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THE NEWEST EQUAL PROTECTION: CITY OF CLEBURNE AND A COMMON LAW FOR STATUTES AND COVENANTS AFFECTING GROUP HOMES FOR THE MENTALLY DISABLED

PETER MARGULIES*

Our society has belatedly recognized the need to accommodate the mentally ill¹ and mentally retarded.² In earlier days,

* Clinical Associate Professor, New York Law School. I thank Lewis Golinker, Herbert Semmel, Len Rubenstein, Arlene Kanter, Marc Arkin, and Michael Perlin for their ideas. Responsibility for the conclusions expressed in this article rests solely with the author.

1. Mental illness usually involves conditions in three broad categories: organic disorders, schizophrenic disorders, and affective disorders. Organic problems comprise a diverse group, but most commonly derive from aging of the brain or the ingestion of foreign substances, such as addictive drugs. Symptoms can include significant impairment of intellectual ability, memory loss, and perceptual disturbances such as delusions and hallucinations. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 101-79 (3rd ed. 1980) [hereinafter referred to as *DSM-III*]. Schizophrenic disorders usually develop before age 45, involve deterioration from previous levels of functioning, and always feature delusions, hallucinations, or other thought disturbances in some phase of the illness. See *DSM-III*, *supra* at 181-93. Symptoms can be alleviated through use of psychotropic drugs. See THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1467-68 (14th ed. 1982) [hereinafter referred to as *Merck Manual*]. These drugs, however, may have lasting, deleterious side-effects on the central nervous system. *Merck Manual*, *supra*, at 2335-36. Affective or "mood" disorders typically involve violent shifts in mood from elation to depression, sometimes combined with thought disturbances. See *DSM-III*, *supra*, at 205-24. In acute phases of the disease, electroconvulsive therapy (ECT), known colloquially as "shock treatment," is the clinician's first resort. *Merck Manual*, *supra* at 1457. For less serious manifestations, antidepressants, particularly lithium, are the treatment of choice. *Id.* at 1458-62.

2. Mental retardation involves "significantly subaverage" intellectual functioning and deficits or impairments in adaptive behavior displayed before the age of 18. *DSM-III*, *supra* note 1, at 36. Clinicians divide it into four subtypes, roughly grouped along IQ levels: Mild (IQ 50-70); Moderate (IQ 35-49); Severe (IQ 20-34); Profound (IQ below 20). *Id.* at 39. With training, mentally retarded persons can learn academic, self-care, and social skills in degrees demarcated approximately by the above four rubrics. *Id.* at 39-40. Unlike mental illness, however, mental retardation cannot be successfully "treated." No medication or other therapy can significantly alter the intellectual thresholds set forth. *Merck Manual*, *supra* note 1, at 1872-74.

While mental health professionals deal with mental illness and mental retardation in different ways, courts considering the adequacy of community and institutional care have tended to view these populations as analogous for legal purposes. See *Wyatt v.*

these groups were objects of fear.³ Until the 1960s, they were confined in large state institutions,⁴ and suffered under complementary regimes of brutality and neglect.⁵ Before the 1960s, society's concern for their life in institutions had extended only to the point of seeking to prevent them from "polluting" the gene

Stickney, 344 F.Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part, rev'd in part and rem'ded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). See also Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1314 nn.49, 50, 1318 n.54 (E.D. Pa. 1978) (key inquiry is whether record reflects that particular plaintiffs "posed a danger to society").

3. See Fernald, *The Burden of Feeble-mindedness*, 17 J. PSYCHO-ASTHENICS 87, 90 (1913) (the retarded "cause unutterable sorrow at home and are a menace and danger to the community"); L.M. Terman, *Feeble-Minded Children in the Public Schools of California*, 5 SCH. & SOC'Y 161 (1917) ("only recently have we begun to recognize how serious a menace [feeble-mindedness] is to the social, economic and moral welfare of the state. . . . [I]t is responsible . . . for the majority of cases of chronic and semi-chronic pauperism, and for much of our alcoholism, prostitution, and venereal diseases"), cited in *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3266 n.8 (1985) (Marshall, J. concurring in part and dissenting in part).

4. See, e.g., D. ROTHMAN & S. ROTHMAN, *THE WILLOWBROOK WARS* 23 (1984) [hereinafter cited as ROTHMAN]. The Rothmans note that at the Willowbrook State School, a notorious New York facility for the mentally retarded, "[b]y 1963, 6,000 residents were crammed into a space set for 4,275."

5. Robert Kennedy made an unannounced visit to Willowbrook in 1965. He later told the press that the wards of the facility were "less comfortable and cheerful than the cages in which we put animals in a zoo." ROTHMAN, *supra* note 4, at 23. At least four residents died unnecessarily in 1965, including two who were scalded to death in antiquated showers. *Id.* Yet little was done. Rothman describes the scene in 1972 when Gerardo Rivera, a lawyer-turned-television reporter, surreptitiously filmed Willowbrook life:

The images had a jumpy and elusive quality. This spindly and twisted limb was a leg; that grossly swollen organ was a head. The blotches smeared across the wall were feces; the white fabric covering the figure in the corner was a straitjacket. That crouching child, back to the camera, was naked and so was the one next to him. Both of them were on the floor; there was no furniture in the room save for a wooden bench and chair. The camera focused for a few seconds on an oddly smiling person, the only one fully clothed. That had to be the single attendant.

Id. at 17.

A court assessing conditions at the Pennhurst State School in Pennsylvania, a virtual twin of Willowbrook, observed that defendants had conceded that the facility "does not meet minimally acceptable professional standards." Halderman v. Pennhurst State School & Hosp., 446 F.Supp. at 1313. The Supreme Court, considering a different issue in the same case, subsequently asserted that,

It is common knowledge that "insane asylums," as they were known until the middle of this century, usually were underfunded and understaffed . . . [p]hysical facilities, due to consistent underfunding by state legislatures, have been grossly inadequate—especially in light of advanced knowledge and techniques for the treatment of the mentally ill.

Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 912 n.16 (1984).

pool by creating new life.⁶ Indeed, Justice Holmes, in a decision upholding a compulsory sterilization law, opined with typical forthrightness that, "three generations of imbeciles are enough."⁷

The civil rights revolution of the 1960s had a marked spillover effect on the rights of the mentally handicapped.⁸ In 1973,

6. "Massive custodial institutions were built to warehouse the retarded . . . the aim was to halt reproduction of the retarded and 'nearly extinguish their race.'" *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. at 3266-67 and n.9 (Marshall, J. concurring in part and dissenting in part), citing A. MOORE, *THE FEEBLE-MINDED IN NEW YORK* 3 (1911). The pseudo-science of eugenics, geared to selecting those "fit" and "unfit" to reproduce, took hold between 1907 and 1931, as 29 states enacted compulsory sterilization laws. See 105 S. Ct. at 3267; Gould, *Carrie Buck's Daughter*, 2 Const. Comment. 331 (1985); Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

7. *Buck v. Bell*, 274 U.S. 200,207 (1927). Cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In *Skinner*, the Court indicated its continuing reliance on *Buck v. Bell*, see 316 U.S. at 539-40, 42, while striking down a state law which mandated sterilization of habitual felons, but exempted embezzlers. The Court's opinion, by Justice Douglas, invoked the equal protection clause, U.S. CONST. amend. XIV, § 1, to invalidate "such conspicuously artificial lines." 316 U.S. at 542. This is an early example of equal protection "underinclusiveness" doctrine. See *infra* notes 94-108 and accompanying text.

In *Buck*, unlike *Skinner*, the plaintiff ostensibly had the benefit of procedures to determine the need for sterilization. 274 U.S. at 206-07. But see Lombardo, *supra* note 6, at 49-58; Gould, *supra* note 6, at 336 (hearing "cursory and contradictory"). Chief Justice Stone, concurring in *Skinner*, wanted to use the due process clause, U.S. CONST. amend. XIV, § 1, to strike down the statute, since the plaintiff was not given a hearing to "discover whether his criminal tendencies are of an inheritable type." 316 U.S. at 544. It is unclear how *Skinner* or the non-criminal Carrie Buck, facing a similar task, could possibly have proven that their problems were not inheritable. See Gould, *supra* note 6, at 334. Nevertheless, this lack of process is the only kind explanation for the *Skinner* Court's solicitude toward convicted felons, compared with the *Buck* Court's blithe acceptance of a state's authority to "interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies." 316 U.S. at 544 (Stone, C.J., concurring). Posterity has viewed *Skinner* as establishing that the right to procreate is "fundamental," and cannot be infringed absent a "compelling state interest." See *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. at 3255; Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 28-29 (1972) However, it is difficult to reconcile the requirement of a compelling state interest with the slipshod pseudo-science endorsed in *Buck*. The only other explanation is that the Court, including at different times Justices Holmes and Douglas, shared the public's prejudice against mentally retarded persons. Cf. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation); *Bradwell v. Illinois*, 16 Wall. 130 (1873) (upholding a state bar on the practice of law by women).

8. See ROTHMAN, *supra* note 4, at 50-54. As the authors note,

The civil rights movement encouraged women, prisoners, and eventually, the disabled to define themselves as oppressed minorities and to search for constitutional, not political, grounds for winning their rights. It taught them to

Congress passed the Rehabilitation Act,⁹ which barred discrimination against the handicapped in programs or activities receiving federal funds. This statute and its subsequent amendments mirror the language and texture of Title VI of the Civil Rights Act of 1964.¹⁰ Congress also enacted the Education of the Handicapped Children Act (EHA)¹¹ which established procedures to provide handicapped students, formerly shut out of the education system,¹² with "free, appropriate public" schooling.¹³ The EHA, as well as state law, declared that mentally handicapped people should receive services in the "least restrictive environment" consistent with their needs.¹⁴

Federal efforts have been less significant in one crucial area—housing.¹⁵ Mentally handicapped people often encounter

think of themselves not as poor unfortunates who should be the object of paternalism, but as competent individuals who had entitlements. This shift marks a major divide in twentieth-century social thought and social action. It moves us from Progressive protective legislation, which prohibited women from working in strenuous occupations, to agitation for equal rights; from involuntary commitment laws, which incarcerated the incompetent, to agitation for mental patients' rights.

Id. at 51-52.

9. Vocational Rehabilitation and other Rehabilitation Services Act (Rehabilitation Act), 29 U.S.C. § 701 *et. seq.* (1985). The most important provision of the Rehabilitation Act mandates that:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

10. Title VI, 42 U.S.C. § 2000d (1981), provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

11. 20 U.S.C. § 1400 *et seq.* (Supp. 1985).

12. Congress found that, "one million of the handicapped children in the United States are excluded entirely from the school system and will not go through the educational process with their peers" 20 U.S.C. § 1400(b)(4) (Supp. 1985).

13. 20 U.S.C. § 1400(c) (Supp. 1985).

14. See 20 U.S.C. § 1412(5)(B) (1978). See also, *e.g.*, Mentally Retarded Persons Act of 1977, TEX. REV. STAT. ANN., Art. 5547-300, § 7 (Vernon Supp. 1986).

15. One federal program, known as "section 202," provides direct assistance in this area in the form of loans for housing for the elderly and handicapped. See The National Housing Act, 12 U.S. § 1701q (1980). Another statute permits partial federal reimbursement for residential services for mentally retarded adults. See 42 U.S.C. § 1396d(a)(15) (1983).

difficulty in living alone.¹⁶ Small congregate facilities in the community with resident staff are their best alternative to institutionalization¹⁷ or homelessness.¹⁸ However, many cities and towns have zoning ordinances which either expressly restrict the availability of such housing,¹⁹ or otherwise operate "neutrally" to produce the same effect.²⁰ Some, but not all, states have promulgated statutes overriding these laws.²¹

Zoning is typically considered a state and local,²² not federal, matter. Nevertheless, the Supreme Court recently consid-

16. See B. BAKER, G. SELTZER & M. SELTZER, *AS CLOSE AS POSSIBLE: A STUDY OF COMMUNITY RESIDENCES FOR RETARDED ADULTS* (1977) [hereinafter cited as *Baker & Seltzer*].

17.

[G]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3253 n.6 (District Court findings).

18. Mentally ill persons, rather than those suffering from mental retardation, are most likely to be homeless. Until recently, the superior functioning of mentally ill persons taking medication, see *supra* note 1, led hospitals to release them without a fixed community placement. Often, those released found no placement but the streets. See *Klostermann v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588 (1984), *on rem'd*, 126 Misc.2d 247, 481 N.Y.S.2d 580 (Sup. Ct. N.Y. Co. 1984) (seeking structured community residences for ex-psychiatric patients, now homeless).

Other homeless individuals are poor, but are free from mental disability. See *Callahan v. Carey*, N.Y.L.J. Dec. 11, 1979, at 10, col. 5 (Sup. Ct. N.Y. Co.). Many families now fall into this category, as well. See, e.g., *Koster v. Webb*, 598 F. Supp. 1134 (E.D.N.Y. 1983).

19. See, e.g., *Cleburne Zoning Ordinance*, Section 8, set out in *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. at 3252 n.3.

20. Most neutral ordinances restrict permissible uses to single-family occupancy, barring group homes, commercial uses, etc. See *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218 (1984), *dism'd for want of a substantial federal question*, 105 S. Ct. 57 (1984); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Compare *McMinn v. Town of Oyster Bay*, 498 N.Y.S.2d 128 (Ct. App. 1985) (striking down ordinance on state constitutional grounds). Similar limits appear in restrictive covenants. See, e.g., *Crane Neck Ass'n v. New York City/Long Island County Services Group*, 61 N.Y.2d 154, 460 N.E.2d 1336 (1984), *app. dism'd, cert. denied*, 105 S. Ct. 60 (1984). See also *infra* notes 126-29 and accompanying text.

21. See, e.g., AL. HEALTH & SAFETY CODE § 1566 et. seq. (West 1979 and Supp. 1985); CONN. GEN. STAT. § 8-3c (Supp. 1985); N.D. CENT. CODE § 25-1614(2) (Supp. 1983); R. I. GEN. LAWS, § 45-24-22 (1980). See also MD. HEALTH CODE ANN. § 7-102 (Supp. 1984); N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1984-85) (saturation of community with existing community residences is sole basis for contesting siting of new facility).

22. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding wide ambit of discretion for zoning authorities).

ered the validity of an expressly restrictive ordinance under the equal protection clause. In *City of Cleburne v. Cleburne Living Center*,²³ the Court, in a unanimous decision, struck down the challenged law. However, a majority of the Court declined to declare that the mentally retarded constitute a suspect class, like racial minorities,²⁴ or a quasi-suspect class, like women.²⁵ A minority of the Court split on its approach. One group favored granting the mentally retarded quasi-suspect status.²⁶ The other group argued that one standard of review was appropriate for all equal protection cases, regardless of the group affiliation of plaintiffs.²⁷

This article first briefly reviews the facts and law of the *Cleburne* decision, summarizing the three positions which the members of the Court espoused. It identifies a principle underlying the majority's view: skepticism about radically underinclusive classifications.²⁸ Next, in light of *Cleburne*, it discusses the

23. 105 S. Ct. 3249 (1985).

24. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

25. See, e.g., *Califano v. Westcott*, 443 U.S. 76 (1979) (provision of Social Security Act providing benefits to families whose dependent children have been deprived of parental support because of unemployment of the father but not the mother held unconstitutional as not substantially related to the attainment of statutory goals); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (provision of Social Security Act requiring that widower prove dependency on wife in order to receive survivor's benefits held unconstitutional as discriminating against working females by granting their spouses less protection); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (provision of Social Security Act barring widower from receiving benefits based on earnings of deceased wife held unconstitutional based upon same rationale as *Goldfarb*); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating statutes which deem spouses of male members of uniformed services to be dependents for allowance and benefits purposes, while requiring spouses of female members to prove that they are dependent for over one-half of their support); *Reed v. Reed*, 404 U.S. 71 (1971) (striking down Idaho probate code provision which gave preference to men over women of equal entitlement class when appointing administrators of estates). But see *Rostker v. Goldberg*, 453 U.S. 57 (1981), which held that Congress did not act unconstitutionally in declining to authorize registration of women, as well as men, for the draft. This result may be explained, however, by the majority's desire to uphold "Congress' authority over national defense and military affairs." *Id.* at 2651. Justice Rehnquist, writing the opinion of the Court, asserted that, "in no other area has the Court accorded Congress greater deference." *Id.*

26. See 105 S. Ct. at 3263 (Justice Marshall, joined by Justices Brennan and Blackmun, concurring in part and dissenting in part). See also *infra* notes 87-92 and accompanying text.

27. See 105 S. Ct. at 3260 (Justice Stevens, joined by Chief Justice Burger, concurring). See also *infra* notes 84-86 and accompanying text.

28. For a pioneering discussion of this important concept, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346-53 (1949). See also *infra*

utility of clear rules and more flexible standards in equal protection jurisprudence. It concludes that, in dealing with the problems of mentally retarded persons, a seemingly simple rule might prove to be more troublesome than the broad standard which the Court adopted.²⁹

The situation which the *Cleburne* majority distinguished, the case of the facially neutral statute,³⁰ presents greater difficulties. A challenge to this type of law may not be cognizable under the equal protection clause, or indeed any source of federal law.³¹ However, I urge that courts take their cue from Calabresi³² in this context, and interpret neutral statutes as part of a new landscape dominated by state and federal policy, as well as social science research, favoring accommodation of the mentally handicapped.³³ Similarly, based on the approach of Landis³⁴ and Harlan,³⁵ I recommend that the common law of neutral restrictive covenants incorporate accommodational concerns.³⁶ This is necessary if mentally retarded persons seeking housing are to receive "the equal protection of the laws" in function as well as form.

I. THE SUPREME COURT'S DECISION

A. Facts

The *Cleburne* plaintiffs sought to establish a group home for the mentally retarded in an apartment house district identified as "R-3" under the local zoning ordinance.³⁷ The ordinance permitted multiple dwellings, boarding houses, residential hotels, hospitals, sanitariums, and nursing homes.³⁸ It required a

notes 93-108 and accompanying text.

29. See *infra* notes 109-26 and accompanying text.

30. See 105 S. Ct. at 3254 n.8.

31. *Id.* See also *infra* notes 129-31 and accompanying text.

32. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) [hereinafter cited as *Calabresi*].

33. See *infra* notes 132-89 and accompanying text.

34. See Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (R. Pound ed. 1934).

35. See *Moragne v. States Marine Line*, 398 U.S. 375 (1970). See also *infra* notes 175-77.

36. See *infra* notes 187-89 and accompanying text.

37. 105 S. Ct. at 3252 n.3.

38. *Id.*

special permit, with an application signed by adjacent property owners, for "[h]ospitals for the insane or feebleminded, or alcoholic or drug addicts, or penal or correctional institutions."³⁹ The reference to the "feebleminded" had appeared in various versions of the ordinance since 1947.⁴⁰ Its apparent inspiration was a similar allusion in a Dallas code enacted in 1929,⁴¹ just after Justice Holmes' opinion in *Buck v. Bell*,⁴² and shortly after the era in which titles like *The Menace of the Feeble Minded in Connecticut* were "commonplace."⁴³

In *Cleburne*, the town advanced a number of reasons for denying plaintiffs a permit. First, they cited the "negative attitudes" of nearby property owners, whose signatures were necessary under the ordinance.⁴⁴ Next, it cited two factors related to the home's proposed location. The home would be across the street from a junior high school, and the town asserted that students might harass home residents.⁴⁵ In addition, the home was to be located, like the rest of the district, on a "five hundred year flood plain," which risked inundation every half-millennium.⁴⁶ Other concerns which the town invoked included uncertainty about legal responsibility for the actions of home residents,⁴⁷ fire safety,⁴⁸ and congestion, both in the home and caused by the home in the community.⁴⁹

The District Court applied the rational basis test, the lowest level of review available in equal protection cases,⁵⁰ and upheld the town's denial of a special permit.⁵¹ The Fifth Circuit Court of Appeals reversed, applying the heightened or "middle level"

39. *Id.*

40. *Id.* at 3268 n.17 (Marshall, J., concurring in part and dissenting in part).

41. *Id.*

42. 274 U.S. 200 (1927). *See also supra* note 7.

43. *See* 105 S. Ct. at 3266 n.8 (Marshall, J., concurring in part and dissenting in part).

44. 105 S. Ct. at 3259.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 3260.

49. *Id.* at 3259-60.

50. *See* 105 S. Ct. at 3253 (discussing District Court decision). Courts often invoke the rational basis test to uphold government regulation of business. *See* 105 S. Ct. at 3254, citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (sustaining municipality's selective ban on pushcart food vendors in French Quarter).

51. 105 S. Ct. at 3253.

scrutiny employed in gender discrimination matters.⁵² It reasoned that the history of "unfair and often grotesque mistreatment" of the mentally retarded tended to show that present discrimination against them reflects "deep-seated prejudice."⁵³

B. The Law

1. The Applicable Standard

Justice White, writing for the majority, noted that most governmental decisions enjoy presumptive validity under the equal protection clause.⁵⁴ This presumption allows "democratic processes" maximum leeway in correcting "improvident decisions," while limiting the role of the federal judiciary, the least democratic branch of government.⁵⁵ Certain statutory classifications, however, isolate factors so irrelevant to any legitimate governmental interests that the courts are obliged to review them more carefully, as they are likely to "reflect prejudice and antipathy."⁵⁶ Race, alienage, and national origin are classifications which courts subject to "strict scrutiny." They survive judicial review only if they are necessary for fulfillment of a "compelling

52. 726 F.2d 191, 196-200 (5th Cir. 1984). For a summary of some significant gender discrimination decisions, see *supra* note 25. The Fifth Circuit noted that heightened scrutiny was especially appropriate given the facts in *Cleburne*, in which the government restricted the availability of housing, a vital resource. 726 F.2d at 199-200, citing *J.W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983). Cf. *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas prohibition of public education for children of illegal aliens on grounds that education is a significant, although not "fundamental," right).

53. 726 F.2d at 197.

54. 105 S. Ct. at 3254.

55. *Id.* Unlike executives and legislators, who must periodically submit themselves to the pleasure of the electorate, federal judges are appointed for life. U.S. CONST. art. III § 1. By design, the federal judiciary is thus removed from the pressures of democratic accountability. See also *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). The Court observed in *Carolene Products* that prejudice against minorities "may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152 n.4. This footnote has set the tone for the Court's subsequent development of equal protection jurisprudence. See J. ELY, *DEMOCRACY AND DISTRUST* (1980); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1001 (1978). But see Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (suggesting that racial minorities might now be adequately represented in the political sphere).

56. 105 S. Ct. at 3255.

state interest.”⁵⁷ Restrictions on “fundamental rights” like voting⁵⁸ and travel⁵⁹ are similarly suspect.⁶⁰ An intermediate level of review is appropriate for classifications based on gender and illegitimacy, which are also typically irrelevant to functional capacity.⁶¹ These distinctions must be “substantially related to a[n] . . . important governmental interest.”⁶²

The *Cleburne* majority decided that classifications based on mental retardation require no more than the lowest standard of review: they must serve a “rational” state interest.⁶³ Justice White noted that not even plaintiffs in the instant case denied that the mentally retarded suffer from a “reduced ability to cope with and function in the everyday world.”⁶⁴ Therefore, mental retardation may be a *relevant* factor in the allocation of social goods, different from irrelevant factors like race and gender.⁶⁵ An example of this relevance, not specified by Justice White, might be employment as a surgeon. A mentally retarded person would by definition lack the I.Q. and fine motor skills necessary in such an occupation.

White also argued that, since the mentally retarded are a

57. *Id.*

58. See *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

59. See *Shapiro v. Thompson*, 394 U.S. 618 (1969). See also *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (Brennan, J., joined by Marshall, Blackmun, and Powell, concurring) (Alaska's preference for established residents over newcomers in apportionment of annual mineral income violates right to travel); *id.* at 71 (O'Connor, J., concurring).

60. 105 S. Ct. at 3255.

61. *Id.* See also *supra* note 25, discussing gender discrimination cases.

62. 105 S. Ct. at 3255, citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

63. See 105 S. Ct. at 3255-58.

64. *Id.* at 3256 and n.9. See also *supra* note 2.

65. 105 S. Ct. at 3256. One could argue that, like race and gender, mental retardation is an “immutable” characteristic, and that people should not be treated differently based on factors they cannot control. See G. GUNTHER, *CONSTITUTIONAL LAW* 753-54 (9th ed. 1975) [hereinafter cited as G. GUNTHER]. The *Cleburne* majority dismissed this notion with a wave to Ely:

Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there? See J. ELY, *supra* note 55, at 150 (footnote omitted), cited at 105 S. Ct. at 3256 n.10.

diversified group with a wide range of disabilities,⁶⁶ a broad judicially fashioned rule would be less appropriate than deference to a legislature "guided by qualified professionals."⁶⁷

In addition, White viewed the recent legislative gains⁶⁸ of the mentally retarded as belying the need for more vigorous review. New reform statutes, according to White, demonstrated that democratic processes *do* work for the mentally retarded, and that judicial action supplementing those mechanisms is unnecessary.⁶⁹ Moreover, much new legislation targeting the needs of this group assumes the existence of some relevant differences between the mentally retarded and others.⁷⁰ A heightened standard might raise lawmakers' doubts about the validity of relying on such assumptions, thus leading them to "refrain from acting at all."⁷¹

Finally, White observed, identifying the mentally retarded as a "quasi-suspect" class would make it difficult to deny the same status to other groups with special traits, like the "aging, the disabled, the mentally ill, and the infirm."⁷² The majority did not wish to work this kind of marked expansion in equal protection doctrine.⁷³

2. Applying the Standard

Having explained at some length why rational basis review, usually just a rubber stamp for governmental decisions,⁷⁴ was appropriate, Justice White rather casually applied this standard to strike down the challenged ordinance. The majority first de-

66. 105 S. Ct. at 3256.

67. *Id.* For a case ceding substantial discretion to professionals in dealing with conditions in institutions for the mentally retarded, see *Youngberg v. Romeo*, 457 U.S. 307, 321-25 (1982).

68. See *supra* notes 9-14 and accompanying text.

69. 105 S. Ct. at 3256-57. Justice White cited one federal statute, the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010 (1), (2) (1983), which states that mentally retarded persons should receive services in a setting "least restrictive of [their] personal liberty." 105 S. Ct. at 3256. Interestingly, the Court had previously held, in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), that this statute was merely precatory, and conferred no enforceable rights.

70. 105 S. Ct. at 3257.

71. *Id.*

72. *Id.* at 3257-58.

73. *Id.* at 3258.

74. See *supra* note 50.

cided to review the ordinance only "as applied" in this particular matter, in order to avoid "unnecessarily broad constitutional judgments."⁷⁵ White then dismissed what might be called the "subjective" strand of defendants' justifications for denying a special permit, the "negative attitudes" of adjacent property owners.⁷⁶ Since such views, if given credence, could support even the most invidious discrimination,⁷⁷ the Court looked for more objective criteria.⁷⁸

The Court found these criteria, like fear of congestion, fire, flooding, and other problems,⁷⁹ unconvincing because defendants did not apply them uniformly. Nothing about the proposed group home would have been objectionable if it had been associated with the wide spectrum of uses permitted under the ordinance, including boarding houses, hospitals, nursing homes, or family dwellings.⁸⁰ The home met all state and federal standards for group housing in the community.⁸¹ The record supplied no reason for treating a group home differently from the ordinance's permitted uses.⁸² According to the Court, defendants' objective justifications were essentially pretexts for acting on "irrational prejudice."⁸³

C. Other Justices' Views

Justice Stevens, along with Chief Justice Burger, agreed with the majority's result, but wrote separately to express his dissatisfaction with the entire tier or level system which the

75. 105 S. Ct. at 3258.

76. *Id.* at 3259. *Cf.* *Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982). In *Cornwell*, the court upheld a district court decision finding a community group liable under 42 U.S.C. § 1985(3) for conspiring to deny the mentally retarded the equal protection of the laws, and conspiring to "prevent and hinder" the state from providing equal protection to the mentally retarded. The community group, upon learning that the state had contacted local officials about acquiring a house to use as a community residence for the mentally retarded, purchased the property. It then sought to sell the house for a figure which, it told prospective buyers, was "below the market price to defeat New York's plan to use [the house] as a community residence. . . ." 695 F.2d at 38. The group repeatedly declined to sell the property to New York State. *Id.*

77. 105 S. Ct. at 3259.

78. *Id.*

79. *Id.* at 3259-60.

80. *Id.*

81. *Id.* at 3260, *citing* 42 CFR § 442.447 (1984).

82. 105 S. Ct. at 3260.

83. *Id.*

Court has developed under the equal protection clause. The tier structure, Stevens asserted, serves to obscure, rather than explain the "decisional process."⁸⁴ Stevens urged the universal adoption of a flexible rational basis test, something like the one the majority employed in *Cleburne*.⁸⁵ This standard could accommodate what Stevens saw as the "continuum of judgmental responses to differing classifications" at the heart of equal protection jurisprudence.⁸⁶

Justice Marshall, joined by Justices Brennan and Blackmun, wrote to protest the majority's rejection of heightened or middle-tier scrutiny. Marshall contended that this rejection, coupled with the majority's "as applied" approach,⁸⁷ furnishes little guidance for future courts and players.⁸⁸ This is particularly dangerous, the Justice continued, because the *Cleburne* majority in fact, if not in rhetoric, applied a test more probing than the traditional rational basis rubber stamp.⁸⁹ Bewildered lower courts might extend this invigorated standard into inapposite areas, like government regulation of commerce.⁹⁰ In addition, while Marshall conceded that mental retardation might be a relevant factor in allocating certain social goods, the *Cleburne* result showed it could also be irrelevant. According to Marshall, the government should bear the burden on this issue.⁹¹ Marshall also attacked the majority for citing recent reform legislation as a reason to resist heightened judicial scrutiny. The Court, he observed, had not let such political developments affect its analysis

84. *Id.* at 3261.

85. *Id.* at 3261-63.

86. *Id.* at 3260-61.

87. *Id.* at 3272-75. For further criticism of the Court's "as applied" analysis, see The Supreme Court, 1984 Term: Leading Cases, 99 HARV. L. REV. 120, 170-73 (1985).

88. *Id.* at 3265.

89. *Id.* at 3264-65.

90. *Id.* at 3265, citing *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Court applied an invigorated rational basis test to strike down a law establishing maximum hours for bakery employees. The majority's "substantive due process" inquiry, with its emphasis on the "liberty" of employers and employees to bargain freely about hours and other job features, bears a kinship to the more modern fundamental rights equal protection decisions. Cf. G. GUNTHER, *supra* note 65, at 567. See also *supra* notes 58-60 and accompanying text. *Lochner* and its progeny in the area of economic and social regulation, see, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down minimum wage law), are "now universally acknowledged to have been constitutionally improper." See J. ELY, *supra* note 55, at 14-15.

91. 105 S. Ct. at 3270-71.

in the area of race, which was still deemed suspect despite comparable legislative activity.⁹²

II. THE CENTRAL *Cleburne* PRINCIPLE: UNDERINCLUSIVENESS TRIGGERS MORE SEARCHING REVIEW

Although Justice Marshall accused the *Cleburne* majority of leaving lower courts without guidance,⁹³ the majority's decision actually has a clear fulcrum: the lack of "fit" between the language of *Cleburne*'s zoning ordinance and the objectives ostensibly served by the town's denial of a special group home permit. This "means focused"⁹⁴ analysis, much like its younger sister standard, middle-level scrutiny,⁹⁵ seeks to determine whether governmental classifications are substantially related to important state objectives. It follows from two common flaws of rules, including laws.

Some rules purport to cope with a particular mischief, but only cover part of it. Such rules are called "underinclusive."⁹⁶ Other rules also target a given mischief, but cover persons or situations which do not contribute to the mischief. These rules are referred to as being "overinclusive."⁹⁷ Sometimes, rules can be both.⁹⁸ Governments are not obliged to fashion a perfect fit,

92. *Id.* at 3269. *But see* Ackerman, *supra* note 55 (arguing that increased political power of racial minorities weakens case for constitutional protections).

93. *Id.* at 3272-75.

94. *See* Gunther, *supra* note 7, at 20-37. Unlike substantive due process and fundamental rights equal protection analysis, which limit the ends which government can accomplish, means scrutiny inquires only about the evenhandedness with which government promotes ends. One commentator has termed means scrutiny an "avoidance device." *Id.* at 26-27. This type of analysis "does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact." *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring), *cited in* Gunther, *supra*, at 22-23. However, even if a broader measure would be constitutionally permissible, the very fact that it would affect much larger numbers of people creates a risk of "political retribution" that contains official action almost as comprehensively as a finding of constitutional infirmity. 336 U.S. at 112-13, *cited in* Gunther, *supra*, at 23. For this reason, the Court employs means analysis sparingly. *See infra* notes 99-100 and accompanying text.

95. *See supra* note 25 and accompanying text.

96. *See* Tussman & tenBroek, *supra* note 28, at 346-53.

97. *Id.* at 351-52.

98. *Id.* at 352-53. To illustrate this, the authors cited *Hirabayashi v. United States*, 320 U.S. 81 (1943), in which the Court upheld a federal statute, enacted after the United States entered World War II, which classified all "American citizens of Japanese ancestry" as creating a threat of sabotage. Since other persons, including Americans of Ger-

particularly in areas of affirmative largesse like the availability of cash benefits⁹⁹ or novel criminal defenses.¹⁰⁰ Nevertheless, governments should not act arbitrarily,¹⁰¹ or with prejudice against any one group.¹⁰² Too loose a fit promotes the inference that the objective advanced is only a pretext for accomplishing impermissible objectives.¹⁰³

In *Cleburne*, the application of the challenged ordinance was patently underinclusive. Its purposes, according to the town, were, *inter alia*, minimizing congestion and insuring flood and fire safety.¹⁰⁴ Yet, the permit process did not affect major uses like hospitals, nursing homes, or dormitories, which could be expected to pose much greater problems than a group home.¹⁰⁵ In light of this functional underinclusiveness, the Court declined to

man and Italian ancestry, were also likely saboteurs under this logic, the statute was underinclusive. Additionally, since not all Americans of Japanese descent were traitors, it was also overinclusive. Interestingly, the Court cited national emergency as a basis for leaving the law untouched.

99. See *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) (since state has no constitutional obligation to provide welfare benefits, invalidating limit on number of dependents in family eligible for benefits might force state to eliminate benefits entirely).

100. See *Patterson v. New York*, 432 U.S. 197, 205-09 (1977). In *Patterson*, the Court held that a state may constitutionally shift the burden of proof to a criminal defendant to establish diminished capacity. It reasoned that if the defense was too easy to make, no state would give defendants the option.

101. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (striking down statute which extinguished timely filed handicap discrimination claim if state Commission, through inadvertence, failed to convene factfinding conference within 120 days of filing).

102. See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). In *Moreno*, the Court struck down a section of the Food Stamp Act which excluded any household containing an individual who was unrelated to any other member of the household. Legislative history indicated that Congress intended to prevent "so-called 'hippies' and 'hippie communes' from participating in the food stamp program." 413 U.S. at 534, citing H.R. Conf. Rep. No. 91-1793, at 8; 116 Cong. Rec. 444439 (1970) (Sen. Holland).

103. For example, in *United States Dep't of Agriculture v. Moreno*, 413 U.S. at 535, the government asserted that the exclusion of households containing any unrelated persons helped minimize fraud in the food stamp program. The Court noted, however, that those recipients with sufficient resources to render them ineligible for the program could simply alter their living arrangements, thus avoiding the rule. *Id.* at 537-38 (quoting California Social Welfare Director). Only people so poor that they had to double up in living quarters to afford accommodations would be hurt. Yet, these people, because of their paucity of resources, would virtually always be otherwise eligible for food stamps. According to the Court, an "anti-fraud" provision which targeted people who could not possibly be guilty of fraud was "wholly without any rational basis." *Id.* at 538.

104. 105 S. Ct. at 3259-60.

105. *Id.*

credit the town's putative rationale.¹⁰⁶

Underinclusiveness in zoning can involve "area" restrictions, as well as the kind of "use" restriction struck down as applied in *Cleburne*. While use restrictions curtail the possible uses of land (like group homes and hospitals), area restrictions specify the size and shape of individual parcels (such as dimensions of rear-yards and driveways). A town cannot consistently grant area variances to other uses, and then deny them to a group home.¹⁰⁷

A useful complement to functional disparities is what I will call "chronological underinclusiveness." In this situation, a town with a use-permissive ordinance, allowing for hospitals and dormitories, with no mention of group homes, changes the law to expressly exclude group homes when it receives its first application to establish one. This is even stronger evidence of discriminatory purpose.¹⁰⁸ Such a law would probably fall, even if the town expressly barred new hospitals, nursing homes, and the like, too, if the ordinance "grandfathered" existing nonconform-

106. See also *Galioto v. Dept. of the Treasury*, 602 F. Supp. 682 (D. N.J. 1985), *vacated as moot*, 106 S. Ct. 2683 (1986). In *Galioto*, the court applied rational basis review to invalidate a statute which denied former mental patients the right to contest a bar on their purchase of firearms, but extended that right to others, including certain convicted felons. 602 F. Supp. at 688-90.

In addition to underinclusiveness, the *Cleburne* Court may have relied on the history of abuse of the mentally retarded, see *supra* notes 3-7 and accompanying text, and on the importance of the interest which plaintiffs advanced. The District Court had found that the disputed ordinance deprived the mentally retarded of access to community housing. 105 S. Ct. at 3253. This benefit, although "not fundamental," is obviously "very important." *Id.* (paraphrasing District Court). Together with underinclusiveness and a history of abuse of the retarded, denial of such a crucial benefit provides a compelling justification for a closer look at the challenged statute. See also *Plyler v. Doe*, 457 U.S. 202 (1982) (disadvantaged class, illegal alien children, deprived of important benefit, public education); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (level of scrutiny related, *inter alia*, to "societal importance of the interest adversely affected"); Note, *Constitutional Law: Activating the Middle Tier After Plyler v. Doe: Cleburne Living Center v. City of Cleburne*, 38 OKLA. L. REV. 145 (1985).

107. See *Human Development Services of Portchester, Inc. v. Village of Port Chester*, 493 N.Y.S.2d 481 (App. Div. 2d Dept. 1985). The court observed that, "In the absence of a rational explanation for the denial, the frequency of granting other yard-setback variances, in some instances of far greater magnitude, suggest that the respondent zoning board engaged in a subtle form of discrimination against petitioner. . . ." *Id.* at 486.

108. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252,267 (1977) (dicta on racial discrimination).

ing uses. Grandfathering would simply perpetuate functional underinclusiveness, with its inference of discrimination.

The *Cleburne* standard therefore encompasses underinclusiveness in all mixed-use, i.e., more than one-family-home-only, communities. The majority's decision may have formally invalidated the ordinance only "as applied." Despite Justice Marshall's concern about the narrowness of that holding, however, the logic of the decision extends much further.

III. THE LAWMAKERS' DILEMMA: RULES VERSUS STANDARDS

Much law derives from the conflict between the two crucial values of flexibility and certainty. Without certainty in the law, people have no sure way of discerning their obligations, and acting accordingly.¹⁰⁹ Since many laws "substantially affect . . . primary decisions respecting human conduct,"¹¹⁰ the result would be paralysis in social and economic interaction. However, law must also consider the different interests presented in each case and the myriad factual contours which set cases apart. In a given matter, a rule can be under or overinclusive. A single rule which covers overly disparate cases provides certainty at the expense of flexibility. This trade-off can produce absurdity, coupled with injustice.¹¹¹

In the following discussion, the term "rule" refers to a clear, precise dictate uniformly applied. Many statutes, particularly penal statutes,¹¹² fit under this rubric.¹¹³ The term "standard,"

109. See, e.g., Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 232-34 (1983); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

110. *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

111. See, e.g., Moore, *supra* note 109, at 277-78, citing *Riggs v. Palmer*, 115 N.Y. 506 (1889). In *Riggs*, the court declined to follow the New York Probate Code's clear command governing inheritance, since the heir had murdered the decedent. Permitting the heir to inherit, the court asserted, would have been "manifestly contradictory to common reason." 115 N.Y. at 511.

112. See, e.g., N.Y. PENAL LAW § 140.25 (McKinney 1975) (defining burglary).

113. But see 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies "in restraint of trade." This is much closer to a common law formulation, subject to ongoing definition by the courts. Of course, non-statutory law also has developed certain rules. A good example is the bar on parol evidence to supplement the terms of a written contract. See Kennedy, *supra* note 109, at 1691-92. This type of rule has the same objective as a similarly clear statutory provision: it is designed to foster certainty among parties and instrumentalities, like courts, called upon to review

on the other hand, refers to a looser test with more room for the exercise of judicial discretion.

Cleburne nicely illustrates the tension between these two paradigms in the constitutional arena. Much of the Court's modern jurisprudence, particularly equal protection, has involved the "statutorification" of certain glosses on constitutional text. The architecture of the tier system is one manifestation of this trend. In the area of *de jure*¹¹⁴ discrimination against racial minorities, for example, the Court has been at pains to eliminate legal nooks or crannies where bigots might take comfort.¹¹⁵ The rationale for a rule here resides in the "fit" of the command: it is difficult to envision a situation where a decisionmaker *legitimately* takes race into account.¹¹⁶ Therefore, forbidding acting on bias against racial minorities does not stifle any worthwhile activity.

In a growing number of cases, however, the Court has felt the need to probe governmental decisionmaking without the calcification born of formulating comprehensive rules.¹¹⁷ These cases owe more to the accretional, common law model of constitutional adjudication discerned by Justice Stevens.¹¹⁸ This ap-

the parties' actions. *Id.*

114. See *Keyes v. School Dist. #1, Denver, Colo.*, 413 U.S. 189 (1973). In *Keyes*, the Court defined *de jure* segregation as encompassing not only statutorily mandated dual school systems, but also any deliberate official action aimed at separation of the races. 413 U.S. at 201-03.

115. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (existence of *de jure* discrimination in 1954 was evidence of discrimination more than 20 years later). See also *Hunter v. Underwood*, 105 S. Ct. 1916, 1922-23 (1985) (statute concededly enacted with discriminatory purpose violates equal protection, even though it would be valid if reenacted without such motive).

Outside of the racial discrimination/equal protection context, a good example of "statutorification" is *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court fashioned an incantation which arresting officers could recite to all suspects to defeat an inference of coercion under the fifth amendment.

116. This statement does not address "affirmative action" to aid minorities. As Ely points out, this type of classification does not necessarily call for corrective judicial action, since there is no reason to suppose that the political process has broken down when a majority elects to discriminate against itself. J. Ely, *supra* note 55, at 170-72. A majority, as opposed to a "discrete and insular" minority, has sufficient political power to eliminate such discrimination if it wishes. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

117. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982). See also *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), discussed *supra*, notes 102-03. Cf. Gunther, *supra* note 7.

118. See *supra* notes 84-86 and accompanying text.

proach is well-suited to the particular problems posed by mental retardation. As the Court pointed out in *Cleburne*,¹¹⁹ the case against *all* discrimination based on the presence of mental retardation is not quite as clear as it is with race. A blanket rule would be overinclusive. It would encompass legitimate regulation, like prohibiting those suffering from mental retardation from practicing surgery or handling "hazardous equipment."¹²⁰ It might also render problematic arguably benign classifications, like a state statute which sweeps aside restrictive zoning ordinances but specifies a more focused procedure solely for the establishment of group homes for the mentally disabled.¹²¹ Although Justice Marshall contended that such classifications would survive heightened scrutiny,¹²² he neglected to appraise the strength of a rule with so many acknowledged exceptions.

The fact that a state must show an important need supporting any quasi-suspect classification makes heightened scrutiny even more awkward here. Some view judicial authority as a "wasting asset,"¹²³ which deteriorates when invoked. Under that perspective, a rule shifting the burden of proof to a state to justify barring the mentally retarded from the practice of surgery sounds like a good way to undermine faith in the courts. This effect would not help the judiciary remedy real discrimination.

Marshall's argument that *Cleburne's* means scrutiny-in-fact-but-not-name is itself overinclusive does not persuade. The Justice speculated that business and commerce regulation might fall under the *Cleburne* spell of invigorated rational basis re-

119. See 105 S. Ct. at 3255-58.

120. See 105 S. Ct. at 3262 (Stevens, J., concurring). However, Justice White's argument that the mentally retarded are a "diversified" group with varying abilities, *id.* at 3256, undercuts rather than supports his position. If some mentally retarded persons are functionally almost identical to persons without cognitive impairments, *id.*, there is less reason to assume the "relevance" of classifications based on mental retardation.

121. See N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1984-85). Cf. Schonfeld, "Not in My Neighborhood": Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State, 13 FORDHAM URB. L.J. 281 (1985).

122. See 105 S. Ct. at 3271-72.

123. See O. FISS, THE CIVIL RIGHTS INJUNCTION 82 (1978). Fiss, who does not share this view, cites it in discussing the propriety of issuing a permanent injunction when "irreparable harm" may not occur. A court imposes no hardship on a party, according to Fiss, when the court enjoins it from conduct which it would not engage in, anyway. *Id.* at 81-82.

view.¹²⁴ Here, however, Marshall may have let his concern for bright line rules cloud his view of the limits of stare decisis. The facts of *Cleburne*, which yield the inference of "irrational prejudice,"¹²⁵ have little to do with regulation of commerce. A statute dealing with commerce would yield a different result: it is difficult to envision a modern court perceiving prejudice when government sets controls on, say, the sale of eyeglasses.¹²⁶ The accretional process of non-statutory law thus has its own protections against the rigidification that Marshall feared.

IV. *Cleburne* AND FACIAL NEUTRALITY: JUDICIAL UPDATING OF STATUTES AND COVENANTS

There are two types of vehicles for excluding group homes. One type of statute or covenant is expressly and specifically exclusory. *Cleburne's* ordinance, which barred "homes . . . for the insane or feeble-minded,"¹²⁷ fits into this category. The other exclusionary vehicle simply zones out *all* uses except for residence by single families.¹²⁸ Since this device is not selectively exclusive, like the *Cleburne* ordinance, which allowed hospitals, nursing homes and other dormitory uses, the underinclusiveness principle does not apply.

The Supreme Court has declined to find equal protection violations arising from such ordinances. Indeed, the Court has held that local police power is "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."¹²⁹ The *Cleburne* majority distinguished this set of facts.¹³⁰ If a community with a single-family ordinance grants many use variances, underinclusiveness in the variance process might usher in equal

124. 105 S. Ct. at 3265.

125. 105 S. Ct. at 3260.

126. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (upholding statute on rational basis grounds).

127. See 105 S. Ct. at 3252 n.3.

128. See *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 314 S.E.2d 218, 219-20 (Ga. 1984). Cf. Lippincott, "A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons, 31 STAN. L. REV. 767 (1979).

129. *Village of Belle Terre v. Boraas*, 416 U.S. at 9 (Douglas, J.).

130. 105 S. Ct. at 3254 n.8.

protection doctrine.¹³¹ Otherwise, the Constitution may be of little help in such situations. Therefore, another strategy is necessary.

This strategy requires a new interpretation of the state or local statute. It derives from the ideas of Calabresi, as articulated in *A Common Law For the Age of Statutes*.¹³² Calabresi identifies the problem of obsolete laws which remain on the books after social and economic arrangements have evolved beyond them. The task of the judge, Calabresi posits, is to assay the relevant "legal topography"¹³³ in order to pinpoint statutes in need of updating. Legal topography includes both state and federal statutes, case law, and scholarship.¹³⁴

Calabresi's most radical suggestion is that a court's view of the prevailing legal topography should take precedence over its perception of legislative intent.¹³⁵ If the two conflict, according to Calabresi, topography should guide the court's decision. Moreover, the court should be candid about its disregard for the original purpose of the legislature.¹³⁶

Any deviation from the search for legislative intent raises difficulties. Nevertheless, earlier commentators have advised against a slavish deference to legislative intent when an enactment which is not completely clear on its face trenches on significant institutional interests.¹³⁷ Courts have also invoked fictive concepts of intent in similar circumstances.¹³⁸ However, Calabresi is almost alone in urging a frank defiance of clearly discernible legislative objectives.¹³⁹

This "pure" Calabresian position may not be necessary to deal with most neutral ordinances applied to exclude group homes. Local ordinances rarely generate any legislative history.¹⁴⁰ Their text is the only guide to meaning. Therefore, as

131. See *supra* note 107 and accompanying text.

132. See Calabresi, *supra* note 32.

133. *Id.* at 129-31.

134. *Id.*

135. See, e.g., Calabresi, *supra* note 32, at 87-89.

136. *Id.* at 88-90.

137. See *infra* note 183 and accompanying text.

138. See *infra* notes 182, 184-85 and accompanying text.

139. For a similar approach, apparently arrived at independently of Calabresi, see Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 912-15 (1982).

140. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING*

Llewellyn argued, the "sound quest" for a court is deciding "what the words can be made to bear, in making sense in the light of the unforeseen."¹⁴¹ One-family residence statutes are often susceptible to a functional interpretation which encompasses small congregate facilities like group homes.¹⁴² Other components of legal topography gravitate in the same direction.

In the case of group homes, the legal topography suggests that courts should modify one-family use statutes to permit group homes of a size and character consistent with the surrounding community. National policy, expressed in federal statutes, supports this view.¹⁴³ So does state policy. Many states have enacted laws which classify group homes for the mentally disabled as single-family households.¹⁴⁴ Other jurisdictions, including Texas, have conferred on the mentally retarded, "the right to live in the least restrictive setting appropriate to [their] individual needs and abilities," including "the right to live . . . in a group home."¹⁴⁵ Courts have also recognized the unobtrusiveness of such facilities in a single-family setting.¹⁴⁶ One court has observed that,

[I]n terms of the day-to-day activities of its inhabitants, the . . . property is not employed in a manner which is significantly different from that of neighboring houses except for the fact that most of those who dwell within it are mentally retarded.¹⁴⁷

Social science research has established that group home resi-

AND APPLICATION OF LAW 1269 (tent. ed. 1958).

141. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 400-01 (1950).

142. See *infra* notes 145, 147, and accompanying text.

143. See *supra* notes 9-13 and accompanying text.

144. See *supra* note 21 and accompanying text.

145. See TEX. REV. CIV. STAT. ANN., Art. 5547-300, § 7 (Vernon Supp. 1986).

146. See *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn. 1981); *State v. Dist. Court*, 609 P.2d 245, 248 (Mont. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Group House v. Town of North Hempstead*, 45 N.Y.2d 266, 380 N.E.2d 207, 209-11 (1978) (foster home); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 313 N.W.2d 756, 758 (foster home); *Village of Freeport v. Ass'n for the Help of Retarded Children*, 94 Misc.2d 1048, 406 N.Y.S.2d 221 (Sup. Ct.), *aff'd* 60 A.D.2d 644, 400 N.Y.S.2d 724 (1977); *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 72, 274 S.E.2d 174, 180 (1981); *Philadelphia Center for Development Services v. Plymouth Township*, 492 A.2d 1191 (Pa. Commw. Ct. 1985).

147. See *J.T. Hobby & Son, Inc. v. Family Homes*, 302 N.C. at 72, 274 S.E.2d at 180.

dents do not appreciably contribute to antisocial behavior or other negative trends in the community.¹⁴⁸ Property values do not decrease,¹⁴⁹ and may even increase.¹⁵⁰ In fact, available data suggests that neighborhoods' fear of group homes itself becomes obsolete after a home has opened.¹⁵¹ One case tells the story of a man who "led the opposition" to a community residence in his community. He now "regards his retarded neighbors as his friends; he visits them in their home, and they visit him in his."¹⁵² He also works with other communities to help them accept group homes.¹⁵³ This evidence should inform interpretation of one-family use statutes.

A court can resort to fiction to interpret a statute in light of policies protecting the mentally disabled. In *Ford v. Civil Service Employees Association*,¹⁵⁴ the court vacated an arbitrator's award reinstating an employee of the New York State Office of Mental Health who had sexually abused a patient. Citing a section of the New York Mental Hygiene Law which required that patients receive services "with full respect for [their] dignity and personal integrity,"¹⁵⁵ as well as other statutes,¹⁵⁶ the court as-

148. See Okolo & Guskin, *Community Attitudes toward Community Placement of Mentally Retarded Persons*, 12 INT'L REV. OF RESEARCH IN MENTAL RETARDATION 25, 52-53 (1984) (citing studies).

149. *Id.* at 53. See *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984); *Northwest Residence, Inc. v. City of Brooklyn Center*, 352 N.W.2d 764 (Minn. App. 1984) (citing study finding no decrease in property values absent saturation level, i.e. five facilities within one block). *But see Garcia v. Siffrin Residential Ass'n*, 63 Ohio St.2d 259, 269, 407 N.E.2d 1369, 1380 (1980) (testimony of one real estate broker).

A nonprofit group in Connecticut recently filed suit against the Greenwich Tax Review Board, which had lowered assessments on homes near a halfway house for former mental patients. The suit alleges illegal discrimination under both state and federal law. See 9 MENTAL & PHYSICAL DISABILITY L. REP. 309 (1985).

150. See *J.T. Hobby & Son, Inc. v. Family Homes*, 302 N.C. at 68 n.7, 274 S.E.2d at 178 n.7 (citing study by National Association of Realtors).

151. See ROTHMAN, *supra* note 4, at 196 ("once the home was in business, indifference and even occasionally approval took over"); Okolo & Guskin, *supra* note 148, at 58 ("some evidence that opposition . . . reduces over time").

152. See *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. at 1340-41.

153. *Id.*

154. 94 A.D.2d 262, 464 N.Y.S.2d 481 (1st Dept. 1983).

155. N.Y. MENTAL HYG. LAW § 33.03(a) (McKinney 1978), *cited in* 94 A.D.2d at 264, 464 N.Y.S.2d at 483.

156. See NEW YORK PENAL LAW § 260.25 (McKinney 1980) (endangering the welfare of a person incompetent by reason of mental illness); N.Y. PENAL LAW § 130.25 (McKin-

serted that the award affronted public policy "by making light of the State's fiduciary responsibility to its wards."¹⁵⁷ Moreover, the award had characterized the sexual abuse as "minimal," an adjective which the court said was "appalling" in this context.¹⁵⁸ Upholding the award would "discourage citizens from entrusting their loved ones to state care and defeat the very purpose for which the Mental Hygiene Law was enacted."¹⁵⁹ The court described the award as "plainly irrational,"¹⁶⁰ and held that the arbitrator had "exceeded his power."¹⁶¹ This was a rare result, reached in the face of the "traditional rule that an arbitrator's decision is not reviewable . . . [even where there has been an] egregious disregard for the state of the law and the facts."¹⁶² The court made an essentially fictive connection between the result and the language and purpose of the statute governing vacatur of arbitration awards.¹⁶³

ney 1975) (defining rape as intercourse with an of-age female incapable of consent); N.Y. MENTAL HYG. LAW § 33.17 (McKinney 1978) (female patient transported from ward must be accompanied by another female, or by male family member), cited in 94 A.D.2d at 264-65, 464 N.Y.S.2d at 483.

157. 94 A.D.2d at 266, 464 N.Y.S.2d at 484.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. 94 A.D.2d at 265, 464 N.Y.S.2d at 483-84, citing, *inter alia*, Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 419, 380 N.E.2d 280, 285-86 (1978) (Breitel, J., concurring).

163. The applicable statute is N.Y. CIV. PRAC. LAW § 7511 (McKinney 1980). Subsection 7511 (b)(1) (iii) mandates vacatur if an arbitrator "exceeded his power." This provision, however, seems less related to questions of broad public policy than it is to more mundane and concrete issues, such as whether the award is consistent with express terms contained in the contract which the arbitrator construed. See *In re Arbitration between Granite Worsted Mills and Aaronsen Cowen, Ltd.*, 25 N.Y.2d 451, 255 N.E.2d 168 (1969) (award of \$3,700.00 for delivery of damaged goods set aside when contract specifically limited damages to \$1,000 or less). In *Ford*, no contract term prohibited reinstatement of an employee under the circumstances involved. The court, which never mentioned the relevant statute, also never directly addressed the question of legislative purpose. Its *sub silentio* premise was that the legislature could not have intended such an absurd result. Yet, the court never stated this clearly, or explained why the award was materially different from other legally and/or factually "wrong" outcomes which parties stipulating to arbitration must accept as the price of utilizing a less formal and costly alternative to litigation. *Ford* actually owes little to conventional methods of statutory interpretation. It is much more like a common law supplement to legislative action, albeit one which relies heavily on other statutes to inform its value judgments. Viewed from this perspective, *Ford* fits squarely within Calabresi's thesis.

The British House of Lords, in a decision vindicating confidential access to medi-

Despite courts' willingness to modify statutes through reliance on fiction, this approach and Calabresi's more overt method present problems. Objections fall under two headings: institutional competence and majoritarianism.¹⁶⁴ The *Ford* case underscores the problem of institutional competence. Calabresi assumes that judges are equal to the delicate task of evaluating changes in legal topography and navigating accordingly.¹⁶⁵ Yet judges vary widely in quality. Courts applying a Calabresian analysis may be "voting their policy preferences in the guise of overhauling obsolescent statutes."¹⁶⁶ A similar danger exists in the area of conflict of laws, where the reigning methodology calls for a court to choose the applicable body of law through analysis of each jurisdiction's "interest" in the controversy.¹⁶⁷ This standard permits greater flexibility than the traditional mechanistic rules, which might require that, for example, in an accident case, the law of the situs apply, regardless of the residences of the parties or the location of the insurer.¹⁶⁸ "Interests analysis" takes for granted that courts are competent to identify interests.

cally prescribed contraceptives and birth control advice for teenage females, has also interpreted an established statute in light of present-day policy concerns. In *Gillick v. West Norfolk and Wisbech Area Health Authority and another*, [1985] 3 All E.R. 402, [1985] 3 All E.R. 830, discussed in Cowper, *London Letter: Contraceptive Advice for Children*, N.Y.L.J. Nov. 6, 1985, at 2, col. 3, the majority upheld guidelines issued by the defendant regulating the availability of confidential medical contraceptive advice to girls under sixteen against a parental challenge based on Section 28 of the Sexual Offences Act of 1956. Section 28 declares it illegal for any person to "cause or encourage" sexual intercourse with a girl under sixteen years old for whom the person is responsible. The Law Lords, in a split decision, declined to include doctors within the persons covered by the Act. They cited the increase in pregnancies among under-age females and the contemporary frequency of sexual experimentation among this population, as well as the importance of the physician-patient privilege, as justifications. The majority adopted this instrumental, policy-oriented analysis despite the accessibility of an alternative rationale closer to norms of statutory interpretation, which might have limited the Act's purpose to combatting procurement and child abuse by parents, foster parents, and governmental in loco parentis authorities, like schools.

The dissenters asserted that making contraceptive advice accessible would remove a valuable disincentive to premature sexual exploration.

164. For a discussion of the implications of Calabresi's theory for majoritarian principles, see *infra* notes 170-86 and accompanying text.

165. See Weisberg, *supra* note 109, at 225-26.

166. See Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1169 (1982).

167. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

168. See First Restatement, Conflict of Laws § 377 (1934).

However, this inquiry may be too metaphysical for courts to handle.¹⁶⁹

The second problem with Calabresi derives from the status of statutes as expressions of majoritarian will. There are two facets to this difficulty. The first refers to the use of other statutes, besides the one being modified, as sources of policy. One can call it the "legislative process" or "contract" quandary. Under this formalist view, legislation is a product of compromise between differing factions. The coverage of a statute, including § 504 of the Rehabilitation Act or the Education of the Handicapped Children Act, figures as part of this compromise.¹⁷⁰ Courts in effect second-guess the legislature, the argument goes, when they extend the statute's coverage by treating the statutory purpose or ratio legis as an articulation of policy in cases like the group home controversies where the statute itself does not apply.¹⁷¹ This perspective offers a contrast to Landis' position that statutes, like common law cases, are a rich source of analogy.¹⁷² Landis, taking an instrumental view, urged courts to use broad legislative purposes to "slough off the archaisms in their own legal structure."¹⁷³ This is known as the doctrine of the "equity of the statute."¹⁷⁴ Justice Harlan followed Landis' lead in his much-cited¹⁷⁵ opinion in *Moragne v. States Marine Line*.¹⁷⁶ In

169. See Hill, *Governmental Interest and the Conflict of Laws — a Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960). Because of the nebulous nature of the inquiry, interest analysis may create the risk of uncertain and inconsistent results. See *Gen'l Tel. Co. v. Trimm*, 252 Ga. 460, 311 S.E.2d 460 (1984). Rules are useful because they minimize uncertainty. See *supra* notes 109-13 and accompanying text.

170. See, e.g., *Mohasco Corp. v. Silver*, 447 U.S. 807, 815-26 (1980). In *Mohasco* the Court viewed strict time limitations on filing claims of racial discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (c) and (e), as consideration for the statute's broad substantive sweep. *But see* *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982) (some Title VII time limits subject to equitable modification).

171. See Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982). Posner cites the lack of "assurance that the particular constellation of political pressures" that yielded the statute was also at work in a subsequent situation. *Id.* at 274. Cf. Weisberg, *supra* note 109, at 231, citing J. AUSTIN, *Lectures on Jurisprudence* 629 (5th ed. 1885). It is possible, however, that Austin was referring principally to interpreting a statute itself by reference to its supposed purpose, without regard for its text. See J. AUSTIN, *supra*, at 629-30.

172. See Landis, *supra* note 34.

173. *Id.* at 216.

174. *Id.* at 214. See also Calabresi, *supra* note 32, at 85-86.

175. See, e.g., Calabresi, *supra* note 32, at 152 ("*Moragne* stands as a monument to

Moragne, Harlan invoked policies favoring recovery for wrongful death on the high seas set out in several non-applicable but analogous modern statutes to justify abandoning the ancient rule against wrongful death actions in admiralty.¹⁷⁷

The second part of the majoritarian objection deals with the statute, like the single-family ordinance discussed in this section, being judicially modified. The problem here is one of legitimacy. What right does the judge have to change the determinations of a duly elected legislature? Austin, the great English positivist, asserted that courts have no such prerogative. "[T]he law," he wrote, "as a command, may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated."¹⁷⁸ Critics of Calabresi have stressed that his model dismisses the importance of the hearings, debates, lobbying, and horse trading¹⁷⁹ which accompany the "dance of legislation."¹⁸⁰ Unless a statute is repealed or amended through the same process, critics argue, it has earned the right to respect as the "will of the polity."¹⁸¹

what courts, aware of the fullness of techniques available to them, can do to update laws"); Weisberg, *supra* note 109, at 254 (*Moragne* "nowhere changes any statutes"); Estreicher, *supra* note 166, at 1157-58.

176. 398 U.S. 375 (1970).

177. See 398 U.S. at 388-402. See also *Panama R. Co. v. Rock*, 266 U.S. 209, 216 (1924) (Holmes, J., dissenting), cited in 398 U.S. at 391. In *Panama R. Co.*, the majority invoked the common law bar on wrongful death actions to avoid the influence of policies embodied in more liberal legislation. Justice Holmes noted in dissent that, "courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope."

178. J. AUSTIN, *supra* note 171, at 631. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (statute limiting damages in actions based on wrongful death on the high seas to "pecuniary loss" precluded additional award for "loss of society"). But see Note, *supra* note 139, at 897-98 (criticizing Court's abandonment of interpretive flexibility).

179. See Estreicher, *supra* note 166, at 1136-37.

180. E. REDMAN, *THE DANCE OF LEGISLATION* (1973).

181. Estreicher, *supra* note 166, at 1137. See also *Group House of Port Washington, Inc. v. Town of North Hempstead*, 45 N.Y.2d 266, 274-78, 380 N.E.2d 207, 211-13 (1978) (Breitel, J., dissenting). In *Group House*, the Court of Appeals interpreted a single family use ordinance to allow a small home for foster children. Chief Judge Breitel asserted that the majority set out:

by an evasive process, to stretch the liberal interpretation to still another and even more liberal application; and this could go on endlessly. Such a process is not sound judicially and does not accord with principles of judicial restraint. The worst of the matter is that the problem is easily soluble by legislative

In the group home context, both the institutional and majoritarian arguments have minimal impact. Statutes embodying concern for accommodating the mentally disabled provide an objectively ascertainable source of policy. These statutes also delineate the Calabresian court's role here as not altering expressions of majority will, but rather reconciling disparate majoritarian manifestations.

This role encompasses a presumption that legislatures desire some degree of harmony among their various enactments. Legislatures rarely say this directly. However, courts frequently interpret statutes in light of a fictive legislative intent, and consider factors outside the contemplation of the enacting legislature. This is true of decisions holding that Congress must provide a clear affirmative textual indication that it intends legislation to abrogate the sovereign immunity of the states under the eleventh amendment.¹⁸² Similar "clear statement" rules¹⁸³ apply to statutes imposing major fiscal burdens on states as conditions for the receipt of federal funds under the spending clause,¹⁸⁴ and to statutes limiting courts' traditional equitable

change if indeed there is a legislative purpose to expand the areas in which group homes may be established.

45 N.Y.2d at 278, 380 N.E.2d at 213.

Bickel stressed that no judicial decision will have a lasting practical effect unless it ultimately commands majoritarian support, or at least acquiescence. See A. BICKEL, *THE MORALITY OF CONSENT* 111 (1975). Available data suggest strongly that communities accept the presence of group homes. See *supra* notes 149-53 and accompanying text.

182. See, e.g., *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985) (§ 504 of Rehabilitation Act does not authorize retrospective (monetary) relief against states, since Congress did not clearly manifest this intention); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress specifically authorized backpay awards against states in statute barring employment discrimination based on race); *Edelman v. Jordan*, 415 U.S. 651 (1974) (no reimbursement of welfare benefits denied in violation of federal Social Security Act).

183. These rules of construction rely on a fictive, presumed legislative intent to maintain consistency with the general legal landscape. See *Calabresi*, *supra* note 32, at 215-16. See also Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963).

184. See *Board of Educ. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (declining to find Congressional mandate to maximize, rather than only realize part of handicapped child's educational potential under Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, absent clear legislative intent); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (declining to require states to provide institutional services for the mentally retarded in "least restrictive environment" without textual statutory command).

discretion to select remedies for wrongdoing.¹⁸⁵ Congress can do all of these things, but it must say so expressly. Perhaps a comparable requirement is appropriate for single-family statutes, if legislatures and city councils wish to use them to exclude group homes. Legislatures would have to be careful in this area, however, to *also* expressly bar other non-single-family uses. Otherwise, they could face the *Cleburne* underinclusiveness problem.¹⁸⁶

The second kind of facially neutral device is a single-family-only restrictive covenant. Modifying covenants is less problematic than altering statutes, since a covenant is usually a private arrangement with no formal majoritarian base. Moreover, equitable modification of a covenant, due to changed circumstances which obviate the covenant's purpose, is an accepted judicial technique.¹⁸⁷ Courts in New York and other jurisdictions have also declined to enforce such covenants as inconsistent with public policy favoring self-sufficiency for the mentally disabled.¹⁸⁸ However, these jurisdictions typically have statutes overriding local single-family ordinances.¹⁸⁹ Modifying the ordinance is a prerequisite for altering a covenant. This emphasizes the urgency of the Calabresian stratagem for coping with statutory obsolescence.

IV. CONCLUSION

Mentally disabled people are emerging from the sea of ignorance and prejudice which until recently surrounded them. Fear of this vulnerable population is still commonplace, however. Hostility and distrust of the mentally disabled currently are most pervasive in the area of housing. Yet housing for the mentally disabled is crucial if society wishes to avoid the twin evils of institutionalization and homelessness.

185. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (upholding equitable discretion not to enjoin ongoing violations of Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*)

186. See *supra* notes 94-108 and accompanying text.

187. See *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (4th Dist. 1982) (enjoining enforcement of covenant against group home).

188. See, e.g., *Crane Neck Ass'n, Inc. v. New York City/Long Island County Services Group*, 61 N.Y.2d 154, 460 N.E.2d 1336 (1984). See also *supra* notes 172-77 and accompanying text (discussing doctrine of equity of statutes).

189. See N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1984-85).

Exclusionary zoning ordinances are one way of keeping out housing, particularly small group homes, for the mentally disabled. In *City of Cleburne v. Cleburn Living Center*, the Supreme Court struck down as applied an ordinance which singles out group homes for special scrutiny, while permitting many other more intrusive uses, like apartment houses and hospitals. The Court declined, however, to hold that the mentally retarded are a quasi-suspect class under the equal protection clause, and therefore that *all* government decisions which single out the mentally retarded carry the heavy burden of justification which the *Cleburne* defendants failed to meet. Instead, the Court opted for a more flexible standard based on whether the challenged classification was relevant to an important governmental objective. This standard frees states to implement benign measures designed to help this population. It also permits them to establish common sense criteria which may legitimately exclude the mentally retarded in the allocation of certain social and economic goods, like employment as a surgeon. At the same time, the standard's focus on the inclusiveness of the classification, like the hospitals and dormitories *not* included in the *Cleburne* ordinance, combats obvious forms of discrimination.

More subtle exclusionary devices do not discriminate on their face. Typically, they bar *all* non-single-family uses. The *Cleburne* analysis may not reach this far. However, creative courts anxious to reconcile land-use ordinances with state and national policy and research favoring accommodation of the handicapped should adopt the updating approach which Calabresi advances. Considering accommodation and the unobtrusiveness of group homes uppermost, courts should construe single-family statutes to allow this important source of housing.

Calabresian maneuvering assumes a high degree of competence among judges. It also has some nettlesome implications for the prevalent majoritarian model of statutory interpretation. However, it is not altogether different from what courts have long done, mainly in the guise of fiction. Because of the vital needs at stake, a Calabresian gambit is worth the risk. Without it, policies promoting housing for the mentally disabled may remain more rhetoric than reality.