9-1-1981

Group Homes, Families, and Meaning in the Law of Subdivision Covenants

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The mysteries of horizontal privity and the touch-and-concern requirement still may bedevil first-year property students, but the truth is that the curious features of the common law rules about real covenants decide few cases these days.[1] In the typical modern lawsuit in the area, the plaintiff is a lot owner or association of lot owners in a residential subdivision, the claim is that the defendant, who is also a lot owner, has violated at least one of the restrictive covenants[2] imposed on all of the lots by the developer, and the relief requested is an injunction against further violation of the covenant. The formal validity of the covenant is taken for granted, and the determinative issue is the covenant's meaning. Because such a large proportion of contemporary covenants cases turn on the question of meaning, it is important to understand what is entailed when a court seeks to ascertain the meaning of a covenant. Part I of this Article discusses two questions central to a general account of the problem of meaning in the law of subdivision covenants. First, whose meaning ought to count? The answer to this question is developed principally by contrasting the meaning problem in covenants law with the related problem in other legal realms such as contractual and statutory interpretation. Second, what should be the role in contemporary covenants law of the

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[1] *See* O. BROWDER, JR., R. CUNNINGHAM, J. JULIAN, & A. SMITH, BASIC PROPERTY LAW 674 (3d ed. 1979); Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 919-21 (1977).

[2] The term "covenant" will be used in this Article to refer both to real covenants and to equitable servitudes. The distinction between the two interests makes little practical difference these days and makes no difference with respect to the points discussed here. *See* Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319 (1970); Stoebuck, *supra* note 1, at 920.

traditional rule requiring that ambiguity in covenant language be resolved in favor of the free use of the land? Here the Article explores the nature of ambiguity and critiques the rationale typically given for the ambiguity/free-use rule.

The meaning problem is the centerpiece of a series of recent covenants cases of considerable societal significance. Subdivision residents have invoked covenants restricting lots to single family use in an effort to block establishment in subdivisions of group homes[3] for the mentally retarded or other dependent individuals. Thus, the courts have had to decide whether such group homes count as families within the meaning of single-family-use covenants.[4] Apart from their social importance, the group homes cases are worthy of attention because they show how the subtle interplay of public policy and rights considerations can affect a court's approach to the meaning problem. Part II of this Article is devoted to the group homes cases.

I. Meaning in the Law of Subdivision Covenants

A. *Some Preliminaries*

Before we begin to develop a conception of meaning in the subdivision covenants context, a word or two should be said about the hardly novel, but continually irksome, problem of the ambiguity of the term "meaning" itself. This section introduces a distinction between ordinary meaning and meaning as legal effect—a distinction that will prove important in the subsequent discussion of the group homes cases.[5] Ordinary meaning exists independently of the adjudicatory context. It comprises the senses a word or sentence might have in ordinary use. Meaning as legal effect is the province of courts. It quite simply denotes the legal effect a court is willing to give the language at stake in a case.

1. Ordinary Meaning. A somewhat fanciful, but useful, hypothetical factual context will illustrate three senses in which we might use the term "meaning" in ordinary talk.[6] Suppose that dur-

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[3] For a description of the group home concept, see notes 43-57 and accompanying text *infra*.

[4] The cases are collected at note 60 *infra*. *Cf.* note 59 *infra* (zoning cases).

[5] The distinction is analogous to one proposed by Corbin between interpretation and construction of contracts. *See* 3 A. Corbin, Contracts § 534, at 9 (1960).

[6] *See generally* W. Alston, Philosophy of Language (1964).

ing World War II the BBC broadcast daily a children's program about the social sciences. One day, on instructions from the Allied Command, the BBC altered the script for the program to include the sentence, "The Washington Monument is tall." Across the Channel, a soldier of the French Resistance heard the sentence, then rushed to a nearby bridge over the Seine and blew it up. Actually, let us suppose, the Allied Command had intended that the Frenchman do something else entirely, *i.e.*, cut certain important communications lines near Paris, but someone had used the wrong codebook. Now, in this hypothetical case, what is the meaning of the sentence, "The Washington Monument is tall"?

The sentence has three "meanings." First, there is the meaning to the Frenchman: How did the saboteur (the addressee) understand the sentence? He understood it as an instruction to destroy a bridge. Second, there is the meaning to the Allied Command, or, to put it another way, there is the sense the speaker intended to convey by use of the language: Cut communications lines. Third, there is the sense in which the sentence would be understood by the well-socialized speaker of English who did not recognize the sentence as code at all—in this case, the children who listened to the program and learned a characteristic of the Washington Monument. All three "meanings" are varieties of the species we might call ordinary meaning. The third sense—the sense in which a word or sentence would be understood by a well-socialized speaker of English—might be labeled social meaning.

Lawyers, who spend a lot of time out at the borders of words, can forget the power of social meaning. Social meaning allows me to communicate with you via this Article without a codebook. The social meaning of a word or sentence is a fact—a complex, illusive fact in some cases—but a fact. Social meaning is learned or discovered, not invented. Each of us is born into—inherits—a language. The language evolves, of course, sometimes rather quickly, but the evolution is under no one's particular control overall. We are language takers in much the same way that participants in a competitive market are price takers.[7] Thus, understanding a sentence (knowing its meaning) in the way the British children would have understood, "The Washington Monument is tall," requires familiarity with the linguistic conventions of the society in which the

[7] *See* G. STIGLER, THE THEORY OF PRICE 87-88 (3d ed. 1966).

sentence is used.[8]

2. Meaning as Legal Effect. All of the senses of "meaning" illustrated in the Washington Monument example can be found in judicial opinions, but the use of the term "meaning" in legal discourse cannot be accounted for completely without introducing yet another variation. Courts also use "meaning" to refer to the legal effect they are willing to give language in a case. Often—perhaps in most cases—there will be no practical difference between ordinary meaning and meaning as legal effect, because the court will try to discern and give legal effect to some variant of ordinary meaning. It is an early lesson of the study of law, however, that the legal effect a court is willing to give the language at issue in a case can differ considerably from the sense in which the language would be understood by a well-socialized speaker of English. Statutory interpretation illustrates nicely both the usual congruence of ordinary meaning and meaning as legal effect and the occasional tension between the two. When a court determines the meaning of a statute the analysis typically includes an inquiry into social meaning, because the principle of legality[9] requires that the legal effect of a statute be consistent with the sense in which the statute would be understood by the citizens who must comply with it. Another variant of ordinary meaning—the sense the speaker intended to convey—also counts significantly in statutory interpretation, because legally embodied, democratic political principles direct the court to give legal effect to the will of the representative branch.[10] On the other hand, a court sometimes will interpret a statute in a way more or less inconsistent with ordinary meaning in order to avoid a constitutional question.[11] Such a decision can be seen as part of a dialogue with the legislature since the legislature can amend the statute to make clear it wants a decision on constitutionality.[12]

In the law of subdivision covenants, the relationship between ordinary meaning and meaning as legal effect is both unclear and

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[8] *See* J. SEARLE, SPEECH ACTS 42-50 (1969); MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 760-61 (1966).

[9] *See* L. FULLER, THE MORALITY OF LAW 83 (rev. ed. 1969); MacCallum, *supra* note 8, at 763.

[10] MacCallum, *supra* note 8, at 762-63 (noting a potential tension between social meaning and the sense the legislature intended).

[11] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 56 (1978).

[12] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 181, 200-02 (1962).

evolving. This relationship will be examined in the subsequent discussion of the ambiguity/free-use rule.[13]

B. Whose Meaning Ought to Count?

Prima facie, at least, the meaning that ought to count in the interpretation of subdivision covenants is some version of ordinary meaning. This conclusion rests on three premises: (1) Subdivision covenants constitute valuable rights[14] held by subdivision lot owners. (2) Because covenants, like many other rights, are embodied in the language used to express them, courts must take the language seriously if they are to take the rights seriously. (3) Covenant language generally should be regarded as nontechnical, *i.e.*, addressed to the ordinary person and not to some specialized linguistic community such as property lawyers.

But which variety of ordinary meaning ought to count? Just as the degree of fit between ordinary meaning and meaning as legal effect will vary with the demands of the legal context, so too will the context dictate the choice among varieties of ordinary meaning. For example, in contracts the legal question, "What does this paragraph of the agreement mean?" usually may be rephrased as "How would a well-socialized speaker of English understand this paragraph?" because the aims of contract law will be served by giving effect to the social meaning of the words the parties chose.[15] If, however, the aims of contract law are not served in a particular case by giving legal effect to the social meaning of the agreement's language, the court will, or at least should, switch to another mode of analysis. Harking back to the Washington Monument hypothetical, suppose the parties to a contract agree that the ordinary English words of the document really are in code. Suppose further that the parties agree on the "code meaning" of the contract. Here the court should ignore the social meaning of the agreement in favor of the code meaning unless the legitimate expectation inter-

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[13] *See* Part I, § C *infra*.

[14] *See* Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1976) (majority of jurisdictions which have considered matter hold that building restrictions constitute property rights for purposes of eminent domain and condemner must compensate landowner damaged by violation of restriction); Stoebuck, *supra* note 1, at 921 (judges and scholars overwhelmingly espouse view that covenants constitute interests in the land affected).

[15] *See* 3 A. CORBIN, *supra* note 5, § 537, at 45-49; *id.* § 538, at 67-69, 73.

ests of some third party will be harmed in a way that contract rules prohibit.[16] Thus, social meaning analysis of contract language may be said to be prima facie, but only prima facie, appropriate.

Enforcement of code meaning makes sense in the classical contracts context because the court can identify readily the particular individuals, the "parties," whose meaning ought to count. But whose meaning ought to count in the context of the subdivision covenant? Consider the legal and factual environment. The American subdivision is not a kingdom unto itself; it exists within a complex political framework and can be affected by legal rules and institutions from the local to the national level. Within these constraints imposed from the outside, however, the subdivision can, and often does, operate according to its own set of general rules—the subdivision covenants; and if in this limited sense the subdivision may be called a kingdom, the developer is its first and only king. The developer chooses the language of the covenants (probably with the aid of a lawyer and the lawyer's formbook) in the earliest stages of development of the subdivision. The covenants and a plat showing lot locations are filed in the real estate records at the courthouse before the first lot is sold. With the sale of the first lot, the developer-king relinquishes considerable sovereignty to the purchaser, who acquires the right to enforce the covenants against the developer and subsequent lot purchasers; moreover, each new purchaser in turn acquires this enforcement right against every other property owner in the subdivision.[17] The developer-king abdicates all authority if and when he conveys away his last remaining unsold parcel in the subdivision, because enforcement is an attribute of land ownership in the subdivision.[18] The mature subdivision then ages and lots and houses are resold, some perhaps several times over, so that few of the original purchasers may remain when litigation about the meaning of a covenant occurs.[19]

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[16] *Id.* § 544; § 537, at 53.

[17] Stoebuck, *supra* note 1, at 907-19.

[18] *See, e.g.*, La Mancha Dev. Corp. v. Sheegog, 78 Cal. App. 3d 9, 14, 144 Cal. Rptr. 59, 62 (1978) (plaintiffs not entitled to enforcement of covenant because no longer owners of benefited land); Stoebuck, *supra* note 1, at 917.

[19] The most important distinguishing characteristic of the subdivision covenant is that it "runs with the land." That is, it may be enforced against successors in interest of lot *A* by successors in interest of lot *B*, etc. *See generally* Stoebuck, *supra* note 1.

If ordinary meaning is to be given legal effect in this setting, what species of ordinary meaning? The sense the developer intended to convey? The sense understood by some particular lot purchaser or purchasers? Or the sense in which the covenant language would be understood by a well-socialized speaker of English?

There is no reason to give *special* weight to the sense intended by the developer, even though the developer drafted the covenants. Admittedly, the role of the developer bears some resemblance to the role of the legislature in enacting a statute, and we know that a court pays special attention to the sense intended by the legislature. The analogy, however, is superficial. A court counts legislative intention heavily because legally embodied, democratic political principles require it. Unless the covenants themselves give the developer special quasi-legislative authority in the subdivision,[20] he has none. His stake in the meaning of the covenants is not qualitatively different from that of any other landowner in the subdivision. True, the developer's financial interest in subdivision land is greater quantitatively than that of any lot purchaser, particularly at the beginning, and the covenants serve to protect the developer's investment by assuring the subdivision's attractiveness to potential purchasers,[21] but the financial and social investment of the prior purchasers ought to weigh heavily, too. After all, the lot owners are likely to be around for awhile after the developer has sold the last lot.

Suppose the developer and an original lot purchaser agree that a covenant prohibiting "trailers" does not apply to "doublewide mobile homes."[22] Assuming that interpretation differs from the social meaning of "trailers" in the subdivision context, should the court give effect to the agreement, along the lines of the code-meaning discussion of the contracts example? By now, the answer should be clear. Subdivision covenants cannot be regarded simply as a series of bilateral contracts between the developer and individual lot pur-

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[20] In some cases, developers have reserved the power to amend the restrictions. Even so, however, courts have required that the amendatory power be used equitably for the benefit of the lot owners in the community. *See* Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 292-300 (1976).

[21] *Id.* at 288.

[22] *See generally* Lassiter v. Bliss, 559 S.W.2d 353 (Tex. 1977) (mobile home with wheels removed, placed on blocks, hooked to lights and water is still trailer and therefore prohibited by covenant). *Contra*, Heath v. Parker, 93 N.M. 680, 604 P.2d 818 (1980).

chasers. In this sense, covenants are more like statutes or ordinances than contracts. A court might be willing to hold the developer to his agreement about the meaning of "trailers," but the agreement could not be thought binding on other lot owners in the subdivision, anymore than an agreement between a city council and some citizen about the meaning of an ordinance could be thought binding on other citizens. Even if all of the current lot owners in a mature subdivison agreed, without changing the actual language of a covenant, that the covenant would have some special meaning at odds with social meaning, a court should not enforce that special meaning against a subsequent lot purchaser ignorant of the agreement. Subdivision covenants speak to future as well as present lot owners, just as ordinances speak to potential as well as present town residents. There is very little room for idiosyncratic meaning in either case.[23] Thus, as a general proposition the variety of ordinary meaning that ought to be given legal effect in the law of subdivision covenants is social meaning—the sense in which the covenant would be understood by a well-socialized speaker of English.

C. *The Ambiguity/Free-Use Rule*

Historically, courts viewed covenants as clogs on alienability that prevented efficient use of land.[24] One manifestation of the judicial hostility to covenants was the traditional rule that ambiguity in covenant language should be resolved in favor of free use of the land.[25] Courts continue to invoke the ambiguity/free-use rule;[26] it

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[23] *See, e.g.*, Leighton v. Leonard, 22 Wash. App. 136, 589 P.2d 279 (1979). In *Leighton*, the plaintiffs, who owned a lot burdened by a covenant restricting the height of "the house to be built" on the lot, sought a declaratory judgment that the covenant applied only to the particular house contemplated by the original lot purchasers at the time the covenant was created. The plaintiffs argued that the covenant reflected the covenantee's fear that the specific house planned by the original purchasers would block a view of Puget Sound. The plaintiffs' home would not obstruct the view. The court rejected the plaintiffs' interpretation of the covenant on the ground that a covenant, which governs the conduct of strangers to the original transaction, should be read objectively, and the height restriction did not single out any particular house.

[24] *See, e.g.*, Stoebuck, *supra* note 1, at 885-86.

[25] *See, e.g.*, Swaggerty v. Peterson, 280 Or. 739, 572 P.2d 1309 (1977) (linking rule of strict construction to state policy favoring "untrammeled land use" and questioning whether rule makes sense in view of more modern policy requiring lawful public regulation of land within state).

[26] *E.g.*, Johnson v. Bryant, 350 So. 2d 433 (Ala. 1977); Collins v. Goetsch, 59 Haw. 481,

has been applied in some of the group homes cases.[27] This section analyzes the ambiguity/free-use rule from two perspectives. First, what is the relationship between the rule and social meaning? Can the two coexist peacefully? Second, is the premise underlying the rule, *i.e.*, that covenants impair alienability, valid in the modern subdivision context?

1. The Ambiguity/Free-Use Rule and Social Meaning. Theoretically, there might be no conflict between the ambiguity/free-use rule and the principle that legal effect should be given to the social meaning of covenant language. Application of the ambiguity/free-use rule could be reserved for those occasions when the social meaning of a covenant was regarded as hopelessly indeterminate, *i.e.*, when a well-socialized speaker of English would be completely puzzled about whether the covenant applied. Notably, however, the ambiguity/free-use rule is not, by its terms, limited to such cases. "Ambiguity"[28] can exist even in cases in which the social meaning of a covenant is relatively clear. It is not the case that the explorer of the territory of a general term used in a covenant passes through a series of clear cases, then reaches the border and falls off the edge into the domain of hopeless indeterminacy.[29] Instead, indeterminacy is a matter of degree. We would not be surprised, I take it, if a well-socialized speaker of English were unsure at first whether a covenant applied to a particular set of facts, thought about it, and decided that the covenant "probably" applied or "almost surely" did not apply, etc. This relative uncertainty might be reflected very roughly by assigning percentage degrees of confidence regarding the social meaning of a covenant: A well-socialized speaker of English might be 90% sure that cove-

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583 P.2d 353 (1978); St. John's Evangelical Lutheran Church v. Kreider, 54 Ill. App. 3d 257, 369 N.E.2d 370 (1977); Trenkamp v. Township of Burlington, 170 N.J. Super. 251, 406 A.2d 218 (1979); Parks v. Richardson, 567 S.W.2d 465 (Tenn. App. 1977); Gilbert v. Shenandoah Valley Improvement Ass'n, 592 S.W.2d 28 (Tex. Civ. App. 1979).

[27] *See* J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981); Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

[28] When a court talks about the "ambiguity" of a covenant, it almost always means "vagueness" instead:

> Ambiguity differs from vagueness. Vague terms are only dubiously applicable to marginal objects, but an ambiguous term such as "light" may be at once clearly true of various objects (such as dark feathers) and clearly false of them.

W. QUINE, WORD AND OBJECT 129 (1960). Nevertheless, this Article adheres to the judicial practice of employing the term "ambiguity."

[29] *See* M. BLACK, LANGUAGE AND PHILOSOPHY 32-33 (1949).

nant *A* applied on set of facts *X*, 75% sure that covenant *B* applied on set of facts *Y*, and willing only to pronounce it "more likely than not" that covenant *C* applied on set of facts *Z*. A mirror-image set of examples could be given for magnitudes under 50%.

If "ambiguity" of a covenant is not, then, an all-or-nothing proposition but is a matter of degree, at what point is a court justified in pronouncing a covenant "ambiguous" and invoking the ambiguity/free-use rule? Several alternatives are imaginable. First, there is the possibility mentioned at the outset. The rule should be invoked only when a well-socialized speaker of English would put at 50-50 the probability that a covenant applied on a particular set of facts. Second, a sliding scale metaphor might be invoked. As the expectation interest based on the covenant language becomes less secure with increasing uncertainty about the covenant's application, the relative force of the policy underlying the ambiguity/free-use rule increases, so that at some point (identified, unavoidably, with some measure of intuitive balancing) the court should opt for free use despite the fact that the covenant has some directional force. Third, one might simply deny that degrees of confidence about the applicability of a covenant can be measured in the real world with the mathematical accuracy suggested by percentage figures. Thus, in the area, say, between 60-40 and 40-60, perceived benchmarks must be disregarded as mirages, and the ambiguity/free-use rule should be invoked to resolve cases in this no-man's land.

Alternative two, the sliding scale approach, brings the ambiguity/free-use rule squarely into conflict with social meaning and should be adopted only if the policy premise underlying the rule is justified. Subsection two will present the argument that the premise is in fact wrongheaded, at least when applied to the modern subdivision context. Subdivision covenants tend to enhance, not inhibit, the efficient use of land.[30] Alternative number one does seem to place too high a premium on a court's ability to come up with percentage degrees of confidence about social meaning. That leaves alternative three. The notion that there is a no-man's land distributed around the 50-50 mark seems consistent with common sense. But, assuming that the ambiguity/free-use rule is based on a

[30] *See* note 35 and accompanying text *infra*.

discredited policy premise, we ought to look elsewhere for a resolving rule. A case can be made, I think, for an ambiguity/apply-the-covenant rule.

Ronald Dworkin, in *Taking Rights Seriously,*[31] discusses the issue of whether a chess player who continually smiles at his opponent in such a way as to unnerve him should be held to have violated a rule declaring a game forfeit if one player "unreasonably" annoys the other in the course of play. Dworkin concludes that "[i]f one interpretation of the forfeiture rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation."[32] And how does the chess referee determine the "character" of the game of chess?

> He may well start with what everyone knows. Every institution is placed by its participants in some very rough category of institution; it is taken to be a game rather than a religious ceremony or a form of exercise or a political process. It is, for that reason, definitional of chess that it is a game rather than an exercise in digital skill. These conventions, exhibited in attitudes and manners and in history, are decisive.[33]

For Dworkin's chess game, we might substitute the subdivision "game." The subdivision is a rough category of American institution. There are attitudes, manners, and history associated with it. The case for the ambiguity/apply-the-covenant rule relies on a not uncontroversial but certainly credible set of conclusions about the character of the subdivision "game." Conclusion number one: The name of the subdivision game is risk aversion. Most middleclass American families who live in subdivisions have most of their wealth tied up in the house and lot. Neither people who live in subdivisions nor those who decide to move to subdivisions generally are willing to take big risks with "property values." An ambiguity/apply-the-covenant rule would be consistent with this central feature of the subdivision game. Conclusion number two (related somewhat to conclusion number one): People who live in subdivisions expect their neighbors to be like them. For economic and other reasons, subdivision living assures a relatively high degree of

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[31] R. DWORKIN, TAKING RIGHTS SERIOUSLY 102-05 (1977).

[32] *Id.* at 102.

[33] *Id.*

cultural and aesthetic homogeneity. Since most restrictive covenants are designed to protect that homogeneity, an ambiguity/apply-the-covenant rule would be consistent with the character of the subdivision game.

What is the relationship between the ambiguity/apply-the-covenant rule and social meaning? Would a well-socialized speaker of English invoke the rule to resolve a hard covenants case? This seems a paradox. A hard case *is* a hard case because a well-socialized speaker of English would not be able to give a clear answer one way or the other. On the other hand, we might imagine the rule as the endpoint of a dialectical process in which our well-socialized speaker of English calls upon more and more analytical resources to resolve the issue of the meaning of the covenant.[34] It does seem plausible that he would consider, consciously or unconsciously, the character of the subdivision game when faced with a close case. If this is right, then the ambiguity/apply-the-covenant rule must be regarded as a component of social meaning.

Of course, a court in a covenants case is not refereeing merely the subdivision game, so an ambiguity/apply-the-covenant rule could be only presumptive. A court is refereeing what might be called the legal system game; thus, the legal effect given a covenant must be consistent with the character of the law of property and the character of our legal system in general.

2. The Ambiguity/Free-Use Rule and the Modern Subdivision. Again, the ambiguity/free-use rule is based on the premise that covenants impair the alienability of land. In other words, covenants prevent land from moving to its most efficient uses. In the subdivision context, the premise generally is not valid. The subdivision developer imposes covenants on the lots to enhance their value (and thus maximize his return). Purchasers want covenants because covenants minimize external costs associated with geographical proximity.[35] A house in a subdivision protected by covenants should bring a higher price than a similar structure in an unprotected subdivision. True, there may come a time when an individual lot owner finds that his property, say at the edge of the

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[34] Dworkin suggests something like this dialectical process in his chess hypothetical. *Id.* at 103-04.

[35] *See* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 713-14 (1973).

subdivision, is worth more as a service station than as a residence, and a covenant restricting the lot to residential use certainly impairs the alienability of his lot.[36] But the covenant still probably does not impair the alienability of "land," if "land" can be taken to mean the whole subdivision. The aggregate value, to all of the residents, of keeping the residential character of the subdivision intact in all likelihood exceeds the gain to the single lot owner of converting to commercial use. Thus, the net effect of the covenant on alienability remains positive. At some point, of course, conditions in and around the subdivision may change so much that the enforcement of the covenant no longer makes sense, and in such cases courts have been willing to declare the restriction unenforceable.[37] Courts, however, have used this power sparingly.[38]

The discussion to this point may be summarized as follows: The meaning that ought to count in the subdivision covenants context is social meaning—the sense in which the covenant language would be understood by a well-socialized speaker of English. "Ought to count" includes a stronger and a weaker claim. The weaker claim is that, *assuming* legal effect should be given to some version of ordinary meaning, the *version* that ought to count is social meaning. The stronger claim is that legal effect generally should be given to the ordinary meaning of the covenant. This stronger claim is justified because covenants are rights held by subdivision lot owners—rights embodied in the language used to express them. If a court is to take the rights seriously, it must take the language seriously, and in the covenants context, taking language seriously entails giving presumptive legal effect to the social meaning of the covenant. There is no good reason to subordinate social meaning through the invocation of the ambiguity/free-use rule. And in close cases, a good argument can be made for an ambiguity/apply-the-covenant rule.

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[36] *See, e.g.*, Cunningham v. Hiles, _ Ind. App. _, 395 N.E.2d 851 (1979); Mills v. HTL Enterprises, Inc., 36 N.C. App. 410, 244 S.E.2d 469 (1978).

[37] *See, e.g.*, Lamana-Penno-Fallo, Inc. v. Heebe, 352 So. 2d 1303 (La. App. 1977); Rofe v. Robinson, 93 Mich. App. 749, 286 N.W.2d 914 (1979); Duffy v. Mollo, 400 A.2d 263 (R.I. 1979).

[38] *See, e.g.*, Knolls Ass'n v. Hinton, 71 Ill. App. 3d 205, 389 N.E.2d 693 (1979); Cordogan v. Union Nat'l Bank, 64 Ill. App. 3d 248, 380 N.E.2d 194 (1978); Cunningham v. Hiles, _ Ind. App. _, 395 N.E.2d 851 (1979); Mills v. HTL Enterprises, Inc., 36 N.C. App. 410, 244 S.E.2d 469 (1978).

All of this is not to say that a covenant invariably should be enforced when it "applies" on a set of facts. Although covenants are rights, rights sometimes must yield to paramount rights.[39] Group home residents, for example, may have rights (at least in some cases) that should be recognized as superior to the rights embodied in single-family-use covenants.[40] On the other hand, rights generally should not be subordinated to the state's projects, at least not without the payment of compensation,[41] and in the group homes cases, some courts are open to the charge of having slighted or ignored the social meaning of covenant language to help insure the success of a state policy favoring deinstitutionalization of the mentally retarded and others.[42]

II. THE GROUP HOMES CASES

A. *An Overview*

The group homes litigation should be seen primarily in the larger context of the movement to deinstitutionalize the mentally retarded.[43] Faced with charges of human warehousing,[44] states are in the midst of reducing the populations of large mental institutions and relocating the former residents of those institutions in settings closer to normal living arrangements.[45] The group home is an attractive alternative to the large institution, both because it satisfies the demand of civil libertarians that the state provide the retarded with the least restrictive treatment environment[46] and because mental health professionals are convinced that the retarded can develop more fully as human beings if allowed to live closer to the mainstream of community life.[47] The typical group home for the retarded is a residence housing between six and twelve re-

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[39] R. DWORKIN, *supra* note 31, at 193-94.

[40] *See* Part III *infra.*

[41] *See* notes 176-83 and accompanying text *infra.*

[42] *See* notes 167-75 and accompanying text *infra.*

[43] *See* Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Power,* 25 VILL. L. REV. 273 (1980); Lippincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons,* 31 STAN. L. REV. 767 (1979).

[44] *See, e.g.,* Lippincott, *supra* note 43, at 768.

[45] *See* Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives,* 5 N.Y.U. REV. L. & SOC. CHANGE 137, 137-38 (1975).

[46] *Id.* at 138.

[47] *See* Lippincott, *supra* note 43, at 768.

tarded children or adults, along with live-in supervisory personnel, frequently a married couple, who serve as "surrogate parents."[48] The idea is to place the group home in a residential neighborhood, to replicate as far as possible normal family behavior, and to integrate the retarded residents into the activities of the community.[49]

The group home has proved an attractive living arrangement not only for the mentally retarded but also for the mentally ill,[50] delinquent[51] or emotionally troubled[52] children, and the dependent elderly.[53] Some group homes are operated for profit;[54] others are run by nonprofit organizations (typically with support from the state)[55] or by the state itself.[56] The sponsoring organization generally is the owner or lessor of the house in which the group home is located.[57]

Group homes have encountered considerable neighborhood resistance.[58] The opposition in many instances has taken the form of litigation based either on a zoning ordinance[59] or, more recently, a

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[48] *See, e.g.*, Malcolm v. Shamie, 95 Mich. App. 132, 290 N.W.2d 101 (1980) (five retarded adult women); Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978) (six mentally retarded children); Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980) (eight retarded adults); Boyd, *supra* note 43, at 274-75.

[49] Boyd, *supra* note 43, at 274-75.

[50] *E.g.*, City of Torrance v. Transitional Living Centers for Los Angeles, Inc., 115 Cal. App. 3d 947, 171 Cal. Rptr. 818 (1981); Township of Washington v. Central Bergen Community Mental Health Center, Inc., 156 N.J. Super. 388, 383 A.2d 1194 (1978).

[51] *E.g.*, Christ United Methodist Church v. Municipality of Bethel Park, _ Pa. Commw. Ct. _, 428 A.2d 745 (1981); Pennsylvania George Jr. Repub. v. Zoning Hearing Bd., 37 Pa. Commw. Ct. 151, 389 A.2d 261 (1978).

[52] *E.g.*, Group House of Port Washington, Inc. v. Board of Zoning & Appeals, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

[53] *E.g.*, Jayno Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

[54] *E.g.*, Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

[55] *E.g.*, Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978).

[56] *E.g.*, Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976).

[57] *E.g.*, Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976); Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978).

[58] Boyd, *supra* note 43, at 277; Lippincott, *supra* note 43, at 769; N.Y. Times, Jan. 28, 1979, § 21 (Long Island Weekly), at 1 (planned group home burned by arsonists).

[59] City of Torrance v. Transitional Living Centers for Los Angeles, Inc., 115 Cal. App. 3d 947, 171 Cal. Rptr. 818 (1981); Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. 79, 580 P.2d 1246 (1978); Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); Roundup Foundation Inc. v. Board of Adjustment, _ Colo. App. _, 626 P.2d 1154 (1981); Oliver v. Zoning Comm'n, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974); Mayor of Baltimore v. State Dep't of Health & Mental Hygiene, 38 Md. App. 570, 381 A.2d 1188 (1978); Region 10 Client Management, Inc. v. Town of Hampstead, 120 N.H.

private subdivision covenant.[60] As in the covenants cases that are the major focus of this Article, the zoning cases typically involve the claim that the group home violates a restriction to single family residential use.[61] So far, there are many more group homes zoning cases than group homes covenants cases, but the balance may shift somewhat because many states have enacted legislation mandating that group homes be considered valid uses in single family residential zones.[62] In general, the statutes do not purport to override private subdivision covenants.[63]

885, 424 A.2d 207 (1980); Pemberton Township v. State, 171 N.J. Super. 287, 408 A.2d 832 (1979); Township of Washington v. Central Bergen Community Mental Health Center, Inc., 156 N.J. Super. 388, 383 A.2d 1194 (1978); Young Women's Christian Ass'n v. Board of Adjustment, 134 N.J. Super. 384, 341 A.2d 356 (1975); People v. St. Agatha Home for Children, 47 N.Y.2d 46, 389 N.E.2d 1098, 416 N.Y.S.2d 577, *cert. denied*, 444 U.S. 869 (1979); Group House of Port Washington, Inc. v. Board of Zoning & Appeals, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Committee for the Betterment of Mount Kisco v. Taylor, 63 A.D.2d 650, 404 N.Y.S.2d 380 (1978); Little Neck Community Ass'n v. Working Org. for Retarded Children, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); Moore v. Nowakowski, 46 A.D.2d 996, 361 N.Y.S.2d 795 (1974); *compare* Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981) *with* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980); Christ United Methodist Church v. Municipality of Bethel Park, _ Pa. Commw. Ct. _, 428 A.2d 745 (1981); Hopkins v. Zoning Hearing Bd., _ Pa. Commw. Ct. _, 423 A.2d 1082 (1980); Lakeside Youth Serv. v. Zoning Hearing Bd., 51 Pa. Commw. Ct. 485, 414 A.2d 1115 (1980); Warren County Probation Ass'n v. Warren County Zoning Hearing Bd., 50 Pa. Commw. Ct. 486, 414 A.2d 398 (1980); Pennsylvania George Jr. Repub. v. Zoning Hearing Bd., 37 Pa. Commw. Ct. 151, 389 A.2d 261 (1978); State *ex rel.* Catholic Family & Children's Services v. City of Bellingham, 25 Wash. App. 33, 605 P.2d 788 (1979).

[60] Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); 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); Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978); State *ex rel.* Region II Child & Family Services, Inc. v. District Court, _ Mont. _, 609 P.2d 245 (1980); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976); J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981); Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

[61] One important difference, however, between the covenants cases and the zoning cases is that the single-family-use covenants tend not to define "family" and the zoning ordinances often include a definition. *Compare, e.g.*, Oliver v. Zoning Commission, 31 Conn. Supp. 197, 326 A.2d 841 (1974) ("family" defined as one or more persons occupying premises as single housekeeping unit) *with* Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980) ("family" used without definition). This Article focuses primarily on the meaning issue when "family" is used without definition.

[62] *E.g.*, MICH. COMP. LAWS ANN. § 125.583(b) (Supp. 1981); MINN. STAT. ANN. § 462-357(7)-(8) (West Supp. 1981); MONT. REV. CODES ANN. § 76-2-314 (1979); WIS. STAT. ANN. § 59.97(15) (West Supp. 1980).

[63] *See, e.g.*, Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); Jayno

B. *A Note on the Zoning Cases*

Although this Article concentrates primarily on covenants adjudication, the group homes zoning cases cannot be ignored. Courts in group homes covenants cases in fact have relied on zoning precedent.[64] Moreover, reasoning appears in the zoning cases that we might imagine appearing in future covenants decisions, given the similarity of the fact patterns in the two types of cases. Thus, it is important to decide the extent to which the zoning decisions should be regarded as precedent in the covenants context.

The group homes zoning opinions reveal a subtle interplay of rights, public policy, and meaning considerations similar to the interplay apparent in the covenants decisions. This mix of influences is illustrated nicely in a pair of cases decided by the New York Court of Appeals. In the first case, *City of White Plains v. Ferraioli,*[65] a nonprofit corporation called Abbott House, substantially funded by the state, had rented the Ferraioli's house and established a group home there for ten neglected and abandoned children. The city brought an action alleging that the operation of the group home violated the local zoning ordinance, which restricted the Ferraioli house to use as a "single family dwelling for one housekeeping unit."[66] The ordinance defined "family" as "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers, or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single housekeeping unit with kitchen facilities."[67]

The *Ferraioli* court held that the group home was a family and therefore was not in violation of the zoning provision. Although the holding is cast as a determination of the meaning of the ordinance, the court's rationale suggests more concern about the *validity* of excluding the group home from a residential zone. "[T]he group home is no less *qualified* to occupy the Ferraioli house than are any of the neighboring families in their respective houses."[68] "Zon-

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Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

[64] *See* Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978); State *ex rel.* Region II Child & Family Services, Inc. v. District Court, — Mont. —, 609 P.2d 245 (1980).

[65] 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

[66] *Id.* at 304, 313 N.E.2d at 757, 357 N.Y.S.2d at 451.

[67] *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451.

[68] *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

ing is intended to control types of housing and living and not the genetic or intimate family relations of human beings."[69] "Whether a family be organized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home, should not be consequential in meeting the test of the zoning ordinance."[70] "[A]n ordinance may restrict a residential zone to occupancy by stable families occupying single-family houses, but neither by express provision nor construction may it limit the definition of family to exclude a household which in every but a biological sense is a single family."[71] At no point does the *Ferraioli* court ever raise the question of how the White Plains ordinance would have been understood by a well-socialized speaker of English.

Several years after *Ferraioli,* the court of appeals held in *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*[72] that a group home for "unadapted disturbed children"[73] was a family within the meaning of an ordinance limiting lots to one-family residences. The ordinance defined family as "[o]ne (1) or more persons related by blood, marriage or legal adoption residing or cooking or warming food as a single housekeeping unit; with whom there may not be more than two (2) boarders, roomers or lodgers who must live together in a common household."[74] The court held the group home was "the functional and factual equivalent of a natural family"[75] and held further that "to exclude it from a residential area would be to serve no valid purpose."[76]

Judge Breitel, who wrote *Ferraioli,* dissented in *Port Washington* based on factual differences between the cases.[77] The dissent is particularly interesting because of Judge Breitel's comparison of

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[69] *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

[70] *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452-53.

[71] *Id.* at 306, 313 N.E.2d at 758-59, 357 N.Y.S.2d at 453.

[72] 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

[73] *Id.* at 275, 380 N.E.2d at 211, 408 N.Y.S.2d at 381 (Breitel, J., dissenting).

[74] *Id.* at 270, 380 N.E.2d at 208, 408 N.Y.S.2d at 378.

[75] *Id.* at 272, 380 N.E.2d at 209, 308 N.Y.S.2d at 379-80.

[76] *Id.* at 272, 380 N.E.2d at 209, 308 N.Y.S.2d at 380.

[77] Judge Breitel stressed that the *Port Washington* group home residents were meant to stay only on a temporary basis, whereas the *Ferraioli* children were expected to stay for indefinite periods, and that the *Port Washington* live-in supervisors rotated, whereas the *Ferraioli* "parents" did not. *Id.* at 275-76, 380 N.E.2d at 212, 408 N.Y.S.2d at 382 (Breitel, J., dissenting).

the approach to the meaning issue in the two cases:

> [I]n the [Ferraioli] case . . . the court looked to the purpose of the zoning ordinance and expanded its meaning, quite liberally, to accomplish the purpose, even though the *interpretation went well beyond the literal and even plain meaning of the zoning ordinance.* It is quite another thing, by an evasive process, to stretch the liberal interpretation to still another and even more liberal application; and this could go on endlessly.[78]

Assuming the freewheeling approach to meaning exemplified by *Ferraioli* and *Port Washington* can be defended in the zoning context, is it justified in subdivision covenants adjudication? There are two important distinctions between the zoning context and the covenants context which render questionable the importation into covenants adjudication of the approach to meaning adopted in such group homes zoning cases as *Ferraioli* and *Port Washington.* First, under local government law, the power to zone generally is regarded as delegated power from the state legislature, usually by way of a zoning enabling act.[79] Thus, courts understandably may be determined to harmonize the legal effect of zoning ordinances with clearly enunciated state legislative policy, such as a policy favoring the establishment of group homes. A decision holding a group home to be a "family" within the meaning of a single-family-use zoning provision is a relatively simple way to achieve such consistency between delegated and undelegated state legislative power.[80] There is no comparable structural relationship between private subdivision covenants and the state legislature. Second, a court might hold that a group home is a "family" within the meaning of a zoning ordinance in order to avoid the question of the constitutional validity of the ordinance.[81] This strategy can be justified, as with statutes,[82] as part of a dialogue with the local

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[78] *Id.* at 277, 380 N.E.2d at 213, 408 N.Y.S.2d at 383 (Breitel, J., dissenting) (emphasis added).

[79] *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.01, 2.19 (2d ed. 1976).

[80] *See* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 305-06, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452-53 (1974).

[81] The *Ferraioli* court apparently was sensitive to the constitutional implications of the case. *See* notes 69, 71 and accompanying text *supra.*

[82] *See* note 12 and accompanying text *supra.*

government, since the city council or county commission can amend the ordinance to make clear it wants a judicial determination of validity. But no such dialogue is practical in the subdivision covenants setting because ordinarily a covenant cannot be revised easily in the wake of a judicial determination of meaning.[83] The judicially fixed meaning is likely to stay fixed.

C. *The Social Meaning of "Family"*

We reach, then, the nub of the matter: Is a group home a "family" within the meaning of a subdivision covenant restricting lots to a single family use? The discussion is divided into two parts. In this section, the issue is discussed strictly from the standpoint of social meaning. The goal is to understand how a well-socialized speaker of English would resolve the question. In section *D* the approach developed here is contrasted with the reasoning used in the group homes covenants cases themselves.

1. Linguistically Permissible Meaning vs. Contextual Meaning.[84] We start with a distinctly uncontroversial premise: A well-socialized speaker of English would take context into account in deciding the meaning of "family." "Family" does not mean banana, except perhaps in someone's secret code or in some unknown foreign language. We know that "family" does not mean banana without inquiring at all into the context in which the word was used. But are the Pittsburgh Pirates a family?[85] Only metaphorically, one might be tempted to answer; a baseball team does not fall within the denotation of "family." Actually, one of the definitions of "family" in the *Random House Dictionary* seems to accommodate the Pittsburgh Pirates.[86] So, if the compilers of the dictionary are right, it is linguistically permissible within the con-

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[83] *Cf.* Gladstone v. Gregory, 95 Nev. 474, 596 P.2d 491 (1979) (per curiam) (petition signed by 85 of 99 homeowners in subdivision seeking to end restriction barring two-story structures held ineffective because covenants provided no means of alteration prior to 1990). More modern covenant schemes sometimes provide for a method of amendment. *See, e.g.*, Schmidt v. Ladner Constr. Co., 370 So. 2d 970 (Ala. 1979) (covenants may be amended by vote of majority of lot owners).

[84] The distinction is borrowed from the unpublished Hart and Sacks materials. *See* H. HART & A. SACKS, THE LEGAL PROCESS 1219-20 (tent. ed. 1958).

[85] Justice Coffey uses the example in his *Crowley* dissent. Crowley v. Knapp, 94 Wis. 2d 421, 448, 288 N.W.2d 815, 828 (1980).

[86] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 514 (1967) ("a group of related . . . people").

ventions of modern American English to characterize the Pittsburgh Pirates as a family without having to classify the reference as metaphor. Then would the Pittsburgh Pirates be able to move into a house in a subdivision restricted to single family use without violating the covenant? The question needs no answer, and the lesson here is that there may be a wide difference between linguistically permissible meaning and contextual meaning. Such a difference is possible because human languages lack a separate word for each "bit" of communication or other speech act. A word may be a placesaver for a relatively broad range of concepts. Context can supply the clues necessary to determine which concept the word represents in a particular utterance.

2. *Purpose.* As a general proposition, there is no doubt that a well-socialized speaker of English will take the purpose of an utterance into account in assigning a meaning to the utterance if the purpose is sufficiently manifested. For example,[87] suppose *X* is put in charge of supplying ashtrays for a rather large upcoming meeting in an unfamiliar building. *X* asks *Y*, his assistant, to scout around the building and bring back all the ashtrays he finds. Will *Y*, as a well-socialized speaker of English, rip ashtrays from the walls, snatch them from persons using them, or remove 100,000 of them from a storage room? Certainly not. In deciding which ashtrays to bring, *Y* would consider *X*'s purpose.

Although purpose can be a powerful determinant of contextual social meaning, courts sometimes invoke a mode of purposive analysis that tends to supplant social meaning. Recall Judge Breitel's observation that the purposive analysis employed in *Ferraioli* "went well beyond the literal and even plain meaning of the zoning ordinance."[88] Purposive analysis can supplant social meaning when some single, determinate aim is attributed to an utterance despite the fact that the evidence is simply too inconclusive to justify isolating one dominant aim. When this happens, purposive interpretation becomes reductionist. It slights the conceptual richness of the actual language of the utterance. For example, suppose five hippies move into a house in a subdivison that is restricted by a covenant to single family use. The five are not related by blood or

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[87] The illustration is borrowed from MacCallum, *supra* note 8, at 771-72.

[88] *See* note 78 and accompanying text *supra*.

marriage;[89] they are simply very good friends. Do the hippies constitute a family? Surely the answer is "no" *if* what we are after is the contextual social meaning of "family." But suppose the hippies argue in the following way: "The purpose of the covenant is to insure a certain type of behavior, *i.e.*, family-like behavior. We can show that in our old neighborhood—a neighborhood much like this one—our behavior was virtually indistinguishable from family behavior." The behavioral evidence almost surely would not persuade a well-socialized speaker of English that the hippies are, after all, a subdivision family. The purpose that the hippies attribute to the covenant is not necessarily wrong. Rather, the evidence of purpose is too indeterminate to justify the dominant role assigned to the behavioral element in fixing the meaning of the covenant. It is important to understand that the language of an utterance and the context of the utterance commonly serve as the best evidence of purpose.[90] In the ashtray example, *Y* gathered *X*'s purpose not from some preamble or committee report, but from the language used and the context in which it was used. Similarly, the purpose of a covenant restricting subdivision lots to single family use must be divined, if at all, by the language of the covenant and the subdivision context. The hippies' argument does not convince because the language of the covenant and its context evoke a conception of "family" richer than the behavioral element stressed in the argument from purpose. Engrafting the behavioral purpose onto the covenant and making that purpose the dominant criterion of social meaning would slight the conceptual richness of the language actually used. Thus, an aggregation of persons not otherwise a family within the contextual social meaning of a covenant cannot confer familyhood on itself merely by behaving as a family would behave.

Nevertheless, the argument from purpose made by the hippies does have considerable appeal. The power of the argument is not that it forces us to revise our conviction that the group is not a family, but that it engages our sense of justice. Beneath its formal structure as a meaning argument, it is a rights argument. If a group behaves decently—behaves, in fact, in a way hardly distin-

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[89] I do not mean to imply here that relationship by blood or marriage should be regarded as a necessary condition of family status within the meaning of a single-family-use covenant. *See* notes 94-95 and accompanying text *infra*.

[90] *See* MacCallum, *supra* note 8, at 757-58.

guishable from that of the other residents of the subdivision—then the group has a right to live in the subdivision, whatever the contextual social meaning of the covenant. If the hippies' argument is about meaning at all, it is about the special sort of meaning that is the business of courts: meaning as legal effect.[91]

The characterization of the hippies' argument as a rights argument has important implications for the way a court should respond to their claim. What the hippies are asking the court to do is not simply to interpret the covenant in the ordinary way, but to override it. The conflict in the case is not between competing views about the way in which a well-socialized speaker of English would understand the covenant, but is between conflicting substantive principles: the principle mandating that the court effectuate the contextual social meaning of covenants *qua* property rights,[92] and the principle that no one person or group of persons should be able to interfere with fundamental aspects of the lives of others, such as place of abode.[93] Thus, if the court is to justify a holding in favor of the hippies, it should go beyond the simple-minded rationale that (1) "family" is a vague term, and (2) its meaning must be determined by an inquiry into the purpose of the covenant. That reasoning cannot be meant to persuade us that five unrelated hippies really are a subdivison family—unless caricature is to take the place of an honest portrait of the contextual social meaning of the term—and the reasoning completely sloughs over the real choice between competing principles.

3. The Subdivision Covenant Conception of "Family." The discussion to this point establishes two guideposts for our inquiry. First, although a group home may meet one of the dictionary definitions of "family," the focus must be on the contextual meaning of the word rather than the range of linguistically permissible meanings. Second, the fact that a group home is set up to emulate family behavior should not be regarded as a sufficient condition for family status within the social meaning of a single-family-use covenant. The next step is to try to specify the structure of the subdivision conception of "family" embodied in such a covenant, so that this structure, or definition, can be applied to the group homes

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[91] *See* Part I, § *A supra.*

[92] *See* text following note 38 *supra.*

[93] *See* notes 185-86 and accompanying text *infra.*

facts.

In ordinary discourse, we typically resolve questions about contextual social meaning without elaborate resort to reasoned justification. Our judgments are more or less intuitional. For example, no particular need arose in the earlier discussion to specify the definitional elements of the subdivision conception of "family" before concluding that the Pittsburgh Pirates would not count as such a family. The case of the hippies also seemed easy enough—as a matter of contextual social meaning—without the need for close rationalization. The group homes issue might be handled the same way. But the adversary system of adjudication makes inevitable at least an attempt to support intuitional judgments with rational argument, even though the argument may be no more than a simplistic account of the rich complexity of factors that generate the intuitional conclusion.

If, indeed, it is intuitively clear that the Pittsburgh Pirates do not count as a subdivision family, why is it clear? How would a well-socialized speaker of English go about the task of justifying the intuitional conclusion? He probably would begin by trying to point out that the team lacks attributes necessary to the subdivision-covenant conception of "family": the group is not small enough to be a subdivision family; the team's members are not related by blood or marriage. But this initial justificatory strategy breaks down under scrutiny. Take the point that the team is not a small enough group. Would the squad qualify if it were much smaller? Suppose a baseball team had only five players. Suppose we were talking not about a baseball team, but about the "starting five" of a basketball team. Would a well-socialized speaker of English count the "starting five" as a subdivision family? Conversely, must we disqualify the old woman who lived in the shoe and her children as a family merely because the group is so large? All of this suggests that size alone neither qualifies nor disqualifies a group as a family in the subdivision covenants setting. There is no size "cap" that constitutes an *a priori* necessary condition for family status, nor does the fact that a group's size approximates the size of the paradigmatic subdivision family (mom, dad, and the kids) amount to a sufficient condition for family status in the subdivision.

The observation that the team members are not related by blood or marriage also fails as a satisfactory account of the intuitional

judgment that the team is not a subdivision family because the observation assumes that relationship by blood or marriage is a necessary condition for family status in the subdivision. A well-socialized speaker of English in all likelihood would consider a couple with a foster child to be a subdivision family.[94] It even seems safe to say that an unmarried couple would qualify as a family within the evolved contextual social meaning of the term.[95]

Granted that blood/marriage relationship is not a necessary condition of subdivision family status, is it a sufficient condition? If "relationship" by blood means any degree of blood kinship, the answer almost certainly is "no." A well-socialized speaker of English would not consider five businessmen living in a subdivision splitlevel to be in compliance with a single-family-use covenant even if it turned out that all five were descendants of the same original citizen of Plymouth. On the other hand, it does seem plausible that some suitably restricted definition of blood/marriage relationship might amount to a sufficient condition for subdivision family status. In fact, such a restricted conception of relationship by blood or marriage seems the only real candidate for a sufficient condition, and no promising candidates for necessary conditions seem to pass muster.

The point of all this is that, if we are to come up with a definition of "family" against which to measure a baseball team or a group home, that definition must have some structure other than a closed list of necessary and sufficient conditions for subdivision family status. The fact that the subdivision conception of "family" resists neat capture in a set of necessary and sufficient conditions should come as no surprise. Definitions are meant to reflect the way we actually use terms in discourse, and no single definitional strategy is likely to mirror the "motley" of human language.[96]

The conceptual structure of the social meaning of "family" in the subdivision covenant context might be represented best by us-

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[94] *See* Crowley v. Knapp, 94 Wis. 2d 421, 449-50, 288 N.W.2d 815, 829 (1980) (Coffey, J., dissenting).

[95] *See* L. TRIBE, *supra* note 11, at 975 (1978). *But see* Prince George's County v. Greenbelt Homes, Inc., 50 U.S.L.W. 2050-51 (Md. Ct. Spec. App. July 10, 1981) (unmarried couple not a "family" within meaning of covenant restricting cooperative housing unit to member and "immediate family").

[96] *See* R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 35-40 (1975).

ing a cluster model of definition.[97] This model makes use of the notion of a paradigm: here, the paradigmatic subdivision family—mom, dad, and the kids. The paradigm comprises a cluster of attributes, none of which need be regarded as strictly necessary to family status. That is, a group lacking one or more of the attributes still could be considered a subdivision family by a well-socialized speaker of English. Some attributes may be more critical to the conception than others. As already noted, for example, a suitably restricted version of blood/marriage relationship apparently should count as a sufficient condition and not merely as an attribute tending to qualify a group as a family within the social meaning of a single-family-use covenant.

In Part I, we noted that indeterminacy of covenant language is not an all-or-nothing proposition, but is a matter of degree.[98] The cluster model represents this characteristic nicely. We can imagine a spectrum, with the paradigmatic family at one limit and groups such as baseball teams at, or near, the other limit. Along the spectrum are groups claiming some, but not all, of the attributes of the paradigmatic family. Based on a comparison, admittedly highly intuitive, between the paradigmatic family and any group singled out along the spectrum, a well-socialized speaker of English may be 90% sure the group is (or is not) a family, 75% sure, or only willing to say it is more likely than not that the group is (or is not) a family. Some groups will present hard cases—cases that seem, at least initially, to involve hopeless indeterminacy.[99] Again, the traditional judicial response in such cases has been the ambiguity/free-use rule,[100] but an ambiguity/apply-the-covenant rule may make more sense in the modern subdivision context.[101]

The cluster model of definition is consistent not only with the earlier discussion of covenant indeterminacy, but also with the structure of the most powerful argument in favor of counting a group home as a "family" within the contextual social meaning of the term. The argument is that a group home shares attributes of a paradigmatic subdivision family: The residents of a group home

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[97] *Id.* at 39-40.

[98] *See* text following note 28 *supra.*

[99] *See* Part I, § *C*(1) *supra.*

[100] *See* Part I, § *C supra.*

[101] *See* notes 31-34 and accompanying text *supra.*

behave as a family,[102] the group home is supervised by live-in "surrogate parents,"[103] the group home's residents are meant to stay for indefinite periods rather than set time spans,[104] etc. On the other hand, the most serious objection to the adoption of a simple cluster model to represent the structure of the subdivision-covenant conception of "family" is that the cluster model takes no account of the possibility of disqualifying factors, and the idea of a disqualifying factor is central to the most powerful arguments against counting a group home as a subdivision family. For example, some of the courts that have held group homes not to be subdivision families have rationalized the holdings in part on the basis that the group home in issue was privately operated as a commercial enterprise.[105] The commercial character of the group home was a disqualifying factor. A disqualifying factor, it might be said, is not a special creature; it is merely the converse of a necessary condition. That is, one might express the courts' view in the commercial enterprise cases as a conclusion that the *absence* of commercial motivation for a group's existence is a necessary condition for "family" status in a subdivision. It would be an oversimplification, however, to lump disqualifying factors and necessary conditions into the same category, because necessary conditions are generally assumed to be statable in advance as part of a formal definition, and it is highly unlikely that all of the possible disqualifying factors for subdivision-family status could be listed ahead of time. The impossibility of such a listing is inherent in the theory of disqualifying factors. The theory is based on the common sense proposition that an X may be transformed into a not-X not only by taking away some of the attributes that form X, but also by adding alien ingredients. Some alien ingredients, of course, will be able to coexist with X, leaving its "chemical composition" unchanged, but other new attributes will cause a well-socialized speaker of English to regard what otherwise would be X as Y or Z instead. What alien ingredients, when "added" to a group that otherwise possesses many of the attributes of a paradigmatic family, will cause a well-

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[102] *See* Boyd, *supra* note 43, at 274.

[103] *See* Lippincott, *supra* note 43, at 769.

[104] *See, e.g.*, Crowley v. Knapp, 94 Wis. 2d 421, 439, 288 N.W.2d 815, 824 (1980).

[105] *See* Seaton v. Clifford, 34 Cal. App. 3d 46, 50, 100 Cal. Rptr. 770, 781 (1972); Jayno Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 447, 271 N.W.2d 268, 270 (1980).

socialized speaker of English to withhold the appellation "family"? No doubt a partial list could be made, but a complete list could not be done without the aid of a crystal ball.[106]

Our more fully elaborated structure of the contextual social meaning of "family," then, makes use of the cluster model of definition, supplemented by a theory of disqualifying factors. It should be reemphasized at this point that both qualifying attributes and disqualifying factors may be of varying importance. As already noted, some attributes may clearly qualify a group as a family, while others may merely tend to qualify the group. On the other hand, some factors may clearly disqualify a group, while other factors may merely tend to disqualify it.

4. Application to the Group-Homes Facts. The overview of the group homes controversy established that there is no single, standard group-home fact pattern in the litigated cases.[107] This section arranges the variants of the group-homes facts along the spectrum suggested previously,[108] bounded at one end by the paradigmatic subdivision family. The discussion approaches the variants through a series of shifts away from the paradigm. Thus, we start with mom, dad, and the kids. Suppose we change the facts so that the children now are not natural children of the couple, but foster children, two of them, placed by the state on a temporary basis pending adoption by some other couple. Are the "parents" plus the two foster children a subdivision family within the social meaning of a single-family-use covenant? A well-socialized speaker of English almost surely would count them so.[109] The group possesses most of the attributes of the paradigm. True, there is no blood relationship between the children and the adults, and the children are explicitly considered only temporary members of the group, but the fit is still so close to mom, dad, and the kids that a well-socialized speaker of English almost surely would say the covenant was not violated. Suppose the two children are mentally retarded? No difference in result. Suppose we add four mentally retarded children to the original two? The case is not as clear as it was, demonstrat-

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[106] *See generally* H.L.A. HART, THE CONCEPT OF LAW 124-26 (1961) (discussing the concept of open texture).

[107] *See* notes 48-57 and accompanying text *supra.*

[108] *See* notes 98-99 and accompanying text *supra.*

[109] *See* note 94 and accompanying text *supra.*

ing that size, although not a necessary or sufficient condition for family status,[110] does seem to be a relevant influencing factor. Nevertheless, two adults and six children, in a foster-parent/foster-child relationship, would seem to be a *relatively* clear case. Ten mentally retarded children? Size now may be important enough to be a clearly disqualifying factor. At the least, it might throw the case into the region of substantial indeterminacy, the region in which arguably there ought to be a presumption in favor of applying the covenant.[111] Some group homes have as many as ten, or even more, residents.[112]

Returning to the smaller group of two "parents" and six mentally retarded foster children, suppose we change the facts so that the state does not "place" the children with the parents. Instead, the state (or a private organization) buys or rents a subdivision house, then hires the "parents"—say, a young couple—to move to the house and care for the children.[113] Here a well-socialized speaker of English might well distinguish the group from a subdivision family. First, the implication is that both the "surrogate parents" and the children have no solid roots in the location. Even if it is conceded that no rotation schedule is mandated and that the state expects all residents to remain indefinitely,[114] the common family tie to the land itself is absent. The state (or the private organization) is the landowner or lessee. A well-socialized speaker of English might count this evidence heavily, not only because the evidence moves the group home away from the paradigm of the

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[110] *See* paragraph preceding note 94 *supra*.

[111] *See* notes 31-34 and accompanying text *supra*.

[112] *E.g.*, Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981) (two adults, their five natural children, plus as many as ten delinquent youths); Committee for the Betterment of Mt. Kisco v. Taylor, 63 A.D.2d 650, 404 N.Y.S.2d 380 (1978) (ten children plus housemothers or married couple); Moore v. Nowakowski, 46 A.D.2d 996, 361 N.Y.S.2d 795 (1974) (ten juveniles plus two house parents).

[113] *E.g.*, State *ex rel.* Region II Child & Family Services, Inc. v. District Court, _ Mont. _, _, 609 P.2d 245, 246 (1980) (paid houseparents to reside with retarded children at house owned by corporate defendant); J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, _, 274 S.E.2d 174, 176-77 (1981) (adult couple to reside with retarded adults at home owned by corporate defendant).

[114] *See, e.g.*, Crowley v. Knapp, 94 Wis. 2d 421, 439, 288 N.W.2d 815, 824 (1980) (residents regard home as permanent residence). *But see, e.g.*, Group House of Port Washington, Inc. v. Board of Zoning & Appeals, 47 N.Y.2d 266, 276, 380 N.E.2d 207, 212, 404 N.Y.S.2d 377, 382 (1978) (Breitel, J., dissenting) (group home scheme contemplates housing of transients).

subdivision family, but also because it moves the group home closer to an inconsistent paradigm, the institutional home (*e.g.*, an orphanage), particularly if the "surrogate parents" are paid more than would be necessary simply to provide for the needs of the children.[115] The fact that the residents are mentally retarded adults rather than children might not make much difference because the ordinary person presumably would recognize the behavioral similarity between the two groups.[116] On the other hand, the fact that the residents are mentally retarded adults probably would count as a factor *tending* to disqualify the group because mentally retarded adults obviously are not totally substitutable for children in the paradigmatic subdivision family.

Finally, suppose the group home is a profit-making operation for the dependent elderly.[117] Here a well-socialized speaker of English almost certainly would deny the appellation "family" in favor of "nursing home."

At least four generalizations seem appropriate on the basis of this incomplete[118] summary of the variants of the group-home fact pattern. First, ascertainment of contextual social meaning requires close scrutiny of the facts. Second, the analysis unavoidably includes a residual intuitional element. The judge, familiar with the linguistic conventions of his society, should rely on his own lights as a well-socialized speaker of English. Third, factors that would be unimportant if a group were linked by blood or marriage can acquire significance when that link is missing. Thus, it is not a refutation of the influence of size to point out that a natural family may have twenty children without violating a single-family-use covenant, nor is the point about state (or organization) ownership of the house answered by the observation that a natural family may live in a house owned by Uncle John without running afoul of

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[115] *E.g.*, Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, _, 421 N.E.2d 152, 156 (1981) (live-in supervisors paid salaries); State *ex rel.* Region II Child & Family Services, Inc. v. District Court, _ Mont. _, 609 P.2d 245, 246 (1980) (paid houseparents).

[116] *See* Oliver v. Zoning Comm'n, 31 Conn. Supp. 197, 202, 326 A.2d 841, 844 (C.P. 1974) (retarded referred to as "perpetual children").

[117] *See* Jayno Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

[118] The facts may vary in other ways considered significant. For example, Judge Breitel emphasized in the *Port Washington* case that the "houseparents" rotated—one set for weekdays, another set for weekends. 45 N.Y.2d at 275-76, 380 N.E.2d at 212, 408 N.Y.S.2d at 382 (Breitel, J., dissenting).

such a covenant. Obviously such factors are irrelevant if the group is linked by blood or marriage, since a restricted version of blood/marriage relationship seems to qualify as a sufficient condition for family status.[119] If that link is missing, the full implications of the modified[120] cluster structure of the conception of "family" come into play. Finally, it seems clear enough that there is serious doubt whether a well-socialized speaker of English would conclude that group homes, by and large, count as subdivision families. Many of the attributes shared in general by group homes shift the group away from the paradigm of the subdivision family and toward the competing paradigm of the institutional home.

D. The Cases

The question whether a group home should count as a family within the meaning of a subdivision covenant restricting lots to single-family use is presented most directly in a series of three cases decided recently by the Michigan Court of Appeals[121] and in recent decisions by the Wisconsin[122] and Montana[123] Supreme Courts.[124] A striking feature of all of these cases is the almost complete neglect of contextual social meaning. Take, for example, *Bellarmine Hills Association v. Residential Systems Co.*,[125] the first of the three Michigan cases. In *Bellarmine Hills*, the court held that a group home for six mentally retarded children and one "foster parent"[126] counted as a family within the meaning of a single-fam-

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[119] *See* text following note 95 *supra*.

[120] *See* text following note 104 *supra* (discussion of theory of disqualifying factors).

[121] 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); Bellarmine Hills Ass'n v. Residential Syss. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978).

[122] Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

[123] State *ex rel.* Region II Child & Family Servs., Inc. v. District Court, _ Mont. _, 609 P.2d 245 (1980).

[124] Three other group homes covenants cases focus primarily on the distinction between residential and nonresidential use. Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976); J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981).

[125] 84 Mich. App. 554, 269 N.W.2d 673 (1978).

[126] Some of the cases speak of the "foster parents," others use "houseparents," and still others use "surrogate parents." There is room for suspicion that some of the terms used to describe the various features of the group "home" were chosen as much for rhetorical force as linguistic accuracy.

ily-use covenant.[127] The court began its analysis with a quotation from an earlier decision discussing the meaning of "family":

> Now this word "family," contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers.[128]

After the quotation, the *Bellarmine Hills* opinion continues: "Our examination of subsequent cases and authority from other jurisdictions discloses no more specific definition of the term. Rather, the word family denotes a concept, the application of which is dependent upon . . . " Now here one would expect the court to say " . . . the particular context in which the word is used. And in this case the word is used in a subdivision covenant, necessitating an inquiry into the subdivision setting." Instead, the sentence ends: " . . . the basis of affiliation of the group being analyzed juxtaposed with the public policies invoked by the particular circumstances of the case being reviewed."[129] The remainder of the opinion makes clear that the court will consider a group a family if the "basis of affiliation" is favored by public policy; otherwise not.[130] Thus, we are told that the basis of affiliation in the case of the group home—"the mutual need of the children for expert treatment of their mental retardation"[131]—is favored by public policy, so the group home counts as a family.[132] On the other hand, "such a favored basis of affiliation does not inhere in the operation of a

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[127] The covenant stated in relevant part: "No structure shall be erected . . . on any residential lot other than one single private family dwelling . . . ." 84 Mich. App. at 557 n.3, 269 N.W.2d at 674 n.3. The court held that the covenant restricted the use of the lot as well as the type of structure that could be erected on it. *Id.* at 559, 269 N.W.2d at 675. *But see* J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, _, 274 S.E.2d 174, 181 (1981) (similar covenant held to regulate type of structure, but not use).

[128] 84 Mich. App. at 559-60, 269 N.W.2d at 675 (quoting Carmichael v. Northwestern Mut. Benefit Ass'n, 51 Mich. 494, 496, 16 N.W. 871, 872 (1883)).

[129] 84 Mich. App. at 560, 269 N.W.2d at 675.

[130] *Id.* at 560-61, 269 N.W.2d at 675-76.

[131] *Id.* at 561, 269 N.W.2d at 676.

[132] *Id.* at 562-63, 269 N.W.2d at 676.

boarding house or a college fraternity house," so neither of those counts as a family.[133]

Putting aside for the moment the appeals to precedent[134] and public policy[135] in the court's reasoning, it is striking how foreign the analysis is to a straightforward inquiry into contextual social meaning. Toward the end of the opinion, the court does include a long passage from *Ferraioli,* one of the New York zoning cases already discussed.[136] The passage emphasizes the attributes held in common between a group home and a "traditional family."[137] The passage could have been used as a foundation for exploring contextual social meaning,[138] but the *Bellarmine Hills* opinion leaves the passage hanging and returns to the point about the relationship

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[133] *Id.* at 561, 269 N.W.2d at 675-76 (footnotes omitted).

[134] Adherence to precedent may conflict with effectuation of contextual social meaning if, in a previous case involving facts too similar to ignore, the court interpreted a term in a way at odds with the sense in which the term would be understood by a well-socialized speaker of English. Here the later court apparently must balance the value of treating like cases alike against the value of effectuating contextual social meaning. To adhere to precedent in such a case is to give the language at stake a kind of code meaning, decipherable by lawyers, but not by laymen unfamiliar with the precedent. Arguably, at least, this tips the balance in favor of effectuating contextual social meaning and at the same time follows the principle that like cases be treated alike. The *result* in the earlier case could be rationalized on a rights theory analogous to the rights theory employed by the later court after concluding that the covenant "applied" as a matter of contextual social meaning. *See* Part III *infra.* Thus, only the reasoning of the earlier decision would be rejected.

[135] *See* notes 167-84 and accompanying text *infra.*

[136] *See* notes 65-71 and accompanying text *supra.*

[137] It is significant that the group home is structured as a single housekeeping unit and is, to all outward appearances, a relatively normal, stable and permanent family unit, with which the community is properly concerned.

. . . .

The group home is not, for purposes of a zoning ordinance, a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school (*cf. Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed.2d 797 (1974)). Every year or so, different college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes. Nor is it like the so-called "commune" style of living. The group home is a permanent arrangement and akin to a traditional family, which also may be sundered by death, divorce, or emancipation of the young. Neither the foster parents nor the children are to be shifted about; the intention is that they remain and develop ties in the community. The purpose is to emulate the traditional family and not to introduce a different "life style."

84 Mich. App. at 561-62, 269 N.W.2d at 676 (quoting City of White Plains v. Ferraioli, 34 N.Y.2d 300, 304-05, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974)).

[138] *But see* notes 77-78 and accompanying text *supra.*

between the group home and the state's public policy.[139]

A similar circumnavigation of the usual inquiry into context is evident in *Crowley v. Knapp*,[140] the Wisconsin case. The *Crowley* covenant recited that the use of the premises "shall be restricted to the construction of one single family dwelling . . . and shall be used for residential purposes only."[141] The term "family" was not defined. The trial court held that "family" meant "people . . . related . . . by blood or marriage"[142] and that the use of the burdened lot as a group home for eight mentally retarded adults violated the covenant.[143] The supreme court observed, rightly,[144] that a group need not be related by blood or marriage to qualify as a family within the meaning of such a covenant.[145] Then the court turned to an earlier Wisconsin zoning case, *LaSalette v. Whitefish Bay*,[146] involving occupancy of a house by a group of priests and lay brothers. The zoning ordinance in *LaSalette* restricted use of the property in question to single family dwellings and defined "family" as " 'one or more individuals living, sleeping, cooking, or eating on premises as a single housekeeping unit.' "[147] In *LaSalette*, the court held that the priests and lay brothers were a family within the meaning of the ordinance.[148] Although, as the *LaSalette* court noted, the result could be based simply on the broad definition of "family" given in the ordinance itself,[149] the court also discussed "the ordinary concept of that term"[150] and offered a definition of its own: "a collective body of persons living together in one house, under the same management and head subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness."[151] The *Crowley* court relied on this definition.[152] Clearly, the

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[139] 84 Mich. App. at 562, 269 N.W.2d at 676.
[140] 94 Wis. 2d 421, 288 N.W.2d 815 (1980).
[141] *Id.* at 423, 288 N.W.2d at 817.
[142] *Id.* at 434, 288 N.W.2d at 822.
[143] *Id.* at 423, 288 N.W.2d at 817.
[144] *See* notes 94-95 and accompanying text *supra*.
[145] 94 Wis. 2d at 435, 288 N.W.2d at 822.
[146] 267 Wis. 609, 66 N.W.2d 627 (1954).
[147] 94 Wis. 2d at 435, 288 N.W.2d at 822.
[148] *Id.* at 436, 288 N.W.2d at 822-23.
[149] *Id.*
[150] *Id.* at 436, 288 N.W.2d at 823.
[151] *Id.*
[152] *Id.* at 437, 288 N.W.2d at 823.

definition, like the trial court's very restrictive definition, is within the ambit of the linguistically permissible uses of "family," but is *either* definition an accurate reflection of the contextual meaning of the word? As the court noted in the earlier zoning case, its broad definition of "family" would accommodate a group of school teachers or nurses who set up housekeeping together.[153] It is surely unlikely that a well-socialized speaker of English would consider a group of school teachers a family within the meaning of a single-family-use covenant.

An important lesson of the previous discussion of the cluster model of the subdivision conception of "family"[154] is that the contextual social meaning of "family" in the covenant setting lies somewhere between the narrowest and broadest definitions of "family" one might find in a dictionary. Because the *Crowley* court and others tend not to focus on the significance of the subdivision context, they do not reach the cluster model (by that name or any other) as the Archimedean point for judging the meaning of "family." Instead, particularly in *Crowley* and in the Montana case, *State ex rel. Region II Child and Family Services, Inc. v. District Court*,[155] the opinions set up a false dichotomy: either "family" must be taken in its narrowest sense (persons related by blood, marriage, or adoption) or a group home should count as a family. Considered from the perspective of contextual social meaning, the narrow interpretation of "family" seems something of a straw man. The interpretation was given some standing in *Crowley* by the trial court's adoption of it. Moreover, one of the *Crowley* dissenters urged the narrow view as the correct one.[156] And at least one state supreme court has adopted the narrow interpretation in analogous circumstances.[157] But it seems clear enough that a well-socialized speaker of English would not so narrowly circumscribe the subdivision conception of "family."[158] Significantly, Justice Day, the *Crowley* dissenter who urged the blood-or-marriage interpretation, based his argument not on a consideration of the subdivision con-

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[153] *Id.*

[154] *See* notes 97-101 and accompanying text *supra*.

[155] _ Mont. _, 609 P.2d 245 (1980).

[156] 94 Wis. 2d at 441, 288 N.W.2d at 825 (Day, J., dissenting in part).

[157] Region 10 Client Management, Inc. v. Town of Hampstead, 120 N.H. 885, 424 A.2d 207 (1980).

[158] *See* notes 94-95 and accompanying text *supra*.

text, but on a number of statutes addressed to other contexts and problems.[159]

Of course, it does not follow simply from a rejection of the blood-or-marriage interpretation of "family" that a very broad interpretation should be adopted. The *Crowley* majority avoids the *non sequitur* by invoking a very powerful version of the ambiguity/free-use rule.[160] First, the court cites the broad definition of "family" given in the earlier decision involving the priests and lay brothers.[161] Then the court invokes the ambiguity/free-use rule for the proposition that "if the meaning of ['family'] is to be further limited, the limitation must be expressly stated."[162] In a footnote, the majority chides the dissenters for ignoring the rule: "The authors of the dissenting opinions interpret the covenant largely on the basis of the grantor's probable intent. That position is erroneous as a matter of law, because only the intent of the grantor as expressly set forth in the covenant is relevant."[163] In Part I, the ambiguity/free-use rule was conceived as a resolving presumption to be applied (if at all) only when a well-socialized speaker of English would regard covenant language as hopelessly indeterminate, so that the covenant might be said to lack directional force.[164] The *Crowley* version of the rule seems to operate differently. Under the *Crowley* version, unless the covenant language is *absolutely* clear[165] the presumption is triggered, and the covenant language may be assigned a meaning at odds with "the grantor's probable intent," so long as the meaning is linguistically permissible. Such outright disregard for contextual social meaning needs considerable justification, and as the analysis in Part I established, there is reason to doubt the validity of the premises underlying the ambiguity/free-use rule.[166]

The Michigan cases do not rely on any version of the ambiguity/free-use rule. In fact, in the second of the three Michigan cases,

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[159] 94 Wis. 2d at 442, 288 N.W.2d at 825.

[160] *See* Part II, § *C supra.*

[161] 94 Wis. 2d at 436, 288 N.W.2d at 823.

[162] *Id.* at 437, 288 N.W.2d at 823.

[163] *Id.* at 438 n.3, 288 N.W.2d at 823 n.3.

[164] *See* text accompanying notes 28-30 *supra.*

[165] 94 Wis. 2d at 435, 288 N.W.2d at 822 (covenant language must be expressed in clear, unambiguous, and peremptory terms).

[166] *See* notes 35-38 and accompanying text *supra.*

Jayno Heights Landowners Association v. Preston,[167] the court states that "private residential restrictions, if established by proper instruments, are *favored* by public policy."[168] The dominant doctrinal theme of the Michigan cases is that the public policy aims of the state should be taken into account in fixing the meaning of covenant language. Thus, as already noted,[169] we are told in *Bellarmine Hills* that a group will be considered a subdivision family if the group's "basis of affiliation" is favored by public policy; otherwise not. A group home for mentally retarded children is a family because its basis of affiliation—"the mutual need of the children for expert treatment of their mental retardation"[170]—is favored by public policy. This approach is confirmed in *Malcolm v. Shamie,*[171] the most recent of the three Michigan cases, which held that a group home for five mentally retarded adult women is a family within the meaning of a single-family-use covenant.[172] The *Malcolm* court cites a statute and a provision of the state constitution to show that the group's basis of affiliation is favored by public policy. The statute provides:

> In order to implement the policy of this state that persons in need of community residential care shall not be excluded by zoning from the benefits of normal residential surroundings, a state licensed residential facility providing supervision or care, or both, to 6 or less persons shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zones for single family dwellings . . . .[173]

The state constitutional provision provides: "Institutions, programs and services for the care, treatment, education or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported."[174] The *Malcolm* opinion explicitly invokes *Bellarmine Hills:* "This

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[167] 85 Mich. App. 443, 271 N.W.2d 268 (1978).
[168] *Id.* at 448, 271 N.W.2d at 270.
[169] *See* note 130 and accompanying text *supra.*
[170] *See* note 131 and accompanying text *supra.*
[171] 95 Mich. App. 132, 290 N.W.2d 101 (1980).
[172] *Id.* at 137, 290 N.W.2d at 103.
[173] *Id.*
[174] *Id.*

Court weighed the importance of normalization through community based services for retarded individuals in *Bellarmine* . . . . The public policy arguments of *Bellarmine* apply equally to all retarded individuals regardless of chronological age."[175]

To the extent that the approach utilized in *Bellarmine Hills* and *Malcolm* yields results inconsistent with contextual social meaning,[176] the approach is open to the serious charge that it requires valuable property rights to yield to the projects of the state. The *Bellarmine Hills* court itself noted that subdivision covenants are property rights.[177] Obviously, those rights are embodied in the language used to express them. A court takes the rights seriously if it takes the language seriously, and Part I established that a court takes the language seriously if it effectuates the contextual social meaning of the covenant. Thus, it follows that to subordinate contextual social meaning to an interpretative formula that relies heavily on state policy risks subordination of private property to the state's projects without the payment of compensation. This aspect of the group homes issue has not gone unnoticed. In *Seaton v. Clifford,*[178] an early group homes case decided by the California Court of Appeals, the court responded to an argument based on state deinstitutionalization policy by observing that "the solution . . . lies in the state's exercise of the power of eminent domain to provide the necessary facilities for the mentally retarded. In that way private property rights would not be impaired without just compensation."[179] The point was echoed by a dissenting justice in *Berger v. State,*[180] a New Jersey group homes decision: "I agree with plaintiff's plea that such institutions should be located where they do not intrude on property rights; and if it is felt for any reason that they must, then the state should condemn the private

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[175] *Id.* at 136, 200 N.W.2d at 103.

[176] In a particular case the approach used in the Michigan cases might yield an interpretation of covenant language quite consistent with the interpretation that would be given by a well-socialized speaker of English, but the consistency would be coincidental. A well-socialized speaker of English would not consider the state's policy favoring deinstitutionalization of the retarded to be germane to the question of the social meaning of a private subdivision covenant.

[177] 84 Mich. App. at 558-59, 269 N.W.2d at 674-75.

[178] 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972).

[179] *Id.* at 52, 100 Cal. Rptr. at 782.

[180] 71 N.J. 206, 364 A.2d 993 (1976).

property interests affected and make compensation therefor."[181]

The refusal to subordinate the contextual social meaning of covenant language to state policy has roots in what has been termed the Kantian approach to property theory.[182] This approach holds that individuals should not be regarded merely as means for realizing the ends of society in general. Individuals have rights, and rights are paramount to state goals, aims, and projects. On this view, if a well-socialized speaker of English would conclude that a group home is not a family within the meaning of a single-family-use covenant, then the subdivision lot owners have a right to that interpretation in court. If the state decides that the covenant stands in the way of the important aim of deinstitutionalizing the retarded, then the state may condemn the covenant and compensate the lot owners,[183] just as the government compensates the property owner whose land is taken for a critically needed fire station.

The Kantian approach to property theory is but one of a number of powerful, often contradictory, doctrinal elements in this complex area. Other approaches might well justify the analysis used in *Bellarmine Hills* and *Malcolm*.[184] Nevertheless, if a justification can be constructed for the results in the two cases that is consistent with the Kantian approach, so much the better.

III. Conclusion: Conflicting Rights

Although rights generally should not be subordinated to the state's projects, rights sometimes must yield to paramount rights.[185] A detailed elaboration of the group homes litigation from a rights perspective is beyond the scope of this paper; what follows should be regarded as preliminary exploration. A single-family-use covenant seeks to dictate two of the intimate details of the lives of group home residents—their place of abode and their living companions.[186] Surely there is at least a prima facie moral right to be free of such interference with personal autonomy. The question is whether that moral right can be translated into a legal claim as-

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[181] *Id.* at 228, 364 A.2d at 1004 (Conford, J., dissenting).

[182] B. Ackerman, Private Property and the Constitution 71-87 (1977).

[183] *See* note 14 *supra*.

[184] *See generally* B. Ackerman, *supra* note 182, at 41-70 (discussion of utilitarian theory).

[185] *See* R. Dworkin, *supra* note 31, at 193-94.

[186] *See generally* L. Tribe, *supra* note 11, 886-990 (rights of privacy and personhood).

sertable by the group home residents against the subdivision lot owners. The first hurdle is *Village of Belle Terre v. Boraas,*[187] in which the United States Supreme Court upheld a zoning ordinance prohibiting three or more unrelated persons from residing together in the same household.[188] The Court rejected the claim of a group of college students that the ordinance infringed their fundamental rights, including freedom of association.[189] Moreover, Justice Douglas, writing for the majority, concluded that the police power "is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[190] Given *Village of Belle Terre,* it is at least doubtful that group home residents would be able to establish a federal constitutional right to be free of a single-family-use covenant.[191] In

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[187] 416 U.S. 1 (1974).

[188] *Id.* at 7, 9.

[189] *Id.* at 7-8.

[190] *Id.* at 9.

[191] The case for a federal constitutional right to be free of a single-family-use covenant is not helped substantially by Moore v. City of East Cleveland, 431 U.S. 494 (1976). *Moore* involved a local housing ordinance that (1) limited occupancy to members of a single family and (2) defined family in such a way that Mrs. Inez Moore was prohibited from sharing a residence with her son and two grandsons. The Supreme Court held the ordinance unconstitutional. Justice Powell, writing for a plurality, concluded that the ordinance violated due process because it sliced deeply into the family itself without adequate justification. Justice Powell emphasized that the Constitution "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503. The group home almost certainly would not count as a part of that "history and tradition." Justice Brennan's concurring opinion also relied heavily on the family tradition, including the tradition of the "extended family." *Id.* at 507. Justice Stevens concurred in the judgment, but on the theory that the ordinance amounted to a "taking" of property without due process and without just compensation. *Id.* at 507. Justice Stevens invoked the standard of review set out in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and concluded that the *Moore* ordinance failed to meet the *Euclid* requirement of a substantial relationship to the police power of the state. 431 U.S. at 520. The Stevens opinion does leave somewhat more room for a federal constitutional claim in the group homes situation, particularly in view of the fact that the opinion favorably noted state court hostility to zoning provisions designed to regulate closely the composition of residences, but it is not clear how many of the Justices would be willing to go along with Justice Stevens' theory. He wrote only for himself in *Moore.*

Last Term the Supreme Court rejected the argument that federal legislation gives the mentally retarded a *statutory* right to placement in community living arrangements such as group homes. *See* Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531 (1981). This Term the Court will have the chance to consider the constitutional dimensions of a claimed right to treatment in the least restrictive circumstances. *See* Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), *cert. granted,* 101 S. Ct. 2313 (1981). The *Romeo* case, however, does not involve directly the question whether mentally retarded individuals have a right to

Ferraioli, Judge Breitel suggested that *Village of Belle Terre* could be limited to cases involving transients,[192] but it is not clear at all that the holding can be so circumscribed.[193]

Federal law, however, is not the only potential source of rights. The California and New Jersey Supreme Courts have invoked provisions of their state constitutions to invalidate ordinances similar to the law upheld in *Village of Belle Terre.* In *City of Santa Barbara v. Adamson,*[194] the California court held that an ordinance restricting the number of unrelated persons who may live together violated the state constitutional right of privacy.[195] In *State v. Baker,*[196] the New Jersey court struck down such an ordinance on the basis of state substantive due process. A dissenting justice in *City of Santa Barbara* noted that no federal constitutional right was infringed, citing *Village of Belle Terre.*[197] The majority in *State v. Baker* explicitly rejected the authority of *Village of Belle Terre* on the ground that the decision fixed at most the bounds of *federal* constitutional protection. The California and New Jersey cases take advantage of the doctrine that state constitutional protection may exceed the protection given by the Federal Constitution.[198]

Even if group home residents can establish that the state constitution generally recognizes the sorts of rights they wish to assert, there is the matter of the conflicting rights held by the subdivision lot owners. The stock response here is that fundamental individual rights generally are thought to be of a higher order than property rights.[199] But are the lot owners entitled to claim only property rights? Arguably, the single-family-use covenant is an exercise of the lot owners' own associational rights.[200] Tribe has observed that

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placement in community living arrangements. Rather, the case deals with treatment conditions inside a large institution.

[192] 34 N.Y.2d at 304-05, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

[193] *See* L. TRIBE, *supra* note 11, at 977.

[194] 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

[195] *Id.* at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545.

[196] 81 N.J. 99, 405 A.2d 368 (1979).

[197] 27 Cal. 3d at 139, 610 P.2d at 445, 164 Cal. Rptr. at 548 (Manuel, J., dissenting).

[198] *See, e.g.,* Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights,* 10 GA. L. REV. 533 (1976); Note, *Private Abridgement of Speech and the State Constitutions,* 90 YALE L.J. 165 (1980).

[199] *See, e.g.,* R. DWORKIN, *supra* note 31, at 277-78.

[200] L. TRIBE, *supra* note 11, at 977.

the *Village of Belle Terre* ordinance may be viewed as reflecting the wish on the part of the majority of the villagers "to preserve the integrity of their preferred associational form as a community of traditional families."[201] The same thing might be said of a single-family-use covenant. The point is a powerful one *if* we agree that the modern residential subdivision is a true community. Tribe again: "Belle Terre may not be a real 'community' or 'association' at all but simply a collection of persons . . . because it has no organic life as a center of communal perceptions and common activities."[202] The same doubt about the actual strength of community ties may be applied to many private residential subdivisions. Moreover, assuming the lot owners genuinely may claim associational interests, we need not conclude automatically that one set of associational claims neutralizes any other set. The associational rights asserted by the group home residents relate to the household itself and might easily be thought to weigh heavier in the balance than the rights claimed by the lot owners.

Assuming group home residents have the better substantive constitutional case, at least one further legal hurdle remains: the state action doctrine. Generally, constitutional rights are rights against the government,[203] and a single-family-use covenant is a private document, not a public law. The Supreme Court did hold in *Shelley v. Kraemer*[204] that judicial enforcement of a private covenant constituted sufficient state action on the facts of that case to trigger the Constitution.[205] The Wisconsin court stated in a footnote in *Crowley v. Knapp* that *Shelley* could be used to support a constitutional attack on a single-family-use covenant,[206] and Tribe thinks *Shelley* "probably" would apply in such circumstances,[207] but the reach of *Shelley* beyond the realm of racial discrimination is problematic.[208] Again, however, state courts applying state constitutions need not be bound by the federal contours of the state action doctrine. Some state constitutional guarantees may apply

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[201] *Id.* (footnote omitted).
[202] *Id.* at 979.
[203] *See id.* at 1147-74.
[204] 334 U.S. 1 (1948).
[205] *Id.* at 18-19.
[206] 94 Wis. 2d at 437 n.2, 288 N.W.2d at 823 n.2.
[207] L. TRIBE, *supra* note 11, at 978.
[208] *See id.* at 1156-57.

directly against private conduct,[209] and even if a state analogue to the federal requirement exists, a state court might decide to read the state doctrine more narrowly,[210] thereby expanding the reach of state constitutional protection.

Finally, the moral rights of the group home residents might be legally protected simply by importing constitutional values into private adjudication through the normal common law process.[211] That is, state courts could decline to enforce single-family-use covenants against group home residents without invoking the state constitution *qua* law. Instead, the holding would be based on the court's inherent power. This third approach would not trench on the modern dominance of the legislative branch. The legislature rightly is regarded as the primary policymaker in the democratic state, but there is room for continuing judicial participation in the development of common law based on principle.[212] The refusal to enforce a single-family-use covenant against a group home would be a decision based on the principle that no person or group of persons may dictate the intimate details of the life of another.

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[209] *See* Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 164, 180-81 (1980).

[210] *Id.* at 182-83.

[211] *See id.* at 177 & n.61.

[212] *See* R. DWORKIN, *supra* note 31, at 84-85.