Golden Gate University Law Review

Volume 41 | Issue 1 Article 6

December 2010

Contextualizing Cleburne

Laura C. Bornstein

ARTICLE

CONTEXTUALIZING *CLEBURNE*

*LAURA C. BORNSTEIN**

INTRODUCTION

Twenty-five years ago, the Supreme Court decided *City of Cleburne, Texas v. Cleburne Living Center, Inc.*,[1] involving a zoning ordinance that discriminated against the "mentally retarded"[2] in the establishment of group homes. Most legal experts criticized the opinion as aberrant and unsound.[3] A majority of the Court, represented by Justice Byron White, held that mental retardation was not a suspect or quasi-suspect classification under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,[4] a conclusion that seemed wrong to observers of the Court in light of the immutable nature of mental retardation, the history of invidious discrimination against mentally retarded persons, and the exclusion of the mentally retarded from the political process.[5] Moreover, it was unnecessary for the Court

*Policy Counsel/Women's Law and Public Policy Fellow at the National Partnership for Women & Families, Washington, D.C., 2010-2011; Georgetown University Law Center, J.D. 2010, *cum laude*; Rice University, B.A. 2006, *summa cum laude*. I wish to thank Victoria Nourse, a pioneer of legal "contextualization," for inspiring this Article and providing feedback on early drafts. I am also grateful to Bailey Bifoss and the staff of *Golden Gate University Law Review* for their editing work.

[1] City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

[2] Although "intellectual disability" is now the preferred term for mental retardation in the medical and advocacy communities, this Article will use the older nomenclature to maintain consistency with the *Cleburne* opinion.

[3] *See infra* Part II.

[4] *Cleburne*, 473 U.S. at 442.

[5] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (listing the "traditional indicia of suspectness" in equal protection jurisprudence).

to settle on a standard of review, because it proceeded to strike down the application of the zoning ordinance under rational-basis review.[6] The Court could simply have stated that the city's action failed even the lowest level of scrutiny, thus leaving for another case the question of whether a higher level of scrutiny might be warranted for classifications based on mental retardation. Finally, the Court's decision to invalidate the ordinance as applied was unusual for two reasons: first, because the rational-relationship test is "typically so deferential as to amount to a virtual rubber stamp"[7] on legislation, and second, because the Court had never before employed the Equal Protection Clause to invalidate only a particular application of a statute.[8]

The Court's contortions in *Cleburne* were peculiar but not inexplicable. Precisely because the decision cannot be explained by reference to established modes of equal protection analysis, one can assume that the Justices of the majority were influenced by social and political factors. After summarizing the facts and opinions in the case and examining *Cleburne*'s reception in the legal world (in Parts I and II, respectively), Part III of this Article attempts to identify these external variables. The mid-1980s were a high point of neighborhood hostility to group homes for persons with mental retardation, and a low point of federal spending and enforcement efforts on behalf of the mentally retarded. This social and political milieu, when met with Justice White's unique brand of judicial restraint, produced a decision that, while resolving the immediate issue in favor of the group home residents, set a precedent that reinforced the second-class status of persons with mental disabilities. In conclusion, this Article assesses the long-term impact of the decision and argues that the need to overturn *Cleburne* is still strong.

I. THE *CLEBURNE* CASE

In 1980, Jan Hannah, the vice president and part owner of Cleburne Living Center, Inc. ("CLC"), purchased a house in the city of Cleburne, Texas.[9] She intended to lease the house to CLC for use as a group home for thirteen individuals with mild to moderate mental retardation.[10] The

[6] *Cleburne*, 473 U.S. at 450. *Contra* Zobel v. Williams, 457 U.S. 55, 60-61 (1982) ("[I]f the statutory scheme cannot pass even the [minimum rationality] test . . . we need not decide whether any enhanced scrutiny is called for.").

[7] Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

[8] *Cleburne*, 473 U.S. at 476 (Marshall, J., concurring and dissenting).

[9] *Id.* at 435 (majority opinion).

[10] *Id.*

zoning regulations applicable to the site allowed apartment buildings, fraternity and sorority houses, and nursing homes.[11] However, special use permits, valid for one year at a time, were needed for the operation of "[h]ospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions."[12] The city of Cleburne determined that the proposed group home should be classified as a "hospital for the feeble-minded," thus requiring CLC to apply for a special use permit.[13] After holding a public hearing on CLC's application, the city council voted to deny a special use permit.[14]

CLC sued the city in federal district court, alleging that the zoning ordinance was invalid both on its face and as applied because it discriminated against mentally retarded persons in violation of the Equal Protection Clause.[15] The district court applied the minimum level of judicial scrutiny available to equal protection claims and ruled that the ordinance was rationally related to the city's legitimate interests in "'the safety and fears of residents in the adjoining neighborhood,' and the number of people to be housed in the home."[16] The Court of Appeals for the Fifth Circuit reversed.[17] After considering the history of "unfair and often grotesque mistreatment" of mentally retarded persons, their lack of political power, and the unalterable nature of mental retardation, the court determined that mental retardation was a quasi-suspect classification.[18] The court then held that the ordinance was invalid both on its face and as applied, because it did not substantially further any important governmental interests.[19]

The Supreme Court granted certiorari and, on July 1, 1985, unanimously struck down the ordinance as applied to the Cleburne group home.[20] A six-member majority of the Court, in an opinion written by Justice White, held that the court of appeals erred in affording quasi-suspect status to classifications based on mental retardation for four reasons.[21] First, mentally retarded persons differ from the general population in a real and important respect because they "have a reduced ability

[11] *Id.* at 436 n.3.

[12] *Id.* at 436.

[13] *Id.* at 436-37.

[14] *Id*. at 437.

[15] *Id*.

[16] *Id*. (quoting the district court opinion).

[17] Cleburne Living Ctr., Inc. v. City of Cleburne, Tex., 726 F.2d 191, 202 (5th Cir. 1984), *rev'd*, 473 U.S. 432 (1985).

[18] *Id*. at 197-98.

[19] *Id*. at 200.

[20] *Cleburne*, 473 U.S. at 432.

[21] *Id*. at 442.

to cope with and function in the everyday world."[22] Second, wrote Justice White, "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates . . . that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[23] Justice White pointed to Section 504 of the Rehabilitation Act of 1973, the Developmental Disabilities Assistance and Bill of Rights Act, the Education of the Handicapped Act, and similar laws in the State of Texas as examples of such protective legislation.[24] Third, Justice White asserted, this legislative response "negates any claim that the mentally retarded are politically powerless."[25] Finally, to deem mental retardation a quasi-suspect classification would send the Court down a slippery slope to heightened scrutiny for, among others, "the aging, the disabled, the mentally ill, and the infirm."[26]

After explicitly declining to apply heightened scrutiny to the Cleburne ordinance, the majority inquired whether the city had a rational basis for requiring the group home to obtain a special use permit.[27] Although the city was motivated by the negative attitudes of those who owned property near the proposed group home and the fears of elderly residents of the neighborhood, the majority held that the city had no legitimate interest in deferring to the unsubstantiated biases or fears of its citizens.[28] Likewise, the city could not legitimately deny a special use permit based on its fear that students at the junior high school across the street would harass the occupants of the group home.[29] The city also claimed to be worried about the home's location on a flood plain, but Justice White observed that a flood would equally affect a nursing home or hospital, either of which could be established on the site of the proposed group home without a special use permit.[30] Finally, the city expressed concern that the high occupancy of the group home might disturb the serenity of the neighborhood and cause traffic congestion, fire hazards, and danger to other residents.[31] However, the majority found that denying a permit to the group home did not rationally further its interest

[22] *Id.*
[23] *Id.* at 443.
[24] *Id.* at 443-44.
[25] *Id.* at 445.
[26] *Id.* at 445-46.
[27] *Id.* at 448.
[28] *Id.*
[29] *Id.* at 449.
[30] *Id.*
[31] *Id.* at 449-50.

in regulating population density, because a home containing the same number of non-retarded occupants would be permitted under the zoning ordinance.[32] The majority concluded, therefore, that the city could only have been motivated by "an irrational prejudice against the mentally retarded."[33]

Nevertheless, the majority declined to decide whether Cleburne's zoning ordinance facially violated the Equal Protection Clause. Maintaining that an as-applied ruling "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments,"[34] the majority invalidated the application of the ordinance to the group home but allowed the ordinance to remain on the books.[35]

In a concurring opinion, Justice John Paul Stevens (joined by Chief Justice Warren E. Burger) argued for a universal rational-basis standard to replace the Court's traditional tiered system of equal protection analysis.[36] However, Justice Stevens agreed that the city of Cleburne had required CLC to obtain a special use permit "because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in [the group] home."[37] Thus, he joined the majority in holding that Cleburne's ordinance was invalid as applied.[38]

Justice Thurgood Marshall, writing for himself and Justices Brennan and Blackmun, concurred in the judgment in part and dissented in part.[39] He opined that the majority's explicit rejection of heightened scrutiny was "wholly superfluous to the decision of this case" because the majority found rational-basis review sufficient to invalidate the city's action.[40] Moreover, Justice Marshall questioned whether the majority actually applied a minimum level of scrutiny as it claimed.[41] Instead of presuming that the ordinance was constitutional, as is traditionally the case with minimal scrutiny,[42] the majority presumed just the opposite and

[32] *Id.*

[33] *Id.* at 450.

[34] *Id.* at 447.

[35] *Id.* at 450.

[36] *Id.* at 452 (Stevens, J., concurring).

[37] *Id.* at 455.

[38] *Id.*

[39] *Id.* (Marshall, J., concurring and dissenting).

[40] *Id.* at 456.

[41] *Id.*

[42] *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions . . . our decisions presume the constitutionality of the statutory discriminations and require only that the classification

then found the city's proffered justifications "difficult to believe."[43] Additionally, the majority implied that the city could not take "one step at a time" to regulate population density, as is usually permitted under the rational-basis test.[44] Justice Marshall termed this approach "'second order' rational-basis review" and criticized the majority for failing to provide guidance to the lower courts as to which level of rational-basis review to apply in a given case.[45]

Justice Marshall contended that a zoning ordinance that classifies on the basis of mental retardation should be subject to intermediate-level scrutiny for two reasons. First, the interest of the mentally retarded in establishing group homes is significant because group homes are the primary means by which mentally retarded persons can fully participate in the community at large.[46] Second, "the mentally retarded have been subject to a lengthy and tragic history of segregation and discrimination,"[47] including such horrors as warehousing and sterilization.[48] Indeed, noted Justice Marshall, archaic and narrow-minded laws — including the one at issue in this case[49] — remained on the books in many states.[50]

Justice Marshall criticized the majority's reasoning in concluding that mental retardation was not a quasi-suspect classification.[51] He rejected the notion that a recent increase in legislative initiatives that benefited the mentally retarded should preclude the application of heightened scrutiny to such classifications.[52] Legislatures had grown more enlightened in their treatment of African Americans too, and yet the Court still regarded race-based distinctions as suspect.[53] Furthermore, Justice Marshall observed, the mere fact that governments sometimes have a valid reason to classify on the basis of mental retardation did not mean that the courts must apply rational-basis review to every such classification: "Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage because the Court views the trait

challenged be rationally related to a legitimate state interest.").

[43] *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring and dissenting).

[44] *Id.* at 458.

[45] *Id.* at 460.

[46] *Id.* at 461.

[47] *Id.* (internal quotation marks and citation omitted).

[48] *Id.* at 462-63.

[49] *Id.* at 464 n.17.

[50] *Id.* at 467.

[51] *See id.* at 472-73.

[52] *Id.* at 465-67.

[53] *Id.*

as relevant under some circumstances but not others."[54]

Finally, Justice Marshall expressed his disapproval of the majority's decision to strike down the ordinance on an as-applied basis, an unprecedented maneuver in the equal protection context.[55] According to Justice Marshall, "If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the Equal Protection Clause and cannot validly be applied to anyone."[56] Justices Marshall, Brennan, and Blackmun were not alone in their condemnation of the *Cleburne* majority opinion.

II. REACTIONS TO *CLEBURNE*

Disability rights advocates praised the Court's result,[57] but members of the legal community immediately panned its reasoning. One commentator wrote, "The Court made only a feeble attempt to argue that mental retardation does not meet the traditional indicia of suspectness."[58] He and others believed that the Court should have explicitly applied intermediate-level scrutiny to the zoning ordinance for a number of reasons. Echoing Justice Marshall's dissent, they argued that legislative initiatives benefiting the mentally retarded should not preclude heightened scrutiny; women and racial minorities receive special protection from the courts despite the passage of laws intended to benefit them.[59] The Harvard Law Review Association maintained that the Court's focus on remedial legislative action was dangerous because "[l]egislative reforms may prove short-lived, and even well-intentioned legislation can be mis-

[54] *Id.* at 469.

[55] *Id.* at 476.

[56] *Id.* at 477 n.25.

[57] A lawyer with the Washington-based Mental Health Law Project (now known as the Bazelon Center for Mental Health Law) said that the ruling would "make it easier to establish group homes in cities." *Court Builds Higher Church-State Wall*, U.S. NEWS & WORLD REP., July 15, 1985, at 11. The supervising attorney for Advocacy, Inc., of Austin, Texas, said, "We're very pleased, of course, that the justices have given out the message that the retarded aren't second-class citizens and can't be pushed aside into industrial areas of the city." Philip Hager, *Justices Refuse to Extend Bias Safeguard to Retarded*, L.A. TIMES, July 2, 1985, at 1. Jan Hannah herself greeted the decision as a victory, stating, "I'm about to float out of the atmosphere." David Hanners, *Home's Co-Owner Rejoices*, DALL. MORNING NEWS, July 2, 1985, at A11.

[58] James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 376-77 (1986).

[59] *Id.* at 380; J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications on That Basis Are Subject to Rational Basis Limitations,* 17 ST. MARY'S L.J. 1053, 1074 (1986); Harvard Law Review Ass'n, *Discrimination Against the Mentally Retarded*, 99 HARV. L. REV. 161, 168 (1985); Mark V. Wunder, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in* City of Cleburne v. Cleburne Living Center, 72 IOWA L. REV. 241, 251 (1986).

applied."[60] Commentators were also troubled by the majority's conclusion that the mentally retarded had political power.[61] After all, persons with mental retardation were still ineligible to vote in twenty-six states as of 1979.[62] Moreover, prejudice toward the mentally retarded was still very much alive, as evidenced by widespread community resistance to the establishment of group homes.[63] To these commentators, the Court's pronouncement that the immutability of a group's defining characteristic was irrelevant to a determination of suspectness seemed to fly in the face of its earlier decisions.[64] Finally, they asserted, the denial of an important right (freedom to establish a home) should have justified the use of a

[60] Harvard Law Review Ass'n, *Discrimination Against the Mentally Retarded*, 99 HARV. L. REV. 161, 168 (1985).

[61] Marie Appleby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 110 (1987); James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 379 (1986); J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications on That Basis Are Subject to Rational Basis Limitations,* 17 ST. MARY'S L.J. 1053, 1075 (1986); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793 (1987); Mark V. Wunder, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in* City of Cleburne v. Cleburne Living Center, 72 IOWA L. REV. 241, 251-52 (1986).

[62] Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1645-46, n.10 (1979) ("States that refer to idiots or insane persons include: Alabama (ALA. CONST. art. VIII, § 182); Arkansas (ARK. CONST. art. 3, § 5); Delaware (DEL. CONST. art. V, § 2); Georgia (GA. CONST. art. II, § 2, para. 1); Idaho (IDAHO CONST. art. VI, § 3); Iowa (IOWA CONST. art. 2, § 5); Kentucky (KY. CONST. § 145); Mississippi (MISS. CONST. art. 12, § 241); Nevada (NEV. CONST. art. 2, § 1); New Jersey (N.J. CONST. art. II, para. 6); New Mexico (N.M. CONST. art. VII, § 1); Ohio (OHIO CONST. art. V, § 6); Texas (TEX. CONST. art. VI, § 1); Washington (WASH. CONST. art. VI, § 3); Wyoming (WYO. CONST. art. 6, § 6). States that refer to persons non compos[ ]mentis or mentally diseased include: Alaska (ALASKA CONST. art. V, § 2); Arizona (ARIZ. CONST. art. VII, § 2 (non compos[ ]mentis or insane)); Hawaii (HAWAII CONST. art. II, §2); Minnesota (MINN. CONST. art. VII, § 1; Minn. Stat. Ann. § 200.02(25)(b) (West Supp/1978)); Montana (MONT. CONST. art. IV, § 2); Nebraska (NEB. CONST. art. VI, § 2); North Dakota (N.D. CONST. § 127 (non compos[ ]mentis or insane)); Oregon (OR. CONST. art. II, § 3 (idiot or mentally diseased)); Rhode Island (R.I. CONST. amend. 38, § 1); West Virginia (W. VA. CONST. art. IV, § 1); Wisconsin (WIS. CONST. art. Ill, § 2 (non compos[ ]mentis or insane)).")

[63] James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 380 (1986); Mark V. Wunder, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in* City of Cleburne v. Cleburne Living Center, 72 IOWA L. REV. 241, 250 (1986).

[64] Marie Appleby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 110 (1987); James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 379 (1986); J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications on That Basis Are Subject to Rational Basis Limitations*, 17 ST. MARY'S L.J. 1053, 1073 (1986); Harvard Law Review Ass'n, *Discrimination Against the Mentally Retarded*, 99 HARV. L. REV. 161, 167 (1985); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793 (1987).

heightened level of scrutiny.[65]

Like Justice Marshall, observers in the legal community argued that the majority's unnecessary holding as to the proper standard of review contravened the Court's established preference for deciding constitutional cases on the narrowest possible ground.[66] They also condemned the Court for claiming to use rational-basis review while actually scrutinizing the city's action more searchingly.[67] The majority's disingenuousness, commentators feared, would lead to doctrinal confusion among the lower courts.[68] Additionally, many observers criticized the majority for departing from equal protection precedent by striking down a law only as applied.[69]

III. EXPLAINING *CLEBURNE*

If the majority opinion in *Cleburne* was immediately criticized as inconsistent with equal protection jurisprudence, then how can it be explained? This Article proposes that the majority's deviation from time-honored principles of constitutional decision making can be attributed to three interrelated factors. First, the Court decided *Cleburne* during a period of widespread and open animosity to the establishment of group homes for the mentally retarded, a phenomenon often referred to as "not

[65] Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793 (1987); Mark V. Wunder, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in* City of Cleburne v. Cleburne Living Center, 72 IOWA L. REV. 241, 248-49 (1986).

[66] James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 382 (1986); J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification*, 17 ST. MARY'S L.J. 1053, 1070 (1986).

[67] Marie Appleby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 131 (1987); J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications on That Basis Are Subject to Rational Basis Limitations*, 17 ST. MARY'S L.J. 1053, 1079-83 (1986); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987).

[68] Marie Appleby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 131 (1987); J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications on That Basis Are Subject to Rational Basis Limitations*, 17 ST. MARY'S L.J. 1053, 1079-83 (1986); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987).

[69] J. Daniel Harkins, Case Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications on That Basis Are Subject to Rational Basis Limitations*, 17 ST. MARY'S L.J. 1053, 1076-79 (1986); Harvard Law Review Ass'n, *Discrimination Against the Mentally Retarded*, 99 HARV. L. REV. 161, 170-71 (1985); John D. Wilson, *Cleburne: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 188-89 (1986).

in my back yard," or "NIMBY."[70] Second, the Court was also influenced by the political stance of the Reagan Administration, which was one of indifference to the needs of the mentally retarded and other disabled individuals. Third, the decision was written by Justice White, whose opinions revealed an idiosyncratic attachment to the rational-basis test.

A. NEIGHBORHOOD OPPOSITION

The 1970s and 1980s saw a flurry of court orders requiring states to close down their mental institutions and integrate their mentally retarded citizens into society at large.[71] Yet many Americans abhorred the prospect of sharing their neighborhoods with mentally retarded persons.[72] This section describes the measures to which residents of states such as New York, New Jersey, Florida, and Texas resorted to prevent group homes from opening in their communities. The lingering prejudices of the American populace evidenced in these stories might have induced the Court, ever cautious of outpacing public opinion, to refuse quasi-suspect status to classifications based on mental retardation.

Beginning in the 1920s, states built massive facilities to house the mentally retarded — or, more accurately, to protect society from the promiscuous and criminal impulses that mentally retarded persons were thought to exhibit.[73] These facilities were generally overcrowded, understaffed, unhygienic, devoid of intellectual stimulation, and rife with physical and emotional abuse.[74] Because the goal was to detain the mentally retarded for life, states saw no reason to treat them humanely or develop their capabilities.[75]

In the 1970s, a wave of class action lawsuits and pressure from disability rights groups exposed the horrendous conditions in which institutionalized mentally retarded persons lived.[76] Over the next decade, ad-

[70] NAT'L CONFERENCE OF STATE LEGISLATURES, DEINSTITUTIONALIZATION OF PERSONS WITH DEVELOPMENTAL DISABILITIES: A TECHNICAL ASSISTANCE REPORT FOR LEGISLATORS 28 (2000), *available at* http://www.mnddc.org/parallels2/pdf/00s/00/00-DPD-NCS.pdf.

[71] *See* Joann S. Lublin, *Group Homes That Serve the Mentally Ill Face New Barriers in Some Communities*, WALL ST. J., Dec. 12, 1986, at 1; Samuel Jan Brakel, *Involuntary Institutionalization*, THE MENTALLY DISABLED AND THE LAW 47 (Samuel Jan Brakel et al. eds., 3d ed. 1985).

[72] *See* U.S. GENERAL ACCOUNTING OFFICE, AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 9-10 (1983), *available at* http://archive.gao.gov/f0102/122220.pdf.

[73] ISSAM B. AMARY, THE RIGHTS OF THE MENTALLY RETARDED-DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 6 (1980).

[74] *Id.*

[75] *See id.*

[76] *Id.* at 8-9; Barbara A. Weiner, *Rights of Institutionalized Persons, in* THE MENTALLY DISABLED AND THE LAW 251, 251 (Samuel Jan Brakel et al. eds., 3d ed. 1985).

vocates for the mentally retarded brought legal challenges seeking at first to reform these public institutions, and later to replace institutionalized care with community-based services.[77] Approximately two thirds of the nation's institutionalized mentally ill and retarded patients were released into the community during the 1970s, usually by court order,[78] and the number of group homes for the mentally retarded multiplied by ten.[79] In 1975, the Governor of New York signed a consent decree that required the state to relocate the 5,323 residents of Willowbrook State School for the Mentally Retarded to neighborhood group homes at the rate of fifty people per month.[80] Pursuant to a similar consent decree approved in 1977, Massachusetts reassigned 850 mentally retarded individuals from state schools to community residences.[81] In 1978, a court in Washington, D.C., ordered the city to release at least 100 residents per year from its 1,300-bed facility for the mentally retarded.[82]

The pace of deinstitutionalization was often slower than anticipated, largely due to fierce resistance from neighborhood residents and local governments.[83] However, the transfer of mentally retarded persons out of institutions was somewhat hastened by the economic recession in the early 1980s; community-based care cost states less than institutional

[77] ISSAM B. AMARY, THE RIGHTS OF THE MENTALLY RETARDED-DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 8-9 (1980); Samuel Jan Brakel, *Involuntary Institutionalization, in* THE MENTALLY DISABLED AND THE LAW, 21, 21-23, 40 (Samuel Jan Brakel et al. eds., 3d ed. 1985). By 1983, litigation concerning the operations of public institutions for the mentally retarded had been filed in at least thirty-two states. STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 5 (1983).

[78] Joann S. Lublin, *Group Homes That Serve the Mentally Ill Face New Barriers in Some Communities*, WALL ST. J., Dec. 12, 1986, at 1; *see also* Samuel Jan Brakel, *Involuntary Institutionalization*, *in* THE MENTALLY DISABLED AND THE LAW, 47 (Samuel Jan Brakel et al. eds., 3d ed. 1985) (reporting that the number of patients in public mental institutions dropped from 551 in 1956 to 153 in 1978).

[79] Researchers counted 611 community residential facilities for persons with mental retardation in 1972-74 and as many as 6,300 in 1982. MATTHEW P. JANICKI ET AL., A REPORT ON THE AVAILABILITY OF GROUP HOMES FOR PERSONS WITH MENTAL RETARDATION IN THE UNITED STATES 10 (1982), *available at* http://www.eric.ed.gov/PDFS/ED231157.pdf.

[80] Robert Keating, *The War Against the Mentally Retarded*, N.Y. MAG., Sept. 17, 1979, at 89-90 (noting that at the time, Willowbrook was the world's largest residential institution for the mentally retarded); s*ee also* STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 41 (1983).

[81] Jean Dietz, *Families Object to Plans for Handicapped*, BOSTON GLOBE, Aug. 4, 1985, at 26.

[82] Patrice Gaines-Carter, *Group-Home Bill Emotionally Debated*, WASH. POST, Mar. 21, 1986, at D3; John Purnell, *District's Home for Retarded Finally Is Closed*, WASH. TIMES, Sept. 29, 1991, at A11.

[83] David Kirkwood, *Home Sites for the Retarded Still Raise Fears*, N.Y. TIMES, July 15, 1979, at WC16 (noting that only four years after the Willowbrook consent decree was entered, deinstitutionalization in New York was already behind schedule); s*ee also* Robert Keating, *The War Against the Mentally Retarded*, N.Y. MAG., Sept. 17, 1979, at 90.

care.[84] Some states, like Michigan, voluntarily began to close down their state institutions during that period,[85] and class actions that had been filed against institutions in the 1970s continued to be resolved in favor of the patients.[86] Therefore, even though several court orders that mandated deinstitutionalization were handed down in the late 1970s, the zenith of community integration of mentally retarded individuals — and opposition thereto — occurred in the 1980s, when *Cleburne* was decided.

A 1983 report issued by the U.S. General Accounting Office[87] found that 37% of group home sponsors who participated in public hearings relating to establishment of their group homes faced considerable resistance from community members.[88] The most common objections raised by these opponents concerned dangerous or unusual behavior of group home residents, declining real estate value, and an increase in automobile traffic.[89] The same percentage of group homes prompted community complaints after opening; again, these complaints usually related to the perceived dangerous or unusual behavior of the residents.[90] The U.S. General Accounting Office also concluded that state preemptive zoning laws, which prohibited localities from excluding group homes from residential areas, actually increased community opposition

[84] NAT'L CONFERENCE OF STATE LEGISLATURES, DEINSTITUTIONALIZATION OF PERSONS WITH DEVELOPMENTAL DISABILITIES: A TECHNICAL ASSISTANCE REPORT FOR LEGISLATORS 13-14 (2000), *available at* http://www.mnddc.org/parallels2/pdf/00s/00/00-DPD-NCS.pdf; NEW YORK STATE COMMISSION ON QUALITY OF CARE FOR THE MENTALLY DISABLED, WILLOWBROOK: FROM INSTITUTION TO THE COMMUNITY; A FISCAL AND PROGRAMMATIC REVIEW OF SELECTED COMMUNITY RESIDENCES IN NEW YORK CITY 75 (1982).

[85] NAT'L CONFERENCE OF STATE LEGISLATURES, DEINSTITUTIONALIZATION OF PERSONS WITH DEVELOPMENTAL DISABILITIES: A TECHNICAL ASSISTANCE REPORT FOR LEGISLATORS 17 (2000), *available at* http://www.mnddc.org/parallels2/pdf/00s/00/00-DPD-NCS.pdf.

[86] In 1984, Pennsylvania settled a case brought by residents of the Pennhurst Center for the mentally retarded, agreeing to close the institution within two years. *Accord in Suit Ends 11 Years of Dispute over the Retarded*, N.Y. TIMES, Apr. 6, 1985. Pennhurst had been plagued for years by allegations of neglect, forced labor, and physical assault. William Robbins, *Center for Retarded Still Enmeshed in Legal Battle*, N.Y. TIMES, Sept. 28, 1981; *Workers Indicted in Patient Abuse*, N.Y. TIMES, Nov. 4, 1983. In a 1985 consent decree, Maryland promised to increase community residential placements for the mentally retarded threefold. Brief for the State of Md. as Amicus Curiae Supporting Respondents, City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468). A 1987 settlement in Minnesota required the state to reduce the number of mentally retarded people in its regional centers to two hundred. M. L. Smith, *Court's Jurisdiction over Retarded Ends*, STAR TRIB., Aug. 26, 1989, at 01A.

[87] This agency is now known as the U.S. Government Accountability Office.

[88] U.S. GENERAL ACCOUNTING OFFICE, AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 9-10 (1983), *available at* http://archive.gao.gov/f0102/122220.pdf.

[89] *Id.* at 10.

[90] *Id.*

to group homes, especially in suburban areas.[91]

The difficulties that New York encountered in attempting to place Willowbrook residents in community-based housing are instructive. In 1980, when the state reached an agreement to buy a house in Rockville Centre to accommodate mentally retarded individuals, eighteen neighbors formed a company "whose sole purpose was to buy the house and sell it to anyone but the state."[92] The state had to seek an order against the company in federal court before it could establish the group home.[93]

In 1981, New York State tried to purchase a house for use as a group home in an upper-middle-class community in the Five Towns area; however, the owner refused to sell it to the state and ultimately took it off the market.[94] A county official said that establishing a group home was "like pulling teeth — with few exceptions, every community does not want these homes."[95] The state's two previous attempts to purchase houses in the Five Towns had failed because of resistance from the owners as well as the communities at large.[96]

Also in 1981, the town of Pound Ridge, New York, successfully challenged the placement of a community residence for six developmentally disabled young adults.[97] The Town Supervisor stated, "We would like not to have any group homes in Pound Ridge. But if we have to have [one] . . . we would rather have it in a place where it would not offend people."[98] The town proposed to relocate the group home from "one of the finer neighborhoods" to an infrequently traveled dirt road on the outskirts of Pound Ridge.[99] Residents of that fine neighborhood had been making obscene phone calls to the group home, yelling profanities from their cars, and throwing beer cans at the house.[100] However, the

[91] *Id.* at 24-25.

[92] Phyllis Bernstein, *Home for Retarded Stirs Cedarhurst*, N.Y. TIMES, July 19, 1981, *available at* http://www.nytimes.com/1981/07/19/nyregion/home-for-retarded-stirs-cedarhurst.html (internal quotation marks omitted).

[93] *Judge Orders Sale of House to State*, N.Y. TIMES, Nov. 25, 1981.

[94] Phyllis Bernstein, *Home for Retarded Stirs Cedarhurst*, N.Y. TIMES, July 19, 1981, *available at* http://www.nytimes.com/1981/07/19/nyregion/home-for-retarded-stirs-cedarhurst.html (internal quotation marks omitted); *Long Island Journal*, N.Y. TIMES, Aug. 23, 1981.

[95] Phyllis Bernstein, *Home for Retarded Stirs Cedarhurst*, N.Y. TIMES, July 19, 1981, *available at* http://www.nytimes.com/1981/07/19/nyregion/home-for-retarded-stirs-cedarhurst.html (internal quotation marks omitted).

[96] *Id.*

[97] J. B. O'Mahoney, *Pound Ridge Group Home in Dispute*, N.Y. TIMES, June 28, 1981, at A1.

[98] *Id.*

[99] *Id.*

[100] *Id.*

community reaction could have been even worse: elsewhere in New York, property owners who planned to sell their houses for use as group homes, board members voting to approve group homes, and their family members received death threats, bomb threats, broken windows, and brutal beatings.[101]

New York was not the only state whose communities were inhospitable to the mentally retarded. In 1982, the citizens of New Providence, New Jersey, rallied against a plan to open a group home by organizing meetings, signing petitions, and writing letters to local, state, and federal officials.[102] Like the inhabitants of Rockville Centre, they tried to buy the house before the group-home organization could finalize the deal.[103] Neighbors protested that the home would "destroy the character of the neighborhood" and diminish the values of their properties.[104] While conceding that the home "may be good for the retarded people," they argued that it should not be located "in a nice neighborhood like this."[105]

Arson was a common tactic used by particularly virulent opponents of group homes for the mentally retarded. In 1978, someone entered a soon-to-open group home in Huntington, Long Island, poured gasoline throughout the first floor, and set the house on fire.[106] In 1985, arsonists burned down a group home for the mentally retarded near Tallahassee, Florida, shortly before it was scheduled to open.[107] About a month before the fire, sixty neighborhood residents had met with county officials to express fears that the group home would lower property values and that the occupants would be dangerous.[108] After the fire, one neighborhood resident said, "Just because the building burned doesn't mean the fight is over."[109] In 1989, in the same Five Towns area of New York whose communities had resisted group homes earlier in the decade, a group home being prepared for mentally retarded adults was set ablaze.[110]

[101] Robert Keating, *The War Against the Mentally Retarded*, N.Y. MAG., Sept. 17, 1979, at 87-88.

[102] *Housing a Home*, N.Y. TIMES, Feb. 2, 1982, *available at* http://www.nytimes.com/1982/02/02/nyregion/housing-a-home.html.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] Robert Keating, *The War Against the Mentally Retarded*, N.Y. MAG., Sept. 17, 1979, at 87-88.

[107] Bill Kaczor, *Florida Drops Plans for AIDS Group Home*, GAINESVILLE SUN, Nov. 7, 1987, at 5B; *Reward Offered for Arsonist*, SARASOTA HERALD-TRIB., Jan. 30, 1985, at 9B.

[108] *Reward Offered for Arsonist*, SARASOTA HERALD-TRIB., Jan. 30, 1985, at 9B.

[109] *Id.*

[110] Michael Winerip, *L.I. Police Suspect Arson in Blaze at Site of a Proposed Group Home*,

Newspaper accounts of the fight over the Cleburne home tell a similar story of ignorance and prejudice. During the public hearing on CLC's special use permit application, one Cleburne resident told the Cleburne Planning and Zoning Commission, "It's not a very pleasant thought to go to bed and know there's thirteen demented, self-afflicted people across the street from you."[111] A dentist with a nearby office presented the commission with a petition signed by twenty-nine families opposed to the group home.[112] The principal of Cleburne Junior High School, located across the street from the proposed group home, claimed to be worried about the way his seventh- and eighth-graders might treat the residents of the home.[113] He acknowledged that the group home was needed but wondered, "Is it needed at this site?"[114] A 65-year-old man who lived three doors away told the Associated Press:

> The older women are fearful of this thing. There are a lot of older women in this neighborhood and they don't want these people around. If these people get by with this, all cities might as well do away with their laws. We've lived here all our lives and I don't know why we should be subjected to this. With retarded people, you don't ever know when they're going to do something.[115]

All told, a majority of property owners within 200 feet of the group home requested that the City Council deny CLC a special use permit.[116] Even as the city denied discriminating against the mentally retarded,[117] it justified its actions by arguing that "the mentally retarded by definition possess significantly subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior," and that "[t]hese unique characteristics . . . affect the health, safety and general welfare" of "surrounding neighbors" in unspecified ways.[118]

Many legal scholars and political scientists have observed that Su-

N.Y. TIMES, Feb. 22, 1989, *available at* http://www.nytimes.com/1989/02/22/nyregion/li-police-suspect-arson-in-blaze-at-site-of-a-proposed-group-home.html.

[111] Richard Carelli, *Texas Town Divided over Proposed Group Home*, DAILY NEWS (BOWLING GREEN, KY.), May 5, 1985, at 23-B.

[112] *Id.*

[113] *Court to Rule on Texas Zoning Ban for Retarded*, N.Y. TIMES, Nov. 27, 1984, *available at* http://www.nytimes.com/1984/11/27/us/court-to-rule-on-texas-zoning-ban-for-retarded.html.

[114] *Id.*

[115] *Decision May Settle Disputes*, ROME NEWS-TRIB., Nov. 21, 1984, at 22-E.

[116] Reply Brief for Petitioners at 9, City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468).

[117] *Id.* at 5.

[118] *Id.* at 5-6.

preme Court decisions generally align with popular opinion.[119] In Professor Barry Friedman's words, "The Justices live on this planet and typically are aware of what happens on it."[120] Public opinion of the mentally retarded had certainly improved by the 1980s — few advocated forced sterilization, for instance — but antiquated notions of mentally retarded persons as dangerous, unpredictable, and unsightly persisted in the American consciousness. Perhaps it should not be surprising, therefore, that the *Cleburne* majority, even as it frowned upon the "irrational prejudice" of the citizens of Cleburne, went out of its way to hold that mentally retarded individuals did not deserve special consideration under the Equal Protection Clause and left the city's discriminatory zoning ordinance on the books. The opinion, with a wink and a nudge, invited Cleburne and other cities to continue to exclude mentally retarded persons from respectable neighborhoods, so long as they did this by applying more cleverly constructed ordinances in a more subtle way. Just as Americans were not ready to let mentally retarded persons move in next door, the Justices in the majority were not ready to extend to mentally retarded persons the constitutional status they deserved.

B. THE REAGAN ADMINISTRATION

Through the 1960s and 1970s, the federal government was increasingly attentive to the problems facing mentally retarded Americans.[121] When Ronald Reagan became president, however, his Administration radically reduced federal funding for programs and services for the mentally retarded and abandoned its duty to enforce disability rights laws.[122]

[119] *See* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1294-95 (2004); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019-21 (2004); Robert F. Nagel, *Limiting the Court by Limiting Life Tenure*, *in* REFORMING THE COURT 131 (Roger C. Cramton & Paul D. Carrington eds., 2006); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006).

[120] Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 325 (2005).

[121] *See, e.g.*, PRESIDENT'S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION 201 (1962); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, § 3 (1975); The Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486, § 113 (1975); The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, § 504 (1973); Pub. L. No. 92-223, 85 Stat. 802 (1971).

[122] *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 396 n.20 (1991) ("The federal government's virtual abdication of administrative enforcement efforts for disability rights is well-documented, both in congressional hearings and in scholarly articles. *See, e.g.*, [Robert D. Dinerstein,] *The Absence of Justice*, 63 NEB. L. REV. 680 (1984) (during Reagan Administration, historic position of Justice Department as protector of rights of institutionalized persons eroded substantially).").

Furthermore, the Reagan Administration explicitly urged the Court in *Cleburne* to apply only rational-basis review.[123] It is likely that the executive's disregard for the special needs of persons with mental retardation helped spur the Court to grant deference to legislative action discriminating against those persons.

Federal action in the field of mental retardation and developmental disabilities proliferated beginning in 1961 with the establishment of the President's Panel on Mental Retardation.[124] The panel consisted of twenty-seven physicians, scientists, educators, lawyers, and consumers, tasked by President John F. Kennedy with charting a "comprehensive and coordinated attack on the problem of mental retardation."[125] Many of the panel's recommendations were enacted into law in 1963[126] as part of the Maternal and Child Health and Mental Retardation Planning Amendments[127] and the Mental Retardation Facilities and Community Mental Health Centers Construction Act.[128] These and other federal initiatives funded institutions around the country that agreed to comply with a set of guidelines designed to raise the quality of education and treatment provided to mentally retarded persons housed in their facilities.[129] In the 1970s, Congress enacted laws to reimburse state intermediate-care facilities that provided "active treatment" to the mentally retarded;[130] to prohibit disability discrimination by federal agencies, federal contractors, and programs receiving federal financial assistance;[131] to subsidize state "protection and advocacy" programs for the developmentally disabled and mentally retarded;[132] and to require all federally funded public schools to provide equal access to education for disabled children.[133]

[123] Brief for the United States as Amicus Curiae Supporting Reversal, City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468).

[124] PRESIDENT'S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION 201 (1962).

[125] *Id.*; *see also* DAVID BRADDOCK, FEDERAL POLICY TOWARD MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 17 (1987).

[126] David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, *in* HANDBOOK OF DISABILITY STUDIES 11, 46 (Gary L. Albrecht et al. eds., 2001).

[127] Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Pub. L. No. 88-156, 77 Stat. 273 (1963).

[128] Mental Retardation Facilities Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).

[129] ISSAM B. AMARY, THE RIGHTS OF THE MENTALLY RETARDED-DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION vii (1980).

[130] Pub. L. No. 92-223, 85 Stat. 802 (1971).

[131] The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, § 504 (1973).

[132] The Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486, § 113 (1975).

[133] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, §

In 1981, however, President Reagan took office, announcing in his first inaugural address that he intended "to curb the size and influence of the Federal establishment."[134] By the "Federal establishment," he meant not the military (defense spending increased by 40% during his two terms in office)[135] but rather entitlement programs and social services, including those that catered to the mentally retarded. The President immediately launched a multipronged campaign to restrict federal financial support for mental retardation programs and services. His first budget[136] called for large multipurpose block grants, which offered the states more flexible administration but less money in the areas of social services, health care, and mental health.[137] During President Reagan's first term, federal spending on special education,[138] special recreation,[139] intermediate-care facilities,[140] the training of mental retardation personnel,[141] and income maintenance for mentally retarded persons[142] stagnated or declined. Whereas total federal funding for services for the mentally retarded had increased at an average rate of 15.5% per year from fiscal year ("FY") 1972 to FY 1980,[143] it actually decreased in practical terms every year between FY 1981 and FY 1985, after taking inflation into ac-

3 (1975).

[134] President Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *available at* http://www.bartleby.com/124/ pres61.html.

[135] Greg Schneider and Renae Merle, *Reagan's Defense Buildup Bridged Military Eras*, WASH. POST, June 9, 2004, at E01.

[136] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

[137] DAVID BRADDOCK, FEDERAL POLICY TOWARD MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 26 (1987).

[138] In real economic terms, federal assistance for special education for mentally retarded children "peaked in FY [fiscal year] 1980 and fell steadily every year thereafter through FY 1985." *Id.* at 39.

[139] The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955, § 305 (1978) (authorized grants to state agencies and to public or nonprofit organizations for the development of programs to provide disabled individuals with recreational activities to improve their mobility and socialization). The Reagan Administration, however, did not request any funding for this program from FY 1981 to FY 1984. DAVID BRADDOCK, FEDERAL POLICY TOWARD MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 119 (1987).

[140] From FY 1982 to FY 1985, real growth in intermediate-care facility reimbursements averaged only 1.4% annually, compared with over 56% annually between FY 1972 and FY 1981. DAVID BRADDOCK, FEDERAL POLICY TOWARD MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 57, 59 (1987).

[141] From FY 1980 to FY 1983, federal support for the training of personnel in mental retardation fell 17%. Adjusted FY 1984-85 funding levels "represented the smallest spending commitment for training in 22 years." *Id.*

[142] The rate of growth in federal income maintenance spending for persons with mental retardation averaged 34% per year in the 1950s, 12% per year in the 1960s, 10% per year in the 1970s, and only 2.2% per year during the first half of the 1980s. *Id.* at 133.

[143] *Id*. at 32.

count.[144] In FY 1982, the percentage of the federal government's total annual budget devoted to financing mental-retardation-related activities fell for the first time in thirty years.[145] Moreover, a disproportionately large share of federal spending for the mentally retarded went toward the relatively small proportion of mentally retarded persons living in state-run institutions.[146]

Meanwhile, President Reagan's policy of deregulation led to a "virtual abdication of administrative enforcement efforts for disability rights."[147] The Reagan Administration asserted, at a time when states were still consigning mentally retarded persons to unnecessarily restrictive institutional settings without due process, that "federal regulatory and judicial roles [could] safely recede because states already provide[d] adequate legal protection for their needy citizens."[148] Accordingly, the President established a Task Force for Regulatory Relief and instructed it to "dismantle such administrative monstrosities as affirmative action" for disabled federal employees and contractors.[149] Administration officials not only proposed a drastic curtailment of the federal government's functions in implementing the Education for All Handicapped Children Act of 1975,[150] but also attempted to dilute equal-access provisions of other laws relating to health and social services, recreational programs, employment, and program accessibility.[151]

Additionally, President Reagan sought to eradicate the Legal Services Corporation ("LSC"),[152] the federally operated legal aid organization, which was under a congressional mandate to provide "priority service" to persons with disabilities.[153] When his effort to destroy the LSC failed, he slashed funding for it and appointed a board of directors who

[144] *See* Inflation Data, Historical U.S. Inflation Rate 1914-Present, http://inflationdata.com/inflation/Inflation_Rate/HistoricalInflation.aspx?dsInflation_currentPage=2 (last visited Oct. 22, 2010).

[145] DAVID BRADDOCK, FEDERAL POLICY TOWARD MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 57, 181-82 (1987).

[146] *Id.* at 183.

[147] Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 396 n.20 (1991).

[148] STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 78 (1983).

[149] Edward D. Berkowitz, *A Historical Preface to the Americans with Disabilities Act*, *in* CIVIL RIGHTS IN THE UNITED STATES 96, 107-08 (Hugh Davis Graham ed., 1994).

[150] Otis H. Stephens, *Discrimination, Affirmative Action, and the Disabled*, *in* THE REAGAN ADMINISTRATION AND HUMAN RIGHTS 157, 166 (Tinsley E. Yarbrough ed., 1985).

[151] STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 169-70 (1983).

[152] Kimberly McKelvey, Comment, *Public Interest Lawyering in the United States and Montana: Past, Present and Future*, 67 MONT. L. REV. 337, 344 (2006).

[153] John Parry, *Rights and Entitlements in the Community, in* THE MENTALLY DISABLED AND THE LAW, 607, 680, 683 (Samuel Jan Brakel et al. eds., 3d ed. 1985).

openly opposed the very existence of the organization they headed.[154] One disability law expert characterized this campaign against the LSC as typical of the Reagan Administration's "sophisticated and steady attack on the roots of the disability rights movement."[155]

Other courses of action taken by the Reagan Administration similarly reflected a withdrawal of support for the mentally retarded and other disabled persons. In 1981, for example, the Reagan-era Social Security Administration tried to terminate disability benefits for a significant number of legitimate recipients.[156] In a 1984 Supreme Court case, *Grove City College v. Bell*,[157] President Reagan's Secretary of Education successfully argued for a narrow interpretation of the coverage provisions of Section 504 of the Rehabilitation Act and other anti-discrimination statutes.[158] Four years later, when Congress passed the Civil Rights Restoration Act, which would have overturned the Court's ruling in *Grove City* and expanded the scope of civil rights protections, President Reagan vetoed it.[159] Finally, although the Civil Rights of Institutionalized Persons Act of 1980 authorized the Attorney General to sue state or local public officials where there was "a pattern or practice of resistance to the full enjoyment" of the federal rights of residents of state-run institutions,[160] the Reagan-era Department of Justice exercised this authority only twice on behalf of people with developmental disabilities.[161]

Many observers of the Supreme Court have contended that, in both statutory and constitutional interpretation, the Court is responsive to the preferences of the political branches of government.[162] Yet one need not speculate as to whether the Reagan Administration's general lack of in-

[154] Kimberly McKelvey, Comment, *Public Interest Lawyering in the United States and Montana: Past, Present and Future*, 67 MONT. L. REV. 337, 344 (2006).

[155] STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 244 (1983).

[156] Otis H. Stephens, *Discrimination, Affirmative Action, and the Disabled*, *in* THE REAGAN ADMINISTRATION AND HUMAN RIGHTS 157, 170 (Tinsley E. Yarbrough ed., 1985).

[157] Grove City Coll. v. Bell, 465 U.S. 555 (1984).

[158] Otis H. Stephens, *Discrimination, Affirmative Action, and the Disabled*, *in* THE REAGAN ADMINISTRATION AND HUMAN RIGHTS 157, 167 (Tinsley E. Yarbrough ed., 1985).

[159] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). Congress voted to override the President's veto. *See* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 25 (2005).

[160] Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. §§ 1997-1997j (Westlaw 2010).

[161] *See* NAT'L COUNCIL ON DISABILITY, THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT: HAS IT FULFILLED ITS PROMISE?, app. II (2005), *available at* http://www.ncd.gov/newsroom/publications/2005/ personsact.htm#appendixii.

[162] *See, e.g.*, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 592 (2009); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 415 (1991).

terest in the rights and needs of the mentally retarded affected the outcome of *Cleburne*. The Administration, represented by Solicitor General Rex E. Lee, filed an amicus curiae brief in *Cleburne* in which it opposed the recognition of mental retardation as a quasi-suspect classification.[163] The Solicitor General began by noting that Congress and many state legislatures had exhibited increasing "solicitude for the special needs of mentally retarded persons."[164] As examples of such legislation, he listed Section 504 of the Rehabilitation Act of 1973, the Developmental Disabilities Assistance and Bill of Rights Act, the Education of the Handicapped Act, and a Texas state law[165] — the very same statutes that Justice White later cited in his opinion.[166] Solicitor General Lee then argued that legislatures may properly take mental retardation into account because "unlike members of racial minorities, mentally retarded individuals are different from others in respect to their needs and capacities."[167] Although the mentally retarded deserve "concern and sympathy,"[168] such sentiments do not justify "creating yet another group enabled to compel heightened scrutiny of legislative actions affecting their interests."[169]

Ultimately, a majority of the Court agreed. Its slippery-slope argument referencing "the aging, the disabled, the mentally ill, and the infirm"[170] echoed the Justice Department's brief, which warned that any special constitutional protections offered to the mentally retarded would also have to be extended to "[the] physically handicapped, the infirm, and even those suffering from diseases such as alcoholism."[171] Solicitor General Lee took care to note that the Court could still "conclude that the denial of a special-use permit in this case was so wanting in rationality as to fail to pass muster under the Equal Protection Clause of the Fourteenth Amendment."[172] This, of course, was exactly the approach taken by the *Cleburne* majority.[173]

[163] *See* Brief for the United States as Amicus Curiae Supporting Reversal, City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468).

[164] *Id.* at 5.

[165] *Id.* at 18-19.

[166] City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444 (1985) (majority opinion).

[167] Brief for the United States as Amicus Curiae Supporting Reversal at 8, City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468).

[168] *Id.* at 9.

[169] *Id.*

[170] *Cleburne*, 473 U.S. at 445-46.

[171] Brief for the United States as Amicus Curiae Supporting Reversal at 21, City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468).

[172] *Id*. at 6.

[173] *Cleburne*, 473 U.S. at 435.

C. JUSTICE WHITE

The third factor influencing the majority opinion in *Cleburne* was its author's idiosyncratic method of deciding Fourteenth Amendment cases. Justice White believed in giving the legislative and executive branches wide latitude to make political judgments.[174] However, whether his credo was truly one of judicial restraint is called into question by his "activist" desire to provide guidance to the lower courts as early as possible and his fondness for invalidating statutes under rational-basis review.[175] When viewed in the context of Justice White's jurisprudence, then, *Cleburne* seems less an aberration and more a predictable product of the Justice's various analytical tics.

Justice White's jurisprudence was characterized, above all else, by deference to the political branches.[176] Justice Stevens once observed, "Of all the Justices with whom I have served, I remember Byron [White] as the one who most consistently accorded a strong presumption of validity to the work of the Congress and the Executive."[177] Justice White explicitly articulated his code of judicial restraint in *Bowers v. Hardwick*, where he wrote

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.[178]

Reflective of this restraint, Justice White refused to enlarge the privileged circle of protected interests and classifications eliciting close

[174] *See* Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1332 (2003); Jonathan D. Varat, *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371, 372 (1987).

[175] *See* Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003); *see also* Griswold v. Conn., 381 U.S. 479, 502-07 (1965) (White, J., concurring) (while the majority applied strict scrutiny to invalidate a statute prohibiting the use and distribution of contraceptives, Justice White would have invalidated the statute under minimal scrutiny); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 609 (1979) (White, J., dissenting); Williams v. Vermont, 472 U.S. 14, 27 (1985).

[176] *See* Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1332 (2003); Jonathan D. Varat, *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371, 372 (1987).

[177] Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

[178] Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

judicial review,[179] especially because this circle had already expanded in the years preceding *Cleburne*.[180] Justice White was most comfortable applying the rational-basis test, which minimized judicial interference with legislative will.[181] Even when he purported to apply strict scrutiny, as in race cases, he actually engaged in an analysis similar to the beefed-up rational-basis review seen in *Cleburne*.[182]

The notion that Justice White wanted to circumscribe the role of the judiciary, however, is at odds with his eagerness in *Cleburne* to prematurely rule that mental retardation was not a quasi-suspect classification. In this respect, a remark by Justice Ruth Bader Ginsburg (Justice White's replacement on the Court) may be illuminating; she once stated, "Byron White was an 'activist' Justice only in his unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later."[183] Thus, he issued fifty-four dissents from denials of certiorari in the 1984 term, forty dissents in the 1985 term, and fifty-eight dissents in the 1992 term.[184] Although the Fifth Circuit was the only federal appellate court to have ruled on the appropriate

[179] *See, e.g.*, *Bowers*, 478 U.S. at 195; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 790 (1986) (White, J., dissenting) (arguing that a woman's ability to abort her pregnancy is not a fundamental liberty interest and that restrictions on abortion should be subjected to only "the most minimal judicial scrutiny"); Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (holding that alienage classifications, although subjected to heightened scrutiny when they primarily affect economic interests, should receive less demanding scrutiny when they primarily serve a political function).

[180] *See* Plyler v. Doe, 457 U.S. 202, 224 (1982) (plurality opinion) (holding that discrimination against undocumented aliens "can hardly be considered rational unless it furthers some substantial goal of the State"); Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that sex-based classification must withstand intermediate-level scrutiny); Mathews v. Lucas, 427 U.S. 495, 510 (1976) (applying "less than strictest" but not "toothless" scrutiny to statutory classification on the basis of illegitimate birth).

[181] *See* Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 447 (1993).

[182] Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1366 (2003); *see also* Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19, 30 (1993) (stating that Justice White also favored a sort of rational-basis test in the context of criminal procedure, insisting that "the overriding command of the Fourth Amendment is its inclusive 'reasonableness' requirement, not its more limited 'warrant' requirement.").

[183] Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

[184] Michael J. Broyde, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 612-14 (1987); Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19, 23 n.26 (1993). For purposes of comparison, the Justices issued fewer than 300 such dissents with written opinions between 1982 and 1987, an average of seven per Justice per year. Michael J. Broyde, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 613 n.12 (1987).

level of scrutiny for classifications based on mental retardation,[185] multiple district courts had addressed the issue and arrived at differing conclusions.[186] In light of the surge of litigation over the rights of the mentally retarded over the previous decade, Justice White probably should have clarified the standard of review for the benefit of the lower courts.

Further contradicting Justice White's reputation as a proponent of judicial restraint is the fact that, while he proclaimed his loyalty to the rational-basis test, the analysis he actually engaged in under the auspices of this test often resembled intermediate scrutiny.[187] *Cleburne* is emblematic of his penchant for striking down statutes under rational-basis review. The first hint of this proclivity appeared in Justice White's concurring opinion in *Griswold v. Connecticut*,[188] a substantive due process case. Whereas the majority found that marital privacy was a fundamental liberty interest triggering strict scrutiny, and that Connecticut's statute prohibiting the distribution and use of contraceptives unconstitutionally infringed upon this interest, Justice White would have invalidated the statute after only minimal scrutiny.[189] Several years later, dissenting in *San Antonio Independent School District v. Rodriguez*, Justice White posited that reliance by the Texas school-financing system on local property taxation was irrational and therefore a violation of the Equal Protection Clause. [190] In *New York City Transit Authority v. Beazer*, Justice White, again in dissent, asserted that the New York City Transit Authority's policy against employing methadone users violated the Equal Protection Clause because it was irrational and invidious.[191] In *Williams v. Vermont*, Justice White authored a majority opinion that held that Vermont's use tax on automobiles purchased by out-of-staters who subse-

[185] Cleburne Living Ctr., Inc. v. City of Cleburne, Tex., 726 F.2d 191, 196 (5th Cir. 1984), *rev'd*, 473 U.S. 432 (1985).

[186] *Compare* Ass'n for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 473, 490 (D.N.D. 1982) (applying intermediate scrutiny to a classification discriminating against mentally retarded persons), *and* Fialkowski v. Shapp, 405 F. Supp. 946, 957-59 (E.D. Pa. 1975) (same) (dictum), *with* N.Y. State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (holding that mental retardation is not a suspect classification), Developmental Disabilities Advocacy Ctr. v. Melton, 521 F. Supp. 365, 371 (D.N.H. 1981) (same), *and* Anderson v. Banks, 520 F. Supp. 472, 512 (S.D. Ga. 1981) (holding that mental retardation is not a quasi-suspect classification).

[187] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 502-07 (1965) (White, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 609 (1979) (White, J., dissenting); Williams v. Vermont., 472 U.S. 14, 27 (1985).

[188] Griswold v. Connecticut, 381 U.S. 479, 502-07 (1965) (White, J., concurring).

[189] *Id.* at 503-07.

[190] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting).

[191] N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 609 (1979) (White, J., dissenting).

quently moved to Vermont had no legitimate purpose.[192] Finally, Justice White voted to strike down a state veterans' preference law in *Attorney General of New York v. Soto-Lopez*[193] and a provision of the federal Food Stamp Act in *Lyng v. Castillo*[194] on the grounds that the classifications at issue were irrational. This parade of cases "illustrate[s] Justice White's attachment to the rational-basis standard and his tendency to find that it has been violated when other Justices reach the conclusion of unconstitutionality, if at all, only through some form of heightened scrutiny."[195]

In sum, the *Cleburne* opinion exemplifies the push and pull of Justice White's deferential and activist impulses. Justice White consistently held that minimal scrutiny was the appropriate standard of review in Fourteenth Amendment cases, and *Cleburne* was no exception.[196] He also preferred to set bright-line rules for the lower courts to apply,[197] so in *Cleburne* he announced, unnecessarily, that classifications based on mental retardation did not deserve heightened scrutiny. Finally, *Cleburne* was only one in a long line of Justice White's opinions to hold a statute invalid under rational-basis review.[198] If the task of writing the Court's opinion in *Cleburne* had been assigned to a different Justice, the course of history for Americans with mental retardation might have changed completely.

CONCLUSION: *CLEBURNE*'S LEGACY

The *Cleburne* litigation and decision appear to have spurred some beneficial legislative changes for mentally retarded individuals. Shortly before the Supreme Court handed down its ruling, Texas passed a law that permitted community-based residences housing up to six disabled persons to set up in any residential district in any city,[199] and the Cle-

[192] Williams v. Vermont., 472 U.S. 14, 27 (1985).

[193] Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 916 (1986) (White, J., concurring).

[194] Lyng v. Castillo, 477 U.S. 635, 643 (1986) (White, J., dissenting).

[195] Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1365-66 (2003).

[196] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 195 (1986); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 790 (1986) (White, J., dissenting); Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982).

[197] *See* Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

[198] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 502-07 (1965) (White, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 609 (1979) (White, J., dissenting); Williams v. Vermont., 472 U.S. 14, 27 (1985); Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 916 (1986) (White, J., concurring); Lyng v. Castillo, 477 U.S. 635, 643 (1986) (White, J., dissenting).

[199] Community Homes for Disabled Persons Location Act, TEX. HUM. RES. CODE ANN. § 123

burne municipal code was amended accordingly.[200] At some point, the city also deleted the antiquated reference to the "feeble-minded" from its code.[201] On the national level, *Cleburne* was understood to "put cities on notice that they need clear, rational reasons if they want to treat group homes for the developmentally disabled . . . differently from other residential uses."[202] The decision also "helped create some momentum to amend the Fair Housing Act to prohibit disability discrimination in housing,"[203] a change that occurred in 1988.[204]

On the whole, however, *Cleburne* did little to enhance the status of mentally retarded persons — or persons with disabilities in general[205] — in American society. The courts have relied on *Cleburne* to uphold, inter alia, a statute allowing for the indefinite commitment of persons with mental retardation,[206] a workers' compensation scheme that denied permanent partial disability benefits to claimants who sustained severe skin damage on the job,[207] a policy excluding persons with Alzheimer's-related dementia from a veteran's home,[208] a welfare program that placed a one-year limit on benefits to disabled persons while providing open-ended benefits to all other recipients,[209] and the use of peremptory challenges to strike potential jurors because of their disabilities.[210]

Justice Marshall's prediction that the *Cleburne* analysis would confuse the lower courts came true in the years immediately following the decision.[211] In 1987, the U.S. Court of Appeals for the Tenth Circuit as-

(Westlaw 2001).

[200] CITY OF CLEBURNE, TEX., CODE OF ORDINANCES § 155.30-31 (2009).

[201] *See id.*

[202] Am. Planning Ass'n, *Homes for the Developmentally Disabled*, ZONING NEWS 1 (Jan. 1986); *see also* James T. Hogan, Comment, *Community Housing Rights for the Mentally Retarded*, 1987 DET. C. L. REV. 869, 919 (1987) ("Absent carefully crafted wording, most ordinances would probably be invalidated under the *Cleburne* test.").

[203] RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 14 (2005).

[204] *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 42 U.S.C.A. § 3604 (Westlaw 2010).

[205] *Cleburne*'s holding is commonly interpreted to apply to all forms of disability, not only mental retardation. *See, e.g.,* Matthew D. Taggart, *Title II of the Americans with Disabilities Act After* Garrett*: Defective Abrogation of Sovereign Immunity and Its Remedial Impact*, 91 CALIF. L. REV. 837, 841 n.71 (2003) ("*Cleburne* clearly stands for the proposition that the disabled are a non-suspect class and disability discrimination claims are subject only to 'rational basis' review . . . .").

[206] *In re* Harhut, 385 N.W.2d 305, 311 (Minn. 1986).

[207] Barton v. Ducci Elec. Contractors, Inc., 730 A.2d 1149, 1165 (Conn. 1999).

[208] Estate of Martin v. Cal. Dep't of Veterans Affairs, 560 F.3d 1042, 1049-50 (9th Cir. 2009).

[209] Does 1-5 v. Chandler, 83 F.3d 1150, 1155-56 (9th Cir. 1996).

[210] United States v. Harris, 197 F.3d 870, 876 (7th Cir. 1999).

[211] *See generally* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 617-19 (2000) (quoting cases that interpreted

sumed that a "second order" rational-basis test was the appropriate standard for reviewing the exclusion of mentally impaired and developmentally disabled persons from a federally funded housing project.[212] Many federal district courts, too, believed that *Cleburne* endorsed a more stringent form of rational-basis review and that equal protection doctrine was in upheaval.[213]

However, this confusion was short-lived, as was any possibility that the courts would meaningfully scrutinize classifications based on mental retardation. In *Heller v. Doe*,[214] handed down in 1993, the Supreme Court used a traditional, deferential rational-basis test to analyze a statutory scheme governing the involuntary commitment of mentally disabled persons to state institutions.[215] The majority disclaimed ever "purport[ing] to apply a different standard of rational basis review" in a case involving the mentally retarded.[216] Justice David Souter, dissenting, wrote, "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 left uncertain."[217] After *Heller*, review of legislative distinctions based on mental disability once again became "tantamount to no review at all."[218]

Ironically, given the *Cleburne* majority's emphasis on congressional sensitivity to the needs of the mentally retarded, the Court's premature rejection of intermediate scrutiny in *Cleburne* ultimately curtailed Congress's power to protect individuals with disabilities. In *Board of Trustees of the University of Alabama v. Garrett*,[219] the Court declined to reconsider its holding in *Cleburne* that classifications based on disability were constitutional as long as they were rational.[220] Because Title I of the Americans with Disabilities Act required state employers to accommodate disabled employees even when their refusal to provide such accommodations would be fiscally rational, the Court ruled that Congress had exceeded its constitutional authority.[221]

Cleburne as requiring a more rigorous type of scrutiny than traditional rational-basis review).

[212] Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.2d 1343, 1354-55 (10th Cir. 1987).

[213] *See, e.g.*, Burstyn v. Miami Beach, 663 F. Supp. 528, 533 (S.D. Fla. 1987); Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 409-10 (N.D.N.Y. 1987); Coburn v. Agustin, 627 F. Supp. 983, 988-990 (D. Kan. 1985).

[214] Heller v. Doe, 509 U.S. 312 (1993).

[215] *Id.* at 319-321.

[216] *Id.* at 321.

[217] *Id.* at 337 (Souter, J., dissenting).

[218] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

[219] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[220] *Id.* at 367.

[221] *Id.* at 372-74. A string of other Supreme Court decisions at the turn of the century whittled

In short, although *Cleburne* was a nominal victory for the operators and inhabitants of group homes, its legacy is one of anemic constitutional and statutory protections for the mentally retarded and other disabled individuals. In this legal landscape, government-sanctioned prejudice against mentally retarded persons has endured. As this Article went to print, eight state constitutions still deny voting rights to "idiots" — or people deemed mentally incompetent or thought to lack the capacity to understand[222] — and as recently as 2007, election laws in twenty-two states disqualified voters based on some mental-status criteria.[223] Many states "link mental disability to a present and future inability to care for a child," thus opening the door to the (ostensibly discriminatory) termination of parental rights on the basis of disability.[224] Additionally, several states prohibit persons with mental disabilities,[225] sometimes termed "imbecile[s],"[226] from marrying. Finally, in at least one jurisdiction, once a mentally retarded person is involuntarily committed to an institution, he or she may never have an opportunity to be heard in court again.[227] These and other provisions of state law that unfairly disadvantage people with mental retardation might not be on the books today if the *Cleburne* Court had expressly applied the robust form of scrutiny

down the coverage of the Americans with Disabilities Act ("ADA") and arguably betrayed the Court's continuing aversion to protecting disabled persons from discrimination. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (setting a very high standard for demonstrating a substantial limitation in the major life activity of performing manual tasks); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566-567 (1999) (holding that a plaintiff who was blind in one eye was not necessarily "disabled" under the ADA); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521, 525 (1999) (holding that the defendant did not discriminate on the basis of disability when it fired an employee because of his high blood pressure); Sutton v. United Air Lines, Inc., 527 U.S. 471, 488-89 (1999) (holding that two sisters who were not hired as pilots due to their severe myopia were not "disabled" under the ADA because they had 20/20 vision with corrective lenses). The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008), overturned these decisions in large part.

[222] IOWA CONST. art. II, § 5; KY. CONST. § 145, cl. 3; MINN. CONST. art. VII, § 1; MISS. CONST. art. XII, § 241; NEV. CONST. art. II, § 1 (amended 2005); N.J. CONST. art. II, § 1, para. 6 ; N.M. CONST. art. VII, § 1; OHIO CONST. art. V, § 6.

[223] *See* Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 940 (2007).

[224] Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112, 160 (2007); *see, e.g.*, CAL. FAM. CODE § 7826 (Westlaw 2010); GA. CODE ANN. § 15-11-94 (Westlaw 2010); MISS. CODE ANN. § 93-15-103 (Westlaw 2010); NEV. REV. STAT. ANN. § 128.106 (Westlaw 2010).

[225] *See, e.g.*, KY. REV. STAT. ANN. § 402.990(2) (Westlaw 2010).

[226] *See, e.g.*, TENN. CODE ANN. § 36-3-109 (Westlaw 2010).

[227] Laura W. Harper, Comment, *Involuntary Commitment of People with Mental Retardation: Ensuring All of Georgia's Citizens Receive Adequate Procedural Due Process*, 58 MERCER L. REV. 711, 718, 726 (2007) (citing GA. CODE ANN. § 37-4-2 (Westlaw 2010)).

that, as other critics have argued, such classifications warrant. *Cleburne* was "wrong the day it was decided"[228] and is just as wrong today. It should be overturned.

[228] *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (referring to Plessy v. Ferguson, 163 U.S. 537 (1896)).