THE RADICAL FAIR HOUSING ACT

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This Article uncovers the radical logic at the core of the Fair Housing Act ("FHA"). It is a law which can question and remake the underlying structure of housing markets, not just police individual transactions within those markets.

The FHA is conventionally held to use the same understanding of "discrimination" as the Civil Rights Act's prohibition on employment discrimination. But it does not. The law of employment discrimination limits its scrutiny to the matching of people to jobs; it takes both the jobs on offer and people's qualifications as given. The Fair Housing Act, in contrast, also scrutinizes markets as a whole. It asks whether the set of housing opportunities available has been constructed discriminatorily, and it asks whether households can secure the qualifications necessary to acquire better housing. The FHA, this Article shows, offers its own distinctive theory of antidiscrimination.

This structural understanding of discrimination is not always—or even usually—vindicated in fair housing law, but neither is it some peripheral feature, limited to outlier cases or special provisions. It has been hidden in plain sight: visible in archetypal fair housing cases, which have been successful since the FHA's enactment and are brought under the FHA's core antidiscrimination provisions. Moreover, the FHA's market-level analysis is firmly rooted in the statute's text and purpose. It is an intentional congressional response to the particular challenges of tackling housing discrimination. This Article identifies the FHA's radical approach, as well as the statutory mechanisms through which that approach is operationalized. In so doing, it also re-situates the FHA within the larger landscape of civil rights law.

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For all the Fair Housing Act's many weaknesses, for all its ineffectiveness in practice, the Act has always had radical ambitions. If those ambitions are recognized, they can, perhaps, be built upon.

INTRODUCTION

The standard narrative of the Fair Housing Act ("FHA" or "the Act") is of timidity and failure. The Act was hobbled from the start by intentionally toothless enforcement provisions.[1] It was crafted primarily

[1] Jonathan Zasloff, The Secret History of the Fair Housing Act, 53 Harv. J. on Legis. 247, 248–49 (2016) [hereinafter Zasloff, Secret History] (describing conventional wisdom that the FHA was intentionally weak); Olatunde Johnson, The Last Plank: Rethinking Public and

to overcome overt discrimination, especially against members of the middle class, leaving it incapable of achieving its more ambitious anti-segregation goals.[2] Housing discrimination remains pervasive, and segregation appears intractable.[3] All of this is true, at least to some extent.[4]

But in cataloguing the all-too-real weaknesses of the Fair Housing Act, legal scholars have overlooked a remarkable strength. For all its flaws, the FHA contains a radical core. The FHA—unlike the employment discrimination statutes on which it is based—is committed not only to opening existing opportunities to people regardless of race, sex, or other protected status, but also to creating those opportunities. It can make more, different kinds of housing available for those who are poorly served by normative housing models. And it can protect against discrimination not just in the acquisition of housing, but in obtaining the additional qualifications needed to secure the kind of housing one wants. The Act contemplates, at least sometimes, a restructuring of housing markets, not just the policing of housing transactions. And it holds all of society, across the public and private sectors, potentially responsible for effecting that restructuring.

To be clear, this Article does not argue that the FHA could or should understand discrimination expansively. The FHA has always been understood as structural. The Act's distinct theory of discrimination is written into the text of the statute and has been consistently implemented by courts. Nor does the Article rely on the FHA's unique but poorly enforced mandate for governments "affirmatively to further" fair housing, a provision on which many scholars have pinned hopes for a more ambitious approach to fair housing.[5] Its focus is on the Act's core

Private Power to Advance Fair Housing, 13 U. Pa. J. Const. L. 1191, 1205–07 (2011) (detailing the FHA's original enforcement scheme).

[2] Wendell E. Pritchett, Where Shall We Live? Class and the Limitations of Fair Housing Law, 35 Urb. Law. 399, 401 (2003).

[3] See generally Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1993) (describing the perpetuation and harmful effects of extreme segregation).

[4] But see Richard H. Sander, Yana A. Kucheva & Jonathan M. Zasloff, Moving Toward Integration: The Past and Future of Fair Housing 145–52 (2018) (providing a revisionist take on the FHA's strength).

[5] Johnson, supra note 1, at 1193–94; David D. Troutt, Inclusion Imagined: Fair Housing as Metropolitan Equity, 65 Buff. L. Rev. 5, 8 (2017); Heather R. Abraham, Fair Housing's Third Act: American Tragedy or Triumph?, 39 Yale L. & Pol'y Rev. 1, 8–9 (2020).

antidiscrimination provisions. The FHA's breadth is in its basics, not just at its frontiers.

To demonstrate the FHA's unappreciated strength, this Article compares the Act to Title VII's ban on employment discrimination.[6] Courts routinely declare fair housing to operate essentially entirely in parallel with Title VII and create most FHA standards by importing Title VII jurisprudence. Part I of this Article describes the basic relationship between the FHA and Title VII: not only their parallel construction, but also how scholars have found the FHA to nevertheless fall far short of Title VII's efficacy. This comparison allows Title VII to serve as an analytic baseline: where the FHA goes beyond the statute that courts have deemed to be its model and that scholars have identified as more successfully transformational, the FHA's distinctive features are made visible.

And for all that courts claim to interpret the statutes near identically, in many archetypal types of fair housing cases, the FHA takes a markedly different, more structural approach than Title VII ever allowed. For example, banks that open branches only in predominantly white neighborhoods are frequently found liable for housing discrimination; their siting decisions unfairly create a market in which white households are more likely to apply for and receive a mortgage. But no employment discrimination suit is ordinarily available against a firm that opens its branches in far-flung, predominantly white suburbs rather than transit-rich downtown locations more accessible to non-white workers.

Likewise, a local government which uses restrictive zoning to exclude lower-cost apartments or group homes for people with disabilities may violate the FHA; the Supreme Court has deemed such cases the "heartland" of disparate impact liability under the Act.[7] In these cases, fair housing requires not only equal access to a predefined set of housing opportunities, but that the proper mix of opportunities be available in the first place. But no suit is available to scrutinize a firm's mix of job opportunities. Title VII does not ask, for example, whether a hospital has

[6] Throughout, this Article compares the FHA and Title VII's treatment of discrimination on the basis of race, sex, and other protected characteristics. Each statute also has separate provisions applying a different "reasonable accommodations" standard for certain protected characteristics: religion in Title VII and disability in the FHA. 42 U.S.C. § 2000e(j); id. § 3604(f)(3)(B). Unless specified, this Article does not discuss those provisions.

[7] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539 (2015).

kept too much medical work reserved for physicians (sixty-five percent male) and thereby excluded nurse practitioners (eighty-five percent female).[8]

Finally, the FHA protects homebuyers not only from discrimination at the point of sale, but also from discrimination which denies them the qualifications needed to access certain segments of the market. Specifically, the FHA protects buyers from discrimination in acquiring a mortgage and homeowners' insurance. But no Title VII suit is available to help workers secure the additional qualifications they need for better jobs.

As Part II of this Article explains, the Fair Housing Act takes on practices well beyond the limits of Title VII. Employment discrimination law, at its heart, governs how to match people to job opportunities. Fair housing law, under the right set of facts, can expand the set of opportunities—including, sometimes, to accommodate needs created by preexisting inequalities.

This is not to say that the FHA has had a radical effect in practice. It has not. The FHA does not always allow for the restructuring of housing markets. It *usually* does not. And even when it does, the Act's other, well-appreciated limitations undermine those efforts. Since its enactment, the FHA has consistently fallen short even of its more modest ambitions, all too often leaving housing discrimination and segregation intact. Even the categories of cases highlighted in this Article have had limited effect. Most zoning provisions, for example—even those that clearly disproportionately limit opportunities for people of color or people with disabilities—have never been readily challenged as fair housing violations.[9] Courts have sometimes used causation and "directness" requirements to curtail the reach of the FHA in precisely those areas

[8] U.S. Dep't of Health & Hum. Servs., Bureau of Health Workforce, Sex, Race, and Ethnic Diversity of U.S. Health Occupations (2011–2015), at 10 tbl.1 (2017), https://web.archive.org/web/20241014113124/https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/data-research/diversity-us-health-occupations.pdf#expandhttps://bhw.hrsa.gov/data-research/review-health-workforce-research [https://perma.cc/KCW5-QVAU].

[9] See generally Jonathan Zasloff, The Price of Equality: Fair Housing, Land Use, and Disparate Impact, 48 Colum. Hum. Rts. L. Rev. 98 (2017) [hereinafter Zasloff, Price of Equality] (arguing that more zoning regulations ought to be rejected under a disparate impact theory). See also Noah M. Kazis, Fair Housing, Unfair Housing, 99 Wash. U. L. Rev. Online 1, 13–21 (2021) [hereinafter Kazis, Unfair Housing] (providing a framework for effectively scrutinizing land use regulation under the FHA's Affirmatively Furthering Fair Housing ("AFFH") provisions).

where a structural analysis might be most helpful.[10] Remedial weaknesses limit the impact even of successful suits.[11] Judges remain hesitant and perhaps institutionally ill-equipped to fully police whether housing markets discriminate.[12] The limiting principles courts use are sometimes unclear, and this Article does not resolve these uncertainties.[13] Nor do I mean to suggest that the FHA is radical in all respects. It asks radical questions—considering whether to restructure markets in their entirety and assessing whether almost any action by any actor discriminatorily reduces housing opportunity—but it does not often provide a radical answer or consequences.

Regardless, the Act has maintained an internal logic that is worth uncovering—and building upon. For all the Act's weaknesses, it recognizes that restructuring markets is permissible and sometimes necessary to securing equality. Given the baseline of Title VII, which is often held to be the exemplar of antidiscrimination law, questioning the structure of housing markets *at all* is a radical move. The FHA does not accept that equality can be pursued only within the confines of the world as it currently is.

These structural ambitions reflect the demands of the statute itself. As Part III demonstrates, they derive from textual choices by the Act's drafters, responding to the practical realities of housing markets and

[10] Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 192 (4th Cir. 1999) (finding that the FHA did not cover a highway relocation decision because the Act "requires a closer causal link between housing and the disputed action"); Jones v. Off. of the Comptroller of the Currency, 983 F. Supp. 197, 202 (D.D.C. 1997) (declining to hold a bank regulator responsible for a lending regulation), *aff'd*, No. 97-5341, 1998 WL 315581 (D.C. Cir. May 12, 1998); Mich. Prot. & Advoc. Serv., Inc. v. Babin, 18 F.3d 337, 345 (6th Cir. 1994) (finding neighbors who fundraised to outbid a group home not liable because their actions did not directly make housing unavailable).

[11] One of the most prominent of the exclusionary zoning cases was decided by the U.S. Court of Appeals for the Second Circuit in 1988 and affirmed by the Supreme Court. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 941 (2d Cir. 1988), *aff'd*, 488 U.S. 15, 18 (1988). But the housing development at issue spent decades continuing to fight for permits and, as of 2025, was finally accepting applications. Matinecock Court Residential Community Updates, Hous. Help Inc. (Mar. 25, 2025), https://sites.google.com/housinghelpinc.org/matinecockcourtdfc/home [https://perma.cc/V77N-7DXB].

[12] Samuel R. Bagenstos, The Structural Turn and the Limits of Antidiscrimination Law, 94 Calif. L. Rev. 1, 21–26 (2006); see also Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) ("Our role is not and should not be to sit as a zoning board of appeals.").

[13] See supra note 10 and accompanying text; infra notes 178–79, 315 and accompanying text.

Congress's dual purposes of ending discrimination and segregation.[14] By its plain text, the Fair Housing Act covers more actors and different actions than Title VII.[15] Title VII, for example, primarily covers discrimination by "employer[s]."[16] But Congress extended fair housing liability beyond actions taken by certain actors or within particular relationships, like landlord-tenant or buyer-seller. The FHA intentionally ensures that whoever is capable of building discriminatory market structures can be made to stop. Other statutory language—focused on liability rather than coverage—indicates Title VII's focus on discrimination at the personal or transactional level and the FHA's attention to market conditions.

As the Supreme Court recognized early on, the "reach" of the Fair Housing Act was to create "truly integrated and balanced living patterns."[17] For all the Act's shortcomings, Congress gave it the breadth and powerful ambition to do what must be done to achieve that still-unfulfilled promise.

This Article's aims are primarily to expose and explain the shape of current fair housing law. But identifying the FHA's structural approach also offers new clarity on contemporary issues in fair housing law, as described in Part IV. It explains why the FHA has recently emerged as a leading tool in tackling discrimination by online platforms. It helps delineate the proper scope of the FHA's important but ill-defined mandate that the government "affirmatively further" fair housing, which is currently the subject of a highly contested rulemaking. It reveals how judicial discomfort with the FHA's breadth has been channeled into

[14] This Article is consistent with recent efforts to use "progressive textualism," especially in the civil rights context, to return to the ambitions of the civil rights statutes themselves. See, e.g., Katie Eyer, Textualism and Progressive Social Movements, 90 U. Chi. L. Rev. Online 1, 2 (2024); Deborah A. Widiss, Proving Discrimination by the Text, 106 Minn. L. Rev. 353, 358–59 (2021); Muldrow v. City of St. Louis, 144 S. Ct. 967, 972 (2024) (rejecting lower courts' restrictive Title VII precedents requiring "significant" harm because "Title VII's text nowhere establishes that high bar"). However, in the FHA contexts described here, text, purpose, and most precedent point in the same direction. The goal here is not to restore the statute to an original meaning, but to recognize the statute's operation.

[15] The statute does not, however, demarcate just how far it reaches or precisely when market structures are impermissible. The text and purpose of the statute support the questioning of market structures as potentially discriminatory, but do not offer their own dispositive account of which structures qualify. See infra Part III.

[16] See, e.g., 42 U.S.C. § 2000e-2.

[17] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Walter Mondale)).

attacks on disparate impact. And it supports the recognition of longer and more indirect causal chains in FHA litigation.

Finally, the Article concludes by re-situating the FHA within the broader landscape of civil rights statutes. For while the FHA is conventionally understood to parallel Title VII, its attention to market structures instead resembles features of the Voting Rights Act ("VRA"), the Americans with Disabilities Act ("ADA"), and Title IX's protections for college athletes. To fully understand the FHA—what it is and where it might go—scholars should look to these other civil rights statutes. And to understand civil rights law as a field, scholars must better understand the FHA.

It is an important time to clarify our understanding of the Fair Housing Act. Fair housing has taken on new public significance in response to both the larger mobilization for civil rights spurred by the Black Lives Matter movement[18] and new research underscoring the centrality of housing discrimination and segregation in entrenching inequality.[19] But this engagement comes as the law of fair housing has become unstable. The Supreme Court, in affirming the availability of disparate impact liability under the FHA, described—or perhaps created—a set of judicially imposed "safeguards" on disparate impact meant to avoid any constitutional concerns;[20] the meaning of those safeguards has split the lower courts.[21] Meanwhile, the Department of Housing and Urban Development ("HUD")—the agency responsible for administering and interpreting the FHA—attempted to clarify various legal standards through rulemaking during the Obama Administration, only to reverse course under the first Trump Administration and again under the Biden

[18] Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale & Maia S. Woluchem, Introduction, *in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods 3, 8 (Justin P. Steil, Nicholas F. Kelly, Lawrence J. Vale & Maia S. Woluchem eds., 2021).

[19] See, e.g., Raj Chetty & Nathaniel Hendren, The Impacts of Neighborhoods on Intergenerational Mobility II: County-Level Estimates, 133 Q.J. Econ. 1163, 1208–10 (2018). See generally Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017) (detailing how discriminatory public policy created segregated and unequal communities).

[20] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 544 (2015).

[21] See Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 901–05 (5th Cir. 2019).

Administration.[22] Important aspects of fair housing law are newly up for grabs. With so much uncertain, it is valuable to spotlight what is settled—especially when what is settled is also what is radical.

The U.S. Court of Appeals for the District of Columbia Circuit put it well in an early opinion interpreting the FHA (one of the few to explicitly recognize this transformative ambition): the Act was "an attempt to alter the whole character of the housing market."[23] The court understood Congress to have seen housing discrimination not as a problem contained within individual acts of animus, nor even within the policies and practices of particular lenders or landlords. It is *housing markets writ large* that must be made nondiscriminatory. Fair housing law has been, from its inception, structural.

I. THE NARROW FAIR HOUSING ACT

Understanding the FHA's distinctive understanding of antidiscrimination requires first situating it in context, especially in relation to its employment counterpart, Title VII. The relationship between the two statutes is generally characterized in two ways. First, judicial practice is to interpret the FHA as near identical to Title VII. Thus, Title VII provides a baseline against which FHA cases can be measured. (The FHA is compared to other civil rights laws in this Article's Conclusion.) Second, scholars contrasting Title VII and the FHA generally emphasize Title VII's greater efficacy; it is a testament to Title VII's importance that the workplace has desegregated far faster than neighborhoods have.[24] This provides essential perspective on any claims about the FHA's ambitions. The FHA's strengths, after all, cannot be properly understood—nor squared with the ongoing reality of continuing

[22] See Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8523–24 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91–93, 570, 574, 576, 903, 983); Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100 (2025).

[23] Mayers v. Ridley, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring). Remarkably, this language comes from the split court's narrower, moderate opinion, written by a conservative Nixon appointee. Judge Skelly Wright's opinion for the court's liberals went further still, calling for courts to excise all "vestiges" of discrimination from the "tainted" housing market. Id. at 643 (Wright, J., concurring).

[24] Moreover, Title VII has proven adaptable and able to take on new challenges like sexual harassment. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986). This Article is not meant to question (or endorse) employment discrimination law, only to use it as a point of comparison.

segregation—without clarity as to their coexistence with the Act's considerable weaknesses.

A. The FHA as Parallel to Title VII

The Fair Housing Act is the last of the landmark civil rights statutes of the 1960s, the third pillar of the statutory framework on which modern civil rights law is built. But compared to the Civil Rights Act and the Voting Rights Act, the FHA rarely has been litigated.[25]

As a result, courts universally look to Title VII to guide the interpretation of the FHA.[26] Both text and purpose are considered parallel: courts point to "almost identical language" in the two statutes as well as their "parallel objectives."[27] They describe the pair as "a coordinated scheme of federal civil rights laws."[28] While courts recognize that the two statutes are not identical, they most often do so when discussing very explicit differences: the FHA's inclusion of disability as a protected characteristic,[29] its distinct enforcement scheme,[30] or its broader prohibition on harassment and retaliation, for example.[31] Mostly, though, courts see the two statutes as "functional equivalent[s]."[32]

This parallelism does a great deal of doctrinal work on matters big and small. Courts, for example, deploy the familiar *McDonnell Douglas* approach for evaluating a plaintiff's prima facie case of discrimination,[33] and the *Griggs* burden-shifting approach for disparate impact cases.[34]

[25] Per Westlaw, as of November 2024, the Supreme Court had cited the central section of the FHA, 42 U.S.C. § 3604, in a total of 17 cases, not all of which actually interpreted the Fair Housing Act. The Court had cited the equivalent provision of Title VII, 42 U.S.C. § 2000e-2, 134 times. The ratio in the federal courts of appeals is similar: 753 citations to 6,338 citations.

[26] Larkin v. Mich. Dep't of Soc. Servs., 89 F.3d 285, 289 (6th Cir. 1996) ("Most courts applying the FHA . . . have analogized it to Title VII . . . ."). Courts also use other parallel employment discrimination statutes, especially the Age Discrimination in Employment Act of 1967, to guide their interpretation of the FHA. See, e.g., Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 532–35 (2015).

[27] Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 (4th Cir. 1984).

[28] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988).

[29] Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 537 (6th Cir. 2014).

[30] Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 104 n.12 (1979).

[31] Robert G. Schwemm, Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?, 61 Case W. Rsrv. L. Rev. 865, 889 (2011).

[32] Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 295 (7th Cir. 2000).

[33] Ring v. First Interstate Mortg., Inc., 984 F.2d 924, 926 (8th Cir. 1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[34] Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–51 (1st Cir. 2000) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

They determine that sexual harassment constitutes housing discrimination because sexual harassment constitutes employment discrimination.[35] On smaller issues, they use Title VII cases to decide how close in time actions must be to allow an inference of retaliation[36] and whether plaintiffs must have made the "futile gesture" of applying to a plainly discriminatory opportunity.[37] The list could go on. Interpretations of the Fair Housing Act almost always start—and usually end—with an analysis of Title VII.[38]

Title VII has provided not only an interpretive baseline for understanding the Fair Housing Act, but a normative baseline for understanding civil rights law generally. It provides a particular account of what discrimination *is* and how it should be redressed. Courts and scholars alike have declared Title VII to exemplify "real anti-discrimination law[],"[39] a category contrasted with newer "accommodation" laws like the Americans with Disabilities Act or the Family and Medical Leave Act. In this telling, antidiscrimination requires the "equal" treatment of people who are similarly situated, whereas accommodation requires the "special" treatment of those who are differently situated; for critics, the latter is often considered improperly redistributive.[40] In this dichotomy, Title VII sets the standard for what antidiscrimination is and is not. And under this dichotomy, presumably,

[35] Honce v. Vigil, 1 F.3d 1085, 1088–89 (10th Cir. 1993); DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996).

[36] Hall v. Greystar Mgmt. Servs., L.P., 637 F. App'x 93, 98–99 (4th Cir. 2016).

[37] Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1450–51 (4th Cir. 1990).

[38] Some scholars have called for modifying various Title VII standards in the fair housing context. See Frederic S. Schwartz, The Disparate Impact Theory of Discrimination in Employment and Housing: The Limits of Analogy, 59 UMKC L. Rev. 815, 817–19 (1991) (suggesting adjusting the *Griggs* disparate impact standard in different housing contexts); Adam Gordon**,** Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market, 24 Yale L. & Pol'y Rev. 437, 457–68 (2006) (suggesting race-conscious remedies and attention to credit and wealth levels in FHA zoning cases).

[39] Christine Jolls, Antidiscrimination and Accommodation, 115 Harv. L. Rev. 642, 643 (2001) (quoting Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ., 207 F.3d 945, 951 (7th Cir. 2000)). Importantly for this Article, "real anti-discrimination law" includes the "other older civil rights enactments." Id.

[40] See Samuel R. Bagenstos, "Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights, 89 Va. L. Rev. 825, 828 n.9 (2003) (collecting sources).

the FHA—written in the language of antidiscrimination—follows that standard.[41]

Thus, Title VII provides a fixed point against which to evaluate the distinctive pattern of fair housing law. Where fair housing departs from Title VII—often without the courts' acknowledgement—it indicates a choice. These departures reveal the Fair Housing Act's own vision of what antidiscrimination requires.

B. The FHA as Less Effective than Title VII

Meanwhile, an important line of scholarship compares the FHA to Title VII to answer a different question: why integrating neighborhoods has proven so much harder than integrating workplaces. Given the intractability of housing segregation, this is surely an important aspect of the two statutes' relationship. But the scholarly effort to identify the FHA's weaknesses has often led to the FHA's strengths going unappreciated. This Section reviews this literature to make clear the context for this Article's contribution. The Act has not proven as transformative as its radical features might suggest because it has been held back by other limitations, many of which remain in place. But seeing the FHA's ambitions alongside its shortcomings can help chart a better course forward.

"Of all the civil rights battles fought during the last three decades, only housing discrimination appears to remain totally unabated, entrenched, and impervious to public policy and civil rights enforcement," wrote James Kushner in 1989,[42] speaking for a "broad consensus of academics and practitioners."[43] A generation later—and after the substantial strengthening of the FHA in its 1988 amendments—scholars still consider "[t]he persistence of housing discrimination . . . among the most intractable civil rights puzzle[s]."[44]

The statistics speak for themselves. The average Black-white segregation level remains closer to complete segregation than complete

[41] Linda Hamilton Krieger, Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 Berkeley J. Emp. & Lab. L. 1, 3 (2000) (describing all "traditional non-discrimination statutes" prior to the ADA as adopting a formal equality model).

[42] James A. Kushner, The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing, 42 Vand. L. Rev. 1049, 1050 (1989).

[43] Zasloff, Secret History, supra note 1, at 248.

[44] Johnson, supra note 1, at 1191, 1207.

integration.[45] And while Black-white segregation levels have declined nationally, in an especially important set of "hypersegregated" regions, integration has stalled out altogether.[46] Hispanic-white segregation has shown "no trend toward integration" since 1970 and increased to levels of hypersegregation in New York and Los Angeles.[47] Houses in Black neighborhoods are, on average, valued at between 20% and 50% less than equivalent houses in white neighborhoods.[48] Even the most overt forms of discrimination remain too prevalent. In HUD's last comprehensive study of racial discrimination in housing, for example, Black renters were told about 11.4% fewer units than equally qualified white renters and Black homebuyers were told about 17% fewer available homes.[49] In some communities, the problem is far worse: a *Newsday* investigation using paired testers on Long Island found that non-white testers experienced disparate treatment from real estate brokers 40% of the time (49% for Black testers).[50] Progress has been made on all these metrics, certainly.[51]

[45] William H. Frey, Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans, Brookings Inst. (Apr. 6, 2021), https://www.brookings.edu/articles/neighborhood-segregation-persists-for-black-latino-or-hispanic-and-asian-americans/ [https://perma.cc/P3T2-5P2Z]. The Black-white dissimilarity index is, on average, 59 out of 100, meaning 59% of Black households would need to relocate to be distributed evenly across neighborhoods with white households. Id. at tbl.1.

[46] Douglas S. Massey, The Legacy of the 1968 Fair Housing Act, 30 Socio. F. 571, 579 (2015).

[47] Id. at 579–80.

[48] Junia Howell & Elizabeth Korver-Glenn, Weidenbaum Ctr. on the Econ., Gov't & Pub. Pol'y, Appraised: The Persistent Evaluation of White Neighborhoods as More Valuable than Communities of Color 12 (2022), https://nationalfairhousing.org/wp-content/uploads/2022/11/2022-11-2_Howell-and-Korver-Glenn-Appraised.pdf [https://perma.cc/F3WE-DUVU]; Jonathan Rothwell & Andre M. Perry, How Racial Bias in Appraisals Affects the Devaluation of Homes in Majority-Black Neighborhoods, Brookings Inst. (Dec. 5, 2022), https://www.brookings.edu/articles/how-racial-bias-in-appraisals-affects-the-devaluation-of-homes-in-majority-black-neighborhoods/ [https://perma.cc/2SL6-AU2W].

[49] Margery Austin Turner et al., U.S. Dep't of Hous. & Urb. Dev., Housing Discrimination Against Racial and Ethnic Minorities 2012, at xv, xvii (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf [https://perma.cc/8JD6-CDAB]. Other researchers have used audit studies to uncover discrimination on the basis of sex, religion, and family status. See generally Judson Murchie & Jindong Pang, Rental Housing Discrimination Across Protected Classes: Evidence from a Randomized Experiment, 73 Reg'l Sci. & Urb. Econ. 170 (2018).

[50] Ann Choi, Keith Herbert & Olivia Winslow, Long Island Divided, Newsday (Nov. 17, 2019), https://projects.newsday.com/long-island/real-estate-agents-investigation/ [https://perma.cc/25HZ-4VHT].

[51] See David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, The Rise and Decline of the American Ghetto, 107 J. Pol. Econ. 455, 461, 471 (1999) (finding that segregation reached a peak in 1970 and was followed by a steady decline). But see John R. Logan, The Persistence

But whatever the potential strength of the Fair Housing Act, it is too often just that: potential.

The comparative success of Title VII in reducing the most basic forms of employment discrimination has led fair housing scholars to contrast the two schemes to understand what went wrong.[52] For decades, the chief culprit was understood to be the weaker procedural and remedial provisions of the original Fair Housing Act. HUD was limited to voluntary conciliation, while the Department of Justice could bring only "pattern or practice" cases and secure only injunctive relief.[53] Private plaintiffs faced a short statute of limitations, a low cap on punitive damages, and barriers to recovering attorney's fees.[54] The statute was considered a "toothless tiger."[55] Indeed, leading historians see this as intentional: the deal to pass the FHA required "defang[ing] it," leaving the Act purely "a symbolic gesture."[56] To be sure, even under this regime, the federal government could have done more to enforce fair housing law than it did.[57] But indisputably, the enforcement compromises of the original Act held fair housing back.[58]

These initial enforcement problems, however, were resolved by the 1988 Fair Housing Amendments Act. Those amendments not only brought individual enforcement into parity with Title VII; they created an administrative enforcement regime at HUD that is facially stronger than that for employment.[59] But strengthening fair housing litigation did not solve the problem of housing discrimination.

of Segregation in the 21st Century Metropolis, 12 City & Cmty. 160 (2013) (tempering optimism about desegregation).

[52] Johnson, supra note 1, at 1192, 1198.

[53] Id. at 1206.

[54] Id. at 1206–07.

[55] Michael H. Schill & Samantha Friedman, The Fair Housing Amendments Act of 1988: The First Decade, 4 Cityscape 57, 58 (1999) (quoting 134 Cong. Rec. 19711 (1988) (statement of Sen. Edward Kennedy)).

[56] Thomas J. Sugrue, Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North 423 (2008); see also Massey & Denton, supra note 3, at 195 (observing that the FHA was "intentionally designed so that it would not and could not work").

[57] See Joel L. Selig, The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement, 17 U.C. Davis L. Rev. 445, 446 (1984) (describing an incomplete effort by the Civil Rights Division of the Department of Justice to take on more ambitious fair housing cases during the Carter Administration); Zasloff, Secret History, supra note 1, at 251–53 (describing enforcement options that were not used).

[58] Zasloff, Secret History, supra note 1, at 249.

[59] Johnson, supra note 1, at 1204–05, 1207.

Deeper problems remained. Some were legal. For example, administrative enforcement was politically compromised by its placement within HUD. The Department's primary goal is working with communities to build housing and foster community development, not taking actions against them.[60] The Equal Employment Opportunity Commission ("EEOC"), in contrast, could focus on its core antidiscrimination mission.[61] Other problems involved the distinct nature of housing. Protected characteristics overlap with wealth and income inequalities that directly shape housing choice, allowing permissible economic discrimination to substitute for illegal discrimination.[62] And the extreme fragmentation of the housing market renders the private enforcement model ineffective: any given actor is very unlikely to be sued (or have an institutionalized compliance function), so penalties would need to be quite large to change behavior.[63] A third set of issues involves the small fair housing bar, whose growth was stunted by the pre-1988 Act's remedial limitations and whose ambitions were narrowed by public funding for fair housing litigation.[64] Finally, individual preferences appear more resiliently supportive of racial separation in housing than in employment. White homeseekers still favor predominantly white neighborhoods, a pattern of preferences which can quickly cascade to extreme levels of segregation.[65] Meanwhile, there is little consensus within Black, Latino, and Asian communities about the value, or proper extent, of residential integration.[66]

Across this literature, a common theme emerged: the Fair Housing Act was too individualistic in its approach to what was ultimately a systemic

[60] Cf. Nat'l Comm'n on Fair Hous. & Equal Opportunity, The Future of Fair Housing 19 (2008), https://nationalfairhousing.org/wp-content/uploads/2017/04/Future_of_Fair_Housing.pdf [https://perma.cc/25AY-6HWT] (recommending the creation of an independent fair housing enforcement agency).

[61] Chris Bonastia, Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the "Institutional Homes" of Social Policies, 47 Soc. Probs. 523, 530–32 (2000).

[62] Margalynne Armstrong, Protecting Privilege: Race, Residence and Rodney King, 12 Law & Ineq. 351, 372 (1994).

[63] Johnson, supra note 1, at 1203.

[64] See id. at 1209–10; Mara S. Sidney, National Fair Housing Policy and Its (Perverse) Effects on Local Advocacy, *in* Fragile Rights Within Cities: Government, Housing, and Fairness 203, 209–11 (John Goering ed., 2007).

[65] Justin P. Steil & Camille Z. Charles, Sociology, Segregation, and the Fair Housing Act, *in* Perspectives on Fair Housing 45, 59–60 (Vincent J. Reina, Wendell E. Pritchett & Susan M. Wachter eds., 2021) (reviewing literature).

[66] See, e.g., Michelle Adams, Radical Integration, 94 Calif. L. Rev. 261, 263–67 (2006).

problem.[67] Indeed, sociologists Nicholas Pedriana and Robin Stryker have argued that the FHA was more individualistic than even Title VII—and that this divergence explained the "general failure" of fair housing law.[68] Accordingly, scholars have looked for ways to rework the Fair Housing Act into a more structural statute.[69] Recently, this has most commonly centered the statute's Affirmatively Furthering Fair Housing provision, which could provide for a less reactive, more holistic, administratively-led approach to fair housing.[70] Others have called for expanding the scope of the FHA to cover discrimination in subject matters beyond, but related to, housing.[71] In parallel, many have turned past the Fair Housing Act, looking to other housing programs as the more natural place for the kind of proactive, systemic, and regional policies needed.[72]

This Article takes a different tack. I argue that, in important and unappreciated ways, the FHA already goes beyond Title VII's approach to antidiscrimination. It is broader, more searching, and already more structural.[73] (Of course, the two statutes' antidiscrimination provisions share much in common, and thoughtful parallelism is warranted.[74]) This

[67] John O. Calmore, Race/ism Lost and Found: The Fair Housing Act at Thirty, 52 U. Mia. L. Rev. 1067, 1127 (1998) ("Advancing a fair-housing rights campaign is limited, because those rights are essentially individualistic."); Robert G. Schwemm, Private Enforcement and the Fair Housing Act, 6 Yale L. & Pol'y Rev. 375, 383–84 (1988); Johnson, supra note 1, at 1204.

[68] Nicholas Pedriana & Robin Stryker, From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation, 123 Am. J. Socio. 86, 88, 117–18 (2017).

[69] Michael H. Schill, Implementing the Federal Fair Housing Act: The Adjudication of Complaints, *in* Fragile Rights Within Cities: Government, Housing, and Fairness, supra note 64, at 143, 169–70.

[70] Johnson, supra note 1, at 1193–94; Troutt, supra note 5, at 45–47; Abraham, supra note 5, at 9–11; Elizabeth Julian, The Fair Housing Act at Fifty: Time for a Change, 40 Cardozo L. Rev. 1133, 1145–46 (2019) (hoping that AFFH "at long last assumes its primacy" in HUD operations).

[71] Troutt, supra note 5, at 13–14.

[72] Sander et al., supra note 4, at 409, 424–44; see Paula A. Franzese & Stephanie J. Beach, Promises Still to Keep: The Fair Housing Act Fifty Years Later, 40 Cardozo L. Rev. 1207, 1208–09 (2019).

[73] Other differences between the statutes (and the markets they regulate) make FHA claims more difficult for plaintiffs than analogous Title VII claims. See Francis v. Kings Park Manor, Inc., 992 F.3d 67, 76 (2d Cir. 2021) (en banc); id. at 94 n.10 (Lohier, J., concurring in part and dissenting in part) (comparing landlord control over tenants with employers' greater control over employees in limiting landlord liability for tenant-on-tenant harassment).

[74] For one recent example of thoughtfully borrowing from Title VII, see Kate Gehling, The Fair Housing Act After *Inclusive Communities*: Why One-Time Land-Use Decisions Can Still Establish a Disparate Impact, 90 U. Chi. L. Rev. 1471, 1491–97 (2023).

is not to say that the FHA's antidiscrimination provisions, or even civil rights law generally, are sufficient to achieving integration or equality in housing.[75] I agree wholeheartedly with the need to deploy more than civil rights litigation. But this Article's arguments complement that approach. Recognizing that the FHA itself, through its core antidiscrimination provisions, pushes beyond a narrow approach to antidiscrimination can reinforce efforts to think structurally elsewhere.[76] And such recognition underscores the promise of fair housing litigation as one strategy among many. Beneath the weaknesses of the Fair Housing Act is a hidden layer of strength—one which might form a foundation for legal work still to be done.[77]

II. THE FAIR HOUSING ACT'S STRUCTURAL AMBITIONS

The conventional understanding of the FHA's relationship with Title VII is that it is ostensibly doctrinally parallel, though practically less effective. This Part shows how, alongside those patterns, the FHA displays a broader understanding of what discrimination can entail. Title VII is concerned with fair matching: Given a set of jobs and a set of workers, who gets what? The Fair Housing Act, too, looks at how households are matched with homes. But it also questions the set of housing opportunities on offer and the construction of the applicant pool. It asks whether housing opportunities are fairly distributed across space and provide for all protected groups' housing needs, considering housing markets as a whole. On the other side of the transaction, the FHA protects households in securing the prerequisites for more and better housing options. Title VII takes workers with the qualifications they've got and jobs as employers have defined them. The FHA—sometimes—intervenes.

[75] Cf. Olatunde C.A. Johnson, Towards a Law of Inclusive Planning: A Response to "Fair Housing for a Non-Sexist City," 134 Harv. L. Rev. F. 312, 321–22 (2021) (identifying the importance of tools that consider affordability and income in addition to race and other protected characteristics).

[76] In so recognizing, this Article illustrates how a rights-based framework can be less "essentially individualistic." Mark Tushnet, The Critique of Rights, 47 SMU L. Rev. 23, 26 (1993).

[77] Many scholars recognize the ambition of particular FHA provisions which expressly go beyond Title VII. See, e.g., john a. powell, Reflections on the Past, Looking to the Future: The Fair Housing Act at 40, 41 Ind. L. Rev. 605, 627 (2008). This Article shows how radicalism appears within seemingly ordinary antidiscrimination doctrine.

A. The Geographic Organization of Opportunities

The Fair Housing Act's distinctive attention to the set of housing opportunities available is most clearly illustrated by its attention to geography. Fair housing law is closely attuned to how the organization of markets across space supports housing inequality. Most concretely, under the FHA, unlike under Title VII, how firms site their branches readily and routinely gives rise to liability.

Redlining—discriminatorily denying mortgages based on neighborhood characteristics—is among the archetypal harms that the Fair Housing Act addresses. And plaintiffs commonly establish redlining, in part, by demonstrating that a lender did not open branches in non-white neighborhoods.[78] If done intentionally, or without a sufficient justification, this practice can be illegal.[79] And for good reason! A bank that opens branches only in predominantly white neighborhoods will be more visible and accessible to those white customers and predictably, provide them more loans.[80] In turn, the distribution of mortgage credit

[78] See, e.g., Sealed Report & Recommendation at 1, 6, 11, United States v. KleinBank, No. 17-cv-00136 (D. Minn. Jan. 30, 2018) (denying a motion to dismiss FHA claims in part because "the United States has shown that KleinBank has not opened a single branch in Minneapolis or St. Paul, positioned loan officers in these cities, or marketed its products and services there, but has otherwise opened branches, positioned loan officers, and marketed its products and services in other parts of Hennepin and Ramsey Counties. These facts establish at least an inference that KleinBank intentionally avoided offering residential mortgages in majority, minority neighborhoods"). For similar recent cases brought by the Department of Justice and nearly immediately settled in the government's favor, see, e.g., Complaint of the United States of America ¶¶ 1, 23–26, United States v. Park Nat'l Bank, No. 23-cv-00822 (S.D. Ohio Feb. 28, 2023); Consent Order at 1, *Park Nat'l Bank*, No. 23-cv-00822 (S.D. Ohio Mar. 2, 2023); Complaint & Demand for Jury Trial ¶¶ 1, 4–6, United States v. City Nat'l Bank, No. 23-cv-00204 (C.D. Cal. Jan. 12, 2023); Consent Order at 2, *City Nat'l Bank*, No. 23-cv-00204 (C.D. Cal. Jan. 30, 2023). Such cases illustrate that these claims are brought routinely and do not raise novel issues requiring extended litigation.

[79] While redlining cases interact with other banking laws, particularly the Community Reinvestment Act, they are generally brought as antidiscrimination cases with standard theories of liability. See Sealed Report & Recommendation at 3, *KleinBank*, No. 17-cv-00136 (D. Minn. Jan. 30, 2018); Complaint of the United States of America ¶ 1, *Park Nat'l Bank*, No. 23-cv-00822 (S.D. Ohio Feb. 28, 2023); Complaint & Demand for Jury Trial ¶¶ 1, 64, 67, *City Nat'l Bank*, No. 23-cv-00204 (C.D. Cal. Jan. 12, 2023). Moreover, banking regulators apply the FHA similarly, finding that branch locations can support a finding of discrimination. Appeal of a Violation of the Fair Housing Act (Fourth Quarter 2022), Off. of the Comptroller of the Currency (2022), https://www.occ.gov/topics/supervision-and-examination/dispute-resolution/bank-appeals/summaries/files/appeal-of-a-violation-of-fha-q4-2022.html [https://perma.cc/WBR4-588L].

[80] Cf. Ozgur Emre Ergungor, Bank Branch Presence and Access to Credit in Low- to Moderate-Income Neighborhoods, 42 J. Money Credit & Banking 1321, 1321–22 (2010)

affects who builds housing wealth and who can access the neighborhoods of their choice. Branch locations foreseeably shape housing inequality.

But in employment discrimination, the pattern is quite different: the geographic organization of jobs affects equal employment, but Title VII essentially never reaches analogous claims. The importance of siting decisions to employment follows the same logic as for mortgages. A firm that locates its branches in predominantly white neighborhoods will usually secure a whiter workforce, all things equal. Local residents are more likely to see a "help wanted" sign and can commute more easily to that job. This pattern is not lost on employers: there is ample historical evidence of firms intentionally using geography to secure a whiter workforce.[81] But more importantly, it is well established empirically that geography exacerbates racial inequality in employment, intent notwithstanding. A long scholarly tradition attributes poor Black employment outcomes, in particular, to the "spatial mismatch" between the location of Black workers (historically, in the inner city) and job growth (in the suburbs, often far from transit).[82]

Yet as far as I can find, there is no employment case analogous to the ordinary redlining cases: litigation in which the simple distribution of a firm's locations supports a finding of discrimination. Put more concretely, the federal government regularly sues banks if they locate only in white neighborhoods. It does not (absent more) sue a retailer for employment discrimination if it locates only in white neighborhoods.

Even when advocates briefly tried to advance such theories under Title VII, they never sought to reach as broadly as the redlining cases—and in any case, these theories never took root. Hopes to systematically apply

(finding bank branches in low- to moderate-income neighborhoods increase mortgage originations and reduce interest spreads).

[81] See Reginald Stuart, Businesses Said to Have Barred New Plants in Largely Black Communities, N.Y. Times, Feb. 15, 1983, at A14; Robert E. Cole & Donald R. Deskins, Jr., Racial Factors in Site Location and Employment Patterns of Japanese Auto Firms in America, Cal. Mgmt. Rev., Fall 1988, at 9, 18.

[82] The canonical citations are John F. Kain, Housing Segregation, Negro Employment, and Metropolitan Decentralization, 82 Q.J. Econ. 175 (1968), and William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (1987). For more recent work on "spatial mismatch" and employment outcomes, see generally Judith K. Hellerstein, David Neumark & Melissa McInerney, Spatial Mismatch or Racial Mismatch?, 64 J. Urb. Econ. 464 (2008); Leah Platt Boustan & Robert A. Margo, Race, Segregation, and Postal Employment: New Evidence on Spatial Mismatch, 65 J. Urb. Econ. 1 (2009). Similar dynamics exist with respect to other protected characteristics. See Noah M. Kazis, Fair Housing for a Non-Sexist City, 134 Harv. L. Rev. 1683, 1737–39 (2021) [hereinafter Kazis, Non-Sexist City].

Title VII to firms' locational decisions rose and fell over two years in the early 1970s. In 1971, Alfred Blumrosen, a law professor and former EEOC official, suggested that Title VII obligated large employers to consider whether siting decisions would affect minority employment and, if so, to consider alternatives and mitigation measures.[83] An internal EEOC memorandum proposed adopting Blumrosen's theories, though importantly, only as applied to plant *re*locations.[84] But in 1972, after the memo leaked to the press and received substantial pushback in Congress, the EEOC formally disavowed the memorandum and abandoned the proposal.[85]

Thereafter, very few litigants brought any such claims and almost none were successful.[86] Even this handful of cases only applied employment discrimination law to the relocation of existing jobs from one place to another. They addressed alleged discrimination based on the harms to (and generally animus against) specific, existing workers, who would lose their current jobs or be unable to commute to a new location.[87] Neither the cases nor the EEOC's stillborn theory questioned locational decisions absent a relocation or direct animus against individuals. Yet this is exactly what the redlining cases do. Liability is not limited to lenders that stop

[83] Alfred W. Blumrosen, The Duty to Plan for Fair Employment: Plant Location in White Suburbia, 25 Rutgers L. Rev. 383, 388 (1971). Blumrosen was an influential figure; Justice Clarence Thomas considers him the (illegitimate) source of disparate impact doctrine. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 551 (2015) (Thomas, J., dissenting).

[84] See 118 Cong. Rec. 4925–27 (1972) (including the text of the EEOC memo).

[85] Id. at 4924–29 (including congressional opposition, the text of the EEOC memo, the newspaper article, and the EEOC's official disclaimer of the memo); see also Marley S. Weiss, Risky Business: Age and Race Discrimination in Capital Redeployment Decisions, 48 Md. L. Rev. 901, 921 n.87 (1989) (describing abandonment of the EEOC memo).

[86] Weiss, supra note 85, at 903 & nn.1–2. Nor did these rare cases generate a clear theory of liability. As Marley Weiss, the closest observer of these cases, has written, "[i]n none of these cases have the courts squarely confronted the cognizability of such claims under federal employment discrimination laws." Id. at 903; see also Kingsley R. Browne, The Civil Rights Act of 1991: A "Quota Bill," a Codification of *Griggs*, a Partial Return to *Wards Cove*, or All of the Above?, 43 Case W. Rsrv. L. Rev. 287, 354 n.303 (1993) (describing courts as having "always seemed to assume that the initial decision whether to close a plant was unreviewable").

[87] Perhaps the "most successful settlement" case involved an office relocation from Detroit to its suburbs. Weiss, supra note 85, at 903 n.2. There, defendants settled after extreme facts were revealed, including that the defendant had improperly withheld evidence of a "book of blacks" used to track its workforce's racial composition. Bell v. Auto. Club, 80 F.R.D. 228, 231 (E.D. Mich. 1978). Though no decision on the merits was reached, this "book" indicates the case would have been decided on grounds closer to animus against individuals and further from a focus on geography alone.

serving a particular neighborhood. Indeed, in one recent case, a bank defended its service patterns by arguing that it had never served urban areas, pointing to its history as a rural lender focused on agriculture. The court rejected this defense, finding the bank's recent expansion only into whiter suburbs "redolent of a business philosophy that potentially prefers to avoid minority borrowers."[88]

The distinctiveness of the redlining cases is further underscored by one final set of Title VII cases involving layoffs. In this litigation, Title VII *does* consider geography, but much more narrowly than does the FHA. During downsizing, workers sometimes challenge layoffs which disproportionately hit divisions with more workers having a protected characteristic, like the closure of a Chicago branch that is disproportionately Black or a customer service division that is disproportionately female.[89] But while these cases have a geographic component, their analysis is tightly focused on the treatment of existing workers. Since no new jobs are opening, the overall pattern of opportunity is not at issue; these cases are wholesale versions of ordinary Title VII litigation over discriminatory firings.[90] At issue is not the set of jobs across the market, but whether, within a firm, certain employees were unfairly singled out. This is the closest Title VII ordinarily comes to questioning the geographic distribution of work.

Thus, Title VII mostly ignores the geographic organization of opportunity.[91] It understands that geography might be used as a mechanism to discriminate against individuals. And under the broadest theory of employment discrimination—one rejected by the EEOC, rarely attempted, and never recognized by a court—Title VII might scrutinize how a firm's relocation plans reallocate opportunity. But Title VII never asks whether employers' geographic organization, standing alone, *creates* a fair allocation of opportunity.

[88] Sealed Report & Recommendation at 10, United States v. KleinBank, No. 17-cv-00136 (D. Minn. Jan. 30, 2018).

[89] See, e.g., Chi. Tchrs. Union v. Bd. of Educ., 14 F.4th 650, 655 (7th Cir. 2021); Davis v. District of Columbia, 925 F.3d 1240, 1244 (D.C. Cir. 2019); Shollenbarger v. Planes Moving & Storage, 297 F. App'x 483, 484 (6th Cir. 2008); Council 31, Am. Fed'n of State, Cnty. & Mun. Emps. v. Ward, 978 F.2d 373, 375 (7th Cir. 1992).

[90] See *Davis*, 925 F.3d at 1250.

[91] An interesting question outside the scope of this Article is how affirmative action requirements for federal contractors under Executive Order 11246 consider geography in determining the available workforce that can be drawn from a "reasonable recruitment area." 41 C.F.R. § 60-2.14(e) (2009).

The Fair Housing Act, in contrast, does so all the time.[92] In the redlining cases, the harm is not that some identifiable borrower lost a mortgage. There is not any particular bank branch that must or must not have been opened. The problem is the overall denial of mortgages to an area. The redlining cases are forward-looking, less about the loss of something one had and more about ensuring open housing markets in the future. The point is to make opportunities available.[93]

B. The Economic Organization of Opportunities

The geographic allocation of opportunity is just a specific case of a larger pattern. Title VII, the paradigmatic antidiscrimination statute, generally does not question the set of jobs available or the nature of work performed in each position. In important ways, it accepts the structure of employment markets as they are, ensuring that the predefined arrangement of jobs is distributed evenhandedly. The FHA is not so blinkered. Fair housing, at times, demands that the set of opportunities be restructured and expanded.

For generations, legal scholars—especially feminist scholars—have described (and decried) Title VII's failure to adequately question the underlying structures of labor markets.[94] Employers retain the authority

[92] There is some argument that this distinction reflects congressional choices. Among the motivations given for enacting the FHA was the movement of jobs to the suburbs. Nicole Summers, Setting the Standard for Proximate Cause in the Wake of *Bank of America Corp. v. City of Miami*, 97 N.C. L. Rev. 529, 588–89 (2019). This may imply that Title VII alone was understood not to fully address spatial mismatch. It does not, however, indicate that Title VII cannot reach such problems at all, nor does it speak to how the FHA does so.

[93] Another important set of FHA cases concerned with geography scrutinizes the siting of subsidized housing. These cases often involve perpetuation of segregation theories of liability, so they do not make for as clean a comparison. Even so, they underscore the attention of the FHA to the geographic organization of housing opportunities. The Eleventh Circuit, for example, described the siting of public housing only in the neighborhood with the highest concentration of Black residents as "affect[ing] the housing market for minorities." Jackson v. Okaloosa County, 21 F.3d 1531, 1542 & n.17 (11th Cir. 1994).

[94] E.g., Laura T. Kessler, The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory, 34 U. Mich. J.L. Reform 371, 407 (2001) ("All Title VII provides to women is the right to participate in the workplace as presently configured."); Michelle A. Travis, Equality in the Virtual Workplace, 24 Berkeley J. Emp. & Lab. L. 283, 288 (2003) (noting that "courts consistently have failed to interpret antidiscrimination statutes to meaningfully transform the workplace"); Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 Harv. C.R.-C.L. L. Rev. 79, 139 (1989) (arguing that under Title VII, "[d]iscrimination analysis is designed to ensure that no one is denied an equal opportunity within the existing structure; it is not designed to change the structure"); Risa L.

to define what jobs entail. Courts might scrutinize whether job requirements are, in fact, necessary for workers to do the job, as an employer has defined it. But they will not question, much less modify, the job itself.[95] As Pamela Karlan and George Rutherglen put it, Title VII "takes jobs as it finds them."[96]

Consider, for example, employment discrimination claims concerning equipment designed for commonly male body types. In one leading case, the Eighth Circuit held that an airline had discriminated against women by imposing a too-strict height requirement for pilots.[97] The airline demanded pilots be 5'7" tall when the evidence showed that pilots could safely fly at 5'5", a standard that would permit substantially more women to apply.[98] But, as scholars have long observed, the courts never questioned whether the cockpit itself could be redesigned.[99] Title VII allows litigants to question "selection mechanism[s]" but not to "alter the work environment."[100] Put differently, Title VII litigation may require firms to change their business practices, even at some cost (and sometimes quite transformatively), but it does so by changing what qualifications employers may require for a given job, not by changing the job itself.[101]

Goluboff, Book Review, 27 Law & Hist. Rev. 222, 223 (2009) (reviewing Nancy MacLean, Freedom Is Not Enough: The Opening of the American Workplace (2006)) ("Unlike earlier efforts to secure nondiscrimination in employment, Title VII did not guarantee full employment or present any sort of significant challenge to the basic structure of the labor market. It simply protected against discrimination.").

[95] Maxine N. Eichner, Note, Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII, 97 Yale L.J. 1397, 1410 (1988) ("[C]ourts typically seek to determine only that selection practices effectively screen in an unbiased manner for the qualities and structures deemed necessary for the job by the employer. They fail to recognize that the employer's conceptions of necessary job qualities and job structures may themselves contain entrenched discriminatory biases." (footnote omitted)).

[96] Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1, 9 (1996).

[97] Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 53–54 (8th Cir. 1977).

[98] Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1064 (E.D. Mo. 1976), *aff'd*, 568 F.2d 50 (8th Cir. 1977).

[99] See, e.g., Jessica L. Roberts, Accommodating the Female Body: A Disability Paradigm of Sex Discrimination, 79 U. Colo. L. Rev. 1297, 1303–05, 1308–09 (2008); Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 181–82 (1979).

[100] Samuel Issacharoff & Justin Nelson, Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?, 79 N.C. L. Rev. 307, 315 (2001).

[101] Christine Jolls's analysis of disparate impact claims under Title VII makes this clear. She argues that many disparate impact claims have an accommodation-like quality in that they

Jessica Roberts has described physical equipment in the workplace as contributing to "discriminatory built environments," something generally not cognizable under Title VII.[102] Seen through that lens, the divergence between employment law and fair housing becomes clear, for the Fair Housing Act has a clear framework for deeming a built environment to be discriminatory. Under a series of cases dating back to just after the passage of the FHA, courts have asked whether zoning regulations have inappropriately excluded Black or Latino residents from a community.[103] Since apartments or townhouses are disproportionately likely to be inhabited by lower-income minority households, blocking their construction can exclude people of color.[104] Often these cases involve localities rejecting site-specific proposals for subsidized housing, but courts have also found zoning policies which prohibit multifamily housing from being built in predominantly white neighborhoods to be discriminatory.[105] Liability can be based on discriminatory intent, discriminatory effects, or a segregative effect.[106]

These suits allow the equivalent of redesigning the cockpit. The claim is not that a needless barrier has been erected for Black homeowners hoping to buy existing, single-family homes in suburbia (the equivalent of the unnecessary extra two inches of height requirement).[107] The claim is that different homes must be allowed: the built environment itself is too inhospitable to households with lower incomes or wealth. The FHA can help change that built environment. It can modify the range of housing choices available.

require employers to adjust to employees' special needs. But her examples, like grooming rules, height and weight requirements, hiring based on family connections, and English-language requirements, involve modifying the qualifications imposed for matching individuals to predefined jobs, not restructuring work. Jolls, supra note 39, at 652–60.

[102] Roberts, supra note 99, at 1304–05. Roberts looks to disability law to support an expanded view of sex discrimination involving the built environment. Id. But fair housing arguably provides a better hook given the two statutes' closer textual fit.

[103] E.g., United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

[104] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 565–71 (N.D. Tex. 2000).

[105] In some instances, the initial violation is site-specific, but the remedy requires a broader rezoning. See, e.g., Consent Decree at 4–5, United States v. Town of Franklinton, No. 24-cv-01633 (E.D. La. June 28, 2024) (requiring changes to zoning procedures citywide and rezoning of twenty acres of undeveloped land for as-of-right multifamily housing).

[106] Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522, 527–28 (M.D. La. 1997).

[107] Consider, perhaps, a bank which refused mortgages to first-time homebuyers regardless of creditworthiness, disproportionately harming Black or Latino households.

Exclusionary zoning is not an unusual edge case for FHA litigation. Rather, the Supreme Court has deemed such cases "the heartland of disparate-impact liability" under the FHA.[108] Nor are these zoning cases limited to the historically unique ways that land use regulation entrenches racial segregation. Discriminatory zoning can affect many kinds of housing needs. For example, because Orthodox Jews must walk to the synagogue on Shabbat, they have brought fair housing claims to allow the development of dense, walkable, multifamily housing.[109] While such claims were not the core concern of the FHA's drafters,[110] the FHA still extends to Orthodox Jews a chance to recast the set of housing opportunities.[111] Such zoning claims are fundamental features of fair housing law.

Now, we can abstract away from physical infrastructure to the broader principle: the FHA (sometimes) protects the conditions necessary for equal housing opportunity. And then, the radical nature of that approach becomes clear. For the zoning cases can be compared not just to Title VII cases involving the physical apparatus required for work, but to the social and economic apparatuses as well.

Here, consider the long-running fights to create part-time or flexible positions to help women more easily balance obligations to work and family, a potentially profound reorganization of many workplaces.[112] Title VII's antidiscrimination provisions have not generally reached these issues outside of instances of egregiously sexist conduct.[113] Employees usually cannot sue a firm to have it create more part-time positions—and

[108] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539 (2015).

[109] Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead, 98 F. Supp. 2d 347, 355 (S.D.N.Y. 2000).

[110] Indeed, some ultra-Orthodox communities function as ethnic enclaves in tension with the FHA's integrationist aims. Nomi M. Stolzenberg & David N. Myers, American Shtetl: The Making of Kiryas Joel, a Hasidic Village in Upstate New York 9–10 (2021).

[111] Similarly, a variety of land use laws could, within existing doctrine, be challenged as sex discrimination under the FHA. Kazis, Non-Sexist City, supra note 82, at 1711–21, 1730–35.

[112] Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1227 (1989). Put to one side the deep factual and normative disagreements over whether and when such flexible positions stereotype women or sideline them to a "mommy track." See id. at 1237 n.197.

[113] Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. Rev. 709, 760 (1986); Julie C. Suk, Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict, 110 Colum. L. Rev. 1, 61 (2010); Joan Williams, Market Work and Family Work in the 21st Century, 44 Vill. L. Rev. 305, 336 (1999).

a *would-be* employee certainly cannot. As Deborah Dinner explained, "[w]hen female plaintiffs challenged the disparate effects of workplace time organization on women, . . . courts saw these lawsuits as illegitimate threats to managerial prerogatives."[114] Those prerogatives include the right to define which jobs are full-time and which are part-time, and then to define full-time work on a rigid schedule as the normative baseline.[115]

To be sure, Title VII imposes some limits on an employer's power to define a job in discriminatory ways. This inquiry is frequently managed through the doctrinal heading of whether the "bona fide occupational qualification" defense applies. To offer two simple examples, it is a permissible bona fide occupational qualification to define an acting job as for a female part and therefore hire only women.[116] It is impermissible to define a waitstaff job as requiring a "high-class" ambience and therefore hire only male waiters.[117] When employers attempt to justify discrimination by defining it as inherent to the job, these cases edge toward questioning employers' definitions of what jobs entail. In one famous case, a court rejected Southwest Airlines's argument that it employed flight attendants specifically to be sexy, flirty, and female, holding that the job really was to get passengers safely to their destinations.[118] But even here, courts' roles are limited. Courts generally do not intervene in the actual economic organization of the work; they accept the employer's determination of what work must be performed when, questioning only the employer's discriminatory definition of how

[114] Deborah Dinner, Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era, 92 Ind. L.J. 1059, 1094 (2017).

[115] A related set of cases, similarly unsuccessful, involves requirements that employees travel or relocate for work, which may impose higher burdens on people with family obligations (disproportionately women). See Goicoechea v. Mountain States Tel. & Tel. Co., 700 F.2d 559, 560 (9th Cir. 1983) (finding that travel requirements had "a 'manifest relationship'" to the job (quoting Connecticut v. Teal, 457 U.S. 440, 446 (1982))); Catherine L. Fisk, Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees, 2 Berkeley Women's L.J. 89, 110 (1986). But see Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 370 (2011) (Ginsburg, J., concurring in part and dissenting in part) (suggesting not that the relocation requirement itself was impermissible, but that managerial assumptions about women's mobility might be discriminatory).

[116] 29 C.F.R. § 1604.2(a)(2) (2023).

[117] Levendos v. Stern Ent., Inc., 723 F. Supp. 1104, 1107 (W.D. Pa. 1989), *rev'd*, 909 F.2d 747 (3d. Cir 1990).

[118] Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 302–03 (N.D. Tex. 1981).

that work is to be conducted.[119] Indeed, the standard test in bona fide occupational qualification cases looks to the "essence" of the work and whether discriminatory distinctions "relate to ability to perform the duties of the job."[120] As elsewhere in Title VII, what that job is remains fixed.[121]

Litigation under the Pregnancy Discrimination Act (part of Title VII) further illustrates courts' reasoning in accepting employers' definition of jobs—and how that reasoning does not apply in fair housing. In one case, the Seventh Circuit explained that a firm was justified in laying off a part-time female worker before a less-experienced full-time colleague because her part-time status "caused her colleagues some inconvenience," and laying off full-time workers would cause "serious morale problems."[122] The court refused to "second-guess" how firms staff themselves.[123] In another case, the Seventh Circuit dismissed litigation by a woman seeking flexibility to absent herself for severe morning sickness. Disparate impact litigation, the court explained, reached only "eligibility requirements that are not really necessary for the job for which the applicant is being hired"; she was seeking "to excuse pregnant employees from having to satisfy the *legitimate* requirements of their job."[124] The job's leave policy was taken as fixed. "The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars, . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work," and it is not "a warrant for favoritism," the court explained in still a third case.[125] In all this litigation, the courts placed the structuring of jobs into fixed, full-time schedules beyond Title VII's ambit; they did not even reach the question of whether these policies were justified. As Laura Kessler put it, "[t]hey are not seen as policies or practices, but simply 'work.'"[126] The firm's organization of work into a form designed for a full-time breadwinner, able to rely on his wife's taking primary responsibility for

[119] Id. at 302 ("That Southwest's female personnel may perform their mechanical duties 'with love' does not change the result. 'Love' is the manner of job performance, not the job performed."); accord Stephen F. Befort, BFOQ Revisited: *Johnson Controls* Halts the Expansion of the Defense to Intentional Sex Discrimination, 52 Ohio St. L.J. 5, 15 (1991).

[120] UAW v. Johnson Controls, Inc., 499 U.S. 187, 203–04 (1991) (citation omitted).

[121] Id. at 201 (focusing on "qualifications").

[122] Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1155 (7th Cir. 1997).

[123] Id.

[124] Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583–84 (7th Cir. 2000).

[125] Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (Posner, C.J.) (citation omitted).

[126] Kessler, supra note 94, at 414.

family obligations, was not subject to question.[127] These pregnancy-related cases, moreover, involved identifiable individuals observably harmed by the structure of their existing jobs. How much more distant, then, would be a lawsuit forcing a firm to create more flexible positions for future applicants?

Yet that distant claim is remarkably similar, in its basic shape, to those readily cognizable exclusionary zoning cases. Only one standard, normative option, is provided (in a classic exclusionary zoning case, the detached single-family home; in employment, the full-time job). That standard option tends to be differentially available based on a protected characteristic (in the zoning case, favoring white homebuyers due to their higher income and wealth; in employment, favoring men because they are less burdened by familial obligations).[128] Allowing an alternative (an apartment building or a part-time option) is understood by the town (or the employer) to be costly. Associated, incumbent third parties (the neighbors or the coworkers) may find the change "inconvenient," a blow to "morale," or even objectively harmful, as it upsets their settled understandings about their community's prevailing character. Yet, under the right facts, the town must allow the apartment building, while the firm need not allow the part-time option. Within the same doctrinal framework, the FHA allows for claims that, if translated to the employment context, would represent profound expansions of antidiscrimination law and sweeping changes to work itself. The zoning cases have not yet proven themselves transformative—but their logic is.

These "heartland" zoning cases are where the FHA's concern with market-structuring is most apparent, but that concern is not limited to scrutiny of public-sector actions. Suits against certain private actors display similar breadth. Most notably, the FHA also scrutinizes the insurance industry's structuring of housing opportunities.

[127] These cases have been substantially superseded by the recent enactment of the Pregnant Worker Fairness Act. 42 U.S.C. §§ 2000gg to -6. Responding to these sorts of decisions, Congress offered new protections for pregnant workers, irrespective of how their employers treat nonpregnant coworkers. But, notably, Congress did so by creating a new reasonable accommodations requirement, not by modifying Title VII's antidiscrimination framework. Id. Thus, within Title VII, an antidiscrimination mandate did not provide for restructuring jobs to be more compatible with motherhood, and when Congress wished to provide that restructuring, it felt the antidiscrimination framework could not or should not serve that function.

[128] In both cases, the sought-after option will not serve only the one group: the apartment building will house some white residents, and some of the part-time positions will be filled by men.

Like zoning, insurers' underwriting policies also change the set of homes available on the market (as well as who can fill them). These sorts of insurance choices, too, can constitute housing discrimination.[129] Courts have ruled against underwriting practices which, for example, charged landlords higher rates for renting to people with disabilities living in group settings or receiving assistance in the home.[130] The courts explained that such policies provided "powerful disincentives" against these arrangements.[131] The result would be that property owners stopped providing a particular housing type: group homes for disabled people. Like the zoning cases, at issue is what kind of homes are available in a community: "traditional" single-family homes, or alternative models like group homes as well? Such opinions recognize that insurance policies are private regulators, setting the terms against which other market actors decide whom to house.[132] If people with disabilities need certain types of homes, it is wrongful to create a rental housing market where landlords' business models will not provide those homes.[133]

Again, employment law proceeds differently: insurers who incentivize discriminatory employment practices are not themselves liable for employment discrimination. Take employers' use of criminal history in

[129] The Fourth Circuit initially rejected the application of the FHA to insurance altogether. Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423–24 (4th Cir. 1984). However, the Fourth Circuit always stood alone, and its interpretation was shortly superseded by regulation. See NAACP v. Am. Fam. Mut. Ins. Co., 978 F.2d 287, 297–301 (7th Cir. 1992); see also Ojo v. Farmers Grp., Inc., 600 F.3d 1205, 1208 (9th Cir. 2010) (per curiam) (holding that the FHA applies to discrimination in homeowner's insurance); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1355–60 (6th Cir. 1995) (same). The first Trump Administration attempted to "weaken[]" disparate impact liability for insurance claims under the FHA via rulemaking, but was enjoined. Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600, 606–07, 609–12 (D. Mass. 2020).

[130] Wai v. Allstate Ins. Co., 75 F. Supp. 2d 1, 6 (D.D.C. 1999); Nevels v. W. World Ins. Co., 359 F. Supp. 2d 1110, 1119–20 (W.D. Wash. 2004); see also Charge of Discrimination ¶ 19, McClendon, FHEO No. 09-04-1103-8 (H.U.D. 2005), https://web.archive.org/web/20250124130643/https://www.hud.gov/sites/documents/DOC_14391.PDF [https://perma.cc/4PEB-N5FJ] (issuing a Charge of Discrimination against an owner and property manager refusing to rent to a person with disabilities because of property insurance concerns).

[131] *Wai*, 75 F. Supp. 2d at 6.

[132] To underscore that this is market-structuring behavior, note that these are transactions between insurers and private landlords. Neither side is itself a member of the discriminated-against group.

[133] See also United States v. Mass. Indus. Fin. Agency, 910 F. Supp. 21, 28 (D. Mass. 1996) (holding that the denial of conduit bond financing to a group which sought to develop a residential school for teenagers with disabilities is covered by the FHA because "the conduit bond financing agency makes housing unavailable no less than other actors with the power to block the sale or rental of housing").

making hiring decisions. Because of the serious racial disparities in the criminal legal system, the EEOC and courts have each concluded that an employer's improper use of a person's criminal history in hiring can constitute racial discrimination.[134] But insurance company policies that unduly treat hiring people with criminal records as risky—and increase premiums accordingly—are not unlawful employment discrimination, even if they systematically push employers not to hire people with criminal records.[135] The logic parallels the fair housing claims. But only fair housing law directly scrutinizes the upstream incentives that guide the entities which ultimately provide individuals with a job or a home.[136]

In all these ways, Title VII works only to ensure fair competition for the jobs on offer—no matter whether the equipment or the hours are incompatible with substantive equality and no matter how an upstream

[134] U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2012-1, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act (2012), https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions [https://perma.cc/U82H-J35B]; Williams v. Compassionate Care Hospice, No. 16-cv-02095, 2016 WL 4149987, at *4 (D.N.J. Aug. 3, 2016); Smith v. Home Health Sols., Inc., No. 17-cv-30178, 2018 WL 5281743, at *4 (D. Mass. Oct. 24, 2018); cf. Mandala v. NTT Data, Inc., 975 F.3d 202, 211 (2d Cir. 2020) (finding such claims to be "facially appealing," but dismissing the instant claim for improper pleading of relevant statistics).

[135] Joe Palazzolo, Criminal Records Haunt Hiring Initiative, Wall St. J. (July 12, 2015, 5:24 PM), https://www.wsj.com/articles/criminal-records-haunt-hiring-initiative-1436736255; U.S. Comm'n on C.R., Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities 46 (2019), https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/NP2P-GEXV] ("[E]ven if employers wanted to hire employees with criminal records, they may encounter barriers from the insurance industry.").

When employers themselves would be liable for hiring decisions based on their insurance companies' treatment of criminal records is less clear. Higher costs are generally not a defense to Title VII once discrimination has been shown. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 n.26 (1983) (first citing City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 716–17 (1978); and then citing 29 CFR § 1604.9(e) (1982)). However, given that employers may sometimes consider the risks associated with hiring people with a criminal history, supra note 134, determining the additional import of insurability would require additional analysis.

[136] Indeed, the FHA stands out among federal laws for limiting invidious discrimination in insurance markets; besides the FHA, the only two federal statutes limiting insurance discrimination are in healthcare (the Affordable Care Act and the Genetic Information Nondiscrimination Act). Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, Understanding Insurance Antidiscrimination Laws, 87 S. Cal. L. Rev. 195, 198–99 (2014). Even at the state level, antidiscrimination protections in insurance are uneven: "[O]nly ten states have forbidden the use of race, national origin, and religion across all lines of insurance." Id. at 239. This leaves insurance policies unscrutinized in the employment context.

actor's decision predictably reduces employment opportunities.[137] The FHA ensures fair competition too. But every so often, it also works to make the game itself fairer.

C. The Political Organization of Opportunities

Up to now, this Article has discussed claims within the mainstream of FHA litigation. To demonstrate the breadth of the FHA, it is worth examining a decidedly unusual claim. In one remarkable case, the FHA was used successfully not only to question the structure of a local housing market, but to question the very structure of local democracy.

This litigation arose as part of the long-running, multifaceted conflicts surrounding the rapid growth of the ultra-Orthodox Jewish community in suburban New York.[138] Residents of one non-Jewish neighborhood sought to exclude ultra-Orthodox residents, including by barring rabbis from using their homes as small synagogues.[139] To do so, they incorporated as a new municipality, the Village of Airmont, with the goal of securing zoning powers. In the ensuing litigation, plaintiffs claimed not only that the village's zoning was illegal, but also that the incorporation itself violated the Fair Housing Act.[140] On a motion to dismiss, the U.S. District Court for the Southern District of New York agreed that allegations of discriminatory incorporation stated a claim under the FHA.[141] At issue was not an individual transaction barring a Jewish family from living in Airmont. Nor was it even a broad policy making Airmont's homes unamenable to ultra-Orthodox needs. Rather, it was the establishment of a polity that was fundamentally inhospitable to ultra-Orthodox needs. The court itself recognized the relative remoteness of the challenged action from the ultimate exclusionary outcome: "Though

[137] Defendants might be required to create jobs or training programs in the wake of proven discrimination—though even then, only in extreme circumstances. See, e.g., Loc. 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 431–32 (1986). Arguably, this indicates that Title VII could, in principle, reach questions of market-structuring, though it usually does not.

[138] Gerald Benjamin, The Chassidic Presence and Local Government in the Hudson Valley, 80 Alb. L. Rev. 1383, 1383–84 (2017).

[139] LeBlanc-Sternberg v. Fletcher, 763 F. Supp. 1246, 1248 (S.D.N.Y. 1991).

[140] Id. at 1249; LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 269 (S.D.N.Y. 1991) ("[Plaintiffs] assert that the incorporation itself has burdened their rights . . . amounting to injury both under the First Amendment and the Fair Housing Act.").

[141] *LeBlanc-Sternberg*, 781 F. Supp. at 270–72; see also *LeBlanc-Sternberg*, 763 F. Supp. at 1252 ("[S]hould discriminatory intent be found at the root of Airmont's incorporation after a full trial of the issues, the incorporation could be declared null and void.").

plaintiffs themselves have not been excluded from living in Airmont, they assert that the incorporation has had the effect of making Airmont a less desirable place to live for Orthodox Jews who fear that they could not freely practice their religion."[142]

That the lines of a local government could themselves be an FHA violation surely represents something closer to the edge of the FHA's reach. Only the one district court has addressed whether municipal incorporation can violate the FHA,[143] and the Second Circuit, on appeal, did not reach the question.[144] That said, in subsequent litigation against Airmont, the Department of Justice appears still to take the position that the incorporation itself was discriminatory.[145] Such claims are not bad law. The structure of government may usually be too removed from housing availability to support liability, but under the right facts, the FHA can intervene.

The Airmont case represents a uniquely upstream approach to ensuring the proper conditions for integration. It moves the question of antidiscrimination law from who gets a home to what homes are available, and then to who determines what homes are available. The FHA, the case suggests, stands ready to intervene in the very basics of self-government.[146] Needless to say, Title VII does not.

D. The Importance of Alternative Opportunities

The FHA's attention to the set of housing opportunities available appears in a final way, one which limits liability as well as expands it. In assessing two types of land use cases—the traditional exclusionary zoning cases and a separate set of claims involving the redevelopment of housing—courts examine what alternative housing options are available to residents. In such cases, the shape of opportunity in an overall housing market can determine liability.

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[142] *LeBlanc-Sternberg*, 781 F. Supp. at 270.

[143] Jenna Raden, Comment, Fragmenting Local Governance and Fracturing America's Suburbs: An Analysis of Municipal Incorporations and Segregative Effect Liability Under the Fair Housing Act, 94 Tul. L. Rev. 365, 389 n.142 (2020).

[144] LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 422, 428 (2d Cir. 1995).

[145] Complaint ¶¶ 1, 12, United States v. Village of Airmont, No. 20-cv-10121 (S.D.N.Y. Dec. 2, 2020).

[146] There are notable parallels here to a federal court's extensive remedial powers to redress de jure school segregation, which does allow for oversight of local government structure. See, e.g., Stout v. Jefferson Cnty. Bd. of Educ., 882 F.3d 988, 991–92 (11th Cir. 2018).

In cases involving zoning denials, overall market conditions are analyzed to determine whether any injury occurred, since alternative housing options render a zoning denial immaterial. The Eleventh Circuit, for example, has held that the permissibility of a rezoning denial depends on the supply of housing nearby.[147] When there is a "housing shortage," the court reasoned, denying permission for additional affordable housing can adversely impact protected groups.[148] But if there is a "glut in the market" for comparable homes (and no current pattern of residential segregation), no disparate impact is possible.[149] The Ninth Circuit has embraced the same logic, albeit applied quite differently.[150] That court criticized the Eleventh Circuit for too blithely deeming properties to be acceptable alternatives, looking at huge quadrants of a county rather than at comparability block by block, with attention to important amenities like schools, parks, and grocery stores. Nevertheless, the Ninth Circuit agreed that whether "truly comparable housing is available in close proximity to a proposed development" is relevant to a fair housing disparate impact analysis.[151]

The same attention to alternative sites appears in a very different set of cases that Stacy Seicshnaydre has deemed "housing improvement" challenges.[152] These cases generally scrutinize whether efforts to redevelop low-cost housing occupied primarily by Black or Latino residents into pricier housing likely to house more white residents are discriminatory.[153] Although distinct in many ways from the more de-regulatory exclusionary zoning cases,[154] courts have likewise deployed a market-level analysis here. They ask not only who faces displacement and whether those residents might secure new housing in the redeveloped project, but also whether displaced residents would have opportunities to live elsewhere in the community.

[147] Hallmark Devs., Inc. v. Fulton County, 466 F.3d 1276, 1287 (11th Cir. 2006).
[148] Id.
[149] Id.
[150] Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 512 (9th Cir. 2016).
[151] Id.
[152] Stacy E. Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 361 (2013). The Supreme Court later embraced Seicshnaydre's distinction. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540–41 (2015).
[153] Variants look to whether a redevelopment eliminates family-sized apartments, thereby discriminating on the basis of family status. E.g., Borum v. Brentwood Vill., LLC, 218 F. Supp. 3d 1, 20–23 (D.D.C. 2016).
[154] Seicshnaydre, supra note 152, at 361–62.

The strongest such statement comes from the Third Circuit's *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly* decision.[155] There, the court went so far as to state that "when a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing," plaintiffs will "often" be able to establish a prima facie case of disparate impact.[156] At this early stage, therefore, neighborhood conditions may be determinative. When affordable housing is scarce, the court reasoned, "a more searching inquiry into" the defendant's actions is appropriate.[157]

This market-level approach to "housing improvement" claims does not always redound to plaintiffs' benefit, though. The Seventh Circuit, for example, rejected an FHA challenge to the demolition of dilapidated subsidized housing in Joliet, Illinois.[158] The court concluded that neither racial animus nor disparate impact could be found, in part because the residents (who, thanks to prior litigation, would be given housing vouchers) could easily find other acceptable homes nearby.[159] "[S]pace elsewhere will be available," wrote the court.[160] The scarcity of alternative affordable housing options supported plaintiffs' claims in *Mt. Holly*; the availability of alternatives supported defendants in Joliet. In both, whether a redevelopment was discriminatory turned on conditions in the broader housing market. What these cases ultimately require is to not discriminatorily force tenants into a housing market that cannot meet their needs.

Such cases diverge sharply from the mode of analysis under Title VII. Whether restructuring at one firm is discriminatory does not turn on how easily the fired individuals can find new, equivalent work.[161] Courts do

[155] 658 F.3d 375, 385 (3d Cir. 2011). The Third Circuit's approach here likely represents a more plaintiff-friendly approach than will hold moving forward. The Supreme Court in *Inclusive Communities* expressed deep solicitude for defendants' interests in redevelopment cases like *Mt. Holly*. *Inclusive Cmtys.*, 576 U.S. at 544. That dictum, however, did not speak to (much less reject) the logic described here: actions reducing the availability of housing that is disproportionately used by people with a protected characteristic can generate FHA liability, and determining availability requires looking at the broader market.

[156] *Mt. Holly*, 658 F.3d at 384–85.

[157] Id. at 385.

[158] City of Joliet v. New W., L.P., 825 F.3d 827, 829–30 (7th Cir. 2016).

[159] Id. at 830.

[160] Id. at 829.

[161] An individual's ability to find equivalent work affects the amount of back pay that can be awarded. Ford Motor Co. v. EEOC, 458 U.S. 219, 231–32, 236 (1982). But that is a question of remedies, not liability.

not look to local unemployment rates or job listings within the industry in adjudicating employment discrimination claims. Whether "jobs elsewhere will be available" is simply irrelevant to the firm-level analysis of liability under Title VII.

Indeed, these cases suggest another way that the FHA might diverge from Title VII: the availability of a "bottom-line" defense. Under Title VII, such a defense is clearly barred: under *Connecticut v. Teal*, one discriminatory policy cannot be excused simply because some other policy restores demographic balance within the firm.[162] The bottom-line defense "ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally" with other workers.[163] Courts have, following standard interpretive practice, imported the lack of a bottom-line defense to the FHA.[164] But the FHA cases assessing off-site market conditions apply a variation on the bottom-line defense: they ask whether housing availability elsewhere balances out an action's potential harms. Jonathan Zasloff has argued that, for certain land use claims, the bottom-line defense ought to apply, as a matter of statutory text and purpose.[165] This Article suggests that, despite statements to the contrary, courts already agree.[166]

E. Restructuring Opportunity on the Buyer's Side of the Market

Title VII treats as fixed two aspects of the employment process: the structure of the job being filled and the qualifications of the jobseeker for that position. So far, this Article has shown how the FHA restructures one side of the housing market: the opportunities available for buyers and renters seeking a home. The FHA can also restructure the other side of the market: what qualifications those buyers and renters bring to their search.[167] As exemplified by litigation involving homeowners' insurance,

[162] 457 U.S. 440, 450–51 (1982).

[163] Id. at 451.

[164] See, e.g., Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 (4th Cir. 1984) (applying *Teal* after noting the "almost identical language" and "parallel objectives of Title VII and Title VIII").

[165] Zasloff, Price of Equality, supra note 9, at 151–52.

[166] Like Zasloff, I wish to underscore that housing discrimination cases in most contexts should, and do, still follow *Teal*. Id. at 152 n.222; see, e.g., Alexander v. Edgewood Mgmt. Corp., No. 15-cv-01140, 2016 WL 5957673, at *3 (D.D.C. July 22, 2016).

[167] An increasingly important cousin of the cases discussed in this Section involves the behavior of tenant screening companies, which gather and assess a potential renter's qualifications for an apartment—including through extensive automated data collection and

the FHA can protect households' ability to secure certain prerequisites for housing. It not only ensures a fair provision of homes to those who qualify for them, but also helps change the qualifications of those seeking homes.

These cases asked whether denying a person homeowners insurance is covered by the FHA's catch-all prohibition on actions which discriminatorily "make unavailable" housing.[168] Courts have answered that it is. Homebuyers generally cannot purchase a house without a mortgage, courts reason; in turn, mortgage lenders generally will not provide financing without insurance.[169] Thus, the insurance discrimination makes the housing unavailable. Practically speaking, this is entirely appropriate. Insurance discrimination is as effective a technique of exclusion as anything else.

Sensible though it may be, this reasoning is also remarkable. The FHA protects people from discrimination not only in buying a home, but also in accessing certain prerequisites to buying that home.[170] And not only that! The Act provides protections in accessing prerequisites to a certain quality of housing on certain desirable terms. Insurance discrimination does not prevent a person from renting, after all; it frustrates only the additional option of homeownership. Nor does insurance discrimination prevent a person from buying a house with cash; it only prevents them from securing the additional benefits of a mortgage.[171] One could narrowly frame insurance discrimination not as denying anyone housing, but instead as (unfairly) determining the housing for which they qualify.

algorithmic analysis—to guide a landlord's decision. Tenant screening companies do not change the underlying qualifications of the homeseeker, but they can determine which are presented to the decisionmaker. HUD has recently issued extensive guidance on tenant screening companies' obligations under the FHA. Off. of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urb. Dev., Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing 1 (2024), https://web.archive.org/web/20250108175716/https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf [https://perma.cc/5QZP-FCLX].

[168] 42 U.S.C. § 3604(a). While mortgage lending is separately covered by 42 U.S.C. § 3605, the FHA's coverage of homeowners' insurance falls under this "catch-all" provision if anywhere.

[169] E.g., McDiarmid v. Econ. Fire & Cas. Co., 604 F. Supp. 105, 107 (S.D. Ohio 1984); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1354, 1357, 1360 (6th Cir. 1995).

[170] See also Ga. State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 634 (11th Cir. 2019) (holding that the FHA covers discrimination in provision of utilities, as access to utilities is "fundamental to the ability to inhabit a dwelling").

[171] See Mich. Dep't of Ins. & Fin. Servs., Information on Purchasing Home and Renters Insurance (Mar. 12, 2020), https://www.michigan.gov/difs/news-and-outreach/faq/insurance/info-purchasing-home-insurance [https://perma.cc/W63E-X9R4].

The denial of housing, on this telling, is simply the rejection of an unqualified applicant. Indeed, having insurance is a legitimate prerequisite for a mortgage, needed to protect the lender's interest in the property.[172]

Note, again, the difference from employment. Under Title VII, whether workers are "qualified" for a job (or promotion, etc.) is the *sine qua non* of most discrimination claims.[173] Employers are under no obligation to employ genuinely unqualified workers.[174] Nor does Title VII generate any obligations for others to refrain from discrimination in providing those necessary prerequisites to work.[175] Insurance itself provides a direct analogy. Just as insurance is required to buy a house, insurance is sometimes required as a condition of employment. This may be malpractice insurance for hospital employees[176] or auto insurance for workers who drive on the job.[177] The same simple syllogism from the FHA cases might apply: no insurance, no job. Yet Title VII does not prohibit discrimination in these insurance markets. Nor does Title VII protect against discrimination in acquiring more common prerequisites for securing one's desired employment, whether formal requirements like an occupational license or a diploma or informal ones like access to

[172] Thus, the litigation is not about removing an irrelevant qualification for housing, but helping households secure a relevant qualification without discrimination.

[173] 3 N. Peter Lareau et al., Labor and Employment Law § 54.02 (2025) ("Failure to demonstrate that one possesses the minimum qualifications for the job will be fatal to a plaintiff's case."); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650–51 (1989) ("It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case.").

[174] The important exceptions come when the employer itself caused the lack of qualification, see, e.g., Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1187 n.17 (9th Cir. 2002), or when training is provided by the employer itself, 42 U.S.C. § 2000e-2(d). Of course, where one job serves as a qualification for the next job, or where an employer discriminates in providing training or promotions, Title VII also applies.

[175] David A. Strauss, Sexual Orientation and the Dynamics of Discrimination, 2020 Sup. Ct. Rev. 203, 207.

[176] Thaddeus J. Nodzenski, Implementing Medical Staff Malpractice Insurance Requirements, 34 Hosp. & Health Servs. Admin. 281, 282–83 (1989).

[177] Pinghui Wu, Joshua Rivera & Samiul Jubaed, Understanding Job (Mis)Match: Jobs and Jobseekers in Detroit 8 (Aug. 2020) (working paper) (on file with Poverty Solutions at the University of Michigan), https://poverty.umich.edu/files/2021/03/Jobs-and-Jobseekers-in-Detroit-August2020-1.pdf [https://perma.cc/9CQH-UMY5] (finding that fifteen percent of entry-level jobs in Detroit require workers to have auto insurance).

transportation and childcare.[178] Title VII may intervene in how an employer *considers* those qualifications—the landmark *Griggs v. Duke Power Co.* case held that an employer's testing and diploma requirements were discriminatory where unrelated to job performance[179]—but that is a far cry from intervening in how authentic qualifications are acquired in the first place. Title VII takes workers' qualifications as given.

The FHA has not reached all, or even most, prerequisites for securing the housing of one's choice, of course. Most importantly, it does not redress discrimination causing wealth and income inequality or require housing be made available regardless of income. Courts have repeatedly insisted that the FHA does not provide any positive right to housing.[180] Nor is it clear, doctrinally, why some prerequisites to housing are covered by the FHA but not others.[181] But still, the Act reaches some prerequisites. Fair housing law quite distinctively appreciates how ending housing discrimination requires ending discrimination affecting people's qualifications for housing (and for a particular class of housing at that).

III. EXPLAINING THE FHA'S STRUCTURAL AMBITIONS

The distinctive doctrinal development of certain important FHA cases—even as courts purport to read the FHA as parallel to Title VII—reflects the imperatives of the statute itself. The doctrine emerges from clear textual choices made by Congress, which departed from its Title VII model in deciding whose and which actions the FHA scrutinizes. It also reflects the Act's purpose. Housing markets are different from labor markets. Addressing housing discrimination accordingly required a modified approach. The FHA's structural approach is intentional—and it makes sense.

[178] The application of Title VII to licenses is discussed in Subsection III.A.1. Discrimination in education is governed by other provisions of civil rights law, namely Titles IV, VI, and IX. Thus, while Title VII does not extend back into the pre-hiring qualifications of a worker, civil rights law as a whole sometimes does. But the difference is still significant. In fair housing law, discriminatory access to prerequisites for housing can be considered housing discrimination in and of itself. It is internal to the meaning of housing discrimination. Discriminatory access to education is not considered employment discrimination. Treating an issue outside Title VII also carries procedural and remedial implications. See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001) (rejecting a private right of action for disparate impact claims under Title VI).

[179] 401 U.S. 424 (1971).

[180] See, e.g., Acevedo v. Nassau County, 500 F.2d 1078, 1082 (2d Cir. 1974).

[181] Judicial capacity is surely an important, if largely unspoken, factor. See supra note 12 and accompanying text.

A. Text

1. Who Can Violate the FHA?

The foundational textual choice driving the FHA's more radical approach concerns whose discrimination is covered by the statutes: a few designated actors, or the world. Title VII takes a narrow, enumerated approach. Under Title VII, it is an unlawful employment practice "*for an employer* . . . to discriminate against any individual" with respect to employment.[182] Parallel provisions extend the antidiscrimination responsibility to employment agencies and labor organizations.[183] No one other than these three actors is responsible for ending employment discrimination.

Courts have allowed only a modicum of flexibility in understanding who constitutes an "employer." Even a parent company is not necessarily liable for the discrimination of its wholly owned subsidiary.[184] Outside players almost never fall within Title VII's coverage, no matter how directly their actions drive an employer's choices.[185] In limiting liability to employers, Congress decided that responsibility for employment discrimination only extends out so far.

The Fair Housing Act contains no such limitation. The FHA declares only that "it shall be unlawful" to take various discriminatory actions.[186] It does not enumerate that it is unlawful for "sellers," "landlords," "lenders," or "housing providers" to discriminate. Instead, it "focuses on prohibited acts."[187] As courts have long recognized, the Act's "passive voice" construction[188] means that it "applies on its face to 'anyone'"

[182] 42 U.S.C. § 2000e-2(a) (emphasis added).

[183] Id. § 2000e-2(b)–(c).

[184] See, e.g., Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987).

[185] Some courts permit an "interference" theory of liability, under which a party is liable for interfering in the plaintiff's employment relationship with another entity. Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973). Even these cases, however, require a quasi-employment relationship marked by substantial control over the plaintiff's work—the defendant must directly affect the employee, not the employer. Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 874 (6th Cir. 1991). Moreover, the "interference" theory relies on a non-textualist approach unlikely to govern moving forward. See Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 603–04 (9th Cir. 2000) (Gould, J., concurring in part and dissenting in part); Mays v. BNSF Ry. Co., 974 F. Supp. 2d 1166, 1171–74 (N.D. Ill. 2013).

[186] 42 U.S.C. § 3604.

[187] Meyer v. Holley, 537 U.S. 280, 285 (2003).

[188] NAACP v. Am. Fam. Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992).

engaging in a prohibited act.[189] The relevant limitation is only who, as a practical matter, is capable of committing the prohibited acts.[190] Rather than limit the scope of the FHA to certain actors, Congress constrained the FHA's reach primarily through exemptions for certain kinds of dwellings.[191] (The "Mrs. Murphy" exemption for small owner-occupied properties is the most famous.[192]) But insofar as their actions affect a covered dwelling, housing discrimination is something that anyone can do—and that everyone is obligated to forbear from.

This congressional choice drives many of the differences between the FHA and Title VII. Most importantly, upstream actors like public regulators and insurers are not employers under the plain terms of Title VII. No matter how mechanically the discriminatory outcome flows from regulatory action, it is not covered. Denying an individual an occupational license is a simple, direct denial of employment; a license is a legal necessity to work. Yet in contexts as varied as the biased administration of southern bar exams,[193] seniority requirements keeping women from working as longshoremen on the New York City docks,[194] and a blanket ban on allowing former felons to operate dance halls,[195] courts have allowed discriminatory licensure schemes to stand.[196] Title VII simply does not reach these defendants.[197]

[189] United States v. Hunter, 459 F.2d 205, 210 (4th Cir. 1972); see also Fair Hous. Just. Ctr., Inc. v. Broadway Crescent Realty, Inc., No. 10-cv-00034, 2011 WL 856095, at *4 (S.D.N.Y. Mar. 9, 2011) ("This court adopts the position that *anyone* who commits an act set forth in the statute is liable.").

[190] Rigel C. Oliveri, Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act, 43 Harv. C.R.-C.L. L. Rev. 1, 40 (2008). Even arsonists have been brought under the coverage of the FHA when their racially-motivated destruction makes housing unavailable. Antonio v. Sec. Servs. of Am., LLC, 701 F. Supp. 2d 749, 783 (D. Md. 2010).

[191] 42 U.S.C. § 3603(b). An important type of act (and actor) that is largely exempt from the FHA is discrimination by homeseekers. Choices about where to live are treated as a zone of personal autonomy. Lee Anne Fennell, Searching for Fair Housing, 97 B.U. L. Rev. 349, 378–80 (2017).

[192] 42 U.S.C. § 3603(b)(2).

[193] See Joan W. Howarth, The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams, 33 Geo. J. Legal Ethics 931, 938–46 (2020).

[194] Nat'l Org. for Women v. Waterfront Comm'n of N.Y. Harbor, 468 F. Supp. 317, 321 (S.D.N.Y. 1979).

[195] Darks v. City of Cincinnati, 745 F.2d 1040, 1041–42 (6th Cir. 1984).

[196] George v. N.J. Bd. of Veterinary Med. Exam'rs, 794 F.2d 113, 114 (3d Cir. 1986).

[197] At least one licensing body was brought under Title VII under an "interference" theory. See supra note 185. However, this instance involved the unusual circumstance where a state agency had "plenary" control over the relevant workers (teachers), such that the state was

The choice to ban housing discrimination by *anyone* is a necessary prerequisite for many of the FHA's more structural applications. The zoning and insurance cases, for example, would not be possible if only housing providers were covered by the FHA.[198] This universal obligation reflects the congressional desire to root out housing discrimination wherever it lurks. This textual choice about coverage, though, cannot fully explain the FHA's more structural approach. The redlining and housing improvement cases, for example, involve discrimination by actors who would likely be enumerated under any approach: lenders and landlords. Conversely, Title VII accepts market structures when an employer structures its own jobs—structures them as full-time, or as located in a particular neighborhood—just as much as when an outside actor structures the market. A broad reach of *who* can discriminate in housing is necessary, but not sufficient, to support the FHA's structural approach to antidiscrimination.

2. What Actions, Against Whom, Can Violate the FHA?

The second important textual source underpinning the FHA's structural approach comes from its "catch-all" provision, which quietly indicates the statute's attention to markets as a whole. Both the FHA and Title VII have catch-all provisions. Each statute, after listing a series of actions which are prohibited if done discriminatorily, contains a broad all-inclusive phrase to cover the rest of the field. Under the FHA, it is unlawful to refuse to sell or rent to someone because of a protected characteristic, but also to "otherwise make unavailable or deny, a dwelling" because of a protected characteristic.[199] Title VII's broadest language prohibits actions which "otherwise adversely affect [any individual's] status as an employee."[200] The Supreme Court has expressly analogized these provisions, describing each as a "catchall phrase[]

essentially the employer, not a regulator. Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 584 (9th Cir. 2000). But this outcome is exceptional even within the Ninth Circuit, which generally holds that licensing bodies are not covered by Title VII, Haddock v. Bd. of Dental Exam'rs of Cal., 777 F.2d 462, 463–64 (9th Cir. 1985), and most courts reject "interference" theories entirely, Lopez v. Massachusetts, 588 F.3d 69, 88–89 (1st Cir. 2009).

[198] Similarly, HUD has cited this aspect of the FHA in its guidance applying the Act to another important intermediary, tenant screening companies. Off. of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urb. Dev., supra note 167, at 4.

[199] 42 U.S.C. § 3604.

[200] Id. § 2000e-2(a)(2).

looking to consequences, not intent," and meant to "serve the same purpose and bear the same basic meaning."[201]

But for all these phrases' important similarities, they are not the same. Title VII precludes an employer from (discriminatorily) adversely affecting an individual's "status as an *employee*."[202] The FHA prohibits the making unavailable of a *dwelling*. Title VII's catch-all is, in some sense, interpersonal. It points to effects on workers, not on jobs. Moreover, it applies only to harms against individuals in a particular relationship (existing or sought-after) between employer and employee (or applicant). It is a catch-all, but only for discrimination within the bounds of that relationship.

The FHA's catch-all, in contrast, extends out to actions which operate only on dwellings. This is less immediate an understanding of discrimination. To be sure, making a dwelling unavailable includes purely interpersonal discrimination: pulling a house off the market to avoid selling to someone is covered. But the FHA's catch-all does not require a certain relationship between discriminator and discriminated-against. Indeed, it does not require any direct relationship between them at all; the discriminator's actions might affect only the dwelling itself.[203] This catch-all indicates that the availability of housing matters. It matters how many and what sort of homes exist to be rented and bought. It matters whether barriers like insurance discrimination or redlining leave those homes practically out of reach. The catch-all looks to conditions of housing markets, not just transactions within those markets. In doing so, it guides courts partway toward a structural analysis focused on the availability of opportunity.

The distinctiveness of the FHA's approach—its drafting to reach beyond individual transactions—is further underscored by a comparison to additional language in Title VII. The larger provision in which Title VII's catch-all is located provides that it is unlawful for an employer to discriminatorily "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

[201] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534–35 (2015).

[202] 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

[203] Dwellings, notably, do not have a race, a gender, or a familial status. In this way as well, the phrasing allows for the attenuation of what discrimination is covered.

status as an employee."[204] Just as the end of the provision focuses on the plaintiff's "status as an employee," the provision also only makes unlawful actions taken against the defendant's "employees or applicants."[205] This is a meaningful, and seemingly intentional, limitation.[206] For Title VII, Congress twice tethered its catch-all provision to actions taken within the employer-employee relationship. Though this provision is capacious—covering practices which only *tend* to deprive people of employment *opportunities*—not every discriminatory act which limits employment opportunities is covered, only those taken against "employees or applicants."[207] Courts have not usually focused on this language, but it instantiates Title VII's larger focus on a preexisting set of jobs rather than broader market structures.[208] Such limitations are absent in the FHA, though. In fair housing, the catch-all covers actions done to, or through, anyone. The zoning cases do not make housing unavailable through actions done "to a renter" or "to a buyer." They simply make the housing unavailable to the world.

The textual differences between the statutes still do not fully, mechanically, generate the FHA's structural approach. The mother seeking part-time work, for example, is already an employee, asking her employer for an arrangement that would tend to increase her opportunities at the firm. The text of Title VII's catch-all provisions provides no hard

[204] 42 U.S.C. § 2000e-2(a)(2).

[205] Id.

[206] The previous provision of the statute makes it unlawful for an employer to take certain specified discriminatory actions "against any individual." Id. § 2000e-2(a)(1). The specification of actions against "employees or applicants" in the broader, catch-all provision appears intentional.

[207] Cf. Mays v. BNSF Ry. Co., 974 F. Supp. 2d 1166, 1175 (N.D. Ill. 2013) ("The use of the phrase 'his employees or applicants' is significant; it expressly limits subsection (a)(2)'s prohibitory scope to actions that an employer takes with respect to its employees and applicants." (emphasis omitted)).

[208] Marley Weiss has also suggested that Title VII's inability to reach firms' locational decisions may be rooted in the employee-focused language of its catch-all provisions. Weiss, supra note 85, at 1010–11. When a firm is deciding where to site a new facility, there are no current employees and perhaps no applicants for the future jobs. To reach these jobs, courts would have to extend Title VII case law concerning the discriminatory "discouraging" of applications and shaping of the applicant pool to a new context. Id. at 1011. This is a plausible reading of the statute but still requires an additional step. Limiting scrutiny of employer location to the relocation of existing jobs more easily fits the statutory text—and this is indeed what the EEOC originally proposed to do. See supra notes 83–85 and accompanying text. Similarly, this could help explain why the Title VII cases most attuned to geographic structure involve layoffs, not hiring: there are existing employees. See supra notes 89–90 and accompanying text. This analysis, however, is somewhat speculative.

bar against her claim, but she still does not win. The underlying logic of Title VII—that it takes jobs as it finds them—does the work. Conversely, the FHA, too, has an underlying logic: that it need not accept housing markets as it finds them. The divergent approaches of the two statutes reflect not just text, but also their different purposes and contexts: the different markets they aim to fix.

B. Purpose

Courts have always read the FHA broadly, informed by the Act's purpose. They have embraced the statute's declaration of its policy "to provide, within constitutional limitations, for fair housing throughout the United States" and taken that enacted language to require a "broad and inclusive" construction of the text.[209] Most recently, the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, rooted its analysis in the history of restrictive covenants, redlining, Congress's urgent response to the urban unrest of the 1960s, and the Act's "central purpose."[210] Purposivism is also written directly into the statute. The statute requires all executive agencies to affirmatively further "the purposes of" the Act.[211] This indicates that the statute *has* a purpose that goes beyond its precise statutory instructions.[212] While some statutes are best understood only as a "compromise among various interest groups, resulting in a decision to go so far and no farther,"[213] the FHA's drafters understood the Act to have larger policy goals and wished to keep pressing toward them.

Consistent with this understanding of the Act, this Section now examines how a structural approach to housing discrimination derives from, and advances, the FHA's dual purposes of ending housing discrimination and promoting residential integration. While the legislative history of the Act is scant and not especially helpful, the

[209] E.g., City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (citations omitted).

[210] 576 U.S. 519, 528–30, 539 (2015).

[211] 42 U.S.C. § 3608(d).

[212] To be sure, just what that purpose is has been contentious. Kazis, Unfair Housing, supra note 9, at 7–8. Indeed, the very breadth of the FHA's coverage makes it more difficult to reduce "fair housing" to a single ideal. This has, at times, hampered the FHA's efficacy—at least absent clearer guidance from HUD. Id. at 7–13. In this way, the FHA's strengths and weaknesses are linked.

[213] E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 69 (2000) (Scalia, J., concurring).

drafters of the Act understood that features of housing discrimination made a structural approach essential to the Act's effective functioning. A market-level approach to fair housing responds to the distinctive nature of housing markets and housing discrimination—at the time of enactment and now—even as assumptions about market rationality and judicial competence pushed courts away from that approach in employment discrimination.

1. Legislative History

The legislative history of the FHA, unfortunately, generally offers few clues for understanding the law's precise operation, a result of the Act's path to enactment.[214] Early hearings focused on overarching questions of the need for and constitutionality of a federal fair housing law.[215] Then, the text ultimately enacted was a frank political compromise offered without any real explanation and hurriedly adopted, especially after Martin Luther King, Jr.'s assassination.[216] No committee report was produced, leaving the legislative history limited to statements by individual legislators openly seeking votes,[217] the least reliable form of legislative history.[218] These statements rarely examine individual provisions of the FHA, and certainly do not do so authoritatively. No legislative history definitively addresses either the textual choices described in Section III.A or how the Act would scrutinize or accept market structures.

What statements exist concerning the FHA's structural ambitions are mostly unreliable and contradictory. On the one hand, the FHA's lead Senate sponsors labored to emphasize that the legislation would have modest effects. Seeking to allay fears that white homeowners would be forced to sell to Black buyers, they emphasized that only households with

[214] Oliveri, supra note 190, at 25–27; United States v. City of Parma, 661 F.2d 562, 571 (6th Cir. 1981).

[215] See, e.g., Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. & Urb. Affs. of the S. Comm. on Banking & Currency, 90th Cong. 1–76 (1967) [hereinafter Hearings on the Fair Housing Act of 1967].

[216] See Robert G. Schwemm, Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision, 29 Fordham Urb. L.J. 187, 198, 204–05 (2001).

[217] Id. at 198–99.

[218] See George A. Costello, Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 Duke L.J. 39, 40–41.

adequate incomes—like sympathetic Black veterans and professionals—could afford suburban neighborhoods.[219] Statements that "the laws of economics" would still "determine who can buy a house"[220] might indicate the Act was intended to police only individual refusals to sell or lend and unconcerned with increasing housing options.[221] Yet other statements indicate otherwise. The Act's lead House sponsor, Judiciary Chairman Emanuel Celler, framed the Act as necessary for "[s]tates and municipalities" to "carry[] out their obligations to promote equal access and equal opportunity."[222] Securing public action to promote equal access evokes a very different statute than one only preventing private discrimination against middle-class buyers.[223] Given the advocacy context of these statements, though, it is hard to say if anyone spoke accurately, much less if they spoke for Congress. The bill's advocates wished, intermittently, to assuage concerns about the law's reach and praise the law's potential.

More telling, though, is a statement from Senate Minority Leader Everett Dirksen, whose compromise amendment ultimately became the Fair Housing Act. While still in opposition, Dirksen identified and

[219] Myron Orfield & William Stancil, Challenging Fair Housing Revisionism, 2 N.C. C.R.L. Rev. 32, 61 (2022); Alexander von Hoffman, The Origins of the Fair Housing Act of 1968, *in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods, supra note 18, at 47, 61.

[220] 114 Cong. Rec. 2275 (1968) (statement of Sen. Walter Mondale); see also id. at 2279 (statement of Sen. Edward Brooke) ("Fair housing does not promise to end the ghetto; . . . but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America.").

[221] A notable exchange highlights this point. In hearings held in 1967 on an earlier version of the law, Senator Walter Mondale told Attorney General Ramsey Clark that "you point out that this measure is designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or does not apply to zoning requirements, ordinances, and the rest." Hearings on the Fair Housing Act of 1967, supra note 215, at 22–23. If that statement were true and taken literally, this colloquy might indicate a more limited scope for fair housing. However, Clark's testimony never suggested that zoning requirements were not covered by the Act or that it was limited to refusals to rent or sell. Nor does Clark embrace this reading; he answers only by repeating that fair housing legislation would not be a "forced housing bill," but rather a removal of forced housing conditions for millions. Id. at 23. In context, Mondale's question is best read as indicating that the Fair Housing Act would not intrude on nondiscriminatory denials of housing to Black households (with Clark agreeing).

[222] 114 Cong. Rec. 9559 (1968) (statement of Rep. Emanuel Celler).

[223] The leading fair housing advocates also testified that land use tools functioned as effective "racial exclusion" that fair housing legislation would or should cover. Hearings on the Fair Housing Act of 1967, supra note 215, at 217 (statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing).

lambasted the breadth of the legislation. He noted its coverage of "any act or practice" that discriminates, calling it "the world with a fence around it" and "the whole kit and caboodle."[224] Dirksen continued, "Any act and every act can be decided as coming under this provision."[225] Dirksen's amendment eventually changed other elements of the bill in question, but kept the relevant language defining what acts were covered. The Act's ultimate drafter, therefore, understood the FHA's unusual breadth and accepted that no discriminatory act affecting housing is per se outside the FHA's scrutiny.

Also compelling is one feature of the Act's pre-enactment revision history.[226] Fair housing bills had not always employed a "passive voice" proscription on housing discrimination. The Johnson Administration's original 1966 legislation, which supplied the framework for what became the FHA, listed out a finite set of entities covered by each of the bill's provisions. The "owner, lessee, sublessee, assignee, or manager of" a dwelling was prohibited from discriminating in rentals or sales (or making a dwelling unavailable), while a "bank, savings and loan institution, credit union, insurance company" or other lender was barred from discriminating in mortgage terms.[227] Between 1966 and 1968, a drafting choice was made to drop these enumerations, thereby covering any actor who discriminated. The legislative history provides no indication why this choice was made. Indeed, it is unclear whether Congress fully understood that it was expanding the Act by switching to the passive voice: the 1966 list of actors was, at the time, said to be "all inclusive" and implying the "total elimination of discrimination in housing."[228] But whether abandoning this enumeration was meant consciously to expand the Act's coverage, it surely had that effect.[229] The legislative history thus provides some—but not much—support for the FHA's structural approach to housing discrimination. The Act's goals and context provide more important justifications.

[224] 112 Cong. Rec. 22622 (1966) (statement of Sen. Everett Dirksen).

[225] Id.

[226] See Anita S. Krishnakumar, Statutory History, 108 Va. L. Rev. 263, 300–03 (2022) (describing "meaningful revision" inference).

[227] 112 Cong. Rec. 9397 (1966).

[228] Id. at 18117.

[229] Congress might have revised this language to affirmatively avoid under-inclusivity or inadvertently in an effort to pare redundancies.

2. Achieving Integration

First, a structural approach is inherent in the Fair Housing Act's integrationist mission. The FHA has not one purpose but "dual goals": an "antidiscrimination policy" and an "antisegregation-integration policy."[230] The FHA makes integration more than just an aspiration to be achieved through antidiscrimination means. Actions having segregative effects are illegal under the FHA under a theory of liability recognized as independent from disparate impact or disparate treatment.[231] This focus on integration pushes courts into a structural mode when analyzing the FHA, even when not directly deciding a segregation-based claim.

Integration, after all, is intrinsically structural. Discrimination can be conceived of various ways: some more individualistic and some more group-based, some more focused on intent and others on effects. It is possible, whether desirable or not, to narrow the lens of discrimination to individual transactions. Not so with integration. Integration and segregation are not characteristics of individuals. They describe relationships between groups who are separated and concentrated across space or institutions.[232] They are collective, sociological qualities. It is meaningless to say a person has been "segregated" without reference to some larger distribution of people.

Thus, a statute that assesses integration, separate from antidiscrimination, is a statute which necessarily evaluates housing markets writ large. From there, it is no great leap to recognize that a statute which thinks spatially, collectively, and structurally about integration can do so likewise for discrimination. A given redlining case, for example, may not directly allege segregative effects.[233] But in examining the distribution of lending activity, that case employs a geographic analysis akin to what assessing segregation requires. Both employ a macro, spatial

[230] United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir. 1988); see also Clients' Council v. Pierce, 711 F.2d 1406, 1425 (8th Cir. 1983) (mentioning the statute's "dual and mutual goals").

[231] See Robert G. Schwemm, Segregative-Effect Claims Under the Fair Housing Act, 20 N.Y.U. J. Legis. & Pub. Pol'y 709, 710 (2017).

[232] The geographic facts of demographic separation and concentration are not sufficient to constitute "segregation" under all definitions. See Monica C. Bell, Anti-Segregation Policing, 95 N.Y.U. L. Rev. 650, 659–60 (2020). But under any telling, segregation is definitionally a trait of groups as sorted across space or institutions.

[233] Historically, redlining had a significant causal effect on segregation levels. See generally Daniel Aaronson, Daniel Hartley & Bhashkar Mazumder, The Effects of the 1930s HOLC "Redlining" Maps, 13 Am. Econ. J. 355 (2021).

lens. The FHA's integrationist purpose requires a market-level understanding of the problem being solved; this structurally oriented logic then extends throughout the statute.[234]

3. Overcoming Fragmentation in Housing Markets

Next, fair housing law looks to housing markets as a whole because those markets are too fragmented to do otherwise. In labor markets, employers are the dominant actors: they generally exercise significant control over employment outcomes. Many employers are also quite large. Housing markets are much more fragmented in two directions. Vertically, many more actors are engaged in common housing transactions. An ordinary household buying a home will work with a realtor, a seller, an appraiser, an insurance company, and a mortgage lender. Many sales further require the participation of a homeowners' association or involve an insurance broker. Discrimination by any one of these can be outcome-determinative—and all this is before introducing the importance of regulators. Historically, these sites of discrimination were also mutually-reinforcing: buyers', sellers', brokers', and lenders' business models were all built around each other's participation in a broader system of discrimination.[235] Today, the ongoing attention to steering, lending discrimination, insurance discrimination, and appraisal discrimination underscores how many layers of discrimination can impede a fair outcome (and how they compound).

Then, within each of these levels, housing markets are further fragmented horizontally. Most homes are bought and sold by individuals, not large firms.[236] Brokers, too, generally work as independent

[234] In defending an integrationist justification for affirmative action, philosopher Elizabeth Anderson has argued that in an integrationist model, "the solution is in the hands of any agent in a position to reduce it." Elizabeth S. Anderson, Integration, Affirmative Action, and Strict Scrutiny, 77 N.Y.U. L. Rev. 1195, 1212 (2002). Anderson's analysis suggests a connection between integration as an end and the universal command of the FHA to all actors as a statutory, textual choice.

[235] This was well understood by Congress at the time. As Rep. James Corman—a member of the Kerner Commission, whose findings helped prompt the final enactment of the FHA—said in voting to pass the Act, "[i]ndividual personal bias plays only a part in maintaining patterns of racial segregation. . . . Developers, real estate brokers, property managers, lenders, and apartment lessors share a typical concern [that] if they break the 'color line', they will suffer economic loss." 114 Cong. Rec. 9599 (1968) (statement of Rep. James Corman).

[236] The share of single-family homes bought by investors was around sixteen percent before the COVID-19 pandemic and rose to about twenty-seven percent thereafter. Alexander Hermann, 8 Facts About Investor Activity in the Single-Family Rental Market, Harv. Joint

contractors.[237] Large corporate involvement is also relatively rare in the rental market. In 2021, seventy percent of rental properties were owned by individuals (down from ninety-two percent in 1991).[238] Much of the remainder, which includes all properties owned by entities like LLPs or LLCs, are owned by quite small players. As Olatunde Johnson has argued, this fragmentation impedes the effectiveness of individual enforcement.[239] A single successful employment discrimination suit against, say, UPS might directly affect thousands of jobs within the firm, and then multiples more as sophisticated human resources and legal departments in other firms adjust their behavior. A successful lawsuit against a small-time landlord (or worse, an individual seller) might affect one or two units and go entirely unnoticed beyond that; these entities have no office to institutionalize compliance.

Given this fragmentation, meaningful action for fair housing requires taking a market-level approach. To counteract vertical fragmentation, fair housing law must cover each potentially discriminatory actor. Otherwise, other layers of the market could maintain segregationist outcomes. To counteract horizontal fragmentation, fair housing must be able to target institutional players like banks, insurers, and governments. Only enforcement against these central nodes effectively facilitates systemic change, either directly or through general deterrence. In a sector dominated by small, interconnected actors, civil rights law must be comprehensive and flexible in its coverage.

4. The Role of Market Rationality

The fragmentation of the housing market leads to another distinctive feature of fair housing law. In employment law, courts trust employers to operate rationally until proven otherwise and distrust their own capacity to intervene in the complex and diverse operations of firms. Operating in a very different market, many fair housing defendants do not receive the same deference.

Ctr. for Hous. Stud. (July 18, 2023), https://www.jchs.harvard.edu/blog/8-facts-about-investor-activity-single-family-rental-market [https://perma.cc/7PE3-GLQD].

[237] NAR Issue Brief: Real Estate Professionals Classification as Independent Contractors, Nat'l Ass'n of Realtors (Jan. 10, 2024), https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors [https://perma.cc/494D-WCSF].

[238] Brandon Weiss, Corporate Consolidation of Rental Housing & the Case for National Rent Stabilization, 101 Wash. U. L. Rev. 553, 560 (2023).

[239] See Johnson, supra note 1, at 1203.

In employment, courts act on an assumption that market pressures often leave firms basically reliable.[240] Firms are sufficiently incentivized to profit-maximize, which constrains their behavior, and sufficiently expert to effectively respond to those incentives. This presumption structures the *McDonnell Douglas* test: plaintiffs may establish a prima facie case of discrimination by knocking out the common, legitimate, business-oriented reasons for an adverse action against them.[241] And it limits courts' willingness to search for the "best" employer practices; as the Supreme Court explained in *Furnco Construction Corp. v. Waters*: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."[242] This presumption justifies and entrenches a focus on acts of interpersonal and irrational animus—those which are more obviously unwarranted by market forces—while legitimating employment market structures themselves.

The market's purported efficiency does much less work in the housing context. The same *McDonnell Douglas* framework generally applies, to be sure. But dicta about defendants' inherent competence and rationality are scarce. This partially reflects the greater variety of defendants covered by the FHA. One important set of actors—governments—are not directly constrained by the market at all.[243] The governments' structuring of the market is not owed the same deference as the market's structuring of itself.[244] Embracing this reasoning, a minority of courts have even drawn formally different standards for adjudicating FHA claims against public actors. The Fourth and Seventh Circuits, for example, historically treated disparate impact claims more favorably if they sought to remove local

[240] See Noah D. Zatz, Disparate Impact and the Unity of Equality Law, 97 B.U. L. Rev. 1357, 1359 (2017) (describing conservative moves in employment law based on a theory of the "self-regulating market," where the proper role of law is limited to "suppressing employer deviations from a profit-maximizing logic of the market sphere"); Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728, 793 (2011) ("[C]ourts tend to be especially wary of appearing to be hyper-regulators of the workplace given the background commitments, both ideological and doctrinal, that typically favor employer autonomy.").

[241] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

[242] 438 U.S. 567, 578 (1978).

[243] But see The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates (William A. Fischel ed., 2006) (describing the market for local services).

[244] Governments sometimes earn their own form of deference. While courts sometimes evince a distrust of regulation, they also—especially more recently—have emphasized that state and local governments should not be prevented from protecting their own citizens through land use controls. See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 544 (2015).

regulations interfering with private housing construction than if they sought to affirmatively compel a government to build integrated housing.[245] This approach gave the FHA a certain type of structural analysis: a deregulatory one.

Even most private actors in housing are described without deferential language.[246] This likely reflects who those actors are. Private defendants in fair housing litigation are often individual homeowners, independent real estate brokers, or small-time landlords who own a building or two. They are not necessarily sophisticated actors; for many, real estate is not their full-time job. Courts do not describe these actors as more competent than judges, presumably because often, they are not: judges buy and sell homes, too.

Moreover, individuals often engage with the housing market through intermediaries (most notably brokers). These intermediaries are widely understood not only to navigate markets, but through their control over information, to construct those markets—sometimes in discriminatory ways.[247] Thus, one year after the Supreme Court explained the importance of deferring to employment markets in *Furnco*, it described real estate agents' steering as "manipulat[ing] the housing market" in a leading FHA case.[248] Market structures are presumed to reflect economic rationality in the bureaucratized and consolidated employment market. But in housing, they are more often seen to reflect the prejudices of the market's many small-time participants—and then to impose those prejudices on others.[249] Courts are therefore more willing to intervene.

[245] Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 n.5 (4th Cir. 1984); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290, 1293 (7th Cir. 1977). I say "historically" because HUD's codification of a disparate impact standard did not adopt this element. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013).

[246] When courts express solicitude for individual participants in the housing market, they usually emphasize defendants' "private autonomy," not their competence. *Arlington Heights*, 558 F.2d at 1293. This leads to very different zones of deference, however, especially as autonomy- and property-based rights to discriminate were fully aired and mostly rejected in the debates over the FHA.

[247] Elizabeth Korver-Glenn, Race Brokers: Housing Markets and Segregation in 21st Century Urban America 7–8 (2021); Max Besbris, Upsold: Real Estate Agents, Prices, and Neighborhood Inequality 6, 15–16 (2020).

[248] Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979).

[249] I suspect that the immense government involvement in the mortgage market similarly makes the construction of the housing market more visible. Courts' willingness to deem a mortgage (and therefore homeowners' insurance) all but necessary to buying a house, as opposed to one preferred but unprotected option for buying a house, see supra Section II.E,

Finally, housing providers have less need to discriminate on legitimate bases than employers. As *Furnco* suggests, jobs are different from each other in countless small ways, and work requires ongoing, involved relationships between employees, their bosses, and their coworkers. Employers need to evaluate individuals for things like personality and job-specific skills and then match them to business models that can vary considerably. These are assessments that markets should generally perform better than courts. Most housing transactions, though, are flatter. Landlords, sellers, and lenders do not try to match each unit to just the right resident. They should be more focused on financial basics and risk factors, and business models should be more similar across entities. Courts can be more confident they will not break the housing market if they intervene.

Here, insurance is the exception that proves the rule. Courts (and under the Trump Administration, HUD) have expressed concerns with scrutinizing insurance risk classification decisions under the FHA. There, FHA defendants appear more sophisticated, more constrained by competition, and more capable of and reliant on making accurate individualized assessments. In this context, there has been an urge to pull back the FHA's reach.[250] These exceptional cases, however, have not defined the general doctrine.

The Title VII and FHA cases share a certain neoliberal skepticism of government intervention into a well-ordered private market.[251] Under Title VII, that skepticism limits the reach of the statute, focusing it on individual acts of interpersonal discrimination.[252] Private actors should

may be shaded by the federal government's active creation and promotion of a system where the thirty-year self-amortizing mortgage is the norm for homebuying.

[250] See Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423 (4th Cir. 1984); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288, 60323–27 (Sept. 24, 2020).

[251] Cf. Dinner, supra note 114, at 1070 (discussing "how Title VII and neoliberalism intertwined historically").

[252] Among the employment discrimination cases that come closest to questioning employers' geographic organization of opportunity are those involving layoffs concentrated in certain locations. See cases cited supra note 89. Notably, these cases appear to have disproportionately concerned layoffs at public employers. See cases cited supra note 89 (collecting cases that involved layoffs at Chicago schools, a Washington, D.C. child welfare agency, and an Illinois unemployment insurance agency). This is likely because public entities' decisions about downsizing are not clothed in a presumption of economic necessity. Cf. Shollenbarger v. Planes Moving & Storage, 297 F. App'x 483, 486 (6th Cir. 2008) (finding a legitimate business justification for cutting predominantly female job categories in an analogous private sector case).

structure the employment market. But in the FHA cases, that same deference to the free market provides fewer obstacles to judicial intervention—and even justifies suits against discriminatory local governments that prohibit housing construction or brokers who limit buyers' access to information.[253] Housing markets are visibly constructed by actors who are not clothed in the armor of market rationality. Courts are willing and able to reconstruct such markets.

IV. THE FHA'S STRUCTURAL AMBITIONS IN CONTEMPORARY CONTEXT

The broad scope and structural ambitions of the FHA are core aspects of the statute, found in the statute's text, purpose, and consistent case law dating to the Act's enactment. But they have rarely been recognized explicitly, and never systematically. Out loud, courts stick to the Title VII analogy. This Part closes by showing how identifying the breadth of the Fair Housing Act supports new claims and clearer thinking in contemporary legal contexts. First, it shows how litigants are currently using the Fair Housing Act's market-level approach to take on the challenge of algorithmic discrimination. Then, it identifies three recent areas of controversy in fair housing law that could be better understood in light of the FHA's breadth.[254]

A. Online Platforms

In recent years, the FHA has proved uniquely able to confront the new challenge of discrimination by online platforms, demonstrating the continued relevance of its concern with discriminatory market structures. As these platforms create and structure new marketplaces online, especially for advertising, the FHA has been civil rights litigants' best tool to intervene.

As advertising has moved online, the opportunities for discrimination have changed—and even increased.[255] Print and broadcast media, no

[253] In the land use context, Stewart Sterk has deemed this "market restoration." Stewart E. Sterk, Federal Land Use Intervention as Market Restoration, 99 B.U. L. Rev. 1577, 1581–82 (2019).

[254] A market-level analysis does not and should not mean that courts should take over broad swaths of housing policy. It informs the application of the FHA, as constrained by standard legal principles external and internal to the statutory scheme.

[255] Katherine M. O'Regan, The Fair Housing Act Today: Current Context and Challenges at 50, 29 Hous. Pol'y Debate 704, 707 (2019).

matter how targeted, are still accessible to anyone interested: women can read the ads in *G.Q.*, for example. Advertising on Google, Facebook, and other online forums, in contrast, can be targeted so that certain demographics never see certain advertisements. Online ads might be directly filtered based on a protected characteristic (e.g., showing a listing to only young men); based on a closely correlated characteristic (e.g., filtering out Univision viewers to exclude Latinos); or based on "lookalike" demographics where the platform advertises to the users most similar to the advertisers' existing customers (replicating any preexisting disparities).[256] Other users would not know that the opportunity being advertised existed. When advertising jobs or homes, the potential for illegal discrimination is considerable—and litigation, accordingly, has taken off. Such litigation raises a raft of issues for civil rights law—including cutting-edge questions of how to understand algorithmic discrimination influenced by the real-time interactions of users, advertisers, and platforms—and HUD described its approach to discrimination on digital platforms in important new guidance published in April 2024.[257]

For this Article, though, what is notable is how much more strongly claims against the platforms have fared under the Fair Housing Act than under supposedly parallel civil rights statutes. The major litigation to date has focused on Facebook. The first round of suits, brought by private plaintiffs, focused on Facebook allowing advertisers to select certain audiences and ended in a major settlement. While Facebook agreed to change its protocols for employment, credit, and housing advertisements, it agreed to greater protections against housing discrimination.[258] The

[256] Pauline T. Kim & Sharion Scott, Discrimination in Online Employment Recruiting, 63 St. Louis U. L.J. 93, 98 (2018).

[257] Off. of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urb. Dev., Guidance on Application of the Fair Housing Act to the Advertising of Housing, Credit, and Other Real Estate-Related Transactions Through Digital Platforms 1 (2024), https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Advertising_through_Digital_Platforms.pdf [https://perma.cc/T8D7-GLL9].

[258] Facebook et al., Summary of Settlements Between Civil Rights Advocates and Facebook (2019), https://nationalfairhousing.org/wp-content/uploads/2022/01/3.18.2019-Joint-Statement-FINAL-1.pdf [https://perma.cc/3GJU-5CSS]. For all three categories, Facebook agreed to create a separate advertising portal in which advertisers could not target users based on protected characteristics or closely correlated characteristics (including geography). Id. For housing alone, however, Facebook agreed to create an additional page where users could search all listings, regardless of what was promoted to the user on their feed. Id.

settlement indicates that the parties agreed plaintiffs' housing claims stood on different, stronger ground.

After this settlement, the federal government stepped in with additional claims. The government alleged that Facebook was still permitting advertisers to choose their audiences in discriminatory ways and added additional claims that Facebook's algorithms discriminatorily selected users from within advertisers' targeted group; in their words, Facebook discriminated by facilitating advertisers' selection of an "eligible audience" and then again in creating the "actual audience" who saw the ads.[259] But unlike the private litigants, the federal government did not allege housing, credit, and employment discrimination. They brought their claims under the Fair Housing Act alone.[260]

The strategic reason, presumably, is the difficulty in extending Title VII's obligations to Facebook. When posting a help-wanted ad, the advertiser, not Facebook, is the relevant employer. But the advertiser does not control the algorithm that selects an "actual audience" from the "eligible audience." A suit against them could not redress all the relevant harms. To bring Facebook under Title VII's coverage, plaintiffs would have to argue that Facebook was acting as an "employment agency" that "regularly undertak[es]" the role of procuring employees for employers. This argument is not implausible, but it is ambiguous and untested.[261] But while Title VII only debatably reaches online advertising, the Fair Housing Act clearly covers the publishers of discriminatory advertisements: "[T]he publication of discriminatory classified advertisements in newspapers was precisely one of the evils the Act was designed to correct."[262] The federal government planned its litigation accordingly.

[259] See Charge of Discrimination ¶¶ 13, 21–23, Facebook, Inc., FHEO No. 01-18-0323-8 (H.U.D. Mar. 28, 2019); Memorandum of Law in Support of Joint Motion for Approval of Proposed Settlement Agreement at 2–3, United States v. Meta Platforms, Inc., No. 22-cv-05187 (S.D.N.Y. June 21, 2022).

[260] When *United States v. Meta Platforms* settled, too, Facebook voluntarily extended the settlements' terms to ads for employment and credit. Ariana Tobin & Ava Kofman, Facebook Finally Agrees to Eliminate Tool that Enabled Discriminatory Advertising, ProPublica (June 22, 2022, 4:30 PM), https://www.propublica.org/article/facebook-doj-advertising-discrimination-settlement [https://perma.cc/G5C4-HJCB].

[261] Pauline T. Kim, Manipulating Opportunity, 106 Va. L. Rev. 867, 915–17 (2020).

[262] United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972). Discriminatory advertising is not handled under the FHA's general prohibition on making housing unavailable, but rather under a special provision regulating all discriminatory statements. 42 U.S.C. § 3604(c).

This litigation highlights the contemporary importance of the FHA's structural approach. Pursuing individual cases of discrimination in Facebook's housing listings is unlikely to produce any substantial reduction in total discrimination—enforcement building by building (or sublet by sublet) in that fragmented market just does not add up. But Facebook is a centralized node in the market. It could disseminate reforms widely. Indeed, online platforms are today's market-makers for so many important transactions.[263] They are the intermediaries that "direct opportunities in ways that reproduce or reinforce historical forms of discrimination."[264] The FHA is attuned to how intermediaries structure transactions and how that structure can shape and constitute discrimination. By bringing these intermediaries within the scope of civil rights law, the FHA—uniquely—can target contemporary forms of discrimination.

B. Affirmatively Furthering Fair Housing

An appreciation for the structural ambitions of the Fair Housing Act also helps us better understand one of the Act's most important, but obscure, provisions—and to appreciate that it, too, has an ambitious reach. This Section reexamines the recent administrative jockeying over the scope of the FHA's "affirmatively furthering fair housing" ("AFFH") requirement in light of the FHA's attention to market-level harms, finding new support for broad conceptions of the AFFH process.[265]

[263] Julie E. Cohen, Law for the Platform Economy, 51 U.C. Davis L. Rev. 133, 165 (2017) ("Platform-based, massively-intermediated processes of search and social networking are inherently processes of market manipulation.").

[264] Kim, supra note 261, at 869.

[265] Appreciating the FHA's breadth does not provide answers to all, or even most, questions about AFFH. My goal here is more basic, and perhaps more defensive: to ground a robust AFFH process in the commitments of the Act's core antidiscrimination provisions. Much has been written about how to strengthen the AFFH process, including how to improve efficacy and enforceability, e.g., Abraham, supra note 5, at 51–52; Kazis, Unfair Housing, supra note 9, at 13–21; how to apply AFFH in new policy domains or geographic contexts, e.g., Vicki Been, Gentrification, Displacement, and Fair Housing: Tensions and Opportunities, *in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods, supra note 18, at 169, 169–91; Michael C. Lens, Incorporating Data on Crime and Violence into the Assessment of Fair Housing, *in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods, supra note 18, at 192, 192–209; Megan Haberle, Furthering Fair Housing: Lessons for the Road Ahead, *in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods, supra note 18, at 210, 210–23; Jade A. Craig, "Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South, 40 Miss. Coll. L. Rev. 5, 93–96 (2022); how to quantify AFFH progress,

In addition to its core, privately-enforceable provisions directly prohibiting discrimination, the FHA also tasks all executive agencies with the obligation to administer their housing and urban development-related programs "in a manner affirmatively to further the purposes" of the Act.[266] HUD grantees, including state and local governments, must do the same.[267] AFFH, by all accounts, requires the government to do more than stop discriminating.[268] Covered entities must proactively build a fairer housing system.[269] This is a unique, powerful provision of law, one that policymakers, advocates, and scholars have rightly identified as potentially transformative.

But just what it means to affirmatively further fair housing is far from clear. The terms are not defined in the statute, and there is little relevant legislative history to offer guidance.[270] In implementing this provision, HUD has had to grapple with many difficult questions. What policies are sufficiently housing-related to fall under the AFFH obligation? Just how much affirmative furthering is required, and what are the consequences for falling short? And what is "fair housing" anyway? Does furthering it obligate a state to prioritize mobility and racial integration over community development in segregated neighborhoods?

e.g., Paavo Monkkonen et al., Do Land Use Plans Affirmatively Further Fair Housing?, 90 J. Am. Plan. Ass'n 247, 251–52 (2024); and how AFFH might navigate difficult questions of fair housing law, especially regarding the balance between mobility and place-based strategies, e.g., Thomas Silverstein & Diane Glauber, Leveraging the Besieged Assessment of Fair Housing Process to Create Common Ground Among Fair Housing Advocates and Community Developers, 27 J. Affordable Hous. & Cmty. Dev. L. 33, 36–38 (2018).

[266] 42 U.S.C. § 3608(d).

[267] This requirement has been interwoven into federal housing law through a series of enactments that require HUD's grantees to certify that they will "affirmatively further fair housing." Id. § 5304(b)(2) (Community Development Block Grant); id. § 5306(d)(7)(B) (Housing and Community Development Act); id. § 12705(b)(15) (Cranston-Gonzalez National Affordable Housing Act); id. § 1437c-1(d)(16) (United States Housing Act). These obligations are generally understood as parallel.

[268] Even the weakest articulation of the AFFH requirement agrees on this point. See Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47902 (Aug. 7, 2020).

[269] NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 155 (1st Cir. 1987).

[270] The language is derived from an advocacy document prepared by the National Committee Against Discrimination in Housing. Von Hoffman, supra note 219, at 60–62. It clearly indicates concern that federal housing policies, especially at the Federal Housing Administration and in public housing, be administered to promote integration—the opposite of agencies' practice at the time. Id. at 63. See generally Joy Milligan, *Plessy* Preserved: Agencies and the Effective Constitution, 129 Yale L.J. 924 (2020) (describing how segregationism persisted in federal housing policy long after *Brown v. Board of Education*). However, just what such administration entails—what it may entail and what it must entail—was left unanswered. Von Hoffman, supra note 219, at 63.

Any plausible answer must relate, at least somewhat, to the other provisions of the Fair Housing Act. After all, the requirement is that agencies work "affirmatively to further the purposes *of this subchapter*."[271] The obligation exists in reference to the Fair Housing Act as a whole. While the AFFH obligation goes well beyond the FHA's core antidiscrimination provisions, the latter shapes any understanding of the former.

Thus, if the FHA takes a structural perspective on discrimination, AFFH should require additional furthering of those same structural ambitions. This helps fill in the content of AFFH: if AFFH requires doing "more" than not discriminating, understanding the Act's structural approach points to what more must be done.

After all, many affirmative interventions involve only the fair matching of people to existing opportunities. That is often how affirmative action has functioned in race-based hiring, contracting, or educational admissions programs: the opportunities are fixed and their allocation is at issue. A requirement to "affirmatively further" fair housing could conceivably be limited to this scale. A public housing authority might be obligated to affirmatively market its existing homes with integration in mind but not to site new units to foster integration, while a state might need to increase enforcement actions against individual instances of discrimination but not improve land use regulations or shift funding patterns. Affirmative marketing and robust enforcement clearly further fair housing—they are *part* of what AFFH requires—but the statute demands more. AFFH should look more broadly, because the Fair Housing Act looks more broadly.

Drawing that connection helps clarify ongoing debates about the proper scope of the AFFH process. The AFFH process was given shape during the Obama Administration after a series of exposés revealed how HUD had failed for decades to enforce the provision. Building on existing regulations and case law, HUD chose a procedural approach to AFFH. It required that localities conduct detailed analyses of fair housing issues, created data tools to inform those analyses, and mandated participation processes to elevate the issue within local governance. At the time, one of HUD's most ambitious choices was to require that these analyses study not only housing conditions, narrowly defined, but also how community assets like transportation, employment, and education were distributed

[271] 42 U.S.C. § 3608(d) (emphasis added).

across racially and ethnically concentrated neighborhoods. Supporters celebrated this more holistic look at opportunity,[272] but critics saw it as intrusive and unauthorized. In the notice-and-comment process, HUD grappled with the criticism that its strategies went "beyond the scope of the protections of the Fair Housing Act."[273] Conservative criticism of the Biden Administration's attempts to revive a substantially similar AFFH rule[274] leveled the same charge.[275]

HUD responded—properly—that homes "do not exist in a vacuum."[276] Rather, neighborhood conditions shape "fair housing choice and access to opportunity."[277] Connecting this insight to the structural approach of the FHA's core substantive provisions, though, could have strengthened HUD's defense. Just as land use laws shape what kinds of housing are available where, and therefore guide patterns of integration, so too does physical and social infrastructure. It defines the context in which housing decisions are made. We ask that housing not only provide shelter, but also provide access to good jobs and schools. An AFFH process attentive to neighborhood conditions can increase the number and variety of quality homes for households to choose from. That is, at its core, not so different from expanding the number and variety of homes through zoning changes. Both increase the number of housing opportunities in good neighborhoods, one by adding housing in already high-opportunity neighborhoods, the other by building good neighborhoods around

[272] See, e.g., Angela Glover Blackwell, A Call to Action to Embrace and Enforce the AFFH Rule, *in* The Dream Revisited: Contemporary Debates About Housing, Segregation, and Opportunity in the Twenty-First Century 222, 223 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019).

[273] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42281 (July 16, 2015); see also Howard Husock, Affirmatively Furthering Fair Housing: Are There Reasons for Skepticism?, *in* Furthering Fair Housing: Prospects for Racial Justice in America's Neighborhoods, supra note 18, at 127, 128 ("[N]otwithstanding its name, affirmatively furthering fair housing is less about 'fair housing'—in terms of nondiscrimination, equal opportunity, and racial/ethnic integration—and more about a model to improve the life chances . . . for those who participate in the program . . . .").

[274] Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91–93, 570, 574, 576, 903, 983).

[275] Howard Husock, Citing 'Equity,' Biden Revives a Pernicious Housing Proposal from the Obama Administration, Nat'l Rev. (Jan. 24, 2023, 6:30 AM), https://www.nationalreview.com/2023/01/citing-equity-biden-revives-a-pernicious-housing-proposal-from-the-obama-administration/ ("The breadth of the 'equity plans' with which HUD will burden local officials is breathtaking, touching on almost any aspect of local government.").

[276] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42282 (July 16, 2015).

[277] Id.

existing housing. If the FHA takes a market-level perspective concerned with the set of available opportunities, these both further the purposes of the Act. Were the FHA only concerned with fair matching—or even only concerned with fair matching and segregation—it is not clear they would.

Conversely, recognizing the FHA's breadth requires abandoning the most crabbed visions of AFFH. During the heat of the 2020 election, for example, the Trump Administration put forward a final rule eviscerating AFFH obligations. The rule deemed any affirmative action sufficient to comply, no matter how small, so long as it was "rationally related" to promoting fair housing; it also eliminated any process for overseeing or enforcing the obligation.[278] In 2025, the second Trump Administration put forward a similar rule which likewise would essentially eliminate any meaningful AFFH process.[279] There are *many* flaws with these rules: as a matter of fair housing law, administrative procedure, and effective governance. Their purpose was to require as close to nothing as possible. But in 2020, HUD's legal justification for effectively repealing all AFFH requirements rested, in large part, on a claim that AFFH had swept in too much.[280] "Fair Housing," HUD claimed, had a "limited scope" in that "housing is 'fair' if anyone who can afford it faces no discrimination-based barriers to purchasing it."[281] In this telling, the Fair Housing Act only provides for "the elimination of discrimination," and this, in turn, is limited to "overt housing discrimination" and "[d]iscrimination in the sale and rental of housing."[282] It is well established the first half of this claim is wrong: the FHA has always been concerned with segregation as well as discrimination. But this Article underscores the errors with the second half of the rule's logic. "Discrimination" is understood capaciously in the fair housing context, and for good textual reasons. A focus only on

[278] Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47904 (Aug. 7, 2020).

[279] Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11020, 11020 (Mar. 3, 2025) (requiring only a "general commitment that grantees will take active steps to promote fair housing").

[280] In 2025, HUD barely offered any new justification for its decision, largely reincorporating the 2020 analysis. See id. ("Grantee AFFH certifications will be deemed sufficient provided they took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination.").

[281] Preserving Community and Neighborhood Choice, 85 Fed. Reg. at 47901.

[282] Id. at 47901–02 (quoting NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 154 (1st Cir. 1987)); see also id. at 47900 (arguing that using AFFH to force changes to zoning was "never authorized by law").

discrete transactions, or on only the particular actions of renting or selling a house, ignores the scope of the Act.

Recognizing the FHA's capacity to restructure markets still allows multiple visions for how those markets ought to be restructured. Consider an alternative AFFH rule proposed by the Trump Administration earlier in 2020.[283] This rule would have created a new AFFH framework, somewhat less planning-oriented than the Obama rule, while replacing a more race-conscious assessment of segregation and discrimination with a deregulatory focus on eliminating barriers to housing supply. Fair housing advocates saw this proposal as weakening enforcement and community participation mechanisms while abandoning the FHA's specific focus on protected characteristics.[284] It may have been unwise or unlawful. But even so, this proposed rule *did* capture the FHA's focus on market structure. The proposed rule would have defined the AFFH obligation as "advancing fair housing choice," which consisted not only of "protected choice" (a lack of discrimination at the transaction level) but also "actual choice" and "quality choice."[285] These required that an adequate supply of affordable housing options exist, that information and resources be available to allow informed choices, and that the available housing be decent, safe, and sanitary.[286] HUD explained: "Fair housing choice requires not only the absence of discrimination but the existence of realistic housing options."[287] This proposed rule—despite its faults—embraced the FHA's attention to the market structures within which homes are acquired.

Thus, the Obama/Biden rules emphasized the spatial elements of fair housing, including segregation, and the importance of neighborhood conditions for expanding quality housing options. The Trump Administration's proposed rule emphasized the barrier-removing aspects of fair housing and the need for abundant affordable homes. These are

[283] Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (proposed Jan. 14, 2020).

[284] E.g., Letter from Lisa Cylar Barrett, Dir. of Pol'y, NAACP Legal Def. & Educ. Fund & Hamida Labi, Pol'y Couns., NAACP Legal Def. & Educ. Fund, to David Enzel, Deputy Assistant Sec'y for Enf't Programs, U.S. Dep't of Hous. & Urb. Dev. 8–11 (Mar. 16, 2020), https://www.naacpldf.org/wp-content/uploads/AFFH-Comment-Letter-FINAL.pdf [https://perma.cc/S2HT-L96B]; Letter from Lisa Rice, President & CEO, Nat'l Fair Hous. All., to Reguls. Couns., U.S. Dep't of Hous. & Urb. Dev. 14–19 (Mar. 16, 2020), https://nationalfairhousing.org/wp-content/uploads/2020/03/NFHA-Comments-on-HUDs-2020-Proposed-AFFH-Reg-3.16.20.pdf [https://perma.cc/KX3G-FW3X].

[285] Affirmatively Furthering Fair Housing, 85 Fed. Reg. at 2045.

[286] Id.

[287] Id. at 2047.

very different visions of fair housing—but they are both structural. In sharp contrast to the Trump Administration's ultimate rules, both sought to improve the set of opportunities within which individual choices can be made. The market-level analysis of the FHA should guide a market-level process for AFFH—and this is an ambition that can cross partisan lines.

C. Disparate Impact

Disparate impact liability under the civil rights laws, though repeatedly affirmed by the Supreme Court, has been under steady attack from conservative judges, being narrowed on statutory grounds and questioned on constitutional ones.[288] After decades in which it examined disparate impact primarily in employment cases, the Supreme Court's most recent extended examination of disparate impact came in an FHA case: *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*.[289] That case, and in particular, Justice Alito's dissent, shows how the judicial conflation of the FHA with Title VII breeds misunderstanding, or perhaps allows for obfuscation. At issue in *Inclusive Communities* was whether the FHA authorized disparate impact liability. Because the disparate impact framework was created in *Griggs*, a Title VII case, both the majority and dissent bounced between the employment and housing contexts. In doing so, judges and litigants expressed a palpable discomfort with the FHA's breadth, but without apprehending where in the statute that breadth came from. That discomfort was then sublimated into attacks on the doctrinally separate issue of disparate impact.

This misunderstanding is most visible—and given changes to the Court's composition, highest-stakes—in Justice Alito's dissent for four conservative justices. Justice Alito exposed the imperfect match between disparate impact liability as applied in the two areas of law. But he incorrectly diagnosed the source of that mismatch, and its import. The issue driving his concerns was not (only) that disparate impact was available under the FHA, but that the FHA applied disparate impact to actors and actions not reached by Title VII.

[288] See, e.g., Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring) (raising constitutional questions); id. at 620–26 (Ginsburg, J., dissenting) (describing the majority's narrowing of disparate impact).

[289] 576 U.S. 519 (2015).

One passage is particularly telling. To illustrate the purported errors of disparate impact liability, Justice Alito's dissent offered three hypotheticals (notably, all from the employment context, though the case was interpreting the FHA).[290] Two related to statistical disparities in hiring; Alito asked whether the disproportionately Black NFL draft class or the disproportionately young attorneys representing the Solicitor General showed discrimination "because of" race or age.[291] These examples both involved a classic Title VII question—employers' selection of employees for a fixed set of jobs—and implicate a core question about disparate impact: when statistical imbalances without evidence of discriminatory intent create liability.[292]

But Justice Alito's lead hypothetical was quite different. There, he asked whether a minimum wage which by assumption reduced the number of jobs available for unskilled Black and Latino workers made jobs unavailable "because of" race.[293] The intuition he sought to elicit, of course, is that minimum wages are not discrimination. But this hypothetical constructs a slippery slope by pasting the choices made by Congress for one issue, housing, to another, employment, where Congress, for its own reasons, chose differently. This example involves a regulatory action, not an employer's decision. So as previously explained, the imagined defendant is expressly not covered by Title VII. Moreover, the hypothetical concerns an impact on the quantity of jobs available rather than the selection of people for those jobs, which again, is not a type of claim that Title VII generally recognizes. Under no formulation of disparate impact (or even discriminatory intent) would Title VII prohibit minimum wages.

Accordingly, the minimum wage hypothetical obscures rather than illuminates. Even if one considers the hypothetical outcome unacceptable—inconsistent with the law of employment discrimination, an overreach beyond congressional intent, or an undesirable policy consequence—it does not speak to disparate impact, per se. It is the

[290] Formally, the examples are meant to show that the phrase "because of race" means "motivated by" race, rather than caused by race. See Noah D. Zatz, The Many Meanings of "Because Of": A Comment on *Inclusive Communities Project*, 68 Stan. L. Rev. Online 68, 68 (2015). But the examples chosen make a results-oriented argument as much as a textual one.

[291] *Inclusive Cmtys.*, 576 U.S. at 564–65 (Alito, J., dissenting).

[292] In this discussion, Justice Alito omits the rest of the disparate impact analysis, misleadingly intimating that a statistical imbalance alone constitutes disparate impact. It does not.

[293] *Inclusive Cmtys.*, 576 U.S. at 564–65 (Alito, J., dissenting).

FHA's broad coverage—its scrutiny of regulators and its attention to the quantity of opportunities available—that lets it reach issues analogous to the minimum wage. And Congress's decision to extend the FHA broadly is quite separate from its choices about disparate impact.

This fear of the FHA's structural reach recurs throughout the *Inclusive Communities* dissent. Later, Justice Alito expressed confusion about how to apply the disparate impact framework's second step, which in employment cases asks whether a policy is justified by business necessity, to housing. "What is the FHA analogue of 'job related'?" Justice Alito asked.[294] "Is it 'housing related'? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing."[295] The source of the dissent's agitation here is not really the conceptual difficulty of applying the disparate impact framework in housing. Every court of appeals had managed to apply this framework workably. And this very passage captures the gist of the applicable standard, even in casting it as unworkable. No, the dissent appears to be upset about the "vast array" of policies and the "countless decisions" that would be brought under disparate impact scrutiny.[296] Justice Alito was worried about the breadth of the FHA's coverage, which he intuited to depart from the Title VII framework. But he recast those worries as concerns about disparate impact.

The *Inclusive Communities* dissenters' conflation of the FHA's scope and its standard of liability, though, is not unique to them. Litigants made the same move. *Magner v. Gallagher* was the first of three cases that the Supreme Court took to decide whether disparate impact claims were cognizable under the Fair Housing Act; it settled after certiorari was granted and cast a long shadow over later litigation.[297] *Magner*'s successful cert petition presented to the Court the question of "whether disparate impact analysis applies to the Fair Housing Act."[298] But the section of petitioners' brief addressing that question was titled "The Fair Housing Act Does Not Reach Every Event That Might Conceivably Affect The Availability Of Housing."[299] These are entirely separate

[294] Id. at 586.
[295] Id.
[296] Id. at 586–87.
[297] Magner v. Gallagher, 565 U.S. 1013 (2011) (granting petition for writ of certiorari). Justice Alito's dissent in *Inclusive Communities* began not with the facts of the case before him, but with the facts of *Magner*. *Inclusive Cmtys.*, 576 U.S. at 557–58 (Alito, J., dissenting).
[298] Petition for Writ of Certiorari at 2, *Magner*, 565 U.S. 1013 (No. 10-1032).
[299] Id. at 12.

issues. After all, the FHA might reach every event *intentionally* affecting the availability of housing. Or, as under Title VII, disparate impact litigation might be permitted, but only against certain actors and actions. Yet petitioners centered concerns with the statute's breadth in their challenge to disparate impact.

Why did the challenge to disparate impact so consistently slide into critiques of the FHA's structural approach? Parties and judges seemed to sense that the FHA had escaped the narrow confines of disparate impact as they understood it from the well-developed Title VII context. Something seemed to them to have gone wrong. Or, alternatively, *given* the FHA's breadth, disparate impact was seen as untenable, or perhaps unintended.[300] But as a matter of statutory interpretation, either argument leaves much to be desired, especially for textualist judges. The statute's scope and its standards for liability are derived from different statutory text and based on separate congressional decisions.[301] These are simply two separate axes. Litigants and judges rightly picked up on their interaction, but to use the one to limit the other has no statutory basis. It is simply to impose the substantive position that civil rights statutes cannot be too strong: if they cover more issues and more actors, they must cover them more weakly. Congress's decision to extend the FHA beyond Title VII in one respect does not imply it limited the FHA elsewhere.[302] And it should not permit courts to write in such a limitation.

The federal courts may ultimately abandon disparate impact. The Supreme Court may overturn its precedent and reject disparate impact

[300] The petitioners in *Inclusive Communities* framed the argument closer to these terms. They wrote, "given the wide scope of actionable conduct under the FHA, there is almost no housing decision for which a litigant would be unable to establish a 'prima facie case.'" Petition for a Writ of Certiorari at 15, *Inclusive Cmtys.*, 576 U.S. 519 (No. 13-1371) (citing 42 U.S.C. §§ 3604, 3605).

[301] To determine whether disparate impact liability is available, the Court considered whether discrimination is defined in results-oriented language, what it means to act "because of" a protected characteristic, and the meaning of three exemptions to the FHA added in the 1988 amendments. *Inclusive Cmtys.*, 576 U.S. at 534–38. None of this text is what makes the FHA reach more actors and actions than Title VII.

[302] This judicial move requiring that civil rights statutes' breadth be paired with concomitant limitations—often extratextual—is not unique to the FHA. See Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) ("The majority fears that the statute Congress wrote is too 'radical'—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions." (citation omitted)); Allen v. Milligan, 143 S. Ct. 1487, 1509 (2023) (declining to narrow the Voting Rights Act because "[s]ince 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits").

either as a matter of statutory interpretation (for the FHA) or as barred by the Equal Protection Clause (for both the FHA and Title VII).[303] Better understanding the Fair Housing Act hardly speaks to all future arguments. But given that *Inclusive Communities* represents the Court's last word on the topic, the FHA will loom large in any future litigation. The differences between the FHA and the employment discrimination laws—differences rooted in text and purpose—should not be allowed to confuse which choices are actually before the Court.

D. Causation

Finally, appreciating the FHA's breadth offers guidance on a pressing, open question of fair housing law: what standards of causation apply? In recent years, the Supreme Court has twice identified causation as a core limitation on liability under the FHA, each time leaving unresolved the details of what causation requires. In *Bank of America Corp. v. City of Miami*, the Court reaffirmed that standing under the FHA reaches as far as Article III permits, but elevated proximate cause as the proper framework for determining when harm is too remote from the defendant's conduct to allow liability.[304] The Court declined, however, to "draw the precise boundaries of proximate cause under the FHA."[305] In doing so, according to one commenter, it left the FHA in a "state of legal uncertainty" and the doctrine of proximate cause "wholly incoherent, consisting of a morass of unintelligible standards."[306] And in *Inclusive Communities*, as the Court reaffirmed the availability of disparate impact liability under the Act, it simultaneously laid out the important limitations on disparate impact, including the existence of a "robust causality requirement."[307] Precisely what "robust causality" entails—including

[303] *Inclusive Communities* held that the Constitution did not irreconcilably conflict with disparate impact claims. 576 U.S. at 540 ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise."). But the Court has been quickly revising precedent around race, and there are real concerns here. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023); Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 494, 495–501 (2003).

[304] 581 U.S. 189 (2017).

[305] Id. at 203. For a recent exploration of the bounds of proximate causation under the FHA, see Nat'l Fair Hous. All. v. Deutsche Bank Nat'l Tr., No. 18-cv-00839, 2019 WL 5963633, at *3–6 (N.D. Ill. Nov. 13, 2019).

[306] Summers, supra note 92, at 531–32.

[307] *Inclusive Cmtys.*, 576 U.S. at 542.

whether the Court was describing existing law or imposing new constraints—is currently being considered in the lower courts and in HUD rulemakings.[308]

This Article makes clear that judges and administrators will err if they draw standards too closely from employment law. Causation, ultimately, is about connecting defendants to the harms for which they can be held responsible. But which connections suffice surely must depend on who can be liable and which harms can be unlawful: those are the dots being connected. If the drafters of the Fair Housing Act chose to cast a wider net on those questions, then more, different, and longer chains of causation should arise under the statute than in an otherwise-analogous employment discrimination regime.[309] Those causal chains should be permitted. Standards of causation—proximate or factual—should not reinscribe another statute's requirement for tight connections in a setting where Congress rejected them.

For example, if market-structuring actions are covered by the Fair Housing Act, then causal chains must be permitted to be more indirect—even if each link in the chain must still be adequately demonstrated. An upstream actor like an insurer may not, by itself, deny anyone housing; rather, it causes another actor to do so. Moreover, it does so with distinct motives and justifications from those of the actor that ultimately denies someone housing. A requirement that proximate causation not "go beyond the first step,"[310] if applied narrowly, would undermine the congressional choice to cover actors whose effect on housing is indirect.[311] Similarly, a causation analysis that requires narrowly isolating

[308] See Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 902–05 (5th Cir. 2019); Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8523–24 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91–93, 570, 574, 576, 903, 983); Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100 (2025).

[309] Cf. Sandra F. Sperino, Statutory Proximate Cause, 88 Notre Dame L. Rev. 1199, 1227–28 (2013) (explaining that congressional choices about "the limits of liability" should constrain judicial analysis of proximate cause); Summers, supra note 92, at 573 (same).

[310] *Bank of Am. Corp.*, 581 U.S. at 203 (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 10 (2010)).

[311] Justin Steil and Dan Traficonte have argued that proximate cause should be broader under civil rights statutes than in the antitrust and Racketeer Influenced and Corrupt Organizations Act cases where the Supreme Court developed its proximate cause jurisprudence. Justin P. Steil & Dan Traficonte, A Flood—Not a Ripple—of Harm: Proximate Cause Under the Fair Housing Act, 40 Cardozo L. Rev. 1237, 1258–74 (2019). This Article extends that analysis, suggesting that even among civil rights statutes, the FHA requires a looser proximate cause standard. As Steil and Traficonte argue, "[t]he Fair Housing Act is

the discriminatory effects of each individual practice of each individual actor is better fitted for a statute where only direct employer-employee interactions are being scrutinized.[312]

Likewise, overly rigid formulations of how to show causation statistically are inappropriate under the FHA. In the employment discrimination context, courts have intently scrutinized plaintiffs' comparator groups, holding them closely to the preferred comparison between the demographic composition of the at-issue jobs and the composition of the "qualified population in the relevant labor market."[313] This requirement for a "qualified" comparator pool may be appropriate for some fair housing claims, but not for all. In some housing discrimination cases—the zoning cases, most obviously, but not exclusively—the law facilitates access for those who are *not* qualified in the relevant (expensive, exclusionary, single-family) housing market. In employment, it might "make little sense to judge a hospital's physician-hiring policies by looking at the effect those policies have on a population of high school graduates."[314] But in those zoning cases, the goal is to allow some non-physicians in.

This Article does not affirmatively supply the proper standards for causation under the FHA. And indeed, causation—appropriately defined—is a well-fitted doctrinal tool for the FHA precisely because the statute reaches so broadly.[315] The claim is only that causation is not a place to borrow too breezily from Title VII cases. The FHA was designed to work on more actors, in different transactions, and at a more structural level. Its causation standards must permit this broad sweep.

premised on a causal logic reflective of the deep connections between the individual-level and collective harms that the statute was designed to address simultaneously." Id. at 1269.

[312] See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). Exactly how *Wards Cove* applies to the FHA remains an open question. See Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100 (2025) (interpreting *Inclusive Communities* to have implied that *Wards Cove* does not provide the relevant causation standard for the FHA and explaining that causation standards should be determined on a case-by-case basis given the variety of claims covered by the FHA).

[313] Mandala v. NTT Data, Inc., 975 F.3d 202, 210 (2d Cir. 2020) (citation omitted).

[314] Id.

[315] Steil & Traficonte, supra note 311, at 1272–73 (giving examples of claims outside the FHA's proper scope of liability).

CONCLUSION

This Article has focused on the FHA's breadth relative to Title VII because it is Title VII that courts have deemed relevant for interpreting the Fair Housing Act. Contrasting these two statutes best illuminates legislators' and courts' choices in constructing the law of fair housing. But situating the FHA within civil rights law, more broadly, may provide a different perspective.

For the Fair Housing Act is not the only civil rights statute concerned with discriminatory structures. Like the FHA, Title IX, the Voting Rights Act, and the Americans with Disabilities Act each go beyond requiring fair matching. Each has required the construction of a set of opportunities consistent with its equality goals. Title VII, though the most illuminating comparison, is not the only lens through which to understand the FHA.

First, Title IX provides women protected opportunities to play collegiate sports. While Title IX generally prohibits sex discrimination in education, it has special provisions governing college athletics.[316] There, Title IX does not ensure only that men and women can compete on equal footing for a fixed, common set of athletic opportunities, as in the Title VII model.[317] If it did, exclusion, not equal participation, would ensue; schools could (or perhaps would be required to) create a single team for each sport. The basketball team would inevitably be filled with taller, mostly male athletes. Title IX instead requires universities to create opportunities—men's and women's teams—that accommodate female students' interests and abilities.[318] Put differently, Title IX limits universities' discretion to construct the set of athletic positions available.

Similarly, the Voting Rights Act does more than ensure each individual's equal access to the ballot, though these "first generation" claims were imperative.[319] The VRA's "second generation" of challenges asked not only whether people could vote, but whether those votes were

[316] 20 U.S.C. § 1681; Deborah Brake, The Struggle for Sex Equality in Sport and the Theory Behind Title IX, 34 U. Mich. J.L. Reform 13, 46–47 (2001).

[317] Kimberly A. Yuracko, One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?, 97 Nw. U. L. Rev. 731, 757 (2003); Brake, supra note 316, at 21–22.

[318] See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415, 71417–18 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86). Notably, these opportunities need not be identical (many schools do not have a women's football team).

[319] Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1093 (1991).

"meaningful."[320] In an at-large election, for example, white and Black voters are equally allowed to cast a ballot, but under racially-polarized conditions, the election is constructed such that minority interests will always lose. The Voting Rights Act made such vote dilution potentially illegal, and during the 1980s, litigation forced jurisdictions across the country to adopt single-member districts that allowed racial minorities to elect candidates of their choice.[321] While the Supreme Court has limited scrutiny of many such "aggregation" and "governance" claims under the VRA,[322] the law still assesses not only who can vote and how, but what they get to vote for.[323]

Finally, the Americans with Disabilities Act employs not only an antidiscrimination standard, but a "reasonable accommodation" requirement. The accommodation framework sometimes requires a meaningful reimagining of what particular jobs entail, providing workers with a modified schedule or reconfigured responsibilities.[324] It does not accept "the assumption that labor markets begin from neutral and fair baselines"[325] but instead considers whether "the very way in which particular jobs are structured is in part the product of stereotyped beliefs."[326] How significant a gap exists between "reasonable accommodation" and the antidiscrimination model is a subject of substantial scholarly dispute,[327] but indisputably, the ADA is relatively more attuned to certain claims.

Directly sharing doctrinal principles between the FHA and these statutes should be done only with caution. Title IX, the VRA, and the ADA are not drafted in parallel to the Fair Housing Act, making analogies less textually grounded. Indeed, the Supreme Court has expressly rejected

[320] Id. at 1093–94.

[321] Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 739–40 (1998).

[322] See Holder v. Hall, 512 U.S. 874, 885 (1994); Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 510 (1992).

[323] Pamela S. Karlan, All Over the Map: The Supreme Court's Voting Rights Trilogy, 1993 Sup. Ct. Rev. 245, 251–52.

[324] Karlan & Rutherglen, supra note 96, at 38–39.

[325] Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, Accommodating Every Body, 81 U. Chi. L. Rev. 689, 696 (2014).

[326] Karlan & Rutherglen, supra note 96, at 39.

[327] See Reva B. Siegel, Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 Yale L.J. 929, 940–46 (1985) (providing an important early account of this overlap). See generally Jolls, supra note 39 (finding overlap between accommodation and antidiscrimination through a law-and-economics lens); Bagenstos, supra note 40 (finding overlap between accommodation and antidiscrimination through an anti-subordination lens).

efforts to link the FHA and the VRA, even while restating the link between the FHA and Title VII.[328] The FHA also has its own separate "reasonable accommodation[]" provisions for disability claims; the FHA's antidiscrimination provisions expressly adopt a different standard than accommodations jurisprudence.[329] While the comparison to Title VII comes baked in, as a matter of law, analogies to the ADA, VRA and Title IX require careful analyses of which lessons might be transferable, informed by the particular congressional purposes and compromises of each statute and the social practices they regulate.[330] This is a matter for future exploration.

Even so, there is much to plumb here for fair housing law. These areas of law have something to teach—arguably more than Title VII—about how structural fair housing claims should proceed. Comparing fair housing and voting rights, for example, might offer instruction on how to cohere individual antidiscrimination claims and aggregate harms concerning segregation[331] or help distinguish between fair housing claims involving rivalrous goods (e.g., who gets a particular unit) and those less zero-sum (like land use regulations).[332] Once courts begin questioning the allocation of opportunities, these bodies of law may help determine what should guide and constrain that inquiry.

At the same time, recognizing the FHA's conception of discrimination allows for a richer understanding of civil rights law generally. As shown in this Article, FHA cases sometimes generate an accommodation-like result—facilitating the provision of different opportunities for differently situated households—even under the doctrinal heading of antidiscrimination. If the traditional comparisons of Title VII and the ADA involve two poles in the relationship between antidiscrimination and accommodation, the FHA shows another point on a spectrum. Understanding the FHA's departures from Title VII also decenters Title

[328] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340–41 (2021) ("The text of the relevant provisions of Title VII and the Fair Housing Act differ from that of VRA § 2, and it is not obvious why Congress would conform rules regulating voting to those regulating employment and housing.").

[329] 42 U.S.C. § 3604(f).

[330] Cf. Yuracko, supra note 317, at 768 (justifying Title IX standards in light of education's particular role in preparing students for the future).

[331] Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1684 (2001).

[332] Nicholas O. Stephanopoulos, Disparate Impact, Unified Law, 128 Yale L.J. 1566, 1607 & n.231 (2019) (citing Owen M. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235, 304 (1971)).

VII as the defining understanding of antidiscrimination law; Title VII provides one conception of antidiscrimination, not a universal one. We cannot map the landscape of civil rights law without including one of its major statutes—or without understanding that statute's particular logic.

This Article has expanded that understanding of the Fair Housing Act, spotlighting the statute's market-level breadth and ambition alongside its all-too-real shortcomings. The FHA does not adopt Title VII's approach to discrimination. Recognizing the distinctive features of housing discrimination and housing markets, the FHA does not always accept either the set of housing opportunities or the set of housing applicants as the market has defined them. The statute works to "alter the whole character of the housing market."[333] Though antidiscrimination law cannot fully vindicate that ambition alone, Congress intended that the Fair Housing Act push toward it.

[333] Mayers v. Ridley, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).