxic Tide*, DESERT MORNING NEWS, Sept. 8, 2005, quoted in Driesen et al., *supra*, at 38. As reported soon

Katrina soil samples found “high levels of lead, arsenic and other hazardous chemicals.”¹⁹ As discussed below in this Part, pre-Katrina data also indicates that contamination is most predominant in communities of color. As a threshold matter, and as in many major cities, communities of color “have been fighting for environmental justice in New Orleans and Louisiana for decades.”²⁰ Historic “Cancer Alley”²¹ and the Agriculture Street Landfill²² are paradigmatic examples. Hurricane Katrina should bring new scrutiny to these issues, in a way that will bring about actual protection for residents.

In terms of lead contamination, an Environmental Protection Agency (EPA) investigation post-Katrina found excessive lead levels in soil in fourteen New Orleans areas, each equivalent to six to eight city blocks.²³ As the *Times-Picayune* reported, the lead contamination was mostly found in the Lower Ninth Ward, Treme, Bywater, Gentilly, and other communities.²⁴ The highest levels of lead contamination in all of New Orleans were found in Gentilly, “where the soil concentration is nearly three times the [Louisiana Department of Environmental Quality (LDEQ)] soil cleanup level, and more than ten times the level that may qualify as hazardous waste under the EPA’s guidelines.”²⁵ Lead

afterward, no one could determine the extent of contamination that was “exacerbated by poor initial cleanups.” Driesen et al., *supra*, at 5.

19. *All Things Considered, Katrina Stirs Up Issue of Lead Levels in Soil* (NPR radio broadcast Mar. 1, 2006) [hereinafter *Lead Levels in Soil*].

20. Nina Haletky, *Rebuilding on Common Ground: Social and Environmental Justice in New Orleans*, 2006 URBAN ACTION 91, 92, available at bss.sfsu.edu/urbanaction/ua2006/pdf/ua2006-Haletky.pdf.

21. *See id.* (describing Cancer Alley as the “stretch of about a hundred miles between Baton Rouge and New Orleans along the Mississippi River dominated by industrial chemical facilities”).

22. *See* ALICIA LYTTLE, UNIV. OF MICH., AGRICULTURE STREET LANDFILL: ENVIRONMENTAL JUSTICE CASE STUDY (Dec. 2000, rev. Jan. 2003), <http://www.umich.edu/~snre492/Jones/agstreet.htm>; *see also infra* note 43-44 and accompanying text (discussing environmental concerns in the Agriculture Street community).

23. *See* Matthew Brown, *Lead Found in Soil of Many Areas of N.O.: Contamination by Toxic Metal Predates Katrina, Scientists Say*, *TIMES-PICAYUNE* (New Orleans), Apr. 6, 2006; *see also* EPA, RELEASE OF MULTIAGENCY REPORT SHOWS ELEVATED LEAD LEVELS IN NEW ORLEANS SOIL, CONSISTENT WITH HISTORIC LEVELS OF URBAN LEAD (Apr. 4, 2006), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/BA5F2460D6C777F58525714600693B5B>; Solomon & Rotkin-Ellman, *supra* note 18, at 12-14.

24. *See* Brown, *supra* note 23 (identifying three sites in Gentilly, two sites in Central City, two sites in Treme, and one site each in Bywater, Carrollton, Lower Ninth Ward, Mid City, St. Roch, the Seventh Ward, and Uptown); *see also* Solomon & Rotkin-Ellman, *supra* note 18, at 13-14. Indeed, as “[o]ne of the oldest cities in the United States, New Orleans has Black families that go back as many as ten generations.” Haletky, *supra* note 20.

25. Solomon & Rotkin-Ellman, *supra* note 18, at 12; *see also id.* at 13

concentrations were also found greatly exceeding the LDEQ soil cleanup level in communities including Lower Ninth Ward and Bywater.²⁶

Childhood lead exposure has, of course, long been a serious problem in many major cities across the country. Applicable here, and as Dr. Howard Mielke et al. write, pre-Katrina data for New Orleans showed that 14% of the city's children overall—and between 20% and 30% of inner-city children—had elevated blood-lead levels (i.e., greater than 10 micrograms (μg) of lead per deciliter (dL)).²⁷

What is the reason for the elevated childhood blood-lead levels in the inner city? Though lead paint in older housing may be a contributing factor, it does not squarely explain the spike in soil-lead levels in the inner city. Rather, the answer appears to lie in studies that indicate that soil-lead concentrations in New Orleans “increase profoundly” in the inner city.²⁸ Children with high blood-lead levels tend to live in census tracts with high soil-lead levels; conversely, children with low blood-lead levels tend to live in census tracts with low soil-lead levels.²⁹ Research by Dr. Mielke further indicates that soil-lead concentrations are elevated because of their proximity to high-traffic routes.³⁰ Soil contamination

26. See *id.* at 13 (listing Gentilly, Bywater, the Lower Ninth Ward, and Mid-City with lead concentrations that far exceed the LDEQ cleanup level of 400 mg/kg).

27. Mielke et al., *supra* note 17, at 7623 (citing Howard Mielke et al., *New Orleans Soil (Pb) Cleanup using Mississippi River Alluvium: Need, Feasibility, and Cost*, 40 ENVTL. SCI. & TECH. 2784, 2784-89 (2006) (citations omitted)).

28. Howard W. Mielke, *Lead in the Inner Cities*, AM. SCIENTIST, Jan.-Feb. 1999, at 62 [hereinafter Mielke, *Lead in the Inner Cities*]; see also Howard W. Mielke, *Lead's Toxic Legacy*, GEOTIMES, May 2005, at 24 [hereinafter Mielke, *Lead's Toxic Legacy*] (stating that a soil-lead map is a “better gauge for predicting childhood lead exposure” than a map of housing ages).

29. Mielke et al., *supra* note 27, at 2784 (citation omitted); see also Howard W. Mielke et al., *The Urban Environment and Children's Health: Soils as an Integrator of Lead, Zinc, and Cadmium in New Orleans, Louisiana, U.S.A.*, 81 ENVTL. RESEARCH 117, 124 (1999) (noting “a consistent and significant association between paired median [blood-lead] and median [soil-lead]”).

Children are at risk based on where and how their play. “[I]n predictable locations of many cities, the soil is a giant reservoir of tiny particles of lead. This means that many children face their greatest risk for exposure in the yards around their houses and to a lesser extent, in the open spaces such as public playgrounds in which they play.” Mielke, *Lead in the Inner Cities*, *supra* note 28; see also Mielke et al., *supra* note 27, at 2784 (“Studies incorporating measurements of [lead] dust on hands before and after outdoor play indicated that in inner-city communities children's hands became [lead]-contaminated after playing outside.” (citations omitted)); Cobb et al., *supra* note 18, at 4576 (“[L]ead in urban soil is directly correlated to lead in the air . . . and to lead on children's hands This suggests a significant potential for children to experience elevated lead exposures in areas where soils contain high lead concentrations.” (citations omitted)).

30. Mielke, *Lead in the Inner Cities*, *supra* note 28; see also Cobb et al., *supra* note 18, at 4575 (“Lead is prevalent in cities due to historic uses of leaded gasoline and leaded paint. Therefore, [lead] concentrations are commonly elevated in soils near major highways and near homes.” (citations omitted)).

declines sharply in suburban areas, and even more in rural areas.³¹ As a result, the highest levels occur in residential areas in the inner city.³²

Census data also supports the conclusion that communities of color are disparately impacted by these elevated lead levels. A separate analysis by Herman Mielke et al., reviewing 1990 census data, shows that approximately 60% of the population living census tracts with higher concentrations of lead and other metals were African American, while approximately 37% were white.³³ These percentages are practically reversed in the census tracts with lower concentrations.³⁴ African American children at least six years old living in these higher-concentration tracts outnumbered white children of the same age group by nearly 3.5 to 1.³⁵ In the case of all children at least six years old living in higher-concentration tracts, 75% were African American.³⁶ All together, this reveals a drastic “overrepresentation” of exposure by communities of color, particularly children, to dangerous toxins.³⁷ As the study concludes: “Black children are overrepresented in communities of the city that contain the highest amount of [lead] in the environment.”³⁸

Arsenic³⁹ and petroleum-based contaminants⁴⁰ were also found at elevated levels in post-Katrina sampling, based on an analysis published by the Natural Resources Defense Council (NRDC) in March 2006 of sediment samples collected by the EPA within five months of Hurricane Katrina. As stated in the NRDC report:

31. Mielke, *Lead's Toxic Legacy*, *supra* note 28, at 23.

32. *Id.* By the same token, highly paved areas in the inner city, such as the central business district and the French Quarter “contain little soil, and therefore cannot act as reservoirs for lead.” Mielke, *Lead in the Inner Cities*, *supra* note 28.

33. Mielke et al., *supra* note 29, at 122.

34. *See id.*

35. *See id.* at 123 tbl. 3.

36. *See id.* at 125.

37. *Id.*

38. *Id.* *See generally* JOHN R. LOGAN, THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED NEIGHBORHOODS 9 fig. 2, <http://www.s4.brown.edu/Katrina/report.pdf> (last visited Nov. 19, 2007) (providing a color-illustrated map of the racial composition of the damaged areas of New Orleans, including the inner city).

39. The NRDC reports that this arsenic contamination may have been caused by “past use of arsenic-based pesticides, trash incineration, leakage from industrial sites and the use of building materials pressure-treated with chromium-copper arsenate.” Solomon & Rotkin-Ellman, *supra* note 18, at 4. “Alternatively, the arsenic may have been in the sediment at the bottom of Lake Pontchartrain and distributed throughout the city with the floodwaters.” *Id.* “[T]ests since the storm ‘suggest’ an increase in arsenic levels in sections of Lakeview, Gentilly and eastern New Orleans.” Coleman Warner, *Getting Out the Message Is Tough: N.O. Safe for Visitors, Residents, DEQ Says*, TIMES-PICAYUNE (New Orleans), Nov. 13, 2006.

40. *See, e.g.*, Solomon & Rotkin-Ellman, *supra* note 18, at 7-11 (discussing benzo(a)pyrene and diesel-fuel contamination).

Most districts in New Orleans contain concentrations of arsenic, lead, diesel fuel or cancer-causing benzo(a)pyrene above levels that would normally trigger investigation and possible soil cleanup in the state of Louisiana. Some hot spots in residential neighborhoods have levels of contamination that are ten times, or even more than a hundred times normal soil cleanup levels.⁴¹

For instance, the EPA found excessive levels of benzo(a)pyrene⁴² in parts of the Agriculture Street community. This elevation may be related to the nearby Agriculture Street Landfill,⁴³ which was created to bury debris from Hurricane Betsy in 1965.⁴⁴ Benzo(a)pyrene was tested in some instances at more than 50 times above the LDEQ soil cleanup level.⁴⁵ Additionally, a more recent NRDC study of arsenic contamination, from soil sampling conducted in March 2007, found elevated levels of arsenic exceeding cleanup guidelines in 30% of samples taken from city playgrounds and schools.⁴⁶

EPA issued a “clean bill of health”⁴⁷ to New Orleans in mid-August 2006.⁴⁸ Advocates argued that this “clean bill of health” essentially “allows a disproportionate number of the poor and people of color to

41. *Id.* at 3 (emphasis added); *see also* Cobb et al., *supra* note 18, at 4574 (discussing post-Katrina sampling that found arsenic concentrations exceeding the human-health soil-screening levels for cancer in forty-three samples).

42. *See* Solomon & Rotkin-Ellman, *supra* note 18, at 10-11 (“Benzo(a)pyrene is part of a group of chemicals known as polycyclic aromatic hydrocarbons (PAHs). These chemicals are found in soot and are also in many petroleum products. Benzo(a)pyrene is one of the most toxic PAHs.”).

43.

The high levels of benzo(a)pyrene found in the sediment may be due to the numerous spills of petroleum products such as diesel fuel during the hurricanes, or can be due to historic contamination from burning of debris or petroleum. The flooding spread the benzo(a)pyrene around many parts of the city, and even after the waters receded it remained in the soil

Id. The NRDC also concluded that the high level of contamination at the Agriculture Street community is likely because of disposal of burned materials at the landfill. *See id.*

44. *See* LYTTLE, *supra* note 22.

45. *See* Solomon & Rotkin-Ellman, *supra* note 18, at 10-11; *see also* Bullard, *supra* note 1, at 4; EPA, *supra* note 23.

46. Fields et al., *supra* note 18, at 9; *see also* Solomon & Rotkin-Ellman, *supra* note 18, at 5-6 (listing Uptown/Carrolton, Mid-City, Lakeview, Gentilly, Bywater, the Lower Ninth Ward, New Orleans East, Arabi, and Chalmette with arsenic concentrations exceeding the LDEQ cleanup guideline of 12 mg/kg, and Mid-City, Gentilly, and Lakeview with arsenic concentrations exceeding the EPA cleanup guideline of 39 mg/kg).

47. Brown, *supra* note 17; *see also* Robert D. Bullard, Clark Univ., Evtl. Justice Res. Ctr., *EPA Gives New Orleans a Clean Bill of Health: Should Government Monitor or Clean Up Toxic Contamination?*, Sept. 7, 2006, <http://www.ejrc.cau.edu/NOLACLEANHEALTH.htm>.

48. EPA, SUMMARY RESULTS OF SEDIMENT SAMPLING CONDUCTED BY THE ENVIRONMENTAL PROTECTION AGENCY IN RESPONSE TO HURRICANES KATRINA AND RITA (Aug. 17, 2006), *available at* <http://www.epa.gov/katrina/testresults/sediments/summary.html>.

move back into areas that are still unsafe and highly polluted with no plans for proper cleanup.”⁴⁹ The EPA reasoned, however, that “[t]he lead results from the EPA samples are comparable to the historical concentrations of lead in soil in New Orleans” found pre-Katrina.⁵⁰ The *Times-Picayune* quoted an EPA toxicologist for this point: “The hurricane didn’t cause any appreciable contamination that wasn’t already there.”⁵¹ LDEQ adopted the same position.⁵² Regardless of whether that is actually true,⁵³ to the extent that any unsafe level of contamination is historic (predating the hurricane), the moral issue still turns on whether the communities most affected should even face such risks.

In the wake of Hurricane Katrina, the government and policymakers are now (or ought to be) “forced to confront” this issue.⁵⁴ In the absence of a comprehensive monitoring and cleanup plan as part of the reconstruction that addresses these concerns, the default posture is to go ahead and rebuild—and to deal with the contamination later, if at all. As a result, a number of activists have been vocal in their objections.⁵⁵ For instance, in late 2006 the Louisiana Conference of the NAACP argued that “‘serious environmental hazards’ resulted from Katrina” and sought “‘continued testing, with findings made available ‘in plain language which the average individual’ can interpret.”⁵⁶ LDEQ rejected such concerns as alarmist, countering that they are inhibiting investment and economic growth in the city.⁵⁷ Of course, the city should not be cast in a blanket fashion as uninhabitable. At the same time, a heightened risk of

49. Interview by Steve Curwood with Robert D. Bullard, *supra* note 16.

50. EPA, *supra* note 48; *see also* EPA, *supra* note 23. “Because of the historical problems with lead-based paint and elevated lead levels in soil, . . . government agencies have recommended for years that all children under the age of 6 years old living in New Orleans should be tested for lead.” Brown, *supra* note 23.

51. Brown, *supra* note 17 (quoting EPA toxicologist Jon Rauscher).

52. *See* EPA, *Release of MultiAgency Report Shows Elevated Lead Levels in New Orleans Soil, Consistent with Historic Levels of Urban Lead* (Aug. 4, 2006), available at <http://www.deq.louisiana.gov/portal/portals/0/news/pdf/EPA-ReleaseofMultiAgency.doc> (“The lead levels appear to be consistent with historic levels reported in a local university study conducted in New Orleans prior to the hurricane. Nationwide studies of older cities have shown similar findings of elevated lead levels in urban soil.”); *see also* *Lead Levels in Soil*, *supra* note 19 (quoting an LDEQ toxicologist for stating that the excessive lead and arsenic findings discussed above are “pretty consistent with what was found before Katrina”).

53. *See supra* note 18 and cited scientific literature on this issue.

54. Brown, *supra* note 23 (context of lead contamination).

55. *See, e.g.*, Warner, *supra* note 39.

56. *Id.* (internal quotations omitted).

57. *See id.* (reporting that a state employee tried to assure Walt Disney Company representatives scouting out New Orleans as a potential filming site “that contaminants detected after Katrina were not at levels threatening to public health,” but that “they never called back”; the Disney representatives had “sought expert backup to provide answers to their cast and employees, many of whom viewed the city as contaminated”).

harm to discrete populations is a moral and legal issue, which as a general matter it would be in any setting, and should not be dismissed out of hand.

As Dr. Beverly Wright, Director of the Deep South Center for Environmental Justice at Dillard University, explained in late 2006: “We are basically being told that because there were so many pollutants in this very old urban city, that what’s here now is no different from what was here before Katrina. For that reason, they are going to allow us to come back into a heavily polluted city.”⁵⁸ As a result, a number of communities are “fearful that the environmental and land-use decisions may be used against them in a discriminatory way that will kill their communities—instead of addressing . . . contamination and cleanup standards that are uniform and stringent so that you clean up a neighborhood like the lower Ninth Ward.”⁵⁹

Of course, with each passing day, it gets more difficult to resolve this issue because of the natural impetus to restore and rebuild. In litigation, one party often benefits from delay. Here, the government benefits from foot-dragging and avoidance. It also has the initial say in enforcing levels of remediation, in addition to considering whether to monitor contamination levels. As a result, the question becomes how communities can best deal with an inequitable (re)distribution, and government ratification, of environmental harm. This question occurs at a pivotal moment—in the reconstruction and revitalization of an important and diverse urban center—when such concerns can and ought to be addressed in a meaningful way. If sufficient will were generated, New Orleans in particular is posed under these circumstances to address the problem, and to do so comprehensively.

III. APPLYING TITLE VIII TO THE RECONSTRUCTION

A. *Title VIII’s Main Features*

This Article focuses on 42 U.S.C. §§ 3604(b) and 3617 of the Fair Housing Act.⁶⁰ Though in general, the Fair Housing Act has many

58. See Curwood, *supra* note 16.

59. Ronald Roach, *Unequal Exposure: Environmental Justice Advocates Mobilize to Ensure Minority Communities Are Not Left out of the Hurricane Katrina Cleanup*, 22 DIVERSE ISSUES IN HIGHER EDUC. 32 (2005), available at http://www.diverseeducation.com/artman/publish/article_5145.shtml (quoting Robert Bullard).

60. Additional statutes related to Title VIII and fair-housing advocacy include the following:

42 U.S.C. § 3604(a), which makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or

“intriguing” features for environmental-justice advocacy.⁶¹ This characterization applies to both §§ 3604(b) and 3617, and include the following:

Scienter generally not required. This is a comparative advantage over the Equal Protection Clause⁶² and Title VI.⁶³ The Fifth Circuit has stated that a Title VIII violation may be established by either “proof of discriminatory intent [or] of significant discriminatory effect.”⁶⁴

otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”

42 U.S.C. § 3604(a) (2000) (emphasis added); *see also* 24 C.F.R. §§ 100.60, 100.70 (2004). Accordingly, a § 3604(a) plaintiff must show that discrimination made his or her housing “unavailable.” Title VIII does not define “available” or “unavailable.” *See* 42 U.S.C. § 3602 (definitions section).

Some case law suggests, but is far from clear, that § 3604(a)’s “availability” requirement also applies to § 3604(b). That requirement effectively means that a plaintiff would need to argue that the housing’s actual post-reconstruction “availability” with contaminated soil meaningless because it posed unacceptable risk. But this risks crossing into “habitability,” which standing alone does not allow for any claim under either subparagraph of § 3604. This Article focuses on § 3604(b), and addresses the uncertainty over this “availability” issue in Part III.B.2.

Id. § 3608(d), which requires that “[a]ll executive departments and agencies . . . administer their programs . . . in a manner affirmatively to further [Title VIII’s] purposes.” *Id.*; *see also id.* § 3608(e) (requiring that the Secretary of the Department of Housing and Urban Development (HUD), *inter alia*, “cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions” and “administer the programs and activities relating to housing and urban development in a manner affirmatively to further [Title VIII’s] policies”).

Id. § 1982, which provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” *Id.* Section 1982 “potentially applies more broadly than Title VIII, but [as with Title VI and the Equal Protection Clause] requires proof of discriminatory intent or purpose.” 2A-12B ENVIRONMENTAL LAW PRACTICE GUIDE § 12B.04 (citations omitted).

61. Cole, *supra* note 6, at 534-35.

62. The Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976) held that proof of discriminatory intent is required in an equal-protection claim. *Id.* at 242-48. As further explained in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), an equal-protection claim would be viable if a party has circumstantial evidence of discriminatory intent. *Id.* at 264-68 (applying five nonexhaustive factors).

63. Section 601 of Title VI prohibits discrimination “on the ground of race, color, or national origin” to anyone who would otherwise be entitled to federal “financial assistance.” 42 U.S.C. § 2000d. A Title VI claim requires discriminatory intent. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (finding it “beyond dispute . . . that [§ 601] prohibits only intentional discrimination”).

64. *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (citing *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986)); *cf. Huntington Branch NAACP v. Town of Huntington*, 488 U.S. 15, 18 (1988) (though not addressing whether the disparate-impact test was “appropriate,” affirming the Second Circuit’s finding that the NAACP established a disparate impact and that the municipality’s justification to rebut it was inadequate).

Discriminatory effect “may be proven by either (1) a showing of disparate impact, or (2) a showing of segregative effect.”⁶⁵

Reaches defendants without a nexus to federal funds: Title VIII “reaches private and governmental defendants without regard to their receipt of federal monies.”⁶⁶

Sovereign immunity: Courts have stated that Title VIII does not abrogate Eleventh Amendment sovereign immunity.⁶⁷ Still, the Supreme Court’s century-old decision in *Ex parte Young*⁶⁸ generally allows “suits against state officials for prospective injunctive relief to end a continuing violation of federal law.”⁶⁹ Injunctive relief would be the proper remedy here.⁷⁰

Private right of action: Title VIII expressly confers a private right of action. It states that “[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court” when he or she suffers a Title VIII violation.⁷¹

Statute of limitations: Title VIII provides a two-year limitations period, from “after the occurrence or the termination of an alleged discriminatory housing practice.”⁷²

65. *Summerchase Ltd. P’ship I v. City of Gonzales*, 970 F. Supp. 522, 528 (M.D. La. 1997). When suing a private defendant—who may have discriminated in a way that affects housing for only one person or a handful of people—the issue is “not whether a single act or decision by that defendant has a significantly greater impact on members of a protected class, but instead . . . whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class.” *Simms*, 83 F.3d at 1555 (citing *Anderson v. Douglas & Lomason Co., Inc.*, 266 F.3d 1277, 1284 (5th Cir. 1994)).

66. *Cole*, *supra* note 6, at 534-35.

67. *See, e.g., Gregory v. South Carolina Dep’t of Transp.*, 289 F. Supp. 2d 721, 724-25 (D.S.C. 2003); *Project Life, Inc. v. Glendening*, 139 F. Supp. 2d 703, 710-11 (D. Md. 2001); *Sierotowicz v. New York Div. of Hous. & Cmty. Renewal*, No. 04-CV03887, slip op. at 5 (E.D.N.Y. June 14, 2005); *Welch v. Century 21 Chimes Real Estate, Inc.*, No. CV-90-3410, slip op. at 3-4 (E.D.N.Y. Feb. 27, 1991).

68. 209 U.S. 123 (1908).

69. *AT&T Commc’ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 643 (5th Cir. 2001). Insofar as a Louisiana state official would be a defendant, this Article assumes that the two main Title VIII claims discussed below would survive against such a defendant under the *Ex parte Young* doctrine. *See id.; cf. James J. Hartnett, Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 135 n.222 (1993) (“The [Eleventh Amendment] presents no serious barrier to suits against state affordable housing agencies under Title VIII. The doctrine of *Ex parte Young* provides that when a state officer is acting in an unconstitutional or illegal manner, he is acting outside the scope of his duty and is therefore not covered by sovereign immunity.” (citation omitted)).

70. *See generally Hills v. Gautreaux*, 425 U.S. 284, 297-98, 305-06 (1976) (holding that racial discrimination by HUD in selecting public-housing sites could be remedied by a comprehensive “metropolitan area relief” order).

71. 42 U.S.C. § 3613(a) (2000).

72. *Id.* § 3613(a)(1)(A). This computation does not include “any time during which an administrative proceeding under this title was pending.” *Id.* The general rule is that “[t]he two-year statute of limitations runs from the last asserted occurrence of a discriminatory housing practice.” *N.D. Fair Hous. Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 979 (D.N.D. 2004) (citing

Administrative remedies need not be exhausted before commencing an action. Title VIII does not require a plaintiff to exhaust administrative remedies, although the plaintiff has the option to pursue administrative remedies before filing suit.⁷³

Nexus to housing discrimination. Title VIII, of course, requires a nexus to housing discrimination. As discussed below, this is a central issue. Tangentially, it also has two sub-features:

Covers a broad scope of real property. Title VIII “extend[s] to all dwellings except those covered by a specific exemption in the statute.”⁷⁴

Credited with potential to advance environmental justice. Although it applies in the precise context of ensuring “fair housing,” in general terms, “[t]he Supreme Court has mandated that courts use ‘a generous construction’ of Title VIII to achieve the policy it embodies.”⁷⁵

B. Potential § 3604(b) Claim

Plaintiffs’ first argument would be under 42 U.S.C. § 3604(b). Section 3604(b) makes it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”⁷⁶ As discussed below, the United States Court of Appeals for the Fifth Circuit⁷⁷ has interpreted this statutory language to require the following: (1) that the prohibited discrimination occur “in connection” with the sale or

Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1998)); see also Jersey Heights Neighborhood Ass’n v. Glendening, 174 F.3d 180, 186-87 (4th Cir. 1999) (finding the statute of limitations was triggered by the government’s Record of Decision (ROD) to site a highway because, for “the fundamental question of where the highway would be located, the ROD . . . signaled the end of the decisionmaking process”). Defining a triggering event for the two main Title VIII claims discussed below is outside of this Article’s scope.

73. 42 U.S.C. § 3613(a)(2). Title VIII allows parties to file a complaint with HUD within one year “after an alleged discriminatory housing practice has occurred or terminated.” *Id.* § 3610(a)(1)(A)(i).

74. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 149 (2004); see also 42 U.S.C. § 3603(a). Exempted properties include single-family houses rented by an owner who “does not own more than three single-family houses at any one time” (42 U.S.C. § 3603(b)(1)), “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other” (*id.* § 3603(b)(2)), and properties owned by religious organizations, insofar as the lease or sale of those properties involves sectarian preferences (*id.* § 3607).

75. Brown & Lyskowski, *supra* note 6, at 743 (citing *Havens Realty Corp.*, 455 U.S. at 380; *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 93 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-10 (1972)).

76. 42 U.S.C. § 3604(b) (emphasis added); see also 24 C.F.R. §§ 100.65, 100.70 (2004).

77. See *infra* note 82 and accompanying text.

rental of housing; and (2) that it relate to a “service,” “facility,” or “privilege” owed to the plaintiff.

1. “In Connection” with the Sale or Rental of Housing

Section 3604(b) only applies to discrimination in “the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities *in connection therewith*.”⁷⁸ The first issue is whether “the language ‘in connection with’ refers to the ‘sale or rental of a dwelling’ or merely the ‘dwelling’ in general.”⁷⁹ This turns on what “therewith” means. Does it refer (1) to the “dwelling” itself (i.e., the broad interpretation, covering discrimination after the transaction), or (2) only to the “terms, conditions, or privileges of [the dwelling’s] sale or rental” (i.e., the narrow interpretation, generally only covering discrimination before or during the transaction)? While a source of some debate, particularly in early legal commentary,⁸⁰ many courts have “narrowed [Title VIII’s] reach” and not interpreted it “so generously.”⁸¹

Less than two and a half months after Hurricane Katrina, the Fifth Circuit in *Cox v. City of Dallas*⁸² affirmed a district court decision which held that § 3604(b) plaintiffs must show that the disparate impact “related to the acquisition of their homes.”⁸³ In *Cox*, the plaintiffs asserted § 3604(b) against a municipality for failing to enforce its zoning laws against illegal dumping at a landfill near their homes.⁸⁴ The Fifth Circuit held that “the ‘services’ subject to the alleged discrimination must be ‘in connection’ with the ‘sale or rental’” of housing.⁸⁵ The plaintiffs’ claim failed because the municipality’s conduct occurred after they bought their homes.⁸⁶ The court reasoned that “unmooring the ‘services’

78. 42 U.S.C. § 3604(b) (emphasis added).

79. *Cox v. City of Dallas*, No. Civ. A. 398CV1763BH, slip. op. at 20-21 (N.D. Tex. Feb. 24, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 20, (2006) (citing *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 2002)); *see also* *Brown & Lyskowski*, *supra* note 6, at 749 (positing the issue as “must the ‘services or facilities’ be ‘in connection’ with the ‘sale or rental of a dwelling,’ or, merely ‘a dwelling’”).

80. *See, e.g.*, *Kaswan*, *supra* note 6, at 249 (“To the extent that a siting decision prompts white residents to move but leaves minority residents in place due to their lesser housing mobility, a siting decision could be seen as having a segregative effect actionable under Title VIII.” (citing *Cole*, *supra* note 6, at 535-37)); *Brown & Lyskowski*, *supra* note 6, at 750.

81. *Meyers*, *supra* note 6, at 42 (citing *Guill*, *supra* note 6, at 223).

82. 430 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 20, (2006).

83. No. Civ. A. 398CV1763BH, slip. op. at 25.

84. 430 F.3d at 738-39, 745.

85. *Id.* at 746.

86. *Id.* at 746-47 (“The claims here do not assert the requisite connection between the alleged discrimination and the sale or rental of a dwelling—that is, [§ 3604(b)] does not aid plaintiffs, whose complaint is that the value or ‘habitability’ of their houses has decreased.”).

language from the ‘sale or rental’ language” would exceed Congress’s intent by allowing a Title VIII claim whenever discrimination “impacts property values.”⁸⁷ The court also found this interpretation “grammatically superior” and consistent with decisions of “many” other courts.⁸⁸

At the same time, the Fifth Circuit acknowledged that § 3604(b)’s implementing regulation⁸⁹ prohibits certain conduct that might occur after the transaction.⁹⁰ Specifically, the regulation states that prohibited conduct includes, but is “not limited to,” acts or omissions that (1) limit

87. *Id.* at 746. Though not cited by the Fifth Circuit, the district court in *Cox* also relied on a passage from Title VIII’s legislative history. No. 398CV1763BH, slip op. at 23-24 (quoting 114 CONG. REC. 4975 (1968) (“[F]air housing throughout the United States . . . means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.” (Sen. Mondale))). This particular legislative excerpt is cited by a handful of other courts. However, *United States v. Koch*, 352 F. Supp. 2d 970 (D. Neb. 2004), expressly criticized the district court’s reliance on this legislative history in *Cox*. *Id.* at 976 n.6. The *Koch* court reasoned that this “broken quote” lacks context because Senator Mondale was merely “respond[ing] to a colleague’s concern” that Title VIII not be interpreted to obligate the federal government to actually provide housing. *Id.*

88. 430 F.3d at 745 (citations omitted); *see also* *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004) (rejecting plaintiffs’ claim that they were harassed by other property owners in violation of § 3604); *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (“The Fair Housing Act does not grant to residents the right to have highways sited where they please.”); *Lawrence v. Courtyards at Deerwood Ass’n, Inc.*, 318 F. Supp. 2d 1133, 1141-43 (S.D. Fla. 2004) (holding that § 3604(b) applies “only in connection with the sale or rental of a dwelling” (citation omitted)); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (holding that § 3604(b) “cannot be extended to a decision such as the selection of a stadium site” (citing *Southend Neighborhood Improvement Ass’n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (referencing § 3604(b)’s “prohibition against discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling”)); *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) (limiting § 3604(b) to services “provided in connection with the sale or rental of housing”); *cf.* *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297, 301 (7th Cir. 1992) (holding that § 3604(b) prohibits discriminatory denials of insurance “in connection with the purchase of a dwelling”).

Legal commentary has noted this narrow interpretation as a possible vulnerability to § 3604(b) claims. *See* Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 642 n.66 (2000); Meyers, *supra* note 6, at 42; Guill, *supra* note 6, at 226-27; Cole, *supra* note 6, at 535-36; Lazarus, *supra* note 6, at 840. *But see* Brown & Lyskowski, *supra* note 6, at 750 (arguing that *Laramore* and *American Family* “misinterpreted prior precedent” and “should carry little weight”).

89. 24 C.F.R. § 100.65 (2007).

90. 430 F.3d at 746 n.37; *see also* Brown & Lyskowski, *supra* note 6, at 750 (citing 24 C.F.R. § 100.65(b) for its prohibitions referenced above). At the same time, a case looking at the same regulatory section concluded that it shows that “the ‘in connection therewith’ language in [§ 3604(b)] [refers] to the ‘sale or rental of a dwelling,’ rather than the ‘dwelling’ in general.” *Lopez v. City of Dallas*, No. 303CV2223M, slip op. at 23-24 (N.D. Tex. Sept. 9, 2004) (citing 24 C.F.R. § 100.65(a)-(b)).

“the use of privileges, services or facilities associated with a dwelling,”⁹¹ or (2) hinder “maintenance or repairs” of housing.⁹² With little explanation,⁹³ the court stated that these provisions were still somehow “‘connected to’ the sale or rental of a dwelling.”⁹⁴

This statement is not meant to discount arguments for a broader interpretation of § 3604(b), which are discussed below. Rather, it is simply meant to clarify that cases adopting a broader interpretation⁹⁵ may be of limited value in light of *Cox*. For instance, the Middle District of Florida decided *Richards v. Bono*⁹⁶ in-between the district court’s and Fifth Circuit’s *Cox* decisions. The *Richards* court rejected the district court’s reasoning in *Cox* and concluded that the narrow interpretation of § 3604(b) “does not extend to cases of post-acquisition discrimination *in a rental context*.”⁹⁷ The *Richards* Court reasoned that tenants necessarily retain certain “privileges” during the period of their tenancy.⁹⁸

91. 24 C.F.R. § 100.65(b)(4).

92. *Id.* § 100.65(b)(2).

93. The court acknowledged that the regulation’s reference to hindering maintenance or repairs “appeared not to be” connected to housing transactions. 430 F.3d at 746 n.37. It continued, however, that “even [such conduct] can be ‘connected to’ the sale or rental of a dwelling.” *Id.* Without further explanation, it stated that constructively evicting a tenant by failing to keep up with required maintenance was such an example. *Id.* The court did not attempt to reconcile this interpretation with other examples under the regulation’s ostensibly broader language. *Id.*

94. *Id.* Plaintiffs could try to argue for a broader application of this regulation, especially because the regulation itself says that it is not providing an exhaustive list of prohibited conduct. *Id.*

95. See, e.g., *Houston v. City of Cocoa*, 2 Fair Housing-Fair Lending (P-H) P 15,625 (M.D. Fla. Dec. 22, 1989) (finding a often-cited in legal commentary; municipality’s refusal to afford African-Americans protection from industrial zoning violated § 3104(b)); cf. *Oliver v. City of Indio*, slip op. No. SA CV 90-0097 (C.D. Cal. filed Feb. 19, 1990) (involving Title VIII claims against a municipality based on its designation of plaintiffs’ property as a blighted area in order to allow a mall to expand onto it). Both cases are taken from *Brown & Lyskowski, supra* note 6, at 745-47. See also *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (“In my view, it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein Thus, and in view of the authorities counseling a broad interpretation of the language of [Title VIII], I cannot share the *Halprin* courts’ cramped interpretation of the scope of [§ 3604].” (citations omitted)); *Richards v. Bono*, No. 504CV4840C10GRJ, slip op. at 11-15 (M.D. Fla. Apr. 26, 2005) (discussed above); *Campbell v. City of Berwyn*, 815 F. Supp. 1138 (N.D. Ill. 1993) (discussed above); cf. *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-65 (8th Cir. 2003) (finding post-tenancy discrimination on the basis of disability actionable under 42 U.S.C. § 3604(f) (2000), which is similar to § 3604(b) by prohibiting discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap”).

96. No. 504CV4840C10GRS, slip op. at 11-15 (M.D. Fla. Apr. 26, 2005).

97. *Id.* at 9-11 (emphasis added).

98. *Id.* at 11-15. The Fifth Circuit in *Cox* affirmed the district court’s decision without referencing *Richards*.

Campbell v. City of Berwyn,⁹⁹ from 1993, is another example.¹⁰⁰ In *Campbell*, the district court held that § 3604(b) applied even though the plaintiffs “had already moved and secured housing” before the police department’s decision to stop providing onsite police protection.¹⁰¹ The court held that the plaintiffs’ set forth a *prima facie* case under § 3604(b) on this ground.¹⁰² The district court in *Cox* expressly rejected *Campbell*’s interpretation of what “in connection therewith” meant.¹⁰³ Without mentioning *Campbell*, the Fifth Circuit in *Cox* affirmed the district court.¹⁰⁴ While *Campbell* has not been expressly overruled, subsequent cases within the United States Court of Appeals for the Seventh Circuit indicate that § 3604(b) generally does not cover discrimination that happens after the housing transaction.¹⁰⁵

The reconstruction of New Orleans, however, would necessarily take place hand-in-hand with many housing transactions. At the very least, it would (or should) be a condition precedent to new-housing construction.¹⁰⁶ The Louisiana Recovery Authority (LRA) has published that “an unprecedented number of homes were destroyed or severely damaged”: “123,000 homes were destroyed or suffered major damage”; “82,000 rental properties were destroyed or suffered major damag[e]”; and “a substantial portion were occupied by low income households.”¹⁰⁷

99. 815 F. Supp. 1138 (N.D. Ill. 1993).

100. *Cox v. City of Dallas*, No. 398CV1763BH, slip op. at 24 (N.D. Tex. Feb. 24, 2004).

101. 815 F. Supp. at 1143.

102. *Id.* at 1143-44.

103. No. 398CV1763BH, slip op. at 24 (“[T]he Court holds that [§ 3604(b)] applies only to discrimination in the provision of services that precludes the sale or rental of housing.”).

104. *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005).

105. The Seventh Circuit in *Halprin* expressly refused to extend § 3604 to “post-acquisition” discriminatory conduct. 388 F.3d at 330. There, the plaintiffs alleged that a homeowners’ association failed to stop harassment by other residents against the plaintiffs on the basis of their religion. *Id.* at 328. The plaintiffs alleged that the president of the homeowners’ association actually wrote religious epithets on their property. *Id.* In rejecting their § 3604 claim (after quoting both subparagraph (a) and (b) earlier in the decision), the court reasoned that the harassment was not related to anything that happened when the plaintiffs acquired their property. *Id.* at 329.

106. Section 3604(b) also covers vacant land that is “offered for sale” for development of new housing. 42 U.S.C. § 3602 (2000) (extending Title VIII to “any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof”). The Fifth Circuit in *Cox* clarified what “offered for sale” means. There, the court rejected the plaintiffs’ alternative argument that “that the dump . . . made housing ‘unavailable’ because the land underneath the dump [was] unavailable for housing for them or prospective residents.” 430 F.3d at 744. The court reasoned that the plaintiffs failed to show that the disposal site was ever going to be offered for sale, and further that “there [was] no guarantee that housing would have been constructed on the land, even had the City stringently enforced its dumping laws.” *Id.*

107. LRA, THE ROAD HOME HOUSING PROGRAMS: ACTION PLAN AMENDMENT FOR DISASTER RECOVERY FUNDS 2 (2006), <http://www.doa.la.gov/cdbg/dr/Housing%20Action%20>

Some of the new housing would be leased to tenants whose prior leases were washed away with the flood.¹⁰⁸ Another potential class of plaintiffs would be homebuyers, such as those who buy through Louisiana's Road Home program, which is discussed below.¹⁰⁹ These relatively common situations are central to why Title VIII applies.¹¹⁰ Under the "in connection therewith" requirement, new-housing transactions serve as § 3604(b)'s "statutory hook." Here, because the cleanup is essential for safe housing, and should go hand-in-hand with the reconstruction, the cleanup would take place "in connection" with new-housing transactions.

Louisiana's Road Home program,¹¹¹—which is administered through a nonprofit public-benefits corporation formed under this program called the Road Home Corporation¹¹²—is also relevant. Under this program, a homeowner who wishes to relocate within Louisiana may sell his or her property to the Road Home Corporation in exchange for up to 100% compensation of its pre-Katrina value.¹¹³ For a homeowner who elects to move outside of Louisiana, the Road Home program provides up to 60% of the property's pre-Katrina value.¹¹⁴ Total compensation under either option is capped at \$150,000 per property.¹¹⁵ The purchased properties "will be either redeveloped to be returned to commerce or preserved as green space, in a manner which is consistent with local land use plans and direction."¹¹⁶ Insofar as the Road Home program involves the direct sale of redeveloped housing, its prospective buyers arguably have § 3604(b) standing in a way that is unique from buyers outside of the program.

Plan%20No%202%20FINAL.pdf (citing the Federal Emergency Management Agency (FEMA) for some of these figures).

108. See *id.* at 2 (referencing 82,000 destroyed or uninhabitable rental properties).

109. See *infra* notes 111-116 and accompanying text.

110. Under *Cox's* narrow interpretation § 3604(b) would likely not apply to residents who rebuild their existing homes or stay in their preexisting rental properties. Arguably, this limitation may create a negative incentive for existing homeowners to sell their properties. This concern is addressed at the end of Part III.B.1.

111. The Road Home program, sometimes also referred to as the Road Home Housing Program, is part of the Louisiana Housing Preservation Act, LA. REV. STAT. ANN. §§ 40:600.31-.44; see also The Road Home Homepage, <http://road2la.org/> (last visited Nov. 19, 2007); LRA, *supra* note 107 (program guide).

112. LA. REV. STAT. ANN. § 40:600.63. The Road Home Corporation was formed to effect "the acquisition, disposition, purchase, renovation, improvement, leasing, or expansion of housing stock." *Id.* The Road Home Corporation is governed by the Louisiana Road Home Corporation Act, LA. REV. STAT. ANN. §§ 40:600.61-.68.

113. See LRA, *supra* note 107, at 12.

114. See *id.*

115. See Overview of the Homeowner Program, <http://www.road2la.org/homeowner/overview.htm> (last visited Nov. 19, 2007).

116. LRA, *supra* note 107, at 12.

Additionally, as to causation, the government's argument that preexisting contamination need not be remediated because it was not caused by the hurricane should be rejected under the statute itself. Section 3604(b)'s plain language shows that its only causal element looks at the *defendant's* own conduct "in connection" with the housing transaction.¹¹⁷ A § 3604(b) claim here would be predicated on the disparate impact caused by an environmentally unjust cleanup and reconstruction.¹¹⁸ Accordingly, a "cleanup" leaving unsafe housing and disparate levels of contamination in communities of color should itself serve as causation under § 3604(b).

Although § 3604(b) claims could lead to logistical issues in the reconstruction, that should not preclude communities from enforcing their rights. First, the fact that only certain tenants and homeowners would have § 3604(b) standing could create a puzzle of parcels that the government would be compelled to remediate versus others that it would not. Perhaps the effect of having Title VIII claims over at least some parcels would leverage political impetus for a more comprehensive cleanup. Indeed, a parcel-by-parcel approach for contaminated properties is sub-optimal for qualitative reasons because of the risk of cross-contamination. Dr. Mielke et al. address this point in espousing a comprehensive lead cleanup program.¹¹⁹ As they explain, lead in soil is "resuspended and dispersed into neighboring properties in the same manner [as] a community surrounding a former [lead] smelter."¹²⁰ Children, then, may face exposure from neighboring properties as a result of natural forces,¹²¹ as well as from playing directly in contaminated areas. This indicates why "an extensive, community-wide clean soil program rather than merely a program for isolated properties" is important.¹²²

117. See *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 99 (2d Cir. 2000) ("To sustain a disparate impact claim under [§ 3604(b)], *plaintiffs must show that the challenged practice had an adverse impact* on members of the protected class with respect to the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." (emphasis added)).

118. See Part II (discussing the bases for Title VIII claims in this context).

119. See Mielke et al., *supra* note 17, at 7626; Mielke et al., *supra* note 27, at 2787.

120. Mielke et al., *supra* note 17, at 7626 (citations omitted); see also *id.* ("[R]esuspension of [lead] from soil has been described as a major contributor to the ongoing deposition and accumulation of [lead]." (citations omitted)).

121. New Orleans experienced arid conditions in late 2005 and early 2006. See Mielke et al., *supra* note 17, at 7626. "The resuspension of [lead] from the reservoir of [lead] dust in the city provides a plausible explanation for the gradual but significant increase in soil [lead] beginning before Katrina." *Id.*

122. *Id.*

Second, it is arguable that because only new-housing transactions (including sales and rentals) would be covered under § 3604(b), existing homeowners could have a negative incentive to sell their properties. The government, however, should ultimately be held accountable for this incentive. It is rooted to the government's own inadequate cleanup. The Road Home program arguably already creates a similar incentive to the extent that it distributes up to \$150,000 to homeowners who wish to relocate.

Third, § 3604(b) claims may arguably delay some reconstruction pending further monitoring or until a court determines what kind of cleanup is required. Notwithstanding, the tradeoff for all of these concerns is that Title VIII may help to ensure that the reconstruction does not, in the long term, create unsafe housing. Such issues should not prevent communities from avoiding longer-term (multigenerational) consequences from these environmental harms.

2. "Services," "Facilities," or "Privileges"

A § 3604(b) plaintiff must next show that an adequate and nondiscriminatory cleanup constitutes a housing-related "service," "facility," or "privilege."¹²³ *Southend Neighborhood Improvement Association v. County of St. Clair*,¹²⁴ decided by the Seventh Circuit in 1984, is often cited by cases and commentary for this issue.¹²⁵ There, the court stated that § 3604(b) "applies to services generally provided by governmental units such as police and fire protection or garbage collection."¹²⁶ The court held, however, that the county's refusal to clean

123. The case law generally does not distinguish between a "facility," "service," or "privilege." The Fifth Circuit in *Cox* observed that "characterizing plaintiffs' argument to include this contention [of a housing-related privilege], we find it unavailing for the same reason that the 'services' claim is unavailing." *Cox v. City of Dallas*, 430 F.3d 734, 745 n.32 (5th Cir. 2005).

124. 743 F.2d 1207 (7th Cir. 1984).

125. See, e.g., Crawford, *supra* note 6, at 77 (referring to *Southend* as a "touchstone case"). The court in *Cox* did not reach this issue on the merits. 430 F.3d at 745 ("Even assuming that the enforcement of zoning laws alleged here is a 'service,' we hold that [§ 3604(b)] is inapplicable here because the service was not 'connected' to the sale or rental of a dwelling as the statute requires). The "service" element was not technically on appeal because the district court had granted summary judgment to the municipality based on the "in connection" element. *Cox v. City of Dallas*, No. 398CV1763BH, slip op. at 25 (N.D. Tex. Feb. 24, 2004). The court cited to *Southend* and other cases as leaving unanswered questions as to whether the municipality's failure to enforce its zoning laws constituted a "service." *Id.* at 745 n.34 (citing *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210; *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 193 (4th Cir. 1999); *Clifton Terrace Assocs.*, 929 F.2d at 720).

126. 743 F.2d at 1210; see also *Housing Justice Campaign v. Koch*, 164 A.D.2d 656, 673, 565 N.Y.S.2d 472 (1st Dep't 1991) (citing this part of *Southend* in holding that the plaintiffs failed to allege facts sufficient to show that New York City violated § 3104(b) by "allocat[ing] funding to create housing units out of their economic reach"). For this point, the court cited

or demolish dilapidated buildings that it acquired by tax deed was “distinct from these types of services.”¹²⁷ Fifteen years later, the United States Court of Appeals for the Fourth Circuit decided *Jersey Heights Neighborhood Association v. Glendening*.¹²⁸ Like *Southend*, *Jersey Heights* held that a highway siting decision was not a “service.”¹²⁹ It reasoned that by “selecting a site for the [highway], defendants did not become providers of housing services.”¹³⁰ This holding also turned on the “in connection therewith” requirement because the court used the reasoning above to conclude that “no one has refused to sell or rent a dwelling to any of appellants on a discriminatory basis.”¹³¹

These cases are often cited for the proposition that the alleged “service” must have a direct housing-related connection. The Eastern District of Virginia, in an unpublished 1999 opinion in *Washington Park Lead Committee v. EPA*,¹³² interpreted *Jersey Heights* to mean that the EPA’s decision on how to perform a cleanup under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹³³ did not allow for a claim under § 3604.¹³⁴ This opinion was decided outside of the Fifth Circuit, and no cases cite to it as of the time this Article was written. But plaintiffs may also be able to distinguish it on the merits.

First, the decision made no clear distinction between subparagraphs (a) and (b) of § 3604.¹³⁵ The court did not cite to either subparagraph, and generally referenced a “Section 3604” claim. It stated that *Jersey*

dictum from the Fourth Circuit in *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419 (4th Cir. 1984). In *Mackey*, the court stated that the term “services” includes “such things as garbage collection and other services of the kind usually provided by municipalities.” *Id.* at 424.

127. 743 F.2d at 1208, 1210. The court provided no further reasoning on that point. *Id.* at 1210. It left open the issue of “whether practices of landlords, bankers, real estate brokers, insurers, or governmental units, including other [county] practices” violate Title VIII. *Id.*

128. 174 F.3d 180 (4th Cir. 1999).

129. *Id.* at 193.

130. *Id.* Tellingly, the court also rejected the plaintiffs’ § 3604(a) claim on a similar ground. The plaintiffs argued that a discriminatory highway siting decision was akin to discriminatory rental policies by landlords or “racial steering” by realtors that made housing unavailable on the basis of race. *Id.* at 192. The court stated that those sorts of Title VIII violations were “‘housing-related’ in a way that a highway siting decision is not.” *Id.* “Countless private and official decisions may affect housing in some remote and indirect manner, but the Fair Housing Act requires a closer causal link between housing and the disputed action.” *Id.* (citation omitted).

131. *Id.* at 193.

132. No. 298CV421, slip op. (E.D. Va. July 12, 1999).

133. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000).

134. *Wash. Park Lead Comm.*, No. 298CV421, slip op. at 9-10 (E.D. Va. July 12, 1999). The court held the same for § 3608. *See id.*; *see also supra* note 60 and accompanying text.

135. *See supra* note 60 and accompanying text.

Heights “definitively held that Section 3604 . . . only reaches actions of landlords, sellers or persons who control the *availability* of housing.”¹³⁶ The court in *Washington Park* indicated that *Jersey Heights* was relying for this point on the Fourth Circuit’s general statement in *Mackey v. Nationwide Insurance Cos.*¹³⁷ that “Section 3604 does not reach every action ‘that might conceivably effect the availability of housing.’”¹³⁸ However, *Jersey Heights* cited that passage from *Mackey* in analyzing § 3604(a), not § 3604(b).¹³⁹

Plaintiffs may argue that this “unavailability” requirement should not be imputed into § 3604(b). More precisely, reading in such a requirement would suggest that the two subparagraphs should be subsumed into one from a drafting standpoint. Of course, interpreting § 3604(b) to require that discrimination occur temporally “in connection” with a sale or rental suggests that the discrimination may sometimes involve availability, but it does not require that conclusion.

For this issue, recent case law is somewhat murky. As recent as July 2007, the Fifth Circuit in *Reule v. Sherwood Valley I Council of Co-Owners Inc.*¹⁴⁰ made the same generalization as in *Washington Park*. Specifically, the court cited *Cox* and the Seventh Circuit’s decision in *Halprin v. Prairie Single Family Homes of Dearborn Park Association*¹⁴¹ for the ostensibly broad statement that the plaintiff’s § 3604 claim (without reference to its subparagraphs) failed because it went to “the habitability of her condominium and not the availability of housing.”¹⁴²

It is true that *Halprin* similarly generalized that the language of both subparagraphs “indicates concern with activities . . . that prevent people from *acquiring* property.”¹⁴³ But as with *Washington Park* and *Reule*, that decision did not separately analyze the precise difference between the language in subparagraphs (a) and (b).¹⁴⁴ As for *Cox*, the organization in that case suggests a clearer demarcation between subparagraphs (a) and

136. *Wash. Park Lead Comm.*, No. 298CV421, slip op. at 10 (emphasis added) (citing *Jersey Heights Neighborhood Ass’n*, 174 F.3d at 192-93).

137. 724 F.2d 419 (4th Cir. 1984).

138. *Wash. Park Lead Comm.*, No. 298CV421, slip op. at 10 (citing *Mackey Nationwide Ins.*, 724 F.2d at 423).

139. *Jersey Heights Neighborhood Ass’n*, 174 F.3d at 192. Though the court in *Jersey Heights* did separately state in its § 3604(b) analysis that plaintiffs’ claims there failed “[f]or similar reasons,” it continued that the siting decision at issue did not “implicate ‘the terms, conditions, or privileges of sale or rental of a dwelling, or . . . the provision of services or facilities in connection therewith.’” *Id.* at 193 (quoting § 3604(b)).

140. 235 F. App’x 227 (5th Cir. 2007).

141. 388 F.3d 327 (7th Cir. 2004).

142. *Reule*, 235 F. App’x at 227 (5th Cir. 2007).

143. 388 F.3d at 328-29 (emphasis added).

144. *Id.*

(b). There, the court rejected the plaintiffs' § 3604(a) claim that a municipality should have stopped illegal dumping at a landfill.¹⁴⁵ The court reasoned that municipality's inaction concerned nearby housing's "habitability" but not its "availability."¹⁴⁶ In its separate § 3604(a) analysis beforehand, the court partially relied on that subparagraph's own "simple language" to conclude that § 3604(a) required unavailability (and that inhabitation alone was insufficient).¹⁴⁷ Whereas, in analyzing § 3604(b), the court held the statute inapplicable on the basis that the service at issue was not "'connected' to the sale or rental of a dwelling as the statute requires."¹⁴⁸

Second, and one of the most important issues for this analysis, the *Washington Park* opinion was premised on the fact that the EPA was a defendant. The court reasoned that CERCLA "is by no stretch a 'housing and urban development' program, but rather is a comprehensive statute designed to facilitate the clean-up of hazardous wastes."¹⁴⁹ Here, plaintiffs would need to argue that the housing- and remediation-related services are united as far as the government is concerned. Were the EPA or LDEQ named as defendants, the reasoning from *Washington Park* might have some analogies as to them. Of course, plaintiffs may counter that these agencies are confronting a cleanup that has virtually unprecedented ties to housing.

But here we have entities that are specifically tasked with a meaningful role in housing redevelopment as part of post-Katrina reconstruction. The reconstruction, which necessarily contemplates (if not directly provides for) the sale, resale, and releasing of housing, ought to carry with it a duty not to vest new generations in these communities with preventable contamination. Indeed, *Washington Park* made this point clear in stating that "the plaintiff's claims against the city and its housing-redevelopment agency, at least at this stage of the litigation, appear more within [Title VIII's] ambit" because those defendants "*are*

145. *Cox v. City of Dallas*, 430 F.3d 734, 744 (5th Cir. 2005).

146. *Id.* at 740-41, 744.

147. *Id.* at 741.

148. *Id.* at 745; *see also* *Edwards v. Johnson County Health Dep't*, 885 F.2d 1215, 1222-25 (4th Cir. 1989) (holding that plaintiffs who received substandard housing lacked a § 3604(a) claim because they could not "contend that [the defendants] literally made migrant housing facilities unavailable"; the court separately rejected a § 3604(b) claim because it found no racially discriminatory impact).

149. *Wash. Park Lead Comm. v. EPA*, No. 298CV421, slip op. at 9 (E.D. Va. July 12, 1999). It added that the EPA was not a landlord or seller that "control[led] public housing as required under Section 3604." *Id.* at 10.

agencies or entities responsible for renting or selling property under Section 3604.”¹⁵⁰

As to the scope of services subject to a § 3604(b) claim, *South Camden Citizens in Action v. New Jersey Department of Environment Protection*¹⁵¹ is an often-cited case. There, the District of New Jersey cited *Jersey Heights* in holding that the New Jersey Department of Environment Protection was not providing a “service” in deciding to grant air-pollution permits for a cement grinding facility.¹⁵² It reasoned that in granting permits, the agency was not involved in the sort of “door-to-door ministrations” as provided by police and fire departments.¹⁵³ Similarly, the Eastern District of Pennsylvania in *Edwards v. Media Borough Council*¹⁵⁴ fairly recently cited to both *Southend* and *Jersey Heights* in holding that a decision on whether to grant a variance was “a discretionary decision comparable to administering city-owned properties or deciding where to site a highway.”¹⁵⁵

Still, other courts have applied *Southend* favorably for environmental-justice plaintiffs. For instance, *Campbell* relied on *Southend* to find police protection as a “service” covered by § 3604(b).¹⁵⁶ Though the district court in *Cox* rejected *Campbell’s* interpretation of what “in connection therewith” meant,¹⁵⁷ neither the district court nor the Fifth Circuit in *Cox* questioned *Campbell’s* interpretation of the “service” requirement. Additionally, the same district court that decided *Cox* decided *Miller v. City of Dallas*¹⁵⁸ two years earlier. In *Miller*, the court cited *Campbell* and *Southend* in indicating that it would deny a future summary-judgment motion against a § 3604(b) claim that a municipality discriminated against the plaintiffs in how it provided street and drainage

150. *Id.* at 10 (emphasis added). This limit on the government’s function also serves to address fears of a “slippery slope.”

151. 254 F. Supp. 2d 486 (D.N.J. 2003).

152. *Id.* at 490, 502-03.

153. *Id.* at 503.

154. 430 F. Supp. 2d 445 (E.D. Pa. 2006).

155. *Id.* at 453. The *Edward* court’s subtle reference to “discretionary” decisions being outside § 3604(b)’s scope is noteworthy. Under that logic, had *Cox* reached the merits on the “service” issue, the fact that *enforcement* of zoning laws is nondiscretionary would have weighed in the plaintiffs’ favor. At the same time, any defendant is already allowed some “discretion” under the standard of review, as discussed below. In that part of the test, the defendant must show that it has a legitimate interest for its discriminatory conduct.

156. 815 F. Supp. at 1143-44.

157. *Cox v. City of Dallas*, No. 398CV1763BH, slip op. at 24-25 (N.D. Tex. Feb. 24, 2004).

158. No. 398CV2955D, slip op. (N.D. Tex. Feb. 14, 2002).

services, community-development funding, and protection from floods and industrial nuisances.¹⁵⁹

Here, building on the arguments referenced above for *Washington Park*,¹⁶⁰ § 3604(b) plaintiffs would also need to argue that the cleanup, as part of the reconstruction, is a necessary “service” for safe housing. The central thrust of this argument is that rebuilding on contaminated land provides no margin of safety. Indeed, it would be unsafe to begin with, as it risks impairing residents’ health and causing the sort of short-term and long-term harms as described below—all of which could be avoided by a proper remediation at the outset. Specifically, unsafe housing plagued by harmful levels of contamination would lead to significant environ-

159. *Id.* at 2-3, 44-46; *see also* Concerned Tenants Ass’n of Indian Trails Apts. v. Indian Trails Apts., 496 F. Supp. 522, 525 (N.D. Ill. 1980) (rejecting the defendants’ argument that § 3604(b) did not apply as “ludicrous” because “[q]uite clearly, the plaintiffs have alleged that they are not getting the kinds of services and facilities that were available to tenants when the [housing] project was predominantly white, and that this differential treatment existed because they are black”). *But see* Steptoe v. Beverly Area Planning Ass’n, 674 F. Supp. 1313, 1322 (N.D. Ill. 1987) (“BAPA’s role in supplying voluntarily and without charge limited housing information regarding nontraditional moves is too far removed from transactions in the commercial residential market to be considered services ‘in connection’ with the sale or rental of a dwelling.”).

160. *See supra* notes 132-150 and accompanying text.

mental,¹⁶¹ physical and neurological,¹⁶² psychological,¹⁶³ and sociological and community-based¹⁶⁴ harms.

Accordingly, an environmentally just reconstruction may be analogized as having the same sort of housing-related nexus as police protection,¹⁶⁵ fire protection,¹⁶⁶ garbage collection,¹⁶⁷ and protection from floods, industrial nuisances, and discriminatory community funding.¹⁶⁸ Additionally, *South Camden* and *Edwards* are inapposite insofar as plaintiffs' claim would not be premised on the issuance of a permit or variance. Rather, returning evacuees can "inhabit their old neighborhoods as they wish,"¹⁶⁹ without such governmental gatekeeping.

161. See *supra* Part II.

162. See, e.g., Howard Mielke et al., *Multiple Metal Accumulation as a Factor in Learning Achievement within Various New Orleans Elementary School Communities*, 97 ENVTL. RESEARCH 67, 72 (2005) ("Learning disabilities, behavioral disorders, and neurotoxicity are a consistent theme in research and discussions about [lead]. Lead exposure is strongly associated with learning disorders and behavioral problems for children and the problems persist into adulthood. . . . Children experience a 7.4-point decrease in IQ from < 1 to 10 µg per dL while they exhibit a 4.6-point decrease in IQ per each 10 µg per dL over the entire range of exposure." (citations omitted)); see also Mielke et al., *supra* note 27, at 2784-85 (further discussing IQ deficits as a result of lead exposure and related statistics (citations omitted)); Mielke, *Lead's Toxic Legacy*, *supra* note 28, at 23 (indicating a risk of neurological impairment based on blood-lead concentrations of as small as 2 to 5 µg per dL); Megan Sever, *Lead Linked to Violence*, GEOTIMES, May 2005, at 25 (citing behavioral problems based on studies by Dr. Herbert Needleman); Solomon & Rotkin-Ellman, *supra* note 18, at 12 ("Lead is very toxic to humans, especially children. Lead can harm many parts of the body, causing neurological problems, high blood pressure and kidney damage. Even very low levels of lead are known to harm brain development in children. Many scientific studies have found that lead can cause children to have lower IQ scores, behavioral problems and difficulty concentrating on tasks in school.").

163. See, e.g., Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271, 278-79 (1992) (discussing psychological harms created by living with environmental hazards), cited in David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 500 & n.337 (2000); see also Mielke et al., *supra* note 162, at 72 (discussing behavioral problems); Sever, *supra* note 162, at 25 (same, based on studies by Dr. Needleman).

164. See, e.g., Mielke et al., *supra* note 27, at 2788 (positing that societal costs from elevated blood-lead levels "ripple beyond IQ deficits" and into violent crime, diabetes, and unwed pregnancy); Troutt, *supra* note 163, at 501 (describing environmentally unjust zoning as "manifestations of discriminatory barriers to community growth"); see also Mielke et al., *supra* note 162, at 72 (citing behavioral problems); Sever, *supra* note 162, at 25 (same, based on studies by Dr. Needleman).

165. See *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143 (N.D. Ill. 1993); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984).

166. See *Southend Neighborhood Improvement Ass'n*, 743 F.2d at 1210.

167. See *id.*

168. See *Miller v. City of Dallas*, No. 398CV2955D, slip op. at 2-3, 44-46 (N.D. Tex. Feb. 14, 2002).

169. Peter Whoriskey, *New Orleans Repeats Mistakes as It Rebuilds*, WASH. POST, Jan. 4, 2007, at A01.

What is more, neurotoxins like lead put children and pregnant women at constant risk in and around their own homes. And this harm not only affects residents on their own property, but ameliorating it should also not have much (if any) impact on industry. Specifically, unlike many Title VIII and nuisance cases from the past, there would be no societal “cost” to a comprehensive cleanup beyond the single cost allocation for the cleanup itself. This opportunity for action is unique, both temporally and because the costs can be contained. To the contrary, the cost of doing nothing is greater and more widespread, perhaps inestimable.¹⁷⁰

C. Potential § 3617 Claim

Plaintiffs’ next argument would be under 42 U.S.C. § 3617. Section 3617 states in pertinent part that it is unlawful “to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by” listed provisions of Title VIII,¹⁷¹ including § 3604.¹⁷² Case law indicates that § 3617 prohibits discrimination that may occur after a housing transaction. For instance, in *Evans v. Tubbe*,¹⁷³ the Fifth Circuit in 1981 recognized an “arguably valid” claim under § 3617 based on discriminatory conduct that occurred after the plaintiff purchased her property.¹⁷⁴ Moreover, unlike § 3604(b), § 3617 does not generally require that the discrimination occur “in connection” with a housing transaction.¹⁷⁵ As a result, the requirement that discriminatory conduct take place “in connection” with the sale or rental of housing¹⁷⁶ would not be required.

At the same time, courts are split on whether § 3617 requires a separate Title VIII violation, such as under § 3604, or instead is an

170. These points also go far in showing that there is no legitimate interest, or otherwise, in leaving unsafe levels of contamination. See Part III.D.

171. 42 U.S.C. § 3617 (2000) (emphasis added); see also 24 C.F.R. § 100.400 (2004); Crawford, *supra* note 6, at 80-82 (discussing § 3617).

172. Section 3617 specifically lists 42 U.S.C. §§ 3603, 3604, 3605, and 3606 as among the rights “granted or protected” under Title VIII. 42 U.S.C. § 3617.

173. 657 F.2d 661 (5th Cir. 1981).

174. *Id.* at 662. In *Evans*, the defendant erected a gate on his property that prevented the plaintiff from accessing her property. *Id.* at 662. He refused to give her a key because she was African American. *Id.* at 662-63.

175. See also 24 C.F.R. § 100.400(c)(2) (implementing § 3617, prohibiting “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race . . . of such persons, or of visitors or associates of such persons” (emphasis added)).

176. See *supra* notes 82-88 and accompanying text. The Fifth Circuit in *Cox* cited *Evans*, but only for an unrelated point not involving § 3617. *Cox v. City of Dallas*, 430 F.3d 734, 742 n.18 (5th Cir. 2005).

independent cause of action.¹⁷⁷ No cases within the Fifth Circuit directly address this issue. If the Fifth Circuit or Eastern District of Louisiana were to find that § 3617 requires a separate Title VIII violation, plaintiffs would still need to establish a § 3604(b) violation. In that case, no plaintiff could escape having to show that the discrimination occurred “in connection” with a housing transaction.¹⁷⁸

On its merits, § 3617 requires that plaintiffs establish that the government has “interfer[ed]” with their “exercise or enjoyment” of their housing rights. This analysis draws heavily on the same arguments discussed above for whether the cleanup constitutes a “service” to which they are entitled under § 3604(b). Insofar as § 3617 may be pled independently, identifying the “protected” housing right (and duty) at issue becomes more penumbral. Plaintiffs may argue that the risk of harm to communities facing unsafe housing¹⁷⁹ creates a discriminatory nuisance undermining Title VIII’s purpose and effect.¹⁸⁰ Beyond that, as with § 3604(b),¹⁸¹ there is no requirement that the hurricane have actually caused the contamination. Rather, the only causal element is the government’s “interference” with plaintiffs’ right to be free from discriminatory housing opportunities.

D. No Legitimate Interest in Unsafe Housing

Assuming plaintiffs establish a *prima facie* case, the burden would shift to the government to attempt to justify its action, or inaction. The Fifth Circuit does not appear to have clearly ruled on which standard of review applies for Title VIII claims. At least one court describes the “legitimate interest” test as “the prevailing view” in Title VIII cases.¹⁸²

177. Compare *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004) (indicating that § 3617 applies “only against acts that interfere with one or more of the other [Title VIII] sections,” but allowing an independent § 3617 claim because the defendants “forfeited” their ability to challenge it), with *United States v. Koch*, 352 F. Supp. 2d 970, 978 (D. Neb. 2004) (“To the extent that the *Halprin* courts hold that a violation of [§ 3617] cannot lie absent a [separate Title VIII] violation . . . , I respectfully disagree. As another district judge in this circuit has aptly noted, ‘such a construction renders [§ 3617] a redundant section.’ Similarly, other circuit courts have concluded that [§ 3617] may be violated when ‘no discriminatory housing practice may have occurred at all.’” (citations omitted)).

178. See Part III.B.1. The risk of creating precedent limiting § 3617’s reach in this way illustrates why community groups would need to make a fully informed decision before asserting any of these Title VIII claims.

179. See *supra* notes 161-164 and accompanying text.

180. Cf. 24 C.F.R. § 100.400(c)(2) (2004) (prohibiting “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of” race or color).

181. See *supra* notes 117-118 and accompanying text.

182. *Thompson v. Dep’t of Hous. and Urban Dev.*, 348 F. Supp. 2d 398, 418 (D. Md. 2005); see also *Cole*, *supra* note 6, at 537 (“[E]ven if a plaintiff group can make a *prima facie*

The Supreme Court in *Huntington Branch NAACP v. Town of Huntington*¹⁸³ affirmed the United States Court of Appeals for the Second Circuit's finding that a municipality failed the "legitimate interest" test but declined to "endors[e]" that test.¹⁸⁴ The Middle District of Louisiana in *Summerchase Limited Partnership I v. City of Gonzales*¹⁸⁵ suggested in dictum that a "compelling governmental interest" test may apply to Title VIII claims.¹⁸⁶ As that court articulated, "the burden shifts to the defendant to 'prove that its actions furthered, in theory and in practice, a legitimate bona fide [compelling] governmental interest and that no alternative would serve that interest with less discriminatory effect.'"¹⁸⁷

Because neither the Fifth Circuit nor Eastern District of Louisiana appear to directly address this issue and context, some uncertainty arguably exists about which test should apply in New Orleans. The "legitimate interest" test, as Luke Cole cautioned over a decade ago, may be somewhat of a "problem" for certain Title VIII plaintiffs.¹⁸⁸ Notwithstanding, this Article argues that the government ought to be hard-pressed to meet its burden under even that test. It seems implausible to find a "legitimate," much less a "compelling," cost benefit in undertaking a reconstruction that leaves communities of color with parcels of new yet unsafe housing.¹⁸⁹ Moreover, as a matter of substance, the cost-benefit analysis may weigh in plaintiffs' favor.¹⁹⁰

case of discrimination, a defendant can argue that the siting or zoning decision is based on a legitimate interest, and that no alternative course of action could be taken that would serve the interest with less discriminatory impact.").

183. 488 U.S. 15 (1988).

184. *Id.* at 18 ("Without endorsing the [Second Circuit's] precise analysis . . . , we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the *prima facie* case was inadequate.").

185. 970 F. Supp. 522 (M.D. La. 1997).

186. *Id.* at 528.

187. *Id.* (alteration in original) (quoting *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.), *aff'd*, 488 U.S. 15 (1988)). The court listed the following factors for determining whether a compelling-government interest exists: (1) "whether the ordinance in fact furthers the governmental interest asserted"; (2) "whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it"; and (3) "whether less drastic means are available whereby the stated governmental interest may be attained." *Id.* (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1186-87 (8th Cir. 1974)).

188. Cole, *supra* note 6, at 537.

189. Indeed, the Road Home program has been funded with several billions of dollars. See LRA, *LRA Chairman Travels to Capitol Hill To Thank Congressional Leaders for Their Support of Louisiana Recovery, Commitment To Fund the Road Home Shortfall* (Nov. 1, 2007), <http://lra.louisiana.gov/pr110107.html>; HUD Approves \$4.2B for Louisiana's "Road Home" Rebuilding Program, USA TODAY, July 11, 2006.

190. This advantage, of course, depends on how the costs and benefits are calculated, and what the costs of the remedy are. A cost-benefit analysis is outside of this Article's scope. It

Additionally, the government's interest would likely be defined by its desire to promote economic growth and to rebuild.¹⁹¹ As the Louisiana legislature found, substantially damaged areas "must be repopulated to restore the economic base both of the core disaster areas and of the state."¹⁹² Public and private investment is essential.¹⁹³ According to the Brookings Institution, without that investment, "the future of New Orleans remains in doubt."¹⁹⁴

At the same time, the government must also lay the groundwork for the most socially optimal conditions, economically and environmentally for the sake of its own residents and their health.¹⁹⁵ On both levels, a core legitimate interest is also to "ensur[e] that the city and region emerge as inclusive, sustainable, and prosperous."¹⁹⁶ Concerns about an inequitable cleanup and reconstruction may well undermine public confidence and growth in communities of color,¹⁹⁷ leaving significant, long-term environmental and health risks.¹⁹⁸ Moreover, this issue is an environmental issue that is directly connected with housing—indeed, it is residents' own land and neighborhoods—and capable of being resolved without harm to business or industry generally. Malcolm X is attributed as having said, "You can't drive a knife into a man's back nine inches, pull it out six inches, and call it progress." The same should hold true for the recovery and revitalization of New Orleans.

bears mentioning, however, that under a proposal involving clean-soil cover, Dr. Mielke and his coauthors estimate that that "the combined benefits of [lead]-safe paint abatement or renovation and clean soil cover should outweigh the estimated annual cost of [lead] poisoning of children returning to New Orleans." Mielke et al., *supra* note 17, at 7626; *see also* Mielke et al., *supra* note 27, at 2784. The NRDC also suggested in August 2007 the government work with residents to cleanup areas with unsafe levels of contamination, including the removal and replacement of the six inches of topsoil, at an estimated cost of \$3,500 to \$5,000 per average-size single-family home. Fields et al., *supra* note 18, at 6, 23.

191. *See supra* note 57 and accompanying text.

192. LA. REV. STAT. ANN. § 40:600.32.

193. *See* LRA, *supra* note 107, at 5 (warning of "abandoned homes, clouded land titles, and disinvestments if a large portion of the financial assistance is not directly invested in rebuilding homes or buying replacement homes in the affected areas."); AMY LIU, BUILDING A BETTER NEW ORLEANS: A REVIEW OF AND PLAN FOR PROGRESS ONE YEAR AFTER HURRICANE KATRINA 3 (2006), http://www.brookings.edu/metro/pubs/20060822_KatrinaES.pdf (describing investment as "critical").

194. Liu, *supra* note 193, at 3 (emphasis added).

195. *See id.* at 3.

196. *Id.*

197. *See supra* notes 58-59 and accompanying text.

198. *See supra* notes 161-164 and accompanying text. Of course, a "cleanup" should ameliorate these risks.

IV. CONCLUSION

In general terms, this Title VIII analysis draws on the fact that the post-Katrina reconstruction goes hand-in-hand with the resale and reletting of new housing opportunities, and that an environmentally just cleanup is a foundational part of safe housing in the first instance. Certainly, the risk of negative precedent is a prevalent concern in public-interest litigation in general.¹⁹⁹ In some competition with this concern, creativity is the nucleus of advocacy in general and environmental-justice advocacy in particular.²⁰⁰ As a practical matter, resolution of these legal issues is also an art, depending to some degree on lawyering and judicial interpretation.

This debate, of course, dovetails the more thematic question of whether Title VIII may be dusted off to fulfill the promise left behind by Title VI and the Equal Protection Clause. Some courts have already interpreted Title VIII, and § 3604(b) in particular, in a way that suggests a limited environmental-justice shelf-life. But the facts here are distinct in very material ways from the more traditional nuisance cases in which the statute has often arisen before. So, in terms of the law, the precise question is whether this application may advance the doctrine in a positive way.

Ultimately, however, what is really at stake is whether the reconstruction will provide new housing opportunities that free generations, predominantly in communities of color, from disparate environmental harms associated with where they happen to live. All things considered, § 3604 and 3617 present novel but perhaps piquant ingredients to combat a potentially new cycle of injustice, precisely at a time when New Orleans is being revitalized.

199. See generally Crawford, *supra* note 6, at 80 (“Despite its promise, litigants who wish to appeal to Section 3604(b) clearly should do so with caution. . . . [A] potential litigant should only advance this claim cognizant that courts have not agreed on the interpretation of these provisions.”); Michele L. Knorr, *Environmental Injustice: Inequities between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71, 98 (1997) (“Since there is no Supreme Court decision to determine the extent to which Title VIII can be used, environmental advocates need to be aware of this and be creative.”).

200. See generally Brown & Lyskowski, *supra* note 6, at 755 (“[L]awyers representing the victims of environmental injustice must think creatively and broadly when framing complaints, combining diverse causes of action, including civil rights statutes, environmental laws and regulations, and land use and zoning laws and ordinances.”).