

Exclusionary Club Goods in Residential Communities

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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 discriminatory covenants,¹ the development of various legal doctrines to police against overt and often pernicious forms of 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, 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,” Jews, families with children, Catholics, Republicans, or African Americans from particular residential communities.⁷ And some people appear willing to pay a substantial

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¹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

² *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 437 (1973) (holding federal antidiscrimination laws applicable to private clubs that link membership benefits to “residency in a narrow geographic area”); 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, § 3604, 82 Stat. 73, 83 (codified at 42 U.S.C. § 3604); New Jersey Fair Housing Act, N.J. Stat. Ann. § 52:27 D301-329 (West 2004).

⁴ *See, e.g.*, David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 *J. POL. ECON.* 455, 477 (1999).

⁵ *See, e.g.*, *Senior Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992).

⁶ *Taormina Theosophical Community, Inc. v. Silver*, 140 Cal.App.3d 964 (Ct. App. 1983).

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 ed. 2001) (noting that 11% of whites responded in a survey that they wanted to live in neighborhoods that were 100% white, and that 2.5% of black respondents said they wanted to live in all-black neighborhoods).

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 essay explores one such response, and examines the pros and cons of an inclusionary counter-response by government. Perhaps counterintuitively, the exclusionary device I have in mind are various types of club goods.

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 number.”¹¹ 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 strategy utilizing club goods begins with a simple first step: A developer of a common interest community can embed particularly costly club goods within the residential development and then record covenants and declarations that require all present and future members of the community to contribute toward their maintenance on the basis of some criteria other than use. The willingness to pay for these goods will function as a sorting mechanism for would-be residents. People who are likely to use the club good will purchase homes in the common interest community, and those who are unlikely to use the club good in question will be deterred from joining the community. So far, there is nothing insidious about this process. Those who like to swim will gravitate toward condo developments with nice pools, and those who like to play softball may join homeowners’ associations that invest in attractive softball diamonds. This seems perfectly natural, and welfare enhancing, as Charles Tiebout

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

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

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

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

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

argued long ago.¹³ Such self-sorting increases homogeneity within residential communities, but heterogeneous preferences with respect to sporting activities do not seem like something the law should combat, at least not at first glance.

The worrisome part of this story arises in the following circumstance. What if a developer selects a particular club good, not because the members of an association will actually derive substantial value from its use, but because the club good in question deters “undesirable” 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 anti-discrimination laws that protect members of those groups. Whereas Tiebout envisioned municipalities competing for residents by providing them the goods, services, and tax packages that they valued most, we can now imagine a world in which homeowners associations (and perhaps municipalities) compete for the residents that they want by providing them with goods, services, and assessment packages that are unpalatable to undesired potential residents. Such associations thereby select common amenities, not only on the basis of what amenities are inherently welfare enhancing, but also on the basis of how effectively those amenities promote self-selection by would-be residents. The most valuable club goods for these purposes are the ones that send the clearest signals to desirable and undesirable prospective purchasers.

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

For further development of Tiebout’s ideas within the legal literature, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World*, 86 GEO. L.J. 201 (1997); Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1 (2001); Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996). For criticisms of the Tiebout theory, see Truman F. Bewley, *A Critique of Tiebout’s Theory of Local Public Expenditures*, 49 ECONOMICA 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. In the 1970s, Allan De Serpa modeled the idea that individuals may derive utility or disutility based on the extent to which their fellow club members have particular characteristics. *See* Allan C. De Serpa, *A Theory of Discriminatory Clubs*, 24 SCOTTISH J. OF POL. ECON. 33, 34 (1977); *see also* Sandler & Tschirhart, *supra* note 10, at 344 (“Once heterogeneity is allowed in clubs, sharing arrangement can account for members consuming both the shared good and the characteristics or attributes of other members.”). De Serpa did not develop a model of exclusionary club goods or anything like it. Rather, his major contribution consisted of noting the possibility that these preferences for particular kinds of club memberships would affect the Pareto optimum level of club goods provision. *Id.* at 39. Lee Fennell has also argued that individuals will care substantially about the nature of the people with whom they share local public goods, and that 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.

Let me make this scenario concrete with a plausible example. Say a developer wants to create a residential community within a heterogeneous metropolitan area, where whites and blacks have similar income levels, and each racial group comprises 50% of the population. Suppose the developer knows that the only salient difference between blacks and whites is that 80% of whites play polo, whereas only 20% of blacks play polo. Finally, suppose, consistent with empirical data, that there is substantial market demand for housing developments that are relatively racially homogenous.¹⁵ The sophisticated developer might build his residential development around a polo grounds, and require that all those who purchase homes in the vicinity pay annual assessments to support the upkeep, staffing, and real estate taxes associated with the polo grounds and their affiliated stables.

At base, we might expect that the resulting population of homeowners will be 80% white and 20% black, because non-polo players will decide to spend their real estate dollars elsewhere. But to the extent that some white 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.¹⁶ Ideally, this group might prefer to live in a community that practiced overt racial discrimination,¹⁷ but because the law thwarts such discrimination, this polo grounds development represents the next “best” alternative.¹⁸

¹⁵ For a comprehensive review of the literature on preferences for residential segregation, see Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URBAN AFF. 379 (2004).

¹⁶ 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 , at 259 tbl. 4.6; Dawkins, *supra* note 15, at 387-92. Moreover, African Americans are unlikely to move into neighborhoods that are believed to contain a large percentage of residents who do not want African American neighbors. See Charles, *supra* note 7, at 230-31.

¹⁷ Or it might not. Overt discrimination may be socially costly in a way that discrimination-by-club-goods 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.

¹⁸ Tom Schelling’s work on neighborhood “tipping” suggests the bleak possibility that complete residential segregation is inevitable if both Caucasians and African Americans prefer to live in diverse neighborhoods where they are part of the majority group. See Thomas Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143 (1971). Schelling’s approach has been the subject of recent criticism on both theoretical and empirical grounds. See, e.g., Abraham Bell & Gideon Parchamovsky, *The Integration Game*, 100 COLUM. L. REV. 1965 (2000); William Easterly, *The Racial Tipping Point in American Neighborhoods: Unstable Equilibrium or Urban Legend* (N.Y.U. Working Paper June 2003); see also W.A.V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1 (1991) (concluding that Schelling’s account is more right than wrong). One problem with Schelling’s model 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.

In the real world, gated communities built around polo grounds are rare, though *Forbes* has identified a few of them.¹⁹ But those built around golf courses are common, and during the 1990s golf had precisely the polarizing attributes that my hypothetical ascribed to polo. I will explore the possibility that residential golf communities function as exclusionary club goods below. At the same time, I will also point to instances in which the exclusionary club goods strategy might contribute to acceptable, or perhaps even laudable, types of residential sorting.

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

In any event, if we assume that Schelling’s multiple equilibrium model works in the real world, we might envision exclusionary club goods as a mechanism for reducing the uncertainty and transition costs associated with residential tipping. Assume a new residential development. Potential buyers will be unable to discern whether the community will tip in the African American or Caucasian direction. To the extent that anti-discrimination laws are enforced, they will prevent developers and real estate agents from identifying the race of initial buyers. To the extent that many initial buyers will be real estate speculators, the developer himself may lack information about the planned development’s initial racial composition. And to the extent that few residents have moved into the neighborhood, it may be impossible to obtain accurate information about prospective purchasers through simple observation. Accordingly, prospective buyers will purchase under tremendous uncertainty, knowing that they will have to leave if the neighborhood tips too far away from their preferred composition. Exclusionary club goods address this uncertainty by signaling African American and Caucasian purchasers about which direction the development is likely to tip. Given the high costs associated with residential relocation, this information may be extremely valuable to prospective purchasers who care about the racial composition of their neighborhoods but are barred from obtaining accurate information about that subject. By promoting the sorting of successive purchasers, exclusionary club goods may also provide a permanent bulwark against “reverse tipping” that might result from block-busting activities organized by real estate agents or community groups. On block busting, see Drew S. Days, III, *Rethinking the Integrative Ideal: Housing*, 33 *MCGEORGE L. REV.* 459, 465 (2002). This analysis suggests that exclusionary club goods may be quite valuable in new residential developments precisely because they make tipping far more efficient. Indeed, to the extent that exclusionary club goods are social goods that cause many neighborhood residents to congregate in particular places, they may dramatically lower the information costs associated with prospective purchasers’ efforts to discern a neighborhood’s racial composition.

¹⁹ See Sarah Clemence, *Most Expensive Gated Communities in America 2004*, *Forbes.com*, available in <http://www.forbes.com/2004/11/19/cx_sc_1119home.html> (“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.”)

I. The Exclusion Premium

A recent paper by Michael Schill, Ion Voicu & Jonathan Miller identified an interesting puzzle in the Manhattan real estate market.²⁰ As a general matter, apartments in condominiums attract a premium over similar apartments in housing cooperatives. Controlling for the many variables that differentiate housing units, Schill and his coauthors found that, as a general matter, a condominium apartment commands a 15.5% premium over a similarly situated cooperative.²¹ This finding was consistent with what Manhattan real estate agents expected.²²

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

Unlike the case of cooperative apartments, condominium owners do not effectively share liability on mortgage debt, they are free to transfer their apartments to whomever they choose, they are subject to fewer rules than cooperative apartment owners and, correspondingly, they need spend less time in internal governance.²³

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.²⁴ New buildings in Manhattan overwhelmingly structure themselves as condominiums, not cooperatives,²⁵ but the high costs of transitioning from the cooperative to the condominium form explain why there are still many cooperative buildings in New York.²⁶

Strikingly, however, Schill and his co-authors identified a group of apartments in which the ordinary patterns were reversed. For these apartments, the cooperative form actually conferred a very substantial premium – 20.7 percent – on owners.²⁷ 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

²⁰ Michael H. Schill et al., *The Condominium v. Cooperative Puzzle: An Empirical Analysis of Housing in New York City* (2004), available in <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=502362>.

²¹ *Id.* at 30.

²² *Id.* at 5, 11.

²³ *Id.*

²⁴ See Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25 (1991).

²⁵ Schill et al., *supra* note 20, at 5.

²⁶ *Id.* at 32-33. Schill et al. identify substantial transaction costs and adverse tax consequences associated with transitioning a cooperative building into a condominium.

²⁷ *Id.* at 30.

where the owners can afford to buy homes without any need for a mortgage. Prohibitions on mortgage financing arise in both condominium and cooperative buildings, but it is the cooperative apartment buildings that command a hefty premium as the domain of Manhattan's economic elites.

Let us be quite clear about what this data means. Wealthy owners of Manhattan cooperative apartments seem willing to pay a hefty premium *and* sacrifice substantial leisure time, all for the benefits of exclusivity and having a say in who their neighbors are.²⁸ For money-is-no-object types, the leisure time premium paid by cooperative owners may be even more substantial than the economic premium. Cooperatives' authority to exclude has been exercised to keep the likes of Madonna and Richard Nixon out of prestigious New York buildings,²⁹ but there is also some evidence suggesting that it has been used to exclude members of historically marginalized groups.³⁰ Perhaps as a result, the New York courts have begun policing decisions to exclude members of protected groups from cooperative apartments more closely in recent years.³¹

This data suggests something else that is equally important. Before the advent of antidiscrimination laws and doctrines, restrictions on alienation and club membership could keep "undesirables" out of certain communities. But once the state began enforcing antidiscrimination laws, people who wished to exclude these undesirables had to do so on the basis of proxies.³² Wealth and income often provide important proxies, and suburbs in particular managed to maintain substantial exclusivity by restricting neighborhoods to single family homes built on large lots.³³ But the Manhattan coops show that price will sometimes be an inadequate exclusionary proxy. People may want to exclude "new money" or "old money" or members of a particular political party from their communities, and will seek out some mechanism for doing so. This helps explain the cooperative premium at the high end. In recent decades, income and wealth have become poorer proxies for race, family status, religion, and several other characteristics

²⁸ *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.").

²⁹ *Id.* at 10 n.8.

³⁰ See Maldonado & Rose, *supra* note 2, at 1245; Sabrina Malpeli, Comment, *Cracking Down on Cooperative Board Decisions that Reject Applicants Based on Race: Broom v. Biondi*, 73 ST. JOHN'S L. REV. 313 (1999).

³¹ *Id.*

³² See generally WILLIAM J. COLLINS, THE HOUSING MARKET IMPACT OF STATE-LEVEL ANTI-DISCRIMINATION LAWS 1960-1970 (Feb. 2003) (examining the effects of anti-discrimination law enforcement on the housing market).

³³ J. Peter Byrne, Book Review, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2266-72 (1997); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1894-1906 (1994).

that have often formed the basis for exclusion.³⁴ Once wealth and income become less useful proxies, people interested in screening their neighbors may have to turn to other characteristics.

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

On the basis of the Schill et al. study, and similar studies,³⁵ it seems appropriate to assume a market demand for exclusion in the residential setting, and particularly strong market demand for exclusion at the highest income levels. Some other studies suggest that, as incomes rise, the demand for racially homogeneous neighborhoods actually increases.³⁶ 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 fellow members with undesirable characteristics.³⁷ As soon as that assumption is made, and the law attempts to restrict certain types of exclusion that are demanded by some consumers, exclusionary club goods become inevitable.

³⁴ See *infra* note 69.

³⁵ See *supra* note 15 and sources cited therein.

³⁶ See, e.g., Patrick Bayer et al., *An Equilibrium Model of Sorting in an Urban Housing Market: The Causes and Consequences of Residential Segregation*, YALE ECON. GROWTH CTR. DISCUSSION PAPER NO. 860 (July 2003). This trend is evidently more pronounced for Caucasians than for African Americans. See Richard D. Alba et al., *How Segregated Are Middle-Class African Americans?*, 47 SOCIAL PROBLEMS 543 (2000); Dawkins, *supra* note 15, at 382-83.

³⁷ See, e.g., De Serpa, *supra* note 14, at 34; Sandler & Tschirhart, *supra* note , at 344 (“Once heterogeneity is allowed in clubs, sharing arrangement can account for members consuming both the shared good and the characteristics or attributes of other members. Members’ characteristics may be viewed by other members as generating an increase (e.g., intelligence in a learned society) or a decrease (e.g., rudeness) in utility.”); Suzanne Scotchmer, *On Price-Taking Equilibria in Club Economies with Nonanonymous Crowding*, 65 J. PUB. ECON. 75, 75-76 (1997); see also Fernando Jaramillo & Fabien Moizeau, *Conspicuous Consumption and Social Segmentation*, 5 J. OF PUBLIC ECON. THEORY 1, 2 (2003) (“The reason agents are interested in joining social groups is that these groups may serve to allocate goods or services not traded on markets. Exchanging friendship, communicating information about job search and business opportunities, providing mutual aid or insurance constitute many examples of these forms of allocation.”). Mine is not the first paper to hypothesize that signaling occurs in the club goods setting. Fernando Jaramillo, Hubert Kempf, and Fabien Moizeau have speculated briefly that individuals may engage in wasteful conspicuous consumption as a means of signaling wealth to potential clubs, who would invite these consumers to join their high-status clubs based on a belief that a willingness to engage in conspicuous consumption indicates a willingness to contribute to club goods. Fernando Jaramillo, Hubert Kempf, and Fabien Moizeau, *Conspicuous Consumption, Social Status and Clubs* (Fondazione Eni Enrico Mattei Working Paper 2000); see also *id.* at 18 (“[W]e could see the signaling problem in a very different way: the observable item could be the individual contribution to the club, on which is based society’s inference over individual income and therefore on social status. In other words you contribute to the New York Yacht Club not because you like sailing but for snobbish reasons only: just to show off your fortune. It is then social segmentation into clubs which serves as the support of status discrimination or social segmentation into statuses.”).

A. Understanding Exclusionary Club Goods

I define an “exclusionary club good”³⁸ 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. 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.

In order to function as an effective sorting device, an exclusionary club good must be relatively expensive. If the club good in question is too cheap, then the decision to join a particular community hardly will be affected by its presence. But if the club good is relatively expensive, such that an “undesirable” residential purchaser will conceptualize it as a high differential tax without any associated benefit, then it may convince the undesirable purchaser to buy a home in a community that does not provide the club good in question.

Where a form of exclusion is sanctioned by neither the law nor prevalent social norms, one should not expect to find any exclusionary club goods. For example, residential communities in the United States are permitted by law to discriminate against convicted sex offenders who present high risks of recidivism.³⁹ Citizens may, understandably, have a strong preference for excluding such individuals from their neighborhoods,⁴⁰ but the legality of overt discrimination renders it inefficient for a community to invest in exclusionary club goods that would be attractive to non-sex offenders, but unattractive to sex offenders.⁴¹ Instead, communities use covenants or even local ordinances to exclude high risk sex offenders.⁴²

³⁸ A quick note on terminology. My use of “exclusionary” to describe the club goods in question does not indicate that the exclusion mechanism has anything to do with trespass law (the body of property law that protects the right to exclude most directly). Rather, exclusionary club goods are exclusionary in the same way that exclusionary zoning is exclusionary – the end result of either strategy will be a community in which the citizens targeted for exclusion are poorly represented. Similarly, I refer to “inclusionary club goods” later in the paper. These club goods are inclusionary in the same way that “inclusionary zoning” is. Inclusionary zoning typically encompasses strategies designed to make a community more attractive to lower-income residents. For further discussion of exclusionary and inclusionary zoning, see PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 203-227 (2003); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2357-61 (2003); Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981).

³⁹ *Mulligan v. Panther Valley Property Owners Assn*, 766 A.2d 1186 (Sup. Ct. 2001).

⁴⁰ See, e.g., David Herbest, *Neighbors Pressure Sex Offender to Move*, MOUNTAIN VIEW VOICE, Sep. 10, 2004 (describing the decline in property values and neighborhood opposition that occurred after one sex offender moved into a common interest community), available in <http://www.mv-voice.com/morgue/2004/2004_09_10.chavez.shtml>.

⁴¹ It is not difficult to imagine a club good that might provide a good proxy for sex offender’s status. Community members might make extremely heavy investments in school child-abuse-awareness programs or domestic violence police, as a way of discouraging dangerous sex offenders from settling in a particular community.

⁴² Stephanie Simon, *Ex-Cons Exiled to Outskirts*, L.A. TIMES, Dec. 5, 2002, at ___.

When club members or real estate developers have a preference for excluding other types of residents, the options available shrink. For example, African Americans and members of all other racial groups are protected by various laws designed to combat discrimination in the housing sector.⁴³ Such laws reach not only refusals to sell or lease, but also limit the ability of landlords or sellers to advertise in a racially discriminatory manner.⁴⁴ This law substantially constrains a developer's choice of human models in housing advertisements by imposing liability on landlords whose advertisements feature exclusively Caucasian models.⁴⁵ Indeed, in some respects, housing advertising is more tightly regulated than the sale or leasing of housing. For example, anti-discrimination laws permit "mom and pop" landlords to refuse to lease certain apartments to tenants on the basis of race, but bar those same landlords from advertising their discriminatory preferences with respect to said apartment.⁴⁶ Deprived of "efficient"⁴⁷ 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.⁴⁸ Exclusionary club goods may become a viable option under such circumstances.

⁴³ See *supra* note 3.

⁴⁴ Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335 (2003).

⁴⁵ *Ragin v. NYT*, 923 F.2d 995 (2d Cir. 1991).

⁴⁶ Petty et al., *supra* note 44, at 376.

⁴⁷ 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 17; cf. De Serpa, *supra* note 14, at 39 ("[P]eople are apt to be reluctant to admit, face to face, that the characteristics of others are repulsive to them. As a consequence, the exclusion of individuals exhibiting certain characteristics evolves as a second best solution."). Second, club members may actually want to attract members of disfavored groups who actually loathe other members of their disfavored groups. To maximize this preference, overt discrimination will be ineffective, but exclusionary club goods may be highly effective. That said, a discriminatory advertising strategy would dominate an exclusionary club goods strategy most of the time, if permitted by law.

⁴⁸ Formally, the federal Fair Housing Act (FHA) and Fair Housing Act Amendments (FHAA) recognize disparate impact claims. See *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 466-67 (3d Cir. 2002); *Gamble v. City of Escondido*, 104 F.3d 300, 304-07 (9th Cir. 1997). That said, FHA and FHAA are almost always brought against local governments, as opposed to individual developments, perhaps because it is so easy for a developer to rebut a prima facie case of disparate impact by pointing to a "legitimate, nondiscriminatory reason for its action," such as consumer demand, unconnected to exclusionary motives, for the club good in question. *Lapid-Laurel, supra*, at 467; *Gamble, supra* at 305.

The leading FHA disparate impact case involving a non-governmental defendant is *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000). In *Hack*, the plaintiffs alleged that Yale's requirement that freshmen and sophomores live in co-educational dormitories had a disparate impact on unmarried Orthodox Jews whose religious convictions barred them from residing in co-ed environments. *Id.* at 88. The plaintiffs complained that they were compelled to pay for dormitory rooms that they did not and would not use. *Id.* The panel majority held that the plaintiffs failed to state a claim under the FHA because they did not allege "that Yale's policy has resulted in or predictably will result in under-representation of Orthodox Jews in Yale housing." *Id.* at 91. The majority therefore determined that the plaintiffs failed to state a prima facie case under the FHA. Even if they had shown a disparate impact,

B. Comparing Private Goods

To be sure, self-sorting occurs in many contexts.⁴⁹ Developers might distort the population of a new housing development by providing larger-than-average kitchens (attracting gourmets) or miniscule kitchens (attracting those who prefer to eat at restaurants). That said, there are two critical difference between self-selection through these private goods and self-selection through club goods.

The first distinction is social. Club goods necessarily involve social interactions among the members who are entitled to use them.⁵⁰ Private goods, by contrast, typically involve more limited social interactions. In a neighborhood comprised entirely of quiet shut-ins living in single family homes, homeowners probably will not care that much about the characteristics of their neighbors.⁵¹ 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.⁵² Indeed, racial segregation is a public policy problem precisely because place of residence greatly affects the nature of individuals' social networks.⁵³ Residential segregation helps explain the segregated nature of social interactions in public schools, political gatherings, and some workplaces.⁵⁴ Moreover,

however, the majority probably would have ruled in Yale's favor, finding that Yale's interest in promoting gender-integration was non-discriminatory and reasonable. A dissenting judge would have held that the plaintiffs could pursue a discriminatory impact claim under the FHA's prohibition on religious discrimination. *See id.* at 104 (Moran, J., dissenting). Although the plaintiffs did not frame their argument as such, an exclusionary club goods story implicitly underpinned their discrimination claim.

⁴⁹ Self-sorting has been studied in the employment context, where employers may offer particular benefits as a means of preventing undesirable types from joining a firm in instances where employees have asymmetric information. *See, e.g.,* Peter C. Coyte, *Specific Human Capital and Sorting Mechanisms in Labor Markets*, 51 SOUTHERN ECON. J. 469 (1984). For a recent application of this idea to the legal literature on executive compensation, see James Spindler & Todd Henderson, *Corporate Heroin: A Defense of Perks*, GEORGETOWN L.J. (forthcoming 2005).

⁵⁰ Marilyn Gardner, *An Empty Nest – Now What?, Once the Kids Move Out, Couples Start to Ask Themselves What They Want in Life and How Much Space They Need*, CHRISTIAN SCI. MON., April 21, 2001, at 15.

⁵¹ 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 , at 391.

⁵² Indeed, the social nature of club goods also allows prospective purchasers to obtain information about neighborhood composition at a low cost. *See supra* note 18. By contrast, in a neighborhood with no common spaces, it may be difficult for a prospective purchaser to discover the characteristics of the neighborhood's residents.

⁵³ Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. OF SOCIOLOGY 1306, 1324-26 (1996).

⁵⁴ Charles T. Clotfelter, *Spatial Rearrangement and the Tiebout Hypothesis: The Case of School Desegregation*, 42 SOUTHERN ECON. J. 263, 268 (1975) (noting that whites' opposition to residential

exclusionary club goods may be particularly desirable for people who prefer both sociability and racial homogeneity among their neighbors. Outside of selecting the cooperative form, it may be difficult for a community to prompt self-selection on the basis of preferences for frequent social interactions.

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,⁵⁵ and perhaps mandate variance if the cost-benefit calculus suggests that an invidious motive is at work. Semi-excludable club goods and non-excludable public 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.⁵⁶ Thus the legal system usually will have a great deal of difficulty discerning which club goods are motivated by a desire to solve a collective action problem and which are motivated by more nefarious objectives.

C. Exclusionary Club Goods in Action

To date, the discussion has been rather abstract. Are there real-world instances of developers using exclusionary club good strategies? An example from the Washington, D.C. suburbs suggests that the answer may be "yes." At the very least, this example shows that developers are conscious of the ways in which the presence or absence of communal amenities can deter certain groups of undesirable residents from joining a new common interest community.

Fall Church, Virginia, like many suburban communities, has had trouble keeping its tax burden low while maintaining high quality public schools for its residents.⁵⁷ 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 80-unit condominium, but gave the developer a financial incentive to ensure that no more than eight school children moved into the complex.⁵⁸ For the ninth child living in Broadway, and every additional

integration is strongest when they believe that residential integration will result in the desegregation of local public schools).

⁵⁵ Variance in this context means a development with both large and small kitchens.

⁵⁶ 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 club goods. *See supra* note 48.

⁵⁷ *See* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Future Housing Supply and Demand Analysis for the Greater Washington Area*, 33 U. BALT. L. REV. 153, 175-76 (2004).

⁵⁸ 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.

child beyond nine, the developer would have to pay Falls Church \$15,000.⁵⁹ The developer agreed to pay such fees for the first five years of the development's life.⁶⁰

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

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

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

...

Once the deal was signed, "I could steer the project in a certain direction to maximize or minimize the number of children," Zachariasse said. "You didn't have to be a brain surgeon to decide which way to go."⁶¹

By providing a library and bar, but failing to provide a playroom, the developer made the development in question attractive to childless residents but less attractive to families. Real estate agents who sold units in the development noted that families with children never even inquired about living in the Broadway.⁶²

It is hardly surprising that developers understand how to use exclusionary club goods. The only surprising aspect of this story is Zachariasse's willingness to discuss his actions and motivations so candidly with a *Washington Post* correspondent. Zachariasse lived to regret his candor, no doubt, as the Department of Housing and Urban Development launched an investigation into Falls Church and Waterford Development for violating the Fair Housing Act by intentionally discriminating against families with children.⁶³ The investigation ultimately resulted in a settlement, whereby Falls Church agreed to alter the way in which it collects school impact fees from developers, and the developers agreed to devote \$120,000 toward training its employees to avoid further discrimination against families with children.⁶⁴

Following this settlement, one expects that developers will be more tight-lipped when discussing their provision of amenities in residential developments. This raises a

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* I thank Lee Fennell for bringing the Falls Church incident to my attention.

⁶² *Id.* ("We haven't had any inquiries from people with lots of kids. It's kind of like how water seeks its own level. It just happens.") (quoting Mary Alice Kaplan).

⁶³ See News Release, *HUD Settles Investigation of Falls Church and Condo Developers*, U.S. Department of Housing and Urban Development, Nov. 19, 2004, available at <<http://www.hud.gov/news/release.cfm?content=pr04-142.cfm>> (visited Feb. 15, 2005).

⁶⁴ *Id.*

serious problem. How are agencies charged with enforcing anti-discrimination laws to ensure that the laws are not thwarted through exclusionary club goods strategies once developers learn from Zachariasse's mistake and instead offer pretextual but plausible explanations for exclusionary club good strategies?

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

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

D. Golf and Race in the United States

During the 1990s, if you told me whether an American citizen played golf, I would have been able to make a highly accurate guess about that individual's race. Among warm weather leisure activities attracting 25 million or more participants, golf stood out as the most racially segregated. During the period from 1994 to 1995, 27.7 million Caucasian Americans participated in golf, or approximately 16.9 % of all Caucasians 15 and older.⁶⁵ By contrast, only 900,000 African Americans participated in golf during that timeframe, comprising just 4.2% of the African American population.⁶⁶ Once the size of these groups is adjusted 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 Hispanic and Asian Americans.⁶⁷ 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.⁶⁸

⁶⁵ R. JEFF TEASLEY ET AL., RECREATION AND WILDERNESS IN THE UNITED STATES 18 (University of Georgia Dept. of Agricultural & Applied Economics Working Paper) (date), available in <<http://www.agecon.uga.edu/~erag/finalreport.htm>> (visited Jan. 1, 2005).

⁶⁶ *Id.*

⁶⁷ *Id.* Data from a 1997 study showed an even more substantial gap in participation. In that year, 2.7% of African Americans participated in golf, versus 12.6% of Caucasians. Jill Lieber, *Golf Finally Reaching Out: Programs Seek More Diversity, yet Progress Remains Limited*, USA TODAY, Aug. 15, 2001, at C1 (quoting statistics from a 1997 study by the National Golf Foundation).

⁶⁸ See NATIONAL GOLF FOUND., MINORITY GOLF PARTICIPATION IN THE U.S. 6 (2003) (noting that the average golfer played 19.2 rounds during the previous year, whereas the average African American golfer played 13.9 rounds during the previous year). Some caution is in order in interpreting this data, however. African American golf participation increased during the first few years of the millennium, and it may be that an influx of new African American golfers explains the lower intensity of participation. See *infra* text accompanying note 129.

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.⁶⁹ That differential is critical. After all, if income provided a better proxy for race than golf participation does, those interested in residential racial homogeneity could have used large lot sizes or occupancy restrictions to exclude African Americans. This strategy – referred to in the literature as “exclusionary zoning” – is well documented and widely practiced.⁷⁰ But once substantial numbers of African American families achieve higher incomes and higher wealth, exclusionary zoning strategies lose their effectiveness. Given the illegality of alternative discrimination strategies, construction of an expensive, racially polarizing amenity may provide the next- “best” strategy for promoting racial homogeneity.

Numbers from the same survey suggest that other land-based, warm weather sports were far more racially integrated. For example, African Americans comprised 13.6% of joggers, 8.2% of bicyclists, 15.5% of baseball players, 19.1% of basketball players, 8.3% of soccer players, and 12.6% of volleyball players.⁷¹ Even tennis, stereotypically a leisure activity with low levels of African American participation, attracted a rather integrated playing population. Fully 8.2% of tennis participants were African American, and participation rates are not starkly different among the races.⁷²

Sports that exhibit the same level of racial segregation as golf tended to be either aquatic or snow-based. The only warm water sport with a greater percentage of Caucasian participants was water skiing, which attracted approximately half as many participants as golf did, and for which 94.4% of participants were Caucasian. Motor boating was almost as segregated as golf, with 92.5% of participants identifying as Caucasian, and 3.3% of participants identifying as African American. Rock climbing exhibited a similar skew, but drew only 7.5 million participants in the 1994-95.⁷³

⁶⁹ In 2000, 14.2% of Caucasians lived in households with annual incomes in excess of \$100,000, whereas 6.1% of African Americans lived in such households. *See* <<http://print.infoplease.com/ipa/A0104552.html>>. Thus, Caucasians are 2.3 times as likely as African Americans to have household incomes above \$100,000 per year, but four times as likely to play golf. Income inequality between Caucasians and African Americans has been diminishing consistently over time. BUREAU OF THE CENSUS, MEASURING 50 YEARS OF ECONOMIC CHANGE C-7 (Sep. 1988)

Wealth is more racially skewed than income in the United States, a result partially due to decreasing marginal consumption as incomes rise, demographic variables, and asset allocation decisions. Joseph G. Altonji, Ulrich Doraszelski & Lewis Segal, *Black/White Differences in Wealth*, ECON. PERSPECTIVES 38, 48-49. Wealth differentials, though, appear to be less dramatic than golfing participation differentials, as well. *See, e.g.,* Sharmila Choudhury, *Racial and Ethnic Differences in Wealth and Asset Choices*, 64 Social Security Bull. 1, 8 tbl. 3 (2002) (noting that a white in the top quartile of whites in their 60s had to have \$551,818 in net worth, whereas a black in the top quartile of blacks in their 60s needed to have \$247,555 in net worth). Between 1969 and 1995, the percentage of Southern Caucasians in the top 3 U.S. wealth quintiles stayed constant at 60%, while the percentage of Southern African Americans in this group increased from 27.6% to 34.6%. *See* MDC INC., INCOME AND WEALTH IN THE SOUTH: A STATE OF THE SOUTH INTERIM REPORT 10 (May 1998).

⁷⁰ *See supra* note 38.

⁷¹ *Id.* at 18-19.

⁷² *Id.* at 19. The tennis participation rates were as follows: 10.8% of Caucasians; 7.8% of African Americans, and 12.8% of “Others.” *Id.*

⁷³ *Id.* at 23.

Similarly, 94% of cross-country skiers were Caucasian, but the sport drew less than 7 million participants.⁷⁴

In short, there were roughly four categories of sports that exhibited heavy racial disparities in participation levels during the mid 1990s: motor boat-based activities (such as motor boating and water skiing), cold weather activities (such as cross country skiing), less popular warm weather activities (such as rock climbing), and golf. Of these, one would expect to see golf provide the most attractive basis for an exclusionary club goods strategy. After all, golf courses are quite expensive to develop and maintain (unlike rock climbing walls);⁷⁵ they can be built in virtually any climate (deserts, prairies, forests, coastal regions, swamps, etc.) (unlike cross-country skiing courses or marinas); they can be enjoyed by virtually any age demographic (again, unlike rock climbing walls); and they do not generate potentially welfare-reducing noise externalities (unlike marinas that house motor boats).⁷⁶ To the extent that communities wished to employ racially discriminatory selection mechanisms using exclusionary club goods, golf presented the best opportunities.⁷⁷ Given the racial dynamics of golfing in the United States, a residential development built around a mandatory membership, high-quality golf course would have attracted two types of people: avid golfers (who were overwhelmingly white), and people with a preference for living among avid golfers or non-golfers attracted to such communities. It is therefore worth investigating the exclusionary club goods hypothesis by examining statistics on golf course-related residential developments.

⁷⁴ *Id.* at 20.

⁷⁵ W.J. Florkowski & G. Landry, *An Economic Profile of Golf Courses in Georgia: Course and Landscape Maintenance* 4 (Georgia Agricultural Experiment Stations Research Report No. 681) (April 2002) (noting that the average maintenance expenditure – not including land acquisition costs and property taxes – for a Georgia golf course was \$417,042 per year). J. Richard McElyea et al., *Golf's Real Estate Value*, URBAN LAND 14, 14 (Feb. 1991).

⁷⁶ Club goods are not the only means of sorting residents. Saul Levmore has suggested to me that common interest communities conceivably could achieve the same ends through direct subsidies for “sorting” activities, as opposed to club goods provision. For example, a homeowners’ association might provide a subsidy of up to \$5000 per household for rock climbing expenses, and tax all homeowners equally to pay for this subsidy. Presumably, African Americans would be as deterred by this approach as they would be by a residential golf community with a \$5000 annual mandatory membership fee. In light of my theory, why don’t we see such arrangements in the real world? The puzzling absence of these arrangements is probably explained by legal doctrine. Covenants and equitable servitudes that do not “touch and concern” the land do not bind successors -in-interest under American property law. Affirmative promises to pay money for common amenities located within a development, such as communal golf courses, have long been held to “touch and concern” the land, but affirmative promises to pay money for rock climbing or other activity subsidies presumably would not satisfy the “touch and concern” requirement. See *Anthony v. Brea Glenbrook Club*, 58 Cal.App. 3d 506, 511-12 (Ct. App. 1976); *Regency Homes Ass’n v. Egermayer*, 498 N.W.2d 783, 791-93 (Neb. 1993).

⁷⁷ This view is premised on the idea that golfers are at least somewhat evenly spread across income levels. If, by contrast, all African American golfers were wealthy, then residential golf courses would not provide a terribly effective way of engaging in the exclusionary club goods strategy. The best available data indicates that African American golfers skew to slightly higher incomes than Caucasian golfers do, but the difference is not particularly pronounced. NATIONAL GOLF FOUND., *MINORITY GOLF PARTICIPATION IN THE U.S.* 16 (2003).

E. Golf Course Developments in the United States

A residential golf course is a golf course that is surrounded by residential properties, be they single family homes, townhouses, or condominiums. During the 1990s, golf participation intensified,⁷⁸ and the United States saw a rapid increase in the number of residential golf course developments.⁷⁹ 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.⁸⁰ In Florida, which has more golf courses than any other state, as many as 54% of golf courses were residential.⁸¹

It would be inappropriate to assert that the exclusionary club good phenomenon I have identified is largely responsible for this boom in residential golf courses. The data simply does not support such a claim, and, even if it did, one should wonder why the boom began in the late 1980s or early 1990s, when antidiscrimination laws had long been on the books. Undeniably, an aging population helps explain a large part of this boom. That said, if one digs further into the data on the growth of residential golf communities, one finds several intriguing data points, all of which are consistent with – but do not prove – the hypothesis that exclusionary club goods were behind some of the changes in the nature of the residential golf course market.

The first intriguing data point concerns the mix of mandatory golf course memberships and optional membership for residents of residential golf communities. Early residential golf course developments followed a particular financing model. Namely, those who purchased residences in the development were obligated to purchase “equity memberships” or “bundled memberships” in the adjoining golf course.⁸² This meant that all homeowners would pay for the development and upkeep of the course, regardless of their utilization of it. In the mid-to-late-1990s, however, the market shifted somewhat, with developers increasingly embracing semi-private golf course

⁷⁸ 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.*

⁷⁹ John L. Crompton, *Designing Golf Courses to Optimize Proximate Property Values*, 5 MANAGING LEISURE 192, 193 (2000).

⁸⁰ *Id.* (“While the real estate industry in the United States as a whole grew at an annual rate of 2-3% in the 1990s, the annual growth rate of developments which incorporated golf courses approached 10%, making it one of the hottest sectors in real estate.”). Some recent evidence suggests that residential golf courses were overbuilt during the 1990s, resulting in a current glut in that market. See Kevin Allison, *Golf Comes out of the Bunker*, FINANCIAL TIMES, Feb. 1, 2005, at 10.

⁸¹ John J. Haydu & Alan W. Hodges, *Economic Impacts of the Florida Golf Course Industry*, at iv (April 5, 2002); see also Lewis M. Goodkin, *Out of the Rough?*, FLORIDA TREND, Dec. 1, 1998, available in 1998 WL 10743346 (quoting an earlier estimate that 40% of Florida’s golf courses are residential). In South Carolina, approximately one-third of golf courses are residential. Jordan N. Roberts & Darla Domke-Damonte, *Utilization of Golf Course Facilities by Residents of Golf Course Communities in Myrtle Beach*, 1 COASTAL BUSINESS JOURNAL 13, 14 (date).

⁸² Goodkin, *supra* note 81.

developments, where membership is optional among homeowners and members of the public can play for a daily use fee.⁸³ This brings us to a second intriguing data point.

There are two group of golf courses that did not shift away from equity memberships: high end courses played by the very wealthy, and courses located in areas with the largest African American populations, such as Broward and Miami-Dade counties.⁸⁴ For wealthy homeowners, mandatory golf course membership might be functioning in the same way that the cooperative structure functioned in Manhattan. Wealthy people can afford to pay a premium for the perceived benefits of exclusionary policies, and are happy to do so. Instead of paying more for apartments and association governance via the cooperative corporate form, these Floridians might be opting for a luxury amenity that effectively excludes those who are unwilling to pay substantial amounts for a world class golf facility.

To complete the story, we must introduce a final intriguing data point. Many purchasers who buy into residential golf courses *do not play golf*. This phenomenon of non-golfer households in residential golf communities has been widely noted in golf industry periodicals, and was true during timeframes when “mandatory membership” golf course developments were more common than “optional membership” developments.⁸⁵ To be sure, not all of these people are racists or segregationists. Indeed, it is likely that many of these non-golfing golf course residents are willing to pay a premium because they enjoy the open space or low densities offered within golf course developments.⁸⁶ That said, real estate appraisal research suggest that golf course views provide only one-third as much of an increase in real estate values as views of a creek or marsh.⁸⁷

⁸³ *Id.*

⁸⁴ *Id.* According to the 2000 census Miami-Dade and Broward have the largest African American populations among Florida counties. Among Florida’s large counties, they rank second and third, respectively, in percentage of African American residents. Duval County’s population is 27.8% African American; Broward’s is 20.5% African American; and Miami-Dade’s is 20.3% African American. Florida as a whole is 14.6% African American. *See* <<http://www.state.fl.us/edr/population/census2000/pop2000.xls>> (visited Jan. 26, 2005).

⁸⁵ McElyea et al., *supra* note , at 16 (“Golf-course-oriented homes appeal to nongolfers as well as to golfers. (Only about one-third of golf-frontage home-buyers in nonretirement properties play golf regularly.”); Crompton, *supra* note , at 193 (citing McElyea); Goodkin, *supra* note , at ___ (quoting a developer’s expectation that “50% of buyers will be golfers”); Nancy Kressler Murphy, *Golf Course Communities Sprouting*, MERCER BUSINESS 15 (June 1, 1990) (quoting a New Jersey developer’s statement that “[f]ifty percent of my buyers are golfers, and then 50 percent have never picked up a club and never plan to.”); Stella M. Chavez, *Subdivisions Want Residents to Join the Club; Boca Woods to Vote on Making Club Fees Mandatory for All Homeowners*, FT. LAUDERDALE SUN-SENTINEL, Feb. 15, 2000, at A1.

A cautionary note is in order. Although the above-cited sources suggest the presence of large numbers of golfers in all types of residential golf courses, I so far have been unable to find data that breaks down the prevalence of non-golfers in mandatory membership developments. I am searching for such data, but it does not appear to be available from primary sources. Cross-referencing 2000 census tract data against lists of mandatory membership and optional membership golf communities is the critical next step in testing this paper’s falsifiable hypothesis.

⁸⁶ *See, e.g.,* Murphy, *supra* note 85, at 15.

⁸⁷ James R. Rinehart & Jeffrey J. Pompe, *Estimating the Effect of a View on Undeveloped Property Values*, APPRAISAL J. 57, 60 (Jan. 1999) (“The results show that ocean views add 147% to lot values, location on a creek or marsh adds 115% to lot prices, and golf course location adds 39% to lot values).

Artificial lakes and waterways evidently add more value and are cheaper to maintain than golf courses,⁸⁸ and yet they are much less of a mainstay of new real estate developments than golf courses.⁸⁹ 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.⁹⁰ In short, golf courses *qua* golf courses add less value to nearby or adjacent residences than one might expect.

So a desire for open space did not seem to be driving all the demand for residential golf courses among non golfers. Is there any evidence for more insidious explanations? The marketing data appears to suggest that many non-golfer residents of residential golf courses find the homogenous nature of these communities' populations appealing. D. Robert DeChaine has conducted the only systematic study of the ways in which residential golf communities market themselves.⁹¹ 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.⁹²

Certainly, marketing materials talked about the quality of the golf courses at length,⁹³ 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.⁹⁴

⁸⁸ Emailed newsletter article from Jim Kass, Research Director, National Golf Foundation, dated Feb. 15, 2005.

⁸⁹ Even within residential golf courses, lots with views of water hazards are particularly desirable, and command the highest premiums. GREGORY L. CORY ET AL., *GOLF COURSE DEVELOPMENT IN RESIDENTIAL COMMUNITIES* 37 (2001); Crompton, *supra* note , at 198.

⁹⁰ Haydu & Hodges, *supra* note 81, at 20 ("Commercial, agricultural, industrial, institutional, and government land use types all showed an increase in value associated with golf courses, ranging from \$24,000 to \$54,000 per parcel, while residential properties had a considerably smaller differential value than the other sectors (\$6,114). Utility land uses showed a negative difference in value."). This study included not only residential golf communities, but homes near such communities, as well as those within a mile of public courses, country club courses, and semi-private courses.

⁹¹ D. Robert DeChaine, *From Discourse to Golf Course: The Serious Play of Imagining Community Space*, 25 J. OF COMMUNICATION INQUIRY 132 (2001). Sadly, for my purposes, DeChaine did not distinguish between mandatory membership and optional membership communities.

⁹² *Id.* at 134.

⁹³ *Id.* at 138-39.

⁹⁴ *Id.* at 139-43. DeChaine's analysis lacked a quantitative dimension, but his article devoted far more space to discussions of exclusivity than discussions of golf quality. I cannot determine whether this reflects a selection bias or a proportional treatment based on the relative proportions of developer rhetoric. It would also be helpful to know the extent to which residential golf communities stress exclusivity more or less than other gated communities do in their marketing materials.

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

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

Members come from every section of the United States, Germany, England, France and many other countries. They bring with them the traditions of some of their nations', and the world's, great golf clubs. Members embrace traditional values and are known to jealously guard their privacy and comfort.⁹⁵

Harbour Ridge's advertisement seems evocative enough to send clear signals to prospective purchasers about the nature of the community.⁹⁶

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

Optional membership residential golf communities, on the other hand, should not have been expected to market themselves to people with a preference for homogeneity. After all, an optional membership residential community faces a tragedy of the commons if too many non-golfers join it. The tragedy of the commons arises when many people try to take advantage of the views and open space provided by a golf course, but only those residents who are members of the course pay for its upkeep. A residential community can solve this tragedy of the commons only by shifting toward some form of mandatory membership or by permitting non-residents to use its course, which potentially raises privacy, safety, or traffic concerns for residents.⁹⁷

⁹⁵ See <<http://www.golfcoursehome.net/doc/communities/Community-Harbourridge.htm>>.

⁹⁶ 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. NYT*, 923 F.2d 995 (2d Cir. 1991).

⁹⁷ For discussions of the heated debates that arise when optional-membership golf communities try to solve this tragedy of the commons by mandating membership, see Lee Hoke, *Mandatory Memberships? Solution or Band-Aid?*, CLUB MGMT., Dec. 1, 2004, at 18; Patty Pensa, *Country Club Battle Heads to Court; Community Split over Required Membership*, SOUTH FLORIDA SUN-SENTINEL, Dec. 14, 2004, at 3B; Residents Fight Rule on Joining Golf Club in Delray Community, available in <<http://www.ccfj.net/HOAFLogolffight.html>>; Boca Lago Vote Against Mandatory Club Memberships, available in <<http://www.ccfj.net/HOAFLogolffBocaLargo.html>>. On the privacy drawbacks of solving a

This account of exclusionary club goods therefore provides a testable hypothesis. Did optional membership residential golf communities have higher percentages of African American residents than equivalent mandatory membership golf communities? Given the prevalence of both types of communities in Florida, it is possible to answer this question, controlling for home prices, resident income, and other attributes. Tom Miles and I have just begun the process of gathering the 2000 census and demographic data that will allow us to test this hypothesis, and also to investigate whether the racial composition of golf communities in general differed substantially from the racial composition of non-golf gated communities. We hope to be able to obtain the data that will allow us to test the hypothesis empirically in a follow-up paper.

Before ending this part of the discussion, it is worth noting the possibility that exclusionary club goods 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 distinction. In the pages that follow, I will show how communities can employ exclusionary club goods strategies to achieve innocuous, or perhaps even beneficial, objectives.

F. Other Examples of Exclusionary Club Goods

The Hyde Park neighborhood of Chicago is home to the University of Chicago. It is also home to a fascinating, high-profile, condominium building, known as the Powhatan. The Powhatan is a landmarked high-rise that was completed in 1929 and named for a famous chief of the Algonquin tribe.⁹⁸ Boasting fantastic views, the building is considered Hyde Park's most prestigious common interest community, although the list prices for its enormous units are a bargain. Less affordable are the building's assessments, which currently range from approximately \$2,500 to \$4,000 *per month*, depending on the size of a unit.

Why are the assessments so astronomically high? Maintaining a landmark building is an expensive venture, no doubt, but the building also offers various expensive amenities. Besides a swimming pool, doorman, and party room, the Powhatan also boasts something that virtually no residential buildings offer these days: human-operated elevators. These operators work around the clock, to make sure that the Powhatan's residents can come, go, and visit as they please. Although virtually every other residential high-rise in Chicago has installed automated elevators to avoid these labor costs, the Powhatan remains a quaint (and expensive) throwback.

When I was in the market for housing last year, it did not occur to me to buy at the Powhatan. The building's (non tax-favored) assessments certainly put it outside my price range. But even were my income to double, I would not contemplate living in the building. My preferences for privacy and independence render the idea of having to summon another human being so that I could leave my home and venture into the outside

tragedy of the commons by opening up the golf course to outsiders, see Mary Shemklin, *Golf Communities Tee Off; New Course-Side Developments are Proliferating*, ORLANDO SENTINEL, Nov. 10, 1996, at J1.

⁹⁸ For more on the Powhatan building, see <<http://www.ci.chi.il.us/Landmarks/P/PowhatanApts.html>>.

world quite unappealing. Buying into the Powhatan would mean paying an enormous sum of money for a club good that would, quite frankly, annoy me. So I would not live there, my appreciation for the building's architecture, stunning views, and glamorous residents notwithstanding. . . . And that may be precisely the point.⁹⁹

Suppose that a few people within the Powhatan share my preference for an automated elevator, particularly given the cost savings associated with automation. But suppose, further, that they believe that an expensive human-operated elevator serves as a proxy for other desirable characteristics in neighbors: Old World charm, sociability, or maturity, perhaps. It might well be rational for such a resident to oppose automation of the Powhatan's elevator, precisely because such automation would render the building a palatable home for people like me. To the extent that such a calculus plays out, the human-operated elevator functions as an exclusionary club good. In the case of the Powhatan, such exclusion seems unproblematic, particularly given the wealth of housing options in the greater Chicago area.¹⁰⁰ Indeed, to the extent that the Powhatan's homogeneity across certain characteristics enhances social capital, the use of the exclusionary club good to exclude the likes of me may be welfare enhancing.

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 they believe a critical mass of believers in a confined geographic space is necessary for the religious community to thrive.¹⁰¹ In such a setting, one might expect to see the community embrace direct efforts to limit the entrants of nonbelievers into the community. For example, a homeowners'

⁹⁹ I first heard about the Powhatan from a Property professor who shared my exasperation with its astronomical assessments. A current colleague of mine, also a Property professor, reports that he and his wife were similarly deterred from purchasing a unit in the Powhatan by the same consideration. Perhaps the Powhatan's elevator operates as an exclusionary club good with Property professors writ large as the targeted group.

¹⁰⁰ Cf. Heather K. Gerken, *Second Order Diversity*, 118 HARV. L. REV. 1099 (2005).

¹⁰¹ For discussion along these lines, see EDUARDO PEÑALVER, PROPERTY AS ENTRANCE 85 (Working Paper 2005). A group of deaf Americans has recently begun laying plans to develop Laurent, South Dakota, a new town "expressly created for people who sign." See Monica Davey, *As Town for Deaf Takes Shape, Debate on Isolation Re-Emerges*, N.Y. TIMES, Mar. 21, 2005, at A1. Community planners were excited about the prospect of a town in which sign language is the language of choice and community services could be geared toward a largely deaf population. An exclusionary club goods strategy might prove useful to these developers in their efforts to ensure that a critical mass of signers resides in Laurent, and the law would probably not respond with great hostility to their employment of an exclusionary strategy.

More controversially, such arguments might be invoked by a racial or ethnic minority. For example, black separatists might argue that they ought to be allowed to use exclusionary club goods that have a tendency to prevent whites from joining a community. In my view, such use of exclusionary club goods to exclude a racial majority is nearly as problematic as the use of exclusionary club goods to exclude a racial minority, but I claim no special expertise in the matter. One can finesse the "reverse discrimination" issue to some extent by noting that while there are some African Americans who presently wish to live in overwhelmingly Caucasian neighborhoods, there are very few Caucasians who prefer to live in overwhelmingly African American neighborhoods. See *supra* notes 7, 16.

association might record covenants barring property sales to people who are not members of the religious community in question. Alas, such restraints on alienation have been invalidated by courts as contrary to public policy.¹⁰²

Reliance on exclusionary club goods may provide an alternative strategy. In such a scheme, the community would place a large religious temple at the center of the community, and provide that all homeowners within the association must share the expenses and burdens of the church's upkeep. This church could function as an exclusionary club good if some of the community's members do not plan to attend the church but want to be surrounded by church goers.¹⁰³ 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.¹⁰⁴ 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 might not be deemed to violate public policy.¹⁰⁵

2. Exclusionary Linguistic Goods

Although this paper focuses on club goods in residential communities, we should not be surprised to observe the same phenomena in virtual communities as well. Indeed, participants in various virtual worlds have developed alternative languages, with their own grammars and conventions, many of which prove befuddling to the uninitiated.¹⁰⁶ Although some of these languages appropriate internal messaging abbreviations that help shorten the length of typed communications, the most important on-line language – 133t (“leet”) is properly understood as facilitating encryption, not communication. As a result, 133t is more cumbersome to use than ordinary American English.¹⁰⁷ Efficiency

¹⁰² *Taormina Theosophical Community, Inc. v. Silver*, 140 Cal.App. 3d 964 (Ct. App. 1983).

¹⁰³ For example, people may feel like cultural Jews, and 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.

¹⁰⁴ *See supra* note 76.

¹⁰⁵ Under the Restatement approach, an equitable servitudes generally binds successors unless it is (1) “arbitrary, spiteful, or capricious”; (2) “unreasonably burdens a fundamental constitutional right”; (3) “imposes an unreasonable restraint on alienation, . . . trade or competition”; or is (4) unconscionable. RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 3.1 (2000). Covenants and equitable servitudes restricting religious institutions from common interest communities have long been deemed enforceable, based on pro-contract and state neutrality rationales that could be logically extended to cover mandates that homeowners subsidize resident religious institutions. *See, e.g., Hall v. Church of the Open Bible*, 89 N.W.2d 798, 799-800 (Wis. 1958).

¹⁰⁶ *See* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 26 n. 128 (2004).

¹⁰⁷ *See* Blake Sherblom-Woodward, *Hackers, Gamers, and Lamers: The Use of 133t in the Computer Subculture* 6-9 (Fall 2002), cached at Google Scholar, and on-file with author. As a case in point, see the English to Hacker Speak translator at <http://www.cs.utk.edu/~cjohnson/computing/javascript/round_hackerspeak.php> (visited April 11, 2005).

considerations do not explain the proliferation of l33t: Using English would be easier for most of the inhabitants of these online communities.

Imposing these barriers to entry may maximize welfare for these communities by making participation in these online communities vexing for a naïve newcomer, who the computer savvy refer to as a “n00b” (newbie). A major purpose of these languages is to marginalize newbies and exclude the virtual riff-raff.¹⁰⁸ Newbies can of course learn l33t eventually, but this process will take time, and the learning process will encourage the greenest entrants into virtual worlds to spend more time observing and less time typing during their initial forays. l33t thus functions as a means of discouraging those who are unsavvy, impatient, or unwilling to incur substantial language-learning costs from joining Internet-based subcultures.

3. Exclusionary Public Goods

Recall at the outset I differentiated between non-excludable public goods and somewhat excludable club goods. Military defense is often cited as a quintessential public good, in that a national government cannot selectively deny the benefits of military protection to some citizens while providing it to others.¹⁰⁹ In nations that mandate military service by the able bodied, the provision of this public good may function in an exclusionary way.

Consider Israel, for example. Its “law of return” provides for easy immigration by Jews living abroad to Israel.¹¹⁰ By the same token, mandatory military service probably plays some role in skewing the pool of Jewish immigrants from other nations.¹¹¹ After all, Diaspora Jews young enough to serve in the Israeli military will incur substantial costs if they immigrate. As a result, one can expect that those Jews who do emigrate to Israel will either be too old to be drafted, or will have an abundance of nationalist sentiment, physical courage, or motivation to immigrate. All of these attributes might conceivably skew the Israeli populations in beneficial ways. Because of the substantial costs associated with integrating new immigrants into the military, it may well be that the military costs of mandating service for recent immigrants exceed the military benefits, but the policy might still be justified by the desirable selection effects it promotes. If so, then the compulsory military service would function as an exclusionary public good. This selection effect is not the reason why Israel mandates military service, but it may function as a beneficial side effect resulting from governmental policies.

I thank Neil Richards for altering me to l33t as an online manifestation of the exclusionary club goods phenomenon.

¹⁰⁸ Sherblom-Woodward, *supra* note 107, at 15, 28.

¹⁰⁹ Of course, military defense hardly functions as a public good at the global level. It is provided by nation states, which function like clubs in this instance.

¹¹⁰ On the Law of Return, see Mark J. Altschul, Note, *Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining Its Present Language*, 2002 U. ILL. L. REV. 1345.

¹¹¹ On mandatory military service in Israel, see Ayelet Shachar, *Whose Republic? Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 259-62 (1999).

III. Inclusionary Club Goods

In the previous pages, I have suggested that an exclusionary club goods strategy is neither good nor evil. Rather, it might further good or evil purposes, depending on the particular setting in which it is employed. Normative considerations might cause us to view the use of an exclusionary club goods strategy unfavorably if used by Caucasians to exclude African Americans from an affluent neighborhood, but favorably if used by members of a religious minority to establish a critical mass of believers in a particular physical space. This discussion of exclusionary club goods raises an obvious implication. Inclusionary club goods should also exist. The presence of such goods might spark heterogeneity, and the absence of such goods might function in the same way as the presence of an exclusionary club good.

A. Examples of Inclusionary Club Goods

An inclusionary club good is a resource that does not, by itself, provide enough welfare to the residents of a particular community to explain its presence in that community. On the other hand, the inclusionary club good does make the community more 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 applicant pool is brought into the community. Inclusionary club goods will be adopted, in short, to make the composition of a building or development better reflect the heterogeneity that exists in the wider surrounding community.

For example, some student residential buildings on college campuses acquire reputations as non-academically rigorous, and, in some instances, these reputations are well deserved. At some point, members of a community may decide that this reputation for a lack of rigor is imposing substantial costs on the members – such as diminished access to employment networks, lower status relative to members of other communities, or undue scrutiny from university administrators. To that end, the members may decide to devote a large amount of scarce public space to a “study room,” and renovate the study room to make it look tranquil, attractive, and nicely furnished. The study room may then go unused by the residents, especially during its early years. But as time passes, and successive groups of incoming residents opt into the house, the presence of the study room might cause more studious students to self select into the house, and some of these newcomers may eventually start using the amenity. Initially, the study room functions as an inclusionary club good, but eventually it is transformed into an ordinary club good that is welfare maximizing in its own terms.¹¹²

¹¹² Inclusionary club goods of other sorts are prevalent in college and university settings. Most provocatively, there is a sense in which affirmative action policies function as inclusionary club goods, as opposed to mere inclusionary devices. By that I mean the following: Many sought-after Caucasian college students want to attend law schools that have racially diverse student bodies. Racial preferences in admission therefore may be designed to attract not only members of minority groups, but also to attract

Anecdotal evidence suggests that inclusionary club goods of this nature are pervasive.¹¹³ 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 signal to such potential purchasers and, over time, it may become a more efficiently utilized amenity through the operation of selection effects.¹¹⁴

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 resources in the creation of "artist colonies" and other efforts to attract young members of the creative class.¹¹⁵ This effort, inspired in large part by Richard Florida's influential book, *The Rise of the Creative Class*,¹¹⁶ is designed to boost economic growth by attracting the young, energetic, art and culture lovers who are sought after by major employers. As a result of these arguments,

these heterogeneity-seeking Caucasians. Were a law school to abolish race-based affirmative action, this might not only increase the percentage of Caucasians in the student body, but it would also skew the *attributes* of the Caucasians in the student body, attracting Caucasians who preferred racial homogeneity or did not care much about racial diversity, but turning off potential applicants who valued racial heterogeneity.

Similarly, college athletic programs may function as inclusionary club goods. Outstanding academic universities with strong Division I-A sports programs, like Berkeley, Stanford, Duke, and Michigan, 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.

¹¹³ The study room example identified in the paragraph above is drawn from the author's own experience with off-campus student housing at Berkeley.

¹¹⁴ On the connection between condominium amenities and resident selection effects, see Kathy McCormick, *Condo Amenities Reflect Changing Needs: Cover the Gamut from Car Wash Bays to 24-Hour Concierge*, NATIONAL POST, Mar. 3, 2001, at N4, available in 2001 WL 14437690. See also text accompanying *supra* note 61.

¹¹⁵ See, e.g., Abe Amidor, *Cool Indy*, INDIANAPOLIS STAR, Oct. 3, 2004, at J1; Timothy J. Gibbons, *The Cool Factor: Jacksonville Has Much to Do to Attract Young, Creative Workers*, FLA. TIMES-UNION, Feb. 16, 2004, at FB10; Keith Herbert, *Struggling Borough Tries to Get Creative; Norristown Hopes Artists Will Be Attracted by Low Rents and Incentives Such as Tax Breaks*, PHIL. INQUIRER, Aug. 15, 2004, at B1; Elaine Hopkins, *Cheap Rent + Good Light = Art; Art Project Rep Says Peoria's Buildings Are the Perfect Places to Foster Creativity*, PEORIA J. STAR, June 12, 2004, at B3; E.J. Schultz, *Artists, Writers and Young Professionals See Potential in the Region's Budding Arts and in Fresno's Reviving Downtown, as They Try to Remake the City into . . . Creative Fresno*, FRESNO BEE, Jan. 9, 2005, at D1.

¹¹⁶ RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* (2002).

communities across the United States are investing in public goods and club goods that are not terribly appealing to the communities' existing populations.¹¹⁷

B. Inclusionary Club Good Voids

Just as inclusionary club goods can be used to attract diverse residents to heterogeneous communities, communities can maintain their diversity through conscious choices to avoid inclusionary club goods or public goods. A desire to avoid offering inclusionary club goods might cause community residents to forego provision of the communal resources that their residents would otherwise prefer.¹¹⁸

For example, many communities desire access to public transportation hubs. Even if such hubs are shunned by commuters, who increasingly prefer to drive to work alone, they provide enormous value to those not yet old enough to drive, those too old to drive, and those unable to afford or use motor vehicles of their own. People who drive to work every day may garner substantial benefits from having bus or subway routes nearby, for example, by freeing up scarce freeway space or making it easier for babysitters, house cleaners, or other car-less service providers to reach their homes.¹¹⁹ Yet many communities are nearly devoid of usable public transportation.

¹¹⁷ The problem with Richard Florida's approach, of course, is that the fight over members of the creative class is in some respects a zero-sum game, so as more municipalities compete, the returns from strategies designed to appeal to them will diminish.

¹¹⁸ There are important connections between my argument here and an argument that Clayton Gillette has voiced. Gillette noted that within common interest communities, certain types of restrictive covenants might be imposed, not because the residents objected to the proscribed land uses themselves, but because they objected to the types of people who might engage in the proscribed uses. Gillette gave the following example, justifying restrictions on trailer homes:

[E]ven where individuals do not have an aversion to certain practices that are prohibited in covenants, such as maintenance of trailer homes, they may believe that there is a correlation between the subject of the covenant and characteristics that can serve as the basis for a desirable affinity. I may have nothing against trailer homes, other things being equal. That is, I may believe that they are not aesthetically displeasing, and may believe that they offer the best available housing opportunities for a large segment of the population. I may, however, simultaneously seek a relatively noise-free environment, or assurances that I live among others who do not mind a high degree of regimentation, and 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 , at 1396. 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.

¹¹⁹ In theory, service providers ought to be able to pass these transportation costs onto homeowners whose homes are not proximate to public transportation. Their ability to do so may be constrained, to the extent that demand for these services is elastic.

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, the absence of a metro station in Washington D.C.'s Georgetown neighborhood is a source of frustration for the area's many college students and employees, as well as tourists. The Washington D.C. subway runs underneath Georgetown, and the area's high density suggests that mass transportation could thrive there. But, at the time of the subway's construction, affluent Georgetown residents were concerned that building a subway station in Georgetown would attract a "bad element" to the neighborhood.¹²⁰ As a result, the neighborhood elected to forego this valuable public good. Affluent neighborhoods in other parts of the country have done likewise, even keeping out valuable transportation amenities like freeways.¹²¹ Exclusionary zoning would be adequate to keep poor non-students from *living* in Georgetown, but an exclusionary dearth of public goods is necessary to keep them out of Georgetown entirely.¹²²

IV. Regulating the Provision of Exclusionary and Inclusionary Goods

So far, this paper has shown how communities can use exclusionary club goods or an absence of inclusionary club goods and inclusionary public goods 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 religious minority), and instances in which most readers will not sympathize (e.g., racial homogeneity, achieved through the use of mandatory golf club memberships). How should the law respond to these efforts? I offer preliminary thoughts below, and hope that these ideas will spark debate and discussion.

A. Anti-Discrimination Law

When the law bars discriminatory restraints on alienation, entry, and advertising, communities whose residents prefer particular kinds of homogeneity will, to some degree, substitute an exclusionary-club-goods-strategy or a lack-of-inclusionary-goods-strategy. This raises the question of what is worse: the medicine or the disease? If the

¹²⁰ See generally Stephen C. Fehr, *Where D.C. Wants Metro to Go Next; City Proposes Fort Lincoln, Georgetown, Adams-Morgan, and New York Avenue Stations*, WASH. POST., Mar. 23, 1994, at D3; Arianne Aryanpur, *Georgetown Area Considered for Local Metro Stop*, HOYA, Oct. 30, 2001, available in <<http://www.thehoya.com/news/103001/news4.cfm>>. On the DC subway's history, see ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO* (forthcoming 2005).

¹²¹ Beverly Hills, California, is perhaps the most famous example here.

¹²² A similar example arises in Chicago's Hyde Park community – an increasingly affluent college neighborhood that, quite conspicuously, lacks a movie theatre. Hyde Park had a movie theatre in the 1990s, but it drew large numbers of African American youths from surrounding Chicago neighborhoods. Eventually, the University of Chicago, which owned the land, elected to close the cinema entirely, notwithstanding complaints from students. Hyde Park's lack of a cinema and other entertainment amenities prompts many graduate and professional students to live in distant neighborhoods and endure long commutes to the campus.

exclusionary club goods strategy produces worse societal outcomes than overt discrimination, savvy policymakers might contemplate doing away with antidiscrimination laws altogether.

Exclusionary club goods present a form of discrimination less “efficient” than overt discrimination. There are social costs and social benefits that result from this inefficiency, however. The social costs are the deadweight losses that result from the expenditure of scarce societal resources on signaling and sorting club goods. For example, I have suggested that society has built too many residential golf courses – resulting in wasteful land use policies and, in this instance, substantial environmental damage.¹²³ Repealing anti-discrimination laws might well eliminate this excess demand for golf course construction. On the other hand, much of this social waste is paid for by those seeking residential homogeneity.¹²⁴ To that extent, permitting exclusionary club goods as a lawful alternative to overt discrimination might function as an excise tax on residential homogeneity. It would be a wonderful coincidence if this tax was equivalent to the social costs of the resulting residential homogeneity, but the likelihood of establishing a Pigouvian efficient tax are exceedingly low.¹²⁵ That said, in a society that values residential heterogeneity as a general matter, taxing exclusion in this manner may help ensure that people who wish to engage in this form of exclusion have rather strong preferences for doing so. Gary Becker, Richard Epstein, and others have argued that the market adequately sanctions people who refuse to deal with African American customers by depriving them of an important market.¹²⁶ But that hypothesis only holds in the absence of strong and broad consumer demand for segregated environments. In a world where large numbers of Caucasians are willing to pay a premium for neighborhoods that exhibit rather substantial racial homogeneity,¹²⁷ the waste associated with the provision of exclusionary club goods may provide the only real penalty suffered by an entrepreneur who satisfies these discriminatory preferences.

Exclusionary club goods strategies necessary create a second kind of inefficiency: They will be less precise than overt discrimination. Tiger Woods is not the only affluent African American golfer. So a homeowners’ association that tries to use golf as a proxy for race may not achieve complete racial homogeneity. This might be a good thing in

¹²³ For discussions of the ecological consequences of golf course development, see M.K. BREWIN, AN ANNOTATED BIBLIOGRAPHY AND LITERATURE REVIEW ON THE POTENTIAL IMPACTS OF GOLF COURSES ON FRESHWATER ENVIRONMENTS 44-129 (Trout Unlimited Canada 1992) (summarizing the existing literature and providing an annotated bibliography); James C. Balogh et al., *Background and Overview of Environmental Issues*, in GOLF COURSE MANAGEMENT & CONSTRUCTION: ENVIRONMENTAL ISSUES 1 (James C. Balogh & William J. Walker eds. 1992); DEPARTMENT OF ENVIRONMENTAL RESOURCES MGMT., ENVIRONMENTAL QUALITY MANAGEMENT AT FIVE MUNICIPAL GOLF COURSES IN MIAMI-DADE COUNTY (Dec. 2002), available in <http://www.miamidade.gov/derm/land/library/golf_course.pdf>; Michael A. Lewis et al., *Effects of a Coastal Golf Complex on Water Quality, Periphyton, and Sea Grass*, 53 ECOTOXICAL ENV. 154 (2002);

¹²⁴ Though not all. Again note the environmental externalities in the golf context.

¹²⁵ See R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 182-85 (1988).

¹²⁶ See, e.g., GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

¹²⁷ See Dawkins, *supra* note , at 387-88.

several respects. First, exposure to some racial heterogeneity, albeit a limited amount, may result in preference changes that would not occur in a world of complete homogeneity. It is not naïve to think that positive interactions with a “token” African American neighbor would diminish demand for racial homogeneity.¹²⁸ Second, exclusionary club goods 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.¹²⁹ If this trend continues, then golf courses will no longer function effectively as exclusionary club goods, and Caucasians interested in racial homogeneity will have to resort to other sorting devices.

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

B. Administrative Concerns

Let us focus on the use of exclusionary club goods to achieve objectionable ends, such as racial residential segregation to exclude African Americans. Should the law proscribe the creation of club goods that deter African Americans from joining a particular community? Probably not. In a world where courts are prone to error, and evidence of discriminatory intent is difficult to gather, policing the provision of exclusionary club goods will often prove quite difficult. After all, there is substantial demand for residential golf courses, and a desire for racial homogeneity is not the only plausible explanation for a mandatory membership structure. On the contrary, mandatory membership may be designed to combat free riding by those who benefit from a golf course’s views and open space but do not contribute to its upkeep. Moreover, mandatory membership might be designed as a pre-commitment device for residents to contract for high levels of social interactions among neighborhood residents.¹³⁰ As a result, it seems appropriate to proscribe exclusionary club goods strategies only where there is clear evidence that the club good in question was procured for the purpose of achieving a type of residential homogeneity that violates public policy interests.

¹²⁸ *Cf. id.* at 389; Tollison, *supra* note 12, at 283.

¹²⁹ NATIONAL GOLF FOUND., *supra* note , at 3; April Adamson, *Tiger Draws Many to Sport*, PHI. DAILY NEWS, June 24, 2004.

¹³⁰ Members might value social interactions as such, and want to bind themselves to interact socially with their neighbors. Mandatory membership will reduce each household’s disposable income, thereby limiting their opportunities for social interactions with people from outside the residential golf community. And since people have difficulty ignoring sunk costs, having already paid for a membership at a golf club might cause them to play more golf, and attend more golf-course related events than they otherwise would.

That said, some strategies for policing exclusionary club good strategies are superior to others. Given the concern about false positives, it seems appropriate to police the financing mechanisms for club goods before policing the provision of those club goods themselves. There is nothing objectionable about mandatory membership in golf communities that charge all residents for the positive externalities that the golf course confers on them. This means charging golfers within a residential golf development for open space, views, and golf; and charging non-golfers for open space and views. Indeed, many residential golf communities provide such two-tiered membership structures,¹³¹ and even the ones that do not implicitly charge non-golfers by capitalizing the extra value of a view into the original purchase price of a home. Accordingly, in instances where there is strong evidence to suggest that the provision of exclusionary club goods promotes residential segregation, the appropriate solution is not to ban residential golf communities, but rather to invalidate mandatory membership schemes for golf-playing, which is racially skewed, as opposed to golf-course-view-enjoyment, which one supposes to be race neutral.

A more promising alternative strategy for combating the use of exclusionary club goods would try to alter the preferences of the group that is targeted for exclusionary treatment. Tiger Woods's success on the PGA tour correlated with a staggering increase in the percentage of African Americans who identify themselves as avid golf fans.¹³² Relatedly, the Tiger Woods Foundation has sought to provide golfing opportunities to minority and disadvantaged youth.¹³³ These demographic developments might render residential golf courses poor race-oriented exclusionary club goods in the years ahead.¹³⁴ Group disparities in preferences for club goods are socially constructed. As such, they may be amenable to concerted efforts by government or private groups to homogenize preferences as a means of thwarting insidious exclusionary club good strategies.

¹³¹ See CORY ET AL., *supra* note , at 166-73; *see also supra* note 97.

¹³² In 1996, 10.1% of Caucasians and 2.5% of African Americans identified themselves as avid fans of professional golf. In 2003, 11.8% of Caucasians and 12.0% of African Americans identified themselves as avid fans of professional golf. Thus, whereas avid fandom increased by 16.8% among Caucasians, it increased by 380% among African Americans. The increases among casual fans were not as dramatic. Casual fandom increased by 10.5% among Caucasians and 73.2% among African Americans. See GOLF 20/20: VISION FOR THE FUTURE, INDUSTRY REPORT FOR 2003, at 12 (June 8, 2004).

¹³³ Lieber, *supra* note 67, at C1; *supra* note 129.

¹³⁴ Residential golf courses might still function as exclusionary club goods, but they would prompt sorting on the basis of some factor other than race. For example, men are noticeably more likely than women to participate in golf. See NATIONAL GOLF FOUND., *supra* note , at 12 (noting that 22% of white adult males play golf, versus 6% of white adult females, although the discrepancies are less pronounced for racial minorities). Given this disparity, it may be that married couples that purchase homes in residential golf communities are more patriarchal than ordinary married couples, in the sense that the husband plays a dominant role in making important family decisions, like the choice of residential locations. To the extent that a patriarchal husband seeks a neighborhood with a plethora of fellow patriarchs, selecting a residential golf community might be a viable strategy.

C. 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 club goods. In instances where a religious, linguistic, or other minority community genuinely requires some measure of critical mass to thrive, it may be appropriate for the state to subsidize the creation of exclusionary club goods 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 such the creation and maintenance of these kinds of club goods. As long as courts are capable of distinguishing between those instances in which exclusion furthers policy objectives and those in which exclusion undermines policy objectives, there is no reason to demand that states police the types of activities in the same way that they police strategies designed to exclude marginalized minority group members from affluent neighborhoods.

V. Conclusion

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

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