

2005

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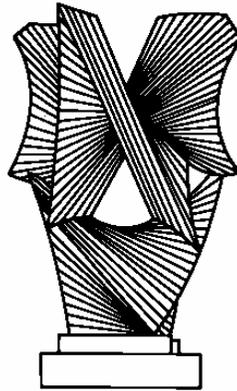
## Recommended Citation

Lior Strahilevitz, "Exclusionary Amenities in Residential Communities" (University of Chicago Public Law & Legal Theory Working Paper No. 98, 2005) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=757388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=757388).

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# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 98



## EXCLUSIONARY AMENITIES IN RESIDENTIAL COMMONS

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

July 2005

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## Exclusionary Amenities in Residential Communities

Lior Jacob Strahilevitz\*

During recent decades, courts and legislatures have devoted a great deal of time and energy to stamping out various forms of housing discrimination. These efforts have included a refusal to enforce racially discriminatory covenants,<sup>1</sup> the development of various legal doctrines to police overt racial discrimination in the residential housing context,<sup>2</sup> and numerous statutory initiatives designed to prevent discrimination in housing sales, leases, and advertising.<sup>3</sup> As a result, a real estate developer's choice of language, human models, and media are all subject to legal scrutiny.

Despite these governmental efforts, many housing consumers still have preferences for certain forms of exclusion.<sup>4</sup> Some people will want to exclude young homeowners from a common interest community or apartment complex, and others will want to exclude the elderly.<sup>5</sup> Others may want to exclude members of particular religious minorities or majorities.<sup>6</sup> Still other homeowners may want to exclude "new money," families with children, Republicans, African Americans, or residents who lack fashion sense from particular residential communities.<sup>7</sup> And some people appear willing to pay a

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<sup>1</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>2</sup> *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 437 (1973); Rosemarie Maldonado & Robert D. Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community-Based Living?*, 23 *FORDHAM URB. L. J.* 1245 (1996).

<sup>3</sup> *See, e.g.*, Fair Housing Act of 1968, Pub. L. No. 90-284, § 3604, 82 Stat. 73, 83 (codified at 42 U.S.C. § 3604); New Jersey Fair Housing Act, N.J. Stat. Ann. § 52:27 D301-329 (West 2004).

<sup>4</sup> *See, e.g.*, EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 60-78 (1994); David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 *J. POL. ECON.* 455, 477 (1999); Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 *AM. SOC. REV.* 23, 28 (1994).

<sup>5</sup> *See, e.g.*, *Senior Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992); MCKENZIE, *supra* note 4, at 57.

<sup>6</sup> *See, e.g.*, *Taormina Theosophical Community, Inc. v. Silver*, 140 Cal.App.3d 964 (Ct. App. 1983).

substantial premium for this privilege.<sup>8</sup> Whatever the law says about the legality of certain kinds of exclusion, individual preferences for exclusion will persist to varying degrees.<sup>9</sup>

People interested in residential homogeneity inevitably will try to thwart integration using creative substitutes for overt discrimination. This essay explores one such response, which is essentially unregulated by antidiscrimination laws. The essay then examines the pros and cons of inclusionary government remedies. Perhaps counterintuitively, the primary exclusionary device I have in mind are various types of club goods, although local public goods can further the same purpose too.

Club goods are somewhat rivalrous resources from which outsiders can be excluded,<sup>10</sup> for which “the optimal sharing group is more than one person or family but smaller than an infinitely large number.”<sup>11</sup> Residential elevators, concierges, and tennis courts are classic examples of club goods, in that few individuals or nuclear families find it worth their while to include such resources in their living quarters, but these resources can become quite attractive when their costs and benefits can be divided among multiple households.<sup>12</sup> If too few people are using the elevator, concierge, or tennis court, then it will go to waste, and those who must pay for a share of the resource will be overtaxed by their condominium or homeowners’ associations. If, on the other hand, too many people try to use the resource in question, it will become too crowded and provide insufficient value to members of the club. Access to club goods is, in large measure, what makes residence in a common interest community attractive to so many families.

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<sup>7</sup> See, e.g. Camille Zubrinsky Charles, *Processes of Racial Residential Segregation*, in URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES 217, 259 tbl. 4.6 (Alice O’Connor ed. 2001) (noting that 11% of whites responded in a survey that they wanted to live in neighborhoods that were 100% white, and that 2.5% of black respondents said they wanted to live in all-black neighborhoods); see also Michael O. Emerson et al., *Does Race Matter in Residential Segregation? Exploring the Preferences of White Americans?*, 66 AM. SOC. REV. 922, 927-32 (2001) (finding that the presence of Asian Americans and Latinos had little effect on whites’ willingness to move into a neighborhood once crime, public school quality, and anticipated appreciation of real estate were controlled, but that the presence of African Americans had a very substantial effect on whites’ willingness to move into the neighborhood, even after controlling for these variables); Abby Goodnough, *Salsa Dancers and Stunt Men? Must Be a Miami Condo Project*, N.Y. TIMES, May 23, 2005, at A1 (discussing the over-the-top efforts of condominium developers to attract “image conscious people, many from Latin America and Europe” with lavish sales parties designed to “emulate the club scene,” including one party at a “sports-inspired” condominium with “trampoline artists, karate demonstrations, masseuses, and aura reader, an oxygen bar, and sales agents in tracksuits”).

<sup>8</sup> Patrick Bayer et al., *Residential Segregation in General Equilibrium*, Yale University Working Paper (Oct. 2003); Bayer et al., *Equilibrium Model*; Cutler & Glaeser; Stephen L. Ross, *Segregation and Racial Preferences: An Analysis of Choice Based on Satisfaction and Outcome Measures 2* (Univ. of Conn. Dept. of Econ. Working Paper 2003).

<sup>9</sup> See Joe R. Feagin, *Excluding Blacks and Others from Housing: The Foundation of White Racism*, 4 CITYSCAPE: J. OF POL’Y DEV. & RESEARCH 79, 81-88 (1999).

<sup>10</sup> Todd Sandler & John Tschirhart, *Club Theory: Thirty Years Later*, 93 PUB. CHOICE 335 (1997). The leading academic treatment of club goods is RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 347-480 (2d ed. 1996).

<sup>11</sup> James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1, 2, 13 (1965).

<sup>12</sup> Robert D. Tollison, *Consumption Sharing and Non-Exclusion Rules*, 39 ECONOMICA 276, 287 (1972).

The exclusionary amenities strategy begins with a simple first step: A developer of a common interest community can embed particularly costly club goods within the residential development and then record covenants and declarations that require all present and future members of the community to contribute toward their maintenance on the basis of some criteria other than use. The willingness to pay for these goods will function as a sorting mechanism for would-be residents. People who are likely to use the club good will purchase homes in the common interest community, and those who are unlikely to use the club good in question will be deterred from joining the community. So far, there is nothing insidious about this process. Those who like to swim will gravitate toward condo developments with nice pools, and those who like to play softball may join homeowners' associations that invest in attractive softball diamonds. This seems perfectly natural, and welfare enhancing, as Charles Tiebout argued long ago.<sup>13</sup> Such self-sorting increases homogeneity within residential communities, but heterogeneous preferences with respect to sporting activities do not seem like something the law should combat, at least not at first glance.

The worrisome part of this story arises in the following circumstance. What if a developer selects a particular club good, not because the members of an association will actually derive substantial value from its use, but because the club good in question deters members of "undesirable" groups from joining the community in question?<sup>14</sup> In

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<sup>13</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLITICAL ECON. 416 (1956). Tiebout argued that residents' decisions to move to, or stay in, particular communities revealed their preferences for various packages of public goods and taxes. Where residential mobility is relatively unconstrained, and there are many communities from which to choose, each individual could be expected to flock to "that community which best satisfies his preference pattern for public goods." *Id.* at 418. If there are many such communities within a geographic area, then the immigration and emigration of residents will mimic the buying and selling that disciplines the market. As a result, Tiebout argued that an efficient market could emerge in the provision of municipal services. *Id.* at 423-24; *see also* Robert W. Helsley & William C. Strange, *Exclusion and the Theory of Clubs*, 24 CANADIAN J. OF ECON. 888, 897 (1991) (arguing that the provision of club goods also will be Pareto efficient if excluding outsiders is costly).

For further development of Tiebout's ideas within the legal literature, see Vicki Been, "*Exit*" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World*, 86 GEO. L.J. 201 (1997); Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1 (2001); Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996); and Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481 (2004). For criticisms of the Tiebout theory, see Truman F. Bewley, *A Critique of Tiebout's Theory of Local Public Expenditures*, 49 ECONOMICA 713 (1981).

<sup>14</sup> Tiebout, in a footnote, speculated that individuals might desire to live near "nice" neighbors, but he did not pursue the implications of this idea for his theory. Tiebout, *supra* note 13, at 418 n.12. In the 1970s, Allan De Serpa modeled the idea that individuals may derive utility or disutility based on the extent to which their fellow club members have particular characteristics. *See* Allan C. De Serpa, *A Theory of Discriminatory Clubs*, 24 SCOTTISH J. OF POL. ECON. 33, 34 (1977); *see also* Sandler & Tschirhart, *supra* note 10, at 344 ("Once heterogeneity is allowed in clubs, sharing arrangement can account for members consuming both the shared good and the characteristics or attributes of other members."). De Serpa did not develop a model of exclusionary club goods or anything like it. Rather, his major contribution consisted of noting the possibility that these preferences for particular kinds of club memberships would affect the Pareto optimum level of club goods provision. *Id.* at 39. Lee Fennell has also argued that individuals will care substantially about the nature of the people with whom they share local public goods, and that

this case, potential members may join the club, and happily pay for the club good, knowing that by purchasing this club good they are simultaneously receiving the “benefits” of exclusion without violating anti-discrimination laws. Whereas Tiebout envisioned municipalities competing for residents by providing them the goods, services, and tax packages that they valued most, we can now imagine a world in which homeowners associations (and perhaps municipalities) compete for the residents that they want by providing them with the goods, services, and assessment packages that are least palatable to undesired potential residents. Such associations thereby select common amenities, not only on the basis of what amenities are inherently welfare enhancing, but also on the basis of how effectively those amenities promote self-selection by would-be residents. The most valuable club goods for these purposes are the ones that send the clearest messages to desirable and undesirable prospective purchasers.

There will be two mechanisms that enable exclusionary amenities to promote residential segregation. The first relates to sorting<sup>15</sup> and the second relates to focal points.<sup>16</sup> The sorting point can be explained succinctly. To the extent that a taste for a common amenity,  $x$ , functions as a proxy for some characteristic,  $y$ , then sorting on the basis of willingness to pay for  $x$  will produce, as a predictable side effect, sorting on the basis of  $y$  as well. Mandating that all residents of a neighborhood pay for amenity  $x$  will function as a tax that falls disproportionately on populations that do not possess characteristic  $y$ .

The focal points connection is more complex. The idea here is that consumers will understand the sorting properties of exclusionary amenities and that those who want to live in a community with lots of people who possess characteristic  $y$  will purchase homes in communities that provide amenity  $x$ . By the same token, consumers who do not want to live among those who overwhelmingly possess characteristic  $y$  will be deterred from purchasing a home in a subdivision that offers amenity  $x$ . Amenity  $x$  therefore functions as a focal point around which consumers who care about the presence or absence of characteristic  $y$  can organize themselves. The kicker, of course, is that characteristic  $y$  may be a racial, religious, or other suspect classification. If the public understands the correlation between amenity  $x$  and characteristic  $y$ , then by advertising the presence of amenity  $x$  real estate developers may undermine the efficacy of laws that prohibit discriminatory advertising in the real estate market.

American anti-discrimination laws have gone to great lengths in recent years to obscure the racial composition of newly planned developments from prospective purchasers.<sup>17</sup> If few residents have moved into a new neighborhood, it may be quite

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neighbors who enhance the quality of such goods (e.g., smart students, or neighborhood watch members) will have incentives to coalesce into communities that exclude less cooperative members. Fennell, *supra* note 13, at 26-29.

<sup>15</sup> For prior discussions of sorting in the residential context, see Tiebout, *supra* note 13, at 416, and Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1454-1457 (2005).

<sup>16</sup> For more on focal points generally, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57-71 (1980); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Robert Sugden, *A Theory of Focal Points*, 105 ECON. J. 533 (1995).

<sup>17</sup> See generally 42 U.S.C. § 3604(c); Martin D. Abravanel, *Public Knowledge of Fair Housing Law: Does It Protect Against Housing Discrimination?*, 13 HOUSING POL’Y DEBATE 469, 480 (2002) (noting

difficult for prospective purchasers to obtain accurate information about their fellow prospective purchasers through simple observation. And to the extent that many initial buyers will be real estate speculators, as opposed to owner occupiers, the developer himself may lack information about the planned development's initial racial composition.<sup>18</sup> Yet such information matters greatly to many purchasers, who fear buying into a new development with a racial composition that is not to their liking, particularly given the tendency for neighborhood composition to change rapidly in the manner predicted by Tom Schelling's "tipping" models.<sup>19</sup>

Caucasians who purchase homes in a new development that winds up tipping toward African American composition will incur substantial economic costs as a result.<sup>20</sup>

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widespread public knowledge of the Fair Housing Act's provisions prohibiting racially discriminatory advertising and steering); Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing – Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127 (1995) (describing federal efforts to enforce Fair Housing laws using government officials posing as would be purchasers or renters); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, (1995) ("Under the Fair Housing Act, it is illegal for a real estate broker to indicate, whether asked or not, what the racial makeup of a community is when a buyer is purchasing residential property. Nor can a broker indicate the racial patterns of purchasing and selling in a neighborhood."); Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1180-81 (1998) (noting how anti-blockbusting statutes also constrain real estate agents' ability to discuss anticipated changes in neighborhood racial composition). Despite these efforts, steering and other forms of housing discrimination persist. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 104-05* (1993); Jan Ondrich et al., *Do Real Estate Brokers Choose to Discriminate? Evidence from the 1989 Housing Discrimination Study*, 64 SOUTHERN ECON. J. 880, 889-90 (1998).

<sup>18</sup> See Patrice Hill, *Region Joins Housing Bubble: Overvalued Homes a Worry*, WASH. TIMES, Feb. 14, 2005, at A1 (noting the abundance of speculators in Washington, D.C.); Ted Pincus, *Area Real Estate Market Keeps on Rolling Along*, CHI. SUN-TIMES, Oct. 12, 2004, at 61 (noting the same in Chicago); Linda Rawls, *South Florida Condominium Market May Be Headed for Meltdown, Analysts Warn*, PALM BEACH POST, Aug. 6, 2004 (noting that up to 70% of South Florida condominium buyers are speculators who do not intend to occupy the units).

<sup>19</sup> Ondrich et al., *supra* note 17, at 891. Tom Schelling's work on neighborhood "tipping" suggests the bleak possibility that complete residential segregation is inevitable if both Caucasians and African Americans prefer to live in diverse neighborhoods where they are part of the majority group. See Thomas Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143 (1971). Schelling's approach has been the subject of some recent criticism on both theoretical and empirical grounds. See, e.g., Abraham Bell & Gideon Parchamovsky, *The Integration Game*, 100 COLUM. L. REV. 1965 (2000); William Easterly, *The Racial Tipping Point in American Neighborhoods: Unstable Equilibrium or Urban Legend* (N.Y.U. Working Paper June 2003); but cf. W.A.V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1 (1991) (concluding that Schelling's account is more right than wrong). One problem with the strong version of Schelling's hypothesis is that precise neighborhood-level or block-level racial composition data is hard to obtain, largely because of governmental efforts to combat residential segregation. Schelling seems to assume that residents have, or at some point obtain, perfect information about the racial composition of their neighborhoods. The strong version of his model also deemphasizes factors such as loss aversion, stubbornness, preferences among some citizens for substantial diversity, and the transaction costs associated with real estate transactions. All these considerations help explain why many neighborhoods in the United States achieve a stable equilibrium at some point besides complete racial homogeneity.

<sup>20</sup> Property values appreciate much less quickly in largely African American neighborhoods than in largely Caucasian neighborhoods. See, e.g., Francine D. Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q. J. ECON. 321, 333 (1990); David Rusk, *The Segregation Tax: The Cost of Racial Segregation to Black Homeowners*, BROOKING INSTITUTE SURVEY, October 2001, at 5.

Real estate has historically appreciated much more quickly in all-white neighborhoods than in neighborhoods that have a ten percent African American population, and noticeably more quickly in ten percent African American neighborhoods than twenty percent African American neighborhoods.<sup>21</sup> Relatively minor changes in the racial composition of a neighborhood thus can have enormous consequences for a home-owning family's net worth and may cause families to change residences more frequently than they would prefer. Accordingly, prospective buyers will purchase under tremendous uncertainty, softening the demand for residences in new developments where the likely racial composition is as yet unknown.<sup>22</sup>

In this situation, we can expect substantial pent up demand for information about a new development's likely racial composition. Exclusionary club goods function as a mechanism for reducing the uncertainty and transition costs associated with residential tipping. Exclusionary club goods address this uncertainty by communicating to African American and Caucasian purchasers which direction the development is likely to tip. By promoting the sorting of successive purchasers, exclusionary club goods may also provide a permanent bulwark against "reverse tipping" that might result from block-busting activities organized by real estate agents or community groups.<sup>23</sup> This analysis suggests that exclusionary club goods may be quite valuable in new residential developments precisely because they make the tipping process far more efficient. Exclusionary club goods serve a different function in established developments. There, they function as social goods that cause many neighborhood residents to congregate in particular places, which dramatically lowers the information costs associated with subsequent prospective purchasers' efforts to discern a neighborhood's racial composition.

Let me make the exclusionary amenities scenario concrete with a hypothetical. Say a developer wants to create a residential community within a heterogeneous metropolitan area, where whites and blacks have similar income levels, and each racial group comprises 50% of the population. Suppose the developer knows that the only salient difference between blacks and whites is that 80% of whites play polo, whereas only 20% of blacks play polo. Finally, suppose, consistent with empirical data, that there is substantial market demand for housing developments that are relatively racially homogenous.<sup>24</sup> The sophisticated developer might build his residential development

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<sup>21</sup> Sunwoong Kim, *Race and Home Price Appreciation in Urban Neighborhoods: Evidence from Milwaukee, Wisconsin*, REV. OF BLACK POL. ECON. 9, 25-26 & ex. 7 (Fall 2000).

<sup>22</sup> Housing in developments that were planned after the enactment of the 1968 Fair Housing Act is less racially segregated than housing in older neighborhoods, where lawful, overt discrimination helped entrench a racially segregated housing equilibrium. See Joe T. Darden & Sameh M. Kamel, *Black Residential Segregation in Suburban Detroit: Empirical Testing of the Ecological Theory*, REV. OF BLACK POL. ECON. 103, 106 (Winter 2000); Farley & Frey, *supra* note 4, at 28, 36-37.

<sup>23</sup> Block busting occurs when real estate agents intentionally promote rapid racial tipping in a neighborhood as a means of obtaining sizable commissions on home sales. For more on block busting, see ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO, 1940-1960*, at 31-36 (1998); McKenzie, *supra* note 4, at 72; Drew S. Days, III, *Rethinking the Integrative Ideal: Housing*, 33 MCGEORGE L. REV. 459, 465 (2002); and Mehlhorn, *supra* note 17, at 1145

<sup>24</sup> For a comprehensive review of the literature on preferences for residential segregation, see Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URBAN

around a polo grounds, and require that all those who purchase homes in the vicinity pay annual assessments to support the upkeep, staffing, and real estate taxes associated with the polo grounds and their affiliated stables.

At base, we might expect that the resulting population of homeowners will be 80% white and 20% black, because non-polo players will decide to spend their real estate dollars elsewhere. Embedding a polo grounds within a residential community will function in a manner similar to charging a racially disproportionate tax on purchases within the subdivision, whereby blacks are charged more for homes than whites. But this sorting mechanism will be supplemented by a focal points effect. To the extent that some Caucasian home purchasers have a preference for living in a predominantly white community, we will expect that the population of our development may become even more skewed. After all, *the community in question will attract not only those who have a strong interest in polo, but those who have a strong interest in white residential homogeneity*. This latter group is not paying a premium for the polo grounds and stables per se. Rather, it is paying a premium for the perceived benefits of racial exclusion.<sup>25</sup> Ideally, this group might prefer to live in a community that practiced overt racial discrimination,<sup>26</sup> but because the law thwarts such discrimination, this polo grounds development represents the next “best” alternative. While anti-discrimination laws prevent the developer from advertising in a way that provide prospective purchasers with information about the likely racial composition of the new neighborhood, the presence of a polo ground will communicate such a message to attentive prospective residents.

In the real world, gated communities built around polo grounds are rare, though *Forbes* has identified a few of them.<sup>27</sup> But those built around golf courses are common, and during the 1990s golf had precisely the polarizing attributes that my hypothetical ascribed to polo. In the pages that follow, I will explore the possibility that residential

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AFF. 379 (2004). A less comprehensive literature review, albeit one with a greater emphasis on work by legal scholars, appears in A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. (forthcoming May 2005).

<sup>25</sup> There may be some African Americans who will pay a large premium to live in overwhelmingly Caucasian neighborhoods, but evidently these African Americans do not exist in large numbers. See Charles, *supra* note 7, at 259 tbl. 4.6; Dawkins, *supra* note 24, at 387-92. Moreover, African Americans are unlikely to move into neighborhoods that are believed to contain a large percentage of residents who do not want African American neighbors. See Charles, *supra* note 7, at 230-31. Note further that virtually all white respondents to a telephone survey stated that they were unwilling to move into a neighborhood in which African Americans comprised 65% or more of the residents, even though pollsters informed the white respondents that crime in the neighborhood was low, school quality was high, and housing values were increasing. Emerson et al., *supra* note 7, at 930.

<sup>26</sup> Or it might not. Overt discrimination may be socially costly in a way that discrimination-by-amenities is not. Perhaps this results from the ambiguous social meaning of exclusionary club goods strategies or the law’s decision to sanction one form of discrimination but not the other. Cf. Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1432 (1994) (noting the expressive harms engendered by visible homeowners’ association actions that would conflict with antidiscrimination laws if undertaken with state involvement).

<sup>27</sup> See Sarah Clemence, *Most Expensive Gated Communities in America 2004*, Forbes.com, available in <[http://www.forbes.com/2004/11/19/cx\\_sc\\_1119home.html](http://www.forbes.com/2004/11/19/cx_sc_1119home.html)> (“One on our list of the most expensive in the country has security patrols on the water to keep watch on multi-million-dollar yachts. Others have polo grounds and picnics with all the right people.”)

golf communities have functioned as exclusionary club goods. At the same time, I also will point to instances in which the exclusionary amenities strategy might contribute to acceptable, or perhaps even laudable, types of residential sorting.

This essay proceeds as follows. Part I briefly examines the possibility of exclusion premiums. Residential settings that provide members with opportunities to discriminate among those who can afford to join the community command a market premium, particularly at the high end of the real estate market. Part II develops the idea of the exclusionary club good and exclusionary public good (collectively, “exclusionary amenities”) and points out the possibilities for using these amenities to exclude groups from developments where anti-discrimination law proscribes more “efficient” forms of exclusion. It examines some tentative empirical evidence on exclusionary amenities, focusing on residential golf course developments. Part III introduces the idea of “inclusionary amenities” and examines the possibility that a developer’s decision to forego such resources in a common interest community might provide additional opportunities to exclude undesirables, albeit by depriving the community’s members of resources whose provision they would otherwise find welfare-enhancing. Part IV examines possible legal responses to the introduction of exclusionary amenities or the absence of inclusionary amenities in residential communities. Part V provides a brief conclusion.

## **I. The Exclusion Premium**

A recent paper by Michael Schill, Ion Voicu & Jonathan Miller identified an interesting puzzle in the Manhattan real estate market.<sup>28</sup> As a general matter, apartments in condominiums attract a premium over similar apartments in housing cooperatives. Controlling for the many variables that differentiate housing units, Schill and his coauthors found that, as a general matter, a condominium apartment commands a 15.5% premium over a similarly situated cooperative.<sup>29</sup> This finding was consistent with what Manhattan real estate agents expected.<sup>30</sup>

Why this discrepancy between condominiums and cooperatives? On this point, Schill and his co-authors identify several respects in which the condominium structure is more efficient and more desirable than the cooperative structure. They summarized the most important benefits of the condominium structure in this manner:

Unlike the case of cooperative apartments, condominium owners do not effectively share liability on mortgage debt, they are free to transfer their apartments to whomever they choose, they are subject to fewer rules than

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<sup>28</sup> Michael H. Schill et al., *The Condominium v. Cooperative Puzzle: An Empirical Analysis of Housing in New York City* (2004), available in <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=502362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=502362)>.

<sup>29</sup> *Id.* at 30.

<sup>30</sup> *Id.* at 5, 11.

cooperative apartment owners and, correspondingly, they need spend less time in internal governance.<sup>31</sup>

On this account, Manhattan sounds like a real estate market that works perfectly. The efficient ownership regime confers value on owners, and the inefficient regime confers losses on owners who adhere to it.<sup>32</sup> New buildings in Manhattan overwhelmingly structure themselves as condominiums, not cooperatives,<sup>33</sup> but the high costs of transitioning from the cooperative to the condominium form explain why there are still many cooperative buildings in New York.<sup>34</sup>

Strikingly, however, Schill and his co-authors identified a group of apartments in which the ordinary patterns were reversed. For these apartments, the cooperative form actually conferred a very substantial premium – 20.7 percent – on owners.<sup>35</sup> The distinguishing characteristic of cooperative units that command a premium is that they bar financing as part of the purchase of a unit. These units, in short, are in buildings where the owners can afford to buy homes without any need for a mortgage. Prohibitions on mortgage financing arise in both condominium and cooperative buildings, but it is the cooperative apartment buildings that command a hefty premium as the domain of Manhattan’s economic elites.

Let us be quite clear about what this data means. Wealthy owners of Manhattan cooperative apartments seem willing to pay a hefty premium *and* sacrifice substantial leisure time and a great deal of financial privacy at the time of purchase, all for the benefits of exclusivity and having a much greater say in who their neighbors are.<sup>36</sup> For money-is-no-object types, the leisure time premium paid by cooperative owners may be even more substantial than the economic premium. Cooperatives’ authority to exclude has been exercised to keep the likes of Madonna and Richard Nixon out of prestigious New York buildings,<sup>37</sup> but there is also some evidence suggesting that it has been used to

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<sup>31</sup> *Id.*

<sup>32</sup> See Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25 (1991).

<sup>33</sup> Schill et al., *supra* note 28, at 5.

<sup>34</sup> *Id.* at 32-33. Schill et al. identify substantial transaction costs and adverse tax consequences associated with transitioning a cooperative building into a condominium. During the last three decades, the percentage of common interest communities that have used the cooperative form has plummeted. Evan McKenzie, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POLICY DEBATE 203, 207 tbl. 2 (2003).

<sup>35</sup> Schill et al., *supra* note 28, at 30.

<sup>36</sup> *Id.* at 10. See also *id.* at 31 (“The reasons for this rather large relative shift from a sizable condominium premium to a discount are not absolutely clear. One explanation may be that for a relatively small segment of cooperative apartment owners, the cooperative form is value maximizing because of the power it gives to owners to maintain exclusivity. A large proportion (79.3 percent) of the apartment sales in buildings with rules prohibiting financing were also in the top decline of cooperative apartment values. This suggests that affluent New Yorkers may be using the ‘no financing’ restriction to maintain an affluent living environment and that the benefits of social exclusiveness, themselves, generate value for these purchasers.”). Condominium owners have far less discretion to prevent sales to particular buyers than do cooperative owners.

<sup>37</sup> *Id.* at 10 n.8.

exclude members of historically marginalized groups.<sup>38</sup> Perhaps as a result, the New York courts have begun policing decisions to exclude members of protected groups from cooperative apartments more closely in recent years.<sup>39</sup>

This data suggests something else that is equally important. Before the advent of antidiscrimination laws and doctrines, restrictions on alienation and club membership could keep “undesirables” out of certain communities. But once the state began enforcing antidiscrimination laws, people who wished to exclude these undesirables had to do so on the basis of proxies.<sup>40</sup> Wealth and income often provide important proxies, and suburbs in particular managed to maintain substantial exclusivity by restricting neighborhoods to single family homes built on large lots.<sup>41</sup> But the Manhattan coops show that price will sometimes be an inadequate exclusionary proxy. People may want to exclude “new money” or “old money” or members of a particular political party from their communities, and will seek out some mechanism for doing so. This helps explain the cooperative premium at the high end. In recent decades, income and wealth have become poorer proxies for race and other characteristics that have often formed the basis for exclusion.<sup>42</sup> Once wealth and income become less useful proxies, people interested in screening their neighbors may have to turn to other characteristics.

## II. “If You Build It, They Won’t Come”: An Introduction to Exclusionary Amenities

On the basis of the Schill et al. study, and similar studies,<sup>43</sup> it seems appropriate to assume a market demand for exclusion in the residential setting, and particularly strong market demand for exclusion at the highest income levels. Some other studies suggest that, as incomes rise, the demand for racially homogeneous neighborhoods actually increases.<sup>44</sup> Residential exclusion, in that sense, may be something of a luxury good.

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<sup>38</sup> See Maldonado & Rose, *supra* note 2, at 1245; Sabrina Malpeli, Comment, *Cracking Down on Cooperative Board Decisions that Reject Applicants Based on Race: Broom v. Biondi*, 73 ST. JOHN’S L. REV. 313 (1999).

<sup>39</sup> *Id.*

<sup>40</sup> See generally WILLIAM J. COLLINS, THE HOUSING MARKET IMPACT OF STATE-LEVEL ANTI-DISCRIMINATION LAWS 1960-1970 (Feb. 2003) (examining the effects of anti-discrimination law enforcement on the housing market).

<sup>41</sup> J. Peter Byrne, Book Review, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2266-72 (1997); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1894-1906 (1994).

<sup>42</sup> See *infra* note 84.

<sup>43</sup> See *supra* note 24 and sources cited therein.

<sup>44</sup> See, e.g., Patrick Bayer et al., *An Equilibrium Model of Sorting in an Urban Housing Market: The Causes and Consequences of Residential Segregation*, YALE ECON. GROWTH CTR. DISCUSSION PAPER NO. 860 (July 2003). This trend is evidently more pronounced for Caucasians than for African Americans. See Richard D. Alba et al., *How Segregated Are Middle-Class African Americans?*, 47 SOCIAL PROBLEMS 543 (2000); Dawkins, *supra* note 24, at 382-83.

This conclusion coincides with a standard assumption in the club goods literature that club members derive utility from having fellow members with desired characteristics and disutility from having fellow members with undesirable characteristics.<sup>45</sup> As soon as that assumption is made, and the law attempts to restrict certain types of exclusion that are demanded by some consumers, exclusionary amenities become inevitable.

#### A. Understanding Exclusionary Club Goods

I define an “exclusionary club good”<sup>46</sup> as a collective good that is paid for by all members of a club, at least in part because willingness to pay for the good in question functions as an effective proxy for other desired membership characteristics. In the residential setting, exclusionary club goods function to engender homogeneity among neighborhood residents with respect to any particular characteristic, and prevent the neighborhood’s population from reflecting the heterogeneity that exists in the larger community with respect to that characteristic. As with other forms of club goods, exclusionary club goods are somewhat rivalrous and excludable. Demand for exclusivity

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<sup>45</sup> See, e.g., De Serpa, *supra* note 14, at 34; Sandler & Tschirhart, *supra* note 10, at 344 (“Once heterogeneity is allowed in clubs, sharing arrangement can account for members consuming both the shared good and the characteristics or attributes of other members. Members’ characteristics may be viewed by other members as generating an increase (e.g., intelligence in a learned society) or a decrease (e.g., rudeness) in utility.”); Suzanne Scotchmer, *On Price-Taking Equilibria in Club Economies with Nonanonymous Crowding*, 65 J. PUB. ECON. 75, 75-76 (1997); see also Fernando Jaramillo & Fabien Moizeau, *Conspicuous Consumption and Social Segmentation*, 5 J. OF PUBLIC ECON. THEORY 1, 2 (2003) (“The reason agents are interested in joining social groups is that these groups may serve to allocate goods or services not traded on markets. Exchanging friendship, communicating information about job search and business opportunities, providing mutual aid or insurance constitute many examples of these forms of allocation.”).

Mine is not the first paper to hypothesize that strategic behavior occurs in the club goods setting. Fernando Jaramillo, Hubert Kempf, and Fabien Moizeau have speculated briefly that individuals may engage in wasteful conspicuous consumption as a means of signaling wealth to potential clubs, who would invite these consumers to join their high-status clubs based on a belief that a willingness to engage in conspicuous consumption indicates a willingness to contribute to club goods. Fernando Jaramillo, Hubert Kempf, and Fabien Moizeau, *Conspicuous Consumption, Social Status and Clubs* (Fondazione Eni Enrico Mattei Working Paper 2000); see also *id.* at 18 (“[W]e could see the signaling problem in a very different way: the observable item could be the individual contribution to the club, on which is based society’s inference over individual income and therefore on social status. In other words you contribute to the New York Yacht Club not because you like sailing but for snobbish reasons only: just to show off your fortune. It is then social segmentation into clubs which serves as the support of status discrimination or social segmentation into statuses.”).

<sup>46</sup> A quick note on terminology. My use of “exclusionary” to describe the club goods in question does not indicate that the exclusion mechanism has anything to do with trespass law (the body of property law that protects the right to exclude most directly). Rather, exclusionary club goods are exclusionary in the same way that “exclusionary zoning” is exclusionary – the end result of either strategy will be a community in which the citizens targeted for exclusion are poorly represented. Similarly, I refer to “inclusionary club goods” later in the paper. These club goods are inclusionary in the same way that “inclusionary zoning” is. Inclusionary zoning typically encompasses strategies designed to make a community more attractive to lower-income residents. For further discussion of exclusionary and inclusionary zoning, see PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 203-227 (2003); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2357-61 (2003); Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981).

helps fuel demand for an exclusionary club good, along with inherent demand for the club good itself. Although not all “club goods” entail social interactions among fellow users, exclusionary club goods often do, for reasons that will be explained shortly.<sup>47</sup>

In order to function as an effective sorting device, an exclusionary club good must be both relatively expensive and relatively visible. If the club good in question is too cheap, then the decision to join a particular community might not be affected substantially by its presence. A “cheap” club good may engender heterogeneity through the operation of focal points, but it will not have any sorting effects. If, on the other hand, the club good is relatively expensive, such that an “undesirable” residential purchaser will conceptualize it as a high differential tax without any associated benefit, then it may convince the undesirable purchaser to buy a home in a community that does not provide the club good in question. Similarly, a club good that is invisible or that does not predictably attract purchasers with particular characteristics will not operate as an effective focal point.<sup>48</sup> Homogeneity will result from sorting and focal point mechanisms acting in concert.

To consumers about to make the most important investments of their lifetimes, the synergy between sorting and focal points may prove critical, and this may explain the preference for an expensive club good over a cheap focal point alone. To the extent that focal point messages are misinterpreted, see their meaning change over time, or reach an audience without particularly widespread preferences for homogeneity, the presence of an expensive sorting device will be a critical guarantee that a homogenous population will arise in the first instance and be maintained through multiple generations of buyers.<sup>49</sup>

Where a form of exclusion is sanctioned by neither the law nor prevalent social norms, one should not expect to find any exclusionary club goods. For example, residential communities in the United States are permitted by law to discriminate against convicted sex offenders who present high risks of recidivism.<sup>50</sup> Citizens may, understandably, have a strong preference for excluding such individuals from their neighborhoods,<sup>51</sup> but the legality of overt discrimination renders it inefficient for a community to invest in exclusionary amenities that would be attractive to non-sex

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<sup>47</sup> See *infra* text accompanying notes 62-68.

<sup>48</sup> A large body of real estate law mandates that sellers disclose various attributes of their property to potential purchasers. As the analysis above suggests, various forms of mandatory disclosure may have the unintended consequence of promoting residential homogeneity.

<sup>49</sup> The implicit assumption here is that preferences for certain types of common amenities are more stable over time than linguistic signals, which are the cheapest tools in a focal point strategy, but might see their meanings change radically, thanks to linguistic reclamation, government actions, or other behavioral shifts. For a discussion of efforts to shift the social meaning of particular communications, see Lessig, *supra* note 17, at 1010-13, 1041-42.

<sup>50</sup> *Mulligan v. Panther Valley Property Owners Assn*, 766 A.2d 1186 (Sup. Ct. 2001); *People v. Leroy*, \_\_ N.E.2d \_\_, 2005 WL 880969, (Ill. Ct. App., April 12, 2005).

<sup>51</sup> See, e.g., David Herbest, *Neighbors Pressure Sex Offender to Move*, MOUNTAIN VIEW VOICE, Sep. 10, 2004 (describing the decline in property values and neighborhood opposition that occurred after one sex offender moved into a common interest community), available in <[http://www.mv-voice.com/morgue/2004/2004\\_09\\_10.chavez.shtml](http://www.mv-voice.com/morgue/2004/2004_09_10.chavez.shtml)>.

offenders, but unattractive to sex offenders.<sup>52</sup> Instead, communities use covenants or even local ordinances to exclude sex offenders.<sup>53</sup> Similarly, when a developer seeks to fill a market niche by creating a common interest community devoted to housing members of a politically disfavored group, employing exclusionary amenities would be overkill. Rather, the cheaper alternative of a focal point alone should suffice to establish residential homogeneity within the common interest community. Thus, the Palms of Manasota, the nation's first retirement community for homosexuals, need not invest in exclusionary amenities to keep heterosexual retirees from residing there.<sup>54</sup> Anti-gay sentiment alone is sufficiently powerful among straight seniors to prevent integration.

When club members or real estate developers have a preference for excluding members of protected classes, the options available shrink. For example, African Americans and members of all other racial groups are protected by various laws designed to combat discrimination in the housing sector.<sup>55</sup> Such laws reach not only refusals to sell or lease, but also limit the ability of landlords or sellers to advertise in a racially discriminatory manner.<sup>56</sup> This body of law substantially constrains a developer's choice of human models in housing advertisements by imposing liability on landlords whose advertisements feature exclusively Caucasian models.<sup>57</sup> Indeed, in some respects, housing advertising is more tightly regulated than the sale or leasing of housing. For example, anti-discrimination laws permit "mom and pop" landlords to refuse to lease certain apartments to tenants on the basis of race, but bar those same landlords from advertising their discriminatory preferences with respect to said apartment.<sup>58</sup> Deprived of "efficient"<sup>59</sup> tools of discrimination, such as racist refusals to deal or advertisements,

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<sup>52</sup> It is not difficult to imagine a club good that might provide a good proxy for sex offender's status. Community members might make extremely heavy investments in school child-abuse-awareness programs or domestic violence police, as a way of discouraging dangerous sex offenders from settling in a particular community.

<sup>53</sup> Betsy Blaney, *Safe at Home: Lubbock Company Creating Sex Offender-Free Subdivision*, FT. WORTH STAR-TELEGRAM, June 7, 2005, at B5; Stephanie Simon, *Ex-Cons Exiled to Outskirts*, L.A. TIMES, Dec. 5, 2002, at 1.

<sup>54</sup> Debra Rosenberg, *A Place of Their Own*, NEWSWEEK, Jan. 15, 2001, at 54.

<sup>55</sup> See *supra* note 3.

<sup>56</sup> Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335 (2003); 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 (2001).

<sup>57</sup> *Ragin v. N.Y. Times*, 923 F.2d 995 (2d Cir. 1991).

<sup>58</sup> Petty et al., *supra* note 56, at 376.

<sup>59</sup> There may be a few senses in which exclusionary club goods strategies are more efficient than overt discrimination in admission or advertising. First, adopting the exclusionary club goods strategy may be less "in your face," or confrontational, than excluding members of undesired groups, and excluders may value this opportunity. See *supra* note 26; cf. De Serpa, *supra* note 14, at 39 ("[P]eople are apt to be reluctant to admit, face to face, that the characteristics of others are repulsive to them. As a consequence, the exclusion of individuals exhibiting certain characteristics evolves as a second best solution."). Second, club members may actually want to attract members of disfavored groups who actually loathe other members of their disfavored groups. To maximize this preference, overt discrimination will be ineffective, but exclusionary club goods may be highly effective.

those with a preference for discrimination may explore less “efficient” strategies that the law does not proscribe.<sup>60</sup> Exclusionary amenities may become a viable option under such circumstances.

## B. Comparing Private Goods

To be sure, self-sorting occurs in many contexts.<sup>61</sup> Developers might distort the population of a new housing development by providing larger-than-average kitchens (attracting gourmets) or miniscule kitchens (attracting those who prefer to eat at restaurants). That said, there are two critical difference between self-selection through these private goods and self-selection through club goods.

The first distinction is sociological. Club goods often involve social interactions among the members who are entitled to use them.<sup>62</sup> Private goods, by contrast, typically

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<sup>60</sup> Formally, the federal Fair Housing Act (FHA) and Fair Housing Act Amendments (FHAA) recognize disparate impact claims. *See Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 466-67 (3d Cir. 2002); *Gamble v. City of Escondido*, 104 F.3d 300, 304-07 (9th Cir. 1997). That said, FHA and FHAA are almost always brought against local governments, as opposed to individual developers, perhaps because it is so easy for a developer to rebut a prima facie case of disparate impact by pointing to a “legitimate, nondiscriminatory reason for its action,” such as consumer demand, unconnected to exclusionary motives, for the club good in question. *Lapid-Laurel, supra*, at 467; *Gamble, supra* at 305.

The leading FHA disparate impact case involving a non-governmental defendant is *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000). In *Hack*, the plaintiffs alleged that Yale’s requirement that freshmen and sophomores live in co-educational dormitories had a disparate impact on unmarried Orthodox Jews whose religious convictions barred them from residing in co-ed environments. *Id.* at 88. The plaintiffs complained that they were compelled to pay for dormitory rooms that they did not and would not use. *Id.* The panel majority held that the plaintiffs failed to state a claim under the FHA because they did not allege “that Yale’s policy has resulted in or predictably will result in under-representation of Orthodox Jews in Yale housing.” *Id.* at 91. The majority therefore determined that the plaintiffs failed to state a prima facie case under the FHA. Even if they had shown a disparate impact, however, the majority probably would have ruled in Yale’s favor, finding that Yale’s interest in promoting gender-integration was non-discriminatory and reasonable. A dissenting judge would have held that the plaintiffs could pursue a discriminatory impact claim under the FHA’s prohibition on religious discrimination. *See id.* at 104 (Moran, J., dissenting). Although the plaintiffs did not frame their argument as such, an exclusionary club goods story implicitly underpinned their discrimination claim.

<sup>61</sup> Self-sorting has been studied in the employment context, where employers may offer particular benefits as a means of preventing undesirable types from joining a firm in instances where employees have asymmetric information. *See, e.g., Peter C. Coyte, Specific Human Capital and Sorting Mechanisms in Labor Markets*, 51 SOUTHERN ECON. J. 469 (1984). For a recent application of this idea to the legal literature on executive compensation, see James Spindler & Todd Henderson, *Corporate Heroin: A Defense of Perks*, GEORGETOWN L.J. (forthcoming 2005).

<sup>62</sup> Marilyn Gardner, *An Empty Nest – Now What?, Once the Kids Move Out, Couples Start to Ask Themselves What They Want in Life and How Much Space They Need*, CHRISTIAN SCI. MON., April 21, 2001, at 15; *see also* Ronald T. Mitchelson & Michael T. Lazaro, *The Face of the Game: African Americans’ Spatial Accessibility to Golf*, 44 SOUTHEASTERN GEOGRAPHER 48, 70 (2004) (“The golf course can be a wonderful landscape of intense social and environmental interaction.”).

involve more limited social interactions.<sup>63</sup> In a neighborhood comprised entirely of quiet shut-ins living in single family homes, homeowners probably will not care that much about the characteristics of their neighbors.<sup>64</sup> As interactions among neighbors increase, we can expect that homeowners will care more about the characteristics of their neighbors. Club goods often become a locus of social activity within common interest communities, offering additional dimensions in which interactions can occur. For that reason, one might expect that people will pay a greater premium for desirable neighbors in a community offering many club goods than they would for desirable neighbors in a community offering no club goods.<sup>65</sup> One reason why racial segregation is a public policy problem stems from the connection between residential propinquity and the composition of individuals' social networks.<sup>66</sup> Residential segregation helps explain the segregated nature of social interactions in public schools, political gatherings, and some workplaces.<sup>67</sup> More troubling still, residential segregation is strongly associated with adherence to negative racial stereotypes, and selection effects only explain part of the heightened animosity toward minorities in overwhelmingly white neighborhoods.<sup>68</sup> What's more, exclusionary club goods may be particularly desirable for people who prefer both sociability and racial homogeneity among their neighbors. Outside of selecting the cooperative form, it may be difficult for a community to prompt self-selection on the basis of preferences for frequent social interactions.

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<sup>63</sup> Common amenities that do not promote social interactions among neighbors would, by hypothesis, prove less attractive as exclusionary club goods. For example, one would not expect to see garbage collection services, gardening services, or maid services functioning as exclusionary amenities with great frequency.

<sup>64</sup> To the extent that they do care, they will care because of a belief that their successors in interest will have more substantial interactions with neighbors, and the composition of a neighborhood may affect the home's resale value. See Dawkins, *supra* note 24, at 391.

<sup>65</sup> The social nature of many club goods also allows prospective purchasers to obtain information about neighborhood composition at a low cost. See *supra* text following note 23. By contrast, in a neighborhood with neither common spaces nor front porches, it may be difficult for a prospective purchaser to discover the characteristics of the neighborhood's residents.

<sup>66</sup> Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. OF SOCIOLOGY 1306, 1324-26 (1996). For a discussion of other troubling implications of homogeneity within common interest communities, see MCKENZIE, *supra* note 4, at 188-192.

<sup>67</sup> Charles T. Clotfelter, *Spatial Rearrangement and the Tiebout Hypothesis: The Case of School Desegregation*, 42 SOUTHERN ECON. J. 263, 268 (1975) (noting that whites' opposition to residential integration is strongest when they believe that residential integration will result in the desegregation of local public schools); Yannis M. Ioannides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. ECON. LIT. 1056, 1071-82, 1092 (2004); Wilfred G. Marston & Thomas L. Van Valey, *The Role of Residential Segregation in the Assimilation Process*, 441 ANNALS A. ACAD. POL. & SOC. SCI. 13 (1979). *But cf.* Timothy Bledsoe et al., *Residential Context and Racial Solidarity Among African Americans*, 39 AM. J. POL. SCI. 434, 451-53 (1995) (finding that residence in integrated neighborhoods and increased social contact with whites may decrease social solidarity among African Americans).

<sup>68</sup> J. Eric Oliver & Janelle Wong, *Intergroup Prejudice in Multiethnic Settings*, 47 AM. J. POLI. SCI. 567, 577-80 (2003); see also Donald R. Kinder & Tali Mendelberg, *Cracks in American Apartheid: The Political Impact of Prejudice Among Desegregated Whites*, 57 J. POLITICS 402, 420 (1995) (finding strong correlations between residence in largely white communities and adherence to negative stereotypes about African Americans).

The second distinction is economic. Private goods are excludable. Hence, where the law sees no variation in kitchen sizing, it might examine the costs and benefits of permitting variance,<sup>69</sup> and perhaps mandate variance if the cost-benefit calculus suggests that an invidious motive is at work. Semi-excludable club goods present more difficult issues. With those goods, there may be a very good reason for requiring that each individual contribute toward the good in question. In the absence of such a mandate, residents who value the good could have strong incentives to try to free ride on their neighbors' contributions. The strength of this justification for mandatory membership in the non-excludable goods context can provide excellent cover for bad acts.<sup>70</sup> Thus the legal system usually will have a great deal of difficulty discerning which club goods are motivated by a desire to solve a collective action problem and which are motivated by more nefarious objectives.

### C. Exclusionary Club Goods in Action

To date, the discussion has been rather abstract. Are there real-world instances of developers using exclusionary club good strategies? An example from the Washington, D.C. suburbs suggests an affirmative answer. At the very least, this example shows that developers are conscious of the ways in which the presence or absence of communal amenities can deter certain groups of undesirable residents from joining a new common interest community and that targeted consumers understand those messages.<sup>71</sup>

Fall Church, Virginia, like many suburban communities, has had trouble keeping its tax burden low while maintaining high quality public schools for its residents.<sup>72</sup> One

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<sup>69</sup> Variance in this context means a development with both large and small kitchens.

<sup>70</sup> This explains why plaintiffs asserting disparate impact claims under the Fair Housing Act would face an uphill battle if they attacked a private developer's use of exclusionary amenities. *See supra* note 60.

<sup>71</sup> This essay focuses on developers' uses of exclusionary club goods, as opposed to decisions by populated common interest communities to add exclusionary club goods. Barzel and Sass provide an illuminating explanation for why one might expect to see developers making decisions about common amenities, instead of leaving this decision to residents. *See* Yoram Barzel & Tim R. Sass, *The Allocation of Resources by Voting*, Q. J. ECON. 745, 764-65 (1990). They argue that creating expensive common amenities in a preexisting community will generate substantial controversy, particularly where residents will derive differential utility from these amenities. Complex voting procedures will be needed to resolve these disputes, particularly in common interest communities that have homes of different sizes and values. *Id.* At 765-770.

My account is consistent with Barzel and Sass's, although it supplements it in important ways. Demand for certain common interest communities may sort potential residents of a community in many ways, potentially contributing to homogeneities beyond a common desire for the amenity in question. Thus, developers may create common amenities at the outset, not only because creating such amenities would be more difficult down the road, but also because the absence of such an amenity at the outset will persuade potential purchasers who would like that amenity to purchase elsewhere instead. Indeed, it may be that the presence of certain common amenities promotes homogeneity across a number of dimensions, and these forms of homogeneity lend themselves to less contentious governance within common-interest-communities.

<sup>72</sup> *See* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Future Housing Supply and Demand Analysis for the Greater Washington Area*, 33 U. BALT. L. REV. 153, 175-76 (2004).

way of satisfying both objectives involves trying to limit the development of new housing that is attractive to families with children. To that end, the Falls Church government permitted Waterford Development to build Broadway, an 80-unit condominium, but gave the developer a financial incentive to ensure that no more than eight school children moved into the complex.<sup>73</sup> For the ninth child living in Broadway, and every additional child beyond nine, the developer would have to pay Falls Church \$15,000.<sup>74</sup> The developer agreed to pay such fees for the first five years of the development's life.<sup>75</sup>

The Broadway's developer described his response to this ordinance to a *Washington Post* reporter:

The president of Waterford Development, Jan A. Zachariasse, said he was happy to accommodate the city to win approval of the building, which is under construction on Route 7 at the center of the city.

Coming in under the eight-child ceiling was easy, he said, because a building's demographics can be shaped by simply choosing the right amenities. The Broadway, for example, has a cozy library and a clubroom with a billiard table and bar. It does not have a playroom.

...

Once the deal was signed, "I could steer the project in a certain direction to maximize or minimize the number of children," Zachariasse said. "You didn't have to be a brain surgeon to decide which way to go."<sup>76</sup>

By providing a library and bar, but failing to provide a playroom, the developer made the development in question attractive to childless residents but less attractive to families. A real estate agent who sold units in the development noted that families with many children never even inquired about living in the Broadway.<sup>77</sup>

It is hardly surprising that developers understand how to use exclusionary club goods. The only surprising aspect of this story is Zachariasse's willingness to discuss his actions and motivations so candidly with a *Washington Post* correspondent. Zachariasse

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<sup>73</sup> Peter Whoriskey, *No Kids? That's No Problem; Falls Church's Deal with Builder Highlights Area School Crowding*, WASH. POST, May 25, 2003, at A1.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* I thank Lee Fennell for bringing the Falls Church incident to my attention.

<sup>77</sup> *Id.* ("We haven't had any inquiries from people with lots of kids. It's kind of like how water seeks its own level. It just happens.") (quoting Mary Alice Kaplan). In other contexts, housing consumers with a choice of suburbs seem to understand that the choice of common sporting activities entails a choice about the nature of one's neighbors and social networks. A *New York Times* series on class in America quoted a homeowner's description of his Atlanta suburb and the role played by tennis in organizing social interactions thusly: "The good thing about it is that it is a very comfortable neighborhood to live in. . . . These are very homogeneous types of groups. You play tennis with them, you have them over to dinner. You go to the same parties. . . . When you talk about tennis, guess what? Everybody you play against looks and acts and generally feels like you. It doesn't give you much of a perspective." Peter T. Kilborn, *The Five-Bedroom, Six-Figure Rootless Life*, N.Y. TIMES, June 1, 2005, at A1 (quoting Jim Link).

lived to regret his candor, no doubt, as the Department of Housing and Urban Development launched an investigation into Falls Church and Waterford Development for violating the Fair Housing Act by intentionally discriminating against families with children.<sup>78</sup> The investigation ultimately resulted in a settlement, whereby Falls Church agreed to alter the way in which it collects school impact fees from developers, and the developers agreed to devote \$120,000 toward training its employees to avoid further discrimination against families with children.<sup>79</sup>

Following this settlement, one expects that developers will be more tight-lipped when discussing their provision of amenities in residential developments. This raises a serious problem. How are agencies charged with enforcing anti-discrimination laws to ensure that the laws are not thwarted through exclusionary amenities strategies once developers learn from Zachariasse's mistake and instead offer pretextual but plausible explanations for exclusionary club good strategies?

There are two reasonable responses to this question. One possible, and perhaps appropriate, response is to do nothing. For reasons I will identify in the conclusion, this will sometimes be the best approach in light of the danger that the cure for exclusionary amenities will be even worse than the disease. But it will be an unsatisfying approach in those instances where anti-discrimination laws reflect important normative commitments.

A second possible response is to try to identify club goods that seem particularly susceptible to exclusionary strategies, and then devote careful scrutiny to developers' use of those kinds of goods. In the section that follows I will identify a few trends in the residential golf course industry and raise the possibility that residential golf courses sometimes have functioned as exclusionary club goods, with African Americans as the "undesirable" group targeted for exclusion.

#### D. Golf and Race in the United States

During the 1990s, if you told me that an American citizen played golf, I would have been able to make a highly accurate guess about that individual's race. Among warm weather leisure activities attracting 25 million or more participants, golf stood out as the most racially segregated. During the period from 1994 to 1995, 27.7 million Caucasian Americans participated in golf, or approximately 16.9 % of all Caucasians 15 and older.<sup>80</sup> By contrast, only 900,000 African Americans participated in golf during that timeframe, comprising just 4.2% of the African American population.<sup>81</sup> Once the size of these groups is adjusted to reflect the general population of the United States, we see that

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<sup>78</sup> See News Release, *HUD Settles Investigation of Falls Church and Condo Developers*, U.S. Department of Housing and Urban Development, Nov. 19, 2004, available at <<http://www.hud.gov/news/release.cfm?content=pr04-142.cfm>> (visited Feb. 15, 2005).

<sup>79</sup> *Id.*

<sup>80</sup> R. JEFF TEASLEY ET AL., *RECREATION AND WILDERNESS IN THE UNITED STATES* 18 (University of Georgia Dept. of Agricultural & Applied Economics Working Paper) (date), available in <<http://www.agecon.uga.edu/~erag/finalreport.htm>> (visited Jan. 1, 2005).

<sup>81</sup> *Id.*

93.4% of all golfers were Caucasian, 3.1% were African American, and 3.4% classified themselves as “other,” a group that includes Latinos and Asian Americans.<sup>82</sup> More recent data suggests that African American golfers played fewer rounds of golf than Caucasian golfers did, which would skew the participation data even further.<sup>83</sup>

The data suggests that during the 1990s golf was a substantially better proxy for race than income and a somewhat better proxy than household wealth.<sup>84</sup> That differential

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<sup>82</sup> *Id.* Data from a 1997 study showed an even more substantial gap in participation. In that year, 2.7% of African Americans participated in golf, versus 12.6% of Caucasians. Jill Lieber, *Golf Finally Reaching Out: Programs Seek More Diversity, yet Progress Remains Limited*, USA TODAY, Aug. 15, 2001, at C1 (quoting statistics from a 1997 study by the National Golf Foundation). For an explanation of the various possible causes of low minority participation in golf, see Paul H. Gobster, *Explanations for Minority “Underparticipation” in Outdoor Recreation: A Look at Golf*, 16 ANNAL OF PARK AND RECREATION ADMIN. 46, 48-49 (1998).

<sup>83</sup> See NATIONAL GOLF FOUND., MINORITY GOLF PARTICIPATION IN THE U.S. 6 (2003) (noting that the average golfer played 19.2 rounds during the previous year, whereas the average African American golfer played 13.9 rounds during the previous year). Some caution is in order in interpreting this data, however. African American golf participation increased during the first few years of the millennium, and it may be that an influx of new African American golfers explains the lower intensity of participation. See *infra* text accompanying note 168.

<sup>84</sup> In 2000, 14.2% of Caucasians lived in households with annual incomes in excess of \$100,000, whereas 6.1% of African Americans lived in such households. See <<http://print.infoplease.com/ipa/A0104552.html>>. Thus, Caucasians are 2.3 times as likely as African Americans to have household incomes above \$100,000 per year, but four times as likely to play golf. Income inequality between Caucasians and African Americans has been diminishing consistently over time. BUREAU OF THE CENSUS, MEASURING 50 YEARS OF ECONOMIC CHANGE C-7 (Sep. 1988); see also Farley & Frey, *supra* note 4, at 30 (“[T]he percentage of blacks with economic status qualifying them for expensive housing . . . increased during the 1980s.”); Ryoichi Sakano, *Are Black and White Income Distributions Converging? A Time Series Analysis*, REV. OF BLACK POL. ECON. 91, 91, 104 (Summer 2002) (finding that the black-white income gap converged until the 1960s, but has leveled off, as a result of sharply declining incomes among poor African Americans). During the 1980s and 1990s, the racial gap between blacks and whites participating in white collar jobs declined dramatically. In 1980, 36.6% of blacks and 53.9% of whites were in white-collar occupations. In 2000, 51.3% of blacks and 62.6% of whites were in white-collar occupations. Marshall H. Medoff, *Revisiting the Economic Hypothesis and Positional Segregation*, REV. OF BLACK POL. ECON. 83, 91 (Summer 2004).

Wealth is more racially skewed than income in the United States, a result partially due to decreasing marginal consumption as incomes rise, demographic variables, asset allocation decisions, and disproportionate demands for assistance from low-income kin faced by higher-income African Americans. Joseph G. Altonji, Ulrich Doraszelski & Lewis Segal, *Black/White Differences in Wealth*, ECON. PERSPECTIVES 38, 48-49; N.S. Chiteji & Darrick Hamilton, *Family Connections and the Black-White Wealth Gap Among Middle-Class Families*, REV. BLACK POLITICAL ECON. 1, 21-25 (Summer 2002). Wealth differentials, though, appear to be less dramatic than golfing participation differentials, as well. See, e.g., Sharmila Choudhury, *Racial and Ethnic Differences in Wealth and Asset Choices*, 64 Social Security Bull. 1, 8 tbl. 3 (2002) (noting that a white in the top quartile of whites in their 60s had to have \$551,818 in net worth, whereas a black in the top quartile of blacks in their 60s needed to have \$247,555 in net worth). Between 1969 and 1995, the percentage of Southern Caucasians in the top 3 U.S. wealth quintiles stayed constant at 60%, while the percentage of Southern African Americans in this group increased from 27.6% to 34.6%. See MDC INC., INCOME AND WEALTH IN THE SOUTH: A STATE OF THE SOUTH INTERIM REPORT 10 (May 1998). Moreover, among high-income, middle-aged college graduates, wealth disparities between Caucasians and African Americans disappear. See Ronald L. Straight, *Survey of Consumer Finances: Asset Accumulation Differences by Race*, REV. OF BLACK POL. ECON. 67, 76-77 (Aug.

is critical. After all, if income provided a better proxy for race than golf participation did, those interested in residential racial homogeneity could have used large lot sizes or occupancy restrictions to exclude African Americans. This strategy – referred to in the literature as “exclusionary zoning” – is well documented and widely practiced.<sup>85</sup> But once substantial numbers of African American families achieve higher incomes and higher wealth, exclusionary zoning strategies lose their effectiveness. Notably, during the 1980s and 1990s, the United States saw a substantial exodus of African Americans into the suburbs.<sup>86</sup> Given the illegality of alternative discrimination strategies, construction of an expensive, racially polarizing amenity may provide the next-“best” strategy for keeping these upwardly mobile African Americans out of particular communities.

Numbers from the same survey suggest that other land-based, warm weather sports were far more racially integrated. For example, African Americans comprised 13.6% of joggers, 8.2% of bicyclists, 15.5% of baseball players, 19.1% of basketball players, 8.3% of soccer players, and 12.6% of volleyball players.<sup>87</sup> Even tennis, stereotypically a leisure activity with low levels of African American participation, attracted a rather integrated playing population. Fully 8.2% of tennis participants were African American, and participation rates are not starkly different among the races.<sup>88</sup>

It is difficult to find any activities in which participation was as racially polarized as golf during the 1990s. Sports that exhibit the same level of racial segregation as golf tended to be either aquatic or snow-based. The only warm water sport with a greater percentage of Caucasian participants was water skiing, which attracted approximately half as many participants as golf did, and for which 94.4% of participants were Caucasian. Motor boating was almost as segregated as golf, with 92.5% of participants identifying as Caucasian, and 3.3% of participants identifying as African American. Rock climbing exhibited a similar skew, but drew only 7.5 million participants in the 1994-95.<sup>89</sup> Similarly, 94% of cross-country skiers were Caucasian, but the sport drew less than 7 million participants.<sup>90</sup>

In short, there were roughly four categories of sports that exhibited heavy racial disparities in participation levels during the mid 1990s: motor boat-based activities (such

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2001). If one adjusts for age, income, education, and employment, interracial differences in wealth tend to disappear. *Id.* at 80.

<sup>85</sup> *See supra* note 46.

<sup>86</sup> *See* Bledsoe et al., *supra* note 67, at 440; Medoff, *supra* note 84, at 91 (“By 1999, the number of blacks living in a suburb outside a central city was nearly eleven million, or more than 30% of the total black population, as compared to 9% in 1980.”). Note, however, that suburbanization did not end racial segregation. Many African Americans moved into deteriorating inner suburbs that were becoming majority African American. *See* Darden & Kamel, *supra* note 22, at 105-07.

<sup>87</sup> *Id.* at 18-19.

<sup>88</sup> *Id.* at 19. The tennis participation rates were as follows: 10.8% of Caucasians; 7.8% of African Americans, and 12.8% of “Others.” *Id.*

<sup>89</sup> *Id.* at 23.

<sup>90</sup> *Id.* at 20.

as motor boating and water skiing), cold weather activities (such as cross country skiing), less popular warm weather activities (such as rock climbing), and golf. Of these, one would expect to see golf provide the most attractive basis for an exclusionary club goods strategy. After all, golf courses are quite expensive to develop and maintain (unlike rock climbing walls);<sup>91</sup> they can be built in virtually any climate (deserts, prairies, forests, coastal regions, swamps, etc.) (unlike cross-country skiing courses or marinas); they can be enjoyed by virtually any age demographic (again, unlike rock climbing walls); and they do not generate potentially welfare-reducing noise externalities (unlike marinas that house motor boats).<sup>92</sup> Moreover, golf was historically associated with racial exclusion and played at country clubs that had discriminatory membership policies.<sup>93</sup> As a result, golf “has the image of being a white man’s game.”<sup>94</sup> To the extent that communities wished to employ racially discriminatory selection mechanisms using exclusionary club goods, golf presented the best opportunities.<sup>95</sup> Given the racial dynamics of golfing in the United States, a residential development built around a mandatory membership, high-quality golf course would have attracted two types of people: avid golfers (who were overwhelmingly white), and people with a preference for living among avid golfers or non-golfers attracted to such communities. It is therefore worth investigating the exclusionary amenities hypothesis by examining statistics on golf course-related residential developments.

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<sup>91</sup> W.J. Florkowski & G. Landry, *An Economic Profile of Golf Courses in Georgia: Course and Landscape Maintenance 4* (Georgia Agricultural Experiment Stations Research Report No. 681) (April 2002) (noting that the average maintenance expenditure – not including land acquisition costs and property taxes – for a Georgia golf course was \$417,042 per year). J. Richard McElyea et al., *Golf’s Real Estate Value*, URBAN LAND 14, 14 (Feb. 1991).

<sup>92</sup> Club goods are not the only means of sorting residents. Saul Levmore has suggested to me that common interest communities conceivably could achieve the same ends through direct subsidies for “sorting” activities, as opposed to club goods provision. For example, a homeowners’ association might provide a subsidy of up to \$5000 per household for rock climbing expenses, and tax all homeowners equally to pay for this subsidy. Presumably, African Americans would be as deterred by this approach as they would be by a residential golf community with a \$5000 annual mandatory membership fee. In light of my theory, why don’t we see such arrangements in the real world? The puzzling absence of these arrangements is probably explained by legal doctrine. Covenants and equitable servitudes that do not “touch and concern” the land do not bind successors-in-interest under American property law. Affirmative promises to pay money for common amenities located within a development, such as communal golf courses, have long been held to “touch and concern” the land, but affirmative promises to pay money for rock climbing or other activity subsidies presumably would not satisfy the “touch and concern” requirement. See *Anthony v. Brea Glenbrook Club*, 58 Cal.App. 3d 506, 511-12 (Ct. App. 1976); *Regency Homes Ass’n v. Egermayer*, 498 N.W.2d 783, 791-93 (Neb. 1993).

<sup>93</sup> CALVIN H. SINNETTE, *FORBIDDEN FAIRWAYS: AFRICAN AMERICANS AND THE GAME OF GOLF* 58-60, 121-32 (1998); Mitchelson & Lazaro, *supra* note 62, at 48-51.

<sup>94</sup> James D. Davidson, *Social Differentiation and Sports Participation: The Case of Golf*, in *SOCIAL APPROACHES TO SPORT* 183, 200 (Robert M. Pankin ed. 1982).

<sup>95</sup> This view is premised on the idea that golfers are at least somewhat evenly spread across income levels. If, by contrast, all African American golfers were wealthy, then residential golf courses would not provide a terribly effective way of engaging in the exclusionary club goods strategy. The best available data indicates that African American golfers skew to slightly higher incomes than Caucasian golfers do, but the difference is not particularly pronounced. NATIONAL GOLF FOUND., *supra* note 83, at 16.

## E. Golf Course Developments in the United States

A residential golf course is a golf course that is surrounded by residential properties, be they single family homes, townhouses, or condominiums. During the 1990s, golf participation intensified,<sup>96</sup> and the United States saw a rapid increase in the number of residential golf course developments.<sup>97</sup> By 2000, forty percent of current golf course construction was residential, and the growth rate of residential golf courses far outpaced the growth rate for real estate developments in general.<sup>98</sup> In Florida, which has more golf courses than any other state, as many as 54% of golf courses were residential.<sup>99</sup>

It would be inappropriate to assert at this juncture that the exclusionary club good phenomenon I have identified is largely responsible for this boom in residential golf courses. Alternative explanations cannot be discounted. That said, if one digs further into the growth of residential golf communities, one finds several intriguing data points, all of which are consistent with – but do not prove – the hypothesis that exclusionary club goods were behind some of the changes in the nature of the residential golf course market.

The first intriguing data point concerns the mix of mandatory golf course memberships and optional membership for residents of residential golf communities. Early residential golf course developments followed a particular financing model. Namely, those who purchased residences in the development were obligated to purchase “equity memberships” or “bundled memberships” in the adjoining golf course.<sup>100</sup> This meant that all homeowners would pay for the development and upkeep of the course, regardless of their utilization of it. In the mid-to-late-1990s, however, the market shifted somewhat, with developers increasingly embracing semi-private golf course

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<sup>96</sup> The number of Americans who played one round or more per year declined from 27,800,000 in 1990 to 26,446,000 in 1999. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 761 tbl. 1244 (2001). These Americans played golf more frequently, however, as the total number of golf rounds played increased from 502,000,000 to 564,100,000 during the same period, a 12% increase. *Id.*

<sup>97</sup> John L. Crompton, *Designing Golf Courses to Optimize Proximate Property Values*, 5 MANAGING LEISURE 192, 193 (2000).

<sup>98</sup> *Id.* (“While the real estate industry in the United States as a whole grew at an annual rate of 2-3% in the 1990s, the annual growth rate of developments which incorporated golf courses approached 10%, making it one of the hottest sectors in real estate.”). Some recent evidence suggests that the construction of new residential golf courses has declined of late, see Kevin Allison, *Golf Comes out of the Bunker*, FINANCIAL TIMES, Feb. 1, 2005, at 10, which is consistent with the exclusionary club goods hypothesis. See *supra* text accompanying notes 174-176.

<sup>99</sup> John J. Haydu & Alan W. Hodges, *Economic Impacts of the Florida Golf Course Industry*, at iv (April 5, 2002); see also Lewis M. Goodkin, *Out of the Rough?*, FLORIDA TREND, Dec. 1, 1998, available in 1998 WL 10743346 (quoting an earlier estimate that 40% of Florida’s golf courses are residential). In South Carolina, approximately one-third of golf courses are residential. Jordan N. Roberts & Darla Domke-Damonte, *Utilization of Golf Course Facilities by Residents of Golf Course Communities in Myrtle Beach*, 1 COASTAL BUSINESS JOURNAL 13, 14 (date).

<sup>100</sup> Goodkin, *supra* note 99.

developments, where membership is optional among homeowners and members of the public can play for a daily use fee.<sup>101</sup> This brings us to a second intriguing data point.

There are two group of golf courses that did not shift away from equity memberships: high end courses played by the very wealthy and courses located in areas with the largest African American populations, such as Broward and Miami-Dade counties.<sup>102</sup> For wealthy homeowners, mandatory golf course membership might have functioned in the same way that the cooperative structure functioned in Manhattan. Wealthy people can afford to pay a premium for the perceived benefits of exclusionary policies and are happy to do so. Instead of paying more for apartments and association governance via the cooperative corporate form, these Floridians might have been opting for a luxury amenity that effectively excluded those who were unwilling to pay substantial amounts for a world class golf facility.

To complete the story, we must introduce a final intriguing data point. Many purchasers who buy into residential golf courses *do not play golf*. This phenomenon of non-golfer households in residential golf communities has been widely noted in golf industry periodicals, and was true during timeframes when “mandatory membership” golf course developments were more common than “optional membership” developments.<sup>103</sup> To be sure, not all of these people are overt racists or segregationists.<sup>104</sup> Indeed, it is likely that many of these non-golfing residential golf course dwellers are willing to pay a premium because they enjoy the open space or low densities offered within golf course

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* According to the 2000 census Miami-Dade and Broward have the largest African American populations among Florida counties. Among Florida’s large counties, they rank second and third, respectively, in percentage of African American residents. Duval County’s population is 27.8% African American; Broward’s is 20.5% African American; and Miami-Dade’s is 20.3% African American. Florida as a whole is 14.6% African American. *See* <<http://www.state.fl.us/edr/population/census2000/pop2000.xls>> (visited Jan. 26, 2005).

<sup>103</sup> McElyea et al., *supra* note 91, at 16 (“Golf-course-oriented homes appeal to nongolfers as well as to golfers. (Only about one-third of golf-frontage home-buyers in nonretirement properties play golf regularly.”); Crompton, *supra* note 97, at 193 (citing McElyea); Goodkin, *supra* note 99 (quoting a developer’s expectation that “50% of buyers will be golfers”); Nancy Kressler Murphy, *Golf Course Communities Sprouting*, MERCER BUSINESS 15 (June 1, 1990) (quoting a New Jersey developer’s statement that “[f]ifty percent of my buyers are golfers, and then 50 percent have never picked up a club and never plan to.”); Stella M. Chavez, *Subdivisions Want Residents to Join the Club; Boca Woods to Vote on Making Club Fees Mandatory for All Homeowners*, FT. LAUDERDALE SUN-SENTINEL, Feb. 15, 2000, at A1. This pattern, of non-golfers buying homes in residential golf communities, persists today. *See* Robert Johnson, *Golf Homes Attract Even Those Who Don’t Play*, N.Y. TIMES, May 8, 2005, at 15.

A cautionary note is in order. Although the above-cited sources suggest the presence of large numbers of golfers in all types of residential golf courses, I so far have been unable to find data that breaks down the prevalence of non-golfers in mandatory membership developments. I am searching for such data, but it does not appear to be available from primary sources.

<sup>104</sup> But some of them surely are. A recent *New York Times* article discusses a county in North Carolina where overwhelmingly white residential golf communities are surrounded by overwhelmingly black unincorporated areas. The townships containing the residential golf communities refuse to incorporate the largely black neighborhoods and, as a result, the latter are left without the most basic municipal services, such as garbage collection, piped water, and police protection. *See* Shaila Dewan, *In County Made Rich by Golf, Some Enclaves Are Left Behind*, N.Y. TIMES, June 7, 2005, at A1.

developments.<sup>105</sup> That said, real estate appraisal research suggest that golf course views provide only one-third as much of an increase in real estate values as views of a creek or marsh.<sup>106</sup> Artificial lakes and waterways evidently add more value and are cheaper to maintain than golf courses,<sup>107</sup> and yet they are much less of a mainstay of new real estate developments than golf courses.<sup>108</sup> Rather surprisingly, proximity to a golf course appears to add less to residential property values than it does to commercial, industrial, institutional, or agricultural properties.<sup>109</sup> In short, golf courses *qua* golf courses add less value to nearby or adjacent residences than one might expect.

So a desire for open space did not seem to be driving all the demand for residential golf courses among non golfers. Is there any evidence for more insidious explanations? The marketing data appears to suggest that many non-golfer residents of residential golf courses find the homogenous nature of these communities' populations appealing. D. Robert DeChaine has conducted the only systematic study of the ways in which residential golf communities market themselves.<sup>110</sup> DeChaine noted the

recurring themes emphasized in the persuasive sales appeals for golf community property. These themes included focus on the 'purity' of the community; the privacy and exclusivity of community membership; the safety, security, and serenity of a lifestyle removed from the maddening crowds; the prestige of the golf course as a community focal point; and the sense of freedom afforded by spacious property and surroundings.<sup>111</sup>

Certainly, marketing materials talked about the quality of the golf courses at length,<sup>112</sup> but DeChaine appeared to notice as much, if not more, emphasis on the exclusivity of

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<sup>105</sup> See, e.g., Murphy, *supra* note 103, at 15.

<sup>106</sup> James R. Rinehart & Jeffrey J. Pompe, *Estimating the Effect of a View on Undeveloped Property Values*, APPRAISAL J. 57, 60 (Jan. 1999) ("The results show that ocean views add 147% to lot values, location on a creek or marsh adds 115% to lot prices, and golf course location adds 39% to lot values).

<sup>107</sup> Emailed newsletter article from Jim Kass, Research Director, National Golf Foundation, dated Feb. 15, 2005.

<sup>108</sup> Even within residential golf courses, lots with views of water hazards are particularly desirable, and command the highest premiums. GREGORY L. CORY ET AL., GOLF COURSE DEVELOPMENT IN RESIDENTIAL COMMUNITIES 37 (2001); Crompton, *supra* note 97, at 198.

<sup>109</sup> Haydu & Hodges, *supra* note 99, at 20 ("Commercial, agricultural, industrial, institutional, and government land use types all showed an increase in value associated with golf courses, ranging from \$24,000 to \$54,000 per parcel, while residential properties had a considerably smaller differential value than the other sectors (\$6,114). Utility land uses showed a negative difference in value."). This study included not only residential golf communities, but homes near such communities, as well as those within a mile of public courses, country club courses, and semi-private courses.

<sup>110</sup> D. Robert DeChaine, *From Discourse to Golf Course: The Serious Play of Imagining Community Space*, 25 J. OF COMMUNICATION INQUIRY 132 (2001). Sadly, for my purposes, DeChaine did not distinguish between mandatory membership and optional membership communities.

<sup>111</sup> *Id.* at 134.

<sup>112</sup> *Id.* at 138-39.

golf-courses behind gates, membership rules that limited outsiders' access to the property, and the homogeneity of the community's residents.<sup>113</sup>

If one reads advertisements for mandatory membership golf communities, it is occasionally possible to see not-so-subtle exclusionary messages. The web site for Harbour Ridge, a residential golf community in Stuart, Florida, describes its community this way:

Harbour Ridge Yacht & Country Club is a warm and friendly community of 695 families. Every resident at Harbour Ridge is a member of the Club, thus ensuring universal interest in the care and integrity of the community and the club.

Members come from every section of the United States, Germany, England, France and many other countries. They bring with them the traditions of some of their nations', and the world's, great golf clubs. Members embrace traditional values and are known to jealously guard their privacy and comfort.<sup>114</sup>

Harbour Ridge's advertisement seems evocative enough to send clear messages to prospective purchasers about the nature of the community.<sup>115</sup> Other segregated residential golf communities opt for a less subtle approach, selecting names like "Magnolia Greens Golf Plantation" or "Sea Trail Plantation."<sup>116</sup>

In some ways this focus on exclusivity in marketing materials should not be surprising. Even if non-golfers were to constitute a small minority of members within mandatory membership residential golf communities, one would expect to see developers working hard to try to attract them. After all, the golfers within mandatory membership communities in some sense free ride off the contributions by non-golfers for course upkeep. So someone who loved playing golf, but did not have strong preferences for residential homogeneity or heterogeneity, might rationally prefer to live in a community where non-golf-playing mandatory members subsidized his golfing. Easy access to tee times, a lack of crowding, and little waiting on the course would all be attractive amenities to such golfers.

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<sup>113</sup> *Id.* at 139-43. DeChaine's analysis lacked a quantitative dimension, but his article devoted far more space to discussions of exclusivity than discussions of golf quality. I cannot determine whether this reflects a selection bias or a proportional treatment based on the relative proportions of developer rhetoric. It would also be helpful to know the extent to which residential golf communities stress exclusivity more or less than other gated communities do in their marketing materials.

<sup>114</sup> See <<http://www.golfcoursehome.net/doc/communities/Community-Harbourridge.htm>>.

<sup>115</sup> Harbour Ridge's Internet advertisements, like Jan Zachariasse's statements to a reporter, might be sufficiently candid to invite scrutiny from HUD's attorneys. *Cf. Ragin v. N.Y. Times*, 923 F.2d 995 (2d Cir. 1991). A quick Internet survey suggested that most advertising messages used by bundled membership communities do not violate Fair Housing Act guidelines. In any event, it is interesting to note that the national origin groups featured in Harbour Ridge's advertisement track those groups deemed most desirable in infamous racially discriminatory appraiser's guides. For a discussion of historic discrimination in real estate appraisal and lending, and citations to some of these texts, see Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 793-99 (1995).

<sup>116</sup> Mitchelson & Lazaro, *supra* note 62, at 69.

Optional membership residential golf communities, on the other hand, should not have been expected to market themselves to non-golfers with a preference for homogeneity. After all, an optional membership residential community faces a tragedy of the commons if too many non-golfers join it. The tragedy of the commons arises when many people try to take advantage of the views and open space provided by a golf course, but only those residents who are members of the course pay for its upkeep. A residential community can solve this tragedy of the commons only by shifting toward some form of mandatory membership or by permitting non-residents to use its course, which potentially raises privacy, safety, or traffic concerns for residents.<sup>117</sup>

This account of exclusionary club goods therefore provides a testable hypothesis. Did optional membership residential golf communities have higher percentages of African American residents than equivalent mandatory membership golf communities? Given the prevalence of both types of communities in Florida, it is possible to answer this question, controlling for home prices, resident income, and other attributes. Tom Miles and I are planning to gather the 2000 census and demographic data that will allow us to test this hypothesis, and also to investigate whether the racial composition of golf communities in general differed substantially from the racial composition of non-golf gated communities. This study cannot definitively demonstrate that residential golf communities function as exclusionary club goods, because it will not allow us to disaggregate sorting and focal point mechanisms, but it can show whether mandatory membership residential golf courses have a racially disparate impact in the residential setting and whether (as this essay hypothesizes) residential golf communities are even more segregated than golf participation in general is. This data, combined with the circumstantial evidence outlined above, may raise a strong inference that exclusionary club goods strategies are being pursued by developers. In any event, we hope to be able to obtain the data that will allow us to shed more light on the golf courses-as-exclusionary-amenities hypothesis in a follow-up, empirical paper.

Regardless of the outcome of that empirical investigation, however, the popularity of bundling residential developments with participation in a costly activity that exhibited dramatic racial skews should be particularly disconcerting to those who find residential segregation troubling. During the 1990s residential golf communities could have functioned as exclusionary amenities, and prompted several behavioral dynamics that lend themselves to dramatic segregation if housing consumers were responding “rationally” to widespread preferences among whites for substantial residential racial homogeneity. Namely, such communities would have attracted whites who wanted racial homogeneity, golfers who did not care about racial homogeneity, but were overwhelmingly white, and whites who did not care about racial homogeneity so much as

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<sup>117</sup> For discussions of the heated debates that arise when optional-membership golf communities try to solve this tragedy of the commons by mandating membership, see Lee Hoke, *Mandatory Memberships? Solution or Band-Aid?*, CLUB MGMT., Dec. 1, 2004, at 18; Patty Pensa, *Country Club Battle Heads to Court; Community Split over Required Membership*, SOUTH FLORIDA SUN-SENTINEL, Dec. 14, 2004, at 3B; Residents Fight Rule on Joining Golf Club in Delray Community, available in <<http://www.ccfj.net/HOAFLogolffight.html>>; Boca Lago Vote Against Mandatory Club Memberships, available in <<http://www.ccfj.net/HOAFLogolfBocaLargo.html>>. On the privacy drawbacks of solving a tragedy of the commons by opening up the golf course to outsiders, see Mary Shemklin, *Golf Communities Tee Off; New Course-Side Developments are Proliferating*, ORLANDO SENTINEL, Nov. 10, 1996, at J1.

a form of cultural homogeneity. This latter group would be happy to live with “assimilationist” African Americans – precisely those African Americans who would make a conscious decision to live in overwhelmingly white neighborhoods and participate in a sporting activity that has historically been closed to blacks.<sup>118</sup> These sorting and focal point mechanisms would have been reinforced by the behavior of middle- or upper-income African Americans who did not want to pay for a costly resource that they are unlikely to use, did not want to be the “token” family in an overwhelmingly white environment,<sup>119</sup> or do not want to live in neighborhoods where they will encounter hostility or social snubs from their neighbors.<sup>120</sup> An exclusionary amenities strategy could enable all these effects to operate in unison.

## F. Other Examples of Exclusionary Amenities

Before ending this part of the discussion, it is worth noting the possibility that exclusionary amenities might be used as part of a less obnoxious strategy for promoting residential homogeneity. Racial exclusion is, for very good reasons, regarded as more problematic than other forms of residential sorting. In the pages that follow, I will show how communities can employ exclusionary amenities strategies to achieve innocuous, or perhaps even beneficial, objectives.

### 1. Exclusionary Religious Goods

Suppose the existence of a religious minority, scattered within a large metropolitan area. Suppose further that members of this religious minority value homogeneity in matters of faith and behavior, and that they feel a critical mass of believers in a confined geographic space is necessary for the religious community to thrive.<sup>121</sup> In such a setting, one might expect to see the community embrace direct efforts to limit the entrants of nonbelievers into the community. For example, a homeowners’ association might record covenants barring property sales to people who are not members

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<sup>118</sup> They might not object to having an African American celebrity living in their midst, either. There are at least two highly prestigious golf-oriented country clubs that have Michael Jordan as a member, but virtually no other African American members. See Marcia Chambers, *The Changing Face of Private Clubs*, GOLF DIGEST (August 2000).

<sup>119</sup> For a discussion of the costs associated with being a token African American member of an overwhelmingly Caucasian golf club, see *id.*

<sup>120</sup> See *supra* note 25.

<sup>121</sup> For discussion along these lines, see EDUARDO PEÑALVER, PROPERTY AS ENTRANCE 85 (Working Paper 2005). A group of deaf Americans has recently begun laying plans to develop Laurent, South Dakota, a new town “expressly created for people who sign.” See Monica Davey, *As Town for Deaf Takes Shape, Debate on Isolation Re-Emerges*, N.Y. TIMES, Mar. 21, 2005, at A1. Community planners were excited about the prospect of a town in which signing is the language of choice and community services could be geared toward a largely deaf population. An exclusionary amenities strategy might prove useful to these developers in their efforts to ensure that a critical mass of signers resides in Laurent, and the law probably would not respond with great hostility to their employment of an exclusionary strategy. See *infra* text accompanying notes 178-179.

of the religious community in question. Alas, such restraints on alienation have been invalidated by courts as contrary to public policy.<sup>122</sup>

Reliance on exclusionary amenities may provide an alternative strategy. In such a scheme, the community would place a large religious temple at the center of the community, and provide that all homeowners within the association must share the expenses and burdens of the church's upkeep. This church could function as an exclusionary club good if some of the community's members do not plan to attend the church but want to be surrounded by church goers.<sup>123</sup> As a doctrinal matter, it seems as though such a requirement to pay for a common amenity would satisfy the various requirements necessary for covenants or equitable servitudes to bind successors in interest.<sup>124</sup> Because an exclusionary club good merely taxes incoming property owners who do not share the faith, without restraining alienation to them outright, such a financing scheme arguably would not violate public policy.<sup>125</sup> After all, covenants and equitable servitudes restricting religious institutions from common interest communities have long been deemed enforceable, based on pro-contract and state neutrality rationales that could be logically extended to cover mandates that homeowners subsidize resident religious institutions.<sup>126</sup>

So if the exclusionary amenities strategy might permit religious communities from achieving what they could not otherwise achieve without violating anti-discrimination law, why has no community tried this approach? Until recently, that question remained a puzzle, but developers in Collier County, Florida appear poised to use the exclusionary amenities strategy to create Ave Maria Township, a place some are calling "America's first gated Catholic community."<sup>127</sup> Marketing the for-profit development exclusively to Catholics is illegal. So developers have tied the development to Ave Maria University, a Catholic institution of higher learning founded by Domino's Pizza founder, Tom Monaghan.<sup>128</sup> Besides noting the development's proximity to the new university and its many resources, Monaghan describes a "stunning church in the

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<sup>122</sup> *Taormina Theosophical Community, Inc. v. Silver*, 140 Cal.App. 3d 964 (Ct. App. 1983). Under the Fair Housing Act, a religious organization may discriminate on the basis of religion with respect to housing that the organization owns or controls through a non-profit. *See United States v. Columbus Country Club*, 915 F.2d 877, 882-83 (3d Cir. 1990). A for-profit developer would not be able to take advantage of this exemption. *Id.*

<sup>123</sup> For example, people may feel like "cultural" Jews or Catholics, even if they are not religiously observant. It could be rational for such people to pay for a Synagogue or Church, even if they never planned to attend services, so as to attract people with whom they share cultural affinities to the community.

<sup>124</sup> *See supra* note 92.

<sup>125</sup> Under the Restatement approach, an equitable servitudes generally binds successors unless it is (1) "arbitrary, spiteful, or capricious"; (2) "unreasonably burdens a fundamental constitutional right"; (3) "imposes an unreasonable restraint on alienation, . . . trade or competition"; or is (4) unconscionable. RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 3.1 (2000).

<sup>126</sup> *See, e.g., Hall v. Church of the Open Bible*, 89 N.W.2d 798, 799-800 (Wis. 1958).

<sup>127</sup> Adam Reilly, *City of God: Tom Monaghan's Coming Catholic Utopia*, BOSTON PHOENIX, June 17, 2005.

<sup>128</sup> *Id.*

center of town” and private chapels “within walking distance of each home,” envisioning “an extremely Catholic” population.<sup>129</sup> The developers anticipate that the development will be “primarily Catholic,” especially at the outset, but stress that they were “not going to discriminate or market to Catholics.”<sup>130</sup> Of course, what’s implicit in the developer’s statement is explicit in this essay: One can create a primarily Catholic development without any targeted marketing or overt discrimination. Once again, developers seem to understand this dynamic, even though the law does not.

Although club goods are a term of art in the economic literature, the religious context shows that the universe of exclusionary club goods may include amenities that are merely the functional equivalent of club goods. For example, religious institutions are quite racially segregated in general, and many congregations are racially homogenous.<sup>131</sup> Because members of a religious community typically value proximity to their place of worship, the presence of a church or temple may, independently, promote racial sorting in the surrounding neighborhood. A developer interested in promoting racial homogeneity in his new development might therefore sell a large plot of land within the development to a segregated congregation on quite favorable terms, and then raise the price of the surrounding homes as a means of recouping this subsidy. The church will not be, formally speaking, a club good, in the sense that purchasing a home in the subdivision entitles one to use the church.<sup>132</sup> But it will function like an exclusionary club good, in the sense that all homeowners in the development will be subsidizing the church’s land implicitly, and only people who worship at the church or value the kinds of residential homogeneity associated with the church’s members will be deriving any benefit from this subsidy. As a result, one might expect to see a heavy racial skew in the neighborhood’s population. For this reason, it makes sense to group exclusionary club goods with other kinds of exclusionary amenities.

It makes sense to include public goods in the discussion of exclusionary amenities as well. Local public goods, which confer greater utility on proximate citizens, will function in an analogous way to club goods in a homeowners’ association. Local taxes will simply replace association assessments as a sorting mechanism. As the example that follows suggests, however, the Internet has made it possible to use non-local public goods as exclusionary amenities as well.

## 2. Exclusionary Public Goods

Although this paper focuses on club goods in residential communities, we should not be surprised to observe the same phenomena in virtual communities as well. Indeed,

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* This “focal points” statement from the developer, quoted by a reporter, may well violate laws that bar religious discrimination in advertising. *Compare supra* notes 76-79.

<sup>131</sup> Kevin D. Dougherty, *How Monochromatic is Church Membership? Racial-Ethnic Diversity in Religious Community*, 64 *SOCIOLOGY OF RELIGION* 65, 74-77 (2003) (noting substantial racial homogeneity among U.S. congregations, but a great deal of heterogeneity with respect to income and education); Kinder & Mendelberg, *supra* note 68, at 417.

<sup>132</sup> I thank Ed Kitch for raising this point.

participants in various virtual worlds have developed alternative languages, with their own grammars and conventions, many of which prove befuddling to the uninitiated.<sup>133</sup> Although some of these languages appropriate internal messaging abbreviations that help shorten the length of typed communications, the most important on-line language – l33t (“leet”) is properly understood as facilitating encryption, not communication. As a result, l33t is more cumbersome to use than ordinary American English.<sup>134</sup> Efficiency considerations do not explain the proliferation of l33t: Using English would be easier for most of the inhabitants of these online communities.

Imposing these barriers to entry may maximize welfare for these communities by making participation in these online communities vexing for a naïve newcomer, who the computer savvy refer to as a “n00b” (newbie). A major purpose of these languages is to marginalize newbies and exclude the virtual riff-raff.<sup>135</sup> Newbies can of course learn l33t eventually, but this process will take time, and that lag will encourage the greenest entrants into virtual worlds to spend more time observing and less time typing during their initial forays. l33t thus functions as a means of discouraging those who are non-savvy, impatient, or unwilling to incur substantial language-learning costs from joining Internet-based subcultures.<sup>136</sup>

### III. Inclusionary Amenities

In the previous pages, I have suggested that an exclusionary amenities strategy is neither good nor evil. Rather, it might further good or evil purposes, depending on the particular setting in which it is employed. Normative considerations might cause us to view the use of an exclusionary amenities strategy unfavorably if used by Caucasians to exclude African Americans from an affluent neighborhood, but favorably if used by members of a religious minority that risks losing its identity to establish a critical mass of believers in a particular physical space.<sup>137</sup> This discussion of exclusionary amenities raises an obvious implication. Inclusionary amenities should also exist. The presence of

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<sup>133</sup> See F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 26 n. 128 (2004).

<sup>134</sup> See Microsoft.com, *A Parent’s Primer to Computer Slang*, available at <<http://www.microsoft.com/athome/security/children/kidtalk.msp>> Feb. 4, 2005, (visited July 7, 2005); Blake Sherblom-Woodward, *Hackers, Gamers, and Lamers: The Use of l33t in the Computer Subculture* 6-9 (Fall 2002), cached at Google Scholar, and on-file with author. As a case in point, see the English to Hacker Speak translator at <[http://www.cs.utk.edu/~cjohnson/computing/javascript/round\\_hackerspeak.php](http://www.cs.utk.edu/~cjohnson/computing/javascript/round_hackerspeak.php)> (visited April 11, 2005). I thank Neil Richards for alerting me to l33t as an online manifestation of the exclusionary club goods phenomenon.

<sup>135</sup> Sherblom-Woodward, *supra* note 134, at 15, 28.

<sup>136</sup> It has long been recognized that the adoption of common languages can enhance social solidarity. Lessig, *supra* note 17, at 976-77.

<sup>137</sup> It is, in my view, much more difficult to justify religious residential segregation by members of vibrant, commonly practiced religions, such as Roman Catholicism. See *supra* text accompanying notes 127-130.

such goods would spark residential heterogeneity, and the absence of such goods should function in the same way as the presence of an exclusionary amenities.

#### A. Examples of Inclusionary Club Goods

An inclusionary club good is a heterogeneity-promoting resource that does not, by itself, provide enough welfare to the existing residents of a particular community to explain its presence. On the other hand, the inclusionary club good does make the community attractive to residents who would not otherwise choose to live there. Inclusionary club goods are likely to arise in settings where the members of a community believe that they share undesirable homogeneities, and that the community will be better off if a more heterogeneous resident pool is integrated into the community. Inclusionary club goods will be adopted, in short, to make the composition of a building or development better reflect the heterogeneity that exists in the wider surrounding community.

For example, some student residential buildings on college campuses acquire reputations as non-academically rigorous, and sometimes these reputations are well deserved. At some point, members of a community may decide that this reputation for a lack of rigor is imposing substantial costs on the members – such as diminished access to employment networks, lower status relative to members of other communities, or undue scrutiny from university administrators. To that end, the members may decide to devote a large amount of scarce public space to a “study room,” and renovate the study room to make it look tranquil, attractive, and nicely furnished. The study room may then go unused by the residents, especially during its early years. But as time passes, and successive groups of incoming residents come and go, the presence of the study room might cause more studious students to self select into the house, and some of these newcomers may eventually start using the amenity. Initially, the study room functions as an inclusionary club good, but eventually it is transformed into an ordinary club good that is welfare maximizing in its own terms.<sup>138</sup>

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<sup>138</sup> Inclusionary club goods of other sorts are prevalent in college and university settings. Most provocatively, there is a sense in which affirmative action policies function as inclusionary club goods, as opposed to mere inclusionary devices. By that I mean the following: Many sought-after Caucasian college students want to attend law schools that have racially diverse student bodies. Racial preferences in admission therefore may be designed to attract not only members of minority groups, but also to attract these heterogeneity-seeking Caucasians. Were a law school to abolish race-based affirmative action, this might not only increase the percentage of Caucasians in the student body, but it would also skew the *attributes* of the Caucasians in the student body, attracting Caucasians who preferred racial homogeneity or did not care much about racial diversity, but turning off potential applicants who valued racial heterogeneity.

Similarly, college athletic programs may function as inclusionary club goods. Outstanding academic universities with strong Division I-A sports programs, like Michigan, Stanford, and Duke may use their college athletic programs to ensure that a wide range of applicants seek admission at their schools. In the absence of high-profile athletic teams, a research university may struggle to attract the proverbial “well rounded” students who value more than just academic intensity in a learning environment.

Anecdotal evidence suggests that inclusionary club goods of this nature are common.<sup>139</sup> Some condominium buildings provide gyms that are underutilized by the members, but the space is not converted to higher utility uses because of a concern that the absence of a gym would send the wrong message to certain kinds of buyers. Similarly, some condominiums maintain party rooms and other social spaces that go underutilized by its introverted residents. The idea here is that incoming buyers may value sociability within a condo's corridors, but that reliable information about sociability is hard to come by for many potential purchasers. The party room may provide a reassuring message to such potential purchasers and, over time, it may become a more efficiently utilized amenity through the operation of selection effects.<sup>140</sup>

Local governments use inclusionary public goods to compete for heterogeneous residents, as well. In recent years, communities with declining economic bases, like Peoria, Memphis, and Fresno, have begun investing significant resources in the creation of "artist colonies" and other efforts to attract young members of the creative class.<sup>141</sup> This effort, inspired in large part by Richard Florida's influential book, *The Rise of the Creative Class*,<sup>142</sup> is designed to boost economic growth by attracting the young, energetic, well-educated, art and culture lovers who are sought after by major employers. As a result of this argument, communities across the United States are investing in public goods and club goods that are not terribly appealing to the communities' existing populations.<sup>143</sup>

The movement toward magnet schools in urban public school districts reflects a similar dynamic. In many cities, white flight has rendered the population of urban school districts, and cities themselves, heavily African American and Latino.<sup>144</sup> This widespread exercise of the exit option by middle-class whites has imposed real costs on the lower-

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<sup>139</sup> The study room example identified in the paragraph above is drawn from the author's own experience with off-campus student housing at Berkeley.

<sup>140</sup> On the connection between condominium amenities and resident selection effects, see Kathy McCormick, *Condo Amenities Reflect Changing Needs: Cover the Gamut from Car Wash Bays to 24-Hour Concierge*, NATIONAL POST, Mar. 3, 2001, at N4, available in 2001 WL 14437690. See also text accompanying *supra* note 76.

<sup>141</sup> See, e.g., Abe Amidor, *Cool Indy*, INDIANAPOLIS STAR, Oct. 3, 2004, at J1; Timothy J. Gibbons, *The Cool Factor: Jacksonville Has Much to Do to Attract Young, Creative Workers*, FLA. TIMES-UNION, Feb. 16, 2004, at FB10; Keith Herbert, *Struggling Borough Tries to Get Creative; Norristown Hopes Artists Will Be Attracted by Low Rents and Incentives Such as Tax Breaks*, PHIL. INQUIRER, Aug. 15, 2004, at B1; Elaine Hopkins, *Cheap Rent + Good Light = Art; Art Project Rep Says Peoria's Buildings Are the Perfect Places to Foster Creativity*, PEORIA J. STAR, June 12, 2004, at B3; E.J. Schultz, *Artists, Writers and Young Professionals See Potential in the Region's Budding Arts and in Fresno's Reviving Downtown, as They Try to Remake the City into . . . Creative Fresno*, FRESNO BEE, Jan. 9, 2005, at D1; see also Robert R.M. Verchick, *Same-Sex and the City*, 37 URB. LAW. 191, 193 (2005) (noting that municipalities have tried to attract gays and lesbians as well, also on the basis of an "urban pioneer" theory).

<sup>142</sup> RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* (2002).

<sup>143</sup> The problem with Richard Florida's approach, of course, is that the fight over members of the creative class is in some respects a zero-sum game, so as more municipalities over the same pie, the returns from strategies designed to appeal to them will diminish.

<sup>144</sup> James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 281-83 & n. 152 (1999).

income populations that lack the resources to exit urban school districts.<sup>145</sup> Several cities have tried to counter this trend by investing heavily in selective magnet schools as a means of attracting middle class parents back to public school systems.<sup>146</sup> In communities where the magnet schools rely on aptitude tests or grades to help assign coveted slots to students, the existing population of a city may derive little direct benefit from these schools – few children from poor neighborhoods have the credentials to be admitted to selective magnets. Support for these schools may still exist in poorer parts of the city, however, on the theory that attracting middle-class white parents back to the school district will, in the long run, result in an expansion of resources available to all the district’s schools. To the extent that such a dynamic plays out, a magnet school will function as an inclusionary public good.

As some of these examples suggest, people concerned about various forms of residential homogeneity should perhaps get excited about the inclusionary amenities strategy. Though they appear to be vastly outnumbered by those Americans who prefer homogenous subdivisions, there is a constituency of Americans who want to live in neighborhoods that exhibit genuine racial and economic diversity. The young, upwardly mobile urban pioneers who have been gobbling up “edgy” loft apartments within earshot of Los Angeles’s skid row.<sup>147</sup>

Two important points about inclusionary amenities are worth making before proceeding further. First, although I suspect that exclusionary amenities are more common than inclusionary amenities, examples of the latter may spring to mind more readily. The most likely explanation for this behavior is that people are quite willing to talk about inclusionary motivations, and reticent to discuss exclusionary strategies in polite society. So, when developers create exclusionary amenities, they will be reluctant to discuss their true motivations out of fear of violating antidiscrimination laws or generating controversy. Indeed, their marketing strategies may be aimed at would-be customers who, thanks to unconscious racism, prefer racial homogeneity, but would be reluctant to admit that preference to third parties or even themselves.<sup>148</sup> By contrast, inclusionary amenities designed to increase heterogeneity within a residential setting are generally thought laudable, and may even require substantial publicity if they are to be effective. For instance, if Peoria wants to create an artists’ colony, it cannot simply draw on artists who live in Peoria’s suburbs.<sup>149</sup> Rather, it will need a regional, or perhaps even

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<sup>145</sup> Fennell, *supra* note 13, at 25-31.

<sup>146</sup> Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2402 (1997). Several papers have critiqued the use of magnet schools to diminish white flight. *See, e.g.*, Christine Rossell, *The Desegregation Efficiency of Magnet Schools*, 38 URBAN AFF. REV. 697 (2003); Kimberly C. West, Note, *A Desegregation Tool that Backfired: Magnet School and Classroom Segregation*, 103 YALE L.J. 2567 (1994).

<sup>147</sup> *See* Bernard E. Harcourt, *Policing L.A.’s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles* part V (Working Paper 2005).

<sup>148</sup> *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>149</sup> Does Peoria have suburbs? Indeed, it does. *See, e.g.*, Lacon, IL; Morton, IL; Spring Bay, IL, and Pekin, IL.

national, campaign in order to achieve the critical mass of artists who will alter the nature of the community.<sup>150</sup> That said, inclusionary amenities often will be unnecessary because there are no legal prohibitions on inclusionary advertisements. This situation contrasts sharply with the legal regime governing exclusionary advertisements, which helps drive the use of exclusionary amenities. When should one expect to find inclusionary amenities, then? Perhaps only in those instances where “talk is cheap” and a more expensive investment in inclusion is necessary to attract a heterogeneous audience to a homogeneous community.

Second, the determination of what constitutes an exclusionary or inclusionary amenity will be highly context-dependent. It is possible to imagine circumstances under which a particular amenity might exclude in some contexts and include in others. For instance, if citizens in a predominantly poor African American neighborhood decided to replace a dilapidated public housing project with a high-quality golf course surrounded by stylish bungalows, the residential golf course would function as an inclusionary club good – a resource designed to desegregate a heavily segregated neighborhood, and make its population more reflective of the racial and economic diversity that exists in the United States more generally. Indeed, residents have pursued a similar strategy at the Franklin Park Golf Club in Boston, a racially mixed golf club described as “a large oasis of peace and racial harmony within a generally hostile environment.”<sup>151</sup>

## B. Inclusionary Club Good Voids

Just as inclusionary club goods can be used to attract diverse residents to heterogeneous communities, communities can maintain their homogeneity through conscious choices to avoid inclusionary club goods or public goods. A desire to avoid offering inclusionary club goods might cause community residents to forego provision of the communal resources that their residents would otherwise prefer.<sup>152</sup>

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<sup>150</sup> Indeed, for this reason it may be appropriate to define exclusionary amenities with reference to people who live within a metropolitan area but are targeted for exclusion from a particular development, and inclusionary amenities with reference to people who live in the United States as a whole but are targeted for inclusion in a particular development. Residential developers sometimes try to attract residents from distant states or regions, but rarely worry about excluding residents from distant states or regions.

<sup>151</sup> Mitchelson & Lazaro, *supra* note 62, at 52-53.

<sup>152</sup> There are important connections between my argument here and an argument that Clayton Gillette has voiced. Gillette noted that within common interest communities, certain types of restrictive covenants might be imposed, not because the residents objected to the proscribed land uses themselves, but because they objected to the types of people who might engage in the proscribed uses. Gillette gave the following example, justifying restrictions on trailer homes:

[E]ven where individuals do not have an aversion to certain practices that are prohibited in covenants, such as maintenance of trailer homes, they may believe that there is a correlation between the subject of the covenant and characteristics that can serve as the basis for a desirable affinity. I may have nothing against trailer homes, other things being equal. That is, I may believe that they are not aesthetically displeasing, and may believe that they offer the best available housing opportunities for a large segment of the population. I may, however, simultaneously seek a relatively noise-free environment, or assurances that I live among others who do not mind a high degree of regimentation, and

For instance, many communities desire access to public transportation hubs. Even if such hubs are shunned by commuters, who increasingly prefer to drive to work alone, they provide enormous value to those not yet old enough to drive, those too old to drive, and those unable to afford or use motor vehicles of their own. People who drive to work every day may garner substantial benefits from having bus or subway routes nearby, for example, by freeing up scarce freeway space or making it easier for babysitters, house cleaners, or other car-less service providers to reach their homes.<sup>153</sup> Perhaps most importantly, proximity to efficient light rail and subway lines generally increases property values.<sup>154</sup> Yet many communities are nearly devoid of efficient public transportation.

Part of the resistance to public transportation may stem from concerns about the extent to which such transportation amounts to an inclusionary public good. For example, in the process of planning the Washington, D.C. subway, citizens in various relatively affluent areas opposed the establishment of subway stations because of concerns that inner city denizens would ride the subways into their neighborhoods.<sup>155</sup> Affluent neighborhoods in other parts of the country have done likewise, even keeping

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hence are less likely to be offended when I complain of what to me is excessive noise. A covenant against “unreasonable noise” may be too imprecise to accomplish my objectives. I therefore may prefer a more certain surrogate that reflects the level of comfort to which I aspire. If I believe that the presence of trailers is positively correlated with bothersome levels of noise, a covenant against trailer homes may serve this proxy role.

Gillette, *supra* note 26, at 1396; *see also* MCKENZIE, *supra* note 4, at 76-77 (making a similar point, an noting that those who wanted to preserve racial segregation after *Shelley v. Kraemer* viewed covenants “that targeted certain objectionable practices” as “the next best thing to race restrictive covenants”). The essential difference between Gillette’s example and my own is strategic. Gillette focuses on covenants that restrict the use of particular private goods, whereas my examples show how the same objectives can be satisfied through the provision (or lack thereof) of club and public goods.

<sup>153</sup> In theory, service providers ought to be able to pass these transportation costs onto homeowners whose homes are not proximate to public transportation. Their ability to do so may be constrained, to the extent that demand for these services is elastic.

<sup>154</sup> *See, e.g.*, Hong Chen et al., *Measuring the Impact of Light Rail Systems on Single Family Home Values: A Hedonic Approach with GIS Application* (Portland State Univ. Ctr. For Urban Studies Discussion Paper No. 97-3) (July 1997); Roderick B. Diaz, *Impacts of Rail Transit on Property Values* (APTA Rapid Transit Conference Proceedings Papers), available in <<http://apta.com/research/info/briefings/documents/diaz.pdf>> (visited April 30, 2005).

<sup>155</sup> *See* ZACHARY MOSES SCHRAG, *THE WASHINGTON METRO AS VISION AND VEHICLE, 1955-2001*, at 269-71 (Columbia Univ. PhD Dissertation 2002) (UMI Dissertation No. 3048233). Although it is often asserted that neighbors’ fear of outsiders explains the absence of a subway station in Georgetown, *see, e.g.*, Juan Williams, *Georgetown: Separate City*, WASH. POST, Dec. 8, 1981, at A21; Stephen C. Fehr, *Where D.C. Wants Metro to Go Next; City Proposes Fort Lincoln, Georgetown, Adams-Morgan, and New York Avenue Stations*, WASH. POST., Mar. 23, 1994, at D3, Schrag concludes that there is only “a kernel of truth” to the Georgetown story, since engineering challenges and economic considerations helped steer the Metro away from Georgetown. *See* SCHRAG, *supra*, at 268-69; *see also* Bob Levey, *Metro’s Not Coming to Georgetown – and Nobody’s Crying*, WASH. POST, June 30, 1977, at 7 (noting several bases for neighborhood opposition).

out valuable transportation amenities like freeways.<sup>156</sup> Exclusionary zoning would be adequate to keep the poor from *living* in these communities, but an exclusionary dearth of public goods is necessary to keep them out entirely.<sup>157</sup> The desire to exclude, in some communities, is sufficiently powerful to overcome the added value associated with transit improvements.

#### IV. Regulating the Provision of Exclusionary and Inclusionary Amenities

So far, this paper has shown how communities can use exclusionary amenities or an absence of inclusionary amenities to promote residential homogeneity. As I suggested, there will be instances in which many readers will sympathize with this behavior (e.g., critical mass for a marginalized religious minority), and instances in which most readers will not sympathize (e.g., racial homogeneity, achieved through the use of mandatory golf club memberships). How should the law respond to these efforts? I offer preliminary thoughts below, and hope that these ideas will spark debate and discussion.

##### A. A Normative Framework

My approach to this topic, as to most other topics, is for the most part welfarist. With respect to social welfare, the analysis should, and does, depend, very much on the characteristics of the groups being included or excluded. For example, there is a wealth of social science evidence pointing to the enormous social costs of residential racial segregation.<sup>158</sup> These costs appear to fall particularly heavily on racial minorities, in that the exclusion of minorities from residential communities engenders their absence from valuable social networks.<sup>159</sup> The exclusion of various groups from affluent residential communities may also undermine meritocratic values in the sense that members of these residential communities achieve extra economic and social advancement by virtue of that residence, as opposed to individual merit.<sup>160</sup> A welfarist account of religious or linguistic

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<sup>156</sup> Beverly Hills, California, is perhaps the most famous example here.

<sup>157</sup> A similar example arises in Chicago's Hyde Park community – an increasingly affluent university neighborhood that, quite conspicuously, lacks a movie theatre. Hyde Park had a movie theatre in the 1990s, but it drew large numbers of African American youths from surrounding Chicago neighborhoods. Eventually, the University of Chicago, which owned the land, elected to close the cinema entirely, notwithstanding complaints from students. Hyde Park's lack of a cinema and other entertainment amenities prompts many graduate and professional students to live in distant neighborhoods and endure long commutes to the campus.

<sup>158</sup> See *supra* text accompanying notes 66-67 and sources cited therein.

<sup>159</sup> Many theorists who are sympathetic to welfarism have moved away from pure preference-satisfaction accounts of social welfare by disregarding any positive utility associated with the satisfaction of racist preferences. For a discussion, see Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L. J. 173, 179-96 (2000).

<sup>160</sup> Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. CIV. R.-CIV. LIB. L. REV. 55, 55-56 (1987).

exclusion might reach quite different results, although the dearth of empirical evidence on this score may reduce this analysis to educated guesswork.

Welfarism is, of course, not the only criterion for evaluating the use of exclusionary amenities, and, to be sure, non-welfarist considerations have emerged in my treatment of this issue. Distributionalist treatments of the subject may focus on the extent to which exclusionary club goods are used by the resource-rich to marginalize the resource-poor.<sup>161</sup> Reviewing the cases reviewed herein, it seems that exclusionary amenities are often used by the relatively affluent or powerful to exclude members of relatively less affluent or less powerful groups from their midst. That said, the exclusion of racial minorities from gated communities, for example, is typically directed against the more affluent members of a relatively poor racial group. Indeed, in this respect, the use of exclusionary amenities to keep middle-income blacks out of white neighborhoods or to keep moderate-income Protestants out of Catholic neighborhoods is far less problematic than the use of exclusionary zoning techniques to keep the poor out of wealthier neighborhoods.

## B. Anti-Discrimination Law

This essay has argued that when the law bars discriminatory restraints on alienation, entry, and advertising, communities whose residents prefer particular kinds of homogeneity may substitute an exclusionary-amenities-strategy or a lack-of-inclusionary-amenities-strategy. This raises the question of what is worse: the medicine or the disease? If the exclusionary amenities strategy produces worse societal outcomes than overt discrimination, savvy policymakers might contemplate doing away with antidiscrimination laws altogether.

Exclusionary amenities present a form of discrimination less “efficient” than overt discrimination. There are social costs and social benefits that result from this inefficiency, however. The social costs are the deadweight losses that result from the expenditure of scarce societal resources on sorting club goods. For example, I have suggested that society may have built too many residential golf courses during the 1990s – resulting in wasteful land use policies and, in this instance, substantial environmental damage.<sup>162</sup> Repealing anti-discrimination laws might well eliminate this excess demand

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<sup>161</sup> We might conceptualize anti-subordination analysis as a variant on distributional analysis. An anti-subordination analysis would also examine the distributive consequences of the law’s tolerance for exclusionary club goods strategies, but would emphasize the extent to which those strategies reinforce a caste system among *groups* in American society, focusing particularly on any harms suffered by African Americans. See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 147-170 (1976).

<sup>162</sup> For discussions of the ecological consequences of golf course development, see M.K. BREWIN, AN ANNOTATED BIBLIOGRAPHY AND LITERATURE REVIEW ON THE POTENTIAL IMPACTS OF GOLF COURSES ON FRESHWATER ENVIRONMENTS 44-129 (Trout Unlimited Canada 1992) (summarizing the existing literature and providing an annotated bibliography); James C. Balogh et al., *Background and Overview of Environmental Issues*, in GOLF COURSE MANAGEMENT & CONSTRUCTION: ENVIRONMENTAL ISSUES 1 (James C. Balogh & William J. Walker eds. 1992); DEPARTMENT OF ENVIRONMENTAL RESOURCES MGMT., ENVIRONMENTAL QUALITY MANAGEMENT AT FIVE MUNICIPAL GOLF COURSES IN MIAMI-DADE COUNTY (Dec. 2002), available in <[http://www.miamidade.gov/derm/land/library/golf\\_course.pdf](http://www.miamidade.gov/derm/land/library/golf_course.pdf)>; Michael A.

for golf course construction. On the other hand, much of this social waste is paid for by those seeking residential homogeneity.<sup>163</sup> To that extent, permitting exclusionary amenities as a lawful alternative to overt discrimination might function as an excise tax on residential homogeneity. It would be a wonderful coincidence if the costs imposed by this tax were equivalent to the social costs of the resulting residential homogeneity, but the likelihood of establishing a Pigouvian efficient tax are exceedingly low.<sup>164</sup> That said, in a society that values residential heterogeneity as a general matter, “taxing” exclusion in this way may help ensure that people who wish to engage in this form of exclusion have rather strong preferences for doing so.

Gary Becker, Richard Epstein, and others have argued that the market adequately sanctions people who refuse to deal with African American customers by depriving them of an important market.<sup>165</sup> But the presence of strong and broad consumer demand for segregated environments will, by the same token, reward developers who cater to that demand. In a world where large numbers of Caucasians are willing to pay a premium for neighborhoods that exhibit rather substantial racial homogeneity,<sup>166</sup> the waste associated with the provision of exclusionary amenities may provide the only significant penalty suffered by an entrepreneur who satisfies these discriminatory preferences.

Exclusionary amenities strategies necessarily create a second kind of inefficiency: They will be less precise than overt discrimination. Tiger Woods is not the only affluent African American golfer. So a homeowners’ association that tries to use golf as a proxy for race may not achieve complete racial homogeneity. This might be a good thing in several respects. First, exposure to some racial heterogeneity, albeit a limited amount, may result in preference changes that would not occur in a world of complete homogeneity. It is not naïve to think that positive interactions with a “token” African American neighbor would constrain a white resident’s future demand for racial homogeneity.<sup>167</sup> Second, exclusionary amenities strategies diminish the liberty of members of the excluded group less than overt discrimination does. An African American non-golfer can join a mandatory membership residential golf community, he will just have to pay a premium to do so. As a result, we might expect that he will resent the exclusionary device less. Finally, preferences for the good in question may change over time. In recent years, African Americans have taken up golf in increasing numbers.<sup>168</sup> If this trend continues, then golf courses will no longer function effectively

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Lewis et al., *Effects of a Coastal Golf Complex on Water Quality, Periphyton, and Sea Grass*, 53 ECOTOXICAL ENV. 154 (2002);

<sup>163</sup> Though not all. Again note the environmental externalities in the golf context.

<sup>164</sup> See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 182-85 (1988).

<sup>165</sup> See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

<sup>166</sup> See Dawkins, *supra* note 24, at 387-88.

<sup>167</sup> Cf. *id.* at 389; Chambers, *supra* note 118; Tollison, *supra* note 12, at 283.

<sup>168</sup> NATIONAL GOLF FOUND., *supra* note 83, at 3; April Adamson, *Tiger Draws Many to Sport*, PHI. DAILY NEWS, June 24, 2004.

as exclusionary club goods, and Caucasians interested in racial homogeneity will have to resort to other sorting devices.

For all these reasons then, the “inefficiencies” associated with exclusionary club good strategies may be welfare enhancing for society as a whole. When communities are forced to substitute exclusionary amenities for overt exclusionary admission criteria or restraints on sales, this dynamic may actually enhance social welfare. That said, it is still worth considering whether society would be better off trying to restrict exclusionary amenities strategies, or leaving them unregulated, as the law currently does.

### C. Administrative Concerns

Let us focus on the use of exclusionary amenities to achieve objectionable ends, such as the exclusion of African Americans from overwhelmingly Caucasian neighborhoods. Should the law proscribe the creation of club goods that deter African Americans from joining a particular community? Not necessarily. In a world where courts are prone to error, and evidence of discriminatory intent is difficult to gather, policing the provision of exclusionary amenities will often prove quite difficult. After all, there is substantial demand for residential golf courses, and a desire for racial homogeneity is not the only plausible explanation for a mandatory membership structure. On the contrary, mandatory membership may be designed to combat free riding by those who benefit from a golf course’s views and open space but do not contribute to its upkeep. Moreover, mandatory membership might be designed as a pre-commitment device for residents to contract for high levels of social interactions among neighborhood residents.<sup>169</sup> Finally, there may be alternative reasons, quite apart from racial bias, to explain why golfers want to live among fellow golfers. For example, doing so may lower the search costs associated with obtaining useful golf tips. As a result, it is arguably appropriate to proscribe exclusionary amenities strategies only where there is clear evidence that the club good in question would not have been procured but for the desire to achieve a type of residential homogeneity that violates public policy interests.

Where the law does attempt to defeat exclusionary amenities strategies, some governmental approaches will be superior to others. Given the concern about false positives, it seems wise to police the financing mechanisms for club goods before policing the provision of those club goods themselves. There is nothing objectionable about mandatory membership in golf communities that charge all residents for the positive externalities that the golf course confers on them. This means charging golfers within a residential golf development for open space, views, and golf; and charging non-golfers for open space and views. In fact, many residential golf communities provide such two-tiered membership structures,<sup>170</sup> and even the ones that do not implicitly charge

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<sup>169</sup> Members might value social interactions as such, and want to bind themselves to interact socially with their neighbors. Mandatory membership will reduce each household’s disposable income, thereby limiting their opportunities for social interactions with people from outside the residential golf community. And since people have difficulty ignoring sunk costs, having already paid for a membership at a golf club might cause them to play more golf, and attend more golf-course related events than they otherwise would.

<sup>170</sup> See CORY ET AL., *supra* note 108, at 166-73; see also *supra* note 117.

non-golfers by capitalizing the extra value of a view into the original purchase price of a home. Accordingly, in instances where there is strong evidence to suggest that the provision of exclusionary amenities promotes residential segregation, the appropriate solution is not to ban residential golf communities, but rather to invalidate mandatory membership schemes for golf-playing, which is racially skewed, as opposed to golf-course-view-enjoyment, which one supposes to be race neutral.<sup>171</sup> This approach is, essentially, the unbundling strategy that is well-integrated into antitrust law.<sup>172</sup>

Developers could still build homes next to golf courses, but they could not mandate that these homeowners purchase costly memberships in those courses or otherwise force purchasers to bear the capitalized costs of golf course land acquisition and upkeep. The unbundling strategy essentially eliminates the opportunity to use exclusionary amenities as a discriminatory tax that falls hardest on members of undesirable groups.<sup>173</sup>

The prospect of inclusionary club goods brings to mind another remedial prospect. Rather than require unbundling, the law might mandate bundling of a different sort. Where there are substantial concerns about the use of exclusionary amenities to promote homogeneity, the law might demand the coupling of exclusionary club goods with inclusionary club goods. “Want to put a rock climbing wall in your new development? No problem, just build a basketball court next door.” Such a coupling scheme might produce a world with too few residential golf courses, but it would also promote the construction of more basketball courts, which are probably undersupplied by the market for the reasons developed in this paper. And even if such a mandate results in a basketball court glut, the positive externalities associated with interracial relationships established on the court seem to make basketball an activity worth subsidizing, particularly in suburban residential communities. That said, unbundling is probably a more precise tool than this form of super-bundling, in the sense that it would be difficult

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<sup>171</sup> In the alternative, the common law property doctrine of “touch and concern” might be resuscitated as a means of stamping out the use of exclusionary club goods. Covenants that do not “touch and concern” the land will not run with the land, meaning that they will not be enforceable against second generation owners in a residential development. *See supra* note 92. The trend in Property law has been to treat “touch and concern” as a doctrine that reflect the state’s interests in the nonenforcement of promises that run contrary to public policy interests. *See* Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property*, 78 N.Y.U. L. REV. 1669, 1735-36 (2003); Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 453 (2002).

<sup>172</sup> *See generally* Jerry A. Hausman & Gregory A. Sidak, *A Consumer Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999); Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. CHI. L. REV. 205 (2004).

<sup>173</sup> To be sure, permitting the construction of exclusionary amenities *near* homes might still facilitate pernicious forms of segregation through a focal points mechanism. That is to say, in a world with no mandatory membership exclusionary amenities, those with a preference for racial homogeneity would be drawn to residential communities that are located near racially polarizing amenities and those with a preference for racial heterogeneity might be deterred from moving in to these communities. But a central argument of this paper is that focal points and sorting are particularly powerful when they function together, and the unbundling strategy at least prevents sorting from occurring. *See supra* text accompanying notes 15-23. Moreover, many new residential developments are surrounded by undeveloped or agricultural land. Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URB. LAW. 159, 160 (1997). In these communities, developers prevent people from “free-riding” on the homogeneity that results from exclusionary amenities, by ensuring that only residents of the common interest community can live proximate to the exclusionary amenity.

to calibrate the optimal level of extra bundling to offset the adverse consequences of an exclusionary amenities approach.

This paper has argued that divergent preferences for amenities and activities among members of different racial groups are not innocuous because those divergences create an opening for those interested in promoting residential segregation. Perhaps the most promising strategy for combating the use of exclusionary amenities is to try to alter the preferences of the group that is targeted for exclusionary treatment. Tiger Woods's recent success on the PGA tour correlated with a staggering increase in the percentage of African Americans who identify themselves as avid golf fans.<sup>174</sup> Relatedly, the Tiger Woods Foundation has sought to provide golfing opportunities to minority and disadvantaged youth.<sup>175</sup> These demographic developments might render residential golf courses poor race-oriented exclusionary club goods in the years ahead.<sup>176</sup> Group disparities in preferences for club goods are socially constructed. As such, they may be amenable to concerted efforts by government or private groups to homogenize preferences as a means of thwarting insidious exclusionary amenities strategies.<sup>177</sup>

#### D. Promoting Exclusionary Strategies

Given society's interest in promoting diversity *among* communities, as well as diversity *within* communities, there are arguably instances in which the law should promote the use of exclusionary amenities. Consider the efforts by deaf Americans to establish a community made up largely of sign language speakers in Laurent, South Dakota.<sup>178</sup> There are strong welfarist arguments for such a residential arrangement, given the network effects and economies of scale associated with bringing speakers of this language together in one place. There are sound political representation arguments as well, and Laurent organizers are particularly excited about the prospect of electing

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<sup>174</sup> In 1996, 10.1% of Caucasians and 2.5% of African Americans identified themselves as avid fans of professional golf. In 2003, 11.8% of Caucasians and 12.0% of African Americans identified themselves as avid fans of professional golf. Thus, whereas avid fandom increased by 16.8% among Caucasians, it increased by 380% among African Americans. The increases among casual fans were not as dramatic. Casual fandom increased by 10.5% among Caucasians and 73.2% among African Americans. See GOLF 20/20: VISION FOR THE FUTURE, INDUSTRY REPORT FOR 2003, at 12 (June 8, 2004).

<sup>175</sup> Lieber, *supra* note 82, at C1; *supra* note 168.

<sup>176</sup> Residential golf courses might still function as exclusionary club goods, but they would prompt sorting on the basis of some factor other than race. For example, men are noticeably more likely than women to participate in golf. See NATIONAL GOLF FOUND., *supra* note 83, at 12 (noting that 22% of white adult males play golf, versus 6% of white adult females, although the discrepancies are less pronounced for racial minorities). Given this disparity, it may be that married couples who purchase homes in residential golf communities are more patriarchal than ordinary married couples, in the sense that the husband plays a dominant role in making important family decisions, like the choice of residential locations. To the extent that a patriarchal husband seeks a neighborhood with a plethora of fellow patriarchs, selecting a residential golf community might be a viable strategy.

<sup>177</sup> Gobster, *supra* note 82, at 60-61.

<sup>178</sup> See *supra* note 121.

representatives who will be forceful advocates for their interests.<sup>179</sup> At present, not that many hearing people will want to live in a community where sign language is the lingua franca. But if Laurent becomes economically successful, one can imagine that those who are not fluent in sign language moving to Laurent in search of economic opportunity. To curtail such behavior, Laurent may find it worthwhile to invest in exclusionary amenities.

In instances where a religious, linguistic, or other minority community genuinely requires some measure of critical mass to thrive, it may be appropriate for the state to subsidize the creation of exclusionary amenities or, failing that, at least to remain neutral. In such an instance, neutrality would mean permitting the enforcement of covenants and equitable servitudes designed to support the creation and maintenance of these kinds of club goods. As long as courts are capable of distinguishing between those instances in which exclusion furthers policy objectives and those in which exclusion undermines policy objectives, there is no reason to demand that states police the types of activities in the same way that they police strategies designed to exclude marginalized racial minority groups from affluent neighborhoods.

## V. Conclusion

Individuals care about the identities of their neighbors, and are willing to expend substantial resources to recruit the desirable and deter the undesirable from moving in. When the law prevents individuals from using overt discrimination or discriminatory advertising to control the composition of their neighborhoods, these individuals may employ more subtle strategies for accomplishing the same objective. Namely, developers or community residents may procure exclusionary amenities that cause people to select into or out of particular communities. Exclusionary amenities will be selected, not on the basis of how much inherent utility they provide for residents, but on the basis of how effectively they cause self sorting by desirable and undesirable residents and how clearly they designate focal points to which housing consumers can respond. These goods would not be procured at the same levels if overt discrimination were permitted. The inability to exclude functions as an inducement to spend.

The phenomenon identified here involves high stakes. In recent decades the most important trend in American residential development and property law more generally has been the rise of common interest communities.<sup>180</sup> These communities spend more than thirty billion dollars each year maintaining these amenities.<sup>181</sup> This paper raises the

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<sup>179</sup> Indeed, organizers selected South Dakota as a home for their community in no small measure because of the state's small population, and their anticipated ability to achieve real political representation in short order. See Davey, *supra* note 121, at A1. Given South Dakota's climate, its lack of economic opportunity, and its dearth of urban life, South Dakota may *itself* function as an exclusionary public good. Signers are attracted to South Dakota, not so much because of what it offers, as because of its effectiveness in keeping hearing outsiders from outnumbering the hearing impaired in Laurent.

<sup>180</sup> Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 5 (1989); Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 829-30; Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 827-28 (1999).

<sup>181</sup> Christopher Conte, *Boss Thy Neighbor*, GOVERNING MAGAZINE 39 (April 2001).

troubling possibility that exclusionary motivations explain some of these expenditures. It also posits that starkly heterogeneous preferences for consumer goods among members of different racial groups may be far more troubling than previously thought.

Exclusionary amenities are not necessarily bad things. There may be instances in which they are socially desirable. And inclusionary amenities might function as a tool for promoting residential heterogeneity. This essay suggests that there are certain circumstances in which exclusionary amenities undermine important public policy concerns, and in those circumstances the law ought to police them through antidiscrimination law or property doctrine. But as a general matter, exclusionary amenities are less problematic than overt discrimination. So this essay sounds a cautionary note, and argues against unduly vigorous legal campaigns to stamp out all uses of this exclusionary device. Indeed, when exclusionary amenities in ways that undermine important public policy interests, the best government response may be to adopt policies that seek to homogenize preferences for the club good in question.

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