

Deliberation and Insight: *Bloch v Frischholz* and the “Chicago School” of Judicial Behavior

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How often do appellate judges change their minds, and their votes? Once a case has been decided by a panel, the record is what it is, and it would not be surprising if meticulous and intellectually confident judges were rarely swayed in an en banc rehearing.¹ But the question in general needs further study.

A prevalent view of judicial behavior suggests that judges vote, much of the time, in accordance with relatively fixed ideological preferences. Thus, a judge’s votes can usually be predicted, it is claimed, by looking to the party of the President who appointed him or her.² Other nonrational psychological factors have also been invoked to explain voting patterns: for example, the tendency known as “group polarization,” in which people become more extreme when surrounded by

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¹ Judge Richard Posner, for example, has not changed his mind *in this type of situation* in his twenty-eight years on the bench. See, for example, *United States v Hollingsworth*, 27 F3d 1196, 1199–1200 (7th Cir 1994) (en banc) (Posner); *Marrese v American Academy of Orthopaedic Surgeons*, 706 F2d 1488, 1492 (7th Cir 1983). He has, however, displayed the same openness to argument and rethinking that I find in Judge Easterbrook. Indeed in the present case, with its partial overruling of *Halprin v Prairie Single Family Homes of Dearborn Park Association*, 388 F3d 327, 329 (7th Cir 2004), in which Posner wrote the original majority opinion, he changes his mind at least as markedly as Judge Easterbrook.

² See, for example, Thomas J. Miles and Cass R. Sunstein, *The New Legal Realism*, 75 U Chi L Rev 831, 838–39 (2008) (“[T]he political affiliation of the appointing president greatly matters to judicial votes.”); Cass R. Sunstein, et al, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* 8–11 (Brookings 2006) (“In most of the areas investigated here, the political party of the appointing president is a fairly good predictor of how individual judges will vote.”). See also William M. Landes and Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J Legal Analysis 775, 821–24 (2009) (suggesting an economic explanation for the conformity effect: the heavy appellate workload increases the cost of a dissent); Sunstein, et al, *Are Judges Political?* at 11 (summarizing the Posner and Landes study: they find that the “conformity hypothesis” is supported by their analysis, meaning that an increase in the number of Republican judges on a circuit increases the likelihood that a given judge on a circuit will cast a conservative vote).

like-minded people.³ And yet, particularly on a circuit justly admired for its high level of legal argument and its respectful collegiality across political lines, it might be worth entertaining the idea that judges sometimes listen to reason. We might at least investigate the possibility that, especially in an en banc rehearing, judges would attend carefully to one another, weighing arguments, open to persuasion by the balance of reasons.⁴ I call this type of judicial behavior “the Chicago School.” Where this norm prevails, we might predict that in a non-negligible proportion of the cases such a deliberative process would bring change. One reason for such changes might be that more minds bring more arguments to the table, and at least some of these are likely to have weight. Another might be that an en banc rehearing is only granted in unusually contested cases, and once a case has been recognized as belonging to that category, all judges are likely to sift the reasons, and the record, with unusual care.

One of the most intellectually confident judges on the federal bench, Judge Frank Easterbrook is widely known for his bold and controversial stands. He is less famous for flexibility. But flexibility, it emerges, is among his distinctive judicial traits. In all three cases in which he was involved first in a panel decision and then in an en banc rehearing, Judge Easterbrook changed his vote. *Pruitt v Mote*⁵ concerned a prison inmate with only a sixth grade education who tried to defend himself pro se; when he did not win, he tried to file a motion for appointment of counsel, which was denied.⁶ This denial was affirmed by Easterbrook.⁷ The en banc unanimous opinion reversed, saying that the correct standard included a consideration of the prisoner’s competence, which the district judge did not perform.⁸ (Judge Richard Posner was the dissenting judge whose position the en banc

³ See Miles and Sunstein, 75 U Chi L Rev at 838–39 (cited in note 2) (arguing that the ideological conformity factors increase with the number of copanelists who are appointees from the same party); Sunstein, et al, *Are Judges Political?* at 33–34 (cited in note 2) (reporting that unified panels of Democratic appointees vote in favor of corporate veil-piercing at nearly three times the rate of Republican panels).

⁴ For an older paper making this point, critical of ideological influence models, see Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U Pa L Rev 1639, 1660–62 (2003) (arguing that “sincere” judges do not mechanically rule according to their ideological preferences but instead engage in thoughtful, collegial deliberation). My analysis of *Bloch v Frischholz*, 587 F3d 771 (7th Cir 2009) (en banc), supports Edwards’s characterization of judicial deliberation, at least for this case.

⁵ 472 F3d 484 (7th Cir 2006), vacd en banc, 503 F3d 647 (7th Cir 2007).

⁶ 472 F3d at 485–86.

⁷ Id at 489.

⁸ *Pruitt v Mote*, 503 F3d 647, 655 (7th Cir 2007).

court accepted.⁹) *Wisconsin Community Services v Milwaukee*¹⁰ concerned disabilities accommodation under the Americans with Disabilities Act:¹¹ a clinic sought changes to a zoning law so that it could relocate. The district court found that the relocation was a reasonable and necessary accommodation for the clinic's disabled clients and directed the city to issue a special use permit.¹² Judge Easterbrook originally vacated and remanded the lower court decision,¹³ but he later concurred in the en banc decision, which reversed and remanded, writing:

The district judge said "yes," the panel said "no," and now the en banc court says "yes." Having written the panel's opinion saying "no," I now join the en banc opinion saying "yes," because further consideration has led me to conclude that the right question is what this regulation means rather than what label to attach to its provisions.¹⁴

This exemplary declaration of willingness to follow the argument, all too rare in a political culture increasingly dominated by rigid ideological stances, sets the stage for Easterbrook's third and latest self-reversal, which is the focus of this Essay.

Bloch v Frischholz,¹⁵ known to the world as "The Mezuzah Case," provides a fine paradigm not only of individual but also of group rationality in the best University of Chicago tradition. Initially argued in February 2008, before a panel consisting of Judge William Bauer, Judge Frank Easterbrook, and Judge Diane Wood, the case was decided on July 10, 2008. By a 2-to-1 vote, the panel affirmed the district court's decision to grant summary judgment for Edward Frischholz and Shoreline Towers Condominium Association.¹⁶ Both the intrinsic interest of the case and Judge Wood's eloquent and powerfully argued dissent attracted local and national attention. The circuit agreed to rehear the case en banc; the rehearing took place on May 13, 2009. On November 13, 2009, after lengthy deliberation, the eight judges who participated in the rehearing voted unanimously in favor of the

⁹ See *Pruitt*, 472 F3d at 492 (Posner dissenting) (noting that "a judge who has ordered a jury trial should request a lawyer for a prisoner who plainly lacks the educational or vocational background that would enable him to conduct such a trial with minimum competence").

¹⁰ 413 F3d 642 (7th Cir 2005), vac'd en banc, 465 F3d 737 (7th Cir 2006).

¹¹ Americans with Disabilities Act of 1990, Pub L No 101-336, 104 Stat 327, codified as amended at 42 USC § 12101 et seq.

¹² *Wisconsin Community Service v Milwaukee*, 309 F Supp 2d 1096, 1108 (ED Wis 2004).

¹³ *Wisconsin Community Services*, 413 F3d at 648.

¹⁴ *Wisconsin Community Services v Milwaukee*, 465 F3d 737, 756 (7th Cir 2006) (en banc) (Easterbrook concurring) (citation omitted).

¹⁵ 587 F3d 771 (7th Cir 2009) (en banc).

¹⁶ *Bloch v Frischholz*, 533 F3d 562, 565 (7th Cir 2008), vac'd en banc, 587 F3d 771 (7th Cir 2009).

Blochs, sending the case to trial.¹⁷ As Chief Judge, Easterbrook assigned the opinion; because his role at oral argument was so prominent, as we shall see, it is likely that he continued to play an active role in drafting the opinion. The opinion, written by Judge John D. Tinder, makes heavy use of Judge Wood's dissent in coming to the conclusion that the record shows sufficient evidence of intentional religious discrimination to justify this result. (There are no concurring opinions.)

Bloch is of intrinsic interest for a number of reasons. It raises important issues about the interpretation of several sections of the Fair Housing Act, partially overruling *Halprin v Prairie Single Family Homes of Dearborn Park Association*,¹⁸ a circuit precedent; it raises questions about how to distinguish intentional religious discrimination from a neutral rule that incidentally burdens religion; and, in a related way, it raises questions about the current status of the Free Exercise Clause in a post-*Employment Division v Smith*¹⁹ world. It is also of interest, however, because of the shift of position it involves, in which Judge Easterbrook largely, though not completely, accepts Judge Wood's theory of the case (and in which Judge Posner, author of the majority opinion in *Halprin*, accepts his colleagues' reasoning overruling some of his own earlier views). It thus offers a paradigm of a particular style of judicial deliberation, challenging the conventional wisdom that judges simply vote based on fixed ideological preferences. In the Chicago School of judging, by contrast, judges are attentive to evidence and argument, keenly aware of the bearing of hypotheticals on the status of a disputed distinction, respectful of their colleagues as they press their divergent theories of the case, and ready to shift as the balance of reasons shifts.²⁰

Part I describes the facts of the case, the salient legal issues, and the panel opinions. Part II examines the unanimous opinion that was the outcome of the en banc rehearing. In Part III, I turn to a close examination of the oral argument, using it to articulate the features of the Chicago School of judicial behavior. Part IV further examines an underlying issue in constitutional law to which the case repeatedly alludes.

¹⁷ *Bloch*, 587 F3d at 771. Circuit Judges Joel Flaum, Ilana Rovner, and Ann C. Williams took no part in the en banc case.

¹⁸ 388 F3d 327, 329–30 (7th Cir 2004) (holding that post-sale harassment of homeowners did not violate the FHA's prohibition on discrimination in the sale of a dwelling).

¹⁹ 494 US 872, 879 (1990) (holding that neutral, generally applicable laws do not violate the First Amendment merely because they restrict religious practices).

²⁰ In conversation on December 3, 2009, Judge Easterbrook confirmed that his judicial philosophy as Chief Judge involves pursuing consensus through the give and take of persuasive argument.

I. THE FACTS OF THE *BLOCH* CASE

For many years, the Blochs, an observant Jewish family, have occupied three units in the Shoreline Towers condominium building in Chicago. Like other owners, they are subject to the rules of the building's condominium association. In 2001, the association (of which Lynne Bloch was then chair) passed a new set of rules governing the use of the hallways:

Hallways

1. Mats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors.
2. Signs or name plates must not be placed on Unit doors.
3. Pets must not be left unattended in the hall. Hallways should not be used as dog/pet runs.
4. No alterations to the common area hallways are allowed.
5. No playing with or riding of bicycles, tricycles, roller blades, etc. is allowed.²¹

Like one other observant Jewish resident then living in the Shoreline Towers, the Blochs had a mezuzah on the exterior doorpost of their units.²² Observant, traditional Jews believe that it is a religious obligation to affix a mezuzah to the outside of the doorposts of their dwelling. The mezuzah is a small rectangular box containing a small scroll of parchment inscribed with certain passages from the Torah. Although Judge Tinder is somewhat hyperbolic on the issue of size, stating that a mezuzah is about six inches long, one inch wide, and one inch deep, most mezuzot are much smaller, and three inches would be a much more typical length (with proportional reductions in the other dimensions).²³ The photograph published with Judge Wood's original panel opinion shows an average-sized mezuzah.²⁴ (The mezuzah's size is not ritually relevant.)

For three years, between 2001 and 2004, Hallway Rule 1 was not interpreted to apply to any mezuzah—or to most other objects (wreaths, pennants, and so on) affixed to doors or doorposts. Three pictures only were removed pursuant to the rules: one depicted a

²¹ *Bloch*, 587 F3d at 773.

²² See Ruth Eglash, *The Case of the Confiscated Mezuzah and a Chicago Woman's Aliya*, *Jerusalem Post* 1 (June 9, 2006) (describing the experience of Debra Gassman—who has since emigrated to Israel—at the Shoreline Towers).

²³ As we see in Part III, small is good for the plaintiff's legal theory.

²⁴ *Bloch v Frischholz*, 533 F3d 562, 574 (7th Cir 2008) (Wood dissenting).

swastika, one a marijuana plant, and one a Playboy bunny.²⁵ In addition, Hallway Rule 2 forbade *nameplates* on doors.²⁶ In general, Hallway Rule 1 was interpreted to apply almost exclusively to clutter in the hallway.

In May 2004, the building was renovated and repainted, and the Blochs obligingly took down their mezuzot during the repainting; afterward they replaced them. Suddenly, the association stated that mezuzot violated Rule 1, because the phrase “objects of any sort” was (now) interpreted to include them. During this period, the association repeatedly removed the Blochs’ mezuzot; it also removed other objects on doors, both religious and secular: wreaths, Bears pennants, political posters.²⁷ This practice continued despite the Blochs’ protests, including their presentation of a letter from the Chicago Rabbinical Council stating that the mezuzah must be placed on an exterior doorpost.²⁸ The removal of the mezuzah²⁹ persisted even during the funeral of Lynne Bloch’s husband Marvin: upon returning from the burial, the Blochs, their guests, and a rabbi who had come to conduct the *shiva* found the doorposts empty once again. On three more occasions during the week of mourning, the mezuzah was removed by the maintenance staff, who even interrupted the *shiva* to take it down.³⁰

The Blochs filed a lawsuit, seeking an injunction against the condo association and damages for distress, humiliation, and embarrassment. Another Jewish resident who had had similar experiences, Debra Gassman, also initiated legal proceedings against the condo association, but she had already moved out and gone to Israel.³¹ The Blochs’ request for an injunction was mooted by the fact that both the City of Chicago and the Illinois state legislature passed laws prohibit-

²⁵ *Bloch*, 587 F3d at 773.

²⁶ *Id.* at 785.

²⁷ *Id.* at 773. Although the rule was not originally intended to reach mezuzot (evidenced by the fact that Lynne Bloch led the committee that drafted the rule), the association began mechanically to apply its plain language without exception. *Bloch*, 533 F3d at 565.

²⁸ *Bloch*, 587 F3d at 773.

²⁹ I shift into the singular here, following the narrative of the facts, which seems to focus from this point on Lynne Bloch’s unit alone. Although we can assume that the mezuzot on the doorposts of their two other units were removed, the record is oddly silent about this. Perhaps the three units are all linked as a single dwelling.

³⁰ See *Bloch*, 587 F3d at 774.

³¹ See *Gassman v Frischholz*, 2007 WL 1266291, *1 (ND Ill) (denying Gassman’s motion for a new trial on claims that the association breached its fiduciary duty by removing her mezuzah and retaliated against her when she complained). Proceedings in her case have been suspended pending the outcome of the Blochs’ case. Gassman describes the devastating impact of the association’s conduct on her life in Eglash, *Confiscated Mezuza*, Jerusalem Post at 1 (cited in note 22). When she first discovered that her mezuzah was missing, Gassman thought she had been the victim of a hate crime. *Id.* Later, she concluded that she had essentially been evicted from her home. *Bloch*, 533 F3d at 568 (Wood dissenting).

ing restrictions on affixing religious signs or symbols to doorposts.³² Their claim for damages remained alive. They sought relief under §§ 3604(a), 3604(b), and 3617 of the Fair Housing Act, and also under the Civil Rights Act, 42 USC § 1982.³³ The district court granted summary judgment for the defendants on all four federal theories. Rejecting the §§ 3604(a) and 3604(b) claims, it said that the decision of the Seventh Circuit in *Halprin* precluded claims under those sections for post-sale conditions; the claims under § 3617 and § 1982 were also rejected on the ground that those sections require proof of discriminatory intent, which the court did not find in the record.³⁴

The Blochs appealed, and a three-judge panel affirmed. Judge Easterbrook, joined by Judge Bauer, agreed with the district court that *Halprin* precludes claims for post-sale conduct under §§ 3604(a) and 3604(b), unless the conduct is so severe as to amount to a constructive eviction.³⁵ Addressing the issue of intentional discrimination, he argued that the Hallway Rules were neutral, applying to mezuzot and Bears pennants alike: “What the Blochs want is a religious exception to a neutral rule. That is to say, they seek an accommodation of religion.”³⁶ The Fair Housing Act, however, he continued, requires accommodation only for disability and not for religion. Failure to make an accommodation does not amount to discrimination.

Judge Wood dissented, and her eloquent and closely argued dissent immediately attracted national attention.³⁷ Wood argues that there are a number of theories under which a rational trier of fact could find in favor of the Blochs. First, there is plenty of information

³² See Chicago Municipal Code § 5-8-030(H); 765 ILCS 605/18.4(h).

³³ The Blochs also asserted claims under state law, but those were never adjudicated: the district court declined to exercise supplemental jurisdiction over them, after rejecting all the Blochs’ federal claims. *Bloch*, 533 F3d at 569 (Wood dissenting). See also 42 USC §§ 3604(a), 3604(b), 3617; Civil Rights Act of 1866, 14 Stat 27, 27, codified as amended at 42 USC § 1982.

³⁴ *Bloch*, 533 F3d at 563. *Halprin* reserved the question of whether § 3617 might be construed to apply to post-sale conditions. See 388 F3d at 330.

³⁵ *Bloch*, 533 F3d at 565 (explaining that to address a constructive eviction argument the court “would need to know whether the Blochs’ religious obligation can be met only by a mezuzah on the hallway-facing side of each doorpost”).

³⁶ *Id.*

³⁷ Particularly striking was the coverage in *The Wall Street Journal Law Blog*, beginning with Dan Slater, *Mezuzah Suit Sparks Ruckus, Impassioned 7th Cir. Dissent*, Wall St J L Blog (July 11, 2008), online at <http://blogs.wsj.com/law/2008/07/11/mezuzah-suit-sparks-ruckus-impassioned-7th-cir-dissent> (visited Mar 21, 2010) (noting that the dissent is “nearly three times as long as the majority opinion”) and continuing with Dan Slater, *Mezuzah Ruckus Goes to Washington*, Wall St J L Blog (Sept 19, 2008), online at <http://blogs.wsj.com/law/2008/09/19/mezuzah-ruckus-goes-to-washington> (visited Mar 21, 2010) (describing pending federal legislation that would guarantee condominium residents’ rights to post religious displays). The case continues to attract national commentary. See, for example, John Schwartz, *Fight over Jewish Symbol Heads to Trial*, NY Times A13 (Nov 21, 2009).

on the record to support a claim of intentional discrimination—certainly enough to avoid summary judgment. She also argues that a strong case can be made for seeing the condo policy as tantamount to constructive eviction, and thus as falling under § 3604(a), even under the narrow theory articulated in *Halprin*, according to which that section governs only “availability or access to housing.”³⁸ Indeed, in addition to being tantamount to constructive eviction, the rule “operates exactly as a redlining rule does with respect to the ability of the owner to sell to observant Jews.”³⁹ Furthermore, both §§ 3604(b) and 3617 can be construed to reach post-sale conduct. On this question, Judge Wood argues, *Halprin* does not entirely close the door, although it does reserve the question. Here Wood cites the HUD interpretation of § 3604(b), according to which “terms, conditions, or privileges of sale” may include some post-sale conditions.⁴⁰ A central purpose of the statute is to ensure that “members of protected groups do not win the battle (to purchase or rent housing) but lose the war (to live in their new home free from invidious discrimination).”⁴¹

For Wood, then, the question of intentional discrimination is central, since the Blochs only have a claim under §§ 3604(b) and 3617 if they can show sufficient evidence of intentional discrimination to survive summary judgment. But the question of intentional discrimination is a disputed factual issue that should not be resolved prematurely by granting summary judgment against the Blochs. “The majority’s assumption that this case is really about accommodation is possible only if we improperly resolve a disputed factual question against the Blochs on summary judgment.”⁴²

In addition to finding evidence of intentional discrimination in the parts of the record that we shall discuss in detail in Part III, Judge Wood finds striking confirmation of discriminatory animus in the supplemental brief for the condominium association, which states that “[t]hroughout this matter, Plaintiffs have been trying to get their ‘pound of flesh’ from Defendants due to personal animosity between Lynne and Frischholz.”⁴³ As Wood points out, the defendants apparently do not recall that *The Merchant of Venice*, to which reference is made, concerns virulent anti-Semitism: “Shylock is punished by losing half of his lands

³⁸ *Bloch*, 533 F3d at 570 (Wood dissenting) (noting statements from the Rabbinical Council of Chicago, the Decalogue Society, and a rabbi to the effect that an observant Jew would be forced to move if she were not allowed to display a mezuzah).

³⁹ *Id.* (“The Association might as well hang a sign outside saying ‘No observant Jews allowed.’”).

⁴⁰ 24 CFR § 100.65(b)(4) (prohibiting the limitation of facilities or services based on a resident’s race, color, religion, sex, handicap, familial status, or national origin).

⁴¹ *Bloch*, 533 F3d at 571 (Wood dissenting).

⁴² *Id.* at 572.

⁴³ *Id.* at 569.

and being forced to convert to Christianity. This is hardly the reference someone should choose who is trying to show that the stand-off about Hallway Rule 1 was not *because of* the Blochs' religion, but rather *in spite of it*.”⁴⁴

The court agreed to rehear the case en banc. In his opinion, Judge Tinder states that a primary reason for this decision was the wish to rethink the narrow construction of the FHA in *Halprin*.⁴⁵ Another, clearly—since it is the issue on which the final opinion dwells at greatest length—was a desire to sift the record on the question of intentional discrimination.⁴⁶

II. *BLOCH* EN BANC

The court's opinion does not accept every part of Judge Wood's theory of the case. The court rejects the idea that the Blochs' situation is one of “constructive eviction,” on the grounds that they have not actually moved out. Thus the Blochs have no claim under § 3604(a).⁴⁷ Under § 3604(b), however, they may seek relief, as Judge Wood argued. With respect to this section, the court does not overrule, but distinguishes *Halprin*, which concerned isolated acts of discrimination by an individual, not linked to terms and conditions that were related to the plaintiffs' purchase of their property. “Terms, conditions, and privileges,” the court now clarifies, can include certain types of post-sale conduct.⁴⁸ Certainly they can include the conduct of a condo association, since being bound by the rules of that association is part of the original conditions of sale. Nonetheless, the Blochs have a claim under § 3604(b) only if they “produced sufficient evidence of discrimination.”⁴⁹ As for § 3617, which makes it unlawful “to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of” rights granted elsewhere in the statute, the court now clarifies the status of that section: § 3617 can have a meaning independent of § 3604, reaching post-sale conduct that interferes with the enjoyment of a right. This conclusion involves partially overruling *Halprin* and agree-

⁴⁴ *Id.*

⁴⁵ *Bloch*, 587 F3d at 772.

⁴⁶ In a panel discussion about the *Bloch* case at the University of Chicago, Judge Easterbrook also noted that the Blochs' original lawyer left out facts before the three-judge panel that were crucial to the en banc decision. See *Panel Discussion: Easterbrook on Statutes, “The Interrogation is Unceasing”: A Quarter Century of Judge Frank Easterbrook on the Seventh Circuit* (The University of Chicago Law School, Jan 13, 2010), online at <http://www.law.uchicago.edu/audio/easterbrook011310> (visited Mar 21, 2010).

⁴⁷ Debra Gassman, however, might have a claim under that section should she pursue her case. See *Bloch*, 587 F3d at 776–78.

⁴⁸ *Id.* at 780.

⁴⁹ *Id.* at 781.

ing with the HUD interpretation of the statute (and the amicus brief submitted by the US Justice Department, Civil Rights Division).⁵⁰ The Blochs have a claim for “interference” under § 3617, however, only if the conduct in question was “intentionally discriminatory.”⁵¹ Thus, both federal theories available to the Blochs turn on the question of discriminatory intent.⁵²

On this issue Judge Tinder’s opinion follows the lead of Judge Wood’s dissent: first in making a distinction between the original neutral rule and its later reinterpretation; second, in emphasizing evidence in the record that the reinterpretation targeted observant Jews. Because the vote is unanimous and there is but a single opinion, we must conclude that Judge Easterbrook now accepts that theory of the case. Let us investigate the process of argument that led to that shift.

III. DISCUSSION, DEBATE, AND THE JUDICIAL PROCESS IN ORAL ARGUMENT

A central part of the deliberative process that led to the unanimous vote was the oral argument. At any rate, whatever other deliberations took place—and no doubt they were at least as important—the oral argument is our best evidence for that process. In assessing what takes place here, we must bear in mind that the issue is one of summary judgment: thus, of whether the record, interpreted in the light most favorable to the Blochs, is such that a rational trier of fact could find in their favor. We should also bear in mind that, whereas a circuit panel is bound by circuit precedent, the en banc court has the power to overrule or significantly confine a previous circuit opinion. (Here we see one avenue to change: the question before Easterbrook in the rehearing is different from the one he faced earlier, since now he need no longer be bound by *Halprin*. This change of context, however, does not suffice to produce the result: Judge Easterbrook still had to be persuaded to find evidence of intentional discrimination, before agreeing with Judge Wood.⁵³)

What is immediately impressive about the rehearing is the atmosphere of respectful intellectual camaraderie among the three

⁵⁰ See Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal and Remand on Fair Housing Act Claims, *Bloch v Frischholz*, No 06-3376, *25 (7th Cir filed Jan 16, 2009) (available on Westlaw at 2009 WL 601419) (arguing that § 3617’s plain language clearly extends the FHA to post-acquisition discrimination).

⁵¹ *Bloch*, 587 F3d at 783.

⁵² The court explains that it does not give separate consideration to § 1982 because it, too, requires proof of discriminatory intent. See id at 776 n 5.

⁵³ And, of course, to reach the final unanimous vote, Judge Posner had to be persuaded to go along with his colleagues’ criticism of *Halprin*.

judges (Easterbrook, Wood, and Posner) who take by far the most active roles. (No other judge makes more than a remark or two.) The three are clearly cooperating to figure things out, although—initially at any rate—their positions are divergent. Nobody is defensive or ideological. They offer clever hypotheticals; they show impatience with any lawyer who is not quick on his feet; they know what they want to clarify; and they go straight for that with stiletto-sharp questions. They also help one another out, rephrasing one another's questions and pushing the inquiry further. The atmosphere is remarkably similar to that of a Work in Progress Workshop at The University of Chicago Law School.

This cooperative intellectual combat is evidently well known to the circuit's other judges. At one point Judge Bauer says to David Hartwell, the somewhat baffled lawyer for the condo association, who has just been left in the dust by the rapid repartee, "Have you ever watched an Australian tag team?... Well, you're in one."⁵⁴ Although my knowledge of professional wrestling lags behind that of Judge Bauer, research suggests that an Australian tag team—a type of tag team in wrestling known, for some odd reason, primarily in Mexico, where it is called *Relevos Australianos*—allows three wrestlers from the same team to be in the ring at the same time, all giving trouble to the opponent or opponents.⁵⁵ Thus, although at this particular juncture Judge Posner and Judge Wood are taking the lead in questioning Hartwell, it is reasonable to conclude that Judge Bauer's reference is to the University of Chicago tag team of three, who do indeed go after their targets with cooperative, albeit not altogether likeminded, zeal.⁵⁶

Woe betide the lawyer who cannot get with this Chicago style of rapid-fire argument. It is perfectly clear that the principal lawyers are unevenly matched in this regard. Gary Feinerman of Sidley Austin, representing the Blochs pro bono, and joining the case only at the en banc stage, is intellectually adept and able to withstand the barrage.⁵⁷

⁵⁴ Oral Argument, *Bloch v Frischholz*, No 06-3376, 00:49:30 (7th Cir May 13, 2009), online at <http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=06-3376&submit=showdkt&yr=06&num=3376> (visited Mar 21, 2010).

⁵⁵ Paul Allatson, *Key Terms in Latino/a Cultural and Literary Studies* 145 (Blackwell 2007).

⁵⁶ My research also informs me that one of the pleasures of watching tag team wrestling is that sometimes the members of the team have fallings out. See, for example, Sharon Mazer, *The Doggie Doggie World of Professional Wrestling*, 34 *Drama Rev* 96, 117 (Winter 1990) (describing the fallings out of tag team wrestlers).

⁵⁷ Feinerman is a litigation partner in the Chicago office of Sidley Austin; he joined the firm after serving as Solicitor General of Illinois from 2003 to 2007; he is currently President of the Appellate Lawyers Association of Illinois. See Sidley Austin LLP, *Our People: Gary Feinerman*, online at http://www.sidley.com/feinerman_gary (visited Mar 21, 2010). See also Melissa Harris, *Harder to Stay behind Scenes*, *Chi Trib C1* (Feb 28, 2010) (noting that President Barack Obama recently nominated Feinerman for a federal judgeship in the Northern District of Illi-

Indeed, he appears to enjoy it as much as the judges. For example, he exchanges subtle observations with Posner about the distinction between motive and intent. At a pivotal juncture that I discuss later, he offers a clever hypothetical that gets Posner to make a crucial concession. (Similarly confident is Steven Rosenbaum, appearing for the US in support of the Blochs.⁵⁸) By contrast, David Hartwell, appearing for Frischholz and the condominium association, appears out of his depth from the beginning, probably because of lack of experience in this type of argument. Clumsy with the legal distinctions the judges raise and slow on the uptake, his tone becomes increasingly defensive, until, as we shall see, Easterbrook begins to treat him with impatience.⁵⁹

The judges also have fun: there are two or three times when they crack one another up, and the laughter is itself, I think, a significant aspect of their deliberative engagement. Jokes presuppose a context of community: you know what will crack someone up by sharing background knowledge with him or her, whether ethnic or personal.⁶⁰ From their laughter, we can tell that these judges share a good deal and inhabit some type of well-defined world together. As we see, it is a world of argument.

Two issues are the focus of the judges' questions. First, do the relevant clauses of the Fair Housing Act cover only presale conditions, or is there some way in which they may apply to rules or conduct that take place after the sale?⁶¹ Second, does the record show evidence of intentional religious discrimination, as distinct from a refusal to grant an accommodation? On both, progress toward consensus (and the partial overruling of *Halprin*) takes place.

Feinerman makes a strong case that the FHA, in referring to "conditions" and "privileges" of sale, includes some post-sale conduct. Focusing throughout on the consequences of excluding post-sale conditions from the understanding of those words, he argues that the stat-

nois). For discussion of his theory of the case, I am grateful to Victor Quintanilla, an associate at Sidley Austin, who worked on the case with him.

⁵⁸ Steven H. Rosenbaum, who offered supporting argument for the US, is Acting Deputy Assistant Attorney General in the Civil Rights Division, US Department of Justice. *Bloch*, 587 F3d at 772.

⁵⁹ Hartwell is a founding partner in the firm of Penland & Hartwell; he apparently is the lawyer retained by the condominium association, and it seems likely that his practice has not emphasized issues of this sort. See Penland & Hartwell, *David C. Hartwell*, online at <http://www.penhart.com/bio/?bio=David%20C.%20Hartwell> (visited Mar 22, 2010).

⁶⁰ See Ted Cohen, *Jokes: Philosophical Thoughts on Joking Matters* 12–13 (Chicago 1999) (describing how community and common knowledge are necessary for understanding certain jokes).

⁶¹ Other issues treated more briefly in the resulting opinion—the issue of disparate impact and the issue of constructive eviction—are not discussed. Since those are issues on which the final opinion fails to find in the Blochs' favor, it is possible that the judges have already decided that they will not diverge from the panel ruling. The open question, then, is with respect to the two issues on which they do focus.

ute would be powerless to protect minorities if it were interpreted narrowly.⁶² Minorities would then be forced to endure discriminatory treatment that stopped just short of forcing them out. In the present case, he argued, when a person buys a condominium, part of the terms of sale involve being bound by the rules of the condo association: the contract of sale creates an ongoing relationship with the association, in such a way that the rules of the association are legitimately seen as part of the terms of sale. This interpretation of the FHA was then strongly supported by Steven Rosenbaum, on behalf of the US Department of Justice, Civil Rights Division. He insists that all five of the terms in § 3604(b)—“terms, conditions, privileges, services, facilities”—can apply to post- as well as to pre-acquisition conduct.⁶³ The word “privileges,” in particular, denotes ongoing living conditions such as use of common areas, laundry room, and pool; membership in the condo association; and so forth.⁶⁴ He argues that under *Chevron*,⁶⁵ this reasonable interpretation, issued by HUD, is owed deference.

Hartwell is then questioned about the same matter. Judge Easterbrook helpfully offers him two possible arguments: (1) condo association rules are not conditions or privileges; (2) they are conditions, but conditions of occupancy, rather than conditions of sale. Hartwell initially gets the two arguments utterly confused; but eventually, after Easterbrook points out to him that he has confused the two, he opts for the second. Easterbrook then presses him on *Chevron*: if HUD sees it the other way, interpreting condo rules as falling under conditions of sale, do they have the right to say that? Hartwell answers that they have no right: they just “re-legislated the boundaries of the FHA to—”⁶⁶

At this point, Easterbrook loses patience. Interrupting Hartwell, he says, “That’s just a kind of op-ed page rhetoric.”⁶⁷ And he presses on: are those rules related enough to the sale to count as conditions of sale? “Is there any doubt in your mind that anybody who buys a condo takes it subject to the condo association rules? . . . The sale itself is contingent on the application of the rules.”⁶⁸ At this point, Judge Wood steps in: the condo association rules “conditio[n] the package of rights that you have bought, . . . every condo association has certain restric-

⁶² According to Quintanilla, a keystone of the strategy he and Feinerman adopted was a pragmatic focus on consequences; they chose this emphasis because Quintanilla is influenced by the pragmatist approaches of John Dewey and Karl Llewelyn. But that is also an approach that is likely to be attractive to the Seventh Circuit.

⁶³ See Oral Argument, *Bloch* at 00:15:41 (cited in note 54).

⁶⁴ *Id.* at 00:16:30.

⁶⁵ *Chevron U.S.A. Inc v NRDC*, 467 US 837 (1984).

⁶⁶ Oral Argument, *Bloch* at 00:39:47 (cited in note 54).

⁶⁷ *Id.* at 00:39:49.

⁶⁸ *Id.* at 00:40:00.

tions” that must be followed.⁶⁹ Hartwell seems disgruntled that Wood has stepped in, and says he has not completed his reply to Judge Easterbrook. What follows, in true tag-team style, is:

Easterbrook: Judge Wood and I are asking—

Hartwell: I think that—

Easterbrook: the same question.

Hartwell: I think that’s the same question?

Wood: It’s . . . exactly—

Easterbrook: We’re asking the same question.

Wood: the same question.⁷⁰

To change the metaphor to an area that both Judge Easterbrook and I know well: we could imagine this entire exchange set as a trio in one of Mozart’s operas, which often depict responsiveness and harmony on one side, confusion on the other.

The judges press on: if a condo association passes a rule that says there will be no African-American visitors to any units here, will that violate § 3604(b)? Hartwell says no, since that rule affects only the visitor and not the buyer.⁷¹ This time it is Wood who answers with impatience: “Oh, it affects both people.”⁷² Posner inserts a question about *Chevron*, and Hartwell once again answers that he doesn’t think HUD has the authority to “go beyond [congressional] intent.”⁷³ Easterbrook now becomes even more caustic: “We’re not interested in what you think. We’re interested in what the statute says.”⁷⁴

At this point it is open season on Hartwell. Posner asks what would happen if a condo association said, “We sell to Jews because we have to, but . . . you’re going to be very uncomfortable here, because we don’t like you.” He continues, “so on your view [] that’s lawful?”⁷⁵ Judge Diane Sykes steps in: suppose the condo association states that the trash collection of Jewish owners will be suspended. Hartwell admits this would be discriminatory. But is it actionable, asks Wood? Not under §§ 3604 or 3617, says Hartwell. This time, Posner takes over: surely that would be a “goofy result.” Suppose the landlord

⁶⁹ *Id.* at 00:40:29.

⁷⁰ Oral Argument, *Bloch* at 00:40:54 (cited in note 54).

⁷¹ *Id.* at 00:41:55.

⁷² *Id.* at 00:42:03.

⁷³ *Id.* at 00:43:50.

⁷⁴ Here we may contrast Hartwell’s attempt to impute intent to a statute—an approach Easterbrook clearly does not favor—with Feinerman’s pragmatic emphasis on consequences. Oral Argument, *Bloch* at 00:43:53 (cited in note 54).

⁷⁵ *Id.* at 00:48:17.

said, I'll sell to Jews, but "you know the association does require that Jews wear a yellow star."⁷⁶ Posner and Wood laugh first, and then general laughter ensues, spreading, it would seem, to the spectators.⁷⁷ Hartwell is silent.

What has happened here? Clearly, the judges are reaching a consensus that it is unreasonable or "goofy" if "conditions and privileges" does not extend to rules of the condo association that pervasively govern one's life as an owner; this conclusion leads, in the final opinion, to their partial overruling of *Halprin*. Thus a conclusion of considerable legal importance is reached through careful consideration of hypotheticals (as well as consideration of the HUD interpretation and *Chevron* deference). The outburst of laughter means the end of the road for Hartwell: a community held together by intellectual clarity, good examples, and high standards coalesces in that laughter, and he is left on the outside.

The other major issue dealt with in oral argument is the issue of intentional religious discrimination. This turns out to be the all-important issue, since the final opinion ultimately interprets both §§ 3604(b) and 3617 to require evidence of intentional discrimination.⁷⁸ The key issue is: Are the Blochs asking for a religiously grounded accommodation from a neutral rule (as Easterbrook had argued in his panel opinion)? Or does the record (examined in the light most favorable to the Blochs) show sufficient evidence of intentional discrimination that the case should go to a jury?

Three crucial moves are made. First, Judge Wood repeatedly draws attention to a distinction between two periods: the period between 2001 and 2004, when the rule was apparently a genuinely neutral rule, and was applied against objects such as boots, shoes, and packages, but not against the Blochs' mezuzot, and a period subsequent to the 2004 repainting project, when the rule was apparently reinterpreted to apply to mezuzot, and the campaign of repeated removal began.⁷⁹ In effect, she suggests, we are dealing with two rules, not one. The first rule was truly neutral, but it did not pertain to objects on doorposts, only objects in the hallway. (The final opinion sharpens this argument by pointing out that Hallway Rule 2 forbids "signs or nameplates" on doors, and that this clause would have been utterly redundant if clause 1 had been understood at the time to apply

⁷⁶ Id at 00:50:57.

⁷⁷ Id at 00:51:10.

⁷⁸ Disparate impact is declared irrelevant, not in general, but in this case, because the Blochs did not previously make a separate argument based on disparate impact. See *Bloch*, 587 F3d at 784.

⁷⁹ Oral Argument, *Bloch* at 00:28:35 (cited in note 54).

to doors and doorposts.⁸⁰) By her determined questioning, Wood clarifies the difference between the condo association's behavior in the first period and its behavior in the second period, until one can see a consensus emerging that the change is so substantial as to constitute, in effect, a new rule.

Judge Easterbrook had not previously made any distinction between two periods or two rules. Judge Wood's dissent had: "The whole point of the Blochs' case," she wrote, "is that the Association, under the guise of 'interpreting' the rule in 2004, transformed it from a neutral one to one that was targeted exclusively at observant Jewish residents."⁸¹ The oral argument appears to represent decisive progress toward the eventual unanimous agreement that Wood is correct on this point. During the oral argument, Easterbrook listens attentively to Judge Wood as she questions Hartwell, and by the time of the final opinion, he concurs with her that there are in effect two distinct rules, the first possibly neutral, the second—the 2004 reinterpretation—discriminatory. Judge Wood's interpretation is a major part of the final opinion, which distinguishes the 2001 rule from the 2004 policy introduced "under the guise of 'interpreting' the rule."⁸²

Second, Feinerman, Rosenbaum, and Judge Wood repeatedly draw attention to facts that were always in the record, but that had not been emphasized previously, certainly in Judge Easterbrook's opinion, and in some cases even in Judge Wood's dissent—facts suggesting that the 2004 reinterpretation took place "because of" rather than "in spite of" the Blochs' religion. As Easterbrook points out, under *Personnel Administrator of Massachusetts v. Feeney*,⁸³ the Blochs must show that this is not a case of enforcing a rule with an "empty head"—that is, without knowledge of the religious significance of the mezuzah; if the association interpreted or reinterpreted it with an empty head, or even if, understanding the religious significance of the mezuzah, it proceeded in spite of, rather than because of, the religious significance then it is not discriminatory.⁸⁴

⁸⁰ *Bloch*, 587 F3d at 785.

⁸¹ *Bloch v. Frischholz*, 533 F3d 562, 572 (7th Cir 2008) (Wood dissenting), vac'd en banc, 587 F3d 771 (7th Cir 2009) ("[T]he placing of an object on the doorpost is (as far as anything in this record shows) irrelevant to practitioners of Christianity, Islam, Buddhism, Hinduism, or any other religion, but it is a duty (a mitzvah) for Jews.").

⁸² *Bloch*, 587 F3d at 783:

We agree with the panel dissent that the Blochs are not seeking an exception to a neutral rule. Hallway Rule 1 might have been neutral when adopted; indeed, Lynne Bloch voted for the Rule when she was on the Board of Managers. But the Blochs' principal argument is that the Rule isn't neutral anymore.

⁸³ 442 US 256 (1979).

⁸⁴ Oral Argument, *Bloch* at 00:10:50 (cited in note 54).

In responding to this challenge, the first point Feinerman and Rosenbaum emphasize is that the rule was not enforced against the mezuzah in the earlier period, suggesting that the original intent of the rule was the removal of unsightly objects. (The judges engage in some discussion of the small size of mezuzot, and the fact that it would be difficult even to see one unless you were right in the doorway.⁸⁵) The history of repeated removals of the mezuzot despite the Blochs' protests clearly shows that the condo association understood its religious significance. Did they simply enforce the rule neutrally, or is there evidence that the 2004 reinterpretation was targeted at the religious object? Here several instances of unusual malice are highlighted. The doorman who returned the mezuzah to the Blochs was suspended without pay for his action. Feinerman argues, plausibly, that this is not simply enforcement of a neutral rule: "a reasonable factfinder [could] conclude that . . . what was going on here was . . . the deliberate targeting of Jewish residents."⁸⁶ Especially telling is the funeral episode: during the funeral of Lynne Bloch's husband, while the family was out at the cemetery, the maintenance staff of the condo association removed the mezuzah (and removed it several more times during the week of *shiva*). Moreover, certain secular objects, far larger and more conspicuous than the mezuzah, were not removed: a coat rack that the condo association had apparently provided the Blochs for their *shiva* guests, and a table with a pitcher of water, provided so that guests could wash their hands before entering the condo.⁸⁷ The small religious object was taken away, the large secular objects remained.

Hartwell now attempts to argue that the coat rack and table were intended to go inside the condo, but had not yet been put there because the door was locked.⁸⁸ As Feinerman points out in rebuttal, this interpretation is intrinsically implausible, because the whole point is that guests coming from the cemetery are to wash their hands *before* entering the apartment.⁸⁹ But there is a prior problem with Hartwell's theory, and here we see another instance of tag-team cooperation:

Wood: Is there any record evidence of that or is this something you're speculating right now?

Hartwell: I'm actually not speculating, your Honor, it's not in the record as it sits.

Wood: So it's not in the record.

⁸⁵ Id at 00:31:48 (Wood) ("If you're standing in the hall I'm not even sure you could see it.")

⁸⁶ Id at 00:14:45.

⁸⁷ *Bloch*, 587 F3d at 774.

⁸⁸ Oral Argument, *Bloch* at 00:53:16 (cited in note 54).

⁸⁹ Id at 01:00:35.

Hartwell: The record is somewhat condensed.

Wood: Well, then, then it's not in the record.

Easterbrook: If it's not in the record, it's not in the record. [He laughs.]

Hartwell: It's not in the record. In fact, there's no evidence in the record either way.

[Hartwell then tries to argue that the Blochs requested the coat rack.]

Wood: And that's in the record?

Hartwell: I don't believe it's in the record before this Court.

[Easterbrook sighs audibly in the background.]⁹⁰

Once again, the close cooperation between Wood and Easterbrook and their shared impatience with legally irrelevant theories and sloppy argument is striking. This intensive focus on the record is part of a process that eventually leads to a central finding of the final opinion, supporting the position that a reasonable trier of fact could find discriminatory intent. Judge Tinder concludes: "Selectively interpreting 'objects of any sort' to apply only to the mezuzah but not to secular objects creates an inference of discriminatory intent."⁹¹

One further fact in the record that plays a role in the final opinion, though not in the oral argument, is the fact that, during this same period, Frischholz repeatedly scheduled meetings of the condo association on Friday nights, thus preventing Lynne Bloch from attending due to her religious obligations.⁹² When he was deposed, he was asked whether he was aware of those obligations, and he said that he was: "She's perfectly able. She decides not to. . . . She says that she can't attend after sunset, because it is Shavus [sic]."⁹³ As a footnote at this point explains, Frischholz seems to have bungled the word, which ought to be *Shabbat*. Whether this gives further evidence of discriminatory animus is unclear.⁹⁴ Frischholz also made other derogatory references to Lynne Bloch's religion, saying that if she did not like the removal of the mezuzah, she should "get out."⁹⁵ The final opinion con-

⁹⁰ Id at 00:55:23.

⁹¹ *Bloch*, 587 F3d at 786 (citing this as a fact that pushes the case past summary judgment).

⁹² Id at 773-74.

⁹³ Id.

⁹⁴ An older Ashkenazi Jew, Bloch might well have said "Shabbos," a fact not mentioned by Judge Tinder that makes Frischholz's mispronunciation somewhat less egregious. Many Orthodox Jews pronounce the word "Shabbat" as "Shavus," so it is also possible that Frischholz was not wrong at all in his pronunciation.

⁹⁵ *Bloch*, 587 F3d at 786.

cludes that his responses “smack of religious bias.”⁹⁶ These telling details are not in the oral argument, but it is clear that the oral argument prompted a renewed sifting of the record.

Third, and perhaps most important, the judges investigate the distinction between personal animus and religious discrimination. Much of the record suggests personal animus between Frischholz and Lynne Bloch. The question is whether this evidence undercuts the Blochs’ claim of religious discrimination. On this question, not fully treated in Judge Wood’s original dissent, the oral argument makes decisive progress. In a significant exchange between Feinerman and Posner, the two agree that the *motive* for a particular type of behavior is irrelevant: what is relevant is whether (whatever the motive) the behavior is intentionally discriminatory.⁹⁷ Thus, if a sexual harasser claims that his motive is that he loves women, this does not make any difference: the question is whether his conduct intentionally targets them on grounds of sex. Here, what has to be shown is not that the motive for the conduct is religious hatred (rather than personal animus) but rather that, whatever the motive, the conduct intentionally targets the mezuzah *because of* religion. Posner appears unconvinced. Feinerman now proposes a hypothetical:

Let’s assume that a white landlord or a homeowners’ association burns a cross on the lawn of a black resident and, when hauled into court, says, “I love black people. Some of my best friends are black people. I have nothing against black people. I hated that particular black person and what I did, I wanted to do something to get under his skin and I knew what would get under his skin was to burn a cross on his lawn.” Under your interpretation, there was no discriminatory animus towards African-Americans in general, but I still think that would be found to be a violation and found to be discrimination.⁹⁸

Posner replies, “You know, I agree with you.” On that note, the oral argument ends.⁹⁹

An oral argument is only one aspect of the judicial deliberative process, but it is one that we can study. In this case, we see that each significant part of the final opinion’s consensus is prepared here, by the sharp questioning, the careful attention to the record, and the cooperative distinction-drawing among the judges. Judge Easterbrook’s role in the “tag team” is of particular interest, since it is his prior

⁹⁶ Id.

⁹⁷ Oral Argument, *Bloch* at 01:03:08 (cited in note 54).

⁹⁸ Id at 01:04:00.

⁹⁹ Id at 01:04:36.

theory of the case that is on its way to being overthrown. Without the slightest vanity or defensiveness, eyes squarely on the arguments, and with respect for anyone who offers a good argument, Easterbrook follows reason where it leads.

IV. EASTERBROOK AND RELIGIOUS ACCOMMODATION

Judge Easterbrook changed his mind on some counts. A significant part of his earlier opinion stands unretracted, however: the part in which he comments on issues of constitutional law. I now wish to engage him on those questions, in the spirit of the Chicago School.

At every stage of the case, the participant judges discuss First Amendment issues. These issues are relevant to the case, because the Blochs might have had a constitutional claim under the Free Exercise Clause but for *Employment Division v Smith*, which held that a rule that is neutral and of general applicability is not as such discriminatory, even though it may severely burden religious practice.¹⁰⁰ *Smith*, accordingly, is discussed throughout, and it is agreed by all participants that it limits the claims that the plaintiffs might legitimately make.¹⁰¹ In other words, accommodations for religious reasons are not constitutionally compelled, however severe the burden to religious practice. Moreover, the judges seem united in their desire to conform their analysis of intentional discrimination to the Supreme Court's (post-*Smith*) analysis in *Church of the Lukumi Babalu Aye v Hialeah*,¹⁰² even though no First Amendment claim is on the table.

Elsewhere I have analyzed and criticized Justice Antonin Scalia's reasoning in the majority opinion in *Smith*.¹⁰³ In this concluding Part, my aim is to draw attention to the way in which Judge Easterbrook not only follows *Smith*—as he must—but also appears to go out of his way to endorse both its holding and Justice Scalia's associated theory of democratic government. My hope is to show that he should not be so enthusiastic: the Court's post-*Smith* jurisprudence has left the distinction between refusal of accommodation and intentional discrimination so murky as to be well-nigh unworkable. Moreover, the current patchwork situation, in which some religious practices of some citizens are governed by *Smith*, and some by the tougher standard of the Reli-

¹⁰⁰ 494 US at 879.

¹⁰¹ See *Bloch v Frischholz*, 533 F3d 562, 564 (7th Cir 2008); *Bloch*, 587 F3d at 783, 785; Oral Argument, *Bloch* at 00:07:40 (cited in note 54); id at 00:21:58.

¹⁰² 508 US 520, 521 (1993) (invalidating a city ordinance prohibiting ritual slaughter for lack of a compelling state interest justifying the targeting of the Santeria religion).

¹⁰³ See Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 147–74 (Basic Books 2008).

gious Freedom Restoration Act¹⁰⁴ (RFRA), creates an unacceptable inequality in access to fundamental liberties. Although this Part bears only indirectly on my argument about judicial rationality, I hope that this will be the opening of an exchange with Judge Easterbrook about discrimination and accommodation in the spirit of the norms that I have been observing and defending.

Judge Easterbrook, in his panel opinion, summarizes the current situation well. After *Smith*, the failure to accommodate is not discrimination. Justice Sandra Day O'Connor, as he notes, argued that it was, but the majority saw things differently: “[A] neutral, exception-free rule is not discriminatory and is compatible with the Constitution’s free exercise clause.”¹⁰⁵ Some federal statutes, he notes, do require religious accommodation: Title VII, the Religious Land Use and Institutionalized Persons Act¹⁰⁶ (RLIUPA), and RFRA, which remains constitutional as applied to acts of the federal government.¹⁰⁷ But the FHA does not contain such a provision, requiring accommodation only for disability.¹⁰⁸ Our job, Judge Easterbrook concludes, is to apply the law, not to make it.

In his concluding paragraph, Judge Easterbrook appears to go further, endorsing a version of Justice Scalia’s theory in *Smith*. Justice Scalia argued that the situation in which courts apply the substantial burden–compelling state interest test of *Sherbert v Verner*¹⁰⁹ to all free exercise claims would be tantamount to “courting anarchy.”¹¹⁰ Leaving accommodation to the political process, he conceded, is likely to disadvantage minorities; but that is to be preferred “to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”¹¹¹ Judge Easterbrook expresses a similar idea in a slightly different way:

¹⁰⁴ Religious Freedom Restoration Act, Pub L No 103-141, 107 Stat 1488 (1993), codified at 42 USC § 2000bb et seq (2000) (requiring courts to apply strict scrutiny in determining whether the Free Exercise Clause has been violated).

¹⁰⁵ *Bloch*, 533 F3d at 565.

¹⁰⁶ Religious Land Use and Institutionalized Persons Act, Pub L No 106-274, 114 Stat 803 (2000), codified at 42 USC § 2000cc et seq (2000) (limiting the circumstances in which a government may “impose a substantial burden on the religious exercise of a person residing in or confined to an institution”).

¹⁰⁷ See *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 423 (2006) (applying RFRA to grant an injunction allowing a religious group to use hallucinogenic tea that would otherwise violate the Controlled Substances Act); *Cutter v Wilkinson*, 544 US 709, 714 (2005) (requiring accommodation of religion for prisoners under RLUIPA).

¹⁰⁸ See 42 USC § 3604(f)(3)(B).

¹⁰⁹ 374 US 398 (1963).

¹¹⁰ *Smith*, 494 US at 888 (describing the dangers of “open[ing] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”).

¹¹¹ *Id* at 890.

religious accommodations always give rise to conflicts, and deciding how to handle these conflicts is “a task for the legislature.”¹¹²

But is it? Let us look at where we were prior to *Smith*, and where we are now. Under the *Sherbert* test—the regime that Justice O’Connor plausibly represents in her opinion in *Smith* as the Court’s longstanding tradition—a claim like that of the Blochs would undergo a two-part inquiry.¹¹³ First, a court would inquire into the issue of “substantial burden”: does being forced to remove the mezuzah place a substantial burden on the Blochs’ free exercise of their religion?¹¹⁴ The answer to this question is easy to reach. As Judge Wood emphasized both in her dissent and at oral argument, and as numerous supporting documents attested, the mezuzah is required of traditional Orthodox Jews, and it is impossible for them to observe their religious commandments without it.

The second part of the inquiry would concern compelling interests: is the burdensome rule justified by an interest so strong that it can be taken as “compelling”?¹¹⁵ (Traditionally, interests in peace and safety have fallen into this category,¹¹⁶ and Justice O’Connor argues in *Smith*—concurring in the result though not in the analysis—that Oregon’s interest in policing drugs is of a similar seriousness.¹¹⁷) In the present case, that inquiry is, once again, clear and easy. The association has a strong interest in preventing clutter in the halls. The fact that the mezuzah did not jeopardize that interest, or any other very strong interest, is amply demonstrated by the fact that the rule was not enforced between 2001 and 2004; it could also be demonstrated by following the lead of the oral argument and mentioning the small size of the average mezuzah, which can barely be seen unless one is in the doorway, and so on. That is an inquiry into public facts—an inquiry that courts can handle well.

Contrast the present regime. As all the participating judges seem to agree, *Lukumi* is highly relevant to the present case, because it shows that, even after *Smith*, not all facially neutral laws survive Free Exercise Clause scrutiny. In his panel opinion, Judge Easterbrook cites the case to illustrate what the plaintiffs’ argument (in his view) does not show: “Plaintiffs do not contend that a seemingly neutral rule was adopted to target an unwanted group, after the fashion of [*Lukumi*].”¹¹⁸

¹¹² *Bloch*, 533 F3d at 565.

¹¹³ See *Sherbert*, 374 US at 406.

¹¹⁴ See *Smith*, 494 US at 894 (O’Connor concurring).

¹¹⁵ *Id.* at 895 (describing a compelling interest as a government interest “of the highest order”), quoting *Wisconsin v Yoder*, 406 US 205, 215 (1972).

¹¹⁶ See Nussbaum, *Liberty of Conscience* at 115–74 (cited in note 103).

¹¹⁷ *Smith*, 494 US at 904 (O’Connor concurring).

¹¹⁸ *Bloch*, 533 F3d at 564.

In her dissent, Judge Wood again cites that case, this time on the plaintiffs' side, to argue that the Free Exercise Clause forbids "subtle departures from neutrality."¹¹⁹ Citing Justice Scalia's concurring opinion in *Lukumi*, she argues that the reinterpretation of the Hallway Rule, like the Hialeah statute that forbade ritual animal sacrifice, is one of those "laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment."¹²⁰ Judge Wood is not saying that the Blochs should bring a First Amendment claim: she is using the free exercise tradition to show that, even though accommodations are not constitutionally compelled, non-neutral implementation of a facially neutral rule may still amount to intentional discrimination. *Lukumi* is relevant not as a precedent, but as a case that opens room for a finding of intentional discrimination even when a rule is facially neutral, and all the judges show an interest in the case and deference to the Court's treatment of the issue of targeting. Subsequently, participants in the oral argument use *Lukumi* as a reference point in order to further understand the concept of intentional discrimination.¹²¹ The case, and this same part of Justice Scalia's opinion, is cited again in Judge Tinder's opinion, in order to argue that "to side with the defendants, we must assume that the 'design, construction, or enforcement' of Hallway Rule 1 does not target observant Jews."¹²²

But how helpful is *Lukumi* to courts trying to grapple with this difficult set of issues? The old *Sherbert* test did not play around with either motives or intentions. It said: if there is a burden, and there is no compelling interest on the other side, that is that. As Justice O'Connor says, the essence of the Free Exercise Clause, on that old understanding, was that it is about removal of burdens. *Lukumi* is far more murky. First of all, Justice Anthony Kennedy and Justice Scalia disagree about the test for intentional discrimination. Justice Kennedy thinks that both legislative history and discriminatory implementation are relevant; Justice Scalia excludes the former and considers only the latter.¹²³ (Indeed that appears to be his reason for writing a concurring opinion.) In other words, Scalia, but not Kennedy, relies on something like the distinction between motive and intention that Posner and Feinerman discuss at oral

¹¹⁹ Id at 573 (Wood dissenting), quoting *Lukumi*, 508 US at 534.

¹²⁰ *Bloch*, 533 F3d at 573 (Wood dissenting), quoting *Lukumi*, 508 US at 557.

¹²¹ See, for example, Oral Argument, *Bloch* at 00:28:16 (cited in note 54). Judge Wood analogizes the facts of *Bloch* to *Lukumi*. Here, only one religion required items to be displayed in the hallway, raising the possibility that its members had been improperly targeted.

¹²² *Bloch*, 587 F3d at 786, quoting *Lukumi*, 508 US at 557.

¹²³ See *Lukumi*, 508 US at 558 (Scalia concurring in part and concurring in the judgment) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted.").

argument: motive is irrelevant, intention is relevant. For Kennedy, both are relevant. So that is the first problem: the Court really does not help us sort things out, since different justices understand the test differently.

Second, the motive–intention distinction, which initially looks clear in the case discussed by Feinerman and Posner, is actually very unclear. Intention is not simply disparate impact: it involves a mentalistic component. A finding of intentional discrimination requires finding that the alleged discriminator was aware of the religious significance of the mezuzah and acted *because of*, rather than *in spite of*, the other party's religion. To act intentionally, here, means acting in the light of a goal and with awareness of the way in which one's actions will bear on the goal. But then, it looks as if intentional discrimination involves its own motives and desires. What the distinction really amounts to is that a party may have more than one set of motives, and the motive of personal hostility may be deeper and ultimately more explanatory than the motive to discriminate. Or at least that is how it seems natural to me to recast it, as a philosopher. But then the judge who wants to apply this distinction is stuck with the difficult and indeterminate task of speculating about different levels of motivation, surely an inquiry judges are not well equipped to handle.

How does Scalia solve this problem in *Lukumi*? He suggests that we can infer intentional discrimination from the whole pattern of implementation of the law. It seems, then, that there is no need to delve into messy questions of legislative history or personal psychology. But how satisfactory is his approach, in a case like that of the mezuzah? *Lukumi* was an egregious case, because the targeting of ritual animal sacrifice, and the neglect of other cruel practices, was utterly obvious, and it was easy to see that the implementation of the law was discriminatory. In *Bloch*, the pattern is complicated: the reinterpretation did apply to a couple of other objects, not just the mezuzah, and the evidence that the court eventually relies on hovers on the borderline between motive and intent in a rather unsatisfactory way. Even if one is satisfied that the court is correct in denying summary judgment, the jury will probably have a terrible time with this one. Surely the test proposed in *Lukumi* does not give courts an easier job than *Sherbert*, but a much more equivocal and difficult job.¹²⁴ At the same time, the

¹²⁴ Consider a related hypothetical: a condo association refuses to install a *Shabbat* elevator, citing reasons of cost. Under the current standard, the court will have to sift the evidence to try to figure out whether the reference to cost was pretextual and there is some evidence of an intent to drive away observant Jews. Under the *Sherbert* standard, the questions would be: how large is the burden, and how compelling is the interest? (So, the inquiry will very likely turn on the size of the cost and its relation to usual condo fees, special assessments, and so on, which is an inquiry courts can handle well.)

burden to the Blochs' religious free exercise is large, and utterly clear. In the *ancien régime*, which focused on "substantial burden" and "compelling interest," it would have been clear that the burden was impermissible, and I find this an attractive result.

Judge Easterbrook's response to the difficulty—not retracted in his change of opinion—is that legislatures handle this sort of question better than courts. But we may make two points. First, as Justice O'Connor correctly observes in *Smith*, courts had a clear and workable test under *Sherbert*. Things got much worse for them after *Smith*, which was guided by a theory of deference to legislatures. Second, courts have to get into the act sooner or later, since intentional discrimination is illegal even when accommodation is not required, and the determination of intentional discrimination is difficult for courts to handle—more difficult, I have argued, than the simple, objective questions of burden and compelling interest. The facts of *Bloch* barely made it to a jury, egregious though they were, because it is so hard to find intentional discrimination where there is a facially neutral rule. As Justice O'Connor says in *Smith*, "If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice."¹²⁵ Relief from a burden is its essence—whether the burden is imposed through intentional discrimination or not.

Justice Scalia says that the *Sherbert* test, applied to all religious claims, would mean "courting anarchy."¹²⁶ I think that the shoe is on the other foot. Free exercise rights are fundamental. Justice Scalia acknowledges that when legislatures take control there will be some unevenness in the protections they receive. How right he is. Today, after *Smith* and *City of Boerne v Flores*,¹²⁷ we are truly "courting anarchy." If you have an unemployment insurance claim or a "hybrid claim" under the Free Exercise Clause, you are covered, still, by the *Sherbert* test.¹²⁸ If you are in a prison, or on government land, RLIUPA ensures that you are covered by the *Sherbert* test. If you are up against an act of the federal government, RFRA ensures that you are governed by the *Sherbert* test. If you live in one of the states that has passed a state version of RFRA, or has interpreted its state constitution to require that standard, you are governed by the *Sherbert* test.¹²⁹

¹²⁵ 494 US at 894 (O'Connor concurring).

¹²⁶ *Id.* at 888 (majority).

¹²⁷ 521 US 507 (1997).

¹²⁸ *Smith*, 494 US at 881–82.

¹²⁹ For the list of these states, see Nussbaum, *Liberty of Conscience* at 160 (cited in note 103). For further discussion, see also Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv L Rev

If your claim is under Title VII, your right to a religious accommodation is secure.¹³⁰ If you belong to a minority that has some political clout in the place where you live—if, for example, you can get the Chicago City Council or the Illinois state legislature to pass a law in your favor—your right to be free of a substantial burden on your free exercise of religion is protected.

If none of the above is true, too bad for you. You will have to jump through hoops that a large proportion of your fellow citizens do not have to jump through. At best, you can win only by showing “intentional discrimination,” a concept all too elusive and difficult to establish, except in egregious cases.

Let us take a clear example. The Controlled Substances Act has since been interpreted to permit the sacramental use of peyote¹³¹—because the Native Americans have considerable political clout, and because *Smith* alerted the public to their problem. It was not interpreted to permit the sacramental use of *hoasca*, a hallucinogen used ceremonially by a small Brazilian sect with only 130 members. Luckily for the Brazilians, however, the Controlled Substances Act is federal law, thus (still) governed by RFRA. As Chief Justice John Roberts observed, this is one of those instances where it is good that courts get involved: otherwise the rights of a powerless minority would lack protection. “RFRA . . . plainly contemplates that *courts* would recognize exceptions—that is how the law works. . . . RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required.”¹³² But is it acceptable that fundamental rights of minorities should be subject to chance?

In short, the fundamental rights and privileges of citizenship are currently hostage to majority whim in a way that causes significant inequalities. The difficulty of *Bloch*—which would have been an open-and-shut free exercise case under *Sherbert*—shows how vulnerable fundamental liberties are in a world where courts do not mandate accommodations under the Free Exercise Clause. In the spirit of the new Chicago School, I challenge Judge Easterbrook to elaborate and defend his theory that democratic majorities are better able to handle conflicts over accommodation than are courts. Certainly they have not done very well so far.

155, 211–12 (2004); Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L Rev 275, 310–15. More than half of the states currently have introduced an RFRA-like standard. Laycock, 118 Harv L Rev at 212.

¹³⁰ See *Trans World Airlines, Inc v Hardison*, 432 US 63, 66 (1977). Judge Easterbrook cited this point in his panel opinion. *Bloch*, 533 F3d at 565.

¹³¹ 21 CFR § 1307.31.

¹³² *O Centro Espirita Beneficente Uniao do Vegetal*, 546 US at 434.