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## United States Supreme Court Surveys: 2016 Term. Still Standing After All These Years: Five Decades of Litigation Under the Fair Housing Act and the Supreme Court Still Can't Say for Sure Who Is Protected

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# Still Standing After All These Years:\* Five Decades of Litigation Under the Fair Housing Act and the Supreme Court Still Can't Say for Sure Who Is Protected

David A. Logan\*\*

## INTRODUCTION

The 1960s was one of the most turbulent decades in modern American history, marred by assassinations, widespread civil unrest, and a highly divisive war in Vietnam.<sup>1</sup> But it was also a decade of important legislative accomplishments,<sup>2</sup> including a stronger safety net for the poor,<sup>3</sup> protection of the environment,<sup>4</sup>

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\* With apologies to Paul Simon.

\*\* Professor of Law, Roger Williams University School of Law. Thanks to Mike Green, Justin Kishbaugh, Wayne Logan, John Noyes, and Jeanne Wine for their helpful comments on an earlier draft and to Nicole Dyszlewski, Lucinda Harrison-Cox, and Alisha Hennen for their excellent research assistance.

1. See Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2349 (1993) (“A collage of developments—the Civil Rights movement, the Vietnam War and the opposition to it, urban riots—contributed to a profound unsettlement about the direction the country was taking.”). Accord Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 34 (2007) (“Urban riots, campus unrest, political violence, and a spate of prominent assassinations and multiple murders gripped the nation . . .”).

2. See generally DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS 1946–1990*, at 56–61 (1991) (listing major legislation passed 1960–70).

3. John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1341 (1993) (“Of course, since the mid-1960s a number of important noncash

and bans on discrimination in voting and employment.<sup>5</sup> One of the less-known of these legislative achievements was the passage of the Fair Housing Act (FHA), which made discrimination in housing a violation of federal law.<sup>6</sup>

Five decades after its passage, the FHA plays a “continuing role in moving the Nation toward a more integrated society.”<sup>7</sup> Nevertheless, despite congressional amendment and many federal court decisions, important questions about the law remain unsettled, not least who can claim its protections. This uncertainty was on display in the most recent term of the Supreme Court of the United States in *Bank of America Corp. v. City of Miami*.<sup>8</sup> The next section of this article provides background on the FHA and subsequent sections consider the opinions in *City of Miami* and provide a critique of the Court’s analysis. I conclude that despite a plaintiff victory in *City of Miami*, the Court’s convoluted torts analysis may have, in effect, overruled three venerable precedents and dealt a fatal blow to an important tool for combatting housing discrimination.

#### I. THE FAIR HOUSING ACT

By early 1968, the Civil Rights Movement had secured important legislative successes, winning federal statutory protection for access to public accommodations, voting rights, and equal employment,<sup>9</sup> but a key goal—legislation targeting racial

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programs have been created or expanded to help low-income recipients, including the Food Stamp program, the Medicaid program[,] . . . nutritional programs such as the School Lunch Program, and the supplemental food program for women, infants, and children (WIC).” (citations omitted).

4. The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965) (formerly codified at 33 U.S.C. § 1151) (requiring states to adopt water quality standards and made the federal government responsible for the review and approval of these standards).

5. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to a-2; 2000e-3 (2012); Voting Rights Act of 1965, 42 U.S.C. § 1971 (2012).

6. The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2016)).

7. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015). *Inclusive Cmty.* is discussed in more detail *infra* note 172 and accompanying text.

8. 137 S. Ct. 1296 (2017).

9. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to a-2; 2000e-3 (2012); Voting Rights Act of 1965, 42 U.S.C. § 1971 (2012).

discrimination in housing—proved even more difficult to achieve. Minorities seeking better living conditions were severely disadvantaged by an array of misconduct, ranging from obvious discrimination, such as refusing to sell or rent property to qualified minority home seekers,<sup>10</sup> to the more subtle “red lining” (making it harder and more expensive for minority buyers to get loans)<sup>11</sup> and “steering” (channeling minorities to predominately minority neighborhoods).<sup>12</sup> This discrimination had a negative impact on access to jobs, quality education, and even personal safety.<sup>13</sup> However, the proposed legislation inspired ferocious pushback because people care deeply about whom they live near.<sup>14</sup> Indeed, Dr. Martin Luther King, Jr. was pelted with stones when

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10. Refusal is the “most obvious form of housing discrimination . . . . Typically, this refusal is not outright, but rather manifests itself in the form of grudging sales techniques that defy common sense and business logic. . . . The list of possible delaying tactics and burdensome procedures is endless.” 1 JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2.2 (Thomson West 2008).

11. The term “redlining” takes its name from manuals produced by the federal Home Owners Loan Corporation that sorted neighborhoods based upon perceived credit risk, a conclusion often based upon the presence of, or predicted increase in, minority population; black neighborhoods were considered the least credit-worthy and colored red. Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 107–08 (2006); see also RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (arguing that conscious government policies played an important role in racial segregation in housing).

12. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1 (1982) (“[R]eal estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.”). The author represented the plaintiffs in the *Havens Realty* case.

13. See GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 618 (1944) (“[B]ecause Negro people do not live near white people, they cannot . . . associate with each other in many activities founded on common neighborhood. Residential segregation . . . becomes reflected in uni-racial schools, hospitals and other institutions.”).

14. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 190–91, 264 (2004) (explaining that while whites increasingly opposed racial discrimination in voting, public transportation, and higher education, housing segregation was widespread and supported by whites in both the North and the South).

he marched for fair housing in Chicago, prompting him to remark that “I think the people of Mississippi ought to come to Chicago to learn how to hate.”<sup>15</sup>

The “long hot summer” of 1967, with full-out rioting in cities across the country, propelled race relations to the top of the national agenda,<sup>16</sup> but legislators who covered their racism behind the fig leaf of “states’ rights” remained a significant roadblock to the passage of legislation banning housing discrimination.<sup>17</sup> This widespread civil unrest prompted President Lyndon Johnson to establish the National Advisory Commission on Civil Disorders (the Kerner Commission), a distinguished group of citizens appointed to investigate the root causes of the discord and propose solutions.<sup>18</sup> The Commission reported back on March 1, 1968, and concluded that the riots were caused by racism in general and housing discrimination in particular.<sup>19</sup> The Commission specifically recommended the passage of a “comprehensive and enforceable federal open-housing law to cover the sale or rental of all housing . . . .”<sup>20</sup>

Although Senate opponents of fair housing legislation had

15. Gene Roberts, *Rock Hits Dr. King as Whites Attack March in Chicago*, N.Y. TIMES, Aug. 6, 1966, at A1.

16. Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PENN. ST. L. REV. 421, 428–29, 428 n.35 (2015) (recounting that race riots erupted in 164 cities, causing thousands of injuries and significant property damage, and were serious enough to require deployment of the National Guard).

17. IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 16 (2014) (“That’s what ‘states’ rights’ defended, though in the language of state-federal relations rather than white supremacy. Yet this was enough of a fig leaf to allow persons queasy about black equality to oppose integration without having to admit, to others and perhaps even to themselves, their racial attitudes.”); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 472 (2001) (“[M]oderate’ defenders of apartheid sought to shift the debate from the substantive morality of racism to the procedural morality of localism and states’ rights.”).

18. President Lyndon B. Johnson, Remarks Upon Signing Executive Order Establishing the Commission (July 29, 1967), in 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Aug. 7, 1967, at 1068.

19. OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5(1968).

20. *Id.* at 13.

successfully filibustered three times, and withstood some of the legendary LBJ arm-twisting<sup>21</sup> (he made Air Force jets available to senators to get them from their home states to D.C. for a crucial vote),<sup>22</sup> the momentum created by the riots and the release of the Kerner Commission report enabled supporters to corral enough votes to send a fair housing bill to the floor of the Senate, and soon thereafter the legislation was passed 71–20.<sup>23</sup> Nevertheless, the prospects for passage in a more conservative House of Representatives appeared bleak.<sup>24</sup>

Fate intervened, however, in the form of the tragic assassination of Dr. King on April 4, 1968, which triggered another wave of rioting, and for first time, massive civil unrest reached Washington, D.C.<sup>25</sup> With portions of the city ablaze, and National Guard deployed (troops were even stationed in the Capitol building itself), the House rushed to consider the Senate bill.<sup>26</sup> The crisis provided President Johnson an opening: he urged passage of federal fair housing legislation before the burial of Dr. King as a fitting memorial to a man who was killed because he believed in racial equality.<sup>27</sup> The confluence of these dramatic

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21. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L. J. 899, 923 n.85 (1998) (noting that Johnson was “renowned” for his “arm-twisting” and “cajolery”); see also ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 588–90 (2002) (describing how Johnson gave reluctant Senators “the Johnson treatment”); ROWLAND EVANS & ROBERT NOVAK, *LYNDON B. JOHNSON: THE EXERCISE OF POWER* 104 (1966) (“[It was] supplication, accusation, cajolery, exuberance, scorn, tears, complaint, the hint of threat . . . . He moved in close, his face a scant millimeter from his target, his eyes widening and narrowing, his eyebrows rising and falling. From his pockets poured clippings, memos, statistics. Mimicry, humor, and the genius of analogy made The Treatment an almost hypnotic experience and rendered the target stunned and helpless.”).

22. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 155 (1969).

23. *Id.* at 158–59.

24. Corbin, *supra* note 16, at 430.

25. JOHN T. ELLIFF, *CRIME, DISSENT, AND THE ATTORNEY GENERAL: THE JUSTICE DEPARTMENT IN THE 1960’S*, at 112 (Joel B. Grossman ed., Sage Pub., Inc. 1971) (“Dr. King’s assassination triggered a wave of rioting in over a hundred cities, including serious disorders and widespread property destruction in Washington, D.C. . . .”).

26. Dubofsky, *supra* note 22, at 160.

27. *History of Fair Housing*, U.S. DEPT OF HOUS. AND URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_)

events caused the opposition to crumble and debate on the floor was limited to a single hour; the House acceded to the Senate bill by a 250–171 margin and the President signed the Fair Housing Act (FHA) into law the very next day.<sup>28</sup>

Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act of 1968 banned housing discrimination on the basis of race, color, religion, and national origin, with the goal of replacing residential ghettos with “truly integrated and balanced living patterns.”<sup>29</sup> The statute provides a damages remedy for any “aggrieved person,” defined as “any person who . . . claims to have been injured by a discriminatory housing practice.”<sup>30</sup> The next section discusses the opinions in the Supreme Court’s most recent FHA decision, *Bank of America Corp. v. City of Miami*, and considers who is protected by the statute.

## II. THE DECISION

Determining exactly who has standing to sue to enforce the FHA is complicated by the “protracted and chaotic” circumstances surrounding its passage.<sup>31</sup> With no committee reports and scant floor debate there is little from the congressional record to help answer important questions that arise under the Act, including who has standing to sue.<sup>32</sup>

Three Supreme Court decisions, handed down between 1972 and 1982, however, read the FHA broadly, granting standing not only to minority home seekers, but also to parties who were not actually the targets of discrimination, but nevertheless injured as a result.<sup>33</sup> For example, in *Trafficante v. Metropolitan Life*

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opp/aboutfheo/history (last visited Oct. 1, 2017).

28. Dubofsky, *supra* note 22, at 160.

29. *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 2706 (statement of Sen. Mondale)). In 1988, Congress added bans on discrimination on the basis of “sex,” “familial status,” and “handicap.” See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (discussing congressional actions in 1988).

30. 42 U.S.C. §§ 3602(i)(1), 3613(a)(1)(A), 3613(c)(1) (2012).

31. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 5.2 (Thomson Reuters 2017).

32. *Trafficante*, 409 U.S. at 210 (“The legislative history of the Act is not too helpful.”); see also *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977) (remarking that the legislative history of FHA is “somewhat sketchy”).

33. See *Trafficante*, 409 U.S. at 212; see also *Havens Realty Corp. v.*

*Insurance*, the Court allowed white tenants of an apartment complex to sue for damage to their right to live in an integrated community,<sup>34</sup> while in *Gladstone, Realtors v. Village of Bellwood*, a town was allowed to sue for the tax revenue it lost and the harm to its racial balance caused by racial steering.<sup>35</sup> Finally, *Havens Realty Corp. v. Coleman* recognized standing for both a civil rights group that spent its scarce resources to ferret out housing discrimination and for white “testers” who were working undercover to obtain evidence that a realtor was engaging in racial steering.<sup>36</sup> These three standing decisions supported a conclusion that the sweep of the FHA is as broad as allowed by Article III.<sup>37</sup>

Like many municipalities, the City of Miami experienced a tidal wave of foreclosures when the housing market collapsed in 2007–2008. Because of the resulting harm to city coffers, and relying upon the favorable FHA precedents, the city filed suit in federal district court alleging that lending institutions subjected African-American and Latino borrowers to “predatory loans that carried more risk, steeper fees and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans.”<sup>38</sup> The city claimed that it was an “aggrieved

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Coleman, 455 U.S. 363, 379 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979).

34. 409 U.S. at 211–12.

35. 441 U.S. at 110–11.

36. 455 U.S. at 379.

37. See David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 42 (1984) (arguing that the Supreme Court’s FHA decisions support the view that Congress has the power to “provide judicial redress to parties asserting even novel claims with attenuated causal relationships”); see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988) (“If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it.”).

38. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1266 (11th Cir. 2015). The city introduced evidence that African-American borrowers were 1.6 times more likely to receive a discriminatory loan than a similarly situated white borrower and that Latino borrowers were 2.1 times more likely to experience discrimination. *Id.* at 1268. Unsurprisingly, such unfavorable terms resulted in far more minority borrowers being subject to foreclosure when the real estate market imploded. *Id.* at 1268–69.



person” within the meaning of the statute because these discriminatory practices caused huge numbers of foreclosures in predominantly minority neighborhoods,<sup>39</sup> resulting in blighted areas, lower property tax collections, and higher costs for police, fire, and other city services.<sup>40</sup>

The district court held that the city lacked standing to sue on two grounds: first, the city’s injuries were not in the “zone of interests” protected by the FHA and second, any bank misconduct was not the “proximate cause” of the injuries alleged by the city.<sup>41</sup> The Court of Appeals for the Eleventh Circuit reversed, allowing the lawsuit to proceed<sup>42</sup> and the Supreme Court granted certiorari to hear the banks’ appeal.<sup>43</sup>

The Court upheld the Eleventh Circuit’s decision to allow the case to proceed by a 5–3 vote, with Justice Breyer writing for the majority, joined by Chief Justice Roberts and Justices Ginsberg, Sotomayor, and Kagan.<sup>44</sup> Justice Thomas, joined by Justices Kennedy and Alito concurred in part and dissented in part.<sup>45</sup>

Justice Breyer began his majority opinion by recognizing that in order to have standing to sue the plaintiff must show an “injury in fact” that is “fairly traceable” to the defendant’s misconduct.<sup>46</sup> This means that when a plaintiff asserts a claim for damages under a statute, the plaintiff’s interests must fall within the “zone of interests” that Congress intended to protect when passing the legislation.<sup>47</sup> He then turned to the three earlier FHA decisions—*Trafficante*, *Gladstone*, and *Havens*—which he characterized as supporting the view that the FHA conferred standing “as broadly

39. *Id.* at 1274, 1277–78.

40. *Id.* at 1269.

41. *City of Miami v. Bank of Am. Corp.*, 171 F. Supp. 3d 1314, 1319–20 (S.D. Fla. 2016).

42. *City of Miami*, 800 F.3d at 1289.

43. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017).

44. *Id.* at 1301. See generally Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> (detailing the life and unexpected death of Justice Antonin Scalia, creating a sudden vacancy on the Supreme Court, and thus, leaving an eight-member court).

45. *City of Miami*, 137 S. Ct. at 1301.

46. *Id.* at 1302 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

47. *Id.* at 1302–03.

as is permi[ssible] by . . . the Constitution.”<sup>48</sup> He bolstered this conclusion by pointing out that when Congress amended the FHA in 1988, it “retained without significant change the definition of ‘person aggrieved’ that this Court had broadly construed” in the trio of Supreme Court decisions.<sup>49</sup>

The banks argued that the language from these decisions represented dicta and that Congress could not have intended to expand statutory protections “to the limits of Article III,” which they claimed would mean that literally *anybody* harmed by a discriminatory act would have standing.<sup>50</sup> Justice Breyer disagreed, countering that the city’s financial injuries “fall within the zone of interests that the FHA protects.”<sup>51</sup> To support this conclusion he pointed to *Gladstone*, where the Court held that a town had standing under the FHA for the depressed housing market and the resultant “significant reduction in property values [that] directly injures the municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.”<sup>52</sup> This claim was sufficiently analogous to the claim asserted by Miami that the principle of *stare decisis*, plus Congress’ “decision to ratify those precedents” while amending the statute in 1988, meant that the city had sufficiently alleged injury in fact.<sup>53</sup>

The remaining standing question was whether the banks’ misconduct was the “proximate cause” of the city’s injuries. The Eleventh Circuit had applied a “foreseeability” test and concluded that the allegations were sufficient to avoid dismissal because the banks had access to “analytical tools as well as published reports drawing the link between predatory lending practices ‘and their

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48. *Id.* at 1303 (quoting *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 209 (1972)). Justice Breyer noted that similarly expansive language appeared in *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979) and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 275–76 (1982).

49. *City of Miami*, 137 S. Ct. at 1303.

50. *Id.* at 1304. “The Banks say it would be similarly farfetched if restaurants, plumbers, utility companies or any other participant in the local economy could sue the banks for the business they lost when people had to give up their homes and leave the neighborhood as a result of the banks’ discriminatory lending practices.” *Id.*

51. *Id.*

52. *Id.* at 1305 (quoting *Gladstone*, 441 U.S. at 110–11).

53. *Id.*

attendant harm,' such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues."<sup>54</sup> As a result, even though there were "several links in the causal chain" between the wrongdoing and the city's harms, the appeals court concluded that the injuries were sufficiently foreseeable to withstand a motion to dismiss.<sup>55</sup>

Justice Breyer rejected this foreseeability-based analysis.<sup>56</sup> He began the majority's discussion of causation by pointing out that FHA claims are a statutory-based version of a tort,<sup>57</sup> and proximate cause determinations in tort actions that are based upon a statute, like the city's claim, require analysis of the "nature of the statutory cause of action."<sup>58</sup> A viable FHA claim requires that the injuries alleged cannot be caused by "any remote cause," and the determination of how remote is too remote must be based upon whether the harm alleged has "a sufficiently close connection to the conduct the statute prohibits."<sup>59</sup> To Justice Breyer, "foreseeability alone is not sufficient to establish proximate cause under the FHA."<sup>60</sup>

Justice Breyer pointed out that because a housing market is "interconnected with economic and social life," a violation of the FHA could "cause ripples of harm to flow" far beyond a defendant's misconduct.<sup>61</sup> In light of this broad and deep interconnectedness, Justice Breyer was unwilling to conclude that Congress intended the FHA to provide a remedy "wherever the ripples travel" because such litigation could be "massive and complex," a possible outcome under the foreseeability test applied by the Court of Appeals.<sup>62</sup> To avoid this result, a plaintiff must

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54. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015). The Court of Appeals rejected the banks' argument that the injury had to be *the* "sole" proximate cause, "direct," and "not derivative." *Id.* at 1278–82.

55. *Id.* at 1282.

56. *City of Miami*, 137 S. Ct. at 1306.

57. *Id.* at 1305 ("A claim for damages under the FHA . . . is akin to a 'tort action.'" (citation omitted)).

58. *Id.*

59. *Id.* (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)).

60. *Id.* at 1306.

61. *Id.* (quoting *Assoc. Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983)).

62. *Id.*

prove a “direct relation between the injury asserted and the injurious conduct alleged,”<sup>63</sup> and the “general tendency . . . is to not go beyond the first step.”<sup>64</sup> This, in turn requires an assessment of what is “administratively possible and convenient.”<sup>65</sup>

At this point in the majority opinion, it seemed as if Justice Breyer was endorsing the defendant’s argument that the city’s claim should be dismissed because “the distance between the violation and the harms the City claims to have suffered is simply too great.”<sup>66</sup> This, however, was not the case, as Justice Breyer instead vacated the decision of the Court of Appeals and remanded, leaving it to the lower courts to determine whether the city’s injuries satisfied the directness test.<sup>67</sup>

Justice Thomas, writing for Justices Kennedy and Alito, concurred in part and dissented in part.<sup>68</sup> As to the “zone of interests” question, Justice Thomas argued that the FHA had a narrower ambit than that recognized by the majority, and analogized the Act to prior standing decisions that had significantly limited the class of proper plaintiffs alleging employment discrimination under Title VII.<sup>69</sup> Characterizing the sweeping language in *Trafficante*, *Gladstone*, and *Havens* as “‘ill-considered’ dictum leading to ‘absurd consequences,’”<sup>70</sup> Justice Thomas argued that the interests of Miami were “markedly distinct” from the interests that the Court confronted in the earlier FHA cases.<sup>71</sup> As a result, the city’s injuries were “so marginally related to” the purposes of the FHA that they fell outside the zone of interests.<sup>72</sup>

On the second standing question, whether there was an

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63. *Id.* (citing *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992)).

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

65. *Id.* (quoting *Holmes*, 503 U.S. at 268).

66. *Id.* at 1301.

67. *Id.* at 1306.

68. *Id.* at 1306 (Thomas, J., concurring in part and dissenting in part).

69. *Id.* at 1307–08 (first citing *Thompson v. N. Am. Stainless, LP.*, 562 U.S. 170, 173, 175–78 (2011); then citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388–89 (2014)).

70. *Id.* at 1308 (quoting *Thompson*, 562 U.S. at 176).

71. *Id.* at 1309.

72. *Id.* at 1308.

adequate causal link between the misconduct and the injury, Justice Thomas concurred with the majority, agreeing that proof that an injury was “foreseeable” was insufficient to satisfy the proximate cause requirement for FHA claims.<sup>73</sup> In his view, the relationship between the banks’ discrimination and the injury to the city was “exceedingly attenuated,”<sup>74</sup> and, as a result, there was “little doubt that neither Miami nor any similarly situated plaintiff c[ould] satisfy the rigorous standard that the Court adopt[ed].”<sup>75</sup> Absent an adequate causation allegation, Justice Thomas would have dismissed the case, rather than remanding, because “the Court of Appeals has no advantage over us in evaluating the complaint’s proximate-cause theory.”<sup>76</sup>

### III. ANALYSIS

*City of Miami* was lauded by civil rights advocates as an important victory and, at first glance, that enthusiasm is justified: the Court continues to recognize that a broad range of injuries and parties are within the “zone of interests” protected by the FHA, and the Court gave the city a chance to prove sufficient causation on remand.<sup>77</sup> If Miami and other municipalities are eventually successful at trial, banks would be on the hook for some of the broad-ranging consequences of the rapacious lending that played an important role in the Great Recession that began in 2008.<sup>78</sup> This is especially important given the failure of the federal government to pursue criminal sanctions against the corporate

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73. *Id.* at 1311.

74. *Id.*

75. *Id.*

76. *Id.*

77. See, e.g., Erwin Chemerinsky, *An Important Victory for Civil Rights*, AM. CONST. SOC’Y (May 2, 2017), <https://www.acslaw.org/acsblog/an-important-victory-for-civil-rights> (examining how the *City of Miami* ruling is a win for the Fair Housing Act); Phillip S. Stein & James J. Ward, *Supreme Court Ruling Permits City Lawsuits against Banks to Proceed*, BILZEN SUMBURG’S MORTGAGE CRISIS AND FIN. SERV. WATCH (May 1, 2017), <http://www.financialserviceswatchblog.com/2017/05/supreme-court-ruling-permits-city-lawsuits-against-banks-under-fha-to-proceed/#more-4484> (“This is an extremely important decision.”).

78. See Kat Aaron, *Predatory lending: A decade of warnings*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2009/05/06/5452/predatory-lending-decade-warnings> (explaining that subprime lenders earned enormous profits making mortgages to people who clearly could not afford them).

chieftains who oversaw the reckless lending.<sup>79</sup>

Permitting local governments to sue for discriminatory lending is important for practical reasons: few minority home seekers harmed by the banks' misconduct could be expected to navigate the chaos of a foreclosure, recognize that the loans they took out were based upon discriminatory lending, and manage to file suit within the FHA's short two-year statute of limitations.<sup>80</sup> Even if they could, it is undoubtedly difficult to find attorneys willing to take on the financial burden of retaining the expert witnesses needed to develop the technical and fact-intensive proof showing that banking behemoths engaged in a pattern of discrimination that harmed the tax base and increased the cost of government services.<sup>81</sup> On the other hand, municipal government plaintiffs are in a much better position to deter bank misconduct through civil litigation. First, governments are less susceptible to statute of limitations defenses because the lost tax revenues and higher costs continue for many years after the discriminatory lending.<sup>82</sup> Second, municipalities may take a page from the playbook of the states that won billions of dollars from the tobacco industry by partnering with powerhouse personal injury lawyers

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79. Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail> (discussing why banks and financial institutions were "too big to jail" despite the widespread wrongdoing that led to the Great Recession); see generally JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (Simon & Schuster, 2017).

80. See Alex Gano, Note, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 88 U. COLO. L. REV. 1109, 1156, 1158 (2017).

81. See Andrew Lichtenstein, Note, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L. REV. 1339, 1367 (2010) (discussing the challenges faced by individuals who may have a bona fide predatory lending claim, including the difficulty of identifying misconduct in a timely manner because of its subtlety, the "isolation of subprime communities," informational asymmetries and financial illiteracy of borrowers, a pleading standard that requires information unavailable to plaintiffs and their lawyers without filing a claim, and the need to retain and pay for expert witnesses).

82. See Gano, *supra* note 80, at 1153 (suggesting that cities can avoid statute of limitations defenses by taking advantage of the continuing violation doctrine). The impact of the foreclosure crisis upon municipalities kept renewing itself with each new property tax shortfall and increase in costs of services, so government plaintiffs had a longer time to file claims than individual homeowners. See *id.*

who have the staff and war chests to stand up to the titans of finance.<sup>83</sup>

Nevertheless, a closer look at the causation aspect of *City of Miami* suggests that such rosy conclusions may be unjustified, and in fact raises the distinct possibility that the era of generous grants of standing under the FHA is coming to a close.<sup>84</sup>

#### A. Causation Conundrum

While the Court split 5–3 in favor of the city on the first standing issue—whether the sweeping view of FHA standing recognized in *Trafficante*, *Gladstone*, and *Havens* remains good law—on the second issue, all of the justices endorsed a “direct causation” test, rejecting the more generous foreseeability analysis used by the Court of Appeals.<sup>85</sup> In fact, Justice Thomas, in concurrence on the causation issue, not only agreed that directness was the proper test, but would have applied it to the facts and dismissed the case entirely, rather than remanding as

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83. See Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation*, 33 CONN. L. REV. 1143, 1147–49 (2001) (detailing how the alliance between states and the “elite” of the plaintiffs’ bar provided the necessary resources to take on “Big Tobacco”); Gregory W. Traylor, Note, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1093–98 (2010); see also Jef Feeley & John Lauerma, *Opioid Costs Push Struggling States to Dust Off Tobacco Strategy*, BLOOMBERG (June 14, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-06-14/opioid-costs-push-struggling-states-to-dust-off-tobacco-strategy> (quoting the author of this article that governments are hiring private firms to seek damages from opioid manufacturers).

84. Of course, as a decision construing a federal statute, *City of Miami* can be overturned by Congress and the President, a distinct possibility when both branches are controlled by Republicans. See Roger Clegg, *Silver Linings Playbook: “Disparate Impact” and the Fair Housing Act*, 2014 CATO SUP. CT. REV. 165, 186 (2014–2015) (urging Congress to amend the FHA to overrule *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015), which had approved “disparate impact” claims by plaintiffs); see also *Protect Local Independence in Housing Act of 2015: Hearing on H.R. 3145 Before the H. of Rep.*, 114th Cong. (2015). The Court’s decision in *Inclusive Cmty.* is discussed *infra* at notes 172–75, and accompanying text.

85. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1312 (2017) (Thomas, J., dissenting and concurring). Justice Thomas’ opinion agreed with the majority that proof of “foreseeability” was not sufficient. *Id.* at 1311 (“Although I disagree with its zone-of-interests holding, I agree with the Court’s conclusions about proximate cause.”).

the majority directed.<sup>86</sup>

It is not surprising that all of the justices read the FHA to require a meaningful causal link between the statutory violation and injury to the plaintiff; this is a bedrock principle of tort law, and FHA claims draw from the common law of torts.<sup>87</sup> Indeed, “[n]o serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required.”<sup>88</sup> In the context of common law tort actions, judges primarily, but not exclusively, look to “proximate cause” for such a limitation.<sup>89</sup> But whatever the terminology,<sup>90</sup> the resulting doctrinal mess has been lamented by the great treatise writers,<sup>91</sup> the American Law Institute,<sup>92</sup> and the Court itself,<sup>93</sup> and *City of Miami* did nothing

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86. *Id.* There is no way that the city could satisfy the “rigorous standard for proximate cause that the Court adopts and leaves to the Court of Appeals to apply” because the link between the alleged FHA violation and its asserted injuries was “exceedingly attenuated.” *Id.*

87. *City of Miami*, 137 S. Ct. at 1305.

88. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. a (AM. LAW INST. 2010); accord W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 264 (West Pub. Co., 5th ed. 1984) (“Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.”).

89. Some courts limit liability by modifying the duty that the defendant owed the plaintiff. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. c. The warring opinions in the classic case of *Palsgraf v. Long Island Railroad Co.* reflect this divide, as Chief Judge Cardozo opted for a duty analysis, while Judge Andrews dissented on the basis of proximate cause. 162 N.E. 99 (N.Y. 1928); see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. f. Cabining liability via limited duty rules is discussed in more detail *infra* at notes 113–29.

90. Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DEN. L. REV. 77, 82 (2012) (“All three *Restatements of Torts* have presented traditional proximate cause doctrines as deeply vexed.”).

91. KEETON ET AL., *supra* note 88, at 263 (“There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach.” (citation omitted)).

92. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. b (“‘[P]roximate cause’ is a poor [term] to describe limits on the scope of liability.”).

93. *CSX Trans., Inc. v. McBride*, 131 S. Ct. 2630, 2645 (2011) (Roberts, J., dissenting) (“The plurality breaks no new ground in criticizing the variety of formulations of the concept of proximate cause; courts, commentators, and first-year law students have been doing that for generations. But it is often easier to disparage the product of centuries of common law than to devise a



to fix the doctrinal confusion.

The Court had a range of options at its disposal, drawn from precedents both venerable—like *Palsgraf v. Long Island Railroad Co.*<sup>94</sup>—and modern, like the American Law Institute’s Restatement (Third) of Torts,<sup>95</sup> but two approaches are the most common.<sup>96</sup> One approach, the “directness” test, focuses on the chain of causation that links the defendant’s wrongdoing to the plaintiff’s injury and denies compensation for those injuries that are separated by one or more “links in a chain of causation” because they are deemed “too remote” for recovery.<sup>97</sup> The second approach considers whether the plaintiff’s injuries were a foreseeable consequence of defendant’s wrongdoing, focusing on whether the injuries were within the “scope of the risk” the defendant created, and allows liability for only those results deemed to be “foreseeable.”<sup>98</sup>

A classic example of the directness approach is *In re Polemis and Furness, Withy & Co.*<sup>99</sup> In *Polemis*, a cargo sling dislodged a wooden plank that a stevedore had negligently placed across the hatchway over a ship’s hold.<sup>100</sup> The falling plank hit the bottom of the ship and caused sparks, which ignited flammables that happened to be in the hold, leading to a fire that destroyed the ship.<sup>101</sup> While a falling plank created a foreseeable risk of hitting

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plausible substitute.” (citations omitted). This is not just a modern concern. See, e.g., *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U.S. 469, 474 (1876) (referring to “the oft-embarrassing question, what is and what is not the proximate cause of an injury”).

94. See 162 N.E. 99 (N.Y. 1928).

95. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29.

96. See David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 209–220 (1997) (discussing proximate cause in greater detail).

97. Sometimes “direct” is paired with, or replaced by, a requirement that the injury be a “natural” or “continuous” result of the wrongdoing. See Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L. Q. 49, 81 (1991); see also Allen, *supra* note 90, at 84.

98. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. e, at 499–500 (“Courts have increasingly moved toward adopting a foreseeability test for scope of liability in negligence cases.”).

99. See *In re Polemis & Furness, Withy & Co.*, (1921) 3 K.B. 560 (C.A.).

100. *Id.* at 560.

101. *Id.*

any sailor standing below, it was highly unlikely to cause a fire.<sup>102</sup> The court held that the fact that a fire was unforeseeable did not preclude recovery because the fire was caused directly by the falling plank—that is, without any significant intervening cause or links in the chain of causation.<sup>103</sup>

Some courts in the United States adopted this “directness” test for limiting liability,<sup>104</sup> which is attractive because of its apparent simplicity: look to the unassailable facts of nature to identify the “links in the chain,” and recovery is denied if there are “too many.”<sup>105</sup> History, however, has not been kind to the directness test, in Great Britain or in the United States.

The *Polemis* decision was considered and rejected in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound I)*.<sup>106</sup> In *The Wagon Mound I*, the crew of an oil tanker negligently allowed furnace oil to leak into a harbor, where it flowed to and under the plaintiff’s dock 600 feet away.<sup>107</sup> Workmen were using torches to repair the dock, and their falling molten metal ignited cotton waste floating on the oil.<sup>108</sup> The waste acted as a wick, which ignited the oil and burned the dock.<sup>109</sup> *The Wagon Mound I* court repudiated the “direct causation” rule of *Polemis*, and adopted a limitation on liability based on the foreseeability of the risk.<sup>110</sup> According to the court, it is unfair to saddle a defendant—even a culpable one—with liability for an unforeseeable kind of harm, even though a harmful consequence of an entirely different kind was readily

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102. *Id.*

103. *Id.*

104. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 reprints’ note at 511 (AM. LAW INST. 2010) (collecting cases).

105. See *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1062 (N.Y. 2001) (explaining that victims of handgun violence cannot sue gun manufacturers because the “connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer.”).

106. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (The Wagon Mound I)* [1961] AC 388 (HL) 389 (appeal taken from N.S.W.).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

foreseeable.<sup>111</sup> The court elaborated that limiting liability to foreseeable consequences:

accords with . . . the general public sentiment of moral wrongdoing for which the offender must pay. It is a departure from this sovereign principle if liability is made to depend solely on the damage being the “direct” or “natural” consequence of the precedent act. Who knows or can be assumed to know all the processes of nature?<sup>112</sup>

Limiting liability based upon notions of directness—the test adopted by all of the justices in *City of Miami*—has been harshly criticized by scholars,<sup>113</sup> rejected by the American Law Institute in all three of the Torts Restatements,<sup>114</sup> and increasingly disdained by courts.<sup>115</sup> The primary flaw was identified by the court in *Wagon Mound I*: whether a result was caused directly lacks a logical link to the justification for holding a defendant liable in the first instance, and instead invites metaphysical musings about the workings of nature.<sup>116</sup> The directness test is also easily manipulated by a judge who wishes to constrict (or expand) the scope of liability, because deciding how many links is “too many” is a subjective enterprise.<sup>117</sup> The directness test is

111. *Id.*

112. *Id.* at 426.

113. Adding the locutions “natural” and “probable” does not fix the problem. See Laurence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 123 (1937) (“Nor is clarity attained by the repetitious utterance of a ritualistic formula about ‘natural and probable consequences.’”); ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 26–28 (1963) (criticizing the “natural and probable” test).

114. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 reps.’ note (AM. LAW INST. 2010).

115. *Id.* (collecting cases).

116. See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (The Wagon Mound I)* [1961] AC 388 (HL) 425 (appeal taken from N.S.W.). Thus, the direct test denies liability for injuries that are caused by a culpable defendant regardless of whether the particular outcome was within the scope of the risk associated with defendant’s wrongdoing, as long as it was caused “directly.” RESTATEMENT (THIRD) OF TORTS § 29 reps.’ note, cmt. e (“One major problem with the ‘natural and continuous’ language is that it fails to confront the essential concern of the proximate-cause limitation: actors should not be held liable when the risk-producing aspects of their conduct cause harm other than that which was risked by the tortious conduct.”).

117. See Frank J. Vandall, *Duty: The Continuing Vitality of Dean Green’s Theory*, 15 QUINNIPIAC L. REV. 343, 344 (1995); see also JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS*

also confusing to the extent that it suggests that proximate cause is only present when the wrongdoing is “close in space or time to the plaintiff’s harm.”<sup>118</sup> As William Prosser observed decades ago, direct causation is an “[a]rtificial” test, purporting to fix liability by reference to “a defendant [who] acts upon a set stage” because it offers “a mechanical solution of a problem which is primarily and essentially one of policy.”<sup>119</sup> Finally, the directness test is fatally flawed because it fails to provide a candid discussion of the competing values at stake.<sup>120</sup> As a leading treatise puts it, scope of liability issues “call for judgments, not juggernauts of logic.”<sup>121</sup>

With such an impressive array of authorities rejecting a directness test, one can wonder why a unanimous Court rescued a discredited approach from the slag heap of history. The most likely explanation is that the Court felt that the foreseeability test adopted by the Court of Appeals provided insufficient protection to lenders facing potentially sweeping FHA liability: the city could convincingly argue that sophisticated financial players knew, or should have known, that widespread predatory lending would not only harm borrowers but also the communities that the borrowers lived in. Stated differently, if a bank made thousands of discriminatory loans despite knowing that many of the borrowers were at high risk of foreclosure, then decreased property tax revenues and increased need for city services were clearly foreseeable and within the scope of the risk created by these

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104, 106 (Dennis Patterson ed., 2010) (explaining that the directness test is of limited use as an analytical tool because whether an injury had been “directly” caused by the defendant’s misconduct is not something that can be determined with precision).

118. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. b.

119. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 304 (3d ed. 1964).

120. LEON GREEN, RATIONALE OF PROXIMATE CAUSE 196 (1927) (arguing that limitation of liability should not be achieved by resort to “metaphysical” concepts like “directness” or “foreseeability,” but rather by a forthright balancing of various public policy considerations). The shape-shifting nature of proximate cause was recognized by Judge Andrews in his dissent in *Palsgraf*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting). For Judge Andrews, proximate cause involved “question[s] of fair judgment” that lead, at best, not to a clear rule but only to “an uncertain and wavering line” that would yield “practical” results “in keeping with the general understanding of mankind.” *Id.*

121. DAN B. DOBBS, THE LAW OF TORTS § 181, 447 (2000).

practices. Because the city itself was not subject to discrimination,<sup>122</sup> requiring proof of a “direct link” between the wrong and the harm (instead of or in addition to foreseeability),<sup>123</sup> provides defendants considerably more robust protection from liability.<sup>124</sup>

Unfortunately, the opinions of Justices Breyer and Thomas did not make explicit why such protection was important, but the briefs of the parties and amici certainly did, underscoring that Miami’s claim for damages was only one of many pending claims brought by cities against lending institutions that engaged in similar predatory behavior.<sup>125</sup> These briefs also warned that a victory for the city would expose lending institutions across the country to massive liability.<sup>126</sup> Such “floodgates” or “unlimited liability” concerns have often been the basis for restrictive tort rulings,<sup>127</sup> whether by a strict application of proximate cause or by

122. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1300–01 (2017).

123. In a few situations, courts provide defendants double protection, requiring proof of both directness and foreseeability. See DAN B. DOBBS ET AL., *THE LAW OF TORTS* 704 (2d ed. 2015) (“[I]n certain commercial harm cases . . . the harm must be *both* foreseeable and direct, dismissing the claim for foreseeable harm if the harm was not also ‘direct.’”).

124. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. e (AM. LAW INST. 2010).

125. Petition for Writ of Certiorari at 3, n.1, *City of Miami*, 137 S. Ct. 1296 (No. 15-1111) (“At least twelve cities and local governments have brought suit . . . .”); *id.* at 34 (“The new litigation follows the same model: brought by outside counsel seeking contingency fees; relying on statistical inferences of disparate impact; and demanding ‘hundreds of millions of dollars’ in ‘compensatory damages alone,’ plus unspecified punitive damages. And this . . . is just *one* of the many cases now being pursued by municipal plaintiffs.”). Accord Brief for the Chamber of Commerce of the United States of America As Amicus Curiae Supporting Petitioners at 2, 13, 16, *City of Miami*, 137 S. Ct. 1296 (No. 15-1111, 15-1112) (arguing that the Court of Appeals decision “exposed lending institutions to virtually boundless liability, with no limiting principle apparent to provide even a modicum of predictability or proportionality;” affirming the Court of Appeals would “accelerate the deluge of litigation” and be an insufficient response to the “rising tide of municipal suits”).

126. Brief for the Petitioners at 12, *City of Miami*, 137 S. Ct. 1296 (No. 15-1111, 15-1112) (“the potential liability that lenders face under the Eleventh Circuit’s ruling is breathtaking”).

127. See Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1870–71 (2016) (“The floodgates concern is by no means unique to the realm of economic losses due to defective products. Indeed, it is a common fear whenever a tort right is

limiting the duty owed.<sup>128</sup> These concerns were not prominent in either of the Court's opinions, with Justice Breyer only blandly observing that the directness test took into consideration "what is administratively possible and convenient";<sup>129</sup> even more surprisingly, Justice Thomas failed to even raise the sweeping economic impact that could result if Miami prevailed.

The Court could have been more transparent, and convincing, if it had eschewed going down the rabbit hole of the directness test for proximate cause and instead recognized that claims for lost revenue by municipalities are fundamentally different from claims brought by the primary beneficiaries of the FHA. People who are actually subject to racial discrimination seek to vindicate dignitary interests, or "harm to the personality," like the interests in a garden variety civil rights claim.<sup>130</sup> Such intangible, non-economic interests were at the heart of all of the Court's previous

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expanded. The thrust of the floodgates concern is typically dealt with via proximate cause limitations." (footnotes omitted)); *see also* Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 868–69 (2004) ("When courts refer to 'infinite' or 'unlimited' liability, the references are really shorthand for liability that is grossly disproportionate to the underlying culpability." (footnotes omitted)); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001) (finding that even though gun manufacturers could foresee that innocent victims would be harmed by their products, the potential size of the universe of claims was a basis for denying liability; "[t]his judicial resistance to the expansion of duty grows out of practical concerns . . . about potentially limitless liability.").

128. *See Kinsman Transit Co. v. City of Buffalo (Kinsman II)*, 388 F.2d 821, 825 (2d Cir. 1968) ("In the final analysis, the circumlocution whether posed in terms of 'foreseeability,' 'duty,' 'proximate cause,' [sic] 'remoteness,' etc. seems unavoidable."); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. f (AM. LAW INST. 2010) ("Some courts use duty in situations in which other courts would use proximate cause.").

129. *Bank of Am. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017).

130. DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 623 (2d ed. 1993) (explaining that in claims for "dignitary injuries or injuries to the personality" the "primary or usual concern is not economic at all, but vindication of an intangible right . . . the affront to the plaintiff's dignity as a human being, the damage to his self-image, and the resulting mental distress"); *see also* Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 668 (2012) ("In suits involving invasions to dignitary interests (such as reputation and privacy), or to civil rights (such as voting rights), courts have allowed damages that redress the loss of the right itself . . . [and that] vindicate noneconomic, rather than economic, rights." (footnotes omitted)).

FHA standing decisions. In *Trafficante*, the injury was to the neighbors' "interracial associations";<sup>131</sup> in *Havens*, the plaintiffs sought damages for the racial discrimination actually experienced by the testers and the harm to individual members of the civil rights group who could not "live in an integrated community";<sup>132</sup> and the plaintiffs in *Gladstone* claimed harm to the village's interest in "racial balance and stability" and to the right of the village's residents to "select housing without regard to race," along with the "social and professional benefits of living in an integrated society."<sup>133</sup> While the complaint in *Havens* also sought damages for the cost of investigating discrimination<sup>134</sup> and the plaintiffs in *Gladstone* included an allegation of a "significant reduction in property values [that] directly injures a municipality by diminishing its tax base,"<sup>135</sup> the gravamen of all of the relevant precedents was injury to non-economic harms.

As a result, judicial clarity would have been better served by an opinion that recognized that the core purpose of the FHA was to protect those who experience dignitary harm as the result of discrimination. Such a forthright approach to what the Restatement (Third) of Torts calls the "scope of liability" problem was perhaps best explained by Judge Andrews in his famous dissent in *Palsgraf*: "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."<sup>136</sup>

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131. *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 209–10 (1972).

132. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 369 (1982).

133. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 92 (1979).

134. *Havens*, 455 U.S. at 368.

135. *Gladstone*, 441 U.S. at 95.

136. 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). Leading scholars have endorsed such an approach. *See, e.g.*, DOBBS, *THE LAW OF TORTS*, *supra* note 121, at § 181, 446, 447 ("Judgments about proximate cause are not precise, but, at least roughly speaking, they reflect the ideas of justice as well as practicality . . . . The proximate cause rules give us the language of argument and direct the thought that is brought to bear when the connection between the defendant's negligence and the plaintiff's injury seems tenuous. The rules call for judgments, not juggernauts of logic."); KEETON ET AL., *supra* note 88, at § 44, 301 ("[T]he problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal responsibility.").

If the justices adopted such a candid approach in *City of Miami*, the opinions would have expressly recognized that the lost tax revenues and increased municipal expenses are analogous to the many cases in which courts have aggressively limited damage recoveries when the defendant's misconduct causes economic harm, but no injury to the plaintiff's person or property.<sup>137</sup> This "economic loss rule" is long-standing and primarily based upon the fear of massive liability and the risk that damages awards could bankrupt defendants that provide valuable services to our society.<sup>138</sup> Courts cite the possible "domino effect,"<sup>139</sup> because of the risk that civil actions for economic harm may create liability "in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>140</sup> So, for example, when a utility's gross misconduct caused a massive blackout that harmed millions of people and businesses in New York City, the court sharply restricted the availability of damages.<sup>141</sup> Similarly, courts have placed strict limitations upon the liability of some service providers, like lawyers and stock advisors, because of the way in

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137. See Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857, 864 (2006); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 529 (2009); Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. MICH. J.L. REF. 403, 405–07 (1999).

138. See DOBBS, THE LAW OF TORTS, *supra* note 121, at § 452, 1283 (courts sharply limit the scope of recovery for pure economic harm because "financial harm tends to generate other financial harm endlessly and often in many directions."). These liability-limiting doctrines generally apply when the defendant is guilty of "mere negligence." See Rhee, *supra* note 127, at 868–69 ("When courts refer to 'infinite' or 'unlimited liability,' the references are really shorthand for liability that is grossly disproportionate to the underlying culpability."). However, *Strauss* involved gross negligence and so recognizes that limitations may be appropriate even when the defendant, like the lenders in *City of Miami*, were guilty of highly culpable conduct. See *infra* note 141 and accompanying text.

139. DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 41.7, 1071–72 (2000); David R. Owen, *Recovery for Economic Loss under U.S. Maritime Law: Sixty Years under Robins Dry Dock*, 18 J. MAR. L. & COM. 157, 163 (1987).

140. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

141. *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985) (limiting liability to those who suffered some physical harm or who were in a contractual relationship with the utility); see also *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 304 (1927) (placing limits on liability where misfeasance causes purely economic harm).



which economic losses can “ripple” through the economy.<sup>142</sup> Finally, the Supreme Court of the United States has rejected tort recoveries for harms that are purely economic despite provable misconduct.<sup>143</sup>

Briefs filed in support of the defendants in *City of Miami* drove home that a decision for the city meant that lenders across the country would face sweeping and perhaps economically ruinous liability.<sup>144</sup> They also identified other possible repercussions even if lenders could avoid bankruptcy from FHA claims brought by hundreds of municipalities: if loans to minority home seekers can be the basis of liability to governments, then lenders would be exposed to “legal risks disproportionate to any commercial gain they might recoup” from making loans, and thus, may react by “offering fewer loan products suitable for low-income individuals, thus reducing the credit options available to less-qualified borrowers.”<sup>145</sup>

It would seem that this line of argument would have been the better course in *City of Miami*, rather than remanding and hurling the lower courts into the thicket of proximate causation. Such a forthright approach has the added benefit of providing a roadmap for Congress if there is a move to amend the FHA to

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142. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 (1982) (“In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of ‘proximate cause.’”); see also David B. Lytle & Beverly Purdue, *Antitrust Target Area under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U. L. REV. 795, 796–802 (1976) (noting that, because antitrust violations, like tortious acts, may result in “virtually endless repercussions,” a sense of fairness and proportionality led courts to impose this limitation on § 4 recovery); Pegeen Mulhern, Comment, *Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses*, 18 B.C. ENVTL. AFF. L. REV. 85, 122 (1990) (“A predictable system of compensation is critical to the financial stability of many coastal communities . . . [to avoid] the ripple effect through [their] econom[ies] . . .”).

143. *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 876 (1986) (rejecting a tort claim for economic damages arising out of poor performance of a product).

144. See *supra* text accompanying notes 125, 126.

145. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners at 8–9, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

overrule one or more of the sweeping interpretations given to the statute by the Court decades ago.<sup>146</sup>

*B. The Roles of Judge and Jury*

Another interesting aspect of the majority opinion in *City of Miami* was the decision to remand for fact-finding, despite the justices' obvious skepticism that the city will be able to prove that its fiscal harm was the "direct result" of misconduct by the lenders.<sup>147</sup> The hornbook rule instructs that whether a particular wrong is considered a proximate cause of the plaintiff's injury is an issue of fact to be decided by the jury, unless the trial judge determines that no reasonable jury could find for the plaintiff.<sup>148</sup> However, courts have adopted a different approach to the apportionment of responsibility between judge and jury when the plaintiff's claim diverges from the model of the classic personal injury action, as when a plaintiff alleges no injury to her person or property but nevertheless can show economic or emotional harm.<sup>149</sup>

So for example, the rule limiting recovery for claims of "pure economic harm," raises an issue of law for the court, but operates in much the same liability-limiting way as proximate cause, which is generally an issue of fact for the jury.<sup>150</sup> Similarly, when a bystander witnesses a terrible accident and suffers severe emotional distress, many courts have adopted specific rules that

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146. See Jamal Greene, *Maximinimalism*, 38 CARDOZO L. REV. 623, 637 (2016); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. L. REV. 181, 222 (2009).

147. See *City of Miami*, 137 S. Ct. at 1301, 1306; *id.* at 1311 (Thomas, J. concurring in part and dissenting in part).

148. See DOBBS ET AL., HORNBOOK ON TORTS, *supra* note 139, at 292 ("Although judges are not empowered to decide the factual disputes in a case, they are definitely empowered to conclude that there is no evidence at all and equally empowered to conclude that the evidence is so weak that reasonable people could not accept it as sufficient to prove the plaintiff's case."); W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 729 (2008) ("Nevertheless, courts appropriately rule as a matter of law on factual matters, including whether the defendant acted negligently or whether there is proximate cause when no reasonable jury could find otherwise.").

149. See *Level 3 Commc'ns v. Liberty Corp.*, 535 F.3d 1146, 1162 (10th Cir. 2008) (applying Colorado law).

150. *Id.* at 1162–63; Eddward P. Ballinger, Jr. & Samuel A. Thumma, *The Continuing Evolution of Arizona's Economic Loss Rule*, 39 ARIZ. ST. L. REV. 535, 563 (2007).

require the trial judge to dismiss the claim regardless of whether a reasonable jury could find that the bystander's injury was "foreseeable" or "proximate."<sup>151</sup> As the most recent Restatement (Third) of Torts observed, "[g]enerally, no- or limited-duty rules have been employed to limit liability for other harms, such as economic loss, for which tort law has historically provided less protection."<sup>152</sup> If Justice Breyer had recognized that the city's claim was, in essence, one for "pure economic harm," there would have been no need to tax the parties, the district and circuit courts, and a jury with a remand that requires the parties to develop complex proof and the jury to evaluate sophisticated data, especially given the strong suggestion in the majority opinion that the ultimate result on remand will be dismissal.<sup>153</sup> Alternatively, Justice Breyer could have joined Justice Thomas, who considered the same evidence and concluded that no reasonable jury could find a sufficiently close link between any bank misconduct and Miami's injury.<sup>154</sup>

*Palsgraf* is again instructive regarding the question of the respective roles of judge and jury.<sup>155</sup> In his majority opinion denying liability, Chief Judge Benjamin Cardozo focused on whether the defendant railroad owed a duty to the plaintiff, who was standing on the defendant's platform, but "many feet away"

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151. See *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989) (holding that a plaintiff cannot recover for the negligent infliction of emotional distress arising from witnessing serious physical harm to another unless the plaintiff is "closely related" to the other victim, even if the emotional distress was genuine and severe and the result is "arbitrary"); see also DOBBS ET AL., HORNBOOK ON TORTS, *supra* note 139, at 718 ("Regardless of foreseeable and actual emotional harm to the plaintiff, plaintiff would be denied recovery under [California's] new rule unless she was actually present and witnessed the injury or threat to a close relation.").

152. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. c (AM. LAW INST. 2010).

153. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017).

154. Neither opinion recognized another problem with asking lay jurors to apply a directness test for proximate cause: even properly instructed about the law, jurors remain confused about the legal standard. See *supra* text accompanying notes 73, 74, 75, 76; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979) (finding that 23% of jurors understood "proximate" cause as "approximate" cause, meaning "estimated cause" or some other misconception).

155. 162 N.E. 99, 101 (N.Y. 1928).

from a negligently caused explosion.<sup>156</sup> He argued that this question should be resolved by the judge as a matter of duty, and thus an issue of law, avoiding proximate cause, typically considered an issue for the jury.<sup>157</sup> This act of judicial transubstantiation shifted the decision making from the jury to the judge. Judge Andrews and two of his colleagues vigorously disagreed, insisting that the trial judge had been correct to submit the issue to the jury.<sup>158</sup>

The American Law Institute has recognized the Cardozo/Andrews debate as a “tension in tort law about the proper balance between duty rules and proximate-cause limits to circumscribe appropriately the scope of liability.”<sup>159</sup> The Restatement (Third) of Torts elaborates:

Duty is a question of law for the court . . . while scope of liability, although very much an evaluative matter, is treated as a question of fact . . . Hence, duty is a preferable means for addressing limits on liability when those limitations are clear, are based upon relatively bright lines, when they are of general application, when they do not usually require resort to disputed facts in a case, when they implicate policy concerns that may not be fully appreciated by a jury deciding a specific case, and when they are employed in cases in which early resolution of liability is particularly desirable.<sup>160</sup>

The policies identified in the Restatement that support a

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156. *Id.* at 99–100.

157. *Id.* at 101 (“The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort.”).

158. *Palsgraf*, 162 N.E. at 105 (Andrews, J., dissenting) (“Under these circumstances I cannot say as a matter of law that the plaintiff’s injuries were not the proximate result of the negligence.”); see William E. Crawford & David J. Shelby II, *Time Frame Torts*, 53 LA. L. REV. 1011, 1023 (1993) (“This is all definitively treated in *Palsgraf*; Cardozo’s majority opinion represents the determination of the scope of duty as a question of law . . . and Andrews’ dissent represents the classic application of proximate cause as an issue of fact for the jury.”).

159. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 (AM. LAW INST. 2010).

160. *Id.*

preference for duty rules in some contexts are tailor-made for *City of Miami*. First, a holding that lenders have no duty to municipalities for the impact of discrimination on government coffers provides a “bright-line rule” of “general application” that does not require the consideration, let alone the resolution, of “disputed facts.”<sup>161</sup> Instead, the majority’s decision to remand invites the parties and the court to wade into complex factual matters, for example, how much of the harm to the city’s tax base was due to foreclosures caused by discrimination, as opposed to other factors idiosyncratic to both individual borrowers and to the economy more generally. Similarly, on remand, the parties may have to adduce proof of how much of the city’s increased municipal costs were due to foreclosures on minority borrowers and how much was caused by other economic factors. Second, a no-duty determination would encourage a court to focus explicitly on “policy concerns,” and how a string of substantial judgments against lenders might have catastrophic impact on the local, regional, and national economy. There is also risk that a jury could be influenced by the realization that a substantial verdict for the plaintiff could lead to lower local taxes. And, finally, early resolution of complex economic cases like those presented in *City of Miami* means less of a burden on judges and juries.

Additional support for approaching FHA claims by municipalities as a matter of law comes from how the common law resolves scope of liability issues when a party attempts to use a violation of a criminal statute in a negligence action. Under the doctrine of negligence *per se*, if the harm the plaintiff suffered was within the class of harms that the statute was intended to prevent, and the plaintiff was in the class of people intended to be protected by the statute, then the judge determines negligence as a matter of law, usurping the traditional role of the jury.<sup>162</sup> This requires the judge to identify the legislative purpose for passing the law, and then determine how close the legislative purpose is to the plaintiff’s injury.<sup>163</sup> As the most recent Restatement recognizes, this “statutory-purpose” doctrine “resembles the scope

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161. *Id.*

162. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 14 cmt. c; KEETON ET AL., *supra* note 88, at 229–30.

163. DOBBS ET AL., HORNBOOK ON TORTS, *supra* note 139, at 256; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 14 cmt. f.

of liability doctrine that is applied in ordinary negligence cases . . .”<sup>164</sup> While divining legislative intent may be difficult in individual cases,<sup>165</sup> this exercise is nevertheless better-suited to a judge than a lay jury,<sup>166</sup> and further suggests that the remand in *City of Miami* was unwise.<sup>167</sup>

### C. *The End of an Era?*

By selecting “directness” as the analytical framework for determining causation, but remanding for application, the Court provided municipalities, in theory at least, the chance to prove

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164. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 14 cmt. f; accord DOBBS ET AL., HORNBOOK ON TORTS, *supra* note 139, at 326 (“Proximate cause is part of the language of common law tort analysis that is often equivalent to the class of person/type risk or harm analysis in cases of statutory violation.”).

165. See Barbara Kritchevsky, *Whose Idea Was It? Why Violations of State Laws Enacted Pursuant to Federal Mandates Should Not Be Negligence Per Se*, 2009 WISC. L. REV. 693, 724 (“A problem with hinging the applicability of negligence per se on legislative intent is that the intent can be very difficult to decipher . . .”); DOBBS ET AL., HORNBOOK ON TORTS, *supra* note 139, at 256 (“Statutes do not always clearly indicate what class of persons and risks they are intended to protect against.”).

166. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 17; see also DOBBS ET AL., HORNBOOK ON TORTS, *supra* note 139, at 257 (“The best way [for a judge attempting to determine the applicability of a statute for the purposes of negligence per se] is by adhering to the foreseeability principle that runs through the common law of torts . . . . The standard is also familiar to judges and lawyers from the analogous cases of ‘proximate cause.’”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 14 cmt. f (“In determining the purpose of the statute, the court can rely on the ordinary principles of statutory interpretation, including the language or text of the statutory provision, its location within the larger statutory scheme, the more general context of the statute, and indications of specific legislative intent.”).

167. The judicial role in negligence per se cases has been criticized for giving too much power to the judge. See Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S. C. L. REV. 221, 278 (2009) (“By virtue of the negligence per se doctrine, relatively abstract considerations of legislative purpose—ungrounded, by definition, in either concrete statutory text or concrete specific legislative intent—are ritualistically invoked by judges in a highly manipulable process that leads to divergent and unpredictable results.”). But proximate cause determinations also arise in uncharted waters. See Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 797 (1990) (finding that negligence per se can be used by judges to improperly expand judicial authority).

their allegations and thus have some leverage for settlement.<sup>168</sup> But the language in the majority opinion provides financial institutions much less basis for concern than would have been the case if foreseeability were the focus on remand.<sup>169</sup> From this perspective, *City of Miami* bolsters the reputation of the Roberts Court as a friend of big business.<sup>170</sup>

If it turns out that *City of Miami* imposed a “rigorous” causation requirement, the result will strike a serious blow in the fight to rectify the wide-spread harms caused by predatory lending, leaving the task to individual plaintiffs, perhaps proceeding via class action.<sup>171</sup> In this regard, *City of Miami* closely resembles a FHA case decided by the Court two years previously, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>172</sup> In that 5–4 decision, the Court held that plaintiffs could prove housing discrimination by adducing proof of “disparate impact.”<sup>173</sup> While allowing that

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168. See Chris Bruce, *Bias Suits against Banks Face Test on Causal Links*, BLOOMBERG BNA: BANKING DAILY (June 19, 2017), <https://www.bna.com/bias-suits-against-n73014453561/> (raising the prospect of settlement after remand).

169. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (“[F]oreseeability alone does not ensure the close connection that proximate cause requires . . . [The Fair Housing Act] requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’”).

170. See J. Mitchell Pickerill & Cornell W. Clayton, *The Roberts Court and Economic Issues in an Era of Polarization*, 67 CASE. W. RES. L. REV. 693, 695 (2017); Adam Winkler, *Why Big Business Keeps Winning at the Supreme Court*, WASH. POST (June 26, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/06/26/why-big-business-keeps-winning-at-the-supreme-court/?utm\\_term=.62bcf032d89f](https://www.washingtonpost.com/news/posteverything/wp/2017/06/26/why-big-business-keeps-winning-at-the-supreme-court/?utm_term=.62bcf032d89f).

171. Class actions may turn out not to be an option, as the Roberts Court has significantly constricted the availability of class actions. See Theodore J. Boutrous, Jr. & Bradley J. Hamburger, *Three Myths about Wal-Mart Stores v. Dukes*, 82 GEO. WASH. L. REV. ARGUENDO, 45, 48 (2014) (finding that the Supreme Court’s decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), narrowed the availability of class actions for sex discrimination claims and is likely to apply in other contexts); see also Michelle Gallo, *Wal-Mart Stores, Inc. v. Dukes: The Fatal Class Action Suit*, 20 DIG. NAT’L IT. AM. B. ASS’N L.J. 69, 77 (2012) (“This decision reinforced a pattern of the Supreme Court rulings making it more challenging for complainants, whether employees or consumers, to bring their issues to court.”).

172. 135 S. Ct. 2507 (2015).

173. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006) (“Within antidiscrimination law, no theory has attracted more attention or controversy than the disparate impact theory, which allows proof of discrimination without the need to prove an intent to

claim to proceed, the Court sharply constricted the use of “disparate impact” by imposing a “robust causality requirement.”<sup>174</sup> This result appears to be a close cousin of the imposition of a directness test in *City of Miami*: both cases appear at first blush to be victories for plaintiffs asserting FHA claims, but in both cases, the application of the law to the facts suggests that no liability will ultimately be allowed.<sup>175</sup>

The stakes were certainly high in *City of Miami*, as a holding for the banks would mean the end of an era of progressive FHA holdings, while a decision that lacked a limiting concept could have exposed banks to billions of dollars in liability. One can only speculate, but perhaps in both *City of Miami* and *Inclusive Communities* the more progressive justices (Ginsberg, Breyer, Sotomayer, and Kagan) were faced with choosing between a haircut and a beheading, and they were willing to make concessions on causation in order to garner a fifth vote from a more moderate colleague (Roberts in *City of Miami*, and Kennedy in *Inclusive Communities*).

Such a judicial compromise is suggested by the oral argument in *City of Miami*, when both Chief Justice Roberts and Justice Kennedy expressed concern with the practical ramifications of permitting suits against banks to proceed.<sup>176</sup> By helping Justice

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discriminate.”).

174. *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2512; see Clegg, *supra* note 84, at 170–71 (explaining that the majority’s discussion in *Inclusive Communities*, of the need for plaintiffs to satisfy a “robust causality requirement,” suggests that the plaintiff’s case may be doomed on remand).

175. See John L. Ropiequet, *Has the US Supreme Court Sounded the Death Knell for Fair Lending Cases?*, 36 BANKING & FIN. SERVICES POL’Y REP. 6 (2017) (“This decision [in *City of Miami*], coupled with the robust causation requirement announced in *Inclusive Communities*, may sound the death knell for future fair lending litigation . . .”). It appears that the causation issue in *Inclusive Communities* concerned whether there was a factual link between the defendant’s wrong doing and the plaintiff’s injuries, which, in theory at least, is distinguishable from the causation issue in *City of Miami*, which assumed that the plaintiff had adequately pleaded cause-in-fact. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1740 (1985) (stating that confusion is created by failing to distinguish factual causation from proximate causation); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. b (AM. LAW INST. 2010).

176. Amy Howe, *Argument analysis: City likely to prevail, one way or another, in fair housing case*, SCOTUSBLOG (Nov. 8, 2016, 8:21 PM), <http://www.scotusblog.com/2016/11/argument-analysis-city-likely-to-prevail-one-way-or-another-in-fair-housing-case/>.



Breyer form a majority, which then pruned rather than overruled progressive precedents, Chief Justice Roberts could serve two goals. The first would be avoiding a 4–4 split, something he may be at pains to avoid.<sup>177</sup> Second, a decision that appears consistent with progressive precedents deflects the perception that the Court engages in overtly “political” behavior like “horse-trading”<sup>178</sup>—though that is a charge that the justices regularly deflect.<sup>179</sup> Such concern for institutional appearances was prominent in much of the analysis of Chief Justice Roberts’ decision to uphold Obamacare,<sup>180</sup> and could well have been at play in *City of Miami*.

This would not be a surprising development, as the increasingly conservative justices on the Rehnquist and Roberts Courts have had to decide what to do with the liberal decisions of

177. Ilya Shapiro, *Introduction*, 2016 CATO SUP. CT. REV. 1, 1 (characterizing Chief Justice Roberts as “working hard to craft or facilitate narrow rulings and thus avoid 4–4 splits.”).

178. Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 896 (2004) (“Although negotiation among the justices of the U.S. Supreme Court is highly stylized, there is no question that they negotiate. They do not engage in . . . coarse horse-trading . . . ; rather, they ‘accommodate’ their own ideological perspectives to others’ perspectives as necessary to substantially achieve their own objectives.”); see also Marie A. Failinger, *Against Idols: The Court as a Symbol-Making or Rhetorical Institution*, 8 U. PA. J. CONST. LAW 367, 374 (2006) (describing the “conspiracy theory” of Supreme Court behavior, in which justices make “lofty and objective-sounding arguments while secretly they vote according to their own personal interests, prejudices, or intuitions about injustice”).

179. See Garance Franke-Ruta, *The Supreme Court Has Solved the Angry E-Mail Problem: Justices Only Send Each Other Memos on Paper*, THE ATLANTIC (Oct. 17, 2013), <https://www.theatlantic.com/technology/archive/2013/10/the-supreme-court-has-solved-the-angry-email-problem-justices-only-send-each-other-memos-on-paper/280663/> (“[W]e’re not horse trading. We’re not bargaining. We’re reasoning.”); see also Jeffrey Rosen, *A Majority of One*, N.Y. TIMES (June 3, 2001), <http://www.nytimes.com/2001/06/03/magazine/a-majority-of-one.html?mcubz=1> (“[T]here is little lobbying or horse-trading on the Rehnquist court.”).

180. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); see also Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 763 (2013) (stating that Roberts’ vote upholding the statute was predominantly “institutional” rather than “doctrinal,” an effort to insulate the Court from the appearance of partisan decision-making immediately before a presidential election, to guard his own personal reputation from charges of partisan manipulation, and to increase judicial power); Adam Liptak, *Roberts Shows Deft Hand as Swing Vote on Health Care*, N.Y. TIMES (June 28, 2012), <http://www.nytimes.com/2012/06/29/us/politics/a-defining-move-for-chief-justice-roberts.html> (“[Roberts] chose compromise, or perhaps statesmanship.”).

the Warren and Burger Courts; some say that the result has been “stealth overruling.”<sup>181</sup> A similar strategy was adopted by the California Supreme Court when conservative justices replaced liberals in the 1980’s:<sup>182</sup> a conservative majority would write opinions that acknowledged earlier ground-breaking tort decisions like *Greenman v. Yuba Power Products, Inc.*,<sup>183</sup> *Dillon v. Legg*,<sup>184</sup> *Rowland v. Christian*,<sup>185</sup> and *Tarasoff v. Regents of the University of California*,<sup>186</sup> but nevertheless reached conservative

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181. See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 1 (2010); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863–64 (2014) (describing criticism of the Roberts Court for “narrowly interpreting—but not overruling—precedents in such hot-button areas such as abortion, campaign finance, standing, affirmative action, the Second Amendment, the exclusionary rule, and *Miranda* rights”).

182. See Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 45–46 (2002) (“In a number of historic firsts, the California Supreme Court led the way in carving out new categories of plaintiff recovery in nearly every corner of tort law. California recognized new remedies for non-pecuniary injuries, loss of consortium, prenatal injuries, punitive damages, medical monitoring, wrongful life and wrongful birth. Plaintiffs were also permitted to recover against co-defendants under the novel theory of concerted action.”).

183. 377 P.2d 897 (Cal. 1963) (holding that a plaintiff in a products liability action need not prove that the defendant was guilty of negligence because negligence is irrelevant to a strict liability claim). *But see* *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1168–69 (Cal. 1978) (refusing to follow the logic of *Greenman* by allowing plaintiff’s fault to reduce or eliminate recovery).

184. 441 P.2d 912 (Cal. 1968) (holding that a bystander to a serious physical injury to another person may recover for the negligent infliction of emotional distress even if not subject to physical impact or in the zone of danger if the injury was “foreseeable”). *Dillon* was limited in *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (replacing foreseeability with a rule requiring proof of multiple factors).

185. 443 P.2d 561, 568 (Cal. 1968) (holding that occupiers of premises owe a duty of reasonable care to all entrants injured on the premises, even trespassers). This generous approach to premises liability did not survive. *See, e.g.*, *Ky. Fried Chicken of Cal., v. Super. Ct.*, 927 P.2d 1260, 1270 (Cal. 1997) (holding that an occupier of premises owes no duty to protect entrants on the premises from criminal assaults).

186. 551 P.2d 334, 345 (Cal. 1976) (holding that, when a therapist diagnoses, or reasonably should have diagnosed, that a patient represents a threat of serious harm to others, the therapist owes an affirmative duty of care to protect a foreseeable victim of that danger). *Tarasoff* was limited by subsequent decisions. *See* *Thompson v. County of Alameda*, 614 P.2d 728, 738 (Cal. 1980) (limiting the class of plaintiffs who can sue therapist for

outcomes.<sup>187</sup>

#### CONCLUSION

While *City of Miami* and *Inclusive Communities* allow FHA plaintiffs to survive the pleading stage, the fate of the FHA claims in lower courts is in doubt if judges heed the Court's implied message that such claims should be viewed through skeptical eyes.<sup>188</sup> This may mean that both sides will consider settling rather than undergoing the expense of a full round of litigation, but there is now considerably less pressure on lenders to do so. If, however, the end result is something short of a substantial financial settlement, then champions of civil rights in general, and fair housing in particular, will find that the victory in *City of Miami* was largely illusory.<sup>189</sup>

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negligence).

187. Rustad & Koenig, *supra* note 182, at 52 (“The principal reason for the [California Supreme Court’s] retrenchment has been its change in composition with the appointment of more conservative justices.”); Bill Blum, *Toward a Radical Middle: Has A Great Court Become Mediocre?*, 77 A.B.A. J. 48, 50 (1991) (“In tort law, on the other hand, the [California Supreme Court] has embarked on a clear course of cutting back the principles of liability and the bases for relief.”); *see also* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 604 (1992) (describing how courts can stem the expansion of tort law without expressly overruling precedents).

188. This outcome is even more likely because the Supreme Court has tightened pleading requirements in civil actions generally. *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2118 (2015) (discussing the impact of *Bell Atlantic v. Twombly* and *Iqbal v. Ashcroft*, which upended the liberal pleading doctrine that had “remained essentially static for five decades”).

189. Of course, a damages remedy under the FHA does not cure the segregating impact of government policies that are race-neutral, like zoning regulations that prohibit the building of low-income and moderate-income housing in predominantly white neighborhoods. *See* Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical design of the Built Environment*, 124 YALE L.J. 1934, 1980 (2015) (“There is much evidence to suggest the use of facially race-neutral exclusionary zoning as a strategy to further racial homogeneity and to exclude racial minorities.”).