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Heller v. Doe: The Supreme Court Diminishes the Rights of Individuals With Mental Retardation

I. INTRODUCTION

Involuntary commitment¹ of individuals with mental illness and mental retardation occurs in every state in this country.² Every state except New Hampshire maintains at least one large state-run care facility for individuals with mental retardation.³ Similarly, a network of state-run institutions has been the most prevalent means of addressing the needs of individuals with mental illness.⁴ While there has been a move toward community living arrangements for individuals with mental retardation and mental illness, not all members of these populations have obtained placement in alternative care programs.⁵

1. "Commitment" is defined as "[t]he proceedings directing confinement of a mentally ill or incompetent person for treatment. Commitment proceedings may be either civil or criminal; and voluntary or involuntary . . ." BLACK'S LAW DICTIONARY 273 (6th ed. 1990).

2. In every jurisdiction of the country, there are statutes governing the involuntary commitment of people with mental illness and mental retardation. See *Heller v. Doe*, 113 S. Ct. 2637, 2646-47 (1993).

3. See Brief for Voice of the Retarded (VOR), et al. as Amici Curiae in Support of Petitioner at 5, *Heller* (1993) (No. 92-351).

4. See Ronald L. Wisor, Jr., *Community Care, Competition and Coercion: A Legal Perspective on Privatized Mental Health Care*, 19 AM. J.L. & MED. 145 (1993). In the mid-nineteenth century, Dorothea Dix helped begin the move toward "humane care" for persons with mental illness which included state-run hospitals specifically designed to care for people with mental illness. BETH A. TROUL, M.D., *MODELS OF COMMUNITY SUPPORT SERVICES: APPROACHES TO HELPING PERSONS WITH LONG-TERM MENTAL ILLNESS I* (1986). More recently, innovative alternatives have developed. See Wisor, *supra* (describing the privatization of care for people with mental illness in Massachusetts and evaluating the probability that the Massachusetts system will effectively meet the needs of all people with mental illness in that state).

5. See, e.g., Amicus Curiae Brief of FOCUS on Community Understanding and Services, Inc., et al. in Support of Respondents at 19-20, *Heller* (1993) (No. 92-351) [hereinafter FOCUS] (discussing the movement of many citizens with mental retardation out of institutions and into the community).

Psychosocial rehabilitation programs for people with mental illness have emphasized preventing rehospitalization as well as enabling people with mental illness to become actively involved in managing their programs. Judith A. Cook and Sara J. Hoffschmidt, *Comprehensive Models of Psychosocial Rehabilitation*, in *PSYCHIATRIC REHABILITATION IN PRACTICE* 81, 82 (Robert W. Flexer & Phyllis L. Solomon eds., 1993). For example, Colorado designed a program comprised of six different community-based therapeutic environments. Paul R. Polak & Michael W. Kirby, *A Model to Replace Psychiatric Hospitals*, 162 J. NERVOUS & MENTAL DISEASE 13 (1976). Some of the components of the program included home treatment, crisis intervention, social systems intervention, and rapid tranquilization. *Id.* at 13-14.

Another well known model of community-based care, designed for adults with long-

Most states have statutes governing involuntary commitment procedures for individuals with mental illness and mental retardation.⁶ While both mental conditions may lead to involuntary commitment, many states have identified distinctions between these disabilities⁷ which they contend are relevant to the commitment process.⁸ For example, mental retardation is a developmental disability which manifests itself before adulthood.⁹ By the time a child reaches the age of majority, the existence and the extent of the disability should be well documented.¹⁰ Mental illness, however, is more difficult to diagnose.¹¹ This difficulty is partially attributable to the sudden onset of mental illness and the delayed manifestation of the illness which often appears for the first time during adulthood.¹²

term mental illness, utilizes varying degrees of services and supports incorporating: "[L]ocation of Clients/Outreach; assistance in meeting basic human needs; mental health care; 24-hour crisis assistance; psychosocial and vocational services; rehabilitative and supportive housing; assistance/consultation and education; natural support systems; grievance procedures/protection of client rights; [and] case management." TROUL, *supra* note 4, at 3-5.

Perhaps the most well-known psychosocial rehabilitation program for the long-term mentally ill is Fountain House. John H. Beard et al., *The Fountain House Model of Psychiatric Rehabilitation*, 5 PSYCHOSOCIAL REHABILITATION J. 47 (1982).

6. See *Heller*, 113 S. Ct. at 2646-47 (citing existing statutes on mental illness and mental retardation from virtually every state).

7. For purposes of this Note, the term "disabilities" refers to both mental illness and mental retardation.

8. See *Heller*, 113 S. Ct. at 2645-48.

9. *Id.* at 2643 (referring to AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 29 (3d rev. ed. 1987) [hereinafter DSM-III-R]; AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5, 16-18 (9th ed. 1992); SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 16-17, 37 (3d ed. 1985); KY. REV. STAT. ANN. § 202B.010(9) (Michie/Bobbs-Merrill 1991)).

Mental retardation is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." KY. REV. STAT. ANN. § 202B.010(9) (Michie/Bobbs-Merrill 1991). It "results in 'deficits or impairments in adaptive functioning [such that] the person's effectiveness in areas such as social skills, communication, and daily living skills, and how well the person meets the standards of personal independence and social responsibility expected of his or her age by his or her cultural group'" are diminished. *Heller*, 113 S. Ct. at 2647 (quoting DSM-III-R, *supra*, at 28-29).

10. *Heller*, 113 S. Ct. at 2643-44.

11. *Id.* at 2644 (citing DSM-III-R, *supra* note 9, at 190, 220, 229, where the American Psychiatric Association reported that mental illness may manifest itself during adulthood); see also *Addington v. Texas*, 441 U.S. 418, 430 (1979) (describing the uncertainties inherent in psychiatric diagnosis); BRAKEL, *supra* note 9, at 18; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 438-39 (1985) (stating that mental illness "constitutes an imprecise notion, fraught with definitional and diagnostic fuzziness").

12. *Heller*, 113 S. Ct. at 2644. In contrast to the general definition of mental

The constitutional implications of distinguishing between mental retardation and mental illness in drafting involuntary commitment statutes has become a matter of concern for the Supreme Court of the United States. In *Heller v. Doe*,¹³ the Supreme Court addressed the constitutional protections available to individuals with mental retardation facing involuntary commitment.¹⁴ In *Heller*, the Court held that a Kentucky statute that uses a lower burden of proof to involuntarily commit people with mental retardation, than a similar statute used to involuntarily commit people with mental illness, does not violate the Equal Protection Clause of the Constitution.¹⁵ In addition, the Court ruled that Kentucky's grant of party status to the relatives and legal guardians of adults with mental retardation for purposes of involuntary commitment proceedings, while denying the same rights to the relatives and legal guardians of adults with mental illness, does not violate either equal protection or due process guarantees.¹⁶

This Note analyzes the constitutional and social impact of *Heller v. Doe*.¹⁷ First, this Note addresses both the due process and equal protection implications of involuntarily committing individuals with mental disabilities.¹⁸ Then, after tracing the battle for adequate constitutional protections for Kentucky residents with mental disabilities,¹⁹

retardation, the DSM-III-R does not provide a blanket definition for mental illness. The DSM-III-R provides a variety of definitions and descriptions of varying types of mental disorder, each with its own unique manifestations and treatments. *Id.* The DSM-III-R is broken down into sections covering major areas of mental disorders, the diversity of which reveals the vast spectrum of disabilities referred to by the layperson as mental illness. See DSM-III-R, *supra* note 9. Chapter three of the DSM-III-R includes sections addressing disorders which usually manifest during infancy, childhood, or adolescence (pp. 27-95); those disorders identified as organic mental syndromes and disorders (pp. 95-163); psychoactive substance use disorders (pp. 165-85); schizophrenia (pp. 187-98); delusional (paranoid) disorders (pp. 199-303); psychotic disorders not elsewhere classified (pp. 205-11); mood disorders (pp. 213-33); anxiety disorders (or anxiety and phobic neuroses) (pp. 235-53); somatoform disorders (pp. 255-77); sexual disorders (pp. 279-96); sleep disorders (pp. 297-313); factitious disorders (pp. 315-20); impulse control disorders not elsewhere classified (pp. 321-28); adjustment disorders (pp. 329-31); and psychological factors affecting physical condition (pp. 333-58). DSM-III-R, *supra* note 9.

13. 113 S. Ct. 2637 (1993).

14. *Id.*

15. *Id.*

16. *Id.* at 2647-49.

17. *Id.* at 2637 (1993).

18. See *infra* part II.A.

19. See *infra* parts II.B.

this Note discusses both the majority²⁰ and the dissenting opinions²¹ in *Heller*.

This Note also considers the level of scrutiny applied to statutes affecting individuals with disabilities,²² and finds congressional support in the Americans with Disabilities Act (the "ADA")²³ for strictly scrutinizing such statutes.²⁴ This Note then analyzes the legitimacy of disparate burdens of proof for involuntary commitment statutes applicable to individuals with mental illness and mental retardation.²⁵ Finally, this Note predicts how *Heller* will affect constitutional protections across the country for individuals with mental retardation who face involuntary commitment.²⁶

II. BACKGROUND

Early American history reveals that individuals with mental retardation were often deprived of their constitutional rights.²⁷ Consistent with societal indifference toward the rights of individuals with mental retardation, the Supreme Court did not consider the constitutionality of any civil commitment statutes until the 1960s. Finally, at that time, the Supreme Court began to show interest in protecting the constitutionally guaranteed rights of citizens confronting involuntary commitment.²⁸

20. See *infra* part III.B.

21. See *infra* part III.C.

22. See *infra* part IV.A.

23. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. IV 1992)).

24. See *infra* part IV.B.

25. See *infra* part IV.C.

26. See *infra* part V.

27. See, e.g., FOCUS, *supra* note 5, at 5-6 (suggesting that the constitutional issues of equal protection and due process are significant when applied to people with mental retardation, given the historical treatment of people with mental retardation as less-than-equal members of society).

28. See, e.g., *Baxstrom v. Herold*, 383 U.S. 107, 115 (1966). In *Baxstrom*, the Supreme Court established that the Equal Protection Clause guaranteed a convicted criminal the same commitment proceedings provided for all others facing civil commitment based on mental illness. *Id.* The State placed Baxstrom, a convicted criminal, in a state institution for the criminally insane during his incarceration and denied him release or transfer following the completion of his sentence. *Id.* at 108-09. Eventually, the Supreme Court determined that because all civil commitments except those where the person is awaiting the expiration of a penal sentence, provided for a judicial hearing on the issue of sanity, and that Baxstrom was denied this procedural protection based on a "capricious" classification unrelated to his alleged criminal tendencies, the state policy violated the Equal Protection Clause of the Constitution. *Id.* at 115. This case clarified that equal protection is applicable to all segments of the population, including those people living with mental disabilities.

Involuntary commitment of individuals with mental illness and mental retardation raises both due process and equal protection concerns. This Part explains how, unlike non-disabled²⁹ citizens, citizens with mental illnesses or mental retardation have only gradually obtained due process and equal protection rights under the Constitution.³⁰ This Part also focuses on Kentucky's approach toward involuntary commitment prior to *Heller*.³¹

A. *The Constitutional Implications of Involuntary Commitment*

During the 1970s, a growing concern for due process significantly affected the legal system's evaluation of involuntary commitment statutes.³² The Fifth and Fourteenth Amendments to the Constitution each contain a due process clause which limits the government's ability to deprive individuals of life, liberty and property without an opportunity to be heard.³³ In *Addington v. Texas*,³⁴ the Supreme Court deter-

See also United States *ex rel.* Carroll v. McNeill, 294 F.2d 117 (2d Cir. 1961), *prob. juris. noted*, 368 U.S. 951, and *vacated as moot*, 369 U.S. 149 (1962) (evaluating a law allowing for the commitment of individuals who have served prison sentences without providing for the same pre-commitment proceedings available to others).

29. For purposes of this article, the term "non-disabled" refers to people who have neither a mental illness nor a mental retardation.

30. *See infra* part II.A.

31. *See infra* part II.B.

32. The Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), marked an expansion in the scope of due process guarantees. Justice Brennan wrote the majority opinion in *Goldberg*, holding that due process guarantees an evidentiary hearing prior to terminating welfare benefits. 397 U.S. at 261.

A series of cases following *Goldberg* extended procedural due process guarantees to a broader range of claimants. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 584-588 (12th ed. 1991) (containing a commentary entitled *The Background of the Modern Developments: The Procedural Due Process Revolution of the Early 1970s*). Eventually, the Court had to confront the potential due process issues involved with involuntary commitment statutes. *E.g.*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (holding that the State of Florida violated the Constitution when it involuntarily confined to a mental institution a person who was not dangerous to himself or others). *See generally* RALPH REISNER, LAW AND THE MENTAL HEALTH SYSTEM, ch. 6 (1985); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.4, at 498-500 (4th ed. 1991).

33. U.S. CONST. amends. V, XIV. Substantive due process, as distinguished from procedural due process, restricts the ways in which legislatures may limit individual freedom. NOWAK & ROTUNDA, *supra* note 32, § 13.1, at 487. Procedural due process guarantees a fair procedure to determine the legality of a government action that deprives a person of life, liberty, or property. *Id.*; *see, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (providing a clear explanation of due process and its limits); JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW, pt. 3, ch. 15, § II, at 528 (2d ed. 1983) [hereinafter CONSTITUTIONAL LAW]. For commentary on the federal courts' interpretation of the proper scope of these protected interests, see Robert J. Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978).

34. 441 U.S. 418 (1979).

mined that, at a minimum, due process requires courts to apply a clear and convincing standard of proof when determining whether to involuntarily commit individuals with mental illness.³⁵ Although *Addington* involved the commitment to a mental hospital,³⁶ it set the stage for similar analysis of the involuntary commitment of individuals with mental retardation. Consequently, under due process analysis, the states were left to determine precisely what burden they would require, as long as that burden was equal to or greater than the clear and convincing burden of proof.³⁷

Similarly, equal protection becomes an issue when statutes classify individuals according to disabilities. For example, in *Cleburne v. Cleburne Living Center*,³⁸ the Supreme Court evaluated a zoning ordinance which was allegedly discriminatory as it applied to housing for individuals with mental retardation.³⁹ Concluding that the Fifth Circuit had erred in applying a quasi-suspect classification to individuals with mental retardation, the *Cleburne* Court applied a lesser standard of scrutiny.⁴⁰ Based on the *Cleburne* holding that individuals with either mental retardation or mental illness do not merit heightened or strict scrutiny under equal protection analysis, courts now apply the lowest level of scrutiny in evaluating statutes which classify based on mental illness or mental retardation.⁴¹

35. *Id.* at 433. *Addington* argued that the trial court's use of the "unequivocal and convincing" burden to determine that he was mentally ill and in need of commitment violated his substantive due process rights. *Id.* at 421. *Addington* asserted that the "beyond a reasonable doubt" standard was more proper because it is the standard required to deprive a criminal defendant of liberty. *Id.* at 421-22. Texas refused to apply the "beyond a reasonable doubt" standard because the uncertainty of psychiatric diagnosis would render commitment under this standard almost impossible. *Id.* at 429. The Supreme Court determined that the differences between criminal and civil commitment justified a slightly lower burden of proof for civil commitment. *Id.* at 428-29.

36. *Id.* at 419.

37. *Id.* at 433.

38. 473 U.S. 432 (1985).

39. *Id.* at 434.

40. *Id.* at 435. The Court stated: "The Court of Appeals . . . held that mental retardation is a 'quasi-suspect' classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate . . ." *Id.* See also *Schweiker v. Wilson*, 450 U.S. 221, 231 (1981) (evading the issue of using heightened scrutiny by determining that the statute under review did not classify directly based on mental health); *Doe v. Colautti*, 592 F.2d 704, 710-711 (3d Cir. 1979) (concluding that people with mental illness did not constitute a suspect class); *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 130 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981) (determining that suspect classification is inappropriate when applied to people with mental retardation).

41. See *Cleburne*, 473 U.S. at 446 ("To withstand equal protection review, legislation distinguishing between the mentally retarded and others must be rationally related to a

B. Kentucky's Approach Toward Involuntary Commitment

In Kentucky, the involuntary commitment of citizens with mental disabilities to institutions did not become a significant legal issue until the 1970s.⁴² Historically, Kentucky citizens brought their relatives with mental disabilities to state institutions and worked with staff to determine whether commitment was necessary.⁴³ The lack of due process protections inherent in these commitment procedures did not result in legal action until 1975.

In 1975, the plaintiffs in *Kendall v. True*⁴⁴ attacked the constitutionality of two mental health statutes, forcing the Commonwealth to evaluate its involuntary commitment statutes for the first time.⁴⁵

legitimate governmental purpose.”). Although the *Cleburne* Court claimed to apply a rational basis standard, it really applied a heightened scrutiny test. *See infra* notes 157 and accompanying text.

42. This indifference was not isolated to the Commonwealth of Kentucky. There are still some states that have not developed laws for the involuntary commitment of people with mental retardation. These states treat all commitments of people with mental retardation as voluntary, without considering the individual's functioning ability. *See, e.g.,* *Zinermon v. Burch*, 494 U.S. 113 (1990) (finding a violation of due process rights where a person with mental illness deemed to be incompetent was voluntarily admitted to a Florida mental hospital). Many states with statutes providing for involuntary commitment based on mental retardation continue to commit most individuals on a voluntary basis. *See* Brief of The American Association on Mental Retardation, et al. as *Amici Curiae* in Support of Respondents at 4, *Heller* (1993) (No. 92-351) [hereinafter AAMR].

The recent controversy surrounding involuntary commitment relates in part to the nationwide effort to de-institutionalize care of the disabled. De-institutionalization began during the 1960s, accompanied by exposure of the widespread abuse of people with mental retardation within state-run institutions. *See* FOCUS, *supra* note 5, at 19. As more citizens with mental retardation are accommodated in community-based care facilities, those citizens remaining in, or being committed to, state institutions represent the most severely disabled segment of the population. AAMR, *supra*, at 5 (discussing the context of the case). It is disturbing that the number of adults with mental retardation cared for in state institutions has declined, but the number of adults with mental retardation cared for in Kentucky's state institutions has increased. FOCUS, *supra* note 5, at 19; *see also* AAMR, *supra*, at 5; R. C. Scheerenberger, *Public Residential Facilities: Status and Trends*, 19 MENTAL RETARDATION 59 (1981).

43. *See* Brief for Petitioner at 31-32, *Heller* (1993) (No. 92-351) [hereinafter Petitioner's Brief] (“The voluntary procedure was initiated by an application for admission filed by the parent of a minor or the legal guardian of an adult through one of the state's Community Mental Health Centers. The application required the Director of the Community Mental Health Center to certify that the needs of the mentally retarded person could not be met by services available in the community.”); *see also* Brief for Respondents at 8-9, *Heller* (1993) (No. 92-351) [hereinafter Respondents' Brief] (describing the informal method of commitment actually used in Kentucky).

44. 391 F. Supp. 413 (W.D. Ky. 1975).

45. *Id.* at 414. As quoted in *Kendall*, KY. REV. STAT. § 202.060 provided that:

If the petition alleges that the defendant probably will cause injury to himself or others and that he does not have the capacity or insight to authorize

Specifically, these claims compelled Kentucky to establish certain due process requirements for the involuntary commitment of individuals with mental illness.⁴⁶

his own hospitalization a warrant may be issued for his arrest. Such person if arrested on such warrant shall be conveyed immediately to any hospital, medical facility or institution approved by the commissioner and shall be there examined by one or more staff physicians or psychiatrists of the hospital or facility. If an authorized staff physician concurs that the person probably will cause injury to himself or others if not immediately restrained and thus should be hospitalized, such person may be retained in the hospital pending a hearing and judgment from the appropriate court as prescribed in KRS Chapters 202, 203 or 210, or may be transported to an appropriate state hospital or institution, affiliated with the examining facility, for such retention.

Id. at 415 (quoting KY. REV. STAT. ANN. § 202.060).

The *Kendall* court held that the foregoing statute was constitutional because it provided for involuntary commitment only when individuals were found to pose a threat to themselves or others. *Id.* at 420.

As quoted in *Kendall*, KY. REV. STAT. § 202.100 stated:

When a petition for a sixty-day observation order has been properly filed with the clerk of the court, the court shall appoint two physicians to examine the proposed patient and to certify to the court their findings as to the mental condition of the individual and his need for observation or treatment. Where the individual named is already a patient in a hospital by virtue of a provision of KRS Chapters 202, 203 or 210, the court may waive the appointment of two examining physicians, and accept as evidence of the patient's mental condition the certification of two authorized staff physicians of the hospital in which the patient is held. If the examining physicians certify to the effect that the individual requires further observation or treatment, the court may order such person to a state mental hospital or other medical facility approved by the commissioner, or if facilities are available and if such person is eligible for care or treatment therein, to the United States veterans administration or other agency of the United States government for a period of care and medical examination, observation and treatment of the mental condition of such person for a period of time not to exceed sixty days.

Id. at 154 (quoting KY. REV. STAT. ANN. § 202.100).

The *Kendall* court found this statute unconstitutional because it did not specify how physicians and courts were to determine whether or not an individual was in need of involuntary commitment. *Id.* at 418-19.

46. The *Kendall* court dictated the following due process requirements:

1. A right to a preliminary probable cause hearing, although this need not be overly formal and may properly include the receiving of doctors' reports as hearsay.
2. The right to a notice before the final hearing, setting out in some detail the factual reasons upon which the state intends to rely in seeking the 60 day commitment.
3. The requirement that the final hearing be held within 21 days of the date of confinement. It is noted that the statute has no time limit in this respect.
4. The right of the patient to be present at both hearings, unless the right is intelligently waived by himself and counsel, or unless the Court makes a specific finding after the patient has been brought to the place of hearing that he should be removed from the hearing because his conduct is so disruptive

During the 1970s, the doctrine of *parens patriae*,⁴⁷ which Kentucky and other states used to justify involuntary commitment, lost credibility.⁴⁸ Until the *Kendall* decision, the Commonwealth of Kentucky believed that adults with mental illness lacked the capacity to choose to commit themselves and, therefore, justified committing these individuals under *parens patriae*.⁴⁹ *Kendall* ultimately compelled Kentucky to require a finding that a person was dangerous to himself or to society before the state could involuntarily commit an adult alleged to have a mental illness.⁵⁰ Unfortunately, Kentucky mental institutions effectively avoided the due process requirements established in *Kendall* by characterizing almost all commitments of adults with mental disabilities as voluntary.⁵¹ Not until Kentucky faced a series of claims brought by Plaintiff Doe⁵² did Kentucky courts begin to seriously scrutinize their approach toward involuntary commitment again.

that the proceeding cannot continue in any reasonable manner.

Kendall, 391 F. Supp. at 419; *see also* KY. REV. STAT. ANN. §§ 202A.026, 202A.051 (Michie/Bobbs-Merrill 1991).

47. *Parens patriae* literally means:

“parent of the country”, [and] refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability, such as juveniles or the insane

Parens Patriae originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants

The use of this power to deprive a person of freedom has been limited by recent laws and decisions; *e.g.* *Kent v. United States*, 383 U.S. 541, 554-555 (1966).

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (citation omitted).

48. *Kendall*, 391 F. Supp. at 417; *see also* *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 123 (W. Va. 1974).

49. *Kendall*, 391 F. Supp. at 417.

50. *Id.*; *see also* KY. REV. STAT. ANN. §§ 202A.026, 202A.051 (Michie/Bobbs-Merrill 1991).

51. Respondents' Brief, *supra* note 43, at 8.

52. Doe is the named plaintiff representing a class of people who have been admitted, or who face admission, to Kentucky's institutions for people with mental retardation. *See infra* part III.A.

Plaintiff Doe was placed in the custody of the Kentucky Cabinet for Human Resources in 1971. *Doe v. Austin*, 848 F.2d 1386, 1389 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). The Commonwealth institutionalized him in the Outwood State Hospital, located in Dawson Springs, Kentucky. *Id.* Based on the findings from a judicial hearing, Doe was declared incompetent and his mother was appointed his legal guardian in 1977. *Id.* During the entire seventeen years of Doe's confinement, there has never been an evaluation of the appropriateness of his confinement. *Id.*

III. *HELLER V. DOE*A. *Doe's Fight for Due Process and Equal Protection Rights*

Initiating over ten years of litigation, Plaintiff Doe brought his first claim in 1982.⁵³ This claim challenged the adequacy of both voluntary and involuntary commitment procedures for individuals with mental retardation in Kentucky.⁵⁴ In response to Doe's action, the United States District Court for the Western District of Kentucky invalidated Kentucky's involuntary commitment statutes on both due process and equal protection grounds.⁵⁵ The court held that due process guarantees require Kentucky to provide a judicial hearing for each individual with mental retardation facing involuntary commitment.⁵⁶ The court also held that Kentucky's involuntary commitment statutes violated equal protection guarantees because they required such hearings prior to commitment for individuals with mental illness and not for individuals with mental retardation.⁵⁷

On appeal, the Secretary for the Cabinet for Human Resources, Harry J. Cowherd, M.D., contended that current administrative pro-

53. *Doe v. Austin*, 668 F. Supp. 597, 598 (W.D. Ky. 1986), *aff'd in part, rev'd in part*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988).

54. *Doe v. Cowherd*, 770 F. Supp. 354, 355 (W.D. Ky. 1991) (referring to *Austin*, 848 F.2d at 1392). At the time of the case, Harry J. Cowherd, M.D. was the Secretary for the Cabinet for Human Resources. *Id.* at 354.

55. *Austin*, 668 F. Supp. at 600-01.

56. *Id.* at 600. The court recognized that commitment to an institution for people with mental retardation might be the best alternative for some adults with mental retardation. *Id.* However, the court also acknowledged that commitment to an institution is a curtailment of personal liberty which merits due process protections. *Id.* Thus, the court held that prior to involuntarily committing adults with mental retardation, the Commonwealth must conduct a judicial hearing in order to determine that commitment to such an institution was the best option for the individual. *Id.* The court recognized that adults with mental retardation maintained rights equivalent to adults without mental retardation rather than those rights accorded to minors. *Id.*

57. *Id.* at 600-01. It is important to note that most commitments prior to 1986 were treated as voluntary. The statutory provisions for equal protection and due process were ineffective in light of the realities of commitment. *Austin*, 848 F.2d at 1389 ("[D]uring 1982, 1983, 1984, and 1985, only one mentally retarded person was admitted pursuant to the statutory procedures for involuntary commitment.").

In 1986, amendments to the Kentucky statutes eliminated the provision of judicial hearings prior to the involuntary commitment of adults with mental retardation. *Id.* at 1390. Under the revised statute, most commitments of people with mental retardation were to be treated as voluntary under the revised Kentucky statute. *Id.* The *Austin* court concluded that it would violate due process if Kentucky were allowed to commit people with mental retardation, who have not yet attained the age of eighteen, without a judicial hearing. *Austin*, 668 F. Supp. at 599-600. Finally, the court held that while the two populations affected by these statutes were different, they had equivalent rights to be protected from improper commitment. *Id.* at 601.

cedures satisfied constitutional requirements.⁵⁸ The Sixth Circuit, however, upheld the district court's ruling that the denial of judicial hearings for Kentucky's citizens with mental retardation, when hearings were provided for individuals with mental illness,⁵⁹ deprived individuals with mental retardation of both due process⁶⁰ and equal protection.⁶¹ The Sixth Circuit tempered its holding by accepting that the hearings did not have to be conducted by legally trained judicial or administrative officers.⁶²

Following this decision and the Supreme Court's denial of the Secretary's petition for a writ of certiorari,⁶³ the Secretary began to negotiate with Doe's attorneys in an attempt to bring the commitment proceedings into compliance with the Constitution.⁶⁴ Before a plan could be implemented, however, the Kentucky General Assembly enacted Kentucky House Bill 511 ("HB 511") which reworked the statutory provisions for commitment of individuals with mental

58. *Austin*, 848 F.2d at 1393-94.

59. Prior to 1986, Kentucky state law provided that "[a]ll rights guaranteed by K.R.S. Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." *Austin*, 668 F. Supp. at 598 (quoting KY. REV. STAT. ANN. § 202B.050 (Baldwin 1982)). These rights included the procedural due process right to a preliminary hearing in a district court to determine whether to involuntarily commit a mentally retarded individual. *Id.*

As amended in 1986, KY. REV. STAT. ANN. § 202B.050 provided that "[a]ll rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons." *Id.* (quoting KY. REV. STAT. ANN. § 202B.050 (Baldwin 1986)). According to the district court, "[t]he 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment." *Id.*

60. The Sixth Circuit explained: "[T]he Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment." *Austin*, 848 F.2d at 1394. The *Austin* court cited *J.R. v. Parham*, 442 U.S. 584 (1979), as controlling the issue of due process for minor children with mental retardation. *Austin*, 848 F.2d at 1392. The Court in *Parham* denied that a minor with mental retardation had a due process right to a judicial proceeding so long as there was an inquiry made by a neutral fact finder as to whether the statutory requirements for admission were met. *Parham*, 442 U.S. at 618-19.

61. *Austin*, 848 F.2d at 1394 ("[W]e agree with the district court that equal protection requires the Commonwealth to provide a judicial hearing to appellees, either upon admission, or, if now committed, when they reach adulthood.").

62. *Id.* ("[D]ue process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer.") (citing *Parham*, 442 U.S. at 607; *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation hearing); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (hearing prior to termination of Aid to Families with Dependent Children ("AFDC") benefits)).

63. 488 U.S. 967 (1988).

64. *Doe v. Cowherd*, 770 F. Supp. 354, 356 (W.D. Ky. 1991).

retardation.⁶⁵ Dissatisfied with the new statutory provisions, Doe brought a claim contending that these provisions also provided inadequate procedural protections against involuntary commitment.⁶⁶

One of these new provisions required Kentucky to meet a clear and convincing standard of proof to involuntarily commit an individual with mental retardation.⁶⁷ The Supreme Court had previously concluded in *Addington* that either clear and convincing or beyond a reasonable doubt were acceptable standards.⁶⁸ Nevertheless, Doe

65. According to the district court, "Under HB 511, codified as the 1990 amendments to K.R.S. 202B, the previous incorporation by reference in K.R.S. 202B.050 to the rights of mentally ill persons established in K.R.S. 202A was totally eliminated." *Id.*; see *supra* note 59.

Section 4(2) of HB 511 expressly allowed, without a judicial hearing, voluntary admission of mildly or moderately mentally retarded adults who possess "the mental capacity to give informed consent for admission." *Cowherd*, 770 F. Supp. at 356 (quoting HB 511 § 4(2)). Nevertheless, Section 4(3) of HB 511 failed to provide for voluntarily admitted individuals with mental retardation to be released at their own request. *Id.* at 357 (quoting HB 511 § 4(3)).

66. *Cowherd*, 770 F. Supp. at 359. Doe claimed that the statute's application of a clear and convincing standard of proof for involuntary commitments of people with mental retardation violated equal protection because a higher burden of proof was utilized for the involuntary commitment of people with mental illness. *Id.* at 357-58. Finally, Doe contended that HB 511 obstructed access to legal representation for people with mental retardation confronted with involuntary commitment proceedings, while legal representation for people with mental illness was automatically provided. *Id.* at 358-59. Doe contended that the discrepancies between the statutory provisions for involuntary commitment of people with mental illness and people with mental retardation amounted to an equal protection violation. *Id.* The compliance agreement reached prior to enactment of HB 511 provided for equivalent rights and procedures for commitment of people with mental illness and mental retardation, yet the statutes enacted in Kentucky failed to apply the protections to people with mental retardation. See Respondents' Brief, *supra* note 43, at 7.

Two issues not addressed by the later Supreme Court opinion include Doe's contention that there should be a judicial hearing even for citizens with mild retardation who elect to voluntarily commit themselves, and Doe's observation that there were no provisions for voluntarily committed people with mental retardation to elect to be released from an institution. *Cowherd*, 770 F. Supp. at 357. The district court denied that adults with mild or moderate retardation were incapable of voluntarily committing themselves without judicial proceedings to oversee the process. *Id.* In addition, that court agreed that HB 511 needed to be modified to include express provisions for the release of voluntarily committed adults upon their request. *Id.*

67. *Id.* at 357. The statute providing for involuntary commitment of people with mental illness utilizes the beyond a reasonable doubt standard. *Id.*

Compare KY. REV. STAT. ANN. § 202B.160(2) (Michie/Bobbs-Merrill 1991) (stating that "[t]he manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding, except that the standard of proof shall be by *clear and convincing evidence*") with KY. REV. STAT. ANN. § 202A.076(2) (Michie/Bobbs-Merrill 1991) (stating that "[t]he manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding including the burden of proof *beyond a reasonable doubt*." (emphasis added)).

68. *Addington v. Texas*, 441 U.S. 418, 433 (1979). See *supra* notes 34-37 and

argued, and the district court agreed, that equal protection for individuals with either mental illness or mental retardation required equivalent burdens of proof for the involuntary commitment of individuals with either disability.⁶⁹ Thus, the district court of Kentucky held that using a clear and convincing standard for committing individuals with mental retardation, while applying a beyond a reasonable doubt standard in committing individuals with mental illness, violated equal protection guarantees.⁷⁰ In addition, the court held that Kentucky's granting party status to relatives and guardians of individuals with mental retardation, without granting such party status in commitment proceedings involving individuals with mental illness, violated equal protection.⁷¹

The Sixth Circuit upheld the ruling that a lower burden of proof for involuntary commitment of individuals with mental retardation, as opposed to individuals with mental illness, violated equal protection.⁷² In addition, it concluded that proceedings which place individual liberty in jeopardy required the same constitutional protection provided in criminal proceedings, namely a burden of proof beyond a reasonable doubt.⁷³ The Sixth Circuit also upheld the denial of party participation by relatives and guardians of an individual facing involuntary commitment.⁷⁴

accompanying text. Relying on *Addington*, the Secretary contended that the Supreme Court accepted the clear and convincing standard as a legitimate standard of proof for civil commitments. *Cowherd*, 770 F. Supp. at 358 (referring to *Addington v. Texas*, 441 U.S. 418 (1979)).

69. *Cowherd*, 770 F. Supp. at 357.

70. *Id.*

71. *Id.*

72. *Doe v. Cowherd*, 965 F.2d 109 (6th Cir. 1992). The Sixth Circuit determined that neither it nor the district court had jurisdiction to require the Commonwealth to implement a written provision allowing adults with mental illness, who had voluntarily committed themselves, to request release at will. *Id.* at 111.

73. *Id.* at 113 (citing *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. Ct. App. 1964)).

74. *Id.* The Sixth Circuit determined that allowing party participation by family and guardians of the person facing commitment violated equal protection and due process. *Id.* That court reiterated the reasoning from *Doe v. Austin*, 848 F.2d at 1386 (6th Cir. 1986), and concluded that parents did not have the discretionary power to commit their mentally retarded adult children. *Cowherd*, 965 F.2d at 113. In addition, the Sixth Circuit concluded that the interests of the parent or guardian may be adverse to that of the person confronted with the possibility of commitment. *Id.* According to the court, people with mental retardation should not have to contend against several adverse parties in order to avoid involuntary commitment, when people with mental illness only contend with a single opponent in commitment proceedings. *Id.*

The Kentucky statute at issue provides that "[g]uardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may cross-examine

Kentucky then petitioned for certiorari to the Supreme Court of the United States.⁷⁵ The Supreme Court granted the petition in order to address two questions: (1) the legitimacy of the disparate burdens of proof employed in commitment proceedings; and (2) the legitimacy of granting party status to relatives and guardians of adults with mental retardation during the commitment process.⁷⁶

B. *The Supreme Court's Majority Opinion*

In *Heller v. Doe*,⁷⁷ the United States Supreme Court reversed the decision of the Sixth Circuit and upheld Kentucky's involuntary commitment statutes which require a lower burden of proof to commit individuals with mental retardation than to commit individuals with mental illness.⁷⁸ Furthermore, the Court held Kentucky's practice of granting party status only to family members and legal guardians of individuals with mental retardation during the commitment process constitutional.⁷⁹

Justice Kennedy began the Court's opinion⁸⁰ by finding that the rational basis test applies when evaluating the constitutionality of the Kentucky involuntary commitment statutes.⁸¹ The Court declined to

witnesses if desired; and shall have standing to appeal any adverse decision." KY. REV. STAT. ANN. § 202B.160(3) (Michie/Bobbs-Merrill 1991). The Kentucky statute which governs the involuntary commitment of individuals with mental illness has no such provision. See KY. REV. STAT. ANN. § 202A.076 (Michie/Bobbs-Merrill 1991).

75. *Heller v. Doe*, 113 S. Ct. 373 (1992).

76. *Heller v. Doe*, 113 S. Ct. 2637, 2640 (1993). Based on the different standards of proof required for the involuntary commitment of individuals with mental retardation as compared to the involuntary commitment of people with mental illness, coupled with the right of family and guardians to participate in the commitment process, Doe asserted that the statutes violated the Equal Protection Clause and the Due Process Clause of the Constitution. *Id.*

77. *Id.*

78. *Id.* at 2643.

79. *Id.* at 2649.

80. Justice Kennedy was joined in his opinion by Justices Rehnquist, White, Scalia, and Thomas. *Id.* at 2639. Justice O'Connor concurred in part and dissented in part. *Id.* at 2650 (O'Connor, J., concurring in part). Justice O'Connor agreed with the majority that "allowing guardians and immediate family members to participate as parties in commitment proceedings does not violate procedural due process." *Id.* at 2650 (O'Connor, J., concurring in part). Justice O'Connor also agreed with the majority that the Court should not reach the question of whether "heightened equal protection scrutiny should be applied to the Kentucky scheme." *Id.* (O'Connor, J., concurring in part).

81. *Id.* at 2642. The Supreme Court applies at least three standards of review when determining whether a statute will withstand an equal protection challenge. NOWAK & ROTUNDA, *supra* note 32, § 14.3, at 574. These tests, often referred to as standards of scrutiny, are the rational relationship test, the intermediate scrutiny test, and the strict scrutiny test. *Id.* at 574-76. Under the rational relationship test, the question is "whether it is conceivable that the classification bears a rational relationship to an end

evaluate the statutes under heightened scrutiny, as Doe requested, because of procedural flaws in his presentation of the request.⁸² The Court relied on precedent to substantiate its use of a rational basis test.⁸³

In applying the rational basis standard, the Court found that Kentucky had provided legitimate reasons for implementing a lower burden of proof for involuntary commitment based on mental retardation than that required for involuntary commitment based on mental illness.⁸⁴ The Court explained that, in evaluating equal protection claims under rational basis review, courts do not question the intelligence with which the statutes are designed.⁸⁵ The Court also emphasized that disparate treatment is accepted as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification."⁸⁶

of government which is not prohibited by the Constitution." *Id.* at 574-75. A statute will pass the intermediate scrutiny test if the Court finds that the "classification has a 'substantial relationship' to an 'important' government interest." *Id.* at 576. Finally, under the strict scrutiny test, the court "will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end." *Id.* at 575.

82. Doe requested that the Kentucky statutes receive heightened scrutiny when brought before the Supreme Court. *Heller*, 113 S. Ct. at 2642. While the Supreme Court acknowledged that a heightened scrutiny analysis may have been appropriate, the tardiness of the request justified its denial. *Id.* Prior proceedings implemented a rational basis analysis and the majority accepted rational basis as the correct standard of analysis. *Id.*

83. *Id.* at 2643 ("We have applied rational basis review in previous cases involving the mentally retarded and the mentally ill."). See also Reply Brief for Petitioner at 3-4, *Heller* (1993) (No. 92-351) (urging the application of *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which held that the proper level of scrutiny of state legislation which treats people with mental retardation differently than other classes of people is not heightened scrutiny). In *Cleburne*, the Court stated: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." 473 U.S. at 446; see also *Schweiker v. Wilson*, 450 U.S. 221 (1981). In *Schweiker*, the appellees asserted that the federal benefits under review should be subjected to heightened scrutiny because the statute treated people with mental illness differently than other benefits recipients. 450 U.S. at 230. The Court found that they had "no occasion to reach this issue because . . . this statute does not classify directly on the basis of mental health." *Id.* at 231. The Court determined that a rational basis analysis would be appropriate. *Id.* at 234.

84. *Heller*, 113 S. Ct. at 2643.

85. *Id.* Evaluation under a rational basis standard is central to the Supreme Court's willingness to uphold the contested commitment statutes. *Id.* at 2642-50. Had the Supreme Court evaluated the statutes under a higher level of scrutiny, the probability of the statutes meeting minimum due process and equal protection requirements would have greatly decreased. See *supra* note 81 and accompanying text.

86. *Heller*, 113 S. Ct. at 2642 (citing *FCC v. Beach Communications, Inc.*, 113 S.

To satisfy the Court's rational basis test, Kentucky offered various defenses for its disparate treatment of individuals with mental retardation.⁸⁷ First, it explained that mental retardation is more easily diagnosed than mental illness.⁸⁸ According to Kentucky, mental retardation is a static, permanent condition,⁸⁹ while mental illness may manifest itself suddenly, without forewarning from past behavior.⁹⁰ Kentucky argued, and the Supreme Court agreed, that since mental illness is harder to diagnose than mental retardation, the need to avoid erroneous commitment justifies a higher burden for individuals with mental illness.⁹¹ In addition, the Court also accepted Kentucky's argument that the relative ease of determining that a person with mental retardation poses a danger to himself or others justifies disparate treatment.⁹² For these reasons, the Court concluded "it would have been plausible for Kentucky to conclude that the dangerousness determination was more accurate as to the mentally retarded than the mentally ill."⁹³

The Court also accepted the contention that individuals with mental retardation receive less invasive treatment than individuals with mental illness.⁹⁴ Thus, according to the Court, the heightened burden of

Ct. 2096, 2100-01 (1993)). See also *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (determining that a rational basis existed for distinguishing between child support payments and government funded Title II payments in evaluating eligibility for AFDC benefits); *Bowen v. Gilliard*, 483 U.S. 587, 600-03 (1987) (determining that a rational basis existed for requiring that families wishing to receive AFDC benefits include within the family unit children for whom child support payments are made); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-79 (1980) (holding that under rational basis analysis it is constitutionally permissible for Congress to draw lines between groups of employees for the purpose of phasing out the overlap of two different benefits programs); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970) (holding that under rational basis analysis the Maryland Department of Public Welfare has the authority to place a limit on the amount of a grant under AFDC regardless of the size of the family or the family's need).

87. *Heller*, 113 S. Ct. at 2643-44.

88. *Id.* at 2643.

89. *Id.* at 2644. Mental retardation is a developmental disability that manifests prior to adulthood. Thus, by adulthood, the disability has been well documented. DSM-III-R, *supra* note 9. In contrast, mental illness can have a sudden onset and may not manifest itself until adulthood. *Heller*, 113 S. Ct. at 2644. The Supreme Court has recognized in previous cases that diagnosis of mental illness is very difficult. See, e.g., *Addington v. Texas*, 441 U.S. 418, 430 (1979) (finding that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations"); see also BRAKEL, *supra* note 9, at 16-17.

90. *Heller*, 113 S. Ct. at 2644.

91. *Id.* See also GEOFFREY KEPPEL, DESIGN AND ANALYSIS 65-68 (1973).

92. *Heller*, 113 S. Ct. at 2644-45.

93. *Id.* at 2645.

94. *Id.* The Court explained: "The mentally ill are subjected to medical and

proof for committing individuals with mental illness is justified by the greater extent of potential intrusion through treatment.⁹⁵ Interestingly, the Court accepted that some individuals with mental retardation suffer intrusive treatments during commitment. Nevertheless, the Court concluded that Kentucky could plausibly believe that most individuals with mental retardation receive less intrusive treatment during commitment than do individuals with mental illness.⁹⁶ Thus, the Court concluded the assumption that some individuals with mental illness receive invasive treatments justifies making it more difficult to involuntarily commit individuals with mental illness.⁹⁷

Based on this reasoning, the Court held that the Kentucky involuntary commitment statutes met the traditional rational basis test.⁹⁸ Because Kentucky convinced the Court that the statutes' classifications had some relationship to its legitimate objective,⁹⁹ the Court found the disparate burdens of proof required by Kentucky's involuntary commitment statutes constitutional.¹⁰⁰

Moving to the second issue for review, the Court rejected the challenge that the participation of family members and guardians in the involuntary commitment process of individuals with mental retardation violates due process.¹⁰¹ The Court hypothesized that Kentucky allowed for the participation of family and guardians because they have an intimate knowledge of how a relative or ward with mental retardation functions and behaves.¹⁰² The Court also reasoned that family

psychiatric treatment which may involve intrusive inquiries into the patient's innermost thoughts and use of psychotropic drugs By contrast, the mentally retarded in general are not subjected to these medical treatments." *Id.* (citations omitted).

95. *Id.*

96. *Id.* at 2646.

97. *See id.* The Court expounded on the history of differential treatment of people with mental retardation and mental illness in Anglo-American law. *Id.* at 2646 (citing I F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 481 (2d ed. 1909)). While the historical differences in treatment did not provide immunity from criticism, the historical precedent did help substantiate a claim that there are rational reasons for treating these two populations differently. *Id.* The Court supported this contention by observing that most of the states have separate involuntary commitment laws for the two groups, and separate agencies for meeting the needs of these populations. *Id.* at 2646-47.

98. *Id.* at 2643.

99. *See id.*

100. *Id.* ("Kentucky has proffered more than adequate justifications for the differences in treatment between the mentally retarded and the mentally ill."). *Id.*

101. *Id.* at 2647.

102. The Court based its hypothesis on information about mental retardation obtained from the DSM-III-R, *supra* note 9. *Heller*, 113 S. Ct. at 2643.

members could easily assess the individual's needs based on years of experience and contact with the individual.¹⁰³

In contrast, mental illness may not manifest itself as early as mental retardation.¹⁰⁴ Therefore, family members may not have had sufficient exposure to an individual's mental illness to provide information useful in the commitment process. Furthermore, the Court noted, sudden or late onset, coupled with the unpredictable nature of the illness, renders diagnosis and treatment planning more difficult for individuals with mental illness than for individuals with mental retardation.¹⁰⁵

Based upon these differences, the Court concluded that family and guardian participation in the involuntary commitment process could only be justified for individuals with mental retardation.¹⁰⁶ The Court noted that family and guardian participation decreases the risk of an erroneous decision to deprive individuals with mental retardation of their freedom.¹⁰⁷ While the Court admitted that Kentucky could have developed other means by which to obtain the insights of family members, it refused to question the means chosen by the state legislature to address the needs of its constituents.¹⁰⁸ Thus, because due process seeks to prevent erroneous deprivation of liberty,¹⁰⁹ the Court held that Kentucky may continue to allow family and guardians to participate in the commitment process, because their participation may increase the accuracy of Kentucky's decisions.

103. *Heller*, 113 S. Ct. at 2647. The stability of the impairments of people with mental retardation are easily diagnosed compared to the severe difficulties of diagnosing mental illness, the difficulties of which were previously documented by the court in *Addington v. Texas*, 441 U.S. 418, 430 (1979).

104. *Id.*

105. *See id.* (citing *Addington*, 441 U.S. at 430).

106. *Id.*

107. *Id.* at 2649.

108. *Id.* at 2648; *cf.* *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) ("As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.").

109. *Heller*, 113 S. Ct. at 2649 (citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions.") and *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) (stressing that due process functions to prevent unfair and mistaken deprivations)).

C. Justice Souter's Dissenting Opinion

Writing in dissent, Justice Souter proposed that there was no need to resolve the issue of heightened scrutiny because the Kentucky involuntary commitment statutes could not even meet the rational basis test.¹¹⁰ Thus, Justice Souter argued that the statutes were unconstitutional under any level of scrutiny.¹¹¹ Furthermore, he would have applied the slightly modified rational basis analysis set out in *Cleburne*¹¹² to invalidate Kentucky's involuntary commitment statutes.¹¹³

110. *Heller*, 113 S. Ct. at 2651 (Souter, J., dissenting). Justice Souter wrote a dissenting opinion, in which Justices Blackmun and Stevens joined. *Id.* (Souter, J., dissenting). Justice O'Connor agreed with Justice Souter in part, stating that "Kentucky's differential standard of proof for committing the mentally ill and the mentally retarded is irrational." *Id.* (O'Connor, J., dissenting in part). Nevertheless, she agreed with the Court that family and guardians may participate in the process for patients with mental retardation. *Id.* (O'Connor, J., dissenting in part). See *supra* note 80.

Although Justice Blackmun joined with Justice Souter in his dissent, Justice Blackmun wrote separately to emphasize his conviction that the Court erred in refusing to employ heightened scrutiny to evaluate the Kentucky statutes. *Id.* at 2650 (Blackmun, J., dissenting).

111. *Heller*, 113 S. Ct. at 2651 (Souter, J., dissenting).

112. 473 U.S. at 432. *Cleburne* addressed the constitutionality of a zoning regulation requiring petitioners to obtain a special use permit prior to opening a group home for people with mental retardation. *Id.* at 436-37. The regulation required special use permits prior to the construction of "hospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions." *Id.* at 436. The petitioners in *Cleburne* claimed the statute violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated against people with mental retardation. *Id.* at 437. The district court applied a rational basis analysis to the statute and held it constitutional. *Id.* The Fifth Circuit, however, determined that people with mental retardation constituted a quasi-suspect classification deserving intermediate level scrutiny. *Id.* at 437-38. The Supreme Court reversed this decision, ultimately agreeing with the district court and holding that people with mental retardation were not a quasi-suspect class meriting heightened scrutiny. *Id.* at 442.

The Court recognized that the government had a legitimate interest in providing for people with mental retardation. *Id.* The Court believed that any decision affecting people with mental retardation is a technical matter appropriate for legislators who are guided by professionals, and inappropriate for judicial oversight by an ill-informed judiciary. *Id.* at 442-43. The Court also relied on recent state and federal legislation designed to provide protection against discrimination for people with mental retardation, interpreting this legislation as a sign that heightened scrutiny of state legislation in this area was no longer necessary. *Id.* at 443-45. In addition, the Court interpreted the legislative response as a sign of the political power possessed by people with mental retardation, thus disqualifying them from qualifying for strict scrutiny protection. *Id.*

113. *Heller*, 113 S. Ct. at 2651-52 (Souter, J., dissenting).

Like the Court, Justice Souter acknowledged the inherent differences between mental illness and mental retardation.¹¹⁴ He, however, questioned whether these differences justified the “particular disparate treatment accorded under th[e] Kentucky Statute.”¹¹⁵ Justice Souter concluded that the appropriate issue was to determine whether some unique aspect of mental retardation justified providing less protection against the deprivation of liberty for individuals with mental retardation.¹¹⁶

After reframing the issue, Justice Souter attacked the Court’s interpretation that burdens of proof correlated to difficulties of proof.¹¹⁷ Justice Souter proposed that the burden of proof should actually reflect both the difficulty and importance of avoiding erroneous decisions.¹¹⁸ He then applied his interpretation of the purpose of burdens of proof to the Kentucky statutes, and concluded that disparate burdens of proof were not merited.¹¹⁹ He counterbalanced Kentucky’s interests, provided for by the statute,¹²⁰ with the interests of the individual¹²¹ to determine whether these different interests justified assigning a lower burden of proof to commit individuals with mental retardation.¹²²

114. *Id.* at 2652 (Souter, J., dissenting).

115. *Id.* (Souter, J., dissenting).

116. *Id.* (Souter, J., dissenting).

117. *Id.* at 2653 (Souter, J., dissenting) (stating that the Court concluded that “the demands of minimal rationality are satisfied if burdens of proof rise simply with difficulties of proof”). The Court allowed a lesser burden of proof for involuntary commitment of individuals with mental retardation because diagnosis of mental retardation is less difficult than diagnosis of mental illness. *Id.* at 2643. Additionally, the Court concluded that it is easier to determine the danger posed by individuals with mental retardation than individuals with mental illness. *Id.* at 2644-45. See *supra* notes 84-93 and accompanying text for a complete discussion of the Court’s conclusion.

118. *Heller*, 113 S. Ct. at 2653 (Souter, J., dissenting). Justice Souter contended that “burdens of proof are assigned and risks of error are allocated not to reflect the mere difficulty of avoiding error, but the importance of avoiding it as judged after a thorough consideration of those respective interests of the parties that will be affected by the allocation.” *Id.* (Souter, J., dissenting) (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

119. *Id.* at 2653 (Souter, J., dissenting).

120. According to Justice Souter, with regard to involuntary commitment, the government has an interest in protecting society from citizens whose disability results in a danger to society. *Id.* (Souter, J., dissenting) (citing *Addington*, 441 U.S. at 425). In addition, Justice Souter noted, the government is also responsible for protecting ill or helpless citizens. *Id.* (Souter, J., dissenting).

121. Justice Souter noted that the individual has a counterbalancing interest in liberty and protection from the stigma associated with institutionalization. *Id.* (Souter, J., dissenting) (citing *Addington*, 441 U.S. at 425-26).

122. *Id.* (Souter, J., dissenting).

Justice Souter ultimately argued that there was no correlation which justified assigning different burdens of proof based on which disability led to the commitment proceeding.¹²³ Justice Souter reasoned that involuntary commitment causes an equal loss of freedom for each individual, regardless of whether mental retardation or mental illness leads to commitment.¹²⁴ Justice Souter thus concluded that the equivalent loss of freedom merited the equivalent burden of proof.¹²⁵

In criticizing the Court's conclusion that less invasive treatment for individuals with mental retardation justified a lower burden of proof for involuntary commitment, Justice Souter indicated that the Court failed to propose any plausible explanation for such an assumption.¹²⁶ Justice Souter then contradicted the Court's view that individuals with mental illness receive more invasive treatment¹²⁷ by demonstrating that mind-altering medications are also frequently prescribed for individuals with mental retardation.¹²⁸ Therefore, the Court's analysis of invasive treatment hardly swayed Souter from his position that

123. *Id.* at 2653-54 (Souter, J., dissenting).

124. *Id.* (Souter, J., dissenting). Justice Souter observed:

Both the ill and the retarded may be dangerous, each may require care, and the State's interest is seemingly of equal strength in each category of cases. No one has or would argue that the value of liberty varies somehow depending on whether one is alleged to be ill or retarded, and a mentally retarded person has as much to lose by civil commitment to an institution as a mentally ill counterpart . . .

Id. (Souter, J., dissenting).

125. *Id.* at 2654 (Souter, J., dissenting).

126. *Id.* (Souter, J., dissenting) (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (noting that "under rational basis scrutiny disparate treatment must be justified by 'plausible reasons'")).

127. *Id.* at 2645 (explaining that the treatment of individuals with mental illness is more invasive than that of individuals with mental retardation because the former receives mind altering medication and the latter does not). For further discussion of the Court's analysis, see *supra* notes 94-97 and accompanying text.

128. *Id.* at 2654 (Souter, J., dissenting). Justice Souter noted that "[o]ne recent examination of institutions for the mentally retarded in Kentucky's neighboring State of Missouri, for example, found that 76% of the institutionalized retarded receive some type of psychoactive drug and that fully 54% receive psychotropic drugs." *Id.* (Souter, J., dissenting) (citing J. Intagliata & C. Rinck, *Psychoactive Drug Use in Public and Community Residential Facilities for Mentally Retarded Persons*, 21 *PSYCHOPHARMACOLOGY BULL.* 268, 272-73 (1985); Hill et al., *A National Study of Prescribed Drugs in Institutions and Community Residential Facilities for Mentally Retarded People*, 21 *PSYCHOPHARMACOLOGY BULL.* 279, 283 (1985) (indicating that 38 percent of the residents of institutions for people with mental retardation receive psychotropic drugs); MICHAEL G. AMAN & NIRBHAY N. SINGH, *Pharmacological Intervention*, in *HANDBOOK OF MENTAL RETARDATION* 347, 348 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991) (reporting that surveys generally reveal 30 percent to 50 percent of residents of institutions for people with mental retardation are receiving psychotropic drugs at any given time)).

equivalent commitment standards must be instituted to protect both populations from unjust deprivations of liberty.¹²⁹

Justice Souter also criticized the Court's assumption that the potential deprivation of freedom for an individual with mental illness exceeds the potential deprivation of freedom for an individual with mental retardation.¹³⁰ Justice Souter concluded that this observation is not well-reasoned; he posited that a higher burden of proof, rather than a lower burden, prior to commitment would be the logical result since mental retardation more frequently results in a lifetime of liberty deprivation.¹³¹

Moreover, Justice Souter disagreed with the Court's opinion on granting party status to family members and guardians of individuals with mental retardation during the commitment process.¹³² According to the Court, a mentally ill person's parents may "cease[] to provide care and support" for their child long before illness sets in,¹³³ whereas parents of the mentally retarded are more likely to have insights which would aid in the involuntary commitment process.¹³⁴ Justice Souter pointed out, however, that the same is not true for guardians; they must retain the same connection to a person with mental illness as they would to a person with mental retardation.¹³⁵

Finally, Souter argued that there was no rational justification for imposing the burden of a "second prosecutor" on the person alleged to have mental retardation when individuals alleged to have mental illness have no such burden.¹³⁶ Instead, courts should access the intimate

129. *Id.* at 2656 (Souter, J., dissenting). Justice Souter stated that:

The available literature indicates that psychotropic drugs and invasive therapy are routinely administered to the retarded as well as the mentally ill, and there are no apparent differences of therapeutic regimes that would plausibly explain less rigorous commitment standards for those alleged to be mentally retarded than for those alleged to be mentally ill.

Id. (Souter, J., dissenting).

130. *Id.* at 2656 n.7 (Souter, J., dissenting).

131. *Id.* at 2656 (Souter, J., dissenting).

132. *Id.* at 2656-57 (Souter, J., dissenting).

133. *Id.* at 2647. For further discussion of the Court's analysis, see *supra* notes 104-05 and accompanying text.

134. *Id.* For further discussion of the Court's analysis, see *supra* notes 102-03 and accompanying text.

135. *Id.* at 2656 (Souter, J., dissenting).

136. *Id.* (Souter, J., dissenting). Justice Souter explained:

The Court simply points to no characteristic of mental retardation that could rationally justify imposing this burden of a second prosecutor on those alleged to be mentally retarded where that State has decided not to impose it upon those alleged to be mentally ill. Even if we assumed a generally more regular connection between the relatives and guardians of those alleged to be

knowledge possessed by family members and some guardians only through their participation as witnesses in the commitment process.¹³⁷ Justice Souter ultimately concluded that the Court's allowance of the differential treatment is simply an expression of the outdated stereotype that individuals with mental retardation are "perpetual children," incapable of managing the responsibilities that accompany self-determination and civil rights.¹³⁸

IV. ANALYSIS

Assuming that the Supreme Court has concluded that a traditional rational basis analysis is necessary for statutes which differentiate between individuals with mental illness and individuals with mental retardation, then it must, unfortunately, be conceded that the Court resolved *Heller v. Doe* appropriately. Notwithstanding the Court's conclusions, it may be argued that resolution of these issues is more complicated than the Court's analysis suggests, as indicated by the fact that the constitutionality of the Kentucky involuntary commitment statutes inspired more than ten years of hostile litigation.

Three major areas of disagreement appear in the majority and dissenting opinions which make the resolution of this case extremely difficult. First, the Justices disagreed as to which level of scrutiny to apply.¹³⁹ Second, the Justices disagreed on the construction and application of the rational basis test.¹⁴⁰ Finally, the Justices disagreed about the rationales underlying the burden of proof.¹⁴¹ Unfortunately,

retarded than those said to be mentally ill, it would not explain why the former should be subject to a second prosecutor when the latter are not.

Id. (Souter, J., dissenting).

137. *Id.* at 2656 (Souter, J., dissenting). Justice Souter was equally dissatisfied with the Court's determination that people with mental illness have a greater need for privacy in the commitment process than people with mental retardation. *Id.* (Souter, J., dissenting). Justice Souter's opinion raised the question of why the increased need for privacy existing for individuals with mental illness justified placing an additional burden of defending against a second prosecutor on the shoulders of people with mental retardation. *Id.* at 2657 (Souter, J., dissenting).

138. *Id.* (Souter, J., dissenting).

139. Compare *id.* at 2642-43 (holding that the rational basis test applies) with *id.* at 2651-52 (Souter, J., dissenting) (arguing that the test used in *Cleburne* should be applied). For further analysis of these types of scrutiny, see *supra* notes 81-83 and accompanying text.

140. Justice Souter supports a rational basis test which allows some investigation of the legitimacy of the justifications offered by the state. See, e.g., *id.* at 2654 (Souter, J., dissenting). Yet, the Court applied a traditional rational basis test which was significantly more deferential to the Commonwealth. See, e.g., *id.* at 2643.

141. Compare *id.* at 2644-47 (agreeing with Kentucky that requiring disparate burdens of proof is constitutional) with *id.* at 2652-56 (Souter, J., dissenting)

the Court improperly resolved these issues.¹⁴²

A. *Constitutional Analysis: Three Levels of Scrutiny*

Although critical of the Court's use of traditional rational basis analysis in evaluating Kentucky's involuntary commitment statutes,¹⁴³ Justice Souter's dissent stopped short of fully explaining the Court's errors. When a state statute is challenged on the basis of equal protection, there are three levels of scrutiny available to courts in analyzing the constitutionality of the statute.¹⁴⁴ The lowest level of scrutiny, granting a presumption of constitutionality, tests whether the statute's classification scheme is rationally related to a legitimate state interest.¹⁴⁵ The rational basis analysis, however, does not apply when a statute classifies according to race, alienage, or national origin.¹⁴⁶

Laws which classify based on these categories are subject to a second type of analysis, called strict scrutiny.¹⁴⁷ Under strict scrutiny, legislation is presumed unconstitutional unless it is closely tailored to

(explaining the dissent's conclusion that there is no rational basis for requiring a lesser burden of proof when involuntarily committing a mentally retarded individual).

142. See *infra* part VI.

143. *Heller*, 113 S. Ct. at 2651-52 (Souter, J., dissenting).

144. See, e.g., *Cleburne*, 473 U.S. at 439-42 (describing the three levels of judicial scrutiny which include rational basis review, heightened scrutiny, and strict scrutiny). See also *supra* note 81.

145. See, e.g., *Cleburne*, 473 U.S. at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (recognizing that statutes which utilize classifications will be upheld if they are rationally related to a legitimate governmental objective, unless the classifications are inherently invidious or impinge on fundamental rights); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980) (upholding a statute which allowed certain railroad employees to receive benefits from both the Railroad Retirement System and Social Security, while others were restricted to receiving only Social Security Benefits because the statute's classificatory system was rationally related to a legitimate state interest); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (upholding a statute requiring Foreign Service employees to retire at the age of 60 while Civil Service employees did not have a similar restriction placed on the age of retirement. The Court stated that "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."); *New Orleans v. Dukes*, 427 U.S. 297, 303-05 (1976) (applying rational basis analysis, the Court found that a statute prohibiting New Orleans food vendors from operating in the French Quarter unless they had been in operation for at least eight years was valid). See generally LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-2 to 16-5 (1978).

146. *Cleburne*, 473 U.S. at 440.

147. See *id.* (stating that statutes which classify by race, alienage, or national origin "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

serve a compelling state interest.¹⁴⁸ Strict scrutiny is also applied when a law limits fundamental rights protected by the Constitution.¹⁴⁹

A third level of analysis, labeled heightened scrutiny, applies where the legislative classifications are based on gender or illegitimacy.¹⁵⁰ Heightened scrutiny, a modified version of strict scrutiny,¹⁵¹ requires that the legislative classifications be substantially related to a legitimate state interest.¹⁵² While this level of scrutiny is not as difficult for the state to meet as strict scrutiny, it is much less deferential to the state

148. See *id.* (“These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”). See generally TRIBE, *supra* note 145, § 16-6 (discussing general application of strict scrutiny). The statutes which classify according to race, alienage and national origin “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *Id.*; see also *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (invalidating a law which prohibited unmarried, interracial couples from living together or spending the night in the same room); *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny, the Court evaluated a state welfare law which discriminated against aliens and a state general assistance program which also discriminated against aliens).

149. See *Cleburne*, 473 U.S. at 440 (noting that in addition to statutes which classify by race, alienage, or national origin, those which impinge on personal rights protected by the Constitution will also receive the highest level of scrutiny); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (invalidating a statute limiting franchise in certain school districts because the statute was not necessary to promote a compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (applying strict scrutiny to a statute denying welfare assistance to residents who have not lived in the state for at least one year and implicating the fundamental constitutional right to interstate travel); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding unconstitutional a judgment ordering that the defendant, a habitual criminal, undergo a vasectomy because the judgment affected the fundamental civil right of procreation). See generally TRIBE, *supra* note 145, § 16-7 (discussing inequalities bearing on fundamental rights).

150. See *Cleburne*, 473 U.S. at 440-41 (“Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment.”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (explaining that gender-based classification must support important governmental interests and be substantially related to those interests); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that a gender-based statute which prohibits the sale of alcoholic beverages to males under the age of 18 and to females under the age of 21 did not withstand heightened scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (stating that classifications based on gender are suspect because “the sex characteristic frequently bears no relation to ability to perform or contribute to society”). See generally CONSTITUTIONAL LAW, *supra* note 33, at 424 (discussing alienage, gender, and illegitimacy).

151. See CONSTITUTIONAL LAW, *supra* note 33, at 424.

152. *Cleburne*, 473 U.S. at 441. See also *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (holding that statutes imposing greater restrictions on support suits brought by illegitimate children than those brought by legitimate children will survive heightened scrutiny to the extent they substantially relate to a legitimate state interest).

than the traditional rational basis level of scrutiny.¹⁵³

In 1984, the Supreme Court established that statutory classifications based on mental retardation are subject to rational basis analysis.¹⁵⁴ In *Heller*, several states joined in submitting an amicus brief urging the Court to apply rational basis analysis in evaluating Kentucky's statutes affecting individuals with mental retardation.¹⁵⁵ Furthermore, although the dissenters favored applying heightened scrutiny, they agreed that the procedural posture of *Heller* mandated applying the *Cleburne* rational basis analysis to evaluate Kentucky's involuntary commitment statutes.¹⁵⁶

At first glance, it is unclear how both the majority and the dissent in *Heller* could support use of the rational basis test, and yet disagree so intensely about whether Kentucky's statutes infringe on the fundamental rights of individuals with mental retardation. A close reading of the Supreme Court's decision in *Cleburne*, however, clarifies this apparent contradiction. Although the Court in *Cleburne* claimed to utilize a rational basis test, in actuality, the Court's reasoning resembled a heightened scrutiny analysis.¹⁵⁷

In *Heller*, Justice Souter's dissent understood the *Cleburne* rational basis test to be more stringent than the so-called rational basis test performed by the Court.¹⁵⁸ Thus, in accepting the *Cleburne* test Justice Souter did not contradict his assertion that the Court erred in conducting a traditional rational basis analysis. In supporting a height-

153. NOWAK AND ROTUNDA, *supra* note 32, § 14.3, at 576.

154. The Court in *Cleburne* concluded that mental retardation is not a quasi-suspect classification and thus statutes affecting people with mental retardation are appropriately evaluated under a rational basis analysis. 473 U.S. at 442.

155. Brief for the States of New Jersey, et al. as Amici Curiae in Support of Petitioner, *Heller* (1993) (No. 92-351).

156. Justice Blackmun stated in his brief but pointed dissent, that "laws that discriminate against individuals with mental retardation, or infringe upon fundamental rights, are subject to heightened review." *Heller*, 113 S. Ct. at 2650 (Blackmun, J., dissenting) (citations omitted).

157. *Cleburne*, 473 U.S. at 456 (1985) (Marshall, J., dissenting) ("The Court holds the ordinance invalid on rational basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet *Cleburne's* ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation.").

The *Cleburne* Court actually evaluated every explanation for the allegedly discriminatory zoning ordinance offered by the City Council, and determined that none of the explanations was sufficient to withstand a rational basis evaluation. *Id.* at 448-50. Justice Marshall pointed to the Court's statement that the record did not factually support the rationality of the zoning ordinance and noted that traditional rational basis analysis does not require factual support for policy decisions. *Id.* at 458 (Marshall, J., dissenting).

158. *Heller*, 113 S. Ct. at 2651-52 (Souter, J., dissenting).

ened scrutiny analysis of the Kentucky statutes, the dissenting Justices simply advocated that the Court apply the same rational basis analysis that it utilized in *Cleburne*.¹⁵⁹

Nevertheless, by applying a more traditional rational basis analysis than that used in *Cleburne*, the *Heller* Court implied that it no longer approved of the *Cleburne* Court's analysis. Moreover, until the Court clarifies its interpretation of *Cleburne*'s rational basis analysis, the debate about heightened scrutiny and rational basis analysis for statutes affecting individuals with mental retardation will continue.

B. The Proper Level of Scrutiny Under The ADA

This debate is further complicated by Congress' passage of the ADA.¹⁶⁰ In *Heller*, the Supreme Court avoided the ADA's suggestion of how to scrutinize statutes affecting disabled populations.¹⁶¹ The Respondents' Brief, however, pinpointed congressional approval in the ADA for applying heightened scrutiny to statutes which impinge upon the rights of individuals with disabilities.¹⁶²

159. *Id.* (Souter, J., dissenting) ("*Cleburne* was the most recent instance in which we addressed a classification on the basis of mental disability. . . . While the Court cites *Cleburne* once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day *Cleburne*'s status is uncertain.").

160. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. IV 1992)).

161. *Heller*, 113 S. Ct. at 2642. It is within the Supreme Court's discretion to address a "plain error" which, although not properly raised by counsel, may seriously affect the judicial proceedings. Sup. Ct. R. 24.1.(a). At trial, neither party addressed the level of scrutiny to be applied, and the Supreme Court refused to use its discretion to determine whether the proper level was applied. *Heller*, 113 S. Ct. at 2642 (indicating that the "claim is not properly presented").

162. Respondents' Brief, *supra* note 43, at 28-29. Congress' intent in enacting the ADA was to allow strict scrutiny of classifications that burden people with disabilities. *Id.* (citing 42 U.S.C. § 12101 (Supp. IV 1992)). Respondents' Brief pointed to the congressional findings and purposes provision of the ADA as evidence that people with disabilities are a "discrete and insular minority," thus warranting treatment as a protected class. *Id.*; see also 42 U.S.C. § 12101(a) (Supp. IV 1992) (setting forth the congressional findings). Respondents' Brief pointed to the findings and purposes provisions of the ADA to demonstrate that Congress had identified aspects of disability which allowed for treatment of people with disabilities as a protected class. Respondents' Brief, *supra* note 43, at 28-29.

Recently the United States District Court for the Southern District of Ohio noted that Congress, through the ADA, approved the use of strict scrutiny in evaluating legislation classifying individuals on the basis of disabilities, including mental retardation. *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993). While some object to congressional rejection of the Supreme Court's decision to apply a less stringent evaluation of equal protection and due process claims submitted by people with mental retardation, the district court noted that Congress is far better equipped than the courts to determine whether people with mental retardation require additional protection in the form of strict or heightened scrutiny of equal protection and due process claims. *Id.* at

In the findings and purposes section of the ADA, Congress implied that it favors applying strict scrutiny to state action affecting the disabled.¹⁶³ The findings explain that the disabled populations have historically encountered discrimination and that individuals with disabilities are a discrete and insular minority with little political power.¹⁶⁴ These exact factors are often used in assessing whether or not a category of individuals should be treated as a suspect class qualifying for strict scrutiny.¹⁶⁵ Thus, in accord with the ADA, Doe asserted that individuals with disabilities, including individuals with mental retardation, are a suspect class requiring heightened scrutiny of any statute which appears to discriminate against them.¹⁶⁶

In failing to consider the legislative intent of the ADA, the Supreme Court has shied away from an opportunity to demonstrate its support of Congress' efforts to provide protection for the rights of individuals with disabilities. The Court's hesitancy to clarify how the ADA impacts the judicial evaluation of legislation could lead cynical observers to question whether the Supreme Court approves of this legislation. After *Heller*, optimists can only hope that the Supreme Court will acknowledge Congress' message in the ADA to apply strict scrutiny to statutes affecting Americans with disabilities in the future.

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163. Respondents' Brief, *supra* note 43, at 23-24. The brief explained:

Although this Court has previously held that one sub-group of Americans with disabilities—individuals with mental retardation—do not constitute even a quasi-suspect class Congress, in enacting the ADA, has indicated that all individuals with disabilities, including individuals with mental retardation, should be treated as a suspect class.

Id. at 29 n.15 (citation omitted). *See also Martin*, 840 F. Supp. at 1209 (recognizing Congress' clear intent to have classifications based on disabilities such as mental retardation evaluated under strict scrutiny).

164. 42 U.S.C. § 12101 (Supp. IV 1992).

165. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (delineating the basis upon which a group receives heightened judicial scrutiny for purposes of enforcement of the Fourteenth Amendment). *See also* Respondents' Brief, *supra* note 43, at 29-30 (explaining the connection between the Court's analysis in *United States v. Carolene Prods. Co.* and the purpose and findings section of the ADA).

166. Respondents' Brief, *supra* note 43, at 29-30. "Disability" is defined by the ADA to include mental impairments. 42 U.S.C. § 12102(2)(A) (Supp. IV 1992). "The legislative history of the ADA makes it clear that mental retardation is included among mental impairments Congress intended to be covered by the enactment." (citing H.R. REP. NO. 485 (II), 101st Cong., 2d Sess. 51 (1990), H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 28 (1990), S. REP. NO. 116, 101st Cong., 1st Sess. 21-22 (1989)).

C. *The Burden of Proof*

In addition to applying an improper level of scrutiny, the *Heller* Court approved the Kentucky involuntary commitment statutes based on an incomplete understanding of the purposes served by the burden of proof.¹⁶⁷ The Supreme Court in *Addington* made the critical observation that burdens of proof serve two functions: First, the burden of proof allocates the risk of an erroneous judgment between the opposing parties; and second, the burden of proof correlates directly to the value society places on the individual liberty at risk.¹⁶⁸

In allowing a lesser burden of proof for the loss of liberty suffered by individuals with mental retardation, the Supreme Court sent a clear but disturbing message that the liberty of individuals with mental retardation is less valuable than the liberty of individuals with mental illness. In reaching this conclusion, the Court overstepped its discretionary authority, for even this country's highest court cannot make value judgments about whose freedom is sufficiently important to merit full due process protection, or alternatively, whose freedom is sufficiently unimportant to justify denial of full due process protection. It is distressing that the Supreme Court—the Court that is charged with ensuring that all citizens enjoy the full and equal protection of the Constitution—has placed the liberty interests of one group of citizens below the liberty interests of another group.

D. *Relatives and Guardians as Parties to the Commitment Process*

Finally, neither the Court nor Justice Souter's dissent adequately acknowledged the medical aspects of the commitment decision. In determining whether to commit an individual alleged to have mental illness, medical professionals have been deemed best equipped to determine whether the person can benefit from institutionalization.¹⁶⁹

167. The Court concluded that the burden of proof was directly related to the risk of error faced by the defendant. See *Heller*, 113 S. Ct. at 2644; see also *supra* notes 87-97 and accompanying text. In contrast, Justice Souter's dissent argued that the burden of proof issue was more complex. See *Heller*, 113 S. Ct. at 2653-54 (Souter, J. dissenting) (discussing the rationale for the burden of proof); see also *supra* notes 117-131 and accompanying text.

168. 441 U.S. at 423. The Supreme Court in *Addington* made the interesting observation that debate over the burden of proof may be of purely academic interest because the lay juror may not differentiate between the different burdens to the same extent as a judge does. *Id.* at 423-25.

169. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 609 (1979) ("Here, the questions are essentially medical in character: whether the child is mentally or emotionally ill and whether he can benefit from the treatment that is provided by the state."); *Addington*, 441 U.S. at 429 (maintaining that whether a person has mental illness "turns on the

It is logical to conclude, therefore, that the involuntary commitment of individuals with mental retardation should also rest on a medical decision, and that parental participation in the commitment process is highly inappropriate. This conclusion is bolstered by the fact that courts have traditionally deferred to professional judgment in committing individuals with mental retardation as well as individuals with mental illness.¹⁷⁰

In allowing the family members of an adult with mental retardation to participate as parties in the commitment hearing, the Court inappropriately relied on *Parham v. J.R.*, a case allowing family participation in the commitment of minors.¹⁷¹ Mental retardation is a medical condition and thus should not deprive one of the rights which accompany adulthood.¹⁷² Thus, while parental participation is appropriate in the case of a minor child, such participation essentially trammels the rights of an adult with mental retardation. Admittedly, an adjudicator determining the propriety of commitment would benefit from information available from family members who are familiar with the needs of their relative.¹⁷³ Nevertheless, there are alternative means of obtaining such information without infringing upon an adult's right to due process—the inevitable result of affording party participation to family members and guardians.¹⁷⁴

meaning of the facts which must be interpreted by expert psychiatrists and psychologists”).

170. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (emphasizing that the courts should defer to the judgment of qualified professionals); *Parham*, 442 U.S. at 608 n.16 (limiting judicial review of decisions made by medical professionals).

171. *Heller*, 113 S. Ct. at 2648-49 (citing *Parham*, 442 U.S. at 602-03).

172. AAMR, *supra* note 42, at 10, 21-22. See also *Doe v. Austin*, 668 F. Supp. 597, 599-600 (W.D. Ky. 2986) (establishing that adults with mental retardation have rights equivalent to those of non-disabled adults (citing *Clark v. Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985)); BURTON BLATT, *THE CONQUEST OF MENTAL RETARDATION* 832 (1987).

Case law has also substantiated the claim that every citizen has a fundamental right to physical freedom. See AAMR, *supra* note 42, at 10 (citing *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (evaluating a statute which allowed the detention of certain arrestees for safety reasons, the Court emphasized the importance and fundamental nature of the liberty interest at stake)).

173. See *Heller*, 113 S. Ct. at 2656-57 (Souter, J., dissenting).

174. AAMR, *supra* note 42, at 23-24. The AAMR's Brief points out that familial participation is “more analogous to rules concerning intervention of right in civil litigation. Such intervention is limited to those with separate interests at stake that are not adequately protected by the existing parties.” *Id.* (citing FED. R. CIV. P. 24(a)). Under Federal Rule of Civil Procedure 24(a), which addresses intervention of right, parents cannot be given a stake in a commitment hearing involving their children because the parents themselves are not confronting a loss of liberty.

V. IMPACT

Kentucky is the only state which provides a reasonable doubt standard of proof to involuntarily commit individuals with mental illness and the clear and convincing standard of proof to involuntarily commit individuals with mental retardation.¹⁷⁵ In 1979, fourteen states utilized the reasonable doubt standard in the commitment of mentally ill adults.¹⁷⁶ Ten of those states have since changed their statutory provisions to require the lower clear and convincing standard.¹⁷⁷ Two of the fourteen states now use a mixed standard.¹⁷⁸ Thus, the Supreme Court's ruling that Kentucky could maintain a higher burden of proof to commit individuals with mental illness than to commit individuals with mental retardation will not directly alter the commitment procedures of other states.¹⁷⁹

As a result of the Supreme Court's decision to allow Kentucky to treat individuals with mental retardation and mental illness differently, Kentucky citizens are now left with the seemingly hopeless task of lobbying their state representatives to gain equal protection and due process protection for individuals with mental illness and individuals

175. Brief of the Mental Health Law Project as *Amicus Curiae* in Support of Respondents at 12, *Heller* (1993) (No. 92-351) [hereinafter MHLP].

176. See *Addington v. Texas*, 441 U.S. 418, 431 n.5 (1979).

177. MHLP, *supra* note 175, at 12-13 (citing IDAHO CODE § 66-329(k) (Supp. 1992); KAN. PROB. CODE ANN. §59-2917(f) (Vernon Supp. 1992); MINN. STAT. ANN. § 253B.18 (West Supp. 1992); N.J. STAT. ANN. § 30:4-27.15 (West Supp. 1992); OKLA. STAT. tit. 43A, § 5-401 (Supp. 1992); OR. REV. STAT. § 426.130 (1991); UTAH CODE ANN. § 62A-12-234(10) (Supp. 1992); WIS. STAT. ANN. § 51.20(e) (West 1987); *In re Sanborn*, 545 A.2d 726 (N.H. 1988); *In re Nelson*, 408 A.2d 1233 (D.C. 1979)).

178. See, e.g., HAW. REV. STAT. §§ 334-60.2, 334-60.5(i) (1985 & Supp. 1991). Hawaii requires *proof beyond a reasonable doubt* that a person has mental illness, but only *clear and convincing evidence* of the person's danger to himself or herself and to others and the absence of alternative, less restrictive treatment options. *Id.* Montana requires *proof beyond a reasonable doubt* for physical facts and evidence and *proof to a reasonable medical certainty* for mental disorders, and *proof by clear and convincing evidence* for other matters related to the commitment of people with mental illness. See MHLP, *supra* note 175, at 13 n.9 (citing MONT. CODE ANN. § 53-21-126(2) (1991)). However, in Montana, committing people with mental retardation requires a recommendation by a residential facility screening team coupled with an opportunity for a judicial hearing. *Id.* (citing MONT. CODE ANN. §§ 53-20-121, 53-20-125, 53-20-133 (1991)).

179. MHLP, *supra* note 175, at 13 n.9. In addition, the potential mootness of the issue of involuntary commitment of people with mental retardation is illustrated by New Hampshire, where all the state-run institutions providing care for people with mental retardation have been shut down. See AAMR, *supra* note 42, at 6 (discussing the closing of New Hampshire's state-run institutions and proclaiming that several other states are scheduled to do the same in the next few years). See also *A Wise Plan for the Mentally Ill*, N.Y. TIMES, Nov. 19, 1993, at A14.

with mental retardation.¹⁸⁰ When the Supreme Court legitimizes statutes which perpetuate discrimination against a disabled population, it is the responsibility of the citizens of each state to have their congressional representatives initiate legislation that will protect the disabled against discrimination.

The *Heller* decision certainly has disturbing implications for the future protection of the rights of the disabled. Nevertheless, there is one consideration which renders this opinion slightly less threatening. In light of Congress' enactment of the ADA, courts addressing equal protection and due process claims brought by disabled Americans might successfully avoid *Heller* by following Congress' indication to apply strict scrutiny in evaluating such claims.¹⁸¹ While the Supreme Court may have elected not to comment on the ADA, not all courts will ignore the message sent by Congress that Americans with disabilities have the same constitutionally guaranteed rights as non-disabled Americans, and that these rights must be acknowledged.

VI. CONCLUSION

In *Heller v. Doe*, the Supreme Court effectively denied individuals with mental retardation protection against discriminatory legislation. The Court elected to uphold Kentucky's involuntary commitment statutes which provide for a lower burden of proof for the commitment of individuals with mental retardation than for individuals with mental illness. The Supreme Court also determined that Kentucky may allow relatives and guardians of individuals with mental retardation to participate as parties to the commitment proceedings, while denying the same right to the relatives and guardians of individuals with mental illness. The *Heller* decision resulted in part from the Court's refusal to apply strict scrutiny or even a heightened rational basis analysis that has been used in the recent past. Consequently, individuals with mental retardation living in Kentucky, and their advocates, are once again left to confront the daunting task of lobbying their state representatives to change Kentucky's involuntary commitment statutes.

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180. This task seems hopeless because the lobby supporting the rights of people with mental retardation has already engaged in more than ten years of powerful and unsuccessful action to change the Kentucky involuntary commitment statutes. See *supra* notes 53-66 and accompanying text.

181. MHLP, *supra* note 175, at 14 (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (suggesting that courts tend to turn first to congressional legislation in determining the legality of an act, thus avoiding constitutional questions)).