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THE MENTALLY RETARDED AND PRIVATE RESTRICTIVE COVENANTS

THOMAS F. GUERNSEY*

I. INTRODUCTION

Recent years have evidenced a growing deinstitutionalization of a wide variety of people, including the mentally retarded.¹ As a result of this movement, mental health officials are attempting to place the mentally retarded in the least restrictive environment.² Local zoning ordinances, however, often have hindered their efforts.³ In an effort to overcome these obstacles, twenty-two states

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1. E.g., E. GOFFMAN, *ASYLUMS* (1961); Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897 (1975) (addressing the criminally insane); Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Power*, 25 VILL. L. REV. 273 (1980); Marx, Test & Stein, *Extrahospital Management of Severe Mental Illness: Feasibility and Effects of Social Functioning*, 29 ARCHIVES GEN. PSYCHIATRY 505 (1973); Stein, Test & Marx, *Alternative to the Hospital: A Controlled Study*, 132 AM. J. PSYCHIATRY 517 (1975); Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853, 855 (1979).

2. Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *THE MENTALLY RETARDED CITIZEN AND THE LAW* 499 (1976) [hereinafter cited as PRESIDENT'S COMMITTEE]. See generally *infra* note 5.

3. See, e.g., Boyd, *supra* note 1, at 273; Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 305; Lippencott, *A Sanctuary for People: Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979); Special Report, *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, AMICUS, Mar.-Apr. 1978, at 29; Note, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 VT. L. REV. 509 (1981); Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1980); Comment, *Zoning the Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 ARIZ. ST. L.J. 385 [hereinafter cited as Comment, *Zoning*]; Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976) [hereinafter cited as Comment, *Exclusion*]; Comment, *Deinstitutionalizing the Mentally Retarded in Maine: The Inevitable Face-off with Zoning*, 35 ME. L. REV. 33 (1983); Comment, *Exclusionary Zoning and Its*

have enacted statutes permitting the placement of group homes for the mentally retarded in single-family residential neighborhoods.⁴ Although these statutes have provided some benefit to the mentally retarded,⁵ the statutes are of limited value if private individuals can continue to block the deinstitutionalization of the mentally retarded through the use of restrictive covenants.

This Article provides an analytical framework for a court's analysis of covenants restricting group homes. Parts II and III of the Article indicate that ordinary rules of statutory interpretation allow private individuals effectively to exclude group homes. Part IV discusses whether a state, in its exercise of eminent domain, must compensate surrounding landowners when the state takes property subject to a private restrictive covenant in order to establish a group home. The Article then discusses the constitutionality of restrictive covenants, the circumstances under which public policy may prevent enforcement of restrictive covenants, and whether states may enact statutes to limit the scope of restrictive covenants.

Effects on Group Homes In Areas Zoned for Single-Family Dwellings, 24 U. KAN. L. REV. 677 (1976).

4. For a complete list of these statutes, see Comment, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 WAYNE L. REV. 1349, 1357 n.60 (1982).

5. For a discussion of the various benefits that the residents of group homes receive, see Bachrach, *A Note on Some Recent Studies of Released Mental Hospital Patients in the Community*, 133 AM. J. PSYCHIATRY 73 (1976); Linn, Caffey, Klett & Hogarty, *Hospital vs. Community (Foster) Care for Psychiatric Patients*, 34 ARCHIVES GEN. PSYCHIATRY 78 (1977); Rog & Raush, *The Psychiatric Halfway House: How Is It Measuring Up?*, 11 COMMUNITY MENTAL HEALTH J. 155 (1975); Sorgen, *Labeling and Classification*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 214.

Although the material discussed in this Article is relevant to many different types of group homes, the Article focuses only on those group homes that house the mentally retarded. The validity of a restrictive covenant affecting a group home will vary depending upon the population housed in the home. Of the various populations housed in group homes, the mentally retarded are most conducive to placement in traditional single-family neighborhoods. Unlike the residents of some group homes, the mentally retarded differ from the general population only in their cognitive and adaptive development and are no more dangerous to themselves or to others than are other members of the general population. See PRESIDENT'S COMMITTEE, *supra* note 2, at xxv-xxix.

A. General Validity of Restrictive Covenants

Both the courts of law⁶ and the courts of equity⁷ long have recognized the restrictive covenant as a legitimate means of regulating land use.⁸ With a restrictive covenant, a landowner can control the manner in which subsequent purchasers may use the property. Because the covenant runs with the land,⁹ the burdens or benefits of the covenant are enforceable against subsequent purchasers,¹⁰ absent a statute to the contrary.¹¹ An estate, therefore, can be encumbered forever by a restrictive covenant.¹² Nonetheless, restrictive covenants continue to enjoy the relative favor of the courts.¹³ The only significant limitations that the courts impose upon restrictive covenants are that the covenants run with the land¹⁴ and

6. See *Spencer's Case*, 77 Eng. Rep. 72, 74 (K.B. 1583).

7. See *Tulk v. Moxhay*, 41 Eng. Rep. 1143, 1144 (Ch. 1848).

8. Private restrictive covenants are a primary method of regulating residential land use today. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 349, 360 (2d ed. 1975).

9. "The running of the covenant with the land means that the burdens or benefits, or both, of the covenant, pass to the persons who succeed to the estate of the original contracting parties." R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 516 (3d ed. 1981).

10. The rule against perpetuities does not apply to restrictive covenants. A restrictive covenant, therefore, provides a more effective means of regulating land use than do most future interests. Because the rule against perpetuities also does not apply to defeasible fees other than executory interests, see T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 209 (1966), land owners often restricted the use of their land through the use of defeasible fees before the development of modern restrictive covenants. J. DUKEMINIER & J. KRIER, *PROPERTY* 969 (1981). Modern courts tend to favor restrictive covenants rather than defeasible fees. J. CRIBBET, *supra* note 8, at 215, 348.

11. See, e.g., GA. CODE ANN. § 44-5-60 (1982) (limiting duration of restrictive covenants generally to 20 years).

12. A covenant running in equity may be extinguished under the following circumstances: (a) the subsequent owner performs an act that violates the servitude and continues to do so for the period of the statute of limitations; (b) the dominant tenant executes a release; or (c) conditions exist which make the purpose and object of the servitude impossible to achieve. R. BOYER, *supra* note 9, at 542.

13. See J. CRIBBET, *supra* note 8, at 360; Stoebuck & Williams, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 886 (1977) ("restrictive covenants are now judicial favorites"). But see R. BOYER, *supra* note 9, at 517 ("Because a covenant running with the land encumbers the land and fetters its free alienability there is a tendency to restrict rather than expand the legal effect of the covenant. The 'running' is disfavored rather than favored.").

14. A restrictive covenant can run at law—and thus bind subsequent purchasers of the property—if the following requirements are met: (1) the covenant must be in writing; (2) the original parties to the covenant must have intended that it run with the land; (3) the successors to the property must have had notice of the covenant; (4) the covenant must touch and concern the land; and (5) privity of estate must exist. J. DUKEMINIER & J. KRIER, *supra* note

that they do not violate public policy.¹⁵ Because the courts continue to uphold restrictive covenants, litigation rarely involves a covenant's validity. Instead, litigation primarily involves the interpretation of the covenant.

B. Concerns of the Respective Parties

Recognizing that restrictive covenants are a valid means of regulating land use, the question becomes whether the public's interest in the deinstitutionalization of the mentally retarded should override such regulation. To answer that question, one must consider the interests of the property owner, as well as the interests of the mentally retarded. A natural tendency is to dismiss the objecting landowner as a person seeking to isolate himself from modern realities.¹⁶ Although some landowners undoubtedly have selfish motives for excluding the mentally retarded, others have voiced plausible reasons for their opposition.¹⁷ The most often expressed concern of property owners is that the presence of a group home for the mentally retarded would alter dramatically the underlying character of the owners' neighborhood. More specifically, property owners contend that a group home would produce increased noise and traffic, decreased safety, and a devaluation of property.¹⁸ Property owners also argue that they should not have to bear individually a cost that society should bear collectively.¹⁹ Finally, they maintain that the proponents of group homes have misconstrued the issue: "If we are asked to choose between well-run residential facilities and poor custodial institutions for the mentally retarded, the choice is simple. On the other hand, if we are asked to choose between well-run residential facilities and high-quality institutions,

10, at 1025. See generally Stoebeck & Williams, *supra* note 13. A party seeking enforcement of a restrictive covenant in a court of equity must establish only the first four elements. J. DUKEMINIER & J. KRIER, *supra* note 10, at 1032.

15. See *infra* notes 167-99 and accompanying text.

16. *E.g.*, Boyd, *supra* note 1, at 277; Lippencott, *supra* note 3, at 769; Comment, *supra* note 4, at 1366.

17. *E.g.*, Deutch, *Reaction Comment*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 343.

18. Lippencott, *supra* note 3, at 769 (citing D. LAUBER & F. BANGS, ZONING FOR FAMILY AND GROUP CARE FACILITIES 8-10 (Am. Soc'y of Planning Officials Planning Advisory Serv. Rep. No. 300, 1974)).

19. Deutch, *supra* note 17, at 347.

the problem is more difficult."²⁰

In contrast, the proponents of group homes²¹ have contended that the institutionalization of the mentally retarded is a costly exercise involving the isolation of people in human warehouses.²² In addition to finding that the institutionalization of the mentally retarded is morally reprehensible, proponents also have asserted that institutionalization is both costly and counterproductive: "Many retarded people behave in a socially unacceptable manner and fail to reach their intellectual potential precisely because they are isolated from society and are not *expected* to develop."²³ The proponents maintain that group homes would normalize the living environment, and thereby facilitate the development of the mentally retarded.²⁴

On balance, research indicates that the expressed concerns of landowners opposed to the development of group homes for the mentally retarded are unjustified.²⁵ These concerns presumably reflect a fear of the unknown and a desire to avoid those who are different.²⁶ Despite the fallacy of these concerns, however, landowners remain committed to their position. As a result, the debate over group homes has been heated and occasionally violent,²⁷ with both sides accusing each other of narrowmindedness.²⁸ Aside from the personal feelings that are involved, the debate is difficult to resolve because intertwined within the debate are traditional and often technical contract and property rules, constitutional questions concerning the proper role and power of the courts, and serious questions of public policy. Few courts, however, have addressed adequately all of these various aspects of the debate.

20. *Id.* at 345.

21. *E.g.*, *supra* notes 1 & 3.

22. Lippencott, *supra* note 3, at 768.

23. *Id.*

24. *Id.* at 768-69.

25. *Id.* See also *infra* note 197.

26. See Comment, *supra* note 4, at 1358.

27. See Toperoff, *It Happened In One of the Best Neighborhoods*, N.Y. Times, Feb. 19, 1978, at 26, col. 2 (fire officials suspected arson in a fire which destroyed a group home for the mentally retarded).

28. One opponent of group homes has observed that "[a]dvocates of programs for the mentally retarded, because they often have personal involvement, are frequently so immersed in their own point of view and the feeling that their cause is just that they do not see any merit in legitimate criticism." Deutch, *supra* note 17, at 344.

II. INTERPRETATION OF RESTRICTIVE COVENANTS: A QUESTION OF INTENT

Because courts traditionally view restrictive covenants as contracts,²⁹ the parties' intent normally controls interpretation of the covenant.³⁰ A primary indication of the parties' intent is the precise language of the restrictive covenant. A court will consider the language of the covenant, therefore, in attempting to ascertain the restrictions imposed upon the property. In construing the language of the covenant, a court will consider whether the covenant's restrictions apply to the use of the building or to the nature of the physical structure.³¹ A court also will seek to determine the meaning of such words as "family" and "single-family."³² After discovering the intent of the parties, the court must determine whether public policy allows the court to enforce that intent.³³

A. Structure Versus Use In Restrictive Covenants

A covenant can restrict the use of the property or the nature of the physical structures placed upon the property. In *Shaver v.*

29. See generally Comment, *Validity Rules Concerning Public Zoning and Private Covenants: A Comparison and Critique*, 39 S. CAL. L. REV. 409, 412 (1966).

30. RESTATEMENT OF PROPERTY § 554 (1944).

31. E.g., *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. Ct. App. 1981), cert. denied, 103 S. Ct. 377 (1982).

32. See, e.g., *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982); *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); *City of Livonia v. Department of Social Servs.*, 119 Mich. App. 806, 328 N.W.2d 1 (1982); *Leland Acres Home Owners Ass'n v. R.T. Partnership*, 106 Mich. App. 790, 308 N.W.2d 648 (1981); *Malcolm v. Shamie*, 95 Mich. App. 132, 290 N.W.2d 101 (1980); *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978) (single-family unit); *Bellarmino Hills Ass'n v. Residential Sys.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978) (single-family residence); *Costley v. Caromin House*, 313 N.W.2d 21 (Minn. 1981); *State ex rel. Region II Child & Family Servs. v. District Court*, 609 P.2d 245 (Mont. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981); *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. Ct. App. 1981), cert. denied, 103 S. Ct. 377 (1982); *Crowley v. Knapp*, 94 Wis. 2d 421, 288 N.W.2d 815 (1980); see also *Boston-Edison Protective Ass'n v. Paulist Fathers*, 306 Mich. 253, 10 N.W.2d 847 (1943) (priests wishing to live in an area restricted by a covenant to single-family dwellings); *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982) (day care center in an area limited by a restrictive covenant to residential purposes); *Cash v. Catholic Diocese*, 414 S.W.2d 346 (Mo. Ct. App. 1967) (nuns wishing to live in an area restricted by a covenant to single-family dwellings).

33. See *infra* text accompanying notes 167-99.

Hunter,³⁴ the Texas Court of Appeals determined that the parties had intended to restrict the use of the property, rather than the type of structure.³⁵ In *Shaver*, a covenant restricted property to residential purposes and specified that a "residence shall be construed to be a single family dwelling."³⁶ Based upon this language, the court concluded that the defendant had violated the covenant by allowing his home to be used by a nonprofit corporation as a shelter for severely handicapped individuals. The court, therefore, granted the injunction sought by the plaintiff. As *Shaver* reveals, a restrictive covenant limiting the use of property to a single-family dwelling can prohibit any use of the property as a group home.

In contrast, a restrictive covenant limiting the type of structure that can be placed upon the property has no effect on the property's use. Thus, as the New Jersey Supreme Court observed in *Berger v. State*,³⁷ such a covenant does not prohibit use of the property as a group home. In *Berger*, the court construed a restrictive covenant which provided that "no building of any kind shall be erected or permitted . . . excepting a dwelling house."³⁸ Holding that the defendant had not violated the covenant by allowing the house to be used as a home for handicapped preschool children, the court asserted that such covenants "must be strictly construed [because t]he limitations and prohibitions they impose may be felt over a very long period of time. It is not too much to insist that they be carefully drafted to state exactly what is intended—no more and no less."³⁹

B. Judicial Interpretation of the Term "Family" in Restrictive Covenants

A court's interpretation of the term "family" in a restrictive covenant often determines whether property can be used for a group

34. 626 S.W.2d 574 (Tex. Ct. App. 1981), *cert. denied*, 103 S. Ct. 377 (1982).

35. 626 S.W.2d at 576-77.

36. *Id.* at 576.

37. 71 N.J. 206, 364 A.2d 993 (1976). *Accord* *Malcolm v. Shamie*, 95 Mich. App. 132, 290 N.W.2d 101 (1980); *Bellarmino Hills Ass'n v. Residential Sys.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981).

38. 71 N.J. at ___, 364 A.2d at 996 n.1.

39. *Id.* at ___, 364 A.2d at 997.

home.⁴⁰ Rather than looking to the intent of the original parties, however, courts more often determine the meaning of "family" on the basis of public policy. In *Bellarmino Hills Association v. Residential Systems*,⁴¹ for example, the Michigan Court of Appeals stated that "the word family denotes a concept, the application of which is dependent upon the basis of affiliation of the group being analyzed juxtaposed with the public policies invoked by the particular circumstances of the case being reviewed."⁴²

Although courts certainly should consider public policy when reviewing covenants,⁴³ the courts should not attempt to use public policy as the primary interpretive tool. Rather than defining the term "family" on the basis of public policy, courts should apply ordinary rules of contract interpretation and seek to discern the true intention of the parties. If the intent is unclear, public policy may be determinative. After interpreting the covenant in this manner, the court then can consider whether the covenant should be invalidated on public policy grounds.⁴⁴

Often, courts misconstrue a restrictive covenant by simply adopting the definition of "family" set forth in zoning cases. Courts often cite *City of White Plains v. Ferraioli*⁴⁵ when attempting to define "family" in a restrictive covenant. In *City of White Plains*, the New York Court of Appeals held that a group home which housed ten foster children constituted a family within the meaning of a zoning ordinance.⁴⁶ The court reasoned that because a "group home bears the generic character of a family unit as a relatively permanent household,"⁴⁷ the objectives of the ordinance were met. Applying similar reasoning in a different case, the New York Supreme Court held that a group home for the mentally re-

40. See generally *supra* note 32.

41. 84 Mich. App. 554, 269 N.W.2d 673 (1978).

42. *Id.* at ___, 269 N.W.2d at 675.

43. RESTATEMENT OF CONTRACTS § 236(f) (1932).

44. Under this approach, the court would not be interpreting the covenant, but rather voiding it, on public policy grounds. *Bellarmino Hills* is an exception to most restrictive covenant cases in that the court recognized the public policy considerations inherent in its basis of affiliation test. 84 Mich. App. at ___, 269 N.W.2d at 675.

45. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

46. *Id.* at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 452-53.

47. *Id.*, 313 N.E.2d at 758, 357 N.Y.S.2d at 453.

tarded also came within the definition of a family.⁴⁸

Because of the inherent differences between a restrictive covenant and a zoning ordinance, the applicability of *City of White Plains* to cases involving restrictive covenants is questionable. A zoning ordinance's definition of family may differ significantly from the meaning intended by two private individuals who enter into a restrictive covenant. In enacting a zoning ordinance, a city seeks to protect the interests of the entire population, whereas private individuals seek to further only their own interests through the use of a restrictive covenant. Moreover, although a zoning ordinance has the limited purpose of protecting the character of the neighborhood and promoting the family environment,⁴⁹ a restrictive covenant can promote a much wider range of goals, including some that are not laudable.⁵⁰ Indeed, individuals sometimes use restrictive covenants to advance goals that are repugnant to others in the community.⁵¹ Courts generally will uphold restrictions on lot size⁵² and floor space,⁵³ although such restrictions often are intended not only to maintain the residential characteristics of the neighborhood but also, as with zoning ordinances, to exclude certain persons.⁵⁴

48. *Incorporated Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221, 223, *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (1977). See also *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976).

49. 34 N.Y.2d at 305, 313 N.E.2d at 757, 357 N.Y.S.2d at 452.

50. See *Incorporated Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221, *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (1977); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976).

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

52. See, e.g., *Jones v. Haines, Hodges & Jones Bldg. & Dev. Co.*, 371 S.W.2d 342 (Mo. Ct. App. 1963) (upholding a restriction against the building of residential structures on a lot smaller than 20,000 square feet or less than 100 feet in width); *Rydberg v. Jennings Beach Ass'n*, 69 A.D.2d 816, 414 N.Y.S.2d 744 (1979) (two acre minimum restriction upheld), *aff'd*, 49 N.Y.2d 934, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980); see also *Cadbury v. Bradshaw*, 43 Or. App. 33, 602 P.2d 289 (1979) (no more than one dwelling on a parcel).

53. See, e.g., *Barber v. Winter*, 208 Ga. 712, 69 S.E.2d 249 (1952) (upholding a 1000 square foot minimum floor space restriction); *Shipley v. Oak Park Trust & Sav. Bank*, 30 Ill. App. 2d 335, 174 N.E.2d 216 (1961) (upholding a minimum floor space requirement).

54. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the United States Supreme Court upheld the validity of a zoning ordinance which limited the number of unrelated people who could live together. The ordinance provided that "[a] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not

If a court does base its decision on public policy grounds, zoning cases are relevant in defining "family." Zoning statutes and ordinances presumably reflect public policy, but few courts⁵⁵ identify the limited connection between public policy and the definition of "family."⁵⁶ Although the definition of "family" set forth in zoning decisions should not supplant the parties' intent, courts can consider this definition if the parties' intent is unclear.

Courts have recognized that the term "family" can encompass more than the traditional nuclear family.⁵⁷ In an early decision,⁵⁸ for example, the Michigan Supreme Court observed that "[m]ember of family" may have various meanings under different circumstances.⁵⁹ Rejecting the plaintiff's contention that a family member must be related by blood or marriage, the court reasoned that, because such a definition necessarily would exclude servants from living in the house, the covenanting parties could not have intended such a narrow definition. Applying similar reasoning, modern courts have held that a family may consist of individuals

related by blood, adoption, or marriage shall be deemed to constitute a family.' " *Id.* at 2. The Village of Belle Terre was less than one square mile in size and contained 220 homes. The Court probably would not uphold a similar ordinance in a city the size of New York in the absence of other appropriate areas in which to live. See *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980) (limit of five persons did not achieve effectively the desired goals); see also *Gabe Collins Realty v. City of Margate City*, 112 N.J. Super. 341, —, 271 A.2d 430, 434 (1970) (pre-Belle Terre limitation of two unrelated persons held invalid).

55. *But cf. Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982); *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559 (1982); *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982); *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978); *Bellarmino Hills Ass'n v. Residential Sys.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *Costley v. Caromin House*, 313 N.W.2d 21 (Minn. 1981).

56. Such a failure, of course, is not unique to the interpretation of restrictive covenants. Courts often use interpretation as a guise for implementing public policy. J. CALAMARI & J. PERILLO, *CONTRACTS* 126 (2d ed. 1977). For an extended discussion of this problem in the context of restrictive covenants, see Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 32-44 (1978).

57. Courts long have applied a general definition of "family" in the context of such residential uses as boarding rooms, fraternities, group religious homes, duplexes, and condominiums. See generally Annot., 99 A.L.R.3d 985 (1980). Courts also have applied a general definition of "family" in cases involving restrictive covenants. Only recently, however, have courts confronted the definition of "family" in the context of group homes for the mentally retarded.

58. *Boston-Edison Protective Ass'n v. Paulist Fathers*, 306 Mich. 253, 10 N.W.2d 847 (1943).

59. *Id.* at 259, 10 N.W.2d at 849.

who are not related by either blood or marriage.⁶⁰ The emerging judicial trend is to define a family as "a group of people who live, sleep, cook and eat upon the premises as a single house-keeping unit."⁶¹ In reaching this definition of family, the zoning cases obviously influenced judicial thinking,⁶² as demonstrated by the striking similarity between this definition and the definition set forth in *City of White Plains*.⁶³

Although a general definition of "family" that could be applied uniformly to all cases has some initial appeal, the courts should rely on such a definition only if the parties' intent is unclear. If, however, the courts can determine the definition that the parties themselves intended to apply, that definition should be controlling under the traditional standards of contract interpretation.

C. Interpreting "Family" Under the Traditional Rules of Construction

The court's first step when attempting to interpret the language of any covenant is to define the applicable standard of interpretation.⁶⁴ The *Restatement (Second) of Contracts* adopts the position⁶⁵ advocated by Professor Corbin,⁶⁶ who maintains that a court should interpret a contract on the basis of the parties' actual understanding of the agreement,⁶⁷ rather than upon the basis of a reasonable man standard.⁶⁸ To facilitate the court's determination of the parties' perception of the agreement, the first *Restatement* offers several rules of construction.⁶⁹ Despite the useful guidance that these rules provide,⁷⁰ few courts refer to them when interpret-

60. See, e.g., *Crowley v. Knapp*, 94 Wis. 2d 42, 288 N.W.2d 815 (1980).

61. *Id.* at ____, 288 N.W.2d at 823 (citing *Missionaries of Our Lady of La Salette v. Village of Whitefish Bay*, 267 Wis. 2d 609, 66 N.W.2d 627 (1954)).

62. The Wisconsin Supreme Court relied upon a zoning decision in reaching the definition of "family" set forth in *Crowley*. See 94 Wis. 2d at ____, 288 N.W.2d at 823.

63. See 34 N.Y.2d at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451.

64. J. CALAMARI & J. PERILLO, *supra* note 56, at 116-17.

65. See RESTATEMENT (SECOND) OF CONTRACTS § 21A (1979).

66. J. CALAMARI & J. PERILLO, *supra* note 56, at 121.

67. See 3 A. CORBIN, CORBIN ON CONTRACTS § 542 (1960).

68. J. CALAMARI & J. PERILLO, *supra* note 56, at 118.

69. RESTATEMENT OF CONTRACTS §§ 235-236 (1932).

70. Courts, of course, cannot apply all of the rules suggested by the *Restatement* when interpreting the term "family" in a restrictive covenant. Under the *Restatement's* first rule, for example, courts are to apply the ordinary meaning of words when interpreting the con-

ing restrictive covenants, other than to note that a court must construe the language of any covenant strictly.⁷¹

A rule of construction that often could aid courts in interpreting a restrictive covenant is that a writing should be interpreted as a whole.⁷² *J.T. Hobby & Son v. Family Homes*⁷³ illustrates the significance of this rule. In *J.T. Hobby*, a restrictive covenant limited the property to "one attached single-family dwelling."⁷⁴ The covenant, however, also limited the property to "residential purposes."⁷⁵ Construing the covenant as a whole, the North Carolina Supreme Court concluded that the defendant had not violated the covenant by using the house as a group home. Maintaining that the two phrases must have separate meanings,⁷⁶ the court held that the first phrase referred to the manner in which the property was to be used, whereas the latter phrase, which was not restricted in any way, indicated that use of the property by more than one family was acceptable.⁷⁷

Courts often must ascertain an intent that did not exist at the time of the agreement because the parties who have drafted a restrictive covenant frequently have ignored the possibility that the property might be used for a group home. Courts, therefore, need to consider all of the surrounding circumstances when interpreting a covenant. Courts also may need to examine the subsequent actions of the parties to determine the type of restrictions that the

tract. See *id.* § 235(a). The problem with this rule is that some words, such as "family," have a variety of meanings, and the court may apply a more narrow definition of the word than the parties intended. For example, courts that have construed the term "family" narrowly have required a biological or marital tie between the residents, although the parties may have intended the term to refer to a living unit. See, e.g., *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 72, 274 S.E.2d 174, 180 (1981); *Crowley v. Knapp*, 94 Wis. 2d 421, —, 288 N.W.2d 815, 823 (1980).

The *Restatement* rule requiring a court to apply the technical meaning of technical words likewise provides little guidance in interpreting the term "family" in a covenant. *RESTATEMENT OF CONTRACTS* § 235(b) (1932). Unless both of the original contracting parties were lawyers, they probably did not intend to attach a technical meaning to the term. Thus, a court generally will have no basis for giving the term "family" a technical meaning.

71. See, e.g., *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976).

72. See *RESTATEMENT OF CONTRACTS* § 233(c) (1932).

73. 302 N.C. 64, 274 S.E.2d 174 (1981).

74. *Id.* at 66, 274 S.E.2d at 176.

75. *Id.* at 65, 274 S.E.2d at 176.

76. *Id.* at 75, 274 S.E.2d at 181.

77. *Id.* at 74-75, 274 S.E.2d at 180-81.

parties actually sought.⁷⁸ If, for example, no one challenged the use of the property as a day care center which generates more traffic, noise, and profits than a group home, then the court would be justified in holding that a group home was not prohibited by the restrictive covenant.

D. Express Prohibition of a Group Home for the Mentally Retarded

If courts seek to enforce the intent of the parties, a carefully drafted covenant that expressly prohibits the establishment of any group home on the property⁷⁹ should withstand judicial scrutiny unless the restriction violates public policy or some constitutional provision. The North Carolina Supreme Court has supported this view in dictum. In *J.T. Hobby*, the court permitted the property to be used for a group home, but noted that "[n]othing we have said herein ought to be interpreted to mean that restrictive covenants cannot be drafted so as to regulate the character of the structures erected . . . or their utilization."⁸⁰ Other courts also have intimated that a properly drafted restriction would be enforceable. In *Jayno Heights Landowners Association v. Preston*,⁸¹ for example, the Michigan Court of Appeals enforced a restrictive covenant against a home for elderly women. The court distinguished *Boston-*

78. Although the courts are split, a majority have held that the subsequent actions of the parties may be considered in determining whether the parties intended to create a servitude. See, e.g., *McQuade v. Wilcox*, 215 Mich. 302, 183 N.W. 771 (1921). But see *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919) (minority view).

79. In addition to expressly prohibiting any use of the property for a group home, the covenanting parties can achieve a similar result by expressly prohibiting any mentally retarded individual from living on the property, or by defining "family" as individuals related by blood or marriage. The enforceability of the covenant, however, depends upon the satisfaction of certain requirements. See *supra* note 14. The primary problem for parties seeking to create such a covenant is establishing privity of estate in those jurisdictions where simultaneous privity (transfer of land simultaneously with the creation of the restriction) is required for the covenant to run. The parties can meet this requirement, however, merely by transferring their separate interests to a strawman, who then would reconvey the property subject to the restrictive covenant.

80. 302 N.C. at 75, 274 S.E.2d at 182. See generally *State ex rel. Region II Child & Family Servs. v. District Court*, 609 P.2d 245, 248 (Mont. 1980) ("[n]othing in the language of the restrictive covenant here requires a construction that the 'family' should be a biologically single unit. Accordingly, we hold the use allowed here is one within the ambit and intent of the restrictive covenant.").

81. 85 Mich. App. 443, 271 N.W.2d 268 (1978).

*Edison Protective Association v. Paulist Fathers*⁸²—a case allowing priests to occupy a single-family dwelling—on the ground that the covenant in *Jayno* restricted the residence to “one single family unit,”⁸³ whereas the covenant in *Boston-Edison* was silent concerning the allowable occupants. In a later decision, *Malcolm v. Shamie*,⁸⁴ the Michigan court distinguished *Jayno* on the basis of the distinction between structure and use. In *Malcolm*, the court permitted the continued operation of a group home for mentally retarded women despite a restrictive covenant. In reaching that decision, the court noted the similarity between the covenant before it and the covenant in *Bellarmino Hills*,⁸⁵ which merely restricted the type of structure that could be built upon the property. The court concluded that *Jayno* was distinguishable, therefore, on the ground that the covenant in *Jayno* restricted the use of the property, rather than the type of structure. The apparent need to distinguish *Jayno* evidences an underlying concern for the potential validity of a properly drafted restrictive covenant.

Even if the covenant is properly drafted, a court may refuse to enforce the covenant if it violates public policy or some constitutional provision.⁸⁶ In *McMillan v. Iserman*,⁸⁷ for example, lot owners amended the restrictive covenants in their deeds to prohibit the operation of any state-licensed group home on the property. The defendant, who planned to operate such a facility, had purchased his lot before the amendment. In addition to holding that the restriction was unenforceable because the defendant had relied on the previous restrictive covenants in purchasing his lot, the Michigan Court of Appeals held that the restriction was invalid on public policy grounds.⁸⁸

82. 306 Mich. 253, 10 N.W.2d 847 (1943); see also *supra* text accompanying notes 58-60.

83. 85 Mich. App. at ___, 271 N.W.2d at 270.

84. 95 Mich. App. 132, 290 N.W.2d 101 (1980).

85. 84 Mich. App. 554, 269 N.W.2d 673 (1978); see also *Leland Acres Home Owners Ass'n v. R.T. Partnership*, 106 Mich. App. 790, ___, 308 N.W.2d 648, 651 (1981) (specific language of the covenant held to be very similar to that in *Malcolm* and, therefore, applied only to type of structure).

86. For further discussion of the public policy and constitutional grounds for invalidating restrictive covenants, see *infra* text accompanying notes 123-99.

87. 120 Mich. App. 785, 327 N.W.2d 559 (1982).

88. *Id.* at ___, 327 N.W.2d at 563.

III. COMMERCIAL NATURE OF HOME AS AFFECTING A RESTRICTION'S VALIDITY

Courts consistently have been concerned with the commercial nature of group homes.⁸⁹ In fact, in some cases the profit making nature of the home has determined the outcome.⁹⁰ In *Seaton v. Clifford*,⁹¹ for example, the California Court of Appeals focused primarily on the commercial nature of a group home in determining whether to enforce a restrictive covenant which limited the property to a single-family residence. The defendant in *Seaton* operated a group home which housed a small number of mentally retarded individuals. Holding that the defendant had violated the covenant, the court noted that the defendant had received \$1392 per month in compensation for operating the group home and had employed two individuals to work in the home:

[T]he maintenance of a commercial "boarding house," to use defendant's own terminology, which in essence is providing "residence" to paying customers, is not synonymous with "residential purposes" as that latter phrase is commonly interpreted in reference to property use. . . . [W]e see little distinction between defendant's business and that of a motel, inn [or] rest home. . . .⁹²

A majority of courts have held that, although the commercial nature of a group home may have some relevance, that characteristic should not be determinative.⁹³ In *J.T. Hobby*, for example, the

89. See, e.g., *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); *City of Livonia v. Department of Social Servs.*, 119 Mich. App. 806, 328 N.W.2d 1 (1982); *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982); *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978), *Costley v. Caromin House*, 313 N.W.2d 21 (Minn. 1981); *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981); *Crowley v. Knapp*, 94 Wis. 2d 42, 288 N.W.2d 815 (1980).

90. See, e.g., *Seaton v. Clifford*, 24 Cal. App. 3d 46, 52, 100 Cal. Rptr. 779, 782 (1972) ("The restrictions are not aimed at the mentally retarded they are aimed at the commercial aspects of defendant's activity.").

91. 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972).

92. *Id.* at 51, 100 Cal. Rptr. at 781. The court also rejected any argument based on public policy, stating that the government could always exercise its power of eminent domain. *Id.* at 52, 100 Cal. Rptr. at 782.

93. Compare *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982); *City of Livonia v. Department of Social Servs.*, 119 Mich. App. 806, 328 N.W.2d 1 (1982); *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982); *Costley v. Caromin*

North Carolina Supreme Court permitted the defendant to continue operating a group home for five mentally retarded adults. Although noting that the home was a nonprofit corporation, the court maintained that this factor was not controlling: "[i]t is [the] purpose and method of operation which serves to distinguish defendant's usage . . . from that normally incident to a boarding house."⁹⁴

Under either approach, a court attempts to distinguish group homes from other types of group living arrangements, such as fraternities, convents, and boarding houses. Because of the need to distinguish these various uses, a court should address the commercial status of a group home, but only to the extent that the commercial status of the home relates to the parties' intent. In other words, the court should consider the commercial nature of the home as a factor in determining whether the group home conforms with the "residential" or "family" requirements of the covenant.⁹⁵ If the commercial nature alone was determinative, absurd results which were not contemplated by the parties could arise. Depending upon the precise language in a restrictive covenant, a homeowner who received a job transfer might be unable to rent his home pending its sale because of the commercial nature of the rental agreement. Moreover, certain unobtrusive activities in the home also might be precluded, such as school teachers grading papers or lawyers preparing cases.

A few courts have considered the effect that commercial use has upon the outward appearance of a group home. In *Jayno*, for example, the defendant built a single-family residence upon a lot that he had purchased, and later leased that house to the codefendants, who used the property to provide a home for elderly women. Holding that the defendant had violated the covenant, the

House, 313 N.W.2d 21 (Minn. 1981); *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981); and *Crowley v. Knapp*, 94 Wis. 2d 42, 288 N.W.2d 815 (1980), with *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); and *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

94. 302 N.C. at 73, 274 S.E.2d at 180. The court also discussed the family character of the usage. *Id.*

95. The commercial nature of the home also may be a factor for the court to consider in determining whether to void the covenant on public policy grounds. See *infra* text accompanying note 196.

Michigan Court of Appeals observed that "[t]here is nothing in the record to indicate that the residents of the property at issue are anything more than a group of unrelated individuals sharing a common roof."⁹⁶ In reaching this conclusion, the court distinguished *Boston-Edison*, in which the Michigan Supreme Court permitted six priests and their two servants to continue living in a home despite a restrictive covenant that provided that the home could be used as a "single dwelling house and [for] dwelling house purposes only."⁹⁷ In comparing the two cases, the court in *Jayno* stressed the noncommercial nature of the priests' living arrangement.⁹⁸

By focusing on the commercial nature of the group home only to the extent of its impact on the residential nature of the neighborhood, the court's approach in *Jayno* was consistent with the approach that other courts have taken in considering the applicability of restrictive covenants to boarding houses and fraternities.⁹⁹ For example, courts often distinguish between individual boarders, who merely pay rent, and the boarding houses themselves. This distinction can be illustrated by comparing *Austin v. Richardson*¹⁰⁰ with *Andrews v. Metropolitan Building Co.*¹⁰¹ In *Austin*, the Texas Court of Appeals held that the renting of a room in a home did not violate a covenant which restricted the home to residential purposes and provided that the occupant was not to operate any commercial enterprises on the premises.¹⁰² In contrast, the Missouri Supreme Court in *Andrews* held that the defendant had violated a similar covenant by converting his home into a more extensive boarding house to support his family.¹⁰³

In those cases in which the residents are members of a religious order, courts will make a similar distinction between residential uses and residential plus religious or business functions. In *Boston-Edison*, for example, the court held that the priests had not vio-

96. 85 Mich. App. at ___, 271 N.W.2d at 270.

97. 306 Mich. at 256, 10 N.W.2d at 848.

98. 85 Mich. App. at ___, 271 N.W.2d at 270.

99. See Annot., *supra* note 57, §§ 6-7.

100. 288 S.W. 180 (Tex. Ct. App. 1926).

101. 349 Mo. 927, 163 S.W.2d 1024 (1942).

102. 288 S.W. at 181.

103. 349 Mo. at ___, 163 S.W.2d 1030-31.

lated the covenant because they used the residence only for residential purposes.¹⁰⁴ In contrast, the Missouri Court of Appeals in *Cash v. Catholic Diocese*¹⁰⁵ enjoined the Catholic Diocese from building a home for nuns in a neighborhood that was restricted to detached single-family dwellings. The home was to have thirteen bedrooms, an office, dining room, parlor, and chapel. The court maintained that there are "other words [than single-family residence] that describe such a building. . . . The residence . . . might be described as a boarding house, sorority, or club. Or if one wanted to emphasize the religious status which its occupants would have in common, one might call it a convent. . . ."¹⁰⁶

IV. EMINENT DOMAIN AND ITS IMPACT ON GROUP HOMES

Assuming that the court upholds the validity of the restrictive covenant, a question arises whether the state should be bound by the restriction if it owns or operates the group home.¹⁰⁷ In a significant minority of jurisdictions, courts have held that restrictive covenants are not sufficient property interests to require compensation for their taking.¹⁰⁸

Commentators have made a number of arguments against treating restrictive covenants as property. The most basic argument is that restrictive covenants are contracts and, therefore, cannot be property.¹⁰⁹ In addition, commentators have argued that public policy requires a finding that restrictive covenants are not property because "an owner should not by 'mere contract,' be allowed to inhibit governmental bodies from performing their functions or to compel the payment of compensation for such performance."¹¹⁰ If restrictive covenants do not constitute property rights requiring

104. 306 Mich. at 255, 10 N.W.2d at 847.

105. 414 S.W.2d 346 (Mo. Ct. App. 1967).

106. *Id.* at 349.

107. Most group homes are licensed by the state. *See infra* note 208. Many group homes also receive state aid as independent contractors working for the state. *See, e.g.*, VA. CODE § 37.1-121 (Supp. 1983).

108. W. STOEUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 128-39 (1977); *see, e.g.*, *Moses v. Hazen*, 69 F.2d 842 (D.C. Cir. 1934); *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939).

109. *E.g.*, W. STOEUCK, *supra* note 108, at 132-33. This argument emphasizes form over substance.

110. *Id.* at 134.

compensation, then in many situations involving group homes the covenant will not pose any problem because the state simply can exercise its power of eminent domain and thereafter ignore the restrictions of the covenant.¹¹¹ Although a majority of the courts have not adopted this position, recent state court decisions provide support for this position.¹¹²

In those jurisdictions that have held that restrictive covenants represent property rights and that a violation of those covenants by the state constitutes a taking of private property,¹¹³ the state must condemn the property rights imposed by the covenant and pay compensation. Condemnation is perhaps the most economical means by which a state can contend with a restrictive covenant. Depending on the measure of damages, the required compensation may be sufficiently small so as not to unduly burden the operation of the group home.

The usual measure of damages for the taking of property rights inuring under a restrictive covenant is the reduction in value of surrounding properties caused by the governmental activity.¹¹⁴ To illustrate, suppose that the owners of contiguous lots A, X, Y, and Z restrict the use of their respective lots, and that thereafter a group home is begun on lot A. Theoretically, the owners of the adjoining lots X, Y, and Z have suffered a loss in that their property no longer enjoys the full benefit of the restriction imposed on lot A. The damages, therefore, would equal the diminution in value of the lots X, Y, and Z as a result of the operation of the group home.

Under an alternative method, damages are measured by the dif-

111. Any inverse condemnation proceeding would fail, absent a due process argument, because the state has not taken any property.

112. See, e.g., *Ryan v. Town of Manalapan*, 414 So. 2d 193 (Fla. 1982). Recent decisions, however, reflect no clear trend toward either position. W. STOEBUCK, *supra* note 108, at 129. For a general discussion of the competing views on whether a restrictive covenant constitutes a sufficient property interest to require compensation, see W. STOEBUCK, *supra* note 108, at 128-38. See also Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, 1945 Wis. L. Rev. 5; Case Note, *Constitutional Law/Property—Restrictive Covenants: Do They Apply to Public Bodies?*—*Ryan v. Town of Manalapan*, 10 FLA. ST. U.L. REV. 667 (1983).

113. Even if the restrictive covenant constitutes a property interest, a state is required to pay compensation only if a taking has occurred. For a discussion of whether the state's operation of a group home on property subject to a restrictive covenant constitutes a taking, see *infra* text accompanying notes 209-20.

114. W. STOEBUCK, *supra* note 108, at 136-37.

ference in the value of the surrounding property with and without the restriction. This measure ignores the manner in which the government uses the property and focuses instead on the value of lots X, Y, and Z without the restriction.¹¹⁵ Because of the different focus of these two measures, a court could reach substantially different compensation awards, depending upon which measure is used.

The difference between these two measures of damages perhaps can be understood better by considering the operation of each measure in a typical nuisance suit. Assume that an unpolluted stream first runs through land owned by A and then through land owned by X. The land of X is worth more if he can extract a promise from A that A will not pollute the stream in the future. The difference in the value of X's land with and without the benefit of A's promise reflects the second measure of damages.

A court, however, can apply a different measure of damages if the government condemns A's property and thereafter pollutes the stream. The value of A's promise now can be measured by the difference between the value of X's land before and after condemnation or before and after the discharge of pollutants. The known nuisance will affect the value of the property more than the potential nuisance.

In cases involving restrictive covenants, the first measure of damages normally will produce a higher damage award than will the second measure.¹¹⁶ Courts generally apply the higher measure of damages whenever a partial taking of property has occurred,¹¹⁷ as opposed to a complete taking in which the courts normally will apply the lower measure of damages. Because a state's condemnation of the property rights embodied in a restrictive covenant constitutes a partial taking of property, the courts should determine damages on the basis of the actual diminution in the value of the property as a result of the group home's operation, rather than on the basis of the second measure of damages.¹¹⁸ One could argue, however, that the second measure of damages better serves the underlying policies behind the condemnation award because it com-

115. *Id.*

116. This assumes, of course, that a group home affects the value of adjoining property. *But see infra* note 197 and accompanying text.

117. W. STOEBUCK, *supra* note 108, at 137.

118. *Id.*

pensates the adjoining land owners for the loss of the covenant's protection rather than for the actual damage caused.¹¹⁹

Although this argument has some validity, courts are likely to apply the first measure of damages because, under that measure, the court's award resembles severance damages. Severance damages attempt to compensate for the loss in value of the remaining property by reason of a partial taking and recognize the enhanced value of the whole property before the taking. For example, when the government condemns one-half of a farm's total acreage, a damage award of one-half of the farm's total value may not reflect accurately the loss suffered by the farmer, because the property as a whole has an enhanced value which is greater than the sum of its parts.

Although awarding severance damages is appropriate in those cases in which the government has condemned a physical part of the property, such an award is inappropriate in those situations in which the government condemns the property rights embodied in a restrictive covenant because the physical integrity of the property is left unaltered. By awarding severance damages, the courts elevate form over substance.

When the government uses property in a manner that violates a restrictive covenant, the government not only leaves the physical nature of the property intact, but also leaves the restrictive covenant basically unaltered. The restrictive covenant remains enforceable to the extent that the parties can enjoin other uses, such as a grocery store, a boarding house or a fraternity. In awarding damages, the court should consider this factor.¹²⁰ The court also should recognize that often the possibility of a group home was of little or no concern to the original parties to the covenant. In fact, in today's housing market the developer, who has little long-term inter-

119. Under the first measure of damages, the government could argue reasonably that the extinguishment of a property right should not require compensation if no damage results. *Contra* W. STOEBC, *supra* note 108, at 136.

120. A court should consider whether home buyers are sophisticated enough to require a reduction in the price of the home because this provision of the covenant is no longer enforceable. This consideration, however, is somewhat circular. If the public is aware that a group home may be placed in any neighborhood, the buyer must realize that the purchase price reflects this fact and, therefore, he suffers no compensatory loss if the covenant later is violated.

est in the property, generally is the party responsible for the creation of a restrictive covenant. Finally, the court must consider whether any loss actually has occurred as a result of the government's use of the property. Evidence suggests that group homes have no significant impact on the value of surrounding property.¹²¹ Based upon this evidence, adjoining landowners should not be entitled to any compensation because they have suffered no measurable loss. The adjoining landowners may be entitled to equitable relief, however, even in the absence of identifiable economic loss.¹²²

V. CONSTITUTIONAL VALIDITY OF RESTRICTIVE COVENANTS

The decision by the United States Supreme Court in *Shelley v. Kraemer*¹²³ must be considered when examining the discriminatory impact of any restrictive covenant. In *Shelley*, the Court invalidated a private restrictive covenant that discriminated on the basis of race because judicial enforcement of the covenant would constitute state action within the meaning of the fourteenth amendment.¹²⁴

In determining whether *Shelley* prohibits the enforcement of covenants restricting the institution of group homes for the mentally retarded, a court must consider two issues. First, the court must ascertain whether enforcement of the covenants constitutes state action. If the court determines that state action is involved, then the court must ask whether the state's involvement violates any provision of the United States Constitution.¹²⁵ In answering this question, a court should note the Supreme Court's reluctance since *Shelley* to expand its holding beyond restrictive covenants having racial overtones.¹²⁶ This reluctance is probably due in part to the overwhelming discussion generated by *Shelley*.¹²⁷ Commen-

121. See *infra* note 197 and accompanying text.

122. In determining whether to grant injunctive relief, a court has the power to balance the relative harm. II AMERICAN LAW OF PROPERTY § 9.38 (A. Casner ed. 1952).

123. 334 U.S. 1 (1948).

124. *Id.* at 20.

125. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147-49 (1978).

126. See Leedes, *State Action Limitations on Courts and Congressional Power*, 60 N.C. L. REV. 747, 765-70 (1982).

127. See, e.g., Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811 (1964); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Leedes, *supra* note 126, at 761-70; Wechsler, *Toward Neutral Principles of Consti-*

tators generally have criticized *Shelley* on the ground that the decision, on its face, would require all private agreements to satisfy constitutional standards because the enforceability of the covenants almost always depends on state court action.¹²⁸

A. Decisions Addressing State Action and Restrictive Covenants

In those cases in which courts have considered the validity of restrictive covenants affecting the mentally retarded, few courts have discussed whether state enforcement of those covenants constitutes state action violative of the fourteenth amendment. None of those courts has held that *Shelley* applies to such covenants,¹²⁹ perhaps because of the belief that *Shelley* is inapplicable apart from restrictive covenants involving racial discrimination.¹³⁰ This belief is not universally shared, however, in light of three decisions that found *Shelley* applicable in contexts other than racial discrimination. In *Riley v. Stoves*,¹³¹ for example, the Arizona Court of Appeals found state action in the judicial enforcement of a restrictive covenant that excluded families with children. The court, nevertheless, upheld the covenant under a rational basis standard

tutional Law, 73 HARV. L. REV. 1 (1959). For a recent discussion of the diverse problems associated with state action, see Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289-1609 (1982).

128. L. TRIBE, *supra* note 125, at 1156.

129. See *Welsch v. Goswick*, 130 Cal. App. 3d 398, ___, 181 Cal. Rptr. 703, 711 (1982) (Staniforth, J., concurring) (the applicability of *Shelley* under California common law was unclear); *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559 (1982) (dissenting opinion rejected the contention that *Shelley* applied even though the majority did not rely upon *Shelley* in reaching its decision); *State ex rel. Region II Child & Family Servs. v. District Court*, 609 P.2d 245 (Mont. 1980) (the court did not have to determine the applicability of *Shelley* because the defendant had not breached the covenant); *Crowley v. Knapp*, 94 Wis. 2d 421, ___, 288 N.W.2d 815, 823 n.2 (1980) (the court determined that the defendant had not breached the covenant and, therefore, did not address the applicability of *Shelley*).

130. The courts are divided concerning the applicability of *Shelley* in contexts other than racial discrimination. See generally, Travalio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L.J. 295, 324 (1979); Note, *Judicial Enforcement of Restrictive Covenants Against Children: An Equal Protection Analysis*, 17 ARIZ. L. REV. 717 (1975); Note, *Housing Discrimination Against Children: The Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559 (1977); Note, *Restrictive Covenants and Religious Uses: The Constitutional Interplay*, 29 SYRACUSE L. REV. 993 (1978) [hereinafter cited as Note, *Covenants and Religious Uses*].

131. 22 Ariz. App. 223, 526 P.2d 747 (1974).

of review.¹³² Similarly, in *Franklin v. White Egret Condominium*,¹³³ the Florida District Court of Appeals concluded that the judicial enforcement of restrictive covenants discriminating on the basis of age constituted impermissible state action because the covenant impinged on the fundamental right to procreate.¹³⁴ Finally, an Ohio Circuit Court in *West Hill Baptist Church v. Abbate*¹³⁵ held that the fourteenth amendment prohibited judicial enforcement of a covenant restricting religious use of the property. These decisions, however, do not reflect the majority position.¹³⁶ As one commentator has pointed out, a number of state and federal court decisions reflect a "double standard"—one for racial discrimination and one for all other types of discrimination.¹³⁷ Most courts, however, fail to explain the basis for this double standard.¹³⁸

B. Analysis of The Double Standard for State Action

In perhaps the most intelligible discussion of *Shelley*, Professor Tribe suggests that judicial enforcement of a restrictive covenant does not necessarily constitute state action because of the court's duty to act in a neutral manner:

As conventionally understood, the [equal protection] clause commanded governmental neutrality with respect to such matters as race. . . . If [*Shelley*] was rightly decided, as I believe it was, the reason is either that neutrality does not suffice in matters of racial segregation in housing, or that the state's contract and property rules, including elaborate doctrines designed to limit the enforceability of restraints on the alienation of land, were not in fact neutral in their enforcement of *racial* restraints on alienation while treating many other restraints as unenforce-

132. 22 Ariz. App. at ____, 526 P.2d at 753. Defendants' counsel apparently did not argue that the covenant infringed a fundamental right.

133. 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978).

134. *Id.* at 1088.

135. 24 Ohio Misc. 66, 261 N.E.2d 196 (1969). This decision apparently is the only reported case that has applied *Shelley* to restrictive covenants prohibiting religious use of the property.

136. For a list of cases addressing the applicability of *Shelley* to restrictive covenants prohibiting any religious use of the property, see Note, *Covenants and Religious Uses*, *supra* note 130, at 994 n.9, 1002 n.69.

137. Travalio, *supra* note 130, at 326-27 & nn.201, 208-14.

138. *Id.* at 327 nn.208-14.

able. The issue . . . becomes a matter for resolution in terms of the substantive rules of equal protection. . . .¹³⁹

Under this analysis, a court considering the validity of a restrictive covenant involving the mentally retarded needs to determine whether the mentally retarded require greater protection under the Constitution than the protection offered by judicial neutrality.

In determining the constitutional protection required for the mentally retarded, the courts can look to the zoning cases for guidance. These cases are beneficial because they reflect the degree of constitutional protection required when the state acts directly. Of the various constitutional challenges to exclusionary zoning that commentators have raised,¹⁴⁰ the constitutional requirement of equal protection provides the strongest support for the proposition that the government does not act neutrally when enforcing restrictive covenants against the mentally retarded.¹⁴¹

In analyzing a case on equal protection grounds, a court may apply one of three different standards of review depending upon the basis of the classification, the nature of the interests impaired by the classification, and the state interests offered in support of the classification. Traditionally, courts will uphold a discriminatory classification set forth in a statute if a rational relationship exists between the classification and the state interest.¹⁴² Whenever the discriminatory classification is directed at a suspect class¹⁴³ or the classification burdens the exercise of a fundamental right,¹⁴⁴ however, the court will apply a stricter standard of review. Under this strict scrutiny test, the state must demonstrate that the classification is necessary to achieve a compelling state interest. In cases involving sex discrimination or illegitimacy classifications, the courts recently have adopted an intermediate standard of review.¹⁴⁵ Under this standard, the court examines the classification to ensure that it is substantially related to the achievement of an

139. L. TRIBE, *supra* note 125, at 1170.

140. See generally Comment, *Zoning*, *supra* note 3; Comment, *Exclusion*, *supra* note 3.

141. Commentators also have challenged the covenants as an impediment to the constitutional right to travel. See, e.g., Comment, *Exclusion*, *supra* note 3.

142. L. TRIBE, *supra* note 125, at 994-96.

143. *Id.* at 1012-32.

144. *Id.* at 1002.

145. *Id.* at 1063-66.

important governmental objective.¹⁴⁶

Because the covenant in *Shelley* restricted use of the property by blacks, the covenant impinged upon the rights of a suspect class. Given the judicial reluctance to extend *Shelley*, a court probably will not find that state action is involved in the enforcement of a restrictive covenant unless the covenant is directed at a suspect class or burdens the exercise of a fundamental right.¹⁴⁷ Someone challenging a covenant that prohibits any use of the property by mentally retarded individuals, therefore, must establish that the mentally retarded constitute a suspect class or that the covenant impinges upon a fundamental right. Unless the restrictive covenant affects either of these interests, a court probably will enforce the covenant, particularly in light of the fact that the United States Supreme Court has permitted substantial discrimination in zoning upon the state's showing of a rational relationship. In *Village of Belle Terre v. Boraas*,¹⁴⁸ the Court applied a rational relationship test and upheld a zoning ordinance restricting the entire village to families related by blood or marriage. The Court later held in *Moore v. City of East Cleveland Heights*,¹⁴⁹ however, that an ordinance which excluded collateral relatives impinged on a fundamental right. Absent a finding of a suspect class or a fundamental right, courts will permit a significant amount of private discrimination.

Courts consider a right as fundamental only if the right is "explicitly or implicitly guaranteed by the Constitution."¹⁵⁰ Because the Constitution does not recognize explicitly the right of the mentally retarded to reside in a group home, one must argue that the right is implicitly embodied in the Constitution. The probability that this argument will be successful, however, is low. Although the Court in *Moore* considered as fundamental the right to live with an

146. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

147. State action occurs in the enforcement of a restrictive covenant only if the court does not act neutrally. *See supra* text accompanying note 139. The United States Supreme Court has determined that a court acts neutrally except in the enforcement of a racially discriminatory covenant. Unless the discrimination rises to a comparable level, the Court probably would not follow *Shelley* or find state action in the enforcement of other covenants.

148. 416 U.S. 1 (1974).

149. 431 U.S. 494 (1977).

150. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

extended family,¹⁵¹ the Court was concerned with the more traditional aspects of an extended family.¹⁵² Further, there is no underlying fundamental right to housing.¹⁵³ Although the Court recognized in *O'Connor v. Donaldson*¹⁵⁴ that a person has the right to be free if he does not pose a danger to society, one does not have a fundamental right to live in the place of his choice.¹⁵⁵ One can argue, however, that the right to receive treatment in the least restrictive environment necessarily implies that the mentally retarded have a fundamental right to live in a group home. Despite the logic of this argument, its validity is questionable in light of the United States Supreme Court's recent remand of the leading lower court decision asserting such a right.¹⁵⁶

If restrictive covenants that prohibit the mentally retarded from using the property do not burden the exercise of a fundamental right, one is left to consider whether the mentally retarded constitute a suspect class. The Court has articulated several factors that distinguish a suspect class: an "immutable characteristic determined solely by the accident of birth";¹⁵⁷ a "history of purposeful unequal treatment";¹⁵⁸ and a "position of political powerlessness."¹⁵⁹ The developmentally handicapped, as a class, easily satisfy these criteria.¹⁶⁰ The vast majority of mentally retarded people have been retarded since birth,¹⁶¹ have received unequal treatment

151. 431 U.S. at 520.

152. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974). Cf. *Moore v. City of E. Cleveland Heights*, 431 U.S. 494, 549 (1977) (White, J., dissenting). *Contra* Comment, *Zoning*, *supra* note 3, at 406-07.

153. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 683 (1978).

154. 422 U.S. 563 (1975).

155. *Contra* Comment, *Zoning*, *supra* note 3, at 405-06.

156. *Halderman v. Pennhurst State School*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981). See also *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). *Contra* Comment, *Zoning*, *supra* note 3, at 407-08. See generally Ferleger & Scott, *Rights and Dignity: Congress, the Supreme Court, and People with Disabilities After Pennhurst*, 5 W. NEW ENG. L. REV. 327 (1983).

157. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

158. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

159. *Id.*

160. This is not necessarily the case with mental illness, which may be transitory in nature. See Comment, *Exclusion*, *supra* note 3, at 935.

161. C. BARLOW, *MENTAL RETARDATION AND RELATED DISORDERS* 3 (1978) ("Mental retardation is the symptomatic expression of neurological disease which usually was active during

by both the government and private individuals in a wide range of endeavors,¹⁶² and have been rendered politically powerless by statute in many jurisdictions.¹⁶³

Despite this history of unequal treatment, the Court probably would not label the mentally retarded a suspect class. Because a mental handicap resembles a physical handicap in terms of the individual's ability to perform or contribute,¹⁶⁴ the Court probably would classify the mentally handicapped and the physically handicapped in the same manner. Justice Brennan, in his plurality opinion in *Frontiero v. Richardson*,¹⁶⁵ stated in dicta that a physical disability is a nonsuspect classification: "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Another factor which is antithetical to a judicial finding that the mentally retarded constitute a suspect class is that a classification based on one's mental capacity does not raise the moral indignation that is associated with a racially discriminatory classification.¹⁶⁶

the time of gestation or the prenatal period, and less often during infancy and childhood."); M. HUTT & R. GIBBEY, *THE MENTALLY RETARDED CHILD* 96 (1976) ("The more we have learned about the development of mental retardation, the more we have to come to view the problem as one of interacting factors: the interaction of genetic factors with prenatal or postnatal environmental factors.").

162. A number of revealing books explore the long history of society's mistreatment of the mentally retarded. See, e.g., S. DAVIES, *THE MENTALLY RETARDED IN SOCIETY* (1959); M. HUTT & R. GIBBEY, *supra* note 161. The early history of society's treatment of the mentally retarded reveals that the Spartans, Romans, and Greeks dealt with the mentally retarded through abandonment and killing, and that Luther and Calvin regarded mental incompetents as being "filled with Satan." These beliefs continued until the late eighteenth and early nineteenth centuries when institutionalization of the mentally retarded began. Two photographic essays graphically portray the dehumanizing effects of these residential warehouses. See B. BLATT, *SOULS IN EXTREMIS: AN ANTHOLOGY ON VICTIMS AND VICTIMIZERS* (1973); B. BLATT & F. KAPLAN, *CHRISTMAS IN PURGATORY* (1974).

163. See, e.g., N.J. STAT. ANN. § 19:4-1 (West Supp. 1983-1984) (disqualifying the mentally retarded from voting); VA. CODE §§ 8.01-2, 8.01-338 (Supp. 1983) (disqualifying the mentally retarded from jury service); WIS. CONST. art. 3, § 2 (disqualifying the mentally retarded from voting).

164. See generally Comment, *Zoning*, *supra* note 3, at 403.

165. 411 U.S. 677, 686 (1973) (Brennan, J.).

166. Cases involving the mentally retarded do not create the gut reaction that was present in *Shelley*. For a gut reaction analysis of *Shelley*, see Friendly, *The Public Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1292 (1982) (borrowing this

VI. PUBLIC POLICY AS A BASIS FOR VOIDING RESTRICTIVE COVENANTS

All the arguments thus far discussed for invalidating restrictive covenants are ineffectual because they are either within the control of the original contracting parties or are so unpersuasive that group homes may be excluded effectively by a well-planned effort.¹⁶⁷ The only effective means for voiding a restrictive covenant, therefore, is on the basis of public policy. In determining whether to enforce a restrictive covenant, the court must consider two public policy issues. First, the court must consider whether any property owner should be allowed to encumber the future use of his property. A discussion of the sound public policy arguments against the running of restrictive covenants is beyond the scope of this Article. It is sufficient for the purposes of this discussion to note simply that, although commentators continue to debate the issue, most jurisdictions have decided generally to uphold restrictive covenants.¹⁶⁸

A court, nevertheless, may determine that a *specific* restriction is invalid on public policy grounds. As early as 1834,¹⁶⁹ courts invalidated a number of specific restrictive covenants¹⁷⁰ on public policy grounds because of vagueness or the duration of the restriction.¹⁷¹

As a majority of courts have recognized, public policy as reflected by legislative and constitutional directives favors the development of group homes for the mentally retarded. Of this major-

analysis from Paul Freund, who applied it in his explanation of *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

167. Courts normally have upheld provisions which allow parties to amend restrictive covenants if the parties act reasonably and in good faith. See generally Browder, *supra* note 56, at 32 n.99; Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 291 (1976). In *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559 (1982), the Michigan Court of Appeals held that the amendment of a restrictive covenant in order to exclude a group home for the mentally retarded was invalid because the proposed operator had purchased the property prior to, and without notice of, the amendment, and in reliance on the preexisting covenant.

168. See generally Browder, *supra* note 56, at 33. Compare Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699 (1943), with Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 YALE L.J. 312 (1944).

169. See generally Browder, *supra* note 56, at 16 n.14.

170. See *id.* at 36 n.118.

171. *Id.* at 37-39.

ity, perhaps the Michigan courts have been the most articulate in developing the public policy basis for voiding restrictive covenants that exclude the mentally retarded. These courts have cited both constitutional and statutory enactments as evidence of this public policy.¹⁷² For example, these courts have noted that the Michigan Constitution provides that "[i]nstitutions, programs and services for the care . . . of [the] mentally . . . handicapped shall always be fostered and supported."¹⁷³ These courts also have observed that Michigan's zoning laws provide that "[i]n order to implement the policy of this state that persons in need of community residential care shall not be excluded by zoning . . . [such a facility] shall be considered a residential use."¹⁷⁴ Based upon these constitutional and statutory manifestations of public policy, the Michigan Court of Appeals concluded in *Bellarmino Hills Association v. Residential Systems*¹⁷⁵ that public policy requires the promotion of "the development and maintenance of quality programs and facilities for the care and treatment of the mentally handicapped."¹⁷⁶

Although public policy may favor the development of group homes for the mentally retarded, public policy will not necessarily override the contractual agreements of private individuals.¹⁷⁷ For example, in *Jayno Heights Landowners Association v. Preston*, the Michigan Court of Appeals maintained that the public policy reflected in the state's zoning laws was not determinative with regard to the validity of restrictive covenants.¹⁷⁸ The courts thus must determine whether the policy favoring group homes should take precedence over the countervailing policy of freedom of contract.

Although the articulated test for determining when a court

172. See, e.g., *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559 (1982); *Bellarmino Hills Ass'n v. Residential Sys.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978). *Accord* *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982); *State ex rel. Region II Child & Family Servs. v. District Court*, 609 P.2d 245 (Mont. 1980).

173. MICH. CONST. art. 8, § 8.

174. MICH. COMP. LAWS ANN. § 125.216 (Supp. 1983-1984).

175. 84 Mich. App. 554, 269 N.W.2d 673 (1978).

176. *Id.* at 558, 269 N.W.2d at 674.

177. Although a state may have formulated a policy, a state cannot necessarily apply that policy to private individuals. See *supra* text accompanying notes 123-66.

178. 85 Mich. App. at —, 271 N.W.2d at 270. See, e.g., *Morgan v. Matheson*, 362 Mich. 535, 107 N.W.2d 825 (1961); *Phillips v. Lawler*, 259 Mich. 567, 244 N.W. 165 (1932).

should invalidate a private agreement on public policy grounds varies little from state to state, the courts have applied this test disparately.¹⁷⁹ A review of Michigan cases provides a useful backdrop from which to consider the competing views. Michigan courts long have interpreted restrictive covenants, and have developed a relatively fixed test of whether a restrictive covenant violates public policy. Under the test adopted by the Michigan Supreme Court, a restrictive covenant's validity depends on "the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well settled public opinion relating to man's plain palpable duty to his fellow men. . . ."¹⁸⁰ Despite the egalitarian nature of this test, it is sufficiently ambiguous to allow courts to uphold restrictive covenants that promote improper causes. For example, in *Sipes v. McGee*,¹⁸¹ the companion case to *Shelley v. Kraemer*, the Michigan Supreme Court cited this test as support for its holding that racially restrictive covenants were not contrary to public policy.¹⁸²

Applying this test, a number of courts have concluded that restrictive covenants excluding the mentally retarded should be void on public policy grounds. Several considerations raised by the dissent in *McMillan v. Iserman*, however, caution against immediate acceptance of this conclusion. The dissent in *McMillan* asserted that a court should void such restrictive covenants "only in cases plainly within the reasons on which the doctrine rests."¹⁸³ The dissent thus objected to the majority's invalidation of the restrictive covenant at issue in *McMillan* because the dissent maintained that the constitutional and statutory provisions¹⁸⁴ upon which the doc-

179. Compare *McMillan v. Iserman*, 120 Mich. App. 785, 327 N.W.2d 559 (1982) (restrictive covenants excluding the mentally retarded violate the public policy of Michigan), with *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. Ct. App. 1981) (the restrictions do not violate the public policy of Texas), *cert. denied*, 103 S. Ct. 377 (1982). See generally Browder, *supra* note 56; Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935).

180. *Skutt v. Grand Rapids*, 275 Mich. 258, 264-65, 266 N.W. 344, 346 (1936).

181. 316 Mich. 614, 25 N.W.2d 638 (1947), *rev'd on other grounds sub nom. Shelley v. Kraemer*, 334 U.S. 1 (1948).

182. 316 Mich. at 631, 25 N.W.2d at 645.

183. 120 Mich. App. at —, 327 N.W.2d at 566 (MacKenzie, J., dissenting).

184. The constitutional and legislative provisions upon which the majority relied were the provisions mentioned previously. See *supra* notes 173-74 and accompanying text.

trine rested did not support the majority's holding. More specifically, applying reasoning similar to that noted in the discussion of the term "family,"¹⁸⁵ the dissent argued that the legislators intended that the zoning statute prevent only the exclusion of individuals through zoning and not through other practices.¹⁸⁶ The dissent also contended that the majority had failed to achieve an appropriate balance between the two competing public policies: "[i]n view of the admonition . . . to act with caution in determining whether contracts are void as contrary to public policy and to apply the doctrine only in cases plainly within the reason on which the doctrine rests, we cannot give preclusive effect to one of the two competing public policies."¹⁸⁷

The easy solution to the concerns expressed by the dissent in *McMillan* would be for the legislature to define public policy more clearly.¹⁸⁸ Absent such a clarification, however, the courts should rank public policies which, for the most part, courts develop. Although some courts may require that the legislature initially define public policy,¹⁸⁹ the basic power to void a contract resides with the courts.¹⁹⁰

After considering the concerns raised by the dissent in *McMillan*, if the court nevertheless decides to void a restrictive covenant, the court then must determine the extent to which the restriction should be unenforceable. In other words, the court must determine the types of group homes to allow on the property despite the re-

185. The dissent's argument implicitly recognizes the observation made in conjunction with the discussion of the term "family" that the intent of a zoning statute may be very different from the intent in a private restrictive covenant. *See supra* text accompanying notes 49-50.

186. The statute's statement of policy specifically stated that the purpose of the statute was to ensure that "persons . . . shall not be excluded by zoning. . . ." 120 Mich. App. at ___, 327 N.W.2d at 566 (MacKenzie, J., dissenting) (emphasis added).

187. *Id.* at ___, 327 N.W.2d at 567.

188. *See infra* notes 200-32 and accompanying text.

189. *See, e.g., E. & S. Insulation Co. v. E.L. Jones Constr. Co.*, 121 Ariz. 468, ___, 591 P.2d 560, 562 (1979) ("[T]he court must look to legislative intent to determine whether a contract contrary to law is void as against public policy."); *Melodies, Inc. v. La Pierre*, 4 A.D.2d 982, 167 N.Y.S.2d 703 (1957) (court must look to the state's constitution and laws to find a basis for holding a contract void as against public policy). *See also Jackson v. Sam Finley, Inc.*, 366 F.2d 148, 154 (5th Cir. 1966) (Mississippi employs a restrictive view of a court's power to declare contracts unenforceable, requiring a "showing that the contract be prohibited by 'express terms or the fair implication' of a statute or judicial decision.").

190. *See Browder, supra* note 56; Gellhorn, *supra* note 179.

strictive covenant. In making this determination, Michigan courts consistently consider three factors: "(1) the specific language of the restriction; (2) the nature of the proposed operation with particular attention paid to its commercial status; and (3) the basis of affiliation of the residents in the proposed facility."¹⁹¹ Although the continued utility of this three-pronged test in Michigan is questionable in light of *McMillan's* apparent blanket invalidation of restrictive covenants that prohibit group residential facilities on public policy grounds,¹⁹² the test and its earlier use in such cases as *Bellarmino Hills* provides a useful framework by which to examine a court's application of public policy.

Considering the three prongs in reverse order, the basis of affiliation prong is useful in that its ambiguity allows needed flexibility, but is less useful in explaining the holdings that courts have reached. For example, this prong provides no guidance for understanding why, despite similar bases of affiliation, the court in *Boston-Edison* permitted six priests to live together, whereas the court in *Catholic Diocese* prohibited the operation of a group home inhabited by nuns.¹⁹³ The second prong of the test, which focuses on the commercial nature of the group home, is likewise ambiguous because this prong does not indicate why some courts permit the continued operation of purely profit-motivated day care centers,¹⁹⁴ but not profit-motivated boarding houses.¹⁹⁵ Finally, the prong that focuses on the specific language of the covenant is also unsatisfactory. Because public policy, rather than the parties' intent, is the controlling factor in this test, the specific language of the covenant should be irrelevant. In light of the inadequacies of this three-prong test, a more appropriate judicial approach would be to consider the intent of the parties to the extent that their intent can be reconciled with the overriding public policy against the exclusion of group homes for the mentally retarded.

A question arises, however, concerning the extent to which a court can reconcile public policy with the intent of a restrictive

191. *City of Livonia v. Department of Social Servs.*, 119 Mich. App. 806, ___, 328 N.W.2d 1, 4 (1982).

192. 120 Mich. App. 785, ___, 327 N.W.2d 559, 562-63 (1982).

193. See *supra* text accompanying notes 97-98, 104-05.

194. See, e.g., *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982).

195. See, e.g., *Andrews v. Metropolitan Bldg. Co.*, 349 Mo. 927, 163 S.W.2d 1024 (1942).

covenant. By entering into restrictive covenants, most parties intend to protect the character of the neighborhood, as well as the property values. To the extent that a group home does not affect significantly the character of the neighborhood, public policy and the covenant should be reconcilable. Such factors as the size, physical characteristics, and commercial nature of the group home should be relevant, therefore, only to the extent that those factors affect the neighborhood's character.¹⁹⁶ Reconciling public policy with the parties' intent to preserve property values may be more difficult theoretically, but in actuality, this reconciliation may be easier because of empirical data suggesting that group homes for the mentally retarded do not affect property values.¹⁹⁷

In reconciling public policy and the intent of the parties, one final precaution must be noted. In jurisdictions with zoning laws that allow the operation of group homes in single-family residential areas, the statutes typically delineate the permissible size, licensing, and staffing of the group home.¹⁹⁸ Although those statutes provide readily available guidelines, courts should not equate the concern of zoning laws with the concerns of restrictive covenants.¹⁹⁹ For example, the fact that a zoning ordinance may permit the operation of a group home housing six mentally retarded individuals does not mean that public policy demands that group homes of six or fewer residents be allowed in all neighborhoods. One can imagine situations in which peculiar features of the property would make a group home of six individuals inappropriate.

196. In *Cash v. Catholic Diocese*, 414 S.W. 2d 346 (Mo. Ct. App. 1967), the size of the home, which would have been 6,000 square feet with thirteen bedrooms, would have altered dramatically the character of the neighborhood, whereas the presence of nuns in the neighborhood would not have. Thus, while the court could reconcile the religious use of the home with the covenant, the court could not reconcile the size of the home with the covenant.

197. J. WOLFERT, *GROUP HOMES FOR THE MENTALLY RETARDED* (1978); Dear, *Impact of Mental Health Facilities on Property Values*, 13 *COMMUNITY MENTAL HEALTH J.* 150 (1977); *DEVELOPMENTAL DISABILITIES STATE LEGIS. PROJECT OF THE ABA COMM'N ON THE MENTALLY DISABLED, ZONING FOR COMMUNITY HOMES SERVING DEVELOPMENTALLY DISABLED PERSONS* 2 n.10.

198. See, e.g., *ARIZ. REV. STAT. ANN.* § 36-582 (West Supp. 1983-1984) (state will license group homes of not more than six residents, excluding the operator).

199. See *supra* text accompanying notes 49-50.

VII. STATE STATUTES

State legislatures could relieve the courts from having to determine whether these restrictive covenants violate public policy by enacting specific statutes. Of course, the courts may have to examine the constitutionality of the statutes. Currently, however, only four states have enacted statutes restricting the property owner's ability to prevent the operation of a group home for the mentally retarded on his property.²⁰⁰

A. Is the Statute a Valid Exercise of the Police Power?

In determining whether the statute constitutes a valid exercise of the state's police power, a court must consider two issues. First, the court must ask whether the legislative action is within the state's police power, and second, the court must determine whether this exercise of the police power satisfies the due process requirement of reasonableness. In light of recent Supreme Court pronouncements regarding the rights of institutionalized patients,²⁰¹ as well as decisions upholding zoning statutes affecting the mentally retarded,²⁰² the state undoubtedly has the right to take steps to protect the interests of the mentally retarded. Although the courts may not have fulfilled all of the goals sought by the proponents of group homes, the courts have recognized that in protecting the general welfare, the state has the power to foster the development of group homes.²⁰³

The state's exercise of its police power, however, must be reasonable under the due process clause. To satisfy this requirement, the state must establish that "the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly op-

200. CAL. HEALTH & SAFETY CODE § 1501 (West 1979); IND. CODE § 16-10-2.1-6.8 (Supp. 1981); N.C. GEN. STAT. § 168-23 (Supp. 1981); WIS. STAT. ANN. § 46.03(22)(D) (West 1979). For a proposed model statute, see Comment, *supra* note 4, at 1390.

201. See *supra* text accompanying note 154.

202. See *supra* note 48.

203. Once the legislature determines that steps are necessary for the general welfare, courts will pay considerable deference to that decision. As the United States Supreme Court observed in *Berman v. Parker*, 348 U.S. 26, 32 (1954), "[t]he role of the judiciary in determining whether [legislative] power is being exercised for a public purpose is an extremely narrow one."

pressive on individuals."²⁰⁴ Several commentators also have noted that "only the most unusual and totally arbitrary zoning ordinance could fail such a test. . . . Thus, any arguable 'police power' action is likely to be a non-compensable regulation."²⁰⁵

One can argue that a state's prohibition of restrictive covenants excluding the mentally retarded furthers not only the interests of the mentally retarded, but also the interests of the general public. If states allow private landowners to prevent the establishment of group homes in residential neighborhoods, the result could be a concentration of such homes in certain types of areas or in one particular area. State intervention benefits society, therefore, by limiting concentrations of group homes, increasing the exposure of citizens to diverse groups, and lessening the impact on school systems, social agencies, and health facilities. The state thus can assert that the interests of the public require intervention on behalf of group homes. Moreover, these state interests probably are sufficient to withstand a challenge by property owners because the courts have recognized a wide variety of legitimate governmental interests that affect the quality of life. As the United States Supreme Court has observed,

[t]he concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²⁰⁶

To ensure that the state's prohibition of covenants that exclude

204. *Lawton v. Steele*, 152 U.S. 133, 137 (1894); see generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 443-44; W. STOEBUCK, *supra* note 108, at 168.

205. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 444.

206. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). See also *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (upholding zoning ordinance restricting location of adult movie theaters); *Cordova v. City of Tucson*, 16 Ariz. App. 447, 494 P.2d 52 (1972) (preservation of historic property is a public use); *City of Miami Beach v. Broida*, 362 So. 2d 19 (Fla. App. 1978) (civic center is a public use); *Flaccomio v. Mayor of Baltimore*, 194 Md. 275, 71 A.2d 12 (1950) (expansion of an historical site and museum was a public use); *Elbert v. Village of N. Hills*, 262 A.D. 470, 28 N.Y.S.2d 317, 318 (upholding zoning ordinance designed to protect "appearance and environment"), *rev'd on other grounds*, 262 A.D. 856, 28 N.Y.S.2d 172 (1941); *City of Des Moines v. Hemenway*, 73 Wash. 2d 130, 437 P.2d 171 (1968) (a marina is a public use).

the mentally retarded is not "unduly oppressive," however, the legislature should incorporate into the statute limitations on the size, number, and outward appearance of group homes.²⁰⁷ Usually, the state can impose these limitations on group homes through its licensing provisions.²⁰⁸

B. Does the Statute Constitute a Taking?

If a court concludes that the state's regulation of restrictive covenants is a valid exercise of its police power, the court then must consider whether the statute amounts to a taking of private property requiring compensation. Although a "non-acquisitive regulation" can result in the taking of property,²⁰⁹ not every regulation that diminishes property values constitutes a taking. In fact, a statute can diminish substantially the value of property without constituting a taking.²¹⁰

A number of courts, including the United States Supreme Court, have addressed the extent to which a state can regulate land without paying compensation.²¹¹ These decisions provide little guidance in determining whether a taking has occurred,²¹² however, because the courts frequently fail to distinguish between whether a taking has occurred and whether the statute constitutes a valid exercise of the state's police power. As one commentator has noted, "[i]n practice we will find the courts tending to blend the due-process-unreasonableness limitation with the taking limitation."²¹³ Conse-

207. Some state statutes already impose such limitations on group homes. *See, e.g.*, CONN. GEN. STAT. ANN. § 8-3e (West Supp. 1983-1984) (zoning statute limits group homes in single-family residential areas to six residents and two staff members).

208. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-467 (Supp. 1983); MICH. COMP. LAWS ANN. § 722.115 (West Supp. 1983-1984); VA. CODE §§ 63.1-196 to -202 (1980).

209. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 440. Governmental action that affirmatively takes property or simply prohibits a particular use of the property, such as forbidding buildings above a certain height in order to preserve a view, makes no difference with regard to whether a taking has occurred because either action can result in a taking. *See generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1186-87 (1967).

210. Michelman, *supra* note 209, at 1190-93.

211. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 443.

212. W. STOEBUCK, *supra* note 108, at 169.

213. *Id.* Stoebuck cites the two-part test discussed previously, *see supra* text accompanying note 204, as the test for determining whether the state statute constitutes a valid exercise of the police power, whereas Nowak, Rotunda, and Young, cite the test as the basis for

quently, one encounters difficulty in attempting to discern legislative action that constitutes a taking.²¹⁴ The regulation envisioned in statutes that would allow group homes in residential neighborhoods, however, falls well below the degree of governmental intrusion found in zoning ordinances approved by the Supreme Court. The prohibition against excluding the mentally retarded from a home with an outward appearance congruent with the rest of the neighborhood and an inward structure resembling the typical nuclear family appears considerably less objectionable, for example, than a zoning ordinance which created a \$740,000 decrease in the value of a particular piece of land.²¹⁵

Consideration of the factors that the courts use in determining whether compensation is required offers further support for the position that this type of statute does not constitute a taking. Courts consider four primary factors in determining whether to award compensation:²¹⁶ whether the property has been physically used or occupied; the degree of harm caused; whether the gain outweighs the loss; and whether any loss has occurred other than a restriction of freedom.²¹⁷ Applying only the first of these four factors, a court could conclude that a statute prohibiting the exclusion of the mentally retarded does constitute a taking. Arguably, through the enactment of such a statute, the state has acquired a property interest to the extent that the adjoining land owners no longer enjoy the same benefit that they had before the governmental action. The fact that the government has acquired a servitude, rather than a more substantial property interest such as an easement, does not mean that any less of a taking of property has occurred. As one commentator has noted, the taking that occurs in either situation is essentially the same:

determining whether a taking has occurred. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 443-44.

214. W. STOEUCK, *supra* note 108, at 170; Michelman, *supra* note 209, at 1169-70.

215. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

216. Professor Michelman was the first to identify these four factors. Michelman, *supra* note 209, at 1183-84.

217. Despite Michelman's criticism of these four factors, courts continue to rely on them. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (factors for a court to consider in determining whether a taking has occurred include whether the property has been invaded physically, the economic impact on the property, and whether the gain outweighs the loss).

it appears equally true of the easement and servitude cases that the condemnee is deprived of the protection of law for a claim which has conventionally been regarded as a twig in his fee simple bundle—in the easement case, a right to exclude, and in the servitude case, a liberty to exploit.²¹⁸

In contrast to this first factor, however, the remaining three factors indicate that a statute prohibiting the exclusion of the mentally retarded would not constitute a taking. As discussed previously,²¹⁹ the placement of a group home for the mentally retarded in a neighborhood does not produce any substantial decrease in the value of the adjoining property. A statute which promotes the development of group homes, therefore, would not result in any substantial harm or loss. Moreover, even though subject to debate, the gain realized by the public from the prohibition of restrictive covenants that exclude the mentally handicapped outweighs the loss suffered by the adjoining land owners. Although this conclusion is difficult to support because of the inherent problem in attempting to quantify relative benefits, the balance clearly favors the development of group homes which have little impact on surrounding property values, rather than the warehousing of large numbers of individuals in harmful environments.²²⁰

C. Retroactivity

Of the four states that have enacted statutes prohibiting the exclusion of the mentally retarded, only California²²¹ limits the applicability of the statute to prospective agreements. Whether the other states have the power to apply their statutes to restrictive covenants retroactively raises serious constitutional questions.

1. Contract Clause

The contract clause of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."²²² The extent to which the retroactive ap-

218. Michelman, *supra* note 209, at 1187 n.45.

219. See *supra* text accompanying notes 114-22.

220. *Id.*

221. CAL. HEALTH & SAFETY CODE § 1501 (West 1979).

222. U.S. CONST. art. I, § 10.

plication of a statute would violate this provision is not clear. In *Home Building & Loan Association v. Blaisdell*,²²³ the United States Supreme Court upheld a state statute authorizing courts to extend the time in which mortgagors could redeem their property following a foreclosure sale. The Court held that "[n]ot only are existing laws read into contracts . . . , but the reservation of essential attributes of sovereign power is also read into contracts. . . ." ²²⁴ Among "the 'rules' that may be read into every contract at its inception is the rule that all *other* rules are subject to change if and when the legislature reasonably concludes that such change is needed." ²²⁵

The constitutional limitations that remain based on the contract clause, therefore, are uncertain. One commentator has suggested, however, that "[i]n all likelihood, the content [of the contract clause] . . . is essentially coextensive with the reach of substantive due process and equal protection; it draws centrally on an evolving principle that there exist limits on the degree to which government can sacrifice some individuals to serve the ends of others." ²²⁶ The previous discussion on eminent domain considered the extent to which a state can regulate land use without unduly sacrificing the property rights of some individuals. ²²⁷

2. Due Process And Retroactivity

The due process clause of the United States Constitution also limits the retroactive application of statutes. To overcome a due process challenge, the state must establish that it provided reasonable notice before applying the statute retroactively or that the retroactive application of the statute reasonably conformed with the public's general expectations. ²²⁸ The state is aided in this task by the considerable judicial deference to the state's determination of reasonableness. In *Usery v. Turner Elkhorn Mining Co.*,²²⁹ for example, the United States Supreme Court displayed considerable

223. 290 U.S. 398 (1934).

224. *Id.* at 435.

225. L. TRIBE, *supra* note 125, at 468.

226. *Id.* at 469; *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 426-28.

227. *See supra* notes 201-08 and accompanying text.

228. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 432.

229. 428 U.S. 1 (1976).

deference in upholding a statute that required employers to compensate miners for disabilities incurred before the enactment of the statute. In reaching its holding, the Court asserted that a statute does not violate due process simply because the statute upsets "settled expectations" and that a court should not "assess the wisdom of Congress' chosen scheme."²³⁰ This judicial deference has led commentators to conclude that "[i]f the legislation does have a rational relationship to a proper governmental end, the Court will uphold the retroactive law even though it may impair recognizable property rights."²³¹ Because statutes that prohibit the exclusion of the mentally retarded are rationally related to the state's legitimate effort at deinstitutionalization, a court should uphold the retroactive application of those statutes even though it may impair the property rights found in restrictive covenants.²³²

VIII. CONCLUSION

The judicial trend in the past few years has been to allow the establishment of group homes in residential neighborhoods and in single-family residences. The courts, however, often have failed to delineate the legal basis for allowing this action. Moreover, when courts have specified the basis for this action, they often have offered inconsistent rationales. The courts, therefore, must analyze this issue more carefully in the future. Rather than simply voiding restrictive covenants on public policy grounds as they have done in the past, the courts must explain their holdings in a more analytical manner.

This Article has attempted to provide an analytical framework for interpreting private restrictive covenants. In certain instances, a well-drafted restrictive covenant may give a court no choice but to compensate the property owner for abrogation of the covenant. Absent a constitutional or statutory basis for voiding restrictive covenants that excluded the mentally retarded, a court should con-

230. *Id.* at 16-19.

231. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, at 433.

232. In the unlikely event that a court found that a statute prohibiting the exclusion of the mentally retarded was an unconstitutional taking of preexisting contract rights, the state nevertheless could avoid the retroactivity issue by simply acquiring the property through eminent domain.

sider whether public policy requires the court to invalidate the covenants. If the court finds that public policy does demand such a result, the public policies should be grounded in legislative pronouncements or well-established judicial precedents.