EXCLUSIONARY AMENITIES IN RESIDENTIAL COMMUNITIES

Lior Jacob Strahilevitz[*]

This Article identifies an important mechanism by which segregation arises in new residential developments. The Fair Housing Act and other antidiscrimination laws closely regulate real estate sales, advertising, and racial steering. As a result of these laws and other factors, home purchasers often lack accurate information about the likely demographic makeup of a new neighborhood or condominium building. Yet these laws have not eroded the incentives for housing consumers to obtain this data. This Article argues that developers circumvent fair housing laws by embedding costly, demographically polarizing amenities within a new development and recording covenants mandating that all homeowners pay for those amenities. Its central claim is that developers will select common amenities not only on the basis of which amenities are inherently welfare-maximizing for the residents, but also on the basis of which amenities most effectively deter undesired residents from purchasing homes therein. The Article dubs this approach the exclusionary amenities strategy and shows how it causes sorting and focal point mechanisms to act in concert, thereby engendering substantial residential homogeneity. The inability to exclude functions as an inducement to spend.

During the 1990s, the United States experienced a boom in the construction of residential developments built around costly golf courses. This occurred at a time when golf participation functioned

[*] Assistant Professor, University of Chicago Law School. Thanks to Michael Abramowicz, Theo Angelis, Amitai Aviram, Will Baude, Adam Cox, Liz Emens, Richard Epstein, Lee Fennell, Bernard Harcourt, Saul Levmore, Doug Lichtman, Geoff Manne, Tracey Meares, David McGowan, Miranda McGowan, Tom Miles, Eduardo Peñalver, Randy Picker, Eric Posner, David Reiss, Daria Roithmayr, Allen Sanderson, Cass Sunstein, Geof Stone, David Weisbach, and Albert Yoon for helpful comments, and to Daphne Hsu and Patrick Dunn for terrific research assistance. Further thanks to faculty workshop participants at the University of Virginia, the University of Chicago, the University of San Diego, George Washington University, and New York University, and to the Morton C. Seeley Fund for research support.

as a noticeably better proxy for race than income, wealth, or virtually any other characteristic. Curiously, a substantial number of Americans who purchased homes in mandatory-membership golf communities played no golf. This Article offers circumstantial evidence suggesting that by purchasing homes in these communities, homeowners may have been paying a premium for residential racial homogeneity. The Article then identifies a number of other examples where developers, or even municipalities, appear to be pursuing an exclusionary amenities strategy. It also identifies instances in which the use of exclusionary amenities may promote neutral, or even laudable, objectives.

The Article then notes the possibility of inclusionary amenities, and shows how a few developers, common interest communities, and municipalities have used these amenities to achieve greater residential heterogeneity than would otherwise have been possible. It concludes by evaluating the law's current stance of leaving exclusionary amenities largely unregulated and examines various strategies to curb the use of problematic exclusionary amenities.

INTRODUCTION

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,[1] the development of various legal doctrines to police overt racial discrimination in the residential housing context,[2] and numerous statutory initiatives designed to prevent discrimination in housing sales, leases, and advertising.[3] 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.[4] Some people will want to exclude young homeowners from a common interest community or apartment complex, and others will want to exclude the elderly.[5] Others may want to exclude members of particular religious minorities or majorities.[6] Still other homeowners may want to exclude "new money," families with children, Republicans, African Americans, or even residents who lack fashion sense from par-

[1] See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948).

[2] See, e.g., 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).

[3] See, e.g., Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified at 42 U.S.C. § 3604 (2000)); New Jersey Fair Housing Act, N.J. Stat. Ann. § 52:27D-301–29 (West 2001).

[4] 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).

[5] See, e.g., Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992); McKenzie, supra note 4, at 57.

[6] See, e.g., Taormina Theosophical Cmty. v. Silver, 140 Cal. App. 3d 964 (Ct. App. 1983). For a fascinating discussion of the residential exclusion impulse in the religious setting, see Adam M. Samaha, Endorsement Retires: Religious Symbols and Anti-Sorting Principles, 2005 Sup. Ct. Rev. (forthcoming).

ticular residential communities.[7] And some people appear willing to pay a substantial premium for this privilege.[8] Whatever the law says about the legality of certain kinds of exclusion, individual preferences for exclusion will persist to varying degrees.[9]

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

Club goods are somewhat rivalrous resources from which outsiders can be excluded,[10] for which "the optimal sharing group is more than one person or family but smaller than an infinitely large

[7] 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 et al. eds., 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? Stunt Men? It's a Miami Condo Party, N.Y. Times, May 23, 2005, at A16 (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, masseuses, an aura reader, an oxygen bar, and sales agents in tracksuits").

[8] Cutler et al., supra note 4, at 476; Patrick Bayer et al., An Equilibrium Model of Sorting in an Urban Housing Market (Nat'l Bureau Econ. Research, Working Paper No. 10865, 2004); Patrick Bayer et al., Residential Segregation in General Equilibrium (Yale Univ. Econ. Growth Ctr., Center Discussion Paper No. 885, 2004); Stephen L. Ross, Segregation and Racial Preferences: An Analysis of Choice Based on Satisfaction and Outcome Measures 1–4 (Univ. of Conn. Dep't of Econ., Working Paper No. 2002–04, 2002).

[9] See Joe R. Feagin, Excluding Blacks and Others from Housing: The Foundation of White Racism, 4 Cityscape: J. of Pol'y Dev. & Res. 79, 81–88 (1999).

[10] Todd Sandler & John Tschirhart, Club Theory: Thirty Years Later, 93 Pub. Choice 335, 335–38 (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).

number."[11] 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.[12] 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.

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 it 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.[13] Such self-sorting increases homogeneity within

[11] James M. Buchanan, An Economic Theory of Clubs, 32 Economica 1, 2 (1965).

[12] Robert D. Tollison, Consumption Sharing and Non-Exclusion Rules, 39 Economica 276, 287 (1972).

[13] Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. 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 pro-

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 undesired groups from joining the community in question?[14] In 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 antidiscrimination laws. Whereas Tiebout envisioned municipalities competing for residents by providing them

vision of municipal services. Id. at 423–24; see also Robert W. Helsley & William C. Strange, Exclusion and the Theory of Clubs, 24 Can. J. Econ. 888, 897 (1991) (arguing that the provision of club goods will also 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); Nicole Stelle Garnett, Ordering (and Order in) the City, 57 Stan. L. Rev. 1, 43–47 (2004); 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 Tiebout's theory, see Truman F. Bewley, A Critique of Tiebout's Theory of Local Public Expenditures, 49 Econometrica 713 (1981).

[14] 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; 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."). 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. Allan C. De Serpa, A Theory of Discriminatory Clubs, 24 Scot. J. Pol. Econ. 33, 34 (1977). 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 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.

with 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.[15] 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 are two mechanisms that enable exclusionary amenities to promote residential segregation. The first relates to sorting[16] and the second relates to focal points.[17] The sorting mechanism 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

[15] Becker and Murphy have noted in passing a similar version of this argument in the context of municipalities' efforts to promote segregation. See Gary S. Becker & Kevin M. Murphy, Social Economics: Market Behavior in a Social Environment 72 (2000). Becker and Murphy observed that local governments may use "highly restrictive zoning requirements, housing codes that add greatly to the cost of building houses, and generous spending on schools, swimming pools, and other public activities that raise property taxes" because these forms of regulation would appeal more to "the rich, whites, Catholics, or other groups [municipalities] want to attract." Id. Their discussion further noted that these strategies could function as wasteful, hard-to-detect substitutes for outright discrimination by local governments. Id. Note that although they mention race and religion, Becker and Murphy's discussion of the issue is principally oriented toward economic segregation. I am aware of no evidence supporting the proposition that, once one controls for wealth and income, different racial or religious groups exhibit sharply divergent preferences for school quality, large lot sizes, or swimming pools. Thus Becker and Murphy's approach to the topic and their selection of examples suggest that amenity-related strategies are analytically identical to exclusionary zoning, whose segregation-promoting properties have been well understood since at least the 1960s. Perhaps for that reason they elected not to develop their insight in any detail.

[16] For prior discussions of sorting in the residential context, see Tiebout, supra note 13, at 422; see also Lee Anne Fennell, Revealing Options, 118 Harv. L. Rev. 1399, 1454–57 (2005).

[17] For more on focal points, see generally 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).

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 point mechanism 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 potential danger, 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 antidiscrimination laws have gone to great lengths in recent years to make prospective purchasers of homes in a newly planned development ignorant of its likely racial composition.[18] If

[18] See, e.g., 42 U.S.C. § 3604(c) (2000); Martin D. Abravanel, Public Knowledge of Fair Housing Law: Does It Protect Against Housing Discrimination?, 13 Housing Pol'y Debate 469, 480–83 (2002) (noting 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, 1132 (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, 1013 (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). It is unclear whether the Fair Housing Act bars real estate agents from providing neighborhood racial composition data to a prospective purchaser at the purchaser's request. Compare Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1530 (7th Cir. 1990) (no liability), with Zuch v. Hussey, 394 F. Supp. 1028, 1051 n.11 (E.D. Mich. 1975) (noting the possibility of liability) and National Fair Housing Advocate Online, The Buyer's Agent Issue, http://www.fairhousing.com/index.cfm?method=

few residents have moved into a new neighborhood, it may be quite difficult for prospective purchasers to obtain accurate information about their fellow prospective purchasers through simple observation.[19] In addition, 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.[20] 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.[21]

page.display&pagename=HUD_resources_buyers_agent (reprinting a 1996 letter in which the Department of Housing and Urban Development's Assistant Secretary for Fair Housing and Equal Employment states: "[F]rom the standpoint of legally prudent, as well as ethical, considerations, I would strongly advise against any agent or broker . . . accommodating a request that a housing search be limited based on race, or other protected-class terms."). Despite the law's efforts to regulate real estate agents' conduct, 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 S. Econ. J. 880, 889–90 (1998).

[19] Communities concerned about residential tipping have even been willing to enact laws barring homeowners from placing "For Sale" signs on their property, out of fear that the prevalence of such signs would signal white flight to prospective home purchasers. See Linmark Assoc. v. Twp. of Willingboro, 431 U.S. 85, 87–88 (1977). These restrictions have been invalidated on First Amendment grounds. Id. at 95–98.

[20] See Patrice Hill, Region Joins Housing Bubble: Overvalued Homes a Worry, Wash. Times, Feb. 14, 2005, at A1 (remarking on the abundance of speculators in Washington, D.C.); Ted Pincus, Area Realty Market Keeps on Rolling Along, Chi. Sun-Times, Oct. 12, 2004, at 61 (noting the same in Chicago); Linda Rawls, Condo Market Headed for 'Day of Reckoning,' Experts Warn, Palm Beach Post, Aug. 6, 2004, at 2D (observing that up to 70% of South Florida condominium buyers are speculators who do not intend to occupy the units).

[21] 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, 180–86 (1971); see also Ondrich et al., supra note 18, at 891. Schelling's approach has been the subject of some recent criticism on both theoretical and empirical grounds. See, e.g., Becker & Murphy, supra note 15, at 69–70; Abraham Bell & Gideon Parchomovsky, The Integration Game, 100 Colum. L. Rev. 1965 (2000); William Easterly, The Racial Tipping Point in American Neighborhoods: Unstable Equilibrium or Urban Legend? (June 2003) (unpublished manuscript, on file with the Virginia Law Review). But cf. William A. V. Clark, Residential Preferences and

Caucasians who purchase homes in a new development that ultimately tips toward African American composition will incur substantial economic costs as a result.[22] 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 in twenty percent African American neighborhoods.[23] Thus, relatively minor changes in the racial composition of a neighborhood 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.[24]

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

Neighborhood Racial Segregation: A Test of the Schelling Segregation Model, 28 Demography 1, 17 (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 other than complete racial homogeneity.

[22] 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 Brookings Institution Center on Urban & Metropolitan Policy, The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners 4–5 (Brookings Inst. Survey Series, 2001).

[23] Sunwoong Kim, Race and Home Price Appreciation in Urban Neighborhoods: Evidence from Milwaukee, Wisconsin, 28 Rev. of Black Pol. Econ. 9, 25–26 & Exh. 7 (2000).

[24] 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, 27 Rev. of Black Pol. Econ. 103, 106 (2000); Farley & Frey, supra note 4, at 28, 36–37.

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 blockbusting activities organized by real estate agents or community groups.[25] 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.

The exclusionary amenities scenario can be made concrete with the following 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 fifty percent of the population. Suppose the developer knows that the only salient difference between blacks and whites is that eighty percent of whites play polo, whereas only twenty percent of blacks play polo. Finally, suppose, consistent with empirical data, that there is substantial market demand for housing developments that are relatively racially homogenous.[26] The sophisticated developer might build his residential develop-

[25] Blockbusting 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 blockbusting, see Arnold R. Hirsch, Making the Second Ghetto: Race and 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 18, at 1145.

[26] 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. Urb. 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. 1273 (2005) (reviewing Elizabeth Warren & Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Mothers & Fathers Are Going Broke (With Surprising Solutions That Will Change Our Children's Futures) (2004)).

ment 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 eighty percent white and twenty percent 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. 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.[27] Ideally, this group might prefer to live in a community that practiced overt racial discrimination,[28] but because the law thwarts such discrimination, this polo grounds development represents the next "best" alternative. While antidiscrimination laws prevent the de-

[27] 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 26, at 387–93. 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 sixty-five percent 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.

[28] 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).

veloper 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 grounds 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.[29] But those built around golf courses are common, and during the 1990s golf had precisely the polarizing attributes that my hypothetical ascribed to polo. This Article will explore the possibility that residential golf communities have functioned as exclusionary club goods. At the same time, it will point to instances in which the exclusionary amenities strategy might contribute to acceptable, or perhaps even laudable, types of residential sorting.

The Article will proceed as follows. Part I will briefly examine 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 premium, particularly at the high end of the real estate market. Part II will develop the idea of the exclusionary club good and the exclusionary public good (collectively, "exclusionary amenities") and will point out the possibilities for using these amenities to exclude groups from developments where antidiscrimination law proscribes more "efficient" forms of exclusion. It will also examine some tentative empirical evidence on exclusionary amenities, focusing on residential golf course developments. Part III will introduce the idea of "inclusionary amenities" and will examine the possibility that a developer's decision to forego such resources in a common interest community might provide additional opportunities to exclude undesired prospective residents, albeit by depriving the community's members of resources whose provision they would otherwise find welfare-enhancing. Part IV will examine possible legal responses to

[29] See Sara Clemence, Most Expensive Gated Communities in America 2004, Forbes, 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."). This paper does not discuss polo further, but readers interested in an exploration of polo's exclusivity and cultural significance to white economic elites should consult Corey Dolgon, The End of the Hamptons: Scenes from the Class Struggle in American's Paradise 134–46 (2005).

the introduction of exclusionary amenities or the absence of inclusionary amenities in residential communities.

I. THE EXCLUSION PREMIUM

A recent paper by Michael Schill, Ioan Voicu, and Jonathan Miller identifies an interesting puzzle in the Manhattan real estate market.[30] 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 co-authors found that, as a general matter, a condominium apartment commands a 15.5% premium over a similarly situated cooperative.[31] This finding was consistent with the expectations of Manhattan real estate agents.[32]

Why this discrepancy between condominiums and cooperatives? On this point, Schill and his co-authors identified 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 as follows: "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 cooperative apartment owners and, correspondingly, they need spend less time in internal governance."[33]

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.[34] New buildings in Manhattan overwhelmingly structure themselves as condominiums, not cooperatives,[35] but the high costs of transitioning from the cooperative to the condominium

[30] Michael H. Schill et al., The Condominium v. Cooperative Puzzle: An Empirical Analysis of Housing in New York City (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 04-003, 2004).

[31] Id. at 30.

[32] Id. at 5, 11.

[33] Id. at 1.

[34] See Henry Hansmann, Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice, 20 J. Legal Stud. 25, 30 (1991).

[35] Schill et al., supra note 30, at 5.

form explain why there are still many cooperative buildings in New York.[36]

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—nearly twenty-one percent—on owners.[37] 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, sacrifice substantial leisure time, and forego 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.[38] 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 pres-

[36] 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 Pol'y Debate 203, 207 tbl.2 (2003).

[37] Schill et al., supra note 30, at 30.

[38] 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.

tigious New York buildings,[39] but there is also some evidence suggesting that it has been used to exclude members of historically marginalized groups.[40] In recent years, the New York courts have begun policing decisions to exclude members of protected groups from cooperative apartments closely.[41]

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 undesired prospective residents 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.[42] Wealth and income often provide important proxies, and suburbs in particular manage to maintain substantial exclusivity by restricting neighborhoods to single-family homes built on large lots.[43] The Manhattan cooperatives, however, 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 they 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.[44] Once wealth and income become less useful proxies, people interested in screening their neighbors may have to turn to other characteristics.

[39] Id. at 10 n.8.

[40] See Maldonado & Rose, supra note 2, at 1245–46; Sabrina Malpeli, Comment, Cracking Down on Cooperative Board Decisions that Reject Applicants Based on Race: *Broome v. Biondi*, 73 St. John's L. Rev. 313 (1999).

[41] Maldonado & Rose, supra note 2, at 1245–46.

[42] See generally William J. Collins, The Housing Market Impact of State-Level Antidiscrimination Laws 1960–1970 (Vanderbilt Univ. Dep't of Econ., Working Paper No. 03-W04, 2003) (examining the effects of antidiscrimination law enforcement on the housing market).

[43] Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1894–1906 (1994); J. Peter Byrne, Are Suburbs Unconstitutional?, 85 Geo. L.J. 2265, 2265–72 (1997) (book review).

[44] See infra note 87.

II. "IF YOU BUILD IT, THEY WON'T COME": AN INTRODUCTION TO EXCLUSIONARY AMENITIES

On the basis of the Schill et al. research and similar studies,[45] it seems appropriate to assume a market demand for exclusion in the residential setting, particularly at the highest income levels. Some other studies suggest that, as incomes rise, the demand for racially homogeneous neighborhoods actually increases.[46] Residential exclusion, in that sense, may be something of a luxury good. 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 members with undesired characteristics.[47] As soon as that assump-

[45] See supra note 26 and sources cited therein.

[46] See, e.g., Patrick Bayer et al., An Equilibrium Model of Sorting in an Urban Housing Market: The Causes and Consequences of Residential Segregation 65–66 (Yale Univ. Econ. Growth Ctr., Center Discussion Paper No. 860, 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 Soc. Probs. 543, 556 (2000); Dawkins, supra note 26, at 382–83.

[47] 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 the other members as generating either an increase (e.g., intelligence in a learned society) or a decrease (e.g., rudeness) in utility.") (citation omitted); 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. Pub. 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 et al., Conspicuous Consumption, Social Status and Clubs 18 (Fondazione Eni Enrico Mattei, Working Paper No. 58.2000, 2000), available at http://www.feem.it/NR/rdonlyres/30AB65BF-E91C-4F9E-AC5D-63033F4C2AA8/254/5800.pdf ("[W]e could see the signalling problem in a very different way: the observable item could be the individual contribution to the club, on which is based the 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

tion 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"[48] 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 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 I will be explain shortly.[49]

To function as an effective sorting device, an exclusionary club good must be both relatively expensive and relatively visible. If the

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.").

[48] 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 203–27 (2003); David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2357–61 (2003); James C. Clingermayer, Heresthetics and Happenstance: Intentional and Unintentional Exclusionary Impacts of the Zoning Decision-making Process, 41 Urb. Stud. 377 (2003); Robert C. Ellickson, The Irony of "Inclusionary" Zoning, 54 S. Cal. L. Rev. 1167 (1981); and Lawrence Gene Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767, 780–85 (1969).

[49] See infra text accompanying notes 65–69.

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 homogeneity 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 undesired residential purchaser will conceptualize it as a high differential tax without any associated benefit, then it may convince the undesired 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.[50] 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.[51]

Exclusionary club goods are rarely employed in circumstances where more straightforward mechanisms for exclusion are legally permissible and normatively uncontroversial. For example, residential communities in the United States are permitted by law to discriminate against convicted sex offenders who present high risks of recidivism.[52] Citizens may, understandably, have a strong prefer-

[50] 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.

[51] 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 18, at 1010–14, 1041–42.

[52] People v. Leroy, 828 N.E.2d 769, 776–84 (Ill. App. Ct. 2005); Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1192–94 (N.J. Super. Ct. App. Div. 2001).

ence for excluding such individuals from their neighborhoods,[53] but the legality of overt discrimination renders it inefficient for a community to invest in exclusionary amenities that would be attractive to non-sex offenders, but unattractive to sex offenders.[54] Instead, communities use covenants or even local ordinances to exclude sex offenders.[55] 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. 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.[56] 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 number of available options shrinks. For example, African Americans and members of all other racial groups are protected by various laws designed to combat discrimination in the housing sector.[57] Such laws reach not only refusals to sell or lease but also the ability of landlords or sellers to advertise in a racially discriminatory manner.[58] This body of law substantially constrains a developer's choice of

[53] See, e.g., David Herbert, Neighbors Pressure Sex Offender to Move, Mountain View Voice, Sept. 10, 2004, at 1 (describing the decline in property values and neighborhood opposition that occurred after one sex offender moved into a common interest community), available at http://www.mv-voice.com/morgue/2004/2004_09_10.chavez.shtml.

[54] It is not difficult to imagine a club good that might provide a good proxy for sex offender 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.

[55] Betsy Blaney, Safe at Home: Lubbock Company Creating Sex Offender-Free Subdivision, Ft. Worth Star-Telegram, June 7, 2005, at B5, available at 2005 WLNR 15620575; Stephanie Simon, Ex-Cons Exiled to Outskirts, L.A. Times, Dec. 5, 2002, at A1.

[56] Debra Rosenberg, A Place of Their Own, Newsweek, Jan. 15, 2001, at 54.

[57] See supra note 3.

[58] Ross D. Petty et al., Regulating Target Marketing and Other Race-Based Advertising Practices, 8 Mich. J. Race & L. 335, 373–77 (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, 191 (2001).

human models in housing advertisements by imposing liability on landlords whose advertisements feature exclusively Caucasian models.[59] Indeed, in some respects, housing advertising is more tightly regulated than the sale or leasing of housing. For example, the Fair Housing Act permits "mom and pop" landlords to refuse to lease certain apartments to tenants on the basis of race, but bars those same landlords from advertising their discriminatory preferences with respect to said apartment.[60] Deprived of "efficient"[61] tools of discrimination, such as racist refusals to deal or advertisements, those with a preference for discrimination may explore less "efficient" strategies that the law does not proscribe.[62] Exclusionary amenities may become a viable option under such circumstances.

[59] Ragin v. N.Y. Times, 923 F.2d 995, 1000–02 (2d Cir. 1991).

[60] 42 U.S.C. § 3603(b)(2) (2000); see also Petty et al., supra note 58, at 376. The Seventh Circuit has held that a nineteenth-century federal statute, 42 U.S.C. § 1982, bars racial discrimination by Mrs. Murphy landlords. Morris v. Cizek, 503 F.2d 1303, 1304 (7th Cir. 1974).

[61] 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 28; cf. Clingermayer, supra note 48, at 382–83 (noting that exclusionary zoning proponents rarely discuss racial segregation in public, even where segregationist sentiments are motivating them, because such language "is generally not considered socially acceptable or politically correct" and may invite a lawsuit); 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 want to attract members of disfavored groups who actually loathe other members of their disfavored groups, because the presence of such "self-hating" group members solidifies negative stereotypes about the excluded group or provides cover against discrimination suits. To maximize this preference, overt discrimination will be ineffective, but exclusionary club goods may be highly effective.

[62] See Becker & Murphy, supra note 15, at 72. Formally, the federal Fair Housing Act ("FHA") and Fair Housing Act Amendments ("FHAA") recognize disparate impact claims. See Lapid-Laurel v. Zoning Bd. of Adjustment of the Twp. 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 claims 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. *Gamble*, 104 F.3d at 305; see also *Lapid-Laurel*, 284 F.3d at 467.

The leading FHA disparate impact case involving a non-governmental defendant is Hack v. President & Fellows of Yale Coll., 237 F.3d 81 (2d Cir. 2000). In *Hack*, the plaintiffs alleged that Yale's requirement that freshmen and sophomores live in co-

B. Comparing Private Goods

To be sure, self-sorting occurs in many contexts.[63] 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 differences 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.[64] Private goods, by contrast, typically involve more limited social interactions.[65] In a neighborhood comprised entirely of quiet

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 in part). Although the plaintiffs did not frame their argument as such, an exclusionary club goods story implicitly underpinned their discrimination claim.

[63] 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 S. Econ. J. 469, 470–72 (1984). For recent applications of this idea to the legal literature on executive compensation, see M. Todd Henderson & James C. Spindler, Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption, 93 Geo. L.J. 1835, 1867 (2005); Saul Levmore, Puzzling Stock Options and Compensation Norms, 149 U. Pa. L. Rev. 1901, 1927–28 (2001).

[64] 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. Monitor, Apr. 21, 2004, at 15, available at 2004 WLNR 1649524; 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.").

[65] Common amenities that do not promote social interactions among neighbors would, by hypothesis, prove less attractive as exclusionary club goods. For example,

shut-ins living in single-family homes, homeowners probably will not care that much about the characteristics of their neighbors.[66] 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.[67] One reason why racial segregation is a public policy problem stems from the connection between residential propinquity and the composition of individuals' social networks.[68] Residential segregation helps explain the segregated nature of social interactions in public schools, political gatherings, and some workplaces.[69] Neighborhood residential segregation is also associated with declines in generalized trust, an economic resource that drives people's willingness to cooperate

one would not expect to see garbage collection services, gardening services, or maid services functioning as exclusionary amenities with great frequency.

[66] 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 26, at 391.

[67] 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 25. 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.

[68] Lee Sigelman et al., Making Contact? Black-White Social Interaction in an Urban Setting, 101 Am. J. Soc. 1306, 1324–26 (1996). For a discussion of other troubling implications of homogeneity within common interest communities, see McKenzie, supra note 4, at 188–92.

[69] Charles T. Clotfelter, Spatial Rearrangement and the Tiebout Hypothesis: The Case of School Desegregation, 42 S. Econ. J. 263, 268 (1975) (noting that whites' opposition to residential integration increases 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. Literature 1056, 1071–82 (2004); Wilfred G. Marston & Thomas L. Van Valey, The Role of Residential Segregation in the Assimilation Process, 441 Annals Am. Acad. Pol. & Soc. Sci. 13, 16–17 (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).

economically or socially with strangers.[70] 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.[71] If there were no social interactions among neighbors, then it would be hard to get upset about residential segregation. Residential segregation is a public policy concern precisely because we know that interactions among neighbors are often frequent and take on substantial political and economic importance.

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,[72] 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.[73] 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.

[70] Melissa J. Marschall & Dietlind Stolle, Race and the City: Neighborhood Context and the Development of Generalized Trust, 26 Pol. Behav. 125, 139–44 (2004).

[71] J. Eric Oliver & Janelle Wong, Intergroup Prejudice in Mutliethnic Settings, 47 Am. J. Pol. 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. Pol. 402, 420 (1995) (finding strong correlations between residence in largely white communities and adherence to negative stereotypes about African Americans). But cf. Marschall & Stolle, supra note 70, at 131–32 (reviewing the evidence that supports and conflicts with these findings).

[72] Variance in this context means a development with both large and small kitchens.

[73] 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 62.

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 undesired residents from joining a new common interest community, and that targeted consumers understand those messages.[74]

Falls Church, Virginia, like many suburban communities, has had trouble keeping its tax burden low while maintaining high quality public schools for its residents.[75] One 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 eighty-unit condominium, but gave the developer a financial incentive to ensure that no more than eight school children moved into the complex.[76] For the ninth child living in Broad-

[74] This paper 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. Yoram Barzel & Tim R. Sass, The Allocation of Resources by Voting, 105 Q. J. Econ. 745, 764–65 (1990). They argue that creating expensive common amenities in a preexisting community will generate substantial controversy, especially 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 765–70.

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 cause 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.

[75] See John J. Delaney, Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation, 33 U. Balt. L. Rev. 153, 175 (2004).

[76] 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. I thank Lee Fennell for bringing the Falls Church incident to my attention.

way, and every additional child beyond nine, the developer would have to pay Falls Church $15,000.[77] The developer agreed to pay such fees for the first five years of the development's life.[78]

A *Washington Post* article described the Broadway developer's response:

> 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 simply by 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 then 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."[79]

The developer provided a library and bar, but failed to provide a playroom, making the condominium more attractive to childless residents and 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.[80]

---

[77] Id.

[78] Id.

[79] Id.

[80] 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 real estate agent 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 tennis played in organizing social interactions:

> "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.

It should not be particularly surprising that developers understand how to use exclusionary club goods. The more surprising aspect of this story is Zachariasse's willingness to discuss his actions and motivations so candidly with a *Washington Post* correspondent. Zachariasse later regretted his candor, no doubt, when 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.[81] 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 a fair housing partnership that would provide training for the developer's employees to avoid further discrimination against families with children.[82]

Following this investigation and settlement, one expects that developers will be more tight-lipped when discussing the motivations behind their provision of amenities in residential developments. This raises a serious problem. How are agencies charged with enforcing antidiscrimination 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 the provision of exclusionary club goods?

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. This is an unsatisfying approach, however, in those instances where developers undermine antidiscrimination laws that reflect important normative commitments.

> " . . .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.

[81] See Press Release No. 04-142, U.S. Dep't of Hous. & Urban Dev., HUD Settles Investigation of Falls Church and Condo Developers (Nov. 19, 2004), http://www.hud.gov/news/release.cfm?content=pr04-142.cfm.

[82] Id.

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 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 undesired group targeted for exclusion.

D. Golf and Race in the United States

During the 1990s, one could predict with a high degree of accuracy a person's race upon learning that he or she played golf. Among warm weather leisure activities attracting twenty-five million or more participants, golf stood out as the most racially segregated. From 1994 to 1995, 27.7 million Caucasian Americans played golf—approximately 16.9% of all Caucasians aged fifteen and older.[83] By contrast, only 900,000 African Americans played golf during that timeframe, comprising just 4.2% of the African American population.[84] After adjusting the size of these groups to reflect the general population of the United States, we see that 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.[85] 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.[86]

[83] R. Jeff Teasley et al., Recreation and Wilderness in the United States 20 (Univ. of Ga. Dep't of Agric. & Applied Econ., Working Paper No. 97-13, 1997), available at http://www.agecon.uga.edu/~erag/finalreport.htm.

[84] Id.

[85] Id. Data from a 1997 study showed an even more substantial gap in participation. In that year, 2.7% of African Americans played golf, compared with 12.6% of Caucasians. Jill Lieber, Golf Finally Reaching Out, USA Today, Aug. 15, 2001, at 1C (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 J. Park & Recreation Admin. 46, 48–49 (1998).

[86] See Nat'l 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 in-

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.[87] That differential is critical. After all, if income provided a better proxy for race than golf participation did, those interested in residential racial homogeneity could use large lot sizes or occupancy restrictions to exclude African Americans. This strategy—referred to in the literature as "exclusionary zon-

flux of new African American golfers explains the lower intensity of participation. See infra text accompanying note 177.

[87] In 1995, 19.6% of Caucasians lived in households with annual incomes in excess of $75,000, whereas 8.1% of African Americans lived in such households. See Bureau of the Census, Money Income in the United States: 1995, at 11–12, *in* Current Population Reports P60-193 (Sept. 1996), available at http://www.census.gov/prod/2/pop/p60/p60-193.pdf. Thus, Caucasians were 2.4 times as likely as African Americans to have household incomes above $75,000 per year, but four times as likely to play golf. Income inequality between Caucasians and African Americans has been diminishing consistently over time. See Bureau of the Census, Measuring 50 Years of Economic Change Using the March Current Population Survey C-7 tbl.C-4 (1998); 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."). 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, 32 Rev. Black Pol. Econ. 83, 91 (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 family members faced by higher-income African Americans. Joseph G. Altonji et al., Black/White Differences in Wealth, 24 Econ. Persp. 38, 38, 48–49 (2000); N. S. Chiteji & Darrick Hamilton, Family Connections and the Black-White Wealth Gap Among Middle-Class Families, 30 Rev. Black Pol. Econ. 9, 21–25 (2002). Wealth differentials, like income differentials, appear to be less dramatic than golfing participation differentials. See, e.g., Sharmila Choudhury, Racial and Ethnic Differences in Wealth and Asset Choices, 64 Soc. Security Bull. 1, 8 tbl.3 (2002) (noting that a white household in the top income quartile had $551,818 in mean net worth, whereas a black household in the top income quartile had $247,555 in mean net worth). Between 1969 and 1995, the percentage of Southern Caucasians in the top three 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, chart 10 (1998). Moreover, among high-income, middle-aged college graduates, wealth disparities between Caucasian and African American families disappear. See Ronald L. Straight, Survey of Consumer Finances: Asset Accumulation Differences by Race, 29 Rev. Black Pol. Econ. 67, 76–77 (2001). If one adjusts for age, income, education, and employment, interracial differences in wealth tend to disappear. Id. at 80.

ing"—is well documented and widely practiced.[88] 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.[89] 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.

Golfing facilities constituted an especially attractive exclusionary club good for developers during the 1990s because it was difficult to find any activity in which participation was as racially polarized as golf. First, 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.[90] 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 were not starkly different among the races.[91]

Second, sports that exhibited the same level of racial segregation as golf tended to be either extreme, aquatic, or snow-based, most of which are far less popular than golf. 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 attracted more participants than golf, but was slightly less segregated, with 92.5% of participants identifying as Caucasian, and 3.3% of participants identifying as African American. Rock

[88] See supra note 48.

[89] See Bledsoe et al., supra note 69, at 440; Medoff, supra note 87, 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." (citation omitted)). 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 24, at 105.

[90] Teasley et al., supra note 83, at 20–21.

[91] Id. at 21. The tennis participation rates were as follows: 10.8% of Caucasians; 7.8% of African Americans; and 12.8% of "Others." Id.

climbing exhibited a similar skew, but drew only 7.5 million participants in 1994–95.[92] Similarly, 94.9% of cross-country skiers were Caucasian, but the sport drew less than 7 million participants.[93]

Third, the nature of golf renders it a more attractive exclusionary good: golf courses are quite expensive to develop and maintain (unlike, for example, rock climbing walls);[94] they can be built in virtually any climate (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).[95]

Finally, golf was historically associated with racial exclusion and played at country clubs that had discriminatory membership policies.[96] As a result, golf has an "image as 'a white man's

[92] Id. at 24–25.

[93] Id. at 23.

[94] W. J. Florkowski & G. Landry, An Economic Profile of Golf Courses in Georgia: Course and Landscape Maintenance 4 (Ga. Agric. Experiment Stations Research Report No. 681, 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, Urb. Land, Feb. 1991, at 14 (noting the cost of constructing an 18-hole golf course to range from $2 to $8 million).

[95] Club goods are not the only means of sorting residents. Saul Levmore 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 are such arrangements not present 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, 130 Cal. Rptr. 32, 34–35 (Cal. Ct. App. 1976); Streams Sports Club, Ltd. v. Richmond, 457 N.E.2d 1226, 1230–31 (Ill. 1983); Regency Homes Ass'n v. Egermayer, 498 N.W.2d 783, 791–93 (Neb. 1993); Homsey v. Univ. Gardens Racquet Club, 730 S.W.2d 763, 764 (Tex. App. 1987).

[96] Calvin H. Sinnette, Forbidden Fairways: African Americans and the Game of Golf 58–60, 121–32 (1998); Mitchelson & Lazaro, supra note 64, at 48–51.

game.'"[97] To the extent that communities wished to employ racially discriminatory selection mechanisms using exclusionary club goods, golf presented the best opportunities.[98] Given the racial dynamics of golfing in the United States, a residential development built around a high-quality, mandatory membership golf course would have attracted two types of residents: avid golfers (who were overwhelmingly white), and people with a preference for living among avid golfers or other non-golfers attracted to such communities. It is therefore worth investigating the exclusionary amenities hypothesis by examining statistics on golf course-related residential developments.

E. Golf Course Developments in the United States

A residential golf course is a golf course surrounded by residential properties—single family homes, townhouses, or condominiums. During the 1990s, golf participation intensified,[99] and the United States saw a rapid increase in the number of residential golf course developments.[100] 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.[101] In Florida, which has more golf courses than

[97] James D. Davidson, Social Differentiation and Sports Participation: The Case of Golf, *in* Social Approaches to Sport 181, 200 (Robert M. Pankin ed., 1982).

[98] 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 an effective means of engaging in the exclusionary club goods strategy. The best available data indicates that the household incomes of African American golfers skew slightly higher than those of Caucasian golfers, but the difference is not particularly pronounced. Nat'l Golf Found., supra note 86, at 16.

[99] 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.

[100] John L. Crompton, Designing Golf Courses to Optimize Proximate Property Values, 5 Managing Leisure 192, 192–93 (2000).

[101] Id. at 193 ("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,

any other state, as many as fifty-four percent of golf courses were residential.[102]

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 and should not be discounted. However, an investigation into the growth of residential golf communities reveals several intriguing data points, all of which are consistent with the hypothesis that exclusionary club goods strategies were responsible for some of the changes and growth in the residential golf course market.

The first intriguing data point concerns the shifting mix of mandatory golf course memberships and optional memberships offered to residents of residential golf communities. Early residential golf course developments followed a particular financing model: Those who purchased residences in the development were obligated to purchase "equity memberships" in the adjoining golf course.[103] In this arrangement, all homeowners would pay for the development and maintenance 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 developments, where membership is optional among homeowners and members of the public can play for a daily use fee.[104]

Two groups of golf courses did not shift away from equity memberships: high end courses played by the very wealthy, and courses located in areas with large African American populations, such as

Fin. Times, Feb. 1, 2005, at 10, available at 2005 WLNR 1341985. This is consistent with the exclusionary club goods hypothesis. See infra text accompanying notes 184–186.

[102] John J. Haydu & Alan W. Hodges, Economic Impacts of the Florida Golf Course Industry, Economic Information Report No. 02-4 (Univ. of Fla. Inst. of Food & Agric. Sci., Gainesville, Fla.), June 13, 2002, at 1, 3; see also Lewis M. Goodkin, Out of the Rough?, Florida Trend, Dec. 1998, at 78, 81 (quoting an earlier estimate that 40% of Florida's golf courses are residential). In 1996, approximately one-third of all newly constructed golf courses were residential. Jordan N. Roberts & Darla Domke-Damonte, Utilization of Golf Course Facilities by Residents of Golf Course Communities in Myrtle Beach, 1 Coastal Bus. J. 13, 14 (2002), http://www.coastal.edu/business/cbj/pdfs/golfcommunities.pdf.

[103] Goodkin, supra note 102, at 78.

[104] See, e.g., id. (discussing the emergence of this financing design in Florida).

Broward and Miami-Dade counties.[105] For wealthy homeowners, mandatory golf course membership might have functioned in the same way that the cooperative structure functioned in Manhattan.[106] 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 opted for a luxury amenity that effectively excluded those unwilling to pay substantial amounts for a world class golf facility.

To complete the story, consider the second 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—including those with "mandatory membership" policies—has been widely noted in golf industry periodicals.[107] To be sure, not all of these people are overt racists or segregationists.[108]

[105] Id. at 80. 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. U.S. Census Bureau, County and City Data Book: 2000, at 71 tbl.B-2 (2001).

[106] See supra text accompanying notes 30–44.

[107] See, e.g., McElyea et al., supra note 94, at 16 ("Golf-course-oriented homes appeal to nongolfers as well as to golfers. (Only about one-third of golf-frontage homebuyers in nonretirement projects play golf regularly.)"); Crompton, supra note 100, at 193; Stella M. Chavez, Subdivisions Want Residents to Join the Club, S. Fla. Sun-Sentinel, Feb. 15, 2000, at A1; Goodkin, supra note 102 (quoting a developer's expectation that "50% of buyers will be golfers"); Nancy Kressler Murphy, Golf Course Communities Sprouting, Mercer Bus., June 1990, at 15 (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"). This pattern of nongolfers 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, Real Estate at 15.

A cautionary note is in order. Although the above-cited sources suggest the presence of large numbers of nongolfers in all types of residential golf courses, I have been unable to find data that breaks down the prevalence of non-golfers in mandatory membership developments.

[108] But some of them probably 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. Shaila Dewan,

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 developments.[109] That said, real estate appraisal research suggests that golf course views provide only one-third as much of an increase in real estate values as views of a creek or marsh.[110] Artificial lakes and waterways are cheaper to build and maintain than golf courses, and add similar value,[111] though they are less of a mainstay of new real estate developments than golf courses.[112] 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.[113] 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 sys-

In County Made Rich by Golf, Some Enclaves Are Left Behind, N.Y. Times, June 7, 2005, at A1.

[109] See, e.g., Murphy, supra note 107, at 15.

[110] James R. Rinehart & Jeffrey J. Pompe, Estimating the Effect of a View on Undeveloped Property Values, 67 Appraisal J. 57, 60 (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.").

[111] E-mail from Jim Kass, Research Director, National Golf Foundation, to Lior Strahilevitz, Assistant Professor of Law, University of Chicago School of Law (Feb. 15, 2005, 09:15:04 CST) (on file with the Virginia Law Review Association).

[112] Even within residential golf courses, lots with views of water hazards are particularly desirable and command the highest premiums. See Gregory L. Cory et al., Golf Course Development in Residential Communities 37 fig.2-12 (2001); Crompton, supra note 100, at 198.

[113] Haydu & Hodges, supra note 102, at 23 ("Commercial, agricultural, industrial, institutional, and government land use types all showed an increase in total value associated with golf courses, averaging $10,942 per parcel, and ranging from nearly $20,00 [sic] for residential properties, $70,000 for commercial properties, $114,000 for industrial, to nearly $121,000 for agricultural land."). 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.

tematic study of the ways in which residential golf communities market themselves.[114] 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, among others.[115]

Marketing materials certainly discussed the quality of the golf courses at length,[116] but DeChaine appeared to notice as much, if not more, emphasis on the exclusivity of golf courses behind gates, membership rules that limited outsiders' access to the property, and the homogeneity of the community's residents.[117]

Advertisements for mandatory membership golf communities sometimes provide not-so-subtle exclusionary messages. For example, Harbour Ridge, a residential golf community in Stuart, Florida, describes its community in the following manner:

> 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

[114] D. Robert DeChaine, From Discourse to Golf Course: The Serious Play of Imagining Community Space, 25 J. Comm. Inquiry 132 (2001). Sadly, for my purposes, DeChaine did not distinguish between mandatory membership and optional membership communities.

[115] Id. at 134.

[116] Id. at 138–39.

[117] 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 prevalence 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.

> world's, great golf clubs. Members embrace traditional values and are known to jealously guard their privacy and comfort.[118]

Harbour Ridge's advertisement seems evocative enough to send clear messages to prospective purchasers about the nature of the community.[119] Other residential golf communities opt for an even less subtle approach, selecting names like "Magnolia Greens Golf *Plantation*" or "Sea Trail *Plantation*."[120]

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, in some sense the golfers within mandatory membership communities free ride off the contributions by non-golfers for course upkeep. 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.

Optional membership residential golf communities, by contrast, 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

[118] GolfCourseHome.net, Harbour Ridge, Stuart, Florida, http://www.golfcoursehome.net/doc/communities/Community-Harbourridge.htm (last visited Feb. 17, 2006).

[119] 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, 998–99 (2d Cir. 1991) (discussing subtle discriminatory modeling in newspaper advertisement). 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).

[120] Mitchelson & Lazaro, supra note 64, at 69 (emphasis added).

are members of the course pay for its upkeep. A residential community can solve this problem 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.[121]

There is one final piece of the puzzle. In order for this story to work, it must be the case that Caucasian non-golfers seeking racial homogeneity understood the demographics of golf participation. Ideally, we would be able to access data from the 1990s about white non-golfers' perceptions of who plays golf. Not surprisingly, however, no one ever thought to ask such a question. That said, James Loewen's fascinating book on residential exclusion in the United States notes that, at least in the context of retirement communities, both whites and blacks understood the connection between mandatory membership golf communities and residential racial homogeneity.[122]

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

[121] 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 Tal Abbady, No Change for Boca Lago: Mandatory Membership Voted Down, S. Fla. Sun-Sentinel, May 12, 2004, at 8B; Leon Fooksman, Residents Fight Rule on Joining Golf Club, S. Fla. Sun-Sentinel, Sept. 17, 2003, at 1B; Lee Hoke, Mandatory Memberships? Solution or Band-Aid?, Club Mgmt., Dec. 2004, at 18; Patty Pensa, Country Club Battle Heads to Court: Community Split Over Required Membership, S. Fla. Sun-Sentinel, Dec. 19, 2004, at 3B. On the privacy drawbacks of solving a tragedy of the commons by opening up the golf course to outsiders, see Mary Shanklin, Golf Communities Tee Off, Orlando Sentinel, Nov. 10, 1996, at J1.

[122] James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism 392 (2005) ("Today the tradition of retiring to white enclaves continues, often gated and built around private beaches, golf courses, marinas, or all three. They may provide community, because purchase of a house or town house includes use of a clubhouse, restaurant, sports facilities, and other amenities. . . . While not quite racially segregated, these new towns and developments advertise themselves as 'exclusive' and are often overwhelmingly white, although race goes unmentioned."). Loewen notes that African Americans who move into such communities may face social sanctions from fellow African Americans. Id. at 318 ("A resident of an overwhelmingly white neighborhood near a golf club in south Tulsa told me of a black doctor who moved there. He had to move back to north Tulsa, she said, because 'his [black] patients rose up in protest.'") (bracketed text in original).

possible to answer this question, controlling for home prices, resident income, and other attributes.

In later empirical work, a co-author and I plan to test this hypothesis using census and demographic data and to investigate whether the racial composition of golf communities in general differed substantially from the racial composition of non-golf gated communities. Although this future study will not allow us to disaggregate sorting and focal point mechanisms, it can nevertheless address two questions: (1) whether mandatory membership residential golf courses have a racially disparate impact in the residential setting; and (2) whether (as this Article hypothesizes) residential golf communities are even more segregated than golf participation is in general. This data, combined with the circumstantial evidence outlined above, may raise a strong inference that developers actively pursued exclusionary club goods strategies.

Even if there were no intentional discrimination associated with the bundling of golf with residences, the popularity of bundling residential developments with participation in a costly activity that exhibited dramatic racial skews should be particularly disconcerting to those who worry about the effects of residential segregation. The foregoing evidence suggests that, during the 1990s, residential golf communities could have functioned as exclusionary amenities, and may have facilitated substantial residential segregation if housing consumers were acting upon widespread preferences among whites for residential racial homogeneity. Namely, such communities would have attracted three types of residents: (1) whites who wanted racial homogeneity; (2) golfers who did not care about racial homogeneity, but were overwhelmingly white; and (3) whites who did not care about racial homogeneity so much as 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.[123] These sorting

[123] See supra note 61. These latter residents might not object to the presence of an African American celebrity, either. At least two highly prestigious golf-oriented country clubs have Michael Jordan as a member, though virtually no other African American members. See Marcia Chambers, The Changing Face of Private Clubs, Golf Dig., Aug. 2000, at 93, 100–01.

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 were unlikely to use, did not want to be the "token" family in an overwhelmingly white environment,[124] or did not want to live in neighborhoods where they would encounter hostility or social snubs from their neighbors.[125] 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. Communities sometimes employ exclusionary amenities strategies, however, 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.[126] In such a setting, one might expect to see the community embrace direct efforts to limit the entrance of nonbelievers into the community. For example, a homeowners' association might record covenants barring property sales to people who are not members

[124] For a discussion of the costs associated with being the lone African American member of an overwhelmingly Caucasian golf club, see Chambers, supra note 123, at 100.

[125] See supra note 27.

[126] For discussion along these lines, see Eduardo M. Peñalver, Property as Entrance, 91 Va. L. Rev. 1889, 1962–71 (2005). There is some evidence suggesting that religious residential homogeneity may have some beneficial effects on social welfare, though this data analyzes metropolitan-level homogeneity, as opposed to neighborhood-level homogeneity. See Christopher G. Ellison et al., Religious Homogeneity and Metropolitan Suicide Rates, 76 Soc. Forces 273, 287 (1997) (finding that religious homogeneity is associated with decreased suicide rates). For a critique of residential religious sorting, see generally Samaha, supra note 6.

of the religious community in question. Alas, such restraints on alienation have been invalidated by courts as contrary to public policy.[127]

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 require all homeowners within the association to share the expenses and burdens of the church's upkeep. This temple could function as an exclusionary club good if some of the community's members did not plan to attend it, but only wanted to live among church-goers.[128] 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.[129] 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.[130] 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 logically could be extended to cover mandates that homeowners subsidize resident religious institutions.[131]

[127] Taormina Theosophical Cmty., Inc. v. Silver, 190 Cal. Rptr. 38 (Cal. 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. United States v. Columbus Country Club, 915 F.2d 877, 882 (3d Cir. 1990). A for-profit developer would not be able to take advantage of this exemption. Id. at 882–83.

[128] 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. For an illuminating discussion of the role of churches and synagogues in encouraging residential sorting and hastening or resisting neighborhood flight, see Gerald Gamm, Urban Exodus: Why the Jews Left Boston and the Catholics Stayed 229–60 (1999).

[129] See supra note 95.

[130] Under the Restatement approach, an equitable servitude generally binds successors unless it (1) "is arbitrary, spiteful, or capricious"; (2) "unreasonably burdens a fundamental constitutional right"; (3) "imposes an unreasonable restraint on alienation"; (4) "imposes an unreasonable restraint on trade or competition"; or (5) "is unconscionable." Restatement (Third) of Prop.: Servitudes § 3.1 (2000).

[131] See, e.g., Hall v. Church of the Open Bible, 89 N.W.2d 798, 799–800 (Wis. 1958) (noting that restrictive covenants excluding churches have been universally enforced).

If the exclusionary amenities strategy might permit religious communities from achieving what they could not otherwise achieve without violating antidiscrimination law, why has no community tried this approach? Until recently, that question remained a puzzle; however, 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."[132] Because marketing the for-profit development exclusively to Catholics is illegal, developers have tied the development to Ave Maria University, a Catholic institution of higher learning established by Domino's Pizza founder, Tom Monaghan.[133] Besides noting the development's proximity to the new university and its many resources, Monaghan describes a "stunning church in the center of town" and private chapels "within walking distance of each home," envisioning "an extremely Catholic" population.[134] The developers anticipate that the development will be "primarily Catholic," especially at the outset, but stress that they are "not going to discriminate or market to Catholics."[135] Of course, what is implicit in these statements is explicit in this Article: One can create a primarily Catholic development without any targeted marketing or overt discrimination.

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.[136] Because members of a religious community typi-

[132] Adam Reilly, City of God: Tom Monaghan's Coming Catholic Utopia, Boston Phoenix, June 17, 2005, at 17.

[133] Id.

[134] Id. at 17, 19. "Extremely Catholic" is a double entendre here. Some have suggested that Ave Maria seeks to differentiate itself from other Catholic institutions, like Notre Dame, which Ave Maria's founders regard as unduly progressive. See Sharon Tubbs, School of Faith, St. Petersburg Times, Mar. 28, 2004, at 1E.

[135] Reilly, supra note 132, at 19. This "focal points" statement from the developer, quoted by a reporter, may well violate laws that bar religious discrimination in advertising. Cf. supra notes 79–82 and accompanying text.

[136] Kevin D. Dougherty, How Monochromatic is Church Membership? Racial-Ethnic Diversity in Religious Community, 64 Soc. Religion 65, 74–77 (2003) (noting substantial racial homogeneity among U.S. congregations, but a great deal of hetero-

cally 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 to recoup this subsidy. The church will not formally constitute a club good: Simply purchasing a home in the subdivision will not entitle the homeowner to use the church.[137] 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 those residents who worship at the church or value the kinds of residential homogeneity associated with the church membership will derive 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.

Public goods may also constitute a type of exclusionary amenity.[138] 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 following example suggests, even non-local public goods can function as exclusionary amenities.

2. Exclusionary Public Goods

Although this Article focuses on club goods in residential communities, we should not be surprised to observe the same phenomenon in virtual communities as well. Indeed, participants in various virtual worlds have developed alternative languages with their own grammars and conventions, many of which prove befuddling to the uninitiated.[139] Although some of these languages appropriate internal messaging abbreviations that help shorten the

geneity with respect to income and education); Kinder & Mendelberg, supra note 71, at 417.

[137] I thank Ed Kitch for raising this point.

[138] See supra note 15.

[139] See F. Gregory Lastowka & Dan Hunter, The Laws of the Virtual Worlds, 92 Cal. L. Rev. 1, 26 n.128 (2004).

length of typed communications, one prominent online language—l33t ("leet")—is properly understood as facilitating encryption, not communication. As a result, l33t is more cumbersome to use than ordinary, American English.[140] 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 certain online communities vexing for a naïve newcomer, referred to as a "n00b" (newbie) by the computer savvy. One purpose of these languages is to marginalize newbies and exclude the virtual riff-raff.[141] 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 can function as a means of discouraging those who are non-savvy, impatient, or unwilling to incur substantial language-learning costs from joining Internet-based subcultures.[142]

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 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

[140] See Blake Sherblom-Woodward, Hackers, Gamers and Lamers: The Use of l33t in the Computer Sub-Culture 6–9 (Fall 2002) (unpublished senior thesis, Swarthmore University), available at http://www.swarthmore.edu/SocSci/Linguistics/papers/2003/sherblomwoodward.pdf; Microsoft.com, A Parent's Primer to Computer Slang, Feb. 4, 2005, http:// www.microsoft.com/athome/security/children/kidtalk.mspx; see also English to Hackerspeak Translator, http://www.cs.utk.edu/~cjohnson/computing/javascript/round_hackerspeak.php (last visited Feb. 17, 2006). I thank Neil Richards for alerting me to l33t as an online manifestation of the exclusionary club goods phenomenon.

[141] Sherblom-Woodward, supra note 140, at 14–15.

[142] It has long been recognized that the adoption of common languages can enhance social solidarity. Lessig, supra note 18, at 976–77.

particular physical space.[143] This discussion of exclusionary amenities raises an additional implication: Inclusionary amenities should also exist. The presence of such goods would spark residential heterogeneity, and the absence of such goods should function in the same way as the presence of 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. The inclusionary club good does, however, 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, student residential buildings on college campuses occasionally acquire reputations as non-academically rigorous, and sometimes these reputations are well deserved. At some point, members of a community may decide that this non-academic reputation imposes substantial costs on the members, such as diminished access to employment networks, lower status relative to members of other communities, or unwelcome 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. Although the current residents, and those in the subsequent few years, may infrequently use the study room, this will change. In time, as 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

[143] It may be more difficult to justify religious residential segregation by members of vibrant, commonly practiced religions, such as Roman Catholicism, though distinct Roman Catholic subpopulations may be able to make colorable "critical mass" arguments.

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 on its own terms.[144]

Anecdotal evidence suggests that inclusionary club goods of this nature are common.[145] 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, may become a more efficiently utilized amenity through the operation of selection effects.[146]

Perhaps the most prominent example of the inclusionary amenities approach is the retrofitting of various residential buildings to

[144] 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. That is, it is likely that many sought-after Caucasian college students want to attend a university that has a racially diverse student body. 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 university to abolish race-based affirmative action, this might not only increase the percentage of Caucasians in the student body, but it might also skew the attributes of those Caucasians in the student body by attracting Caucasians who prefer racial homogeneity or do not care much about racial diversity, while turning off potential applicants who value 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.

[145] The study room example identified in the paragraph above is drawn from the author's own experience with off-campus student housing at Berkeley.

[146] 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, Nat'l Post, Mar. 3, 2001, at N4; see also text accompanying supra note 79.

permit access by the disabled. Prior to the enactment of the Americans with Disabilities Act ("ADA") and similar state laws mandating reasonable accommodations for the disabled, numerous building owners voluntarily embraced ramps, elevators, and other accommodations designed to make their buildings more hospitable to handicapped individuals.[147] Such voluntary steps were designed to undercut the segregation of the disabled and to permit disabled Americans to interact freely with their able-bodied peers. Indeed, these voluntary steps helped mainstream the disabled, which in turn galvanized them as a political interest group that lobbied for the enactment of the ADA.

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.[148] This effort, inspired in large part by Richard Florida's influential book, *The Rise of the Creative Class*,[149] is designed to boost economic growth by attracting the young, energetic, and well-educated art and culture lovers who are sought by major employers. Communities across the United States are investing in public

[147] See, e.g., Dick Thornburgh, The Americans with Disabilities Act: What It Means to *All* Americans, 64 Temp. L. Rev. 375, 376, 383 (1991); Tim Gilmer, A Tale of Two Cities, New Mobility, June 2002, available at http://www.newmobility.com/review_article.cfm?id=555&action=browse (noting that Venice, Florida, tried to make itself accessible to the disabled decades before the enactment of legislation mandating access).

[148] See, e.g., Abe Aamidor, 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 10; Keith Herbert, Struggling Borough Tries to Get Creative: Norristown Hopes Artists Will Be Drawn by Low Rent and Incentives Such as Tax Breaks, Phila. Inquirer, Aug. 15, 2004, at B1; Elaine Hopkins, Cheap Rent + Good Light = Art: Arts Project Rep Says that 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, also on the basis of an "urban pioneer" theory).

[149] Richard Florida, The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community, and Everyday Life (2002).

goods and club goods that are not terribly appealing to the existing residents.[150]

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 the cities themselves, heavily African American and Latino.[151] This widespread exercise of the exit option by middle-class whites has imposed real costs on the lower-income populations that lack the resources to exit urban school districts.[152] 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.[153] 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 gain admission 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 support the inclusionary amenities strategy. Though they appear to be vastly outnumbered by those Americans who prefer homogenous subdivisions, a constituency of Americans who want to live in neighborhoods that exhibit genuine racial and economic diversity

[150] One problem with Richard Florida's approach is that the fight over members of the creative class is in some respects a zero-sum game, so as more municipalities vie for the same piece of the pie, the returns from strategies designed to appeal to them will diminish.

[151] James E. Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 281–83 & n.152 (1999).

[152] Fennell, supra note 13, at 25–31.

[153] 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 Urb. Aff. Rev. 697 (2003); Kimberly C. West, Note, A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation, 103 Yale L.J. 2567 (1994).

exists. Consider the young, upwardly mobile, urban pioneers who have been occupying the "edgy" loft apartments within earshot of Los Angeles's Skid Row.[154]

Two important points about inclusionary amenities are worth making before proceeding further. First, although it is likely that exclusionary amenities are more common than inclusionary amenities, examples of the latter may be more readily accessible. One likely explanation for this phenomenon is that people are generally quite willing to talk about inclusionary motivations, but reluctant to discuss exclusionary strategies in polite society. Thus, when developers create exclusionary amenities, they will likely choose not to discuss their true motivations out of fear of violating antidiscrimination laws or generating controversy. Indeed, their marketing strategies may be aimed at potential customers who, thanks to unconscious racism, prefer racial homogeneity, but would be reluctant to admit that preference to third parties or even to themselves.[155] 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.[156] Rather, it will need a regional, or perhaps even national, campaign in order to achieve the critical mass of artists who will alter the nature of the community.[157] That said, inclusionary amenities often will not be cost effective because of the legality of inclusionary advertisements, which will function as a reasonably close substitute for inclusionary amenities. This situation contrasts sharply with the

[154] See Bernard E. Harcourt, Policing L.A.'s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time], 2005 U. Chi. Legal F. 323, 333.

[155] See generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

[156] Does Peoria have suburbs? Indeed, it does. See, e.g., Lacon, Illinois; Morton, Illinois; Spring Bay, Illinois, and Pekin, Illinois.

[157] 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 throughout the United States 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.

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."[158]

B. Inclusionary Club Good Voids

Just as inclusionary club goods can be used to attract diverse residents to homogeneous communities, communities can maintain their homogeneity through the conscious choice to avoid inclusionary club goods or public goods. A desire to avoid offering inclusionary club goods might cause community residents to forego the provision of the communal resources that they would otherwise prefer.[159]

[158] Mitchelson & Lazaro, supra note 64, at 52–53.

[159] There are important connections between my argument here and an argument voiced by Clayton Gillette. He notes that within common interest communities, certain types of restrictive covenants might be imposed, not because the residents object to the proscribed land uses themselves, but because they object to the types of people who might engage in the proscribed uses. Gillette gives 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 characteris-

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 everyday may also 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.[160] Perhaps most importantly, proximity to efficient light rail and subway lines generally increases property values.[161] 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 plan-

> tics 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 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 28, at 1396; see also McKenzie, supra note 4, at 76–77 (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.

[160] 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, however, to the extent that demand for these services is elastic.

[161] 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, 1997), available at http://www.upa.pdx.edu/CUS/publications/docs/DP97-3.pdf; Roderick B. Diaz, Impacts of Rail Transit on Property Values (Am. Pub. Transp. Ass'n, Wash., D.C.), May 1999, available at http://apta.com/research/info/briefings/documents/diaz.pdf.

ning 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.[162] Affluent neighborhoods in other parts of the country have done likewise, foregoing otherwise desirable investments in valuable amenities like well-maintained public roads, parks, and even street signs because of fears that such amenities would attract undesirables.[163] 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.[164] In other affluent neighborhoods, such as the Hamp-

[162] See Zachary Moses Schrag, The Washington Metro as Vision and Vehicle, 1955–2001, at 268–71 (2002) (unpublished Ph.D. dissertation, Columbia University) (on file with the Virginia Law Review Association). Although it is often asserted that neighbors' fear of outsiders explains the absence of a subway station in Georgetown, see, e.g., Stephen C. Fehr, Where D.C. Wants Metro to Go Next, Wash. Post, Mar. 23, 1994, at D3, and Juan Williams, Georgetown: Separate City, Wash. Post, Dec. 8, 1981, at A21, 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. 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 D.C.1 (noting several bases for neighborhood opposition).

[163] Loewen, supra note 122, at 254–55 ("At the behest of the wealthy . . . officials in Nassau County allowed all public roads to fall into disrepair. . . . [R]esidents of . . . a New York City suburb would rather bear the inconvenience of narrow and congested streets on a day-by-day basis than make it easier for the inhabitants of New York City to reach the town. Even street signs are in short supply in Darien, Connecticut, making it hard to find one's way around that elite sundown suburb. Darien doesn't really *want* a lot of visitors, a resident pointed out, and keeping Darien confusing for strangers might deter criminals—perhaps a veiled reference to African Americans. . . . Sidewalks and bike paths are rare and do not connect to those in other communities inhabited by residents of lower social and racial status. Some white suburbs of San Francisco opted out of the Bay Area Rapid Transit system, fearing it might encourage African Americans to move in. . . . Parks, tennis courts, and playgrounds may be few or located on minor roads where visitors will be unlikely to find them. . . . San Marino, an elite suburb of Los Angeles, closes its parks on weekends to make sure the neighboring Asian and Latin communities are excluded, thus keeping out everyone, even its own residents.") (internal quotation marks omitted).

[164] A similar example arises in Chicago's Hyde Park community—an increasingly affluent university neighborhood that, quite conspicuously, lacks a movie theater. Hyde Park had a movie theater 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.

tons, where the incursion of African Americans is viewed as unlikely, but the perceived threat posed by Latino immigrants is substantial, homeowners are happy to support the construction of basketball courts on public land, but they fight hard against the creation of soccer fields.[165] In some communities, the desire to exclude is sufficiently powerful to overcome the added value associated with transit and recreational improvements.

IV. REGULATING THE PROVISION OF EXCLUSIONARY AND INCLUSIONARY AMENITIES

So far, this Article 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 exclusionary amenities). How should the law respond to these strategies? I offer preliminary thoughts below, and hope that these ideas will spark further discussion.

A. A Normative Framework

My approach to this topic, as to most other topics, is principally welfarism. 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.[166] 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.[167] The exclusion of various groups from affluent residen-

[165] Dolgon, supra note 29, at 124–25, 156.

[166] See supra text accompanying notes 68–69 and sources cited therein.

[167] 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).

tial 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.[168] A welfarist account of religious or linguistic exclusion might reach quite different results, although the dearth of empirical evidence on this score may reduce this analysis to educated guesswork.

Welfarism is not, of course, 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.[169] Reviewing the cases cited 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. Thus, from a distributional perspective, 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. Antidiscrimination Law

This Article 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

[168] Julius Chambers, Adequate Education for All: A Right, An Achievable Goal, 22 Harv. C.R.-C.L. L. Rev. 55, 55–56 (1987) (discussing the detrimental effects of public school segregation on meritocracy).

[169] 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. Aff. 107, 147–70 (1976).

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. However, this inefficiency yields some social benefits, as well. The social costs equal the deadweight losses that result from the expenditure of scarce societal resources on sorting club goods.[170] For example, 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.[171] Repealing antidiscrimination laws might well eliminate this excess demand for golf course construction. However, much of this social waste is funded by those seeking residential homogeneity.[172] 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.[173] That said, in a society that values residential heterogeneity as a general matter, "taxing" exclusion in this way may help ensure that people who choose to engage in this form of exclusion have rather strong preferences for doing so.

[170] Cf. Becker & Murphy, supra note 15, at 72 (making this point as applied to the governmental provision of public goods).

[171] For discussions of the ecological consequences of golf course development, see 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); M. K. Brewin, An Annotated Bibliography and Literature Review on the Potential Impacts of Golf Courses on Freshwater Environments 44–129 (1992) (summarizing the existing literature and providing an annotated bibliography); Michael A. Lewis et al., Effects of a Coastal Golf Complex on Water Quality, Periphyton, and Seagrass, 53 Ecotoxicology & Envtl. Safety 154 (2002); and Dep't of Envtl. Res. Mgmt., Environmental Quality Monitoring at Five Municipal Golf Courses in Miami-Dade County (2002), available at http://www.miamidade.gov/derm/land/library/golf_course.pdf.

[172] Though not all. Again note the environmental externalities in the golf context.

[173] See R.H. Coase, The Firm, the Market, and the Law 182–85 (1988).

Gary Becker, Richard Epstein, and others have argued that the market adequately punishes people who refuse to deal with African American customers by depriving them of an important market.[174] 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,[175] 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. Consequently, a homeowners' association that tries to use golf as a proxy for race may not achieve complete racial homogeneity. That might be beneficial 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. Evidence shows that both Caucasians and African Americans possess fewer interracial prejudices and will be more willing to integrate following greater interracial interaction.[176] 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.[177] If this trend continues, then golf courses will no longer function effectively as exclusionary club

[174] See, e.g., Gary S. Becker, The Economics of Discrimination 41 (2d ed. 1971); Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 41–42 (1992).

[175] See Dawkins, supra note 26, at 387–88.

[176] Id. at 389; see also Chambers, supra note 123; Tollison, supra note 12, at 283.

[177] Nat'l Golf Found., supra note 86, at 4; April Adamson, Tiger Draws Many to Sport, Phila. Daily News, June 24, 2004, at 30.

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 enhance social welfare. 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. 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.[178] 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 reduce the search costs associated with obtaining useful golf tips. As a result, it is appropriate to proscribe exclusionary amenities strategies only

[178] Members might value social interactions as such, and may therefore 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. 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 have.

where the club good in question would not have been provided but for the desire to achieve a type of residential homogeneity that violates public policy interests. If a developer can show that consumer demand for an amenity is sufficient to explain its procurement, and that preferences for resident homogeneity do not drive that demand for the amenity, antidiscrimination law should not interfere with the developer's choices about what amenities to offer.

Where the law does attempt to defeat exclusionary amenities strategies, some governmental approaches will be superior to others. Given the risk of false positives, it seems wise to police the financing mechanisms for club goods before policing the actual 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 requires 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,[179] and even those that do not are likely to implicitly charge non-golfers by capitalizing the extra value of a view into the original purchase price of a home. Accordingly, where strong evidence suggests that the provision of exclusionary amenities promotes residential segregation, the appropriate solution is not to ban residential golf communities. Rather, the remedy should be to invalidate mandatory membership schemes for golf-playing, which is racially skewed, as opposed to golf-course-view-enjoyment, which is more likely to be racially neutral.[180] This approach is essentially the unbundling strategy that is well-integrated into antitrust

[179] See Cory et al., supra note 112, at 166–73; see also supra note 121.

[180] 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 95. The trend in property law has been to treat "touch and concern" as a doctrine that reflects 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 Law, 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).

law.[181] Developers could still build homes next to golf courses, but they could not mandate that these homeowners purchase costly memberships to 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 undesired groups.[182]

The prospect of inclusionary club goods brings to mind another remedial possibility. 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. For example, if a developer wants to put a rock climbing wall in a new development, the law might also require him to 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 Article. 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

[181] See generally Jerry A. Hausman & J. Gregory 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).

[182] 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 Article is that focal points and sorting are particularly powerful when they function together, and the unbundling strategy at least prevents sorting from occurring. 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 near the exclusionary amenity.

the sense that it would be difficult to calibrate the optimal level of extra bundling to offset the adverse consequences of an exclusionary-amenities approach. Mandated bundling would, however, be preferable in instances where the relevant decisionmakers felt that there were too few social interactions in the community, and that, in the absence of collective amenities that prompted face-to-face interactions, relations among heterogeneous members of a residential community would suffer too much.[183]

This Article 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 developers 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.[184] Furthermore, the Tiger Woods Foundation has sought to provide golfing opportunities to minority and disadvantaged youth.[185] These demographic developments might render residential golf courses ineffective race-oriented exclusionary club goods in the years ahead.[186] Group disparities in preferences for club

[183] As a corollary to this point, it is worth examining whether the elimination of an exclusionary amenity that promotes residential segregation, but that also facilitates social interactions among all the residents of a community, represents an improvement. In other words, will race relations be better in a community that is ninety-eight percent white, but in which the non-whites interact with their neighbors substantially, or in a community that is ninety percent white but provides fewer outlets for interactions among neighbors?

[184] 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, Golf 20/20 Vision for the Future: Industry Report for 2003, at 12 (2004).

[185] Lieber, supra note 85, at 1C; see also Adamson, supra note 177.

[186] 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 Nat'l Golf Found., supra note 86, at 20 (noting that twenty-two percent of white adult males play golf, versus six percent of white adult females, although the discrepancies are less pro-

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.[187]

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.[188] 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 enticed by the prospect of electing representatives who will be forceful advocates for their interests.[189] At present, few non-deaf people will want to live in a community where sign language is the *lingua franca*. If Laurent becomes economically successful, however, one can imagine that those who are not fluent in sign language will move to Laurent in search of economic opportunity. To curtail such behavior, Laurent may find it worthwhile to invest in exclusionary amenities.

nounced 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 location.

[187] Gobster, supra note 85, at 60–61.

[188] Their goal is to establish a new town "expressly created for people who sign." 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.

[189] 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. Id. 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 because of what it offers, but because of its effectiveness in keeping non-deaf outsiders from outnumbering the deaf population in Laurent.

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. The law is a sufficiently precise instrument to differentiate between these innocuous uses of exclusionary amenities and strategies designed to exclude marginalized racial minority groups from affluent neighborhoods.

CONCLUSION

Individuals care about the identities of their neighbors, and they will 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 to accomplish the same objective. Namely, developers or community residents may procure exclusionary amenities that cause people to sort 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 because 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 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 in property law more generally, has been the rise of common interest communities.[190] These communities spend more than thirty billion dollars each year maintaining common amenities.[191] This Article raises the troubling possibility that exclusionary

[190] 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).

[191] Christopher Conte, Boss Thy Neighbor, Governing, April 2001, at 38, 40.

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. Likewise, inclusionary amenities might function as a tool for promoting residential heterogeneity. This Article 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. As a general matter, though, exclusionary amenities are less problematic than overt discrimination. Consequently, this Article sounds a cautionary note, and argues against unduly vigorous legal campaigns to stamp out all uses of this exclusionary device. Indeed, when exclusionary amenities function in a way that undermines important public policy interests, the best government response may be to adopt policies that seek to homogenize preferences for the club good in question.