

PRIVATE RETIREMENT COMMUNITIES: THE MARKETING AND CONSUMPTION OF AGE-SEGREGATED HOUSING FOR OLDER AMERICANS

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INTRODUCTION

Older persons face abundant housing problems in the United States. Some impoverished older persons cluster in age-segregated, public housing towers and apartment buildings, which can convey a sense of confinement.¹ Others spend their final years in depressing nursing homes, where COVID extracted a particularly high toll.² Overall, many older persons dislike the places in which they live and wish they could somehow return to the apartments and houses that they called home earlier in their lives.³

Accommodations for older persons in private retirement communities are on average better than what is available in public housing

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1. See generally Christine M. Cedrone, *Public Housing for the Elderly in Massachusetts: How Federal and State Disability Laws and Regulations Have Created a Sense of Confinement*, 8 ELDER L.J. 337, 338 (2000).

2. See generally David Ray Papke, *A Stage Set for Disaster: For-Profit Nursing Homes, Federal Law, and COVID-19*, 1 J. ELDER POL'Y 199 (2021).

3. Mojtaba Vaismoradi et. al, *Older People's Experience of Care in Nursing Homes: A Meta-Synthesis*, 63 INT'L NURSING REV. 111, 115 (2016).

and nursing homes.⁴ Furthermore, older persons who have moved into these communities over roughly the last sixty-five years have done so voluntarily.⁵ Unlike older residents in public housing who are driven to their modest apartments by poverty, or those of nursing homes whose medical conditions are determinative, older persons in private retirement communities have freely chosen housing in age-segregated communities.⁶

But what prompts that choice, and how successful has it been? This article examines that question in three sections. The first section explores general marketing and consumption of private retirement communities during the 1960s, which framed housing in these communities as an expensive consumer good, and the specific advertising pitch that promoted sales of this type of housing.⁷ The second section considers whether private retirement community housing was originally discriminatory under the federal Fair Housing Act, and outlines the amendments to that Act which ultimately thwarted that claim.⁸ Finally, the third section examines how the investment in modern-day, private retirement community housing has failed to improve the personal well-being of older persons.⁹

This article's conclusion acknowledges that private retirement communities have settled too fully into place to be fundamentally altered by any effective legal challenge or reform.¹⁰ However, critical consideration of the marketing and consumption of housing in private retirement communities still illuminates different aspects of contemporary society. Crafty marketing plagues our society in general, and much of this advertising reflects our society's ageism. Retirement communities are laced with ageism.¹¹ Reflecting on the marketing and consumption of housing in private retirement communities can beneficially underscore serious multi-faceted problems in American life.¹²

I. PRIVATE RETIREMENT COMMUNITY MARKETING AND CONSUMPTION

Various factors explain the growth of private retirement communities in the United States, but this article underscores that this growth

4. See Papke, *supra* note 2, at 205–07.

5. *Id.* at 202.

6. *Id.*; see also Cedrone, *supra* note 1.

7. See discussion *infra* Section I.

8. See discussion *infra* Section II.

9. See discussion *infra* Section III.

10. See discussion *infra* Conclusion.

11. See Kate de Medeiros, *Ageism Resurgence*, MIAMI MAGAZINE, Fall/Winter 2020, at 12; see also discussion *infra* Conclusion.

12. See generally George Moschis et al., *Marketing Retirement Communities to Older Consumers*, 8 J. REAL EST. PRAC. AND EDUC. 99 (2005); see also discussion *infra* Conclusion.

took place in the context of burgeoning consumer capitalism.¹³ Developers and proprietors of these communities employed marketing strategies and advertising that are common in consumer capitalism, but made their pitch specifically to older people, promising them a carefree, “ageless” lifestyle.¹⁴ Private retirement communities caught on during the 1960s as countless older persons took the bait.

As for consumer capitalism in general, it is a socioeconomic subsystem whose success depends as much on the stimulation of consumption as on the increased production of a given consumer good.¹⁵ Sellers persuade consumers to purchase not so much what they need but instead what they do—or should—desire.¹⁶ One infamous example of consumer capitalism involves tobacco industrialist James B. Duke.¹⁷ His perfection of high-speed rolling machines enabled him to take over the cigarette market.¹⁸ What did Duke do at that point? After Duke realized that cigarette marketing would ultimately be more important in his commercial success than actual production, he moved his business from North Carolina to New York.¹⁹

Consumer capitalism established itself in the United States roughly between 1880–1930 or, as one commentator put it, during the years “when the rural republic of Lincoln turned into the capitalist epoch of Hoover.”²⁰ Familiar markers of the changes in the socioeconomic system include the emergence of the modern department store, the widespread adoption of electric signs for advertising, and the use of planned obsolescence in the automobile industry.²¹ One scholar argues that “[t]he Roaring Twenties were a crucial decade for the *genealogy* of consumer capitalism.”²² Others simply assert that the 1920s was *the* decade during which consumption of consumer goods became widespread and normative.²³ During and after this decade, the term “goods” increasingly represented not only physical items but also various activities and services.²⁴ Consumers, for example, showed increased

13. See generally CESARE SILLA, *THE RISE OF CONSUMER CAPITALISM IN AMERICA, 1880-1930* (2018).

14. See Kevin McHugh, *The “Ageless Self”? Emplacement of Identities in Sun Belt Retirement Communities*, 14 J. AGING STUD. 103, 105 (2000).

15. See generally SILLA, *supra* note 13.

16. See generally T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920*, at 28 (1981).

17. *Id.*

18. *Id.*

19. *Id.*

20. SILLA, *supra* note 13, at 27.

21. See *id.* at 78–88.

22. *Id.* at 188 (emphasis added).

23. See generally DANIEL HOROWITZ, *THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY, 1875-1940*, at 135 (1985).

24. *Id.* at 162.

enthusiasm towards attending professional sporting events such as boxing and baseball, and the cost of attending those events rose dramatically.²⁵

The selling of consumer goods and services depended heavily on increasingly sophisticated advertising campaigns.²⁶ The general goal of advertising is, of course, to influence customers' purchasing decisions, but advertisers can approach this general goal from countless directions.²⁷ One strategy involves convincing consumers to buy one variety of a product instead of another, and another similarly familiar strategy uses purported sales and discounts to persuade consumers to buy sooner rather than later.²⁸ Advertising also reaches consumers even after they make their purchases, in effect reassuring them that they made the right choice and inviting them to make similar choices in the future.²⁹ At their core, advertisements suggest to consumers that they should really want the good or service being advertised.³⁰ How could one possibly be happy without it?³¹

Advertising campaigns make an impact.³² Studies repeatedly show a correlation between levels of consumption and exposure to advertising.³³ But the impact of advertising hardly ends there.³⁴ Sometimes, advertising prompts consumers to develop unwholesome attachments to, and even fetishes regarding, selected consumer goods.³⁵ Short of such marketplace pathology, the purchase of certain consumer goods can connote a certain lifestyle and concomitant, socioeconomic class affiliation.³⁶ The ownership and display of selected consumer goods can be used to say who one is or wants to be, and many rely on consumer goods and services to in effect brand themselves as one type of person or another.³⁷

Indeed, consumer advertising has a general purpose that reaches beyond particular brands or specific goods.³⁸ Advertising promotes habitual shopping.³⁹ According to the highly regarded social critic Christopher Lasch,

25. See generally HOROWITZ, *supra* note 23, at 135–164.

26. SILLA, *supra* note 13, at 37.

27. DAVID RAY PAPKE, *CONTAINMENT AND CONDEMNATION: LAW AND THE OPPRESSION OF THE URBAN POOR* 121 (2019).

28. *Id.*

29. *Id.*

30. SILLA, *supra* note 13, at 43.

31. See *id.*

32. See PAPKE, *supra* note 27, at 122.

33. *Id.*

34. See generally Stephen Kline & William Leiss, *Advertising, Needs, and "Commodity Fetishism,"* 2 CANADIAN J. POL. & SOC. THEORY 5 (1978).

35. See *id.*

36. See generally RON EYERMAN, *FALSE CONSCIOUSNESS AND IDEOLOGY IN MARXIST THEORY* 256–57 (1981).

37. Unfortunately, this self-branding can lead a consumer to clumsily brand others according to the goods and services they have chosen. See generally Joseph E. Davis, *The Commodification of Self*, THE HEDGEHOG REVIEW, Summer 2003, 49.

38. See generally SILLA, *supra* note 13.

39. See *id.* at 38.

advertising generally touts “consumption as a way of life.”⁴⁰ So many advertisers convey this message and so many consumers take it to heart that consumers often measure themselves not through their accomplishments but through the goods and services they have been able to purchase.⁴¹ This stance leads to “a far different and in many ways diminished sense of selfhood from that embodied in the image of the headstrong self-made man.”⁴²

The range of goods and services is hardly limited, and the groups to which those goods and services might be marketed is not at all fixed. Marketers are forever attentive to newly conceived demographic sectors in which one consumer good or another might be successfully marketed.⁴³ In this vein, marketers recognized that older persons and especially retired older persons could constitute a group to whom goods and services could be sold.⁴⁴ The very phrase “senior citizen” originated as a marketing term.⁴⁵ Marketers encouraged older persons to see themselves as a particular type of consumer by offering “senior discounts” and the like.⁴⁶ In general, older persons and retirees could be seen by marketers as a consumer group and lured into thinking of themselves that way when entering the marketplace.⁴⁷

Although the existence of this demographic is taken for granted nowadays, its recognition is a somewhat recent matter.⁴⁸ “Retirement,” after all, did not occur when a majority of older people lived and worked with extended families on farms and in small towns.⁴⁹ As some people aged, they might have done less in the fields and at home; older farmers, though, did not stop working *per se* but rather reduced their labor due to health problems or other reasons.⁵⁰ When industrialization in the United States took off in the late-nineteenth century, industrial employers did not have retirement plans for workers who reached their sixties.⁵¹ Indeed, older workers were thought to be less productive and sometimes encountered extreme difficulty finding

40. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 72 (1978).

41. See LEARS, *supra* note 16, at 37.

42. *Id.*

43. See generally Medeiros, *supra* note 11.

44. See generally Glenda Laws, “The Land of Old Age”: *Society Changing Attitudes toward Urban Built Environment for Elderly People*, 83 ANNALS ASS’N AM. GEOGRAPHERS 672, 682–83 (1993); McHugh, *supra* note 14, at 109.

45. See Medeiros, *supra* note 11, at 12.

46. See generally Aaron Sinykin, *At What Point Is Someone Considered Elderly?* DEVOTED GUARDIANS (April 21, 2021), <https://www.devotedguardians.com/at-what-point-is-someone-considered-elderly/> [<https://perma.cc/NLP7-VUYQ>].

47. See generally Medeiros, *supra* note 11.

48. Joshua C.P. Reams, *Twenty-First Century Advertising and the Plight of the Elderly Consumer*, 52 WILLAMETTE L. REV. 325, 329–30 (2019) (providing a brief history on marketing toward older population).

49. William J. Wiatrowski, *Changing Retirement Age: Ups and Downs*, MONTHLY LAB. REV., April 2001, at 3, 4.

50. *Id.*

51. *Id.*

or keeping industrial jobs.⁵² On the home front, family members often came to consider older persons to be socioeconomic burdens instead of treasured, fountains of wisdom.⁵³ Grandparents and also older parents were not bringing any money into the family, but they still had to be fed and clothed.⁵⁴

By the middle of the twentieth century, meanwhile, “retirement” was definitely a recognized stage of life.⁵⁵ Pensions and Social Security payments made it easier for older people to maintain assets and to be able to “retire.”⁵⁶ Then, too, people on average were living longer, and the population’s new mass longevity meant marketers could sell goods and services to older people for longer periods of time.⁵⁷

Goods and services designed exclusively, or near-exclusively, for older people hit the market in large numbers.⁵⁸ Specially-produced, smart-medicine devices, stair-masters, and walkers were sold primarily to older persons.⁵⁹ Marketers also hawked types of insurance, funeral and cremation services, and a variety of house cleaning and lawn care systems.⁶⁰

Housing became the most expensive good that could routinely be marketed to retirees with assets.⁶¹ For older persons, housing is much more than a roof over one’s head.⁶² In the thoughtful words of a group of gerontologists:

52. Pate Thane, *Social Histories of Old Age and Aging*, 37 J. SOC. HIST. 93, 100 (2003).

53. *Id.* at 105.

54. Laws, *supra* note 44, at 675.

55. Thane, *supra* note 52.

56. Wiatrowski, *supra* note 49 (explaining that the lower life-expectancy in the mid-twentieth century allowed retirement solely on pension and social security benefits).

57. *Id.* (demonstrating the growth of life expectancy throughout the twentieth century).

58. *See, e.g.*, Joshua C.P. Reams, *Twenty-First Century Advertising and the Plight of the Elderly Consumer*, 52 WILLAMETTE L. REV. 325, 329–30 (2019) (discussing examples of products targeted toward older populations).

59. *Id.* at 331–32 (criticizing the frequency of advertisements focused on physical function and financial vulnerability directed toward older population); *e.g.*, Marlo Sollitto, *Equipment and Products for Aging in Place*, AGINGCARE, <https://www.agingcare.com/article/s/equipment-helps-elderly-live-at-home-safely-95653.htm> [<https://perma.cc/2SFK-9S92>] (last visited Oct. 29, 2022) (demonstrating the types of mobility and health products marketed toward older populations, including smart-medicine devices, stair-masters, and walkers).

60. *See, e.g.*, Reams, *supra* note 58, at 331; Associated Press, *Senators Inquire into Funeral Ads*, N.Y. TIMES, July 8, 1964, A17 (funeral and cremation services); ROBERT F. CLARK, HOME AND COMMUNITY BASED CARE IN THE USA 6 (U.S. Dept. of Health and Hum. Serv., 1991) (housekeeping and domestic services); *see also* Erika Gosker, *The Marketing of Gambling to the Elderly*, 7 ELDER L. J. 85 (1999) (discussing marketing of gambling to older populations).

61. Joseph Friedman and Jane Sjogren, *Assets of the Elderly as They Retire*, 44 SOC. SEC. BULL. 16, 27 n.16 (1981) (finding that home equity is the single largest form of asset for most elderly respondents).

62. Jon Pynos, Cristy Nishita, Caroline Cicero & Rachel Caraviello, *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 79 (2008).

The home plays a crucial role in the lives of older adults. A source of identity is cultivated from living in one place for an extended period of time, and home becomes a place to which older adults have deep-seated ties with family members and close friends. . . . Attachment to place is a reflection of the emotional, cultural, and spiritual connection between a person and their environment. . . . Among older adults, housing satisfaction is related to the identity of the home as a harbor of family traditions. For some older widows, leaving the home in which they lived with their husbands may be associated with leaving their relationship behind.⁶³

Developers and their marketers held out private retirement community housing as a way to leave homes that people had lived in for decades.⁶⁴ Property taxes and sales taxes might be lower where the private retirement communities were being built, and this could be appealing to those on fixed incomes.⁶⁵ Then, too, when friends and relatives left home neighborhoods and people with different ethnic and racial identities began to move into those areas, leaving became part of the “white flight” phenomenon.⁶⁶ A private retirement community could be a place to flee, both physically and psychologically.⁶⁷ These communities appeared to be safe domestic havens for older persons.⁶⁸

Ryderwood in the State of Washington can trace its development back to the 1920s, but a giant burst in the development of these communities occurred during the last third of the twentieth century.⁶⁹ Del Webb developed the largest of the early retirement communities.⁷⁰ He owned a construction company that had shamelessly built internment facilities for Japanese-Americans during World War II, and co-owned the New York Yankees for some time.⁷¹ Webb developed his first “Sun City” retirement community near

63. *Id.*

64. Keren Brown Wilson, *Historical Evolution of Assisted Living in the United States, 1979-Present*, 47 GERONTOLOGIST 8, 9 (2007).

65. See Elizabeth McNichol, *How State Tax Policies Can Stop Increasing Inequality and Start Reducing It*, CTR. ON BUDGET AND POL’Y PRIORITIES, Dec. 15, 2016, at 7 (discussing the impact of property and sales taxes on low-income families).

66. See generally Leah Platt Boustan, *Was Postwar Suburbanization “White Flight?” Evidence from the Black Migration*, NAT’L BUREAU ECON. RSCH., Oct. 2007, at 1–6 (discussing potential causations of the “white flight” phenomenon).

67. Keren Brown Wilson, *Historical Evolution of Assisted Living in the United States, 1979-Present*, 47 GERONTOLOGIST 8, 9 (2007).

68. *Id.*

69. Laws, *supra* note 44, at 684.

70. Trevor Perry, *Sun City: A Revolution*, SALT RIVER STORIES, <https://saltriverstories.org/items/show/402> [<https://perma.cc/N7ZP-WAYD>] (last visited Nov. 9, 2022).

71. MARGARET FINNERTY ET AL., *DEL WEBB: A MAN, A COMPANY*, 41–42, 46 (1991).

Phoenix, Arizona, in the early 1960s and managed to sell 2000 homes in the development's first year.⁷² His schemes fit well within Arizona's "new two-party regime dedicated to attracting businesses, jobs, and residents."⁷³

Realizing they had the proverbial goldmine on their hands, Webb and others went on to develop and to extensively market other private retirement communities in California, Nevada, and other Sunbelt states.⁷⁴ Some private retirement "communities" were little more than isolated apartment buildings with four units; others were huge, amounting to sizable towns populated by older persons in what used to be the desert.⁷⁵ All of the communities required their residents to be fully, or partially, retired and at least fifty-five years of age.⁷⁶

Since turnover in the private retirement communities averaged twenty percent annually, marketing and sales of housing in the communities became "critical and continuous processes."⁷⁷ Advertising for these communities became abundant, and appeared primarily in periodicals or in glossy brochures and pamphlets during the early years of the communities' development.⁷⁸ While pictures of the apartments, condominiums, and houses of course appear, it is not the housing in and of itself that is featured.⁷⁹ Instead, the pitch is for the private retirement community in general, accompanied by a promise that residing in such a community will produce happiness.⁸⁰ Rent an apartment in a retirement community, and joy will come your way.⁸¹ Better yet, secure a condominium or a free-standing house in a retirement community, and contentment will be yours.⁸²

72. Elizabeth Rose, *Exploring Vintage Sun City Arizona: A Look Back at the 1960s*, WANDER WITH WONDER (July 2, 2021), <https://www.wanderwithwonder.com/sun-city-arizona/> [https://perma.cc/56YD-VL3Z].

73. David R. Berman, *The Arizona Polity*, MORRISON INSTITUTE FOR PUBLIC POLICY (November 2017), https://www.morrisoninstitute.asu.edu/sites/default/files/arizona_future_past_O.pdf [https://perma.cc/PJ9F-GXA7].

74. Judith Ann Trolander, *Age 55 or Better: Active Adult Communities and City Planning*, 37 J. URB. HIST. 952, 962 (2011) (referencing Sun City developments throughout the Sunbelt states).

75. *Id.* at 963.

76. *Id.* at 952; see generally Patricia Goober, *The Retirement Community as a Geographical Phenomenon: The Case of Sun City, Arizona*, 84 J. OF GEOGRAPHY 189 (1985).

77. Jim Moore, *Foreword*, in BENJAMIN W. PEARCE, SENIOR LIVING COMMUNITIES x (1998).

78. Trolander, *supra* note 74, at 956, 959 (referencing early advertisements for retirement communities).

79. *Id.* at 959.

80. *Id.* (describing Webb's "Philosophy of Retirement" that implied happiness would come from living in an age-restricted retirement community).

81. *Cf. id.* (providing an example of one resident's positive review of living in Sun City, which supports the proposition that early retirement community advertisements implied such happiness would result).

82. *Id.*

One key to this happiness, allegedly, is that older persons would be able to live with only people in their age group.⁸³ The advertisements do not state that goal explicitly, but the minimum-age requirements of fifty, fifty-five, or sixty certainly imply it, as do the advertisements' pictures and illustrations.⁸⁴ Buyers, by implication, can free themselves of annoying and unpredictable younger people.⁸⁵ Some older people literally "bought into" this proposition so enthusiastically that they testified before Congress that they were desperate to avoid living anywhere near children.⁸⁶

Beyond age-segregation, advertising for private retirement communities promised never-ending recreational opportunities.⁸⁷ These opportunities included reading groups, cooking classes, bingo, and day trips, as well as more access to physical pursuits such as golf, tennis, and swimming.⁸⁸ (The proverbial shuffleboard was less featured than one might expect, and may in fact be something of a joke even among some of the residents in these communities). These abundant recreational activities are presented as central to the supposed lifestyles of the communities.⁸⁹ Older people featured in advertisements are always smiling, active, and blessed with unlimited energy.⁹⁰ The recreational activities, according to one promotional statement, produce the "worry-free lifestyle of your dreams."⁹¹

On a deeper level, the recreational activities and carefree lifestyle play off what Kevin E. McHugh has called "the ageless self."⁹² The idea is that through ceaseless recreation and physical activity older people can elude much-dreaded "fossilization" and "encrustation."⁹³ In both a literal and metaphorical sense, older persons can avoid becoming stiff.⁹⁴ Residents of the retirement communities can achieve a "prolongation of midlife."⁹⁵ Even life after fifty-five can be blissful and carefree.⁹⁶ Beneath the wrinkles and

83. Trolander, *supra* note 74, at 959 (demonstrating the benefits of living in an age-restricted community).

84. *Id.*

85. *Id.*

86. See Mark D. Bauer, "Peter Pan as Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to Be Exempt from Civil Rights Laws and Substantive Federal Regulation?" 21 *ELDER L.J.* 33, 38, 41 (2013).

87. See, e.g., Del E. Webb Corporation, *Del Webb's Sun City*, *ARIZONA DAYS AND WAYS MAGAZINE*, Feb. 11, 1962, at 89 (providing an example of an early Sun City advertisement).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Top 10 Reasons to Live in a Retirement Community*, *SENIOR LIFESTYLE*, <https://www.seniorlifestyle.com/blog/top-10-reasons-to-livd-in-a-retirement-community> [<https://perma.cc/BUQ3-5ZAZ>] (last visited Oct. 29, 2022).

92. See McHugh, *supra* note 14, at 103.

93. *Id.* at 111.

94. *Id.*

95. *Id.* at 106.

96. *Id.*

despite the grey hair, “the inner self” remains ready to be active, have fun, and live free of worry.⁹⁷

Overall, marketers claimed—and thousands of older persons believed—that private retirement communities could provide an escape from all the distractions and inconveniences of modern everyday life.⁹⁸ Age-segregated, recreation-based living was said to be delightful.⁹⁹ In the words of one commentator, private retirement communities offered “Peter Pan Housing”—homes where older persons do not have to grow older and get to play all day long.¹⁰⁰

II. CRITICISMS UNDER THE FAIR HOUSING ACT AND SUBSEQUENT REFORMS

The surging development of private retirement communities and the sale of thousands of units were not pure, free-market phenomena.¹⁰¹ Advanced consumer capitalism, after all, does not exist without government involvement and concomitant laws and regulations.¹⁰² That is as true for housing for older persons as it is for other consumer goods.¹⁰³ Laws related to consumer protection, estate planning, and real estate transactions to name only a few of the more obvious examples, affect the development and sale of private retirement community housing. Somewhat more surprisingly, laws regarding housing discrimination have had an impact on the development, marketing, and consumption of this housing.

The most significant law affecting this area is the federal Fair Housing Act (FHA).¹⁰⁴ While state and local housing laws are also important, the FHA will be the focus in this article, “because it is the model upon which most state and local fair housing laws are based and because it is the most comprehensive of all federal laws dealing with housing discrimination.”¹⁰⁵

97. *Id.* at 105

98. *See* Trolander, *supra* note 74, at 957, 963 (demonstrating the marketing strategies used to persuade older populations of the benefits of age-restricted communities and finding that twenty-five percent of total retirees desired to live in an age-restricted community, supporting the contention that thousands believed the communities would improve overall wellbeing).

99. *See* Trolander, *supra* note 74, at 952.

100. Jon Pynoos & Christy M. Nishita, *The Elderly and a Right to Housing*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 279, 283 (Rachel Bratt et al. eds., 2006).

101. *See* Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 212 n.92 (1978).

102. *See generally* Harry M. Trebing, *Government Regulation and Modern Capitalism*, 3 J. ECON. ISSUES, 87, 87 (1969).

103. Schwemm, *supra* note 101, at 205–06.

104. Fair Housing Act, 42 U.S.C. §§ 3601-3619.

105. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 149 (2004).

Congress enacted the FHA in 1968 to proscribe housing discrimination against people in certain protected categories.¹⁰⁶ Although these categories originally included only race, color, religion, and national origin, later amendments to the FHA added sex, familial status, and disability to the list.¹⁰⁷ In order to pacify Republican members of the Senate who threatened to filibuster the Act, Senate Democrats agreed to not criminalize housing discrimination through the FHA.¹⁰⁸ Instead, people in protected categories who believe they were the victim of housing discrimination can file a complaint either with The Department of Housing and Urban Development's (HUD) Office of Fair Housing and Equal Opportunity (FHEO) or state and local agencies that enforce similar housing laws.¹⁰⁹ Alternatively, complainants could pursue a private lawsuit in state or federal court.¹¹⁰

This approach to enforcement might strike some as toothless; moreover, administrative neglect and federal budget cutbacks have also limited the FHA's effectiveness.¹¹¹ But still, the FHA has proven quite successful in highlighting and deterring housing discrimination.¹¹² According to Julian Castro, speaking at the fiftieth anniversary of the FHA's enactment, "[o]ver the years, this groundbreaking piece of legislation has helped reduce barriers to housing opportunities for Americans of all backgrounds."¹¹³

Note that neither the original FHA nor its subsequent amendments mention age discrimination as potential grounds for someone to file a complaint filed with FHEO or even a private lawsuit.¹¹⁴ An individual might have age-discrimination claims under state or local law, but that individual cannot claim discrimination under the FHA solely because of age.¹¹⁵ Of course, this is hardly an issue for older persons in private retirement communities that try to attract older persons, rather than turn them away. And

106. This discrimination might occur not only in the renting or selling of housing, but also through the withholding or misrepresenting of housing-related information, dishonesty about housing availability, biased evaluation of credit scores, inflation of prices, and various acts involving mortgages and financing in general. See AMY M. GLASSMAN & NYDIA M. POUYES, *THE BEGINNER'S GUIDE TO THE FAIR HOUSING ACT* 1–2 (2016).

107. See 42 U.S.C. § 3604(a).

108. See generally Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 248–49 (2016).

109. See GLASSMAN & POUYES, *supra* note 106, at 14–15 (summary of enforcement under the FHA).

110. *Id.*

111. See Julian Castro, *The Fair Housing Act After Fifty Years: Opening Remarks Cardozo Law Review Symposium Benjamin N. Cardozo School of Law March 28, 2018*, 40 CARDOZO L. REV. 1091, 1092 n.3, 1097 (2019) (asserting that HUD did not “fare well” under President Trump’s budget cuts and describing a trend of “disturbing” loss of HUD staff over the years) (internal citations omitted).

112. *Id.* at 1091–92.

113. *Id.* at 1091.

114. See GLASSMAN & POUYES, *supra* note 106, at 5.

115. Schwemm & Allen, *supra* note 105, at 145.

as discussed, many developers of these communities purposefully design and pitch their housing to people fifty-five or older.¹¹⁶

Discrimination finds its place on the table, meanwhile, through a claim that private retirement communities are discriminating based on familial status.¹¹⁷ In particular, claimants can invoke the 1988 amendment to the FHA, which authorizes complaints and private lawsuits by those who believe they have been discriminated against because of their familial status.¹¹⁸ “Adults-only” housing spread rapidly in the United States,¹¹⁹ and parents with children could file complaints or initiate private lawsuits under the “familial status” language.¹²⁰

Two large studies conducted by HUD demonstrate how severely disadvantaged families with children (and especially single mothers) were when seeking to rent or buy housing.¹²¹ A surprising twenty-five percent of all rental units did not allow children.¹²² What’s more, fifty percent of all rental units had restrictive policies which made it difficult for families with children to inhabit those units.¹²³ Approximately twenty-two percent of families with children had been forced to move by hostile landlords or by restrictive policies,¹²⁴ and fifty-five percent of families with children had searched for housing for over nine weeks.¹²⁵ The situation was so difficult for families with children that nineteen percent of family members split up and lived apart from one another.¹²⁶

This sobering evidence caught the eye of influential Senators like Ted Kennedy and Arlen Specter who, along with others, urged Congress to act.¹²⁷ The 1988 familial status amendments were added to the FHA in hopes that lawsuits filed by families with children would prompt an end to widespread discrimination.¹²⁸ And indeed, families filed literally thousands of lawsuits alleging familial discrimination in the years immediately following the amendment’s enactment.¹²⁹

116. See *supra* Section I pp. 11–12.

117. See Jennifer Jolly Ryan, *A Real Estate Professional’s and Attorney’s Guide to the Fair Housing Law’s Recent Inclusion of Familial Status as a Protected Class*, 28 CREIGHTON L. REV. 1143, 1145 n.13 (1995).

118. *Id.* at 1145.

119. See generally Jonathan I. Edelstein, *Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995*, 52 U. MIAMI L. REV. 947, 948 (1998).

120. See Ryan, *supra* note 117, at 1154.

121. See generally Carl A.S. Coan, Jr. & Sheila C. Salmon, *The Fair Housing Act and Seniors’ Housing*, 27 URB. LAW. 826, 826 (1995).

122. *Id.*

123. *Id.* at 826–27.

124. *Id.* at 827.

125. *Id.*

126. *Id.*

127. See Edelstein, *supra* note 119, at 955.

128. Ryan, *supra* note 117, at 1154.

129. Edelstein, *supra* note 119, at 958–59.

The problem, meanwhile, was that most of the fifty-five-and-older private retirement communities that were being so eagerly developed and advertised could be seen as discriminating against families with children.¹³⁰ Indeed, many communities not only had explicit rules excluding children, but also had homeowners' associations prepared to enforce those rules.¹³¹ Congress wanted to protect families with children, but legislators were also receptive to the idea that older persons could and perhaps should "live exclusively among their age peers."¹³² Hence, after Congress enacted legislation designed to protect families with children, it went on to enact several exemptions to the FHA for housing for older persons.¹³³

The third of these exemptions applied directly to private retirement communities.¹³⁴ In its *original* form, this exemption required that these communities: (1) provide significant facilities and services specifically designed to meet older persons' physical and social needs, (2) commit at least eighty percent of their housing units to at least one person fifty-five years of age or older, and (3) publish and adhere to policies reinforcing these rules.¹³⁵

The requirement that there be significant facilities and services to meet the needs of older persons caused the greatest controversy, and efforts by HUD to promulgate rules regarding this requirement constituted a six-year fiasco.¹³⁶ HUD's first attempt at rule-making occurred in early 1989, but this initial attempt to define "significant facilities and services" was harshly criticized; HUD seemed to have in mind requirements that would only be appropriate for disabled, older persons who could not care for themselves.¹³⁷ Residents of private retirement communities, by contrast, were invited to see themselves not as disabled but rather as healthy, fit, and active.¹³⁸ HUD then backed off from its attempt to identify which facilities and services were "significant," and instead simply listed a wide range of possibilities that spread like a weedy vine over fifty-two pages of the *Federal Register*.¹³⁹ When criticized, HUD organized its proposed facilities and services into twelve categories and listed 114 possibilities.¹⁴⁰ Housing providers were then tentatively told that their facilities and services could be deemed "significant" if providers made at least two facilities and services from five of the twelve categories available, including at least two from categories ten ("Leisure

130. Bauer, *supra* note 86, at 42.

131. *See id.* at 38, 56.

132. *See* Coan & Salmon, *supra* note 121, at 827.

133. *Id.*

134. *See generally* Bauer, *supra* note 86, at 39.

135. 42 U.S.C. § 3607(b)(2)(C) (1992) (amended 1995).

136. *See* Bauer, *supra* note 86, at 39–41.

137. *See* Coan & Salmon, *supra* note 121, at 828–29.

138. *See id.* at 334.

139. *See id.* at 833.

140. *Id.* at 834.

Needs”) or eleven (“Health/Safety Needs”).¹⁴¹ Some opponents of HUD’s efforts characterized them as “federal bingo mandates.”¹⁴²

Finally, Congress decided to take charge of the situation.¹⁴³ As part of Republicans’ much-publicized “Contract with America,” assorted congressmen floated the idea of a “Senior Citizens Equity Act,” which, among other things, would make it easier to qualify for the fifty-five-and-older exemption.¹⁴⁴ Then, thirteen Republican congressmen from primarily Sunbelt states, where the private retirement community industry had the greatest political clout, introduced legislation eliminating the requirement that housing providers have “significant facilities and services” to qualify for an exemption.¹⁴⁵ One of these congressmen’s most pointed arguments was that the requirement would make middle-class retirement housing too expensive.¹⁴⁶

Finally, Congress passed the Housing for Older Persons Act (HOPA).¹⁴⁷ Among other things, the Act eliminated the requirement for “significant facilities and services,” and also created a “good faith reliance” immunity for private retirement communities that believed and relied on a written statement sufficient to qualify for the fifty-five-and-older exemption.¹⁴⁸ Whether this really affected older persons at all is an open question, but the provision certainly demonstrated private retirement communities’ concerns about lawsuits and possible orders to pay money damages.¹⁴⁹

In contemplating the removal of the facilities and services requirement, the ramifications for older persons themselves bear underscoring.¹⁵⁰ As previously noted, although the brochures and pamphlets hawking private retirement community housing never fail to extol the communities’ swimming pools and golf courses, in retrospect these attractions do not necessarily make living in a private retirement community more copacetic.¹⁵¹ If queried, the older persons sitting at poolside might have instead said that parking for people with disabilities would be welcome, and the older people reviewing their tee times might have requested housekeeping services. Though the exemption’s original requirements could have supported such facilities and services, the only thing that older persons

141. *Id.*

142. *See* Edelstein, *supra* note 119, at 965–66.

143. *See* Coan & Salmon, *supra* note 121, at 834.

144. *See id.* at 834–35.

145. *See id.* at 835.

146. *See* Edelstein, *supra* note 119, at 965.

147. Housing for Older Persons Act of 1995, 42 U.S.C. § 3607(b)(2)(C), (5).

148. 42 U.S.C. § 3607(b)(2)(C), (5).

149. *See* 141 CONG. REC. 10677–78 (1995) (statement of Sen. Bill Roth) (referring to lawsuits against retirement community boards and realtors as support for the HOPA).

150. *See generally* Edelstein, *supra* note 119, at 965–67 (discussing potential positive and negative effects of the HOPA for older persons).

151. *See supra* text accompanying notes 87–91; Michele Cohen, *The Old-Old Are Coming of Age*, SUN-SENTINEL, Nov. 4, 1985, at 6A.

could count on once the requirement was dropped was an environment without children.¹⁵²

Alongside the elimination of the facilities and services requirement, efforts to prevent housing discrimination against families with children *and* insure housing that served the needs of older persons ground to a halt.¹⁵³ To be sure, provisions barring housing discrimination against families with children existed in some state statutes.¹⁵⁴ Wisconsin, one example, bars housing discrimination based on family status and on other considerations in its Open Housing Statute.¹⁵⁵ Statutes of this sort enable families with children to sue if they were excluded from housing in a private retirement community.¹⁵⁶ But really, how many families with children are going to demand that older residents make room for them by suing a private retirement community in Lake Geneva or Wisconsin Dells?

Other than pursuing housing discrimination claims, those concerned with what is provided for older persons in private retirement communities might lobby for specialized statutes and regulations. One proposal calls for a certification process for private retirement communities; applicants for certification would have to show appropriate facilities and services before receiving their exemptions.¹⁵⁷ More generally, regulatory schemes are in effect or proposed for various services sold to older persons.¹⁵⁸ Something similar could be tried with private retirement communities.

But these proposals are only that, and the largest beneficiaries of both the fifty-five-and-older exemption and the collapse of HUD's regulatory efforts are the developers and marketers of private retirement

152. See Edelman, *supra* note 119, at 967.

153. See Bauer, *supra* note 86, at 42; cf. Alan Kenneth DeLaTorre, Sustainable, Affordable Housing for Older Adults: A Case Study of Factors that Affect Development in Portland, Oregon (2013) (Ph.D. dissertation, Portland State University) (on file with Portland State University's Institutional Repository, PDXScholar).

154. See Timothy C. Cashmore et al., *Housing for Older Persons: Providing for a Graying America or Unlawfully Excluding the Balance?*, 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 212, 217–20 (1997) (discussing state statutes prohibiting discrimination on the basis of family status or age).

155. WIS. STAT. ANN. § 106.50(1) (West 2018) (characterizing as “unlawful” any renting or selling of housing that treats a person unequally because of “sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status . . . lawful source of income, age, or ancestry”).

156. See Cashmore et al., *supra* note 154.

157. Elena R. Minicucci, Note, *Housing for Older Persons Exemption in the Fair Housing Amendments Act of 1988: Can Mr. Wilson Really Stop Dennis the Menace from Moving in Next Door?*, 19 NOVA L. REV. 761, 790 (1995).

158. See, e.g., Keith E. Horton, Note, *Who's Watching the Cryptkeepers? The Need for Regulation and Oversight in the Cremation Industry*, 11 ELDER L.J. 425, 452–55 (2003) (proposing state and federal legislation to regulate cremation services); Bruce A. Radke, Note, *Meeting the Needs of Elderly Consumers: Proposed Reforms for the National Association of Insurance Commissioners' Long-Term Care Insurance Model Act*, 1 ELDER L.J. 227, 249–50 (1993) (suggesting changes to the regulation of insurance sales).

communities.¹⁵⁹ By the time challenges had begun to be made to the discriminatory practices of these communities, especially with regard to families with children, the sale of housing in private retirement communities had become highly profitable.¹⁶⁰ When Congress added requirements for facilities and services to the exemption, developers feared that those requirements would complicate their marketing and lobbied their lawmakers.¹⁶¹ President Bill Clinton signing HOPA into law provided a green light to continue building, advertising, and selling housing in age-segregated retirement communities—essentially no different than the industry had done for the preceding twenty-five years.¹⁶²

One overarching reality in the control and regulation of business activities in the United States is that the government will rarely close down successful, profit-making businesses, even if they are obviously exploitative and harmful to the public.¹⁶³ A good illustration of government hesitancy and ineffectiveness in this regard involves the robust payday lending industry, which not only charges exorbitant interest on loans but also traps people on a debt treadmill, thereby worsening their poverty.¹⁶⁴ On a grander scale, the tobacco industry's products continue to coat lungs with tar, release cancerous chemicals, and cause approximately thirteen hundred people to die prematurely each year, but even a proposal to simply make cigarettes less addictive is unlikely to gain traction anytime soon.¹⁶⁵ Battles with payday lenders and the tobacco industry can be fought elsewhere, but the likely outcomes suggest how attempts to shut down private retirement communities would go. Inevitably, challenges to the discriminatory practices of private retirement communities were overcome, and developers and owners of the private retirement communities continued to sell their housing and reap their profits.¹⁶⁶

159. See Bauer, *supra* note 86, at 36, 42.

160. See *id.* at 40–42; Minicucci, *supra* note 157, at 769 n. 35.

161. See *Fair Housing Issues: Hearings Before the Subcomm. on Civ. and Const. Rts. of the H. Comm. on the Judiciary*, 103rd Cong. 365–66, 419, 421 (1994) (statement of the Hon. E. Clay Shaw, Jr.), (statement of Lori Van Arsdale, Councilmember, City of Hemet, Cal.).

162. See Bauer, *supra* note 86, at 38, 41–42.

163. See David Ray Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure of Reform*, 16 *THE SCHOLAR* 223, 226, 228, 230–33, 252 (2014).

164. See *id.* at 237 (quoting Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenges to Current Thinking About the Role of Usury Laws in Today's Society*, 51 *S.C. L. REV.* 589, 605 (2000)).

165. See Christina Jewett & Andrew Jacobs, *F.D.A. Rule Would Slash Nicotine in Cigarettes*, *N. Y. TIMES*, June 22, 2022, at A1.

166. See Edelstein, *supra* note 119, at 951–52, 954–55; John R. Dorocak, *De Facto Disparate Impact Familial Discrimination (Housing for Older Persons Age Fifty-Five and Over) Under the Fair Housing Act: Is It Legal? Is It Constitutional?*, 21 *GEO. MASON U. CIV. RTS. L.J.* 1, 9 (2010).

III. THE FAILURE OF PRIVATE RETIREMENT COMMUNITY HOUSING

After Congress eliminated the facilities and services requirement, marketing and consumption of private retirement community housing grew rapidly.¹⁶⁷ Marketers realized that Americans fifty or older had come to constitute one-third of the population, and many had ample assets.¹⁶⁸ There were lots of older people with money who could be sold on housing in private retirement communities!¹⁶⁹ New videos, television promotions, website advertisements, and all-expenses-paid visits made the printed brochures and pamphlets of the 1960s look simple by comparison, and marketers advertised a staggering array of private retirement communities.¹⁷⁰ Marketers even drew on a stable of celebrity pitchmen that older persons seemed inclined to trust.¹⁷¹

Retirement communities spread geographically, and marketers promised more and more for consumers.¹⁷² While developers continued to build in Arizona, California, and Nevada, development continued even more rapidly in Florida.¹⁷³ Before long, Florida had active retirement communities at 969 locations.¹⁷⁴ A high concentration of fifty-five-plus communities came in places in southern Florida like Broward and Palm Beach counties,¹⁷⁵ and

167. See Gordon F. Streib, *An Introduction to Retirement Communities*, 24 RSCH. ON AGING 1, 1 (2002).

168. See Leacey Brown, *5 Examples of Everyday Ageism*, S.D. STATE UNIV. EXTENSION (Feb. 21, 2020), <https://extension.sdstate.edu/5-examples-everyday-ageism> [<https://perma.cc/9GAB-4BCE>].

169. See *id.*

170. Compare *Top 3 All Inclusive Vacations: Resorts for Travelers Over 50*, ALL INCLUSIVE OUTLET (Nov. 10, 2018), <https://blog.allinclusiveoutlet.com/senior-all-inclusive-vacations/> [<https://perma.cc/D33W-L46R>], with Paul C. Luken & Suzanne Vaughan, *Active Living: Transforming the Organization of Retirement and Housing in the U.S.*, 30 J. SOCIO. & SOC. WELFARE 145, 150–51, 155–57 (2003). See generally, Chris Strom, *How to Create the Right Kind of Retirement Community Advertising*, CLEARPIVOT (Mar. 9, 2018, 7:00 AM) <https://www.clearpivot.com/blog/how-to-create-the-right-kind-of-retirement-community-advertising> [<https://perma.cc/4T99-6RG7>].

171. See Joanne Kaufman, *Trusting Tom Selleck with Your Life Savings*, N.Y. TIMES, June 25, 2017, at BU3.

172. See Bauer, *supra* note 86, at 84; David Ray Papke, *Segregation of a Different Sort: Age-Segregation in the Housing and Accommodations of Older Americans*, 29 ELDER L.J. 95, 116 (2021).

173. See Bauer, *supra* note 86, at 47–48; Bill Ness, *The 10 Most Popular States for Retirement*, 55 PLACES (June 17, 2013), <https://www.55places.com/blog/the-10-most-popular-states-for-retirement> [<https://perma.cc/V8AP-C3DK>].

174. See Victoria Araj, *11 Pros and Cons of 55+ Communities: Is It Worth It?*, ROCKET MORTGAGE (Oct. 21, 2022), <https://www.rocketmortgage.com/learn/pros-and-cons-of-55-communities> [<https://perma.cc/JXJ3-SBCS>].

175. See *Florida 55+ Active Adult Retirement Communities*, 55 PLACES, <https://www.55places.com/florida> [<https://perma.cc/G4X9-MZ5X>] (last visited Nov. 27, 2022); see generally Rebekah Monson, *Serving Two Generations*, SUN SENTINEL, May 16, 2011, at A1.

as of 2013, well over one-fourth of the residents of those counties were fifty-five or older respectively.¹⁷⁶ Century Village complexes are perhaps the best-known of the Florida retirement communities, although despite their name these communities are not particularly “village-like.”¹⁷⁷ These gated communities each feature between 5,000 and 8,000 condominiums for older persons, typically housing a combined population of over 50,000 people.¹⁷⁸ The Villages in central Florida became the largest private retirement community, boasting 60,000 units and a population of 115,000.¹⁷⁹ According to one resident, “[l]iving here is like living in a town for just retirees.”¹⁸⁰

Eventually, Florida’s massive development spilled over.¹⁸¹ When developers fully used Florida’s premier spots, the mountains and mild climates of the Carolinas, Georgia, and Tennessee became their next target.¹⁸² Eventually, every state in the nation became a home for private retirement communities and their residents.¹⁸³

As for the actual housing within private retirement communities, a range exists. The least appealing housing consists of rental units in small apartment buildings and trailers in mobile home parks.¹⁸⁴ This type of housing is relatively inexpensive and is, at minimum, child-free, but it usually lacks the amenities available in larger complexes.¹⁸⁵ Connected condominiums in two or three-story buildings with asphalt parking lots are common, especially for middle-class, older persons.¹⁸⁶ Free-standing houses are usually smaller than the houses older persons left behind, but some have luxuries such as saunas and whirlpools.¹⁸⁷ The condominiums and houses are likely to be in proximity to various swimming pools, golf courses, tennis

176. See Bauer, *supra* note 86, at 47.

177. See *id.* at 48–49.

178. See *id.* at 48.

179. J.B. Maverick, *Top 10 Active Retirement Communities in the U.S.*, INVESTOPEDIA (Sept. 15, 2021), <https://www.investopedia.com/articles/retirement/082316/top-10-active-retirement-communities-us.asp> [<https://perma.cc/5QSE-2EG2>]; see Cari Oleskewicz, *25 Most Popular Active Adult Communities in Florida*, 55 PLACES (June 8, 2021), <https://www.55places.com/blog/25-most-popular-active-adult-communities-in-florida> [<https://perma.cc/8WPN-K34G>].

180. Maverick, *supra* note 179.

181. See Bauer, *supra* note 86, at 84.

182. See *id.* One website reports that there are thirty-seven private retirement communities in Tennessee, with twenty-five of them in central Tennessee. *Tennessee 55+ Active Adult Retirement Communities*, 55 PLACES, <https://www.55places.com/tennessee/> [<https://perma.cc/66XK-4PMZ>] (last visited Aug. 5, 2022).

183. See *US Senior Living Communities Search*, SENIORHOUSINGNET, <https://www.seniorhousingnet.com/seniors/senior-living-us> [<https://perma.cc/W29D-WDFV>].

184. See Edelstein, *supra* note 119, at 965; *55+ Communities*, SENIORHOUSINGNET, <https://www.seniorhousingnet.com/care-types/55plus-communities> [<https://perma.cc/4LAY-ZXEA>].

185. See Edelstein, *supra* note 119, at 965; *55+ Communities*, *supra* note 182.

186. See Bauer, *supra* note 86, at 48–49.

187. See *55+ Communities*, *supra* note 182.

courts, and even fishing holes.¹⁸⁸ Some of the previously-mentioned Century Village complexes have clubhouses with rooms for billiards, crafts, and cards, as well as theaters large enough for touring shows.¹⁸⁹

Product differentiation is pronounced among the private retirement communities.¹⁹⁰ Differentiation is an introductory marketing concept which describes the process of distinguishing one's consumer good from others to gain sway in a given market.¹⁹¹ Through advertising and other means, a business seeks to convince consumers that a given good is special or unique.¹⁹² Sometimes, as with automobile models, the differentiating occurs among a business's own goods rather than vis-à-vis other businesses' goods. The American economist Edward Chamberlin outlined the workings of product differentiation as early as the 1930s.¹⁹³

Differentiation can be vertical, horizontal, or even both.¹⁹⁴ With vertical differentiation, marketers often rank consumer goods and hope that consumers will take those rankings to heart. As for housing in private retirement communities or private retirement communities in general, "Top 10," "Top 25," or "Top 100" ranking lists are common on the Internet.¹⁹⁵ Vertical integration routinely includes different prices for different varieties of private retirement communities.¹⁹⁶ Some purchasers might like knowing their private retirement community is "luxurious" and be prepared to pay more for that.¹⁹⁷ But vertical differentiation can also help those who want to

188. See *id.*; Bauer, *supra* note 86, at 48–49.

189. See Bauer, *supra* note 86, at 48–49.

190. See Chris Strom, *10 Inventive Marketing Ideas for Retirement Communities*, CLEARPIVOT (Sept. 27, 2019, 8:00 AM), <https://www.clearpivot.com/blog/10-inventive-marketing-ideas-for-retirement-communities> [<https://perma.cc/J8GX-V39Z>]; see, e.g., Maverick, *supra* note 179.

191. See Byron Sharp & John Dawes, *What Is Differentiation and How Does It Work?* 17 J. MKTG. MGMT. 739, 740–43 (2001).

192. See M. von der Fehr Nils-Henrik & Kristin Stevik, *Persuasive Advertising and Product Differentiation*, 65 S. ECON. J. 113, 125 (1998).

193. See EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE* 7–9, 56–57, 63 (8th ed. 1933).

194. See John Sutton, *Vertical Product Differentiation: Some Basic Themes*, 76 AM. ECON. REV. 393, 393 (1986).

195. For a ranking of Arizona retirement communities with golf courses, see *10 Best AZ Retirement Communities*, GOLF AT 55, <https://golfat55.com/best-retirement-communities/> [<https://perma.cc/3RW8-E2LS>] (last visited Oct. 20, 2022).

196. See generally Tim Regan, *How Vertical Integration of Development, Operations Can 'De-Risk' Senior Living*, SENIOR HOUS. NEWS (Nov. 19, 2020), <https://seniorhousingnews.com/2020/11/19/how-vertical-integration-of-development-operations-can-de-risk-senior-living/> [<https://perma.cc/V3AF-D4FR>]; Andrea Catizone, *Senior Living Marketing: The Power of Differentiation*, SENIOR LIVING SMART: OPERATIONS BLOG (June 23, 2014), <https://seniorlivingsmart.com/blog/power-differentiation/> [<https://perma.cc/QR85-DWQ2>].

197. See, e.g., Marlena del Hierro, *The 7 Best Luxury Senior Living Communities in Los Angeles, CA*, SENIORLY (last updated Oct. 27, 2022), <https://www.seniorly.com/resource-center/city-guides/the-7-best-luxury-senior-living-communities-in-los-angeles-ca> [<https://perma.cc/BES5-WT6A>].

pay less.¹⁹⁸ Listings exist for “cheap” private retirement communities, although the term “affordable” might be more graceful.¹⁹⁹

Horizontal differentiation among private retirement communities is less intertwined with pricing, and instead relates to such considerations as color, design, and so forth.²⁰⁰ Often it is simply a matter of cultivated consumer affinities and preferences. Hence, retirement community marketers point consumers to those communities with concentrations of older persons that share their particular religious affiliations and/or ethnic identities.²⁰¹ Niche communities are also sometimes linked to the sexual orientations of their residents.²⁰² One growing variety of horizontal differentiation involves associating private retirement communities with individual colleges and universities.²⁰³ One website lists almost 100 colleges and universities that have lent their names to retirement communities, including the University of Kentucky’s Limestone Crossing and the University of Texas’s Longhorn Village.²⁰⁴ One university-linked community that has a mildly ominous finality to it is the University of Alabama’s Capstone Village.²⁰⁵ The name eerily suggests that it is a place where actual or vicarious members of the Crimson Tide can wrap up their life’s work.

But should Greek-Americans clustered at a retirement community in Arizona, or University of Maryland alumni concentrated in a retirement community in Florida—to cite only two out of a thousand niche

198. See generally Jeff Hoyt, *How to Afford Senior Housing and Elder Care*, SENIORLIVING.ORG (last updated Sept. 21, 2022), <https://www.seniorliving.org/care/cost/affordable/> [<https://perma.cc/EHF4-CS3W>] (discussing “budget-friendly” senior living options)

199. Compare Cari Oleskewicz, *The Most Affordable Retirement Communities in Florida*, 55PLACES.COM (Sept. 17, 2021), <https://www.55places.com/blog/most-affordable-retirement-communities-florida> [<https://perma.cc/WS2J-A3F7>], with *Florida Retirement Community Homes for Sale*, REALTOR.COM, <https://www.realtor.com/realestateandhomes-search/Florida/show-55-plus/keyword-cheap> [<https://perma.cc/7LY5-57YW>] (last visited Oct. 20, 2022) (select “More Filters;” enter the term “cheap;” then select “View Results”).

200. See generally *A Guide to Senior Living Facilities Architecture Design*, DESIGNBLENDZ (Aug. 5, 2022), <https://www.designblendz.com/blog/a-guide-to-senior-living-facilities-architecture-design> [<https://perma.cc/7ADV-WDJJE>]; Catizone, *supra* note 196 (discussing non-price features that make senior living communities different from others).

201. See, e.g., *Baptist Retirement Community*, CARING.COM, <https://www.caring.com/senior-living/texas/san-angelo/baptist-retirement-community-76903> [<https://perma.cc/KC32-KVUW>] (last visited Oct. 20, 2022).

202. See, e.g., Justina Grant, *New Mexico Lands Spots on LGBT-Friendly Top 20 List*, BUS. J.: ALBUQUERQUE BUS. FIRST (Feb. 27, 2018), <https://www.bizjournals.com/albuquerque/news/2018/02/27/new-mexico-lands-two-spots-on-lgbt-friendly-top-20.html> [<https://perma.cc/UW5S-6YM5>].

203. See generally *New College Communities Custom-Built for Retirees*, AM. ASS’N RETIRED PERSONS (Aug. 14, 2019), <https://www.aarp.org/retirement/planning-for-retirement/info-2019/colleges-with-retirement-communities.html> [<https://perma.cc/6TFL-TU5X>].

204. *College-Linked Retirement Communities*, RET. LIVING, <https://www.retirementliving.com/college-linked-retirement-communities> [<https://perma.cc/B9W3-FHAR>] (last visited Oct. 20, 2022).

205. *Id.*

possibilities—be happy with the age-segregated retirement housing that they purchased? Unfortunately, housing in a private retirement community is often a bad financial investment.²⁰⁶ Aside from the fact that some of this housing is poorly constructed, it often has steep staircases, stone walls, and concrete benches that become impediments as the residents grow older.²⁰⁷ Then, too, while fifty-five-year-olds might like a closet in which golf equipment can be dumped, sixty-five-year-old residents might prefer firm railings, convenient light switches, and grab bars in their bathtubs.²⁰⁸ Those seventy-five and older might welcome wider doors and hallways that make it easier to use walkers or wheelchairs.²⁰⁹ As noted earlier, promotional videos and websites routinely promote the notion of an “ageless self,”²¹⁰ but alas, old age, if understood as a period nearing or surpassing the life expectancy of human beings, awaits most people.²¹¹ Housing that might work well for healthy, younger retirees can become undesirable as the years slip by.²¹²

Furthermore, the need for services changes. Relatively young, recent retirees in their fifties or early sixties might have only minor aches and pains and delight if good tennis lessons are available. Even those in the sixty-five to seventy-five age group, annoyed in many cases by hearing loss or complications associated with joint replacements, are still primarily looking for leisure-related services. But by the time older people reach seventy-five, more than fifty percent experience some disabling condition that impairs their quality of life,²¹³ and people in this age group start looking for different kinds of services.²¹⁴ Once older people enter their eighties, the key issue might be whether they have access to regular counseling, physical therapy, or help with daily activities such as bathing, dressing, housekeeping, and preparing meals.²¹⁵ It would be very difficult for developers to tout these kinds of services without contradicting the promises of ageless, vigorous, recreational activities that dominate their advertisements.²¹⁶

206. For a discussion on why retirement homes can be a bad investment, see Andreea, *Are Retirement Homes a Good Investment?*, RETIRING PRO: RET. INFO (last updated Jan. 4, 2022), <https://retiringpro.com/are-retirement-homes-a-good-investment/> [https://perma.cc/P8N4-XQA7].

207. See Bauer, *supra* note 86, at 42.

208. See *id.* at 42–44.

209. See *generally id.* at 43–44.

210. McHugh, *supra* note 14, at 104.

211. Aging does not take place during a definitive range of years, as the years constituting “old age” vary from culture to culture and from one historical period to another. Aging is perhaps best understood simply as a later stretch in the human life cycle. See *generally* Sinykin, *supra* note 46.

212. See Bauer, *supra* note 86, at 42–44.

213. Sinykin, *supra* note 46.

214. See LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER AND DISABLED CLIENTS 10–14 (Am. Bar Ass’n 2008) (1997).

215. See *generally* Schwemm & Allen, *supra* note 105, at 133..

216. For a list of retirement communities that offer “active lifestyle amenities,” see *Fitness, Swimming, and Trails: Top 10 Retirement Communities with This Active Adult*

In addition to facing the expense of retrofitting and dealing with the shortage of useful services, owners of housing in private retirement communities face difficulties when they attempt to sell or resell the housing.²¹⁷ Scholar Mark D. Bauer has not only exposed these difficulties but also used the sad story of Edith and Phil Bauer, his parents, as an illustration.²¹⁸ To begin with, changes in the market for retirement housing are unpredictable and do not parallel changes in markets for regular housing.²¹⁹ For example, sales prices for housing in Florida retirement communities plummeted just as the nation pulled out of the 2008 Recession and prices for regular housing were beginning to rise.²²⁰ In the words of one commentator, housing in Florida's age-restricted communities became "absurdly affordable."²²¹ Odd market fluctuations persist today, although the current demand for private retirement community housing is not as great as it was at the turn of the twentieth century.²²² The trend toward earlier retirement has apparently reversed, larger percentages of people over sixty-five continue to work, and fewer people want retirement housing.²²³ As a result, the "For Sale" listings on the Internet are lengthy.

When retirement housing owners die, their housing usually passes to their children, but these children cannot move into the properties because of covenants regarding the minimum age of new residents.²²⁴ This situation forces those children to make a tough choice: either rent; pay property taxes, assessments, and maybe even mortgage payments; or sell at rock bottom

Trifecta, PRIV. CMTY. REGISTRY: PCR LIFESTYLE BLOG, <https://www.privatecommunities.com/blog/top-10-fitness-retirement-communities.htm> [<https://perma.cc/9NZW-BFJP>] (last visited Oct. 20, 2022). For distinctions between programming offered at independent living and assisted living facilities, compare Tara Fleming Caruso, *Five Differences Between Independent Living and Assisted Living*, HEBREW SENIOR LIFE (Aug. 10, 2020), <https://www.hebrewseniorlife.org/blog/five-differences-between-independent-living-and-assisted-living> [<https://perma.cc/7CP7-YNRJ>].

217. See Bauer, *supra* note 86, at 55.

218. *Id.* at 65–80.

219. See *id.* at 52.

220. Compare Zack O'Malley Greenburg, *Florida Retirement Homes on Sale*, FORBES (Nov. 19, 2010, 12:00 PM), <https://www.forbes.com/forbes/2010/1206/investment-guide-retirement-homes-housing-florida-fire-sale.html?sh=7e580dc74a98> [<https://perma.cc/YHU3-K4X3>], with Monique Beals, *Rising Home Prices: A Timeline*, HILL: FIN. (May 5, 2022, 10:30 AM), <https://thehill.com/policy/finance/3478213-rising-home-prices-a-timeline/> [<https://perma.cc/4Z9T-NGPV>].

221. Greenburg, *supra* note 220.

222. Compare Laws, *supra* note 44, at 677 (discussing the growing presence and desire for elderly housing in the early twentieth century), with David Westenhaver, *Recession-Proof REITs: Senior Housing Demand Bounces Back After Two Catastrophic Years*, FORBES (July 12, 2022, 3:42 PM), <https://www.forbes.com/sites/davidwestenhaver/2022/07/12/recession-proof-reits-senior-housing-demand-bounces-back-after-two-catastrophic-years/?sh=3eedfcb324af> [<https://perma.cc/QVR5-T9VX>] (discussing how COVID-19 decreased the demand for senior housing).

223. See Peter H. Schuck, *The Golden Age of Aging, and Its Discontents*, 18 ELDER L.J. 25, 31 (2010) (noting that the trend for early retirement has reversed).

224. See Bauer, *supra* note 86, at 75.

prices.²²⁵ Not surprisingly, children frequently chose the latter.²²⁶ In some cases, they might even simply abandon the property.²²⁷ The children continue with their lives in some other part of the country and perhaps wish their parents had thought twice before buying into Sun City or Century Village.²²⁸

Beyond the problems involving retrofitting, acquiring needed services, and selling housing in depressed resale markets, housing in private retirement communities often presents deeper, intangible, quality-of-life issues. As already noted, residents living in this housing are isolated. The communities themselves tend to be located in suburban and semi-rural areas, far from the stimulating scramble of urban life.²²⁹ Then, too, when older persons move into these communities, they leave old friends and family members behind, frequently in distant parts of the country.²³⁰ Even with a stable of golfing buddies and a bevy of bridge-playing friends, residents of the private retirement communities often feel lonely. Spousal relationships help, assuming the spouses are still alive, but residents frequently do not have the close human connectedness that, in all age groups, helps to alleviate the angst of modern life.²³¹

The lack of age-diversity can contribute to feelings of isolation in its own way.²³² When people of different age groups live in proximity of one another, the young receive more care and supervision from older persons, and young people can be “an important resource helping to meet the needs of an aging population.”²³³ In addition, young and old alike learn about the

225. See Daniel Vasquez, *A Dilemma: What to Do with Inherited Condo*, S. FLA. SUN-SENTINEL (Dec. 16, 2008, 12:00 AM), <https://www.sun-sentinel.com/news/fl-xpm-2008-12-17-0812160502-story.html> [<https://perma.cc/5AU9-JRLQ>].

226. *Id.*; see also Bauer, *supra* note 86, at 75 (“Heirs will often sell the condominium to any[one] making an offer.”).

227. *Cf.* Vasquez, *supra* note 225 (discussing how heirs who inherit retirement properties may decline title to the property).

228. See Bauer, *supra* note 86, at 69, 74–75, 78 (highlighting that residents in 55-plus communities tend to be different parts of the country from their families, creating issues for families).

229. See Nancy Keates, *As Baby Boomers Retire, Developers Bet Urban Senior Living Will Take Off*, WALL ST. J. (Apr. 9, 2022, 11:08 AM), <https://www.wsj.com/articles/as-baby-boomers-retire-developers-bet-urban-senior-living-will-take-off-11649516882> [<https://perma.cc/2L4S-GT9U>]; see generally John Cromartie, *Rural Aging Occurs in Different Places for Very Different Reasons*, U.S. DEP’T OF AGRIC. (July 30, 2021), <https://www.usda.gov/media/blog/2018/12/20/rural-aging-occurs-different-places-very-different-reasons> [<https://perma.cc/U7P5-PA48>] (discussing, in part, that rural areas frequently are retirement destination counties).

230. See Bauer, *supra* note 86, at 50.

231. See, e.g., Rebecca L. Mauldin et al., *Social Networks in an Assisted Living Community: Correlates of Acquaintance and Companionship Ties Among Residents*, 76 J. OF GERONTOLOGY: SERIES B 1463, 1464 (2021) (discussing ways in which residents of assisted living communities may fail to connect with one another).

232. See Papke, *supra* note 172, at 96, 118 (describing how age-segregation leads to feelings of isolation).

233. Peter Uhlenberg, *Integration of Old and Young*, 40 GERONTOLOGIST 276, 279 (2000).

aging process, and their interaction can “help lessen the negative stereotypes each generation has of each other.”²³⁴

Older persons are, of course, especially likely to suffer from oversimplified images of their incompetency and confusion.²³⁵ Younger people routinely invoke a plethora of insulting terms for older persons.²³⁶ “Bidly,” “codger,” “coot,” and “geezer” are only four of the possibilities.²³⁷ Furthermore, a seemingly unlimited number of quips and jokes point to older persons’ supposed mental, physical, and sexual decline.²³⁸ One goes like so: “Have you heard the one about the rumped old man who dropped to one knee and proposed to a younger woman?”²³⁹ After she turned him down, he said “Well, if you don’t want to marry me, at least you can help me up.”²⁴⁰

Age segregation itself can contribute to older persons’ internalization of the negative stereotypes relating to their decline.²⁴¹ “Ageist stereotypes, like other stereotypes, are nurtured in an environment of high segregation.”²⁴² Furthermore, it hardly helps when older persons in age-segregated communities keep track of one another’s medical problems and look on as their fellow residents die.²⁴³ The age segregation in some private retirement communities makes those communities seem like sprawling nursing homes.²⁴⁴

Leisure and recreational activities cannot really replace the pursuit of meaningful goals and objectives. Golfing or playing bridge can be fun, but leisure activities and recreational pursuits are superficial and difficult to rely upon as the social and psychological foundations of life.²⁴⁵ Work-oriented American culture routinely affords only low expectations for your leisure if you do not have to work at the same time.²⁴⁶ Tien-Chien Tsao argues in a study of university-linked retirement communities that there is a difference between high-status leisure, which is a respite from important work, and low-

234. Tien-Chien Tsao, *New Models For Future Retirement: A Study of College/University Linked Retirement Communities* (2003) (Ph.D. dissertation, University of Michigan) (Proquest).

235. See HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 10–11 (2004).

236. *Id.* at 10.

237. *Id.*

238. Erdman B. Palmore has collected and analyzed ageist jokes. See Erdman B. Palmore, *Attitudes Toward Aging as Shown by Humor*, 12 *GERONTOLOGIST* 181, 182–83 (1971) (analyzing jokes about aging from ten different books).

239. EGLIT, *supra* note 235, at 12.

240. *Id.*

241. See Uhlenberg, *supra* note 233, at 277.

242. *Id.*

243. Cf. Stephen M. Golant, *In Defense of Age-Segregated Housing*, 348 *AGING* 22, 24–25 (1985) (discussing the benefit of retirement communities for residents who can provide mutual support).

244. See Bauer, *supra* note 86, at 54.

245. Cf. Tsao, *supra* note 234, at 4–5, 180–84 (discussing the value of work and leisure in retirement).

246. See *id.* at 26–28.

status leisure, which one might pursue after divorcing oneself from the workplace.²⁴⁷ The leisure pursuits of retirees in private retirement communities are almost always low-status leisure, and as a result contribute virtually nothing to the retirees' sense of purpose.²⁴⁸

Not everyone, of course, would agree with this negative appraisal of the quality of life in private retirement communities.²⁴⁹ Many older people living in these communities report high levels of satisfaction with their lives.²⁵⁰ Some insist that despite the expensive retrofitting to accommodate the later stages of aging and the virtually inevitable depreciation of property values, the opportunity to live a carefree existence with people your own age is worthwhile.²⁵¹ In fact, residents can be quite animated in their praise for these communities.²⁵² Perhaps these statements are, in effect, defensive justifications of what was, after all, a very expensive consumer purchase.²⁵³ Some consumers, be they buyers of retirement housing or something else, are quietly quite disappointed with their purchases.²⁵⁴ They experience "buyer's remorse."²⁵⁵ One way to palliate the remorse is to vigorously defend purchases.²⁵⁶

The defense of private retirement communities by their developers and the developers' defenders is less difficult to decipher. H. Irwin Levy, the builder of the first Century Village and a "founding father" of sorts for retirement living in Florida, never wavered in his belief that people like to live with other people who are the same age or, as he put it, "among their own kind."²⁵⁷ He harshly criticized sociologists who wrote articles suggesting that adult communities are not a good way of life.²⁵⁸ Cohen said, "I think they're great in theory but they don't know what they're talking

247. *Id.* at 4.

248. *See id.* at 1–4.

249. *See, e.g.,* Golant, *supra* note 243, at 22–26.

250. *See id.* at 23; Tsao, *supra* note 234, at 24–25.

251. *See* Golant, *supra* note 243, at 23; Tsao, *supra* note 234, at 24–25; Bauer, *supra* note 86, at 2, 43–44, 50–55 (discussing the cost of expensive retrofitting and depreciation of property values).

252. *See* Golant, *supra* note 243, at 23.

253. *See generally* Michael Lerner, *How You Can Prevent Buyer's Remorse*, WASHINGTON POST (Sept. 16, 2021), https://www.washingtonpost.com/realestate/how-you-can-prevent-buyers-remorse/2021/09/16/bf1447b8-0697-11ec-a266-7c7fe02fa374_story.html [<https://perma.cc/AM8C-TL7R>].

254. *Id.*

255. *Id.*

256. *Cf.* Mike Michalowicz, *Buyer's Defense: The 3-Step Strategy to Help Keep Customers*, AMERICAN EXPRESS, BUSINESS CLASS (Dec. 14, 2015), <https://www.americanexpress.com/en-us/business/trends-and-insights/articles/buyers-defense-3-step-strategy-keep-customers/> [<https://perma.cc/UKW7-YYGH>] (example of marketing strategy to prevent "buyer's remorse" by creating a "buyer's defense" for one's customers).

257. Michele Cohen, *At Century Village, a City of the...*, SUN-SENTINEL (Nov. 3, 1985), <https://www.sun-sentinel.com/news/fl-xpm-1985-11-04-8502190293-story.html> [<https://perma.cc/K7N4-G2NL>].

258. *Id.*

about.”²⁵⁹ He apparently missed the fact that some of these “sociologists” vigorously defended age-segregated retirement housing.²⁶⁰

Despite the spirited defense of housing in private retirement communities, living in one of these communities remains problematic.²⁶¹ Costly to maintain and difficult to resell, these communities can become “a dangerous prison with no escape for the extreme elder.”²⁶² More profoundly, these communities often fail to facilitate what older persons need most—an opportunity to develop their human potential through the final years and decades of their lives.²⁶³ Older persons may not have reflected much on aging and the life cycle before choosing to live in a private retirement community, but a clear-headed awareness of the twists and turns of social life, a critical appreciation of political issues, and meaningful interactions with people from different walks of life enrich old age just as they enrich other stages of life.²⁶⁴ Can private retirement communities truly provide their residents with opportunities to continue their personal growth?

CONCLUSION

In the present, housing in private retirement communities is a well-developed option for older persons during the final years of their lives or, at least, until they move on to assisted living facilities or nursing homes.²⁶⁵ These age-segregated communities are concentrated in Sunbelt states, but older consumers can literally find and buy housing in these communities throughout the United States.²⁶⁶ No major effort is underway to remove these communities’ exemption under the FHA or to otherwise change the requirements for these communities. The legal status of these communities is stable.

But while these communities are obviously popular among older persons, they do not necessarily serve them well. Housing in these communities is often a bad investment because it depreciates in value and is expensive to retrofit as the residents grow older.²⁶⁷ Housing in these communities can also be difficult for children and other heirs to resell when the residents die.²⁶⁸ Most importantly, these communities generally do not enable older persons to continue developing as human beings during the final

259. *Id.*

260. *See, e.g.,* Golant, *supra* note 243, at 22–26.

261. *See generally* Bauer, *supra* note 86, at 78–79.

262. *Id.* at 79.

263. *See generally* Tsao, *supra* note 234.

264. *Id.*; *see generally* Stephen M. Golant, *supra* note 243, at 22–26.

265. *See* Tsao, *supra* note 234, at 19–20; Papke, *supra* note 172, at 99.

266. *See supra* text accompanying notes 74, 119.

267. *See* Bauer, *supra* note 86 (discussing the cost of expensive retrofitting and depreciation of property values).

268. *See id.* at 54–55; *supra* text accompanying notes 222–26.

stage of their lives.²⁶⁹ In many cases, the communities do not enable the residents to grow intellectually and emotionally.²⁷⁰ They do not enhance older persons' actualization and self-esteem.²⁷¹

Housing in private retirement communities can be conceived of as an expensive consumer good, bought and sold in the context of consumer capitalism.²⁷² As is the case with other expensive consumer goods, this housing is not truly "needed." Instead, marketers of consumer goods use advertising and other means to encourage consumers to long and wish for a given good.²⁷³ Marketers prompt some type of desire.²⁷⁴ If the good is actually purchased, it supposedly accommodates the consumer's selected wishes, hopes, and fantasies.²⁷⁵ In the most pathetic of situations, some consumers not only consume a consumer good but also let the consumer good consume them.²⁷⁶ They engage in a type of self-identification with the good, presumably at the expense of richer sources of self-identification.²⁷⁷

Older persons, of course, maintain a high degree of agency and do, in fact, choose to purchase housing in private retirement communities.²⁷⁸ However, older persons' choices are influenced by advertising for the housing and by the general promise that such housing will connect purchasers to an exclusive community ensuring a carefree, "ageless" lifestyle—free from noisy, annoying children.²⁷⁹ After Congress determined that fifty-five-and-older communities need not provide particular facilities and services in order to be exempt from federal housing discrimination law, however, many private retirement communities became distinctive only to the extent they were child-free.²⁸⁰ In the end, the promise that housing in private retirement communities will bring contentment and happiness frequently goes unfulfilled.

Woven throughout the marketing and consumption of housing in private retirement communities are assorted strands of ageism, some quite

269. See generally Tsao, *supra* note 234.

270. See *id.* at 1–3, 21.

271. *Id.*

272. See *supra* Section I.

273. See generally HOROWITZ, *supra* note 23, at 134–65.

274. *Id.*

275. *Id.* at 162.

276. See Thomas C. O'Guinn & Ronald J. Faber, *Compulsive Buying: A Phenomenological Exploration*, 16 J. CONSUMER RSCH. 147, 147–50 (1989).

277. See generally *id.* at 147–57 (discussing the correlation of low self-esteem and lack of clear identity in compulsive buyers).

278. According to the distinguished historian Daniel Horowitz, consumer choice is neither a spontaneous expression of the aspirations of ordinary people nor simply imposed by marketers, advertisers, and other external forces. It is a variable combination of the two. See generally HOROWITZ, *supra* note 23, at xii.

279. See McHugh, *supra* note 14, at 104; Bauer, *supra* note 86, at 38, 42.

280. A child-free environment may be what Bauer has in mind when he speaks of developers of retirement communities being engaged in "a race to the bottom." Bauer, *supra* note 86, at 42.

troubling.²⁸¹ Ageism can take the form of genuinely biased and discriminatory acts against older persons.²⁸² In the worst of scenarios, ageists might privately abuse older persons, or perhaps try to keep them together in places where they need not be seen.²⁸³ In addition and as noted earlier, ageism includes a wide range of harmful definitions, assumptions, and stereotypes, and many older persons internalize ageist beliefs and start doubting and disliking themselves as well as other older people.²⁸⁴

A complex version of this ageist internalization occurs within the consumption of housing in private retirement communities. For starters, marketers identify an age-specific group, persons fifty-five-and-older to be exact, and invite consumers to see themselves in these terms, even though it is a reductive reification of their make-up as human beings.²⁸⁵ Sadly, many older consumers internalize the notion that they are first and foremost “seniors” or, even worse, “the elderly.”²⁸⁶ Once developers and marketers have their hooks into older persons’ mindsets, they urge older people to live with just one another, to not only accept but revel in their age segregation.²⁸⁷ Finally, as a sort of frosting on the ageist cake, people fifty-five-and-older are invited to believe that they will be able to deny the aging process, which from an ageist perspective is a decidedly bad thing.²⁸⁸

While it would be difficult to halt deceptive and ageist marketing for private retirement community housing, recognizing this process and how it works could help older consumers make better choices during the later stages of their lives. More generally, increased reflection on the manipulative practices and oppressive attitudes that manifest themselves in the marketing and consumption of housing in private retirement communities could be a first step in countering these practices and attitudes. Policymakers and shapers of our collective future, after all, should strive to create a society in which human beings of all ages can genuinely flourish.

281. See generally Medeiros, *supra* note 11, at 13; Eglit, *supra* note 235, at 10–13.

282. See generally Medeiros, *supra* note 11, at 13; Eglit, *supra* note 235, at 10–13.

283. See generally Medeiros, *supra* note 11, at 13; Eglit, *supra* note 235, at 10–13. A surprising number of people suffer from gerontophobia, that is, they harbor a morbid fear of older people and sometimes think of them as witches and demons. David Ray Papke, *Ageism: A Powerful Nemesis for Effective Workplace Discrimination Law*, 12 ALB. GOV’T L. REV. 226, 227 (2019); see Jacob Olesen *Fear of the Elderly or Aging Phobia – Gerontophobia*, FEAR OF .NET (last visited Oct. 26, 2022), <https://www.fearof.net/fear-of-the-elderly-or-aging-phobia-gerontophobia/> [<https://perma.cc/UR3G-GQJS>].

284. See generally Richard A. Posthuma, et al., *Age Stereotypes and Workplace Age Discrimination*, in THE OXFORD HANDBOOK ON WORK AND AGING 298–312 (Jerry W. Hedge et al. eds., 2012) (analysis of the state of research regarding age stereotypes and age discrimination in the workplace).

285. Medeiros, *supra* note 11, at 13. (“To assume that all people within a chronological age range are the same ignores the heterogeneity of people as they age.”)

286. See Papke, *supra* note 283, at 226–27.

287. See *supra* text accompanying notes 83–86.

288. See McHugh, *supra* note 14, at 104–06, 113.