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***BANK OF AMERICA V. CITY OF MIAMI:* STANDING AND CAUSATION UNDER THE FAIR HOUSING ACT**

*Alan M. White**

I. INTRODUCTION

Progress towards racial equality in America has been a long journey, of many steps forward and many steps backward. The crisis of 2007-2008 was a large step backwards in the struggle for economic equality, in which the homeownership gains of African-Americans during the 1980s and 1990s were submerged in a historic wave of foreclosures and home losses. In *Bank of America v. City of Miami*,¹ the Supreme Court confronted two vital questions of responsibility under the equality norms of the 1968 Fair Housing Act: 1) whose actions are responsible for the persistent residential segregation and inequality (causation), and 2) who are the victims of housing segregation who may hold the responsible parties to account (standing)? The Court's compromise decision allowing the case to proceed was a step forward on the standing issue and a step backwards on causation. The majority opinion reflected its continuing ambivalence towards recognizing racial segregation as a systemic and intractable feature of our society, both accepting and denying the broad and shared responsibility for causing this structural inequality and for breaking it down.

II. HISTORICAL FRAMEWORK

A. Housing Segregation and the 1968 Fair Housing Act

Black and white Americans have lived in segregated housing in segregated neighborhoods since the beginning of the twentieth

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1. 137 S. Ct. 1296 (2017).

century.² The racial apartheid in American cities was the product of a systemic public-private collaboration, combining private housing market conduct (the actions of white homeowners and landlords) and federal, state and local government policies. In response to the first waves of the great migration of former slaves to the North in the early 1900s, several cities adopted ordinances restricting the areas in which blacks could rent or buy homes.³ The Supreme Court struck down these racial zoning laws under the Equal Protection Clause of the Fourteenth Amendment, because of the direct state involvement in explicit racial discrimination.⁴ In response, white homeowners banded together to sign racially restrictive covenants preventing the sale of homes to nonwhites. The Supreme Court eventually held in 1948 that judicial enforcement of those covenants was unconstitutional state action in *Shelley v. Kraemer*.⁵ From the time public housing came into being in the 1930s, local public housing authorities reinforced racial segregation through their siting and tenant assignment policies.⁶ The Federal government also played a major role in mortgage redlining, denying mortgage credit to minority neighborhoods.⁷ The Homeowners Loan Corporation of the New Deal, followed by the Federal Housing Administration and Veteran's Administration mortgage insurance programs of the post-War period, promoted the use of racially restrictive covenants and cut off mortgage credit to integrated or minority neighborhoods, and denied cheap home financing to African-Americans.⁸ The unique hypersegregation of African-Americans in urban ghettos has resulted from a continual and complex interplay of individual, corporate, and government policies, decisions, and behaviors.⁹ Residential segregation is at the root of many other forms of racial inequality, in education, health,

2. JAMES H. CARR & NANDINEE K. KUTTY, *The New Imperative for Equality, in* SEGREGATION, THE RISING COSTS FOR AMERICA 1-3 (Gregory Squires ed., 2008).

3. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1022 (1992).

4. *Buchanan v. Warley*, 245 U.S. 60 (1917).

5. 334 U.S. 1 (1948).

6. Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, THE AM. PROSPECT (Oct. 11, 2012), <https://prospect.org/article/public-housing-government-sponsored-segregation>.

7. *Id.*

8. CARR & KUTTY, *supra* note 2, at 21-22.

9. See GREGORY D. SQUIRES & CHARIS E. KUBRIN, *PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY* (2006).

employment, and even physical safety,¹⁰ and has been one of the most difficult legacies of Jim Crow to dismantle.

In the landmark 1964 Civil Rights Act, Congress chose not to take on housing discrimination, and specifically exempted the federal housing agencies (the Federal Housing Authority and the Veteran's Administration mortgage programs) from that Act's coverage.¹¹ It was only after the long hot summers of 1964-1966, the Kerner Commission report on urban riots, and finally the assassination of Dr. Martin Luther King, Jr. in 1968, that Congressional resistance gave way, at least partly, and the 1968 Fair Housing Act ("FHA") was passed.¹² Even then, it was only two decades later that Congress made effective enforcement of the FHA possible.

The original FHA was designed by Congress to be only weakly enforceable. The 1968 Act limited Justice Department enforcement to cases involving a pattern or practice of discrimination, or issues of general public importance; damages awarded to private plaintiffs were typically very modest.¹³ It wasn't until the 1988 Fair Housing Amendments Act¹⁴ that Congress authorized full private and federal agency enforcement in individual as well as pattern and practice cases. The 1988 amendments added disability as a protected class, allowed the Department of Housing and Urban Development to investigate discrimination complaints and award damages and injunctions, allowed the Justice Department to bring civil enforcement actions without needing to show a pattern, practice, or an issue of general public importance, and increased the punitive damages cap from \$1,000 to \$10,000 in individual civil actions.¹⁵

Although the Fair Housing Act covered mortgage lending discrimination since its enactment in 1968,¹⁶ most of the early enforcement, by the government and private parties, was directed at discrimination in renting homes and selling homes and at exclusionary zoning practices of local planning agencies. Fair lending enforcement

10. PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

12. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F. 571-88 (2015).

13. GEORGE R. METCALF, *FAIR HOUSING COMES OF AGE* (1988).

14. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

15. *Id.*

16. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 42 U.S.C. § 805.

began in earnest after the 1988 amendments and continued to expand through the passage of the 1991 amendments to the 1974 Equal Credit Opportunity Act.¹⁷ The impact of mortgage lending discrimination on housing segregation might seem more remote, and the actions of mortgage lenders less directly responsible, than the racially biased practices of private landlords, realtors, and public housing authorities. Nevertheless, banks and the federal mortgage agencies were and are critical to the creation and perpetuation of residential segregation, and no societal plan to end housing segregation could be complete without taking on the lending policies and practices of banks and the mortgage industry.

B. Supreme Court Cases Under the FHA

The early Fair Housing Act cases to come before the Court involved overt discrimination by landlords and realtors against minority applicants. In those cases, the Court repeatedly faced issues of identification: who are the “victims” of housing discrimination and racial segregation entitled to sue, and who are the actors whose conduct is responsible for it, and who should therefore be liable? These intertwined issues of standing, causation, and intent are featured in most of the Court’s significant Fair Housing Act cases.

In its first decision interpreting the FHA, *Trafficante v. Metropolitan Life Ins. Co.*,¹⁸ the Court faced the victim identification issue. All nine justices agreed that black and white tenants in an apartment building had standing under the statute to sue their landlord for discriminating against nonwhite applicants.¹⁹ The tenants asserted that they were injured by losing the social and business benefits of living in an integrated community.²⁰ The *Trafficante* decision was remarkable in its broad reading of statutory standing and its recognition that race discrimination by landlords affects persons other than the rejected applicants. Significantly, the Court unanimously held that Congress had defined the class of persons harmed by housing discrimination broadly, and that losing the opportunity to live in a

17. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-96-145, FAIR LENDING: FEDERAL OVERSIGHT AND ENFORCEMENT IMPROVED BUT SOME CHALLENGES REMAIN at 5 (1996); John R. Walter, *Fair Lending Laws and Their Enforcement*, 81 FED. RES. BANK OF RICHMOND ECON. Q. 61, 68 (1995).

18. 409 U.S. 205 (1972).

19. *Id.* at 212.

20. *Id.*

racially integrated community is a redressable injury.²¹

The *Trafficante* decision was followed two years later by an uncontroversial decision that civil plaintiffs asserting FHA claims are entitled to a jury trial.²² Then in the next two FHA cases to reach the Court, both again raising standing questions, the Court reiterated the broad view that civil actions could be brought not just by home buyers or renters turned away based on their race, but by residents of the community affected by race discrimination, and even by the community itself.

In *Gladstone Realtors v. Village of Bellwood*,²³ the plaintiffs were residents of the town who acted as testers in uncovering racial steering by the defendant realtors, and the village itself, which asserted that the realtors' racial steering and blockbusting²⁴ reduced property values, and hence property tax revenues.²⁵ White testers were steered towards all-white neighborhoods, while black testers were steered towards an integrated neighborhood.²⁶ Justice Powell, writing for the majority, found that these adverse consequences of racial steering were direct and profound, and amply qualified the plaintiffs, as residents of the affected community, to assert FHA claims.²⁷ The opinion recognized not only the social harm to residents and the town caused by racial segregation as in *Trafficante*, but also the economic loss in property values and property tax revenues that flows from segregation.²⁸

Justice Rehnquist, in a dissent joined by Justice Stewart, put forward the more narrow view of who is harmed by housing discrimination. He argued that the civil remedy Congress authorized should be available only to the "direct" victims of discrimination, i.e., the parties to individual housing denials or racial steering, rather than to their neighbors.²⁹ This narrow view of standing sounded a theme that echoes through a number of later dissenting opinions written by

21. *Id.* at 208–09.

22. *Curtis v. Loether*, 415 U.S. 189, 191 (1974).

23. 441 U.S. 91 (1979).

24. "Blockbusting" refers to the practice of exploiting the fear of white homeowners that nonwhites are moving into their neighborhood in order to persuade them to sell quickly, while simultaneously promoting home sales to minority buyers in the same neighborhood, all in order to generate profits for realtors. See Amine Ouazad, *Blockbusting: Brokers and the Dynamics of Segregation*, 157 J. ECON. THEORY 811, 812 (2015).

25. *Gladstone Realtors*, 441 U.S. at 94–95, 109.

26. *Id.* at 95.

27. *Id.* at 110.

28. *Id.* at 110–11.

29. *Id.* at 126 (Rehnquist, J., dissenting).

the Court's conservative justices.

In its third major FHA standing case, *Havens Realty Corp. v. Coleman*,³⁰ the Court recognized injury, and hence standing, for a tester, an African-American who did not actually intend to rent an apartment, but applied for housing and was given false information by a landlord.³¹ The white tester was told, accurately, that housing was available, while the African-American tester, who did not intend to rent an apartment, was falsely told no units were available.³² The court held, that the violation of the right to receive accurate information about housing availability was enough of an injury to warrant FHA standing.³³ This informational injury was in addition to the type of neighborhood or community injury recognized in *Gladstone Realtors* and *Trafficante*. The court also held that a white tester who received accurate information was not injured, and therefore, would not have standing.³⁴ Justice Brennan's opinion, written for a unanimous court, was perhaps the high water mark for the Court's broad interpretation of FHA standing.

In the recent FHA cases coming before the Court, the theme changed from who is harmed by discrimination to who should be held responsible. Defendants raised various arguments to avoid liability, disclaiming any intent to discriminate, and denying that their conduct was the proximate cause of housing inequality. The issue of discriminatory intent arose repeatedly when federal agencies and private plaintiffs relied on proof of disparate impact as their theory of discrimination. Disparate impact theory, first approved by the Court in an employment discrimination case,³⁵ holds a defendant responsible for any uniform policy or practice that disadvantages minority applicants and does not further a legitimate business purpose. Disparate impact discrimination does not depend on proof of the defendant's discriminatory intent.³⁶ In its enforcement of the FHA, HUD consistently applied disparate impact analysis to a wide variety of public and private housing practices.³⁷ Eventually most of the

30. 455 U.S. 363 (1982).

31. *Id.* at 374.

32. *Id.* at 368.

33. *Id.* at 373-74.

34. *Id.* at 374-75.

35. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

36. *Id.* at 432.

37. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507,

federal Circuit Courts of Appeals ruled that disparate impact analysis was appropriate for FHA claims.³⁸ In 2013, HUD adopted a regulation making explicit its prior interpretation that the FHA permits a finding of discrimination based on disparate impact analysis.³⁹

The first FHA disparate impact case considered by the Supreme Court involved a public zoning board's ordinance that severely restricted the sites where multifamily housing could be built in the town, with the effect of virtually excluding minority residents from living there.⁴⁰ The Court affirmed the Second Circuit Court of Appeals decision invalidating the ordinance in a per curiam decision.⁴¹ The very brief opinion holds that the record as it stood was sufficient to make out a claim of disparate racial impact of the local zoning ordinance.⁴² The Court also noted that the defendant had conceded the applicability of disparate impact analysis.⁴³ The legal issue whether the FHA authorized disparate impact analysis as a basis for liability was, therefore, left to another day.⁴⁴

That day finally arrived in 2015, in the case of *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*⁴⁵ On two prior occasions, the Court had granted certiorari in cases raising the same issue, but in each case the parties settled before the Court could rule.⁴⁶ The *Texas DHCA* case involved a challenge by a nonprofit advocacy group to a state agency's site selection decisions in allocating low-income housing subsidies.⁴⁷ The plaintiffs claimed that the DHCA's policy of locating subsidized low-income housing in heavily minority neighborhoods contributed to furthering racial segregation.⁴⁸

Justice Kennedy, writing for the majority, grounded the Court's definitive approval of disparate impact analysis in the sad legacy of

2543 (2015).

38. *Id.*

39. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

40. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16 (1988) (per curiam).

41. *Id.* at 18.

42. *Id.*

43. *Id.*

44. *Id.*

45. 135 S. Ct. 2507 (2015).

46. *Magner v. Gallagher*, 565 U.S. 1013 (2011); *Township of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013).

47. *Texas DHCA*, 135 S. Ct. at 2514.

48. *Id.*

various government policies including redlining, steering, and restrictive covenants, that insured the persistence of geographic segregation of races in the United States and perpetuated our vast opportunity and wealth gaps.⁴⁹ In the opinion, he referred to the Kerner Commission's conclusion that the uprisings of the 1960s arose in no small measure from the ghettoization and racial apartheid of American cities.⁵⁰

Justice Kennedy began by comparing the FHA to Title VII of the Civil Rights Act, which has been long understood by the Court to permit disparate impact analysis.⁵¹ He then relied heavily on the fact that in the 1988 FHA Amendments, Congress seemed to approve, at least implicitly, a disparate impact approach.⁵² Several exceptions from FHA liability added by Congress—for example, permitting discrimination based on criminal drug convictions—would make no sense if Congress did not understand the FHA as covering disparate impact discrimination.⁵³ Kennedy continued that disparate impact analysis is an important tool for achieving the central goal of the FHA, and is a useful means to uncover unconscious and covert racism.⁵⁴

In the remainder of his discussion, Justice Kennedy shifted gears, and went to considerable lengths to insist that courts give broad leeway to FHA defendants in evaluating their business justifications for suspect policies.⁵⁵ He insisted that the a policy with a disparate impact need not meet a “necessity” test, but will be immune from FHA challenge if it is necessary to achieve a “valid interest.”⁵⁶ Valid interests, he continued, may include many objective and subjective factors, including “market factors”, cost, historic preservation, and quality of life.⁵⁷ In other words, the decisions of developers and housing agencies that exclude or limit housing for minorities may be insulated from discrimination challenges if one of these non-racial factors is successfully invoked as the “valid interest” being pursued by the challenged policy. So, for example, the defendant state agency in

49. *Id.* at 2515.

50. *Id.* at 2516.

51. *Id.*

52. *Id.* at 2519.

53. *Id.* at 2521.

54. *Id.* at 2521–22.

55. *Id.* at 2522.

56. *Id.* at 2523.

57. *Id.* at 2523.

the *Texas DHCA* case could assert that its valid interest in helping the poor justifies its policy of subsidizing new low-income housing in segregated minority neighborhoods. Justice Kennedy's admonition requires courts to give these asserted policy interests substantial deference.

In a similar vein, Justice Kennedy highlighted the importance of causation as an element in a disparate impact FHA claim, although causation was not an issue before the Court in the case. He noted that defendants should not be held liable for racial disparities they did not create; otherwise, governmental agencies and market actors might be forced to adopt racial quotas.⁵⁸ The Texas DHCA might, for example, claim that its policy of building new subsidized housing in segregated neighborhoods was not the proximate cause of racial segregation, which instead was a product of private market decisions and other forces.

Thus, the decision in *Texas DHCA* giveth and it taketh away. Disparate impact analysis, and the ability to assert FHA violations without proving racist intent, is available, yes. But plaintiffs must run the gauntlet of disproving the defendants' litany of nonracial "valid interests" for discriminatory policies, and then show the causal connection between defendants' policies and racial exclusion or segregation, in a context where the exclusion and segregation have been the legacy of decades.

The American Bankers Association filed an amicus brief in the *Texas DHCA* case,⁵⁹ as it did in the two prior cases challenging disparate impact analysis, although none of the Court's FHA cases to date had involved discrimination in home mortgage lending. The keen interest of the banking industry arose from the fact that the Justice Department and private plaintiffs began bringing more and more discrimination claims against lenders using disparate impact analysis, especially under Attorney General Eric Holder starting in 2009.⁶⁰ Government and private plaintiffs had begun to bring FHA challenges to a number of mortgage lending practices, such as minimum loan

58. *Id.*

59. Brief for Am. Bankers Ass'n et al. as Amici Curiae Supporting Petitioners, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 6660911 [hereinafter Brief for Petitioners].

60. See Andrew Sandler & Kirk Jensen, *Disparate Impact in Fair Lending: A Theory Without a Basis and the Law of Unintended Consequences*, 33 BANKING & FIN. SERVS. POL'Y REP. 18 (2014); see also Brief for Petitioners, *supra* note 59.

amounts, broker pricing discretion, steering of borrowers to subprime, high-rate mortgages, and geographic redlining.⁶¹

The banks argued that disparate impact analysis would stifle the market for mortgage loans, making banks overly cautious about lending policies that might produce statistically adverse effects on minority groups.⁶² Some of the banks' fears were heightened when the Justice Department and Consumer Financial Protection Bureau sued a New Jersey bank and reached a \$25 million settlement based on claims that the bank avoided operating branches in minority neighborhoods (although that case arguably included circumstantial evidence of discriminatory intent as well as discriminatory effects).⁶³ The banks' keen interest in the Fair Housing Act further intensified when cities began filing FHA lawsuits to challenge lending discrimination that led to the 2008 foreclosure crisis.

III. STATEMENT OF THE CASE: *BANK OF AMERICA V. CITY OF MIAMI*

The Fair Housing Act ("FHA") prohibits discrimination based on race, not only in selling and renting homes, but also in any residential real estate-related transaction, including mortgage lending.⁶⁴ *Bank of America v. City of Miami*⁶⁵ was the first FHA lending discrimination case to come before the Supreme Court. The case presented the Court with the opportunity to revisit, in the home financing context, both the "who is harmed" (standing) question and the "who is responsible" (causation) question.

The City of Miami sued two of the nation's four largest banks, Bank of America and Wells Fargo, for mortgage lending discrimination under the FHA.⁶⁶ The City's claim was that the banks concentrated needlessly risky subprime mortgage loans in minority neighborhoods, with the result that mortgage foreclosures, abandonment, and housing vacancies were concentrated in those

61. Alex Gano, Comment, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 88 U. COLO. L. REV. 1109, 1133–50 (2017).

62. *Id.*

63. CFPB and DOJ Order Hudson City Savings Bank to Pay \$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined, CONSUMER FIN. PROTECTION BUREAU (Sept. 24, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/>.

64. 42 U.S.C. § 3605(a) (2012).

65. 137 S. Ct. 1296 (2017).

66. *Id.* at 1301.

neighborhoods.⁶⁷ The City sought damages from the banks for the City's increased expenditures for housing code enforcement, police and fire protection, and property tax losses resulting from foreclosures and home vacancies.⁶⁸

The District Court granted the banks' motions to dismiss, holding that the City was not harmed in a manner that the Fair Housing Act was intended to address, and that any discriminatory lending by the banks was not the proximate cause of the City's alleged losses.⁶⁹ The Eleventh Circuit Court of Appeals reversed, finding the City's allegations of standing and proximate cause sufficient, relying inter alia on the Supreme Court's prior decisions in *Gladstone Realtors* and *Trafficante*.⁷⁰

The banks urged the Supreme Court to reverse the Eleventh Circuit, advancing two arguments. First, the City should not have statutory standing as an "aggrieved person" under Section 3602(i) of the FHA because the harms the City alleged were not within the "zone of interests" Congress intended to protect.⁷¹ Second, the harms alleged by the City from concentrated mortgage foreclosures were not proximately caused by the banks' conduct, because the chain of events connecting the alleged lending discrimination to the city's losses occasioned by vacant homes was too complex and attenuated.⁷²

IV. REASONING OF THE COURT

Justice Breyer wrote the majority opinion, joined by liberals Ginsburg, Sotomayor and Kagan, as well as conservative Chief Justice Roberts, while moderate Justice Kennedy and conservative Justice Alito sided with conservative Justice Thomas' dissent.

On both issues presented, the Court adopted compromise positions between those advocated by the City and by the banks. The majority's analysis of the statutory standing issue is curiously ambivalent. Writing for the majority, Justice Breyer began by recalling that in its three prior cases, *Gladstone Realtors*, *Trafficante*, and *Havens Realty*, the Court had said that in the Fair Housing Act,

67. *Id.*

68. *Id.* at 1307.

69. *Bank of Am. Corp. v. City of Miami*, No. 13-24506-CIV, 2014 WL 3362348, at *5-6 (S.D. Fla. July 9, 2014).

70. *Bank of Am. Corp. v. City of Miami*, 800 F.3d 1262, 1266 (11th Cir. 2015).

71. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017).

72. *Id.*

Congress conferred standing as broadly as Article III permits.⁷³ Article III standing requires only an allegation of injury in fact to the plaintiff, a test the City had no trouble meeting. He added that Congress, aware of the Court's expansive interpretation of FHA standing, amended the FHA in 1988 without altering the relevant statutory text.⁷⁴ Had he simply stopped there, the holding would have been crystal clear. While other statutes⁷⁵ may limit standing to plaintiffs within a narrow "zone of interests" protected by those statutes, the FHA had not previously been interpreted to include any such standing restrictions.

However, Justice Breyer was not content to reaffirm the clear holdings of the Court's prior FHA standing cases. He went on to write that even if the banks' arguments were accepted, and if the FHA were read to limit standing to parties whose injuries meet some stricter "zone of interests" test, the City of Miami's injuries would meet any such test.⁷⁶ He described the prior cases as having held that plaintiffs similarly situated to the city of Miami met the statutory definition of "aggrieved person" under the FHA, i.e., the village in *Gladstone Realtors* that asserted lost tax revenues, the nonprofit organization in *Havens Realty* that alleged harm to its efforts to promote residential integration, and the white residents seeking to preserve their integrated community in *Trafficante*.⁷⁷ This alternative rationale would seem to undermine the preceding analysis—that based on the Court's cases, FHA statutory standing is as broad as the Constitution permits. It is not clear why Justice Breyer needed to apply a narrow standing rule that the Court was not adopting, unless perhaps to further rebut the arguments of the dissent. The majority opinion seems to leave the door at least somewhat open to a narrowing or revisiting of the broad FHA standing holdings of *Gladstone Realtors*, *Trafficante*, and *Havens Realty* in future cases.

The majority's discussion of causation likewise leaves the reader a bit perplexed. Justice Breyer began by rejecting the Eleventh Circuit's approach, which was to equate proximate cause with

73. *Id.* at 1303–04.

74. *Id.* at 1304.

75. The banks, and the dissenting opinion, relied primarily on *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, a 2014 case under the Lanham Trademark Act. 134 S. Ct. 1377, 1388 (2014) (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (interpreting standing under the Administrative Procedures Act).

76. *Bank of Am. Corp.*, 137 S. Ct. at 1304.

77. *Id.* at 1303.

foreseeability.⁷⁸ Under that approach, banks would be liable for lending discrimination to any party whose resulting injuries were foreseeable. Permitting all parties foreseeably harmed by lending discrimination, Justice Breyer concluded, would lead down the slippery slope to “massive and complex damages litigation.”⁷⁹ His solution was to invoke a directness requirement from cases under the Lanham Act⁸⁰ and the RICO statute.⁸¹ In this brief two-paragraph discussion, the opinion ventures that “the general tendency. . . in regard to damages at least, is not to go beyond the first step.”⁸² On the other hand, what may be considered that “first step” in the causal chain will depend on the nature of the statutory claim and on what is administratively possible and convenient.⁸³ Justice Breyer’s uncertainty regarding the City’s claim of causation makes no reference to the Court’s clear ruling in *Gladstone Realtors*, where Justice Powell seemed to have no doubts that the harms caused by housing discrimination to cities were direct and foreseeable:

A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services. Other harms flowing from the realities of a racially segregated community are not unlikely.⁸⁴

Justice Breyer’s opinion concluded by leaving the precise rule elaboration for “direct” or proximate causation under the FHA, and its application, to the lower courts.⁸⁵ As with the standing discussion, the majority opinion left plenty of room for both the City and the banks to advocate for their opposing interpretations as the litigation moves forward. The City will claim that vacancy and neighborhood blight are the direct result of discriminatory mortgage lending, while the banks will argue that the chain of events from making risky mortgages to neighborhood impacts is a chain going far beyond the “first step.”

78. *Id.* at 1305.

79. *Id.*

80. *Id.* at 1299.

81. *Id.*

82. *Id.* (citing *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010)).

83. *Id.*

84. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979).

85. *Bank of Am. Corp.*, 137 S. Ct. at 1306.

V. THE DISSENT

Justice Thomas, joined by Justices Kennedy and Alito, dissented, and would have adopted the banks' positions on both the standing issue and the causation issue. Relying heavily on *Lexmark*, the Court's 2014 Lanham Trademark Act decision, and limiting the prior FHA cases to their facts, Justice Thomas would apply a narrow "zone of interests" test in interpreting the statutory standing Congress granted to "aggrieved persons."⁸⁶ He identified the quintessential aggrieved persons in FHA cases as prospective homebuyers or renters who face discrimination, but suggested that the outer limits of "aggrieved persons" would include those who live in an apartment complex or neighborhood that remains segregated as a result of discrimination.⁸⁷ He explained the decision in *Gladstone Realtors* permitting a village to sue as having implicated its statutorily protected interest in preventing racial steering and segregation of the village. He went on to assert that Miami was not claiming injury based on racial segregation of its neighborhoods, but only the harm of tax revenue losses, not an interest protected by the FHA.⁸⁸

As for the second issue, Justice Thomas characterized Miami's claim as relying on a four-step causal chain, therefore too remote to satisfy the proximate cause requirement.⁸⁹ Banks allegedly discriminated in the terms of mortgage loans, which led to foreclosures, which led to vacant homes, which led to decreased values for surrounding properties, and reduced city property tax revenues. Justice Thomas concludes, without discussing the Court's prior FHA cases, that Miami's chain of causation is too remote as a matter of law to amount to proximate cause.⁹⁰ He adds that homeowners in neighborhoods devastated by foreclosures resulting from discriminatory lending "clearly" could not sue banks under the FHA.⁹¹

86. *Id.* at 1307 (Thomas, J., concurring in part and dissenting in part).

87. *Id.* at 1309.

88. *Id.* at 1310.

89. *Id.* at 1311.

90. *Id.* at 1311–12.

91. *Id.* at 1312.

VI. ANALYSIS

A. The Court's Ambivalence on Standing and Causation, and on the Systemic Nature of Racism

Justice Breyer's opinion, like Justice Kennedy's in the *Texas DHCA* case, seems to tack between the broad and narrow views of responsibility and remedy for racial inequality in America, and seems to be searching for some middle ground. While reaffirming the broad standing holdings of prior cases,⁹² he insists on demonstrating the clear factual analogies between the standing of the City of Miami and the village of Bellwood in *Gladstone Realtors*,⁹³ as if to say the Court is not adding to the categories of discrimination victims who may bring future claims under the FHA. While recognizing that discrimination may cause harms beyond those suffered by individual parties to home purchase and finance transactions, Justice Breyer and his colleagues seem reluctant to accept the consequences of that recognition and are determined to cabin the types of harms FHA plaintiffs may vindicate.

The majority's equivocation on standing will be particularly concerning to antidiscrimination advocates. The prior decisions in *Gladstone Realtors*, *Trafficante*, and *Havens Realty* were abundantly clear in extending FHA standing to any party meeting the Constitutional test of injury-in-fact. Justice Douglas expressed it this way in *Trafficante*: “[a prior Court of Appeals case found that the words ‘person claiming to be aggrieved’ showed] ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution With respect to suits brought under the 1968 Act, we reach the same conclusion.’”⁹⁴ The brief concurrence by Justices White, Blackmun and Powell expressed skepticism that the plaintiffs could even meet the basic injury-in-fact test of Article III, but went on to say that the statutory language makes it clear that Congress intended to extend standing broadly to include the plaintiffs.⁹⁵

In *Gladstone Realtors*, Justice Powell, writing for the seven-justice majority, again stated it plainly: “[s]tanding under § 812 [(civil actions)], like that under § 810 [(administrative complaints)], is ‘as

92. *Id.* at 1303.

93. *Id.* at 1304.

94. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

95. *Id.* at 212 (White, J., concurring).

broa[d] as is permitted by Article III of the Constitution.”⁹⁶ Yet again in *Havens Realty*, Justice Brennan, writing for a unanimous Court, wrote: “the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant’s actions he has suffered ‘a distinct and palpable injury[.]’”⁹⁷ Justice Powell wrote a separate concurrence only to express doubts about the Constitutional standing of the plaintiffs on the facts presented, without questioning in any respect the scope of FHA statutory standing.⁹⁸

The idea that other federal statutes confer standing more narrowly than Article III permits is not a new one. It cannot be said that the Court in 2017 needed to revisit the Fair Housing Act standing cases in light of new doctrinal developments in the law of standing. The banks’ “zone of interests” argument to narrow FHA standing in the *City of Miami* case traces its origins to language from a 1970 case, *Association of Data Processing Service Organizations, Inc. v. Camp*.⁹⁹ The Court in that case interpreted the Administrative Procedures Act (“APA”), and found that the APA limits standing to challenge agency actions to parties who are within the “zone of interests” protected by the substantive statute underlying the challenged agency action, in that case, the Bank Service Corporation Act.¹⁰⁰ The Court applied this statutory standing doctrine, sometimes characterized as “prudential standing,” in numerous cases from 1970 through and including its 2014 decision in *Lexmark*,¹⁰¹ involving statutory standing under the Lanham Trademark Act.¹⁰² On numerous occasions, the Court made it clear that

the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the “generous review provisions” of the APA may not do so for other purposes.¹⁰³

96. 441 U.S. 91, 109 (1979) (quoting *Trafficante*, 409 U.S. at 209).

97. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

98. *See id.* at 366 (Powell, J., concurring).

99. 397 U.S. 150, 153 (1970).

100. *Id.*

101. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

102. *Id.* at 1384.

103. *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

The Court was obviously aware of the “zone of interests” standing analysis on each of the three occasions, in 1972, 1979, and in 1982 when the Court interpreted the FHA as having no such statutory limitation on standing. In fact, the Court of Appeals decision that the Supreme Court reversed in *Trafficante*, the first of the three cases, relied on the “zone of interests” standing test to deny standing to the plaintiffs.¹⁰⁴

Thus, Justice Breyer’s separate application of a “zone of interest” standing test to the city’s FHA claims would be necessary only if the Court were overruling its three prior FHA standing cases, something his majority opinion clearly did not do. At most, he is pointing out that, if the Court were inclined to reinterpret the FHA, *City of Miami* would not be a proper case in which to do so. When he concludes that “the City alleges economic injuries that arguably fall within the FHA’s zone of interests, as we have previously interpreted that statute,” he is necessarily saying that the zone of interests standing test under the FHA is no more restrictive than the basic Constitutional standing test.¹⁰⁵

Plaintiffs other than rejected minority housing applicants have played an important role in all the Supreme Court FHA cases and in many significant lower court cases. Developers seeking to build housing, nonprofit fair housing advocacy groups, and white neighbors have all been recognized as having important stakes in FHA enforcement and in having cognizable injuries flowing from discrimination. The point was eloquently made in an amicus brief filed in *City of Miami* by Anita Trafficante, the daughter of the plaintiffs in the *Trafficante* case.¹⁰⁶ The most direct victims of discrimination are often unaware of the discrimination, are discouraged from vindicating their rights, or have genuine concerns about retaliation. Paul and Margaret Trafficante were white tenant activists who decided to challenge their landlord’s discriminatory conduct when they were faced with retaliatory eviction, and they later had to confront hate mail and threats for their role in the case.¹⁰⁷ Housing discrimination that makes housing unavailable to minority groups, as in the case of

104. *Trafficante v. Metro. Life Ins. Co.*, 446 F.2d 1158, 1160–64 (9th Cir. 1971), *rev’d*, 409 U.S. 205 (1972).

105. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017).

106. *See* Brief for Anita Trafficante et al. as Amici Curiae Supporting Respondent, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (No. 15-1111), 2016 WL 5940648.

107. *Id.* at 15, 18.

exclusionary zoning, has no specific individually identifiable direct victim other than the affected community. Private enforcement of the FHA would not be possible if cities and towns, developers, fair housing groups and neighbors could not bring suit.

At various times, there have been dissenting Justices who would revisit the broad FHA standing holdings of *Trafficante*, *Gladstone* and *Havens Realty*, including of course Justices Thomas and Alito, two of the dissenters in *City of Miami*. The narrow views of both standing and causation are deeply rooted in a non-systemic, limited view of racism, as consisting of reprehensible acts of bigoted individuals against identifiable minority persons, violating an egalitarian consensus, and in Justice Thomas' case, skepticism about the ability of the state and the courts to remedy discrimination.¹⁰⁸ The narrow view blames the persistence of hypersegregation of African-Americans on the landlord who will not accept a nonwhite tenant, the real estate agent who steers a black customer to black neighborhoods, or on the benign choices of black and white families moving to better schools, jobs and environments.

The broader view of FHA liability challenges the individualization of both the victim and the perpetrator. Certainly, the bank defendants would be responsible, even under a narrow view, for economic costs they imposed on minority homeowners who lost their homes as a result of needlessly unfair and risky subprime mortgage terms. The broader view makes the connection between those individual mortgage loan decisions and the neighborhood impacts of concentrated foreclosures, loan denials, and the resulting decline in home values and economic activity. If the bank can point the finger of blame at the white homeowner who flees an integrating neighborhood, and the homeowner points the finger at the bank or the local zoning board, no one is responsible for segregation.

American racism as a system excluded blacks from all but a few neighborhoods and confined them to ghettos. The extreme racial segregation in US cities has persisted for 150 years since Reconstruction, and for fifty years since the second wave of civil rights legislation, including the Fair Housing Act. But who is responsible, and who, therefore, can be sued? The reality of racial

108. Scott Lemieux, *Why Clarence Thomas' Rulings on Race are so Idiosyncratic*, NEW REPUBLIC (May 23, 2017), <https://newrepublic.com/article/142825/clarence-thomass-rulings-race-idiosyncratic>.

segregation is the product of thousands of actions and decisions, including those by the white residents of Saint Louis who banded together to record restrictive covenants in the 1920s, after the explicitly racial zoning ordinances enacted by city councils were struck down in *Buchanan v. Warley*, the New Dealers at the Federal Housing Administration who drew up the redlining maps to direct federal funds for home loans to white-only areas, and the public-private partnership between the Federal Housing Administration and mortgage lenders who systematically excluded blacks from low-cost home financing for the four decades following the Great Depression and World War II. In such a system, the only way civil liability for the harms caused by discrimination can function is with a causation theory that recognizes multiple and simultaneous contributing causes, rather than permitting every fair housing defendant to point the finger at discrimination by others.

B. How Plaintiffs Will Demonstrate Causation After City of Miami

The holding of *City of Miami* on the standing issue is clear: standing to bring Fair Housing Act claims still extends to any plaintiff who demonstrates injury-in-fact, i.e., who meets the basic Article III standing requirements.¹⁰⁹ At the very least, cities economically harmed by realtor blockbusting or bank redlining have standing to sue. The challenge for plaintiffs after *City of Miami* will be to confront the Court's far murkier holding regarding proximate cause. The decision clearly tells us that foreseeability of harm is necessary, but not sufficient, to show proximate cause. Plaintiffs and courts will thus have to grapple with the additional element of "directness" in connecting defendants' conduct to plaintiffs' injuries.

Redlining and reverse redlining by banks cause several direct harms to affected residents and communities. Redlining refers to policies like those alleged in the Hudson City Bank case of refusing to offer home loans in defined neighborhoods or communities.¹¹⁰ While the Justice Department can pursue claims referred by various bank regulators, its capacity to police the entire banking industry is

109. *Bank of Am. Corp.*, 137 S. Ct. at 1303–04.

110. *CFPB and DOJ Order Hudson City Savings Bank to Pay \$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined*, CONSUMER FIN. PROTECTION BUREAU (Sept. 24, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined>.

obviously limited. The causation issue for private plaintiffs challenging bank redlining is to identify and prove the economic and social injuries suffered in communities that are not being served. Lender decisions to restrict access to mortgage credit in certain neighborhoods have measurable and lasting consequences, including lower home prices (and hence lower municipal tax revenues).¹¹¹ The most direct victims of redlining are the least likely to know about it, or be in a position to assert FHA claims. The ability of cities and nonprofit advocacy group testers to bring redlining claims is vital to uncovering and preventing racial redlining.

Reverse redlining refers to the targeting of minority communities for unfairly and unnecessarily disadvantageous home loans, including those with high interest rates and fees, prepayment penalties, and other terms not imposed on other homeowners.¹¹² It may be easier to identify reverse redlining victims, that is, individuals who obtained unfairly priced mortgages, whose injuries can be readily demonstrated. On the other hand, excessively risky mortgages leading to needless foreclosures injure two distinct groups: the homeowners who lose their homes, and their neighbors whose property and community values are undermined.¹¹³ An extremely narrow view of causation would hold that reverse redlining's most direct victims are the minority homeowners who are given needlessly expensive and risky loans, and their direct injuries are measured by the difference between the cost of their loan and the cost of a loan on fair terms offered in comparable non-minority areas. This narrow view of injury would absolve lenders engaged in reverse redlining from responsibility for the overwhelming majority of economic harms caused by their practices, the devastation that concentrated foreclosures can inflict.¹¹⁴

VII. CONCLUSION

Banks, realtors, and landlords have failed to persuade Congress to weaken private enforcement of the Fair Housing Act; they can be

111. Ian Appel & Jordan Nickerson, *Pockets of Poverty: The Long-Term Effects of Redlining* (Oct. 15, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852856.

112. *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998).

113. See Jacob Rugh, *Double Jeopardy: Why Latinos Were Hit Hardest by the US Foreclosure Properties*, 66 J. URB. ECON. 164 (2009).

114. See G. THOMAS KINGSLEY ET AL., THE URB. INST., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES (2009).

expected to continue pressing the courts to do so. The courts should decline the invitation to follow the path advocated in Justice Thomas' dissent, a path perhaps left open in Justice Breyer's ambivalent majority opinion, the path of reinterpreting the Fair Housing Act to restrict standing or impose novel causation requirements. The Fair Housing Act is a Congressional statute, and the Supreme Court is appropriately reluctant to overrule its own statutory interpretations, because Congress remains free to amend a statute if the Court has erred in its interpretation.¹¹⁵ This rationale has particular force in the case of the Fair Housing Act. Congress amended the statute in 1988, after the Court's three standing decisions, not to cut back on private civil enforcement actions, but on the contrary, to strengthen them, for example by increasing the ceiling for punitive damages. As discussed above, Congressional action was entirely consistent with the Court's broad standing decisions, and with the use of disparate impact analysis later approved by the Court in the *Texas DHCA* case.¹¹⁶ In the nearly fifty years since passing the Fair Housing Act, Congresses controlled by Democrats and by Republicans have never once acted to restrict civil enforcement of the FHA in the ways suggested by the banks in *City of Miami*.

The second and deeper reason to preserve the broadest possible understanding of who may seek redress for housing discrimination, and whose conduct may be held responsible for it, is the fact that housing discrimination and racial segregation are at the root of so many other forms of racial inequality in our society. It makes little sense to allow only first-order victims of discrimination to sue, nor to allow only the first-level harms caused by discrimination to be redressed, when housing discrimination has so many participants and so many victims.

115. *Patterson v. McLean Fed. Credit Union*, 491 U.S. 164, 172–73 (1989).

116. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

