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City of Cleburne, Texas v. Cleburne Living Center, Inc.: The Mentally Retarded and the Deimse of Intermediate Scrutiny

David J. Berge

COMMENT

CITY OF CLEBURNE, TEXAS V. CLEBURNE LIVING CENTER, INC.: THE MENTALLY RETARDED AND THE DEMISE OF INTERMEDIATE SCRUTINY

INTRODUCTION

With the relatively recent acquisition of increased medical and behavioral knowledge about mental retardation, traditional theories concerning the care and treatment of mentally retarded individuals have been rejected.[1] In their place, new models have been developed emphasizing the need to make available to the mentally retarded the norms and patterns of everyday society.[2] This "normalization" principle has led to the passage of a great wealth of legislation designed to facilitate the development of residential services for the retarded.[3] Such reform efforts culminated in the Congressional enactment of the Developmental Disabilities Assistance and Bill of Rights Act of 1975.[4] In the Bill of Rights section of the Act, Congress sought to delineate a number of rights to be afforded mentally retarded individuals in-

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1. Traditional theories about the care and treatment of retarded individuals were very limited in their scope. For a discussion of how those theories have been replaced by new concepts, see Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976) (discussing changing scientific attitudes concerning the nature of mental retardation and the vast development potential of mentally retarded persons); Burgdorf, *Freedom from Residential Confinement*, in THE LEGAL RIGHTS OF HANDICAPPED PERSONS 599, 661-701 (R. Burgdorf, Jr. ed. 1980) (analysis of Halderman v. Pennhurst State School and Hospital, 446 F. Supp 1295 (E.D. Pa. 1978); Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, in THE MENTALLY RETARDED AND THE LAW 305, 306-08 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976) (background for changing attitudes and policies concerning mentally retarded individuals); Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 59, 105-11 (R. Kugel & W. Wolfensberger eds. 1969) (attempting to define the nature of various models which appear to underlie the design, location, and operation of residential facilities for the mentally retarded).

2. Nirje, *The Normalization Principle and its Human Management Implications*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 181 (R. Kugel & W. Wolfensberger eds. 1969).

3. *See infra* note 182 and accompanying text.

4. 42 U.S.C. § 6000, *et. seq.* as added by Pub. L. No. 94-103, 89 Stat. 496 (1975), and as amended by Pub. L. No. 95-602, 92 Stat. 3004 (1978).

cluding the right to receive appropriate treatment, services, and habilitation.[5] Such rights, however, have met only begrudging recognition by the courts.

In 1981, the United States Supreme Court dealt a virtual death knell to any thoughts of a constitutional guarantee arising on behalf of the mentally retarded.[6] Justice Rehnquist, writing for the Court in *Pennhurst State School and Hospital v. Halderman*,[7] held that no rights had been created by the Developmental Disabilities Assistance and Bill of Rights Act.[8] Indeed, the Court found that the Bill of Rights section of the Act was a mere expression of national policy without any substantive value emanating from the Constitution.[9] Earlier this year, in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*,[10] the Court once again was afforded the opportunity to extend judicial recognition to the needs of the mentally retarded. Specifically, the Court was asked to grant quasi-suspect status to the mentally retarded which would then trigger an intermediate standard of review under equal protection analysis.[11] While striking a city zoning ordinance requiring a special use permit to construct a group home for the retarded, the Court denied quasi-suspect status to the retarded and limited its holding on an "as applied" basis.

In order to critically examine *Cleburne*, this comment will present the factual background of the case followed by a summary of the historical development of the equal protection doctrine and an overview of the legislative and judicial response to the needs of mentally retarded individuals. Finally, *Cleburne's* lack of continuity with the development of equal protection analysis will be analyzed.

FACTUAL CIRCUMSTANCES

In July, 1980, Jan Hannah purchased a house located at 201 Featherston Street in Cleburne, Texas, with the intention of leasing

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5. 42 U.S.C. § 6000 (8)(B), as amended by Pub. L. No. 95-602, § 503, 92 Stat. 3004-3006 (1978).

6. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). The subsequent history of Pennhurst and its significant procedural implications are beyond the scope of this comment. See Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984).

7. 451 U.S. 1 (1981).

8. *Id.* at 16, n.12.

9. *Id.* at 16.

10. ___ U.S. ___, 105 S. Ct. 3249 (1985).

11. *See infra* notes 108-19 and accompanying text.

it to Cleburne Living Centers, Inc. (CLC), a Texas corporation organized for the purpose of establishing and operating group homes for the mentally retarded.[12] The home would house thirteen men and women who are mildly or moderately retarded.[13] These individuals would require twenty-four hour supervision from CLC staff members.[14] In addition to providing some cooking and cleaning services, the staff was to work with the residents to train them in basic home economics, budgeting, and job hunting skills.[15] The residents would have jobs within the community and in a work activity center.[16] Their stay at the home would be completely voluntary.[17] In addition, CLC planned to comply with all applicable state and federal regulations.[18]

The city informed CLC that a special use permit would be required for the operation of the home pursuant to a local zoning ordinance which designated the area surrounding the proposed site as an "R-3" zone, or an "Apartment House District."[19] Accordingly, CLC

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12. *Cleburne*, 105 S. Ct. at 3252.
13. *Id.*
14. *Id.*
15. Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 193 (1984).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 193-94.

Section 8 of Cleburne's zoning ordinance lists the permitted uses in a district zoned R-3:

> 1. Any use permitted in District R-2.
> 2. Apartment houses, or multiple dwellings.
> 3. Boarding and lodging houses.
> 4. Fraternity or sorority houses or dormitories.
> 5. Apartment hotels.
> 6. *Hospitals*, sanitariums, nursing homes or homes for convalescents or aged, *other than* for the insane or *feeble-minded* or alcoholics or drug addicts.
> 7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
> 8. Philanthropic or eleemosynary institutions other than penal institutions.
> 9. Accessory uses customarily incident to any of the above uses
> . . . .

Id. at 193-94 (emphasis added).

In addition, section 16, subdivision 9, of the same ordinance requires special use permits for "*hospitals for the insane or feeble-minded*, or alcoholic [sic] or drug addicts, or penal or correctional institutions" that are operated anywhere in the city.

Id. at 194 (emphasis added).

submitted a permit application.[20] The city designated the home as a "hospital for the feebleminded."[21] Subsequently, the city's Planning and Zoning Commission held a hearing and voted to deny the permit.[22] Later, the city council held a public hearing on the permit application and again voted (3-1) to deny the permit.[23]

After exhausting administrative remedies, CLC filed suit in Federal District Court challenging the zoning ordinance as invalid on its face and as applied on the grounds that it violated the equal protection rights of CLC and its potential residents.[24] The District Court found that had the potential residents not been mentally retarded, the home's use would have been permitted under the ordinance.[25] In addition, the District Court found that the city council's decision to deny the permit was motivated primarily by the fact that the residents of the facility would be mentally retarded.[26] Nonetheless, the court found that the ordinance passed constitutional muster under traditional equal protection analysis.[27] The court reasoned that no fundamental right had been implicated, nor, in the court's view, did the mentally retarded possess sufficient indicia of suspect or quasi-suspect classifications to warrant a heightened standard of review.[28] As a result, the court employed the "mere rationality" standard of judicial review.[29] The court concluded that the ordinance, as written and applied, was rationally related to the city's legitimate interests.[30] Among the city's chief concerns were the scope of the legal responsibility of the CLC and its residents, the safety and fears of the residents within the vicinity of the home, and the number of people to be housed in the facility.[31]

The Court of Appeals for the Fifth Circuit reversed, finding that mental retardation was a quasi-suspect classification requiring that the validity of the ordinance be assessed under an intermediate level

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20. City of Cleburne, Texas v. Cleburne Living Center, Inc., ___ U.S. ___, 105 S. Ct. 3249, 3252 (1985).

21. *Id.* at 3252-53.

22. *Id.* at 3253, n.4.

23. *Id.* at 3253.

24. Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 194 (1984).

25. City of Cleburne, Texas v. Cleburne Living Center, Inc., ___ U.S. ___, 105 S. Ct. 3249, 3253 (1985).

26. *Id.*

27. *Id.*

28. *Id. See infra* notes 102-18 and accompanying text.

29. *Cleburne*, 105 S. Ct. at 3253. *See infra* notes 71-75 and accompanying text.

30. *Cleburne*, 105 S. Ct. at 3253.

31. *Id.*

of review.[32] Employing such a standard, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interest.[33] The court also held that the ordinance was invalid as applied. Rehearing *en banc* was denied, with six dissenting judges urging that the court reconsider its application of intermediate scrutiny where classifications based upon mental retardation were involved.[34] Subsequently, the United States Supreme Court granted certiorari.[35]

Although the Supreme Court unanimously held that the Cleburne ordinance violated the Equal Protection Clause, three opinions were drafted, each illustrating a different approach to the problem. First, the plurality opinion, authored by Justice White, found that neither strict scrutiny nor an intermediate standard of review should be applied.[36] In noting that the Court has traditionally deferred to the legislature in equal protection matters involving social or economic issues, the plurality held that the Court of Appeals had erred in finding mental retardation to be a quasi-suspect classification calling for a more exacting standard of review.[37] Instead, the Court found that the proper standard to be applied was the rational basis test.[38] In the plurality's view, there may be instances where the state may legitimately treat the mentally retarded differently.[39] Nonetheless, the Court found that the Cleburne ordinance, applied in this instance, violated equal protection.[40] In the plurality's view, the city had failed to demonstrate that the proposed group home would threaten the city's legitimate interests in a way that other permitted uses would not.[41] Rather, the ordinance appeared to rest upon irrational prejudice against the retarded.[42] Thus, in the plurality's view, the ordinance failed the rational basis test.[43]

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32. Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 195-96 (1984).
33. *Id.* at 200.
34. Cleburne Living Center, Inc. v. City of Cleburne, Texas, 735 F.2d 832 (1984).
35. 105 S. Ct. 427 (1984).
36. City of Cleburne, Texas v. Cleburne Living Center, Inc., ___ U.S. ___, 105 S. Ct. 3249, 3252-60 (1985).
37. *Id.* at 3254.
38. *Id.*
39. *Id.* at 3259.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

Justice Stevens' concurrence rejected the Court's apparent recognition of a multi-tiered approach to cases involving equal protection challenges.[44] The concurrence advocated a return to traditional equal protection analysis, viewing the various interests poised for judicial consideration along a continuum.[45] Under this approach, the Court should begin by determining whether a rational basis for the particular classification exists.[46] Implicit within this analysis, however, are concerns for the specific class that is being harmed by the legislation as well as consideration of the interest the legislature hopes to serve by the enactment.[47] In applying this analysis to the mentally retarded, Justice Stevens noted that since the retarded have been subjected to a history of unfair treatment, their lack of mental capacity will often require legislative action on their behalf.[48] Turning to a consideration of the zoning ordinance, Justice Stevens found that the special use permit requirement was motivated by irrational fears, which led him to join in the Court's opinion.[49]

Finally, Justice Marshall, concurring in the judgment in part and dissenting in part, advocated a dynamic approach to cases raising equal protection challenges. At the core of Justice Marshall's disagreement with the Court was his concern that while the plurality purported to be applying the rational basis approach in its resolution of the case, it was in fact using a test more indicative of intermediate review.[50] Justice Marshall viewed the Court's failure to adopt a heightened level of review to be unfortunate in at least two respects: first, such failure would serve as a signal to lower courts to subject all economic and commercial classifications to rational basis review; second, the Court's failure to employ heightened review would leave the lower courts without any guidance as to when, if ever, an intermediate level of review would be appropriate.[51] Justice Marshall proposed a fluid approach to equal protection problems, which would include an evaluation of evolving concepts of liberty and the identification of certain classifications with a history of invidious treatment which could be viewed as potentially discriminatory.[52] In such instances, a closer examination under equal protection would be warranted.[53]

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44. *Id.* at 3260-63.
45. *Id.* at 3260-61.
46. *Id.* at 3261.
47. *Id.* at 3261-62.
48. *Id.* at 3262.
49. *Id.* at 3262-63.
50. *Id.* at 3263.
51. *Id.* at 3263-64.
52. *Id.* at 3265-68.
53. *Id.*

Justice Marshall did not directly apply his analysis to the facts in *Cleburne*, however, he did agree with the Court's holding that the ordinance sweeps too broadly but remained disturbed at the Court's "as applied" approach as the preferred course of adjudication.[54] Justice Marshall found that the Court's approach left open the possibility that the mentally retarded will someday be forced to relitigate the issue because no guidance was offered as to when such ordinances may pass the purported rigors of equal protection analysis.[55] However, any critical examination of the Court's application of the rational basis test must await consideration of the development of the equal protection doctrine and the legislative and judicial response to the needs of the mentally retarded.

HISTORICAL PERSPECTIVE

Development of the Equal Protection Clause

The right to equal protection is contained in the fourteenth amendment to the United States Constitution.[56] Although phrased in general terms, the amendment was added to the Constitution in 1868 to remedy specific ills generated by the Civil War.[57] The dichotomy between the general language of the amendment and its specific purpose is the basis for conflict in determining the scope of the equal protection clause.[58] The first Supreme Court decision interpreting the clause predicted that the amendment would be limited to the specific purpose of protecting black Americans.[59] However, by 1886 this narrow interpretation had been rejected by the Court and the clause was deemed to have a broader application.[60] Nonetheless, the Court did not impose demanding obligations upon legislative bodies in order to establish a presumption of constitutional validity under the equal protection clause. The Court merely required that a state rest its legislative classifications upon differences that were reasonably related to the purpose of the statue.[61]

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54. *Id.* at 3272.

55. *Id.* at 3273-75.

56. "No State shall. . .deny to any person within its jurisdiction the equal protection of the laws. . . ." U.S. CONST. amend. XIV, § 2.

57. A. KELLEY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 473-77 (1976).

58. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV L. REV. 1, 8 (1972).

59. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

60. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

61. *See* Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1897). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

In applying the rationality requirement, the Court gave considerable deference to legislative judgments.[62] The Court would not inquire as to the underlying rationale for the legislative decision, provided it was not arbitrary.[63] In the extreme, as one commentator has noted, if any set of facts could reasonably be conceived to provide a rational basis for the classification, the statute would be upheld.[64] Today, the Court continues to employ a highly deferential rational basis standard of review to most social and economic regulations.[65]

While the Court has utilized a number of standards which purportedly conform to the rationality test, typically, the challenged classification must bear a rational relationship to a legitimate state purpose.[66] As long as there is a plausible reason for the classification scheme, however, it is irrelevant whether the reason actually reflects the legislature's intent.[67] Consequently, the rational basis standard creates a presumption of constitutional validity.[68] In fact, the Court's persistent dismissal of equal protection claims under the rational basis test, led many commentators to conclude that the presumption was so strong that judicial scrutiny under such a test was minimal in theory and virtually nonexistent in fact.[69] The Burger Court, however, has invalidated legislation while purportedly employing the rational

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62. See Tussman & tenBroek, *supra* note 61.

63. *See, e.g.*, Allied Stores, Inc. v. Bowers, 358 U.S. 522, 530 (1959) (a classification for tax purposes must rest upon some reasonable consideration of difference or policy); Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 163 (1936) (legislative basis for statute must only be reasonable, not necessarily accurate); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (statute will stand if there is some factual relationship between the means selected by the legislature and its objective).

64. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 996 (1978).

65. *See, e.g.*, United States R.R. Retirement Board v. Fritz, 449 U.S. 166, 175-79 (1980) ("plausible" reason for legislative classification satisfies the rational basis test); New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976) (presumption of constitutional validity unless a classification trammels fundamental rights or is drawn on inherently suspect distinctions); Dandridge v. Williams, 397 U.S. 471, 485-87 (1970) (if a classification has some reasonable basis, it does not offend equal protection simply because the classification is "not made with mathematical nicety or because in practice it results in some inequality").

66. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

67. *See, e.g., Fritz*, 449 U.S. at 179.

68. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

69. Gunther, *supra* note 58, at 21; L. TRIBE, *supra* note 61, at 1082; Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 978 (1975); Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071, 1079-94 (1974).

basis test.[70] It is unclear when the Court will invalidate legislation while employing such a standard. Nonetheless, it is clear that the Court will continue to employ the rational basis test whenever the challenged classification does not involve a fundamental right or suspect classification.

Strict Scrutiny: The Traditional Two-Tiered Model of Equal Protection

Equal protection does not mean that all persons must be treated identically. Rather, the command is that persons similarly situated must be treated equally.[71] If persons are treated differently under the law, there must be at a minimum some rational basis for that difference in treatment.[72]

In analyzing the relationship between the classification and the purpose of the law, the Court must first identify the legislative objectives. Next, the Court must examine the effectiveness of those means in achieving the ends. This involves the concepts of "overinclusiveness" and "underinclusiveness."[73] The Court has been tolerant of underinclusive classifications when applying the rational basis test.[74] The rationale for such forbearance has been the Court's belief that the legislature should be allowed to address a problem one step at a time.[75] Nonetheless, the Court has recognized that some legislative classifications must be subjected to closer analysis in order to preserve equality and liberty.[76]

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70. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 442 (1982) (state employment discrimination statute found to be an irrational means of achieving the purported state objective); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (legislative purpose of withholding food stamps from "hippie communes" was held to be an illigitimate government interest).

71. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Barbier v. Connolly, 113 U.S. 27, 32 (1885).

72. *See, e.g.*, San Antonio School District v. Rodriguez, 411 U.S. 1, 55 (1973); *McGowan*, 366 U.S. at 425-26 (1961).

73. When the classification includes within its scope persons who are not necessary to the accomplishment of the legislative purpose, the classification is overinclusive. When the classification fails to include within its scope persons who are necessary to the accomplishment of the legislative purpose, the classification is underinclusive. Treiman, *Equal Protection and Fundamental Rights: A Judicial Shell Game*, 15 TULSA L.J. 183, 187 (1980); *see generally*, Tussman & tenBroek, *supra* note 61, at 348-53; Developments in the Law—Equal Protection, *Standards of Review*, 82 HARV. L. REV. 1076, 1084-87 (1969).

74. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

75. Treiman, *supra* note 72, at 188.

76. *Id.*

The expansion of such scrutiny to other types of legislative classification was heralded in a footnote in *United States v. Carolene Products*[77] in which Justice Stone observed that certain legislative classifications aimed at particular minorities or impinging upon certain rights might call for a more exacting judicial scrutiny under the fourteenth amendment.[78] In 1944, the Court in *Korematsu v. United States*[79] appeared to give credence to Justice Stone's formulation of stricter review by finding racial classifications to be "suspect," hence requiring "rigid scrutiny."[80] Subsequently, the Warren Court began to develop a framework for active judicial review of certain legislative classifications.

The Warren Court held that statutes which implicated fundamental rights[81] or which classified individuals on the basis of a "suspect" criteria,[82] required a more stringent standard of review, or strict scrutiny.[83] The Court required that the state show that the statutory scheme was necessary to promote a compelling state interest.[84] If the Court found that legislation under review affected fundamental rights, the state must show that it had chosen the "least drastic means" to achieve the state's objective.[85]

While recent opinions by the Court in applying the rational basis test leave room for speculation regarding constitutional validity,[86] the strict scrutiny standard is a more exacting one. Application of strict scrutiny usually results in the invalidation of the challenged statute.[87] Consequently, whether a statute can survive an equal protection challenge depends almost entirely upon which test is used by the

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77. 304 U.S. 144, 152-53 n.4.

78. The note reads as follows: "[P]rejudice against discreet and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes and which may call for a correspondingly more searching judicial inquiry." *Id.*

79. 323 U.S. 214 (1944).

80. *Id.* at 216.

81. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Griffin v. Illinois, 351 U.S. 12, 15 (1956) (criminal appeals).

82. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 375-76 (1971) (alienage); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (national origin); Korematsu v. United States, 323 U.S. 214, 216 (1944) (race).

83. *See, e.g., Shapiro*, 394 U.S. 618.

84. *Id.* at 634.

85. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

86. *See supra* note 70 and accompanying text.

87. Gunther, *supra* note 58, at 8. *But see Korematsu*, 323 U.S. at 219 (presidential order placing Japanese Americans in "replacement camps" upheld).

Court. Theoretically, the triggering of strict scrutiny continues to depend upon whether a suspect class or fundamental right is implicated. As a result, the focus of equal protection analysis has been upon what rights are to be considered "fundamental" and what classes should be considered "suspect" for purposes of invoking strict scrutiny.

1. Fundamental Rights

A statutory scheme which restricts the exercise of a fundamental right violates the equal protection clause unless the classification is necessary to promote a compelling state interest.[88] In *Shapiro v. Thompson*,[89] the Warren Court first recognized the fundamental rights strand of equal protection analysis.[90] The Court emphasized that the fundamental right to travel which it recognized in *Shapiro* had long been acknowledged as a constitutionally protected right.[91] Justice Harlan, in dissent, expressed concern that strict scrutiny would be applied to any interest or right which the Court considered important or fundamental.[92] Specifically, Justice Harlan was concerned by the Court's "cryptic suggestion" that strict scrutiny would be applied merely because the resort to a lesser standard would have the effect of denying food, shelter, and other necessities of life.[93] While the broad language of the Court's subsequent opinions led many commentators to speculate that fundamental rights might encompass many areas,[94] the fundamental rights recognized by the Warren Court in subsequent cases were few.[95] Similarly, the Burger Court has refused to extend the scope of fundamental rights beyond those recognized by the Warren Court.

In *Dandridge v. Williams*,[96] the Burger Court employed the rational basis test in evaluating a state statute which imposed a ceiling on welfare benefits.[97] While the Court acknowledged that it was dealing with basic economic needs of the poor, the Court concluded that

88. *Shapiro*, 394 U.S. at 634.
89. 394 U.S. 618 (1969).
90. L. TRIBE, *supra* note 64, at 1003.
91. *Shapiro*, 394 U.S. at 661-62.
92. *Id.* 394 U.S. at 661-62.
93. *Id.* at 661.
94. Gunther, *supra* note 58, at 9. *See also* Michelman, *The Supreme Court, 1968 Term—Foreward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).
95. *See supra* notes 81-85.
96. 397 U.S. 471 (1970).
97. *Id.* at 486-87.

such classifications were in the area of social and economic policy; hence, there was no basis for the application of strict scrutiny.[98] The implication in *Dandridge* that the Burger Court would narrowly construe the fundamental rights aspect of strict scrutiny was confirmed in *San Antonio School District v. Rodriquez.*[99]

In *Rodriguez*, the Court held that for the purposes of equal protection analysis, fundamental rights are those explicitly or implicitly protected by the Constitution.[100] Although the Burger Court has not provided any guidelines as to when a right might be deemed to be implicitly protected by the Constitution, the Court has not expanded the concept of fundamental rights for equal protection purposes beyond those recognized by the Warren Court.[101] Thus, despite Justice Harlan's earlier concerns, fundamental rights analysis has not resulted in a widescale invalidation of governmental action. Given the Court's reluctance to recognize further fundamental rights, challenges made under the guise of equal protection must either implicate a traditional fundamental right or involve a suspect classification in order to warrant heightened review.

2. Suspect Classifications

The Court first articulated the concept of suspect classifications leading to application of strict scrutiny in *Korematsu v. United States.*[102] As with the fundamental rights strand of equal protection analysis, the Warren Court displayed an initial tendency to expand strict scrutiny under a suspect classification rationale.[103] The Court drew heavily on Justice Stone's language in *Carolene Products*[104] in labeling groups defined on the basis of race,[105] national origin,[106] and alienage[107] as "discrete and insular minorities." The Court, however, did not articulate any clear basis upon which the labeling of a class as a "discrete and insular minority" would be justified.[108] Nonetheless, the Court con-

98. *Id.* at 485.
99. 411 U.S. 1 (1973).
100. *Id.* at 33-34.
101. Note, *Alternative Models of Equal Protection Analysis: Plyler v. Doe*, 24 B.C.L. REV. 1363, 1372 (1983).
102. 323 U.S. 214 (1944).
103. Gunther, *supra* note 58, at 9-10.
104. 304 U.S. at 152.
105. Loving v. Virginia, 388 U.S. 1, 9 (1967); *Korematsu*, 323 U.S. at 216.
106. *Hernandez*, 347 U.S. 475.
107. *Graham*, 403 U.S. at 372.
108. *See* Sugarman v. Dougall, 413 U.S. 634, 656-57 (1973) (Rehnquist, J., dissenting).

tinued to broadly apply strict scrutiny, leading several commentators to believe that the Court would extend the doctrine to a number of social and political issues and, if given the opportunity, grant suspect status to the poor.[109] However, just as the Burger Court has limited the scope of the fundamental rights doctrine, the Court has been reluctant to extend application of the suspect class concept as well.

In *San Antonio School District v. Rodriguez*, in addition to finding no fundamental right to an education,[110] the Court held that a state school financing scheme which was based in part on local property taxes did not discriminate against the plaintiffs, residents of poor tax districts, as a suspect class.[111] Specifically, the Court found that plaintiffs had not been subjected to a history of discriminatory treatment or relegated to a position of political powerlessness so as to warrant application of strict scrutiny.[112] The Court also indicated that several additional factors may be relevant to a finding of "suspectness," including whether the class has been subject to "a history of purposeful unequal treatment based on stereotyped characteristics not truly indicative of ability,"[113] and whether the class suffers from an immutable characteristic. The Court, however, has not been consistent in its application of any set of criterion identifying suspectness.[114]

This failure by the Court is illustrated by the Court's treatment of gender-based classifications. In *Frontiero v. Richardson*,[115] a plurality recognized gender as inherently suspect.[116] Later cases, however, clearly have not subjected gender-based classifications to strict scrutiny.[117] This inconsistency has led at least one member of the Court to conclude that the Court has lost interest in recognizing further fundamental rights and suspect classifications.[118] However, in fairness to the Court, the strict/rational dichotomy was an inadequate measure to deal with the range of interests potentially implicated by the equal protection clause. Such recognition has led the Court to search for new

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109. Tussmasn & tenBroek, *supra* note 73, at 356; Gunther, *supra* note 58, at 9-10; *see, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969).

110. *See supra* notes 99-101 and accompanying text.

111. 411 U.S. at 28.

112. *Id.*

113. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (age held not a suspect classification).

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

115. *Id.*

116. *Id.* at 688.

117. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 468-69 (1981); Craig v. Boren, 429 U.S. 190, 197 (1976).

118. *Murgia*, 427 U.S. at 318-19 (Marshall, J., dissenting).

ways of dealing with such interests. One way to deal with these interests has been to place more emphasis and refined analysis upon the rational basis test. More significantly, however, has been the development of an intermediate level of scrutiny in order to accommodate the problems confronted by the Court in the realm of equal protection.

Intermediate Standard of Review

Dissatisfaction with the two-tiered approach to equal protection analysis has led the Court to invoke an intermediate level of review.[119] The introduction of this intermediate level of scrutiny came in 1968 in *Levy v. Louisiana*[120] where the Court, while ostensibly applying the rational basis standard, struck a statute denying illegitimate children a right to recover for the wrongful death of their parent.[121] Since that time, the Court has expressly extended intermediate review to legislative classifications based on gender[122] and illegitimacy.[123] However, the Court has also followed the approach it adopted in *Levy* by applying an intermediate type of analysis while expressing adherence to the traditional two-tiered model of analysis.[124] While it is not clear when the Court will employ the intermediate level of review, one commentator has suggested two circumstances that will trigger intermediate review.[125] First, intermediate scrutiny will be triggered if an important, though not necessarily "fundamental" or "preferred," interest is implicated.[126] This important interest involves a significant interference with liberty or a denial of a benefit vital to the individual.[127] Secondly, the Court will apply intermediate scrutiny if the group in question bears sufficient resemblance to traditional suspect classes.[128] Although this formulation of important interests and suspect-like classifications adds little to the analysis, it becomes helpful when examining what precisely is triggered when an intermediate scrutiny approach is employed.

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119. L. TRIBE, *supra* note 64, at 1082.
120. 391 U.S. 68 (1968).
121. *Id.* at 72.
122. *Frontiero*, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976).
123. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91 (1982); Lalli v. Lalli, 439 U.S. 259 (1978).
124. *See supra* notes 121-23 and accompanying text.
125. L. TRIBE, *supra* note 64, at 1089-90.
126. *Id.*
127. *Id.* at 1090.
128. *Id.*

It has been suggested that several requirements are encompassed by intermediate review.[129] The first assesses the importance of the state objectives served by a challenged classification or limitation on liberty.[130] Under intermediate review the Court may also require that the rules employed by the legislature be substantially related to the objectives invoked to defend those rules.[131] The intermediate standard also requires that the Court no longer attempt to fashion a rationale drawn from judicial imagination or even the rule's history, where such rationale has not been advanced in defense of the statute.[132] Rather, when invoking intermediate scrutiny the Court will require a current articulation of the interest purportedly served by the enactment from the lawmaking body.[133] Closely associated with this technique is the requirement that the Court, under the intermediate approach, will strenuously review after-the-fact rationalizations invoked to justify a

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129. *Id.* at 1082.

130. *Id.* For example, as Professor Tribe suggests, in Reed v. Reed, 404 U.S. 71 (1973), the objectives of administrative convenience and avoiding intra-family controversy were deemed of insufficient importance to justify a state statute which gave a mandatory preference to males over females in the appointment of intestate administrators. 404 U.S. at 76-77. Similarly, in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court struck down a provision of the Social Security Act awarding survivor's benefits to widows, but not to widowers. 420 U.S. at 637-39. While purporting to review the statute under the rational basis standard, the Court looked behind the legislature's stated intent to discern the legislature's actual purpose. 420 U.S. at 648. The Court rejected the state's asserted purpose that the provision was a remedial measure designed to compensate women beneficiaries and instead determined that the actual statutory purpose was to enable the surviving parent to remain at home to care for the child. 420 U.S. at 645-47. The Court concluded that for purposes of child care, a distinction between widows and widowers was irrational, and therefore unconstitutional. 420 U.S. at 648.

131. L. TRIBE, *supra* note 64, at 1083. The clearest illustration of this "close fit" technique is in Craig v. Boren, 429 U.S. 190 (1976). In *Craig*, the state's purported interest in public health was deemed to be an important one. However, statistics indicating that .18% of females and 2% of males in the effected age group were arrested for drunk driving provided an unduly tenuous "fit" to justify a gender-based classification regulating the sale of beer to 18-to-20 year olds. 429 U.S. at 204.

132. L. TRIBE, *supra* note 64, at 1083-84.

133. *Id.* at 1085. While Professor Tribe suggests the articulation of this technique as early as in Griswold v. Connecticut, 38 U.S. 479 (1965), and later, in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), both those cases involved statutes that were struck because liberty interests were implicated requiring strict scrutiny. Professor Tribe explains that the rules in both those cases were so badly fitted to the articulated purposes that their invalidation as irrational invasions of liberty became "fairly simple." L. TRIBE, *supra* note 64, at 1083-84. Nonetheless, it is clear from cases such as Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), that where important interests may be involved, the Court, in invoking intermediate scrutiny, pays less deference to unarticulated rationales than is afforded under the traditional rational basis test.

rule.[134] Finally, it is also suggested that the challenged legal scheme may be altered under intermediate review in such a way so as to permit rebuttal on individual cases even if the scheme is not struck down altogether.[135] This enables the legislature to proceed in a piecemeal fashion so as to remedy the perceived ill of the legislation.[136]

The formulation of uniform principles of equal protection review requires a balancing of competing individual and governmental interests. While the important interest strand of intermediate scrutiny remains difficult to define, the Court's development of quasi-suspect classifications has been guided by the factors the Court has utilized under traditional suspect class analysis.[137] As a result, the Court has extended quasi-suspect status to classifications based on gender,[138] illegitimacy,[139] and, in some instances, alienage.[140] Thus, if a certain classification shares at least some of the indicia of suspectness, it may qualify for quasi-suspect treatment.[141] The problem, however, has been in determining the precise degree to which a class must possess these characteristics in order to be accorded quasi-suspect status. In addition, despite the development of the intermediate standard, the Court has applied the standard erratically and often reverts to traditional two-tiered analysis when intermediate scrutiny appears more appropriate.[142]

In spite of the attempts of many commentators to reconcile the

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134. L. TRIBE, *supra* note 64, at 1085-86. Such a technique requires a close review of the legislative history of the enactment. Professor Tribe suggests that where the legislative history is unclear but could be read as consistent with a currently articulated purpose, the Court should nonetheless deny that purpose serious consideration under intermediate review. *Id.* at 1086. As the Court suggested in Trimble v. Gordon, 430 U.S. 762 (1977), whenever more than the mere rationality standard is required, equal protection demands more than a mere incantation of a proper state purpose. 430 U.S. at 766.

135. L. TRIBE, *supra* note 64, at 1088-89.

136. *See supra* notes 73-75 and accompanying text. In Craig v. Boren, 429 U.S. 190 (1976), the Court adopted this approach in dealing with gender-based classifications. While finding a weak congruence between gender and the activity which the legislature sought to proscribe, the court also suggested that the legislature either realign the law in a gender neutral fashion, or adopt procedures for identifying those instances where the classification comported with actuality. 429 U.S. at 204.

137. *See supra* notes 102-18 and accompanying text.

138. *See supra* note 122 and accompanying text.

139. Levy v. Louisiana, 391 U.S. 68 (1968); Matthews v. Lucas, 427 U.S. 495 (1976); Trimble v. Gordon, 430 U.S. 762 (1977).

140. Plyler v. Doe, 457 U.S. 202 (1982); Sugarman v. Douglass, 413 U.S. 634 (1973).

141. *See* Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 916-17 (1981).

142. *See supra* note 101, at 1379.

Court's equal protection decisions,[143] the Court has continued to make case-by-case determinations flexible enough to accommodate the Court's preference for mildly progressive results.[144] Nonetheless, the Court is committed to analyzing equal protection claims within a framework which demands that attention be paid to the interest involved and the classification implicated in the challenged legislative enactment. Prior to critically examining the Court's application of this analysis to the facts involved in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, however, a discussion of the previous treatment the mentally retarded have received from the judiciary and from various legislative bodies, at the state and federal level, is warranted.

Legislative and Judicial Treatment of Mentally Retarded Individuals

Traditionally, the mentally retarded were regarded as "abnormal."[145] Their treatment, for the most part, consisted of isolation from the rest of society and confinement in large institutions.[146] The recent acknowledgement of the ineffectiveness of such treatment and the gradual recognition of the rights of the mentally retarded has resulted in the deinstitutionalization of many retarded individuals.[147] Deinstutionalization frees mentally retarded individuals from the confines of the institutional setting and allows them to reside in a less restrictive environment.[148] Deinstitutionalization is the outgrowth of a trend toward the "normalization" of mentally retarded individuals by integrating them into all aspects of society.[149] In recent years, however, efforts to effectuate such reform have been curtailed because of misconceptions concerning mentally retarded individuals.

Retardation has a variety of causes and exists in different forms and degrees.[150] While mental health authorities disagree as to a precise

143. Gunther, *supra* note 58, at 20-29; Nowack, *supra* note 69, at 1079-94; Wilkinson, *supra* note 69, at 984-88.

144. Wilkinson, *supra* note 69, at 953-54.

145. *See supra* note 1 and accompanying text. *See also* I. AMARY, THE RIGHTS OF THE MENTALLY RETARDED–DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 3 (1980).

146. *See* I. AMARY, *supra* note 145.

147. Note, *Deinstitutionalization as a Due Process Right of the Mentally Retarded*, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 383 (1984).

148. *See* Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 499-514 (M. Kindred, *et. al.* eds. 1976).

149. *Id.*

150. *See* Roos, *Basic Facts About Mental Retardation*, in 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 127, 131 (P. Freidman ed. 1979).

characterization of retardation, the most commonly accepted definition is that developed by the American Association of Mental Deficiency, which describes mental retardation as significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior. Intellectual functioning is determined through standardized intelligence tests; scores two or more standard deviations below the average are indicative of "mild" retardation.[151] Lower test scores, each level representing one standard deviation from the mean, correspond to the following levels of retardation: "moderate," "severe," and "profound."[152] In addition, many individuals are classified as profoundly retarded because they are considered to be "untestable."[153] Approximately 89% of the mentally retarded are in the "mild" category, with 6% "moderate" and 5% "severe and profound."[154] These individuals, in turn, comprise approximately 3% of the population of the United States.[155]

Most retarded individuals are able to function in society, their disability unnoticed and irrelevant to social interaction.[156] Mildly retarded individuals are capable of economic self-sufficiency and moderately retarded people can be economically productive through specialized or sheltered employment.[157] As a result, approximately 95% of the retarded population has demonstrated economic potential and, in addition, people with severe and profound retardation have shown an ability to perform remunerative work.[158] Unfortunately, it is the severely and profoundly retarded who trigger negative stereotypes of helpless, unfeeling, unaware, and unproductive human beings.[159] However, not only has the ability of such individuals to perform rewarding jobs proven that such attitudes are wrong, but scientific advances made in the last twenty years have demonstrated the tremendous behavioral potential of people with severe and profound retardation who, through the application of basic training principles, may increase self-help, social, academic, and vocational skills.[160] Concurrent with these scientific advances have been efforts by various

151. H. GROSSMAN, MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 11 (1973) (attempts to clear up discrepancies involved in the general classification of mentally retarded individuals).

152. *Id.*

153. *Id.* at 18.

154. Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 600 (1983).

155. Roos, *supra* note 148, at 132.

156. *Id.* at 127-28.

157. Ferleger, *supra* note 154, at 601.

158. Roos, *supra* note 150, at 132.

159. Ferleger, *supra* note 154, at 601.

160. *Id.* at 601-02.

legislative bodies to codify rights on behalf of the retarded and to facilitate their habilitation through a series of programs and declarations.

In 1963, President Kennedy proposed, and the Congress approved, two major federal grant programs aimed at developing community services and facilities needed to shift the place of care for mentally retarded individuals away from deplorable conditions existing in state institutions.[161] The perceived goal of the programs was to foster the normalization of the mentally handicapped by reintegrating them into the mainstream of community life through placement in group homes and other community living arrangements.[162] Mental health authorities believe that the treatment of mentally retarded individuals is most effectively accomplished in a realistic community setting.[163] Basic humanitarian concerns, as well as a perceived right to receive treatment in the least restrictive environment possible, also contributed to this reform effort.[164]

These efforts culminated in the enactment of the Developmental Disabilities Assistance and Bill of Rights Act of 1975, and, in 1978, with the Act's amendments. The original Act set forth basic statutory provisions relating to community-based treatment and habilitation of the mentally retarded.[165] The 1978 amendments contain a congressional declaration that it is the purpose of the Act to strengthen programs aimed at reducing the institutional care of people with developmental disabilities.[166] The Act specifically establishes a voluntary financial grant program conditioning receipt of federal aid on the state's provision of certain services for persons with developmental disabilities, including community living arrangements.[167] In the "Bill of Rights" section of the Act, Congress delineated a number of "rights" to be afforded to the mentally retarded including the right to receive appropriate treatment, services, and habilitation.[168] The courts have been slow and reluctant to react to such reform efforts.

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161. *Id.* at 595-97.

162. Nirje, *supra* note 2, at 181.

163. Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125, 126 (1981) (the history of the deinstitutionalization movement and the problem of community resistance to such programs).

164. *Id.*

165. 42 U.S.C. § 6000, *et. seq.* as added by Pub. L. No. 94-103, 89 Stat. 496 (1975), and as amended by Pub. L. No. 95-602, 92 Stat. 3004 (1978).

166. 42 U.S.C. § 6000(a)(5), as amended by Pub. L. No. 95-602, § 502, 92 Stat. 3004 (1978).

167. 42 U.S.C. § 6000(8)(B), as amended by Pub. L. No. 95-602, § 503, 92 Stat. 3004-3006 (1978).

168. *See also* 42 U.S.C. § 6010(1) and (3), as added by Pub. L. No. 94-103, §

The reform effort was dealt a near fatal blow with the Supreme Court's ruling in *Pennhurst State School and Hospital v. Halderman.*[169] In *Pennhurst*, the Court held that although the "Bill of Rights" section represents general statements of federal policy, it neither creates new substantive rights nor, in contrast with other provisions therein, conditions receipt of federal funds on the states following and financially supporting the policies suggested by Congress.[170] The Court based its holding on a strict statutory analysis without specific comment on habilitation. However, in a footnote, Justice Rehnquist, writing for the Court, stated that although the lower court had found that the rights asserted in the Act were encompassed by the fourteenth amendment, he questioned the basic assertion that a "right to treatment" existed at all.[171]

The Court's reluctance to address the notion of a *per se* constitutional right to habilitation was not surprising. Earlier, in *O'Connor v. Donaldson*,[172] the Court declined to decide whether the institutionalized mentally ill had a corresponding right to treatment.[173] However, following its decision in *Pennhurst*, the Court, in *Youngberg v. Romeo*[174] began to recognize the due process rights of the mentally retarded within the institutional setting. Nonetheless, the Court has not yet suggested that a right to habilitation exists, particularly with respect to severely and profoundly retarded individuals.[175]

201, 89 Stat. 502 (1975) which expressed a congressional preference for deinstitutionalization in finding that "the treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the potential of the person and should be provided in a setting that is least restrictive of that person's liberty."

169. 451 U.S. 1 (1981).

170. *Id.* at 8-11.

171. *Id.* at 1539 n.2:

> There is of course a question whether Congress would have the power to create the rights and obligations found by the court below. Although the court below held that "Section 6010 does not go beyond what has been judicially declared to be the limits of the [F]ourteenth [A]mendment," 612 F.2d at 98, this Court has never found that the involuntary committed have a constitutional 'right to treatment' much less the voluntarily committed." (citations omitted).

172. 422 U.S. 563 (1975).

173. *Donaldson*, 422 U.S. at 587-89.

174. 457 U.S. 307 (1982).

175. *Romeo*, 457 U.S. at 317. One commentator has noted, however, that in spite of the Court's holding that "Respondent, in light of the severe character of this retardation, concedes that no amount of training will make possible his release," Romeo never made such a concession, in fact, Romeo has since moved from the institution to a long-planned family scale community living arrangement. Ferleger, *supra* note 154, at 628.

The nature of a perceived right to habilitation must be linked to identifiable liberty interests in order to warrant judicial recognition. In *Romeo* the liberty interest at stake involved freedom from bodily restraint.[176] However, the issue remains clouded as to whether the institutionalized mentally retarded have a due process liberty right to treatment in the least restrictive setting within the institution. If such a right exists, inquiry shifts to whether the concept of the least restrictive alternative creates a due process right to treatment or habilitation in a situation outside of the institution.[177]

The teaching of *Pennhurst* is that legislation, whether tied to federal funding or initiated by the state, must be enacted to achieve community placement for the mentally retarded.[178] Fortunately, as a direct result of the earlier reform efforts, a great deal of philosophical, as well as monetary, support for the community residence approach exists.[179] As noted previously, major federal legislation has been enacted to facilitate implementation of community-based integration and to provide the economic impetus for such efforts at the state level.[180] As a result, several states, including Michigan, New York, and Nebraska, have established agency placement services so that at least the mildly retarded in these states now have the opportunity to reside in a community setting.[181] In addition, some state statutes have preempted local zoning laws that might prohibit group homes in single-family areas.[182] However, the ability of local governing units to pass such restrictions, even where state statutes have preempted

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176. *Romeo*, 457 U.S. at 312-15. It is perhaps significant that Chief Justice Burger, concurring in judgment, asserts that he would flatly hold that Romeo has "no constitutional right to training or 'habilitation' *per se*." *Id.* at 329 (Burger, C.J., concurring).

177. Tuoni, *supra* note 163, at 127.

178. *Id.*

179. *Id.*

180. *See supra* notes 4-5; *See infra* note 182.

181. Comment, *Can the Mentally Retarded Enjoy 'Yards That are Wide?'*, 28 WAYNE L. REV. 1349, 1357 (1982).

182. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-582 (Supp. 1985); CAL. WELF. & INST. CODE §§ 5115-16 (1984); COLO. REV. STAT. § 30-28-115(2)(a) (1977); CONN. GEN. STAT. ANN. § 8-3e (Cum. Supp. 1985); DEL. CODE ANN. tit. 22, § 309 (1981); IDAHO CODE § 67-6531 (1980); IND. CODE §§ 16-10-2.1-6.5 (Supp. 1985); MD. ANN. CODE art. 59A, § 20C (1979); MICH. COMP. LAWS ANN. § 125.286a (West Supp. 1985); MONT. REV. CODES ANN. §§ 76-2-411 & 412 (1984); N.J. STAT. ANN. §§ 40:55D-66.1 (West Supp. 1985); N.M. STAT. ANN. § 3-21-1(c) (1978); N.C. GEN. STAT. § 168-22 (Cum. Supp. 1984); R.I. GEN. LAWS §§ 45-24-22 to -23 (1980 & Supp. 1985); S.C. CODE § 6-7-830 (Supp. 1984); TENN. CODE ANN. § 13-24-102 (1980); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1985); VA. CODE § 15.1-486.2 (1983); WIS. STAT. ANN. § 59.97(15)(c) (West Supp. 1985). In addition, the New York state legislature has preempted local ordinances precluding the establishment of a group

such ordinances,[183] presents a significant obstacle to establishing a group home in such communities.

The exercise of zoning authority by the local municipality has been well established as a legitimate exercise of the city's policy powers. After the constitutional challenge to zoning in *Village of Euclid v. Ambler Realty Co.*[184] in 1926, followed closely by *Nectow v. City of Cambridge*[185] in 1928, the validity of zoning restrictions was not again addressed by the Court until 1974, when the Court sustained a municipal single-family ordinance. In *Village of Belle Terre v. Boraas*,[186] the local government's attempt to enforce its single family ordinance was upheld by the Court as a legitimate legislative decision regulating land use.[187] Applying a minimum level of scrutiny, the Court concluded that the ordinance was rationally related to the state's interest in preserving the traditional family model, maintaining traffic, noise, density, and aesthetics.[188] Attempts to use similar justifications to restrict the establishment of group homes seems readily apparent.[189]

While homeowners might argue for the exclusion of the group home based on the factors articulated in *Belle Terre*, there are strong countervailing arguments that undercut the logic behind these noise, traffic, and density objections. The unrestricted presence of large families, multiple car households, and noisy neighbors in such communities vitiates such objections.[190] The tranquility of these communities will not be seriously impaired by a small group designed to emulate a natural family.[191] An additional problem that may need to be overcome is the willingness of the municipality, or the courts, to define "family" broadly enough to encompass a group of mentally retarded adults living together in an area restricted to single families.[192] Opponents of the group home may also argue that the facility represents a commercial intrusion in violation of residential planning.[193] In addition, homeowners may engage in "private zoning" by

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home through codification of case law. *See* N.Y. MENTAL HYG. LAW § 41.34(5)(e) (McKinney Supp. 1984-85).

183. *See infra* notes 198-99 and accompanying text.

184. 272 U.S. 365 (1926).

185. 277 U.S. 183 (1928).

186. 416 U.S. 1 (1974).

187. *Id.* at 8.

188. *Id.* at 9.

189. *See* Comment, *supra* note 181, at 1361.

190. *Id.*

191. *Id.*

192. *Id. See also* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (a city cannot require a family to subdivide and exclude blood relatives).

193. *Id.* at 1361-62.

forming restrictive convenants that effectively preclude the establishment of a group home in the neighborhood.[194]

An additional check on the state's police power over private property has been the "taking" clause of the Constitution. The Court in *Belle Terre* recognized that a zoning ordinance usually has an impact on the value of the property it regulates.[195] Mere diminution in property value, however, has never been enough to justify compensation.[196] There is no tangible proof that property values decline when a group home is located in a residential area. To the contrary, two studies indicate there is virtually no effect on property values.[197] Nonetheless, attempts to exclude the retarded continue to persist. The strength of such efforts has not only taken the form of private agreements or local ordinances but has also manifested itself very vividly in *Garcia v. Siffrin Residential Association for the Developmentally Disabled.*[198] In *Siffrin*, the Ohio Supreme Court held that a statute providing for the establishment of a group home for the mentally retarded in single-family districts was an unconstitutional invasion of the rights of homeowners in such districts.[199] Thus, not only has the strength of the argument advanced by the homeowners been illustrated, but a method for effectively excluding mentally retarded individuals from the areas most conducive to their habilitation has also been demonstrated.

The treatment that the mentally retarded have received from both legislative and judicial bodies has been tolerable in some respects and deplorable in others. The historical development of the equal protection clause would appear to make classifications based on mental retardation amenable to at least quasi-suspect treatment. Similarly, the rights implicated by efforts aimed at the normalization of such individuals appear to be fundamental. It is with this background that *Cleburne* will be analyzed to illustrate the Court's continuing failure to adhere to a coherent approach to equal protection challenges.

ANALYSIS OF CLEBURNE

In the first portion of the Court's decision, the plurality noted the presumption of constitutional validity to be applied when

194. *Id.* at 1360.
195. 416 U.S. 1, 9 (1974).
196. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).
197. J. WOLPERT, GROUP HOMES FOR THE MENTALLY RETARDED 357 (1978); Dear, *Impact of Mental Health Facilities on Property Values*, 13 COMMUNITY MENTAL HEALTH J. 150 (1977) *as cited in* Comment, *supra* note 181, at 1366.
198. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981).
199. *Id.* at 1371.

evaluating social or economic legislation. Justice White, writing for the Court, noted that the states must be given wide latitude in dealing with such matters and justified such deference because of the presumption that "even improvident decisions will eventually be rectified by democratic processes."[200] Justice White then recognized the traditional exceptions to such a rule, namely, suspect classifications and fundamental rights which would trigger strict review.[201] The Court also acknowledged that intermediate review has been afforded to legislative classifications based on gender or illegitimacy.[202] However, the Court emphasized the failure of the Court in *Massachusetts Board of Retirement v. Murgia*[203] to extend such a heightened standard of review to deferential treatment based on age. Justice White found that *Murgia* required application of the rational basis approach where the class affected by the law has distinguishing characteristics which are relevant to legitimate state interests.[204] Applying this background to the facts involved in *Cleburne*, Justice White held that the Court of Appeals erred in finding mental retardation a quasi-suspect classification triggering intermediate review.[205]

The Court's analysis emphasized the need to defer to the legislature in the treatment of mentally retarded individuals. Justice White found that the reduced ability of the mentally retarded to cope in the world and the very difficulty involved in classifying such individuals warranted deference to the legislature on such technical matters.[206] Although finding such characteristics to be "immutable," Justice White opined that the state's interest in dealing with and providing for the mentally retarded is "plainly a legitimate one."[207] To afford even intermediate review would, in the plurality's view, involve substantive judgments by the Court about legislative decisions where no foundation for such oversight had been established.[208] In so doing, however, the Court failed to give due regard to the immutability element of the traditional test for suspect classifications.[209]

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200. City of Cleburne, Texas v. Cleburne Living Center, Inc., ___ U.S. ___, 105 S. Ct. 3249, 3254 (1985).

201. *Id.* at 3255.

202. *Id.*

203. 427 U.S. 307 (1976).

204. *Cleburne*, 105 S. Ct. at 3255.

205. *Id.* at 3255-56.

206. *Id.* at 3256.

207. *Id.*

208. *Id.*

209. *See supra* notes 110-18 and accompanying text. The Court in *Cleburne*, 105 S. Ct. at 3256 n.10, cited to J. ELY, DEMOCRACY AND DISTRUST (1980) which, at the very least, leaves serious doubt as to whether the Court will consider the "immutability theory" in the future.

The Court then examined the legislative treatment of the mentally retarded. Justice White concluded that legislative efforts, at both the state and federal levels, evidenced the need to afford "special treatment" to such persons and that lawmakers, including the Texas legislature, had been addressing such difficulties.[210] In the Court's view, "civilized and decent society expects and approves such legislation" which, in turn, is indicative of the legitimacy and desirability of such treatment.[211] In addition, the Court noted that much of the legislation designed to benefit the retarded also recognizes the need for disparate treatment. The Court illustrated this assertion by pointing to the Education of the Handicapped Act which merely requires that retarded children be afforded "an appropriate education, not one that is equal in all respects to the education of non-retarded children."[212] Furthermore, the Court asserted, given the variations in the abilities and needs of the retarded, legislatures must be afforded flexibility in shaping and limiting their remedial efforts.[213] What the Court neglected to note, however, is that such flexibility also enables less well meaning legislative bodies to discriminate against the retarded.

The Court then paid cursory treatment to the politically powerless element of the traditional formula for suspect classifications. Pointing once again to the legislative response to the needs of the retarded, the plurality chose to impute political power on behalf of the retarded to those persons who have successfully campaigned on their behalf.[214] In the plurality's view, political power does not necessarily entail direct control over the legislature but apparently encompasses indirect means as well.[215] Whether indirect access to the political process would be sufficient to justify a finding of political power, in the plurality's view, remains unclear.

The Court next focused upon the pragmatic concerns raised if it were to treat the mentally retarded as a suspect or quasi-suspect class. Justice White anticipated that a floodgate would be opened by affording the retarded such status.[216] According to Justice White, other groups having immutable traits, no meaningful political clout, and a history of prejudice would then seek quasi-suspect status leaving it difficult for the Court to distinguish them from the mentally retarded.[217] The Court left open the question of whether such con-

210. *Cleburne*, 105 S. Ct. at 3256-57.
211. *Id.* at 3257.
212. *Id.*
213. *Id.* at 3257-58.
214. *Id.* at 3257.
215. *Id.*
216. *Id.* at 3257-58.
217. *Id.* at 3258.

siderations would constitutionally require intermediate scrutiny in the first instance. Instead, the Court expressed an apparent desire to limit the application of intermediate scrutiny.

The second portion of the Court's analysis concerns itself with the application of the rational basis standard to the validity of the special use permit required for homes for the mentally retarded under the Cleburne zoning ordinance. The Court confined its analysis to a consideration of whether the requirement deprives the respondents of equal protection and did not attempt to suggest that such a conclusion would imply that a municipality could never insist on such a requirement.[218] Thus, since the Court ultimately found the ordinance to be "invalid as applied in this case,"[219] nothing can be said as to when such ordinances may be legitimate. However, the Court's acquiesence on the matter would appear to suggest that at times such an ordinance would pass constitutional muster.

In finding the ordinance to be invalid "as applied," the Court reviewed the findings made by the lower district court. The district court had found that the requirement of a special use permit for the group home at issue was based solely upon the fact that the facility would be used by mentally retarded individuals.[220] Justice White also noted that while the ordinance required a special use permit for such group homes, it did not require a permit for other care and multiple dwelling facilities.[221] The Court suggested that such disparate treatment would be appropriate only if the differences attributable to the mentally retarded would threaten legitimate interests of a city in a manner that the other permitted uses would not.[222]

The district court had also found that the city council's insistence on the permit rested on several factors which Justice White proceeded to review. First, the city council had expressed concern over the negative attitudes of property owners located within 200 feet of the proposed group home site, as well as the fears of the elderly residents of the neighborhood. In dismissing this contention as a rational basis for the zoning ordinance, Justice White considered the very underpinnings of the political powerless element usually afforded under intermediate scrutiny. In Justice White's view, majoratarianism should

218. *Id.* at 3258-59.
219. *Id.* at 3258.
220. *Id.* at 3259.
221. *Id.*
222. *Id.*

never give way to the demands of the equal protection clause.[223] However, the Court chose to cast such considerations in the form of the mere rationality test by holding that mere expressions of fear and negative attitudes are not "permissible bases" for treating a home for the mentally retarded differently from other care and multiple dwelling facilities.[224]

The Court then considered the council's objections to the location of the facility. The council asserted in the lower court proceedings that it was concerned that the facility was to be located across the street from a junior high school.[225] Fearing that students from the school might harass the occupants of the group home purportedly led the council to deny the permit.[226] Reviewing this contention, the Court readily pointed to the fact that about 30 mentally retarded persons attended the school itself.[227] Furthermore, the Court held that to deny the permit upon vague and undifferentiated fears would allow a portion of the community to effectively dictate the scope of the equal protection clause.[228]

The council's other objection to the home's location was that it would be located on a five hundred year flood plain.[229] Justice White noted the absurdity of this justification: while a group home could not be constructed on the site due to concern with the possibility of a flood, the city council would allow other multiple dwellings and care facilities to be constructed there.[230] On this point Justice White drew an analogy to a similar concern raised by the council involving doubts about the legal responsibility for actions that the mentally retarded might take. Justice White questioned the underpinnings of this justification finding that similar concerns had not been expressed with respect to other permitted uses.[231]

The Court then turned its attention to the other concerns expressed by the city council. The council expressed concern with the size of the home and the number of people who would occupy it. Justice White again pointed to the finding made by the district court

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223. *Id.* at 3259-60.
224. *Id.* at 3259.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 3259-60.

that had the residents of the group home not been mentally retarded, the proposed use would have been permitted under the city's zoning ordinance.[232] Although the Court maintained that mentally retarded individuals are different from others, it was not clear to the plurality why such distinctions would warrant density and occupancy restrictions.[233] The Court, once again, pointed to other permissible uses and could find no justification for the view that other people could live under such conditions while the mentally retarded could not.[234] Similarly, the council's last contention, that the ordinance was necessary to avoid a concentration of population and to lessen congestion in the streets, did not correspond to the other uses permitted under the ordinance.[235]

The significance of the Court's opinion is not readily apparent. Its implications for the mentally retarded are unclear. Similarly, it leaves the state of future equal protection challenges in a quandary. The opinion may be read as a refinement of intermediate scrutiny in its denial of quasi-suspect status to the mentally retarded or as indicating the potential use of the rational basis test for invalidating statues. The differing approach taken by the concurrence contributes to this uncertainty.

In stark contrast to the plurality opinion, Justice Stevens' concurrence[236] rejected a multi-tiered approach to problems involving equal protection. Instead, Justice Stevens advocated a return to traditional equal protection analysis.[237] In Stevens' view, inquiry must begin with a determination of whether there is a rational basis for the particular classification involved in each case.[238] Implicit in this concept of "rationality" is a requirement that a legislature operate in a logical fashion to serve a legitimate public purpose that "transcends the harm to members of the disadvantaged class."[239]

Under this analysis, Justice Stevens formulated a variety of basic questions which must be addressed in determining whether the challenged legislation has a "rational basis." First, a court must identify the specific class that is being harmed by the legislation and determine whether the class has been one traditionally subject to legislative

232. *Id.* at 3260.
233. *Id.*
234. *Id.*
235. *Id.* at 3260-61.
236. *Id.* at 3261. Chief Justice Burger joined in the concurrence.
237. *Id.*
238. *Id.*
239. *Id.*

disfavor.[240] The specific characteristic of the disadvantaged class which the legislature asserts justifies disparate treatment must be considered.[241] Justice Stevens asserted that it is such analysis which has led the Court to invalidate racial classifications and uphold economic classifications.[242]

Justice Stevens then applied his test to the mentally retarded. Acknowledging that the retarded have historically been subjected to unfair treatment, Justice Stevens also recognized that lack of sufficient mental capacity will often require legislative action to protect such individuals and others as well.[243] The inquiry then turned to a consideration of whether the Cleburne zoning ordinance's requirement of the special use permit evidenced a need for such protection or was merely an outgrowth of irrational fears stemming from the history of the unfair and grotesque treatment that the retarded have suffered.[244] Justice Stevens concluded that the ordinance was a reflection of the latter and, like the plurality, rejected the city's alleged desire to protect the retarded as "wholly unconvincing."[245]

In marked contrast with the views expressed by the plurality and the concurrence, Justice Marshall, dissenting, would employ intermediate scrutiny in invalidating the Cleburne zoning ordinance on equal protection grounds. Justice Marshall, joined by Justices Brennan and Blackmun, agreed with the Court that the ordinance violated equal protection, but disagreed with the Court's newly adopted approach to equal protection cases and the subsequent failure to recognize the mentally retarded as a quasi-suspect class.[246] The dissent first objected to the Court's "wide ranging discussion" of intermediate scrutiny since the Court instead chose the rational basis test to invalidate the ordinance.[247] When sustaining the decision of a lower court, although supposedly upon narrower grounds, the preferred course in Justice Marshall's view is to affirm on the narrower ground and decline consideration of the broader ground relied upon by the lower court.[248] This appears to be a very rigid approach to the rule that the Court should never anticipate a question of constitutional law in advance of the

240. *Id.* at 3262.
241. *Id.*
242. *Id.* at 3262.
243. *Id.*
244. *Id.* at 3262-63.
245. *Id.* at 3263.
246. *Id.* at 3263-64.
247. *Id.* at 3264.
248. *Id.*

necessity of deciding it.[249] However, given the various approaches adopted by the Court in the area of equal protection such guidance would appear to be warranted.

The dissent's second objection was that while the Court purportedly invoked the rational basis test, it instead adopted an approach more indicative of intermediate review. The dissent noted that traditionally under the rational basis test inquiry on the part of the Court has been minimal.[250] Examination of the record in the microscopic fashion adopted by the Court is not characteristic of such a test.[251] The traditional presumption of constitutionality did not enable the Court to look behind the ordinance in order to convince the Court that the distinction the legislature had drawn was reasonable.

The dissent viewed the Court's refusal to apply a heightened level of review as a potential signal to lower courts to subject economic and commercial classifications to rational basis review.[252] Similarly, the dissent objected to the Court's failure to specify when a more heightened level of review is necessary. This leaves the lower court to guess when such an application is appropriate.[253] In Justice Marshall's view, the multi-tiered approach requires structure as well as flexibility sufficient to address such concern.

To illustrate its point the dissent applied its analysis to the facts involved in *Cleburne*. In applying the first prong of its analysis, the dissent found the interest of the mentally retarded in establishing a group home to be "substantial."[254] According to the dissent, the right to establish a home has "long been cherished as one of the fundamental liberties embraced by the Due Process Clause."[255] The dissent viewed this right as more than just a *per se* right to housing, but rather, as the primary means by which mentally retarded individuals can hope for a meaningful existence as contributing members of society.[256] Although there appears to be sufficient justification to pattern such an interest under the rubric of fundamental rights, the Court's reluctance to expand the fundamental rights doctrine[257] and its recent treat-

249. United States v. Paines, 362 U.S. 17, 21 (1960), *quoting* Liverpool, New York & Philadelphia Steamship Co. v. Comm'rs of Emmigration, 113 U.S. 33, 39 (1885).
250. *Cleburne*, 105 S. Ct. at 3264.
251. *Id.*
252. *Id.*
253. *Id.* at 3266.
254. *Id.*
255. *Id.*
256. *See supra* notes 88-101 and accompanying text.
257. *See supra* notes 145-49 and accompanying text.

ment of mentally retarded individuals[258] makes such recognition unlikely.

The dissent then reviewed the tragic history of invidious discrimination against mentally retarded individuals. One of the vestiges of this history has been the perpetuation of ignorance and irrational fears that have, in turn, promoted the disparate treatment of the mentally retarded. In light of such treatment, Justice Marshall felt that the Cleburne ordinance should meet a more exacting standard of review requiring a substantial government interest important enough to overcome the suspicion that the ordinance was based upon "impermissible assumptions or outmoded and perhaps invidious stereotypes."[259]

The dissent found that the Court failed to give due regard to the factors which traditionally have led to heightened scrutiny. The dissent criticized the Court's apparent belief that once legislative reform efforts have addressed the ills of discrimination, abdication on the part of the Court is warranted.[260] According to Justice Marshall, the Court has a continuing obligation to ensure that fundamental liberties are protected.[261] While evolving standards of equality should properly be embodied in legislation, such action should guide the Court when confronted with legislative enactments challenging the course of such reform.[262] The dissent interprets the proliferation of reform efforts on the behalf of the retarded as a call for heightened judicial scrutiny to remove the barriers found to be inconsistent with the fourteenth amendment.

The dissent challenged the basic premises underlying the Court's decision. In the dissent's view, the Court's assertion that heightened scrutiny is not appropriate where individuals in a group have varying characteristics would vitiate application of intermediate scrutiny in any context.[263] The dissent would allow distinctions to be made only where they bear a "reasonable relationship to their *relevant* characteristics."[264] The dissent attacked the Court's acquiesence to such an overinclusive classification. More specifically, the dissent felt that given that retarded individuals have reduced mental capacities in some

258. *Cleburne*, 105 S. Ct. at 3268.
259. *Id.* at 3268-70.
260. *Id.* at 3269.
261. *Id.*
262. *Id.* at 3269-70.
263. *Id.* at 3270.
264. *Id.* (emphasis added).

areas should not justify using retardation as a shorthand for reduced mental capacity in areas where relevant individual variations in mental capacity do exist.[265] Although such an assertion may be poignant, the dissent failed to address the tolerance the Court had displayed in earlier decisions for a piecemeal approach to such problems.[266]

The dissent next focused on the plurality's holding that the level of review should be made with reference to the number of classifications to which a characteristic would validly be relevant, rather than focusing upon the specifics of each case. According to the dissent, such a requirement is illogical. A determination of relevancy in some or even many circumstances should not create a presumption that the characteristic is relevant in all cases.[267] The dissent found such analysis especially disturbing where there is no reason to believe that the characteristic ought to be considered irrelevant. The dissent pointed to decisions involving gender, illegitimacy, and alienage in which the Court found intermediate scrutiny to be appropriate because the court viewed the trait as relevant in some circumstances but not others.[268] While the dissent appears to overlook the fact that the Court's analysis merely creates a *presumption* of relevancy, the failure of the Court to overcome that presumption where the mentally retarded are involved warrants Justice Marshall's concern.

The history of invidious discrimination against the retarded coupled with the fact that retardation may be viewed as a constitutional irrelevancy in some instances is enough, under the dissent's analysis, to require application of a heightened standard of review. The dissent disagreed with the Court's acquiescence on the matter of continued discrimination against the retarded and the assertion that such treatment may not only be legitimate but desirable.[269] In the dissent's view, such analysis would require that the Court engage in a guessing game to determine whether a particular characteristic meets the Court's relevancy requirement before adopting a heightened level of review.[270] The dissent could find no precedent advocating such a test and maintained that a more flexible standard should be applied enabling the recognition of "evolving principles of equality" and requiring that where classifications could be viewed as "*potentially* discriminatory,"

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265. *Id.*
266. *See supra* notes 71-75 and accompanying text.
267. *Cleburne*, 105 S. Ct. at 3270-71.
268. *Id.*
269. *Id.*
270. *Id.*

an intermediate standard of review should be applied.[271] In the dissent's view, such a standard requires that the government establish that the classification is substantially related to important *and* legitimate objectives signifying that "vital and sufficiently weighty policies justify the departure from equality."[272]

The dissent concluded by agreeing with the Court's holding that the Cleburne ordinance sweeps too broadly but remained disturbed at the Court's "as applied" approach as the preferred course of adjudication.[273] Such abdication, according to the dissent, leads to the possibility that the retarded might once again be forced to litigate the issue under a similar statute.[274] The Court offered no guidance to the city council or to the advocates of rights for the retarded as to when such ordinances may pass the rigors of equal protection. The dissent interpreted the Court's approach as indicating a belief that the ordinance may be "rational" as applied to some subgroup of retarded individuals, such as the profoundly retarded.[275] But, as the dissent pointed out, the ordinance itself is not capable of drawing distinctions between permissible and impermissible applications.[276] Furthermore, the dissent emphasized that the Court's "as applied" approach was especially inappropriate in this case since nine-tenths of mentally retarded individuals are "similarly situated to the respondents."[277]

The major problem with the dissent's analysis is its own failure to delineate factors enabling lower courts to determine when certain groups will be entitled to intermediate scrutiny. The dissent chose to adopt an empirical approach to the problem.[278] While the dissent contended that such analysis is somehow more refined, it apparently would not only add traditional factors into its own calibration, such as immutability and political powerlessness, but other ill-defined elements arising "from a social and cultural perspective as well as a political one."[279] Not only do such elements lack definition but the dissent also failed to make clear how much weight each factor is to be assigned or how many factors are perceived to tip the scale in

271. *Id.*
272. *Id.*
273. *Id.* at 3272-73.
274. *Id.* at 3273-75.
275. *Id.* at 3273.
276. *Id.*
277. *Id.*
278. *Id.* at 3272 n.24.
279. *Id.*

favor of intermediate review over the rational basis test or, for that matter, strict scrutiny over intermediate review. While such a refinement may be an impossibility, the suggestion that an empirical answer to the problem would clear up the many gray lines drawn in the area of equal protection is unwarranted.

In summary, basic disagreement existed among the members of the Court in their approach to the equal protection problem involved in *Cleburne*. One clear distinction between the dissent and the plurality opinions is that the dissent recognized a basic fundamental right to establish a home in the community, while the plurality adopted the lower court's finding that no fundamental right was implicated.[280] The concurrence agreed with the dissent on this point but would view the finding of an important or fundamental right as only one of the many factors to be considered in its sliding scale approach to the problem.[281] More generally, the plurality found that the impact a decision employing heightened review would have justified use of the rational basis test. While the dissent's method lacks definition, the plurality's approach lacks direction. Indeed, the plurality's analysis of the elements traditionally justifying the application of a heightened level of review leaves serious doubt as to whether these factors will be of any significance in the future.

CONCLUSION

The Court's use of the rational basis test and the "as applied" approach in invalidating the Cleburne ordinance fails to preclude skilled draftsmen from formulating enactments which will effectively discriminate against the retarded. Overtones of Justice Rehnquist's view in *Pennhurst State School and Hospital v. Halderman*,[282] that mentally retarded individuals have no constitutional right to treatment, appear to be implicit in the plurality's ultimate holding in *Cleburne*.[283] This is particularly disturbing where a professed right to habilitation is concerned, since scientific evidence suggests that such efforts may be the only means to ensure the full developmental capacity of men-

280. *Id.* at 3253.
281. *Id.* at 3262-63.
282. 451 U.S. 1 (1981).
283. Although the suggestion in *Pennhurst* was that the mentally handicapped should look to state law to ensure habilitation, the failure of many states to act on behalf of such individuals, coupled with the Court's holding in *Cleburne*, enables parochial interests to preclude deinstitutionalization efforts. *See supra* note 182 and accompanying text.

tally retarded individuals.[284] The retarded are left to hope that farsighted legislative bodies and other individuals will continue to ensure full recognition of such rights on their behalf.

DAVID J. BERGE

284. *See supra* notes 147-49 and accompanying text. The Court's opinion reads very much like a Rorschach test; the Court appears willing to read into an equal protection claim whatever it hopes to find. This is especially unfortunate in *Cleburne* since fundamental rights clearly are implicated in efforts to establish group homes for the mentally retarded. Unfortunately, Justice Marshall, in voicing his dissent, chose to couch this interest in the nebulous "right to establish a home in the community" when other fundamental rights, despite the Court's holding in *Pennhurst*, are implicated. *See, e.g.*, Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979) (argues that state statutes disqualifying the mentally ill and retarded from voting violate the equal protection clause); Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974) (encompasses a discussion of quasi-suspect treatment for persons suffering from mental illness as well as individuals with mental retardation).