Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 29 *Supreme Court Symposium*

January 1985

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ZONING DISCRIMINATION AFFECTING RETARDED PERSONS

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In *City of Cleburne v. Cleburne Living Center*,[1] the United States Supreme Court held that a city's refusal to permit group housing for thirteen mildly to moderately retarded adults in a residential zoning district was unconstitutional.[2] A City of Cleburne zoning ordinance required the Cleburne Living Center (CLC)[3] to apply for a special use permit as a precondition to establishing any home for the mentally retarded within the city limits.[4] Accordingly, CLC submitted its proposal to use a one-story residential structure located in a residential

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1. 105 S. Ct. 3249 (1985).

2. Respondent planned to operate the home as a Level I Intermediate Care Facility for the Mentally Retarded (ICF/MR). An ICF/MR is a medicaid funded program administered and regulated at the federal level by the Department of Health and Human Resources. *See* 42 C.F.R. §§ 442-400-516 (1984). An ICF/MR is administered and regulated at the state level by the Texas Department of Mental Health and Retardation. The State of Texas has adopted federal ICF/MR requirements in all respects. *Compare* 9 Tex. Reg. 2139-60 (1984) *with* 42 C.F.R. 442-400-516 (1984).

3. Cleburne Living Center is a Texas corporation organized and licensed for the purpose of establishing and operating group homes for retarded persons. Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 193 (5th Cir. 1983), *aff'd*, 105 S. Ct. 3249 (1985).

4. The proposed group home required a special use permit because the city had classified the facility as a "hospital for the feeble minded"—language used in the zoning ordinance. 105 S. Ct. at 3252-53 & n.3. Had the structure and proposed group use of the home been the same in every regard except for the retardation of its intended residents, the city zoning ordinance would have permitted the group use. For example, the ordinance permitted the use of structures for tenements, a home for unwed mothers, a nursing home for the aged, a fraternity or sorority house or a home for delinquent youth. *Id.* at 3252 n.3.

zoning district as a group home for mildly or moderately retarded adults.[5] CLC would staff the home with professionals who would not live at the facility, but would be present in shifts, twenty-four hours a day. Both the structure and the particular use proposed for it fully complied with the extensive applicable state and federal regulations.[6]

Both the City Planning and Zoning Commission and the City Council conducted public hearings on the proposed special use permit; the City Council thereafter voted to deny CLC's application.[7] The city claimed to have based this decision on the following seven factors: the attitude of a majority of owners of property located within 200 feet of the subject property; the location of a junior high school across the street from the subject parcel; concern for the fears of elderly residents of the neighborhood; the size of the home and the number of people to be housed; concern over the legal responsibility of CLC for any actions that the mentally retarded residents might take; the home's location on a 500 year flood plain; and in general, CLC's presentation before the City Council.[8]

Following the denial, CLC filed suit against the city, alleging that the city's actions violated the due process and equal protection clauses of the United States Constitution as well as other constitutional and statutory provisions.[9] The city prevailed at the trial level. The lower

5. The home was situated on a 16,700 square foot lot. The house contained 2,700 square feet and had four bedrooms. The home was within walking distance of a public park, public library and the city's central business district. Abutting the house, which was situated on a corner lot, was a two-story apartment house; located across the street from the facility was a junior high school, which was attended by some mentally retarded students.

CLC anticipated that the home would house 13 retarded men and women. The residents would receive 24 hour supervision and have jobs either in the community or in workshops supervised by the group home staff. *Cleburne*, 726 F.2d at 193.

6. *See supra* note 2.

7. The Commission's vote operated as a recommendation to the City Council, which subsequently voted three to one to deny the permit. 105 S. Ct. at 3253 & n.4.

8. *Cleburne*, 726 F.2d at 194. In point of fact, the City Council denied the permit because of vigorous opposition by property owners adjacent to the proposed facility. *See* 105 S. Ct. at 3259 (relying on findings by the district court).

9. Initially CLC alleged that the permit denial violated the federal Revenue Sharing Act (RSA), 31 U.S.C. §§ 6701-24 (1982). 726 F.2d at 195. They argued that the zoning function of the City Council was a "program or activity" subject to the nondiscrimination provisions of that Act pertaining to "otherwise qualified handicapped individuals." *See* 726 F.2d at 195; 31 U.S.C. § 6701(a), (b) (1982). Both the district court and the court of appeals rejected the claim, observing that clear and convincing evidence showed that the City Council had not used federal funds to finance the zoning activities. 726 F.2d at 195. The court of appeals also rejected CLC's claim that the City Council

court held that the city's ordinance, both as written and applied, impacted neither a fundamental right nor a suspect classification.[10] Accordingly, the district court stated it would find the ordinance constitutional if it could be shown to bear some rational relationship to a legitimate purpose or interest of the city.[11] The trial court decided that Cleburne had several legitimate reasons for regulating the group home, such as concern for the safety and fears of residents in the neighborhood and the legal responsibilities of CLC and its projected residents.[12] The court viewed the city's denial as a rational way for the city to serve its legitimate concerns.[13]

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itself was an activity receiving federal funds and therefore subject to RSA requirements. The court required a link between the City Council's function of disbursing federal funds, which arguably subjected those decisions to the RSA, and the City Council's zoning function. *Id.* CLC did not pursue this aspect of the case on appeal to the Supreme Court.

CLC also alleged that the city's denial of its permit application constituted a denial of procedural and substantive due process, and infringed upon its constitutional rights to travel and to associate. In addition, CLC claimed that the city's action violated 42 U.S.C. § 1983 (1982), which provides a remedy for violations of federal law by those acting under color of state law. Additional allegations included state equal protection and due process claims under the Texas Constitution and a statutory claim pursuant to the Texas Mentally Retarded Persons Act of 1977. Joint Appendix at 97, Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1983) [hereinafter cited as Joint Appendix].

Finally, CLC asserted that the Cleburne ordinance, which provided criminal penalties for violations, was unconstitutionally vague. 726 F.2d at 194 n.4. CLC did not prevail on the right to travel, freedom of association or constitutional vagueness claims at trial; CLC did not appeal these aspects of the district court's decision.

10. Joint Appendix, *supra* note 9, at 19.

11. The trial court observed that several lower courts had addressed the question of what level of judicial scrutiny applied to distinctions based on mental retardation. *See, e.g.*, Doe v. Colautti, 454 F. Supp. 621, 632 (E.D. Pa. 1978), *aff'd*, 592 F.2d 704 (3rd Cir. 1979) (mentally retarded persons are not a suspect or quasi-suspect class); Sterling v. Harris, 478 F. Supp. 1046, 1053 (N.D. Ill. 1979), *rev'd on other grounds sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981). *But see* Frederick v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 578 F.2d 513 (3rd Cir. 1978) (mentally retarded persons comprise a quasi-suspect class warranting heightened judicial scrutiny). The lower court did not explain its terse conclusion that mentally retarded persons are not a suspect or quasi-suspect class of individuals. Joint Appendix at 19.

12. Joint Appendix, *supra* note 9, at 19.

13. *Id.* This conclusion is not responsive to the question of whether retarded persons are quasi-suspect. Normally, a court measures the class disadvantaged by governmental action against each of the indicia of suspectness. When the class demonstrates many suspect characteristics, the court will conclude that the class is quasi-suspect. The government then must demonstrate that its purpose for discriminating is "important," not merely "legitimate;" otherwise the purpose is held constitutionally deficient. Had the Court been faithful to this standard, detailed in *Frontiero* v. *Richardson*, it

After surveying Supreme Court law that discussed both the appropriate level of scrutiny in equal protection cases and the characteristics of mentally retarded persons, the United States Court of Appeals for the Fifth Circuit concluded that mentally retarded persons constituted a "quasi-suspect" class and therefore a classification based on retardation was subject to intermediate scrutiny.[14] Applying intermediate scrutiny, the Fifth Circuit inquired whether the city's purpose for discriminating was "important" and, assuming that it was, whether that purpose was "substantially furthered" by denial of the group home permit.[15] The court concluded that there was an insufficiently close correspondence "between the city's goals and the ordinance's means for achieving them because the standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly under inclusive."[16]

Following an unsuccessful attempt to obtain a rehearing en banc,[17] the Supreme Court granted certiorari.[18] The Supreme Court granted certiorari to address whether mentally retarded persons are a "quasi-suspect" class for purposes of equal protection, thus requiring that state action affecting them survive an "intermediate" or "heightened"

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would have concluded that distinctions based on retardation must be scrutinized carefully. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (sex-based classification). Not all such distinctions, however, are unconstitutional. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding a statute requiring males, but not females to register for the draft); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (upholding a statutory rape law differentiating between genders).

14. 726 F.2d at 198. The Fifth Circuit found that CLC failed to identify any fundamental rights that the Cleburne ordinance impaired. *Id.* at 196. Indeed, the Supreme Court already has determined that the mentally retarded do not have a fundamental right to residential placement. Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981). Had the Court concluded that governmental action impinged on a fundamental right, the Court would have invalidated the action. State action prejudicing a fundamental right is unconstitutional unless it survives "strict scrutiny." This requires proof that the action was "necessary" to serve a "compelling" state purpose. Scrutiny that is "strict" in theory is fatal in fact. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther].

15. 726 F.2d at 200.

16. *Id.*

17. 735 F.2d 832 (5th Cir. 1984) (per curiam). Six judges dissented from the Fifth Circuit's denial of the city's petition for rehearing. The dissenters argued that because mentally retarded persons were significantly different from the rest of society in terms of their needs and abilities to function, they, unlike women or illegitimate children, were not an appropriate class to receive heightened judicial scrutiny. *Id.* at 832-33.

18. 105 S. Ct. 427 (1984).

judicial scrutiny.[19]

As a general rule, the Court will only "minimally" scrutinize state and local governmental actions that allegedly deny a plaintiff's right to equal protection. Provided the challenged action is intended to serve some "legitimate" public purpose and is "rationally related" to serving the purpose, the Court will not substitute its judgment for that of the local government.[20] The Court's use of minimal scrutiny virtually al-

19. Because the Supreme Court held previously that housing is not a sufficiently important right to be deemed fundamental, and hence not subject to strict scrutiny when prejudiced, Village of Belle Terre v. Boras, 416 U.S. 1 (1974); Lindsey v. Normet, 405 U.S. 56 (1972), the plaintiffs in *Cleburne* based their argument for heightened scrutiny on the characteristics of the class disadvantaged by the city's action and sought to establish that mentally retarded persons are a quasi-suspect class.

In fact, not only had the Court recently decided that housing is not a fundamental right, but other standards by which the Court ascertains whether a fundamental right exists were not applicable to the facts of *Cleburne*. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy). For example, the right of a retarded person to live with other retarded persons in a residential group home is neither so deeply rooted in the "traditions and (collective) conscience of our people . . . as to be ranked as fundamental" nor is it "implicit in the concept of ordered liberty."

20. Plyler v. Doe, 457 U.S. 202 (1982). The rationale for this judicial deference is the constitutional doctrine of separation of powers. As a general proposition, the legislature must be free to make classifications without excessive interference by the judiciary. Generally the political process can rectify improvident governmental actions. *See infra* note 57. Only when those persons negatively affected by governmental action lack the opportunity to avail themselves of the political process is judicial interference—in the form of heightened scrutiny—in order.

Minimal scrutiny is also the rule in "taking" cases, in which a governmental regulatory action is alleged to have gone "so far" as to constitute an unconstitutional taking of property without just compensation in violation of the fifth or fourteenth amendments. For example, in Pennsylvania Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), the Court sustained New York City's landmark-preservation ordinance. The ordinance prevented Pennsylvania Central Railroad from developing its property rights to the air space over Grand Central Station. *Id.* at 138. The Court viewed as "legitimate" the city's objective of historic and architectural preservation. The Court also found that the city ordinance, which prohibited significant alteration of any landmark, served those objectives in a rational way. The Court appeared unconcerned that the effect of the ordinance on Penn Central was an investment-backed expectation loss of several million dollars.

Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984), is an even more extreme example of the deference the Supreme Court has given to state actions alleged to have been a taking. In *Midkiff* the Court had to decide whether the State of Hawaii constitutionally could shift ownership of property from large, land-holding estates to individual homeowners. The large estate owners argued that such legislation served no public purpose. The Court, however, declared that it would not substitute its judgment as to what constitutes a public purpose for the legislature's judgment unless the legislature's judgment was without basis. For all practical purposes, then, the Court decided

ways results in the challenged action being upheld as constitutional. For example, the district court in *Cleburne* found that the city's denial of a special use permit was rationally related to the legitimate purpose of preserving neighborhood residential values.[21]

For decades, however, the Court has been sensitive to the fact that in certain circumstances a deferential standard of judicial review can be inappropriate and a far more searching examination of governmental action is sometimes necessary.[22] In particular, the Court routinely has held that when the class of persons allegedly discriminated against is "suspect," or the right interfered with is "fundamental," it will apply strict judicial scrutiny.[23] To ascertain whether a class of persons is "suspect" the Court inquires as to whether it is a discrete and insular minority, a victim of prior societal discrimination, a politically powerless group, and whether its characteristics are immutable or unrelated to the matters as to which they are discriminated against.[24]

When discrimination is directed at a suspect class, such as race, it is judged by the strictest judicial scrutiny and upheld only if it is "necessary" to serve a "compelling" public purpose.[25] Classifications sub-

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that because the legislature had declared the transfer of land ownership to be in the public interest, the Court would assume the state action to be in the public interest.

21. 105 S. Ct. at 3253.

22. *See* Plyler v. Doe, 457 U.S. 202, 218 (1982); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

23. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); United States v. Carolene Products Co., 304 U.S. 144 (1938). *See also supra* note 20.

CLC asserted that retardation was immutable insofar as it is "ameliorable but not curable," that "people who are retarded constitute a group especially vulnerable to misdirected and prejudicial actions by public officials;" that official reaction to retardation historically has been "exclusion and segregation," and that retarded persons have so routinely been denied education and meaningful political participation that they are without political power. Brief for Respondents at 30-35, *Cleburne*, 105 S. Ct. 3249 (1985).

24. In *Carolene Products*, the Court observed that discrimination against "discrete and insular minorities may be a special condition" warranting strict scrutiny. 304 U.S. at 153 n.4. In San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court explained that a suspect class is one "[s]addled with such disabilities, or subjected to such a history of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

The court regularly has expressed a disinclination to add to the list of classifications subject to heightened scrutiny. *See Plyler*, 457 U.S. at 219; *Rodriguez*, 411 U.S. at 28. The Court has not indicated, however, that it wishes to retreat from its long standing policy of carefully scrutinizing discrimination directed against suspect or "quasi-suspect" persons.

25. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

jected to strict scrutiny virtually always are invalidated because even if such classifications serve compelling governmental interests, they are not, in all likelihood, necessary to serve those purposes.[26]

The Court has applied an "intermediate" level of scrutiny, something between "minimal" and "strict," to certain other classifications. The Court employs this level of judicial scrutiny when it decides that the class discriminated against possesses some, though not all, of the indicia of suspectness, for example, gender.[27] In order to survive intermediate judicial scrutiny, a governmental action must be "substantially related" to an "important" governmental purpose.[28]

The record in *Cleburne* was replete with documentation that mentally retarded persons long have been victims of false stereotyping and stigmatization.[29] Society has isolated the retarded, housing them in

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26. One should note, however, that strict scrutiny does not insure invalidation of a challenged act. *See* Tancil v. Woolls, 379 U.S. 19 (1964), *aff'g*, Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

27. *See* Craig v. Boren, 429 U.S. 190 (1976); Levy v. Louisiana, 391 U.S. 68 (1968). To date the Court has limited intermediate scrutiny to distinctions based on gender, some distinctions based on illegitimacy and distinctions affecting access to public education based upon parental status of illegal residence in the United States. Plyler v. Doe, 457 U.S. 202 (1982).

28. *Craig*, 429 U.S. 190, 197 (1976).

29. The trial court specifically found that "persons who are mentally retarded have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing, living arrangements." Joint Appendix, *supra* note 9, at 9. Historically rooted stereotypes about mentally retarded persons run so deep that as the Fifth Circuit observed, "[o]nce-technical terms for various degrees of retardation—e.g., 'idiots,' 'imbeciles,' 'morons'—have become popular terms of derision." 726 F.2d at 197. *See infra* notes 30-33 and accompanying text.

The Third Circuit likewise has noted that retarded persons "may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude . . . . The retarded cannot vote in most states, and, with few community ties, sponsors or friends have minimal impact on the political process." Romeo v. Youngberg, 644 F.2d 147, 163 n. 35 (3rd Cir. 1980), *vacated on other grounds*, 457 U.S. 307 (1982). *See generally* J. ELY, DEMOCRACY AND DISTRUST, 135-79 (1980). *See also* Ass'n for Retarded Citizens v. Olson, 561 F. Supp. 473 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983) (intermediate scrutiny appropriate in light of lingering discrimination); Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975) (finding retarded persons a suspect class).

Even the Supreme Court has categorized retarded persons through stigmatizing stereotypes. Justice Holmes, in upholding a compulsory sterilization law, stated that "[we] have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who sap the strength of the State for these lesser sacrifices . . . three generations of imbeciles are enough." Buck v. Bell, 274 U.S. 200, 207 (1927). *See also* S. GOULD, THE MISMEASURE OF MAN 335-

remote living arrangements.[30] The retarded frequently have been unable to vote and have been deprived the benefits of public school systems.[31] Additionally, retardation is a condition that is largely immutable and uncontrollable.[32] These factors, CLC argued, compelled the Court to require the city to discriminate only for very important, not merely legitimate, reasons. These disadvantages also required the city to use means carefully tailored to its purpose so as to have a less negative impact than absolutely denying retarded persons access to the only available community living alternative.[33]

The Supreme Court disagreed.[34] The Court began by observing that mentally retarded persons have a reduced ability to function in society.[35] The Court cited *Frontiero v. Richardson*, the case holding that gender-based classifications are quasi-suspect, thus requiring heightened judicial scrutiny.[36] In *Frontiero* the Court pointed out that ". . . what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with recognized suspect criteria, is that the sex characteristic bears no relation to ability to perform or contribute to society."[37] The *Cleburne* Court cited *Frontiero* to establish that distinctions based on a class without full capacity or ability to perform are not inherently suspect and hence do not warrant heightened judi-

36 (1981); Note, *Equitable Jurisdiction to Order Sterilizations*, 57 WASH. L. REV. 373, 375 n. 11 (1982).

30. *Cleburne*, 726 F.2d at 197.

31. *Id.*

32. *Id.*

33. The trial court determined that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded." Group homes are especially important because many states now deinstitutionalize the mentally retarded, rather than the previous policy of placing them in large, generally remote institutions. *See generally* Okolo and Guskin, *Community Attitudes Toward Community Placement of Mentally Retarded Persons*, 23 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION, 25 (1984); Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning.* 82 W. VA. L. REV. 677 (1981).

34. 105 S. Ct. at 3255-56, 3258.

35. *Id.* at 3256. The city argued it had a right to discriminate against mentally retarded persons because the characteristics of the mentally retarded reduce their ability to care for themselves. Therefore, city regulations that discriminate on the basis of these disabilities are not suspect and need only be minimally scrutinized.

36. Frontiero v. Richardson, 411 U.S. 677 (1973) (distinctions based on gender warrant heightened judicial scrutiny).

37. *Id.* at 686, *quoted in*, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3255 (1985).

cial scrutiny. The more precise point, though, is that some discrimination against a given class may be related to the abilities of members of that class, whereas other forms of discrimination against the same class may be wholly unrelated to the abilities of persons in that class. The former kinds of discrimination are not suspect, the latter are.[38] The *Cleburne* Court, however, did not make any such fine distinction. It merely concluded that because mentally retarded persons are "different," the state's interest in "dealing with them and providing for them is plainly a legitimate one."[39]

The *Cleburne* Court then rejected the proposition that retarded persons are sufficiently victimized by discrimination to warrant heightened scrutiny. The Court asserted that ". . . the distinctive legislative response, both national and state, to the plight of those who are 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."[40]

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38. The clear implication of the *Frontiero* dicta, that classifications related to ability are not suspect, is that classifications related to ability are suspect. Therefore, some employment discrimination against retarded persons is not suspect and need not be scrutinized carefully, while other discrimination against the retarded persons may require heightened judicial scrutiny. For example, when there is a relationship between membership in the class and an individual's needs and abilities, as would exist if the city prohibited severely retarded persons from living together without professional assistance, the distinctions based on mental retardation would not be inherently suspect.

Further, neither Supreme Court precedent nor logic compels the conclusion that discrimination based upon a particular class should always be scrutinized by the same standard. For example, the Court generally scrutinizes strictly distinctions based upon a person's alienage, and yet at times the court uses minimal scrutiny of distinctions based on alienage for public policy reasons. *Compare* Graham v. Richardson, 403 U.S. 365 (1971) (states cannot deny welfare benefits to aliens) *with* Ambach v. Nowick, 441 U.S. 68 (1979) (statute requiring school teacher be U.S. citizen valid). In *Cabell v. Chavez-Salido* the Court opined that ". . . although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community." 454 U.S. 432, 443 (1982). Therefore, the Court would only minimally scrutinize discrimination that prevented aliens from working as "peace officers," but would strictly scrutinize barriers to an alien's working as a janitor.

39. *Id.* at 3258. CLC never argued that legislation directed at retarded persons would fail to serve a legitimate public interest. Rather, the issue was whether a merely legitimate interest, as opposed to an important interest, was constitutionally sufficient to permit discrimination against retarded persons. *See supra* note 13.

40. 105 S. Ct. at 3256. The city also argued that mentally retarded persons were not a politically powerless group because a number of federal and state reforms concerning the rights of mentally retarded persons have recently been enacted. Petitioner's brief at 21-22, *Cleburne*, 105 S. Ct. 3249 (1985). *See, e.g.*, Education of the Handicapped Act, 20 U.S.C. §§ 1400-1461 (1982); Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982);

The flaw in the Court's argument is that it confuses the group's "history of purposeful unequal treatment"[41] with the group's current status.[42]

Similarly, the Court decided that because legislation benefitting retarded persons exists, "which could hardly have occurred and survived without public support," such legislation refuted the argument that mentally retarded persons are politically powerless.[43] The Court fails to recognize that the mere fact that a group has been made the beneficiary of some affirmative action does not negate both current victimization in other areas and political powerlessness in any real sense.[44]

Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1982); Mentally Retarded Persons Act of 1977, TEX. STAT. ANN. art 5547-300 (Vernon Supp. 1985).

41. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

42. In *Frontiero v. Richardson*, the Court decided that classifications based upon gender were suspect, in part because of this country's history of discrimination against females. 411 U.S. 677, 682 (1973). The *Frontiero* Court so held despite congressional enactment of the Equal Pay Act and the Civil Rights Act of 1964, which both prohibited gender discrimination. *Id.* at 686. Twelve years later, Justice Marshall, in his separate *Cleburne* opinion, noted that the Court has "never suggested that race based classifications became any less suspect once extensive legislation had been enacted on the subject." 105 S. Ct. at 3269.

43. *See supra* note 42.

The Supreme Court also expressed a concern that if it decided heightened scrutiny was appropriate, "merely requiring the legislature to justify its efforts . . . may lead it to refrain from acting at all," and hence much legislation regarded as advantageous would not be passed. 105 S. Ct. at 3257. This concern is entirely misplaced for two reasons. First, heightened scrutiny, especially if it is only "intermediate" and not "strict," can be satisfied if the government shows it had an important reason for acting, and that the action it took was significantly related to serving this purpose. The government's burden, as Justice Marshall has said, is not heavy if the government did, in fact, have good reason to act and acted carefully. Board of Regents v. Roth, 408 U.S. 564, 591 (1972). Second, the Court's concern that use of heightened scrutiny will chill passage of advantageous legislation obscures the fact that the Court routinely scrutinizes action favorable to a disadvantaged class less strictly than action unfavorable to the same class. For example, the Court strictly scrutinizes race discrimination that disadvantages minorities, but scrutinizes race discrimination favoring minorities less strictly. *Compare* Loving v. Virginia, 388 U.S. 1 (1967) *and* Anderson v. Martin, 375 U.S. 399 (1964) *with* Fullilove v. Klutznick, 448 U.S. 448 (1980); *compare* Califano v. Webster, 430 U.S. 313 (1977) *and* Kahn v. Shevin, 416 U.S. 351 (1974) *with* Califano v. Goldfarb, 430 U.S. 199 (1977) *and* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Accordingly, when municipalities act to benefit retarded persons, they would not be completely burdened by the requirement of showing both an "important purpose" and means "substantially related" to that purpose.

44. In *Cleburne*, for example, although retarded persons may have been the beneficiaries of federal assistance with respect to educational opportunities, they had no polit-

The Court also observed that because the class of retarded persons is "large and amorphous," it would be "difficult to find a principled way to distinguish" them from persons not at all suspect.[45] Therefore, the Court found retarded persons evidence too few indicia of suspectness to be regarded as even quasi-suspect.[46] The Court opined, however, that this conclusion "does not leave them entirely unprotected from invidious discrimination" because the challenged action must still be rationally related to a legitimate interest.[47] The Court concluded that Cleburne's requirement of a special use permit for CLC's proposed use at the site for which CLC applied was unconstitutional.[48] The Court found that none of the seven reasons advanced by the city for denying the permit were legitimate. The prejudice of neighbors "unsubstantiated by factors which are properly cognizable in a zoning proceeding" is not a permissible reason for prohibiting a group home.[49] The proximity of the proposed home to a junior high school was not a legitimate reason because the school allowed retarded persons to attend and the claim appeared to be nothing more than "vague, undifferentiated fear . . . ."[50] The city's concern that the subject parcel was located on a 500 year flood plain was not legitimate because all other group uses of the property would have involved an identical flood concern, yet the city required no other group to secure a special use permit.[51] Fourth, the city had no legitimate interest in regulating the size of the proposed home and the number of residents because, as both lower courts found, "[i]f the potential residents . . . were not mentally retarded, but the home was the same in all other respects, its use would be permitted" as

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ical power to obtain the zoning approval needed for their housing; political pressure by the townspeople caused the City Council to discriminate against CLC.

45. 105 S. Ct. at 3257-58. The class of women or aliens is also "large and amorphous," but this has not precluded the Court's use of heightened scrutiny for distinctions based upon gender or alienage.

46. *Id.* at 3258.

47. *Id.*

48. *Id.* at 3259.

49. *Id.* The Court failed to explain this phrase. What factors the Court believes are "properly cognizable in a zoning proceeding," however, is difficult to discern because the very factors considered deficient by the Court in *Cleburne*, such as property values and the citizenry's sense of security, had been held previously by the Court to be legitimate public concerns. *See* Village of Belle Terre v. Boras, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954).

50. 105 S. Ct. at 3259.

51. *Id.*

of right.[52] Likewise, the Court found no evidence warranting the conclusion that the intended residents would contribute to congestion, fire hazard or neighborhood disfunction any more than would individuals who were permitted by the city to reside on the subject parcel as of right.[53]

The *Cleburne* case is troublesome both from the perspective of those who advocate rights of the mentally retarded and because of its aberrant constitutional analysis.[54] Although CLC eventually prevailed in *Cleburne*, the Court's pronouncement that classifications based on retardation are not suspect or quasi-suspect does little to deter cities and villages from enacting similar discriminatory regulation.[55]

More importantly, *Cleburne* and two other cases of the same term, indicate the Court's willingness to apply a rational relation test "with bite."[56] The Court's use of minimal scrutiny traditionally always re-

52. 726 F.2d at 200, *quoted in*, 105 S. Ct. at 3259-60. The Court observed that although retarded persons have disabilities that other persons who could reside in the home without a special use permit did not share, there was no evidence in the record indicating how "the characteristics of the intended occupants . . . rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." 105 S. Ct. at 3260.

53. 105 S. Ct. at 3260.

54. Justice Marshall asserted that the case is procedurally, as well as substantively, "curious" because the Court did not strike down the ordinance, although the Court found it was enacted because of "irrational prejudice." 105 S. Ct. at 3272. Rather, the Court merely held the ordinance unconstitutional as applied to CLC. *Id.* This, of course, forces other mentally retarded persons to relitigate the constitutionality of the ordinance. *See id.*

55. Congress, of course, could prohibit housing discrimination against mentally retarded persons notwithstanding the Court's refusal to judge any such discrimination by a standard of heightened scrutiny. For example, Congress could amend the Fair Housing Act, 42 U.S.C. §§ 3601-31 (1982).

56. *See* Gunther, *supra* note 14, at 18-19.

In Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985), the Court invalidated an Alabama domestic preference statute that taxed out-of-state insurance companies more heavily than in-state companies. The lower state court found that the statute served at least two legitimate state interests: encouraging capital investment in the state and encouraging the development of a local industry that would be more responsive to the needs of state residents. *Id.* at 1679. The Court held that the statute did not survive minimal scrutiny. *Id.* at 1684. Justice Powell, writing for the majority, argued that the statute was unconstitutional because the state implemented its purposes in a "plainly discriminatory manner." *Id.* This language appears to criticize the state's means rather than its purposes. Indeed, Justices O'Connor, Brennan, Marshall and Rehnquist, who seldom concur with one another, faulted the majority for "collapsing the two prongs of the rational basis test into one . . . ." *Id.* at 1692.

In Williams v. Vermont, 105 S. Ct. 2465 (1985), the Court invalidated a Vermont

sulted in the challenged action being upheld as constitutional.[57]

Ironically, after its protestation that heightened scrutiny is unnecessary when judging distinctions based upon mental retardation, the Court itself, in essence, did subject the city's action to more than the conventional minimal scrutiny test.[58] Some, if not all, of the interests asserted by the City of Cleburne were legitimate objects of the police power. It is certainly within a municipality's power to protect the well being of both its residents and their property values. If prohibiting a group home would, or could, serve any of those interests in any way, mere minimal scrutiny would require sustaining the city's denial. Nevertheless, the Court concluded that the record in the case did not establish that Cleburne's ordinance and denial of a permit to CLC served any legitimate interest. As Justice Marshall points out in his partial dissent, however, when invoking minimal scrutiny the Court does "not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation."[59] Rather, the Court

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statute that collected a use tax on vehicles it registered to persons who had purchased their automobiles out of state. Vermont reduced a person's use tax by the amount of any tax paid to another state if the registrant was a Vermont resident at the time. Nonresidents paid the use tax with no offset. Vermont argued that the taxation scheme served the purposes of encouraging purchases of automobiles within the state, requiring users of state roads to pay for them and enabling Vermont citizens to shop in other states without penalty. *Id.* at 2473-74. Although the Court stated that the legislation served no legitimate interests, *Id.* at 2472, the Court actually found fault with the statute not because Vermont's purposes were illegitimate, but because the means selected were insufficiently related to serving those purposes. *Id.* at 2474. The Court concluded that "residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants . . . ." *Id.*

Although in *Ward* and *Williams* the Court was less deferential to state economic statutes, it is premature to predict that the court may be embarked upon a return to "Lochnerizing," that is, scrutinizing legislative actions carefully, and frequently invalidating them. *See* Lochner v. New York, 198 U.S. 45 (1905).

57. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980). In *Fritz* the Court upheld a retirement act classification that provided for double, or windfall, benefits to some classes of employees but not others. The Court stated that "where, as here, there are plausible reasons for governmental action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." 449 U.S. at 179. In Williamson v. Lee Optical, 348 U.S. 483 (1955), the Court established a deferential standard to scrutinize the means selected by government to serve its "plausible" interest. The Court stated: "It is enough that there is an evil at hand and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U.S. at 488.

58. 105 S. Ct. at 3258. In his partial dissent Justice Marshall stated that the majority used a " 'second order' rational basis review." *Id.* at 3264.

59. *Id.*

simply should look at whether the city might have had a legitimate interest in undertaking its action. Then the Court finds that the means selected by the city are sufficiently related to that purpose if the Court merely can conceive of a connection between the purpose and means.[60]

The *Cleburne* Court's opinion leaves readers uninformed as to why it subjected the Cleburne City Council's action to the more searching inquiry that resulted in its being held unconstitutional. Perhaps, as Justice Marshall has been arguing for years, the decision is sensible when one considers and balances the following three factors: the character of the classification in question, the relative importance to the individual of the right affected and the importance of the governmental interest supporting the classification.[61] Mentally retarded persons evidence several indicia of a suspect class; the right to housing is very important; and the city's denying CLC a permit only served a limited public purpose. The real problem with the *Cleburne* decision, though, lies in the fact that the court fails to provide any clear direction as to when, if ever, zoning discrimination against retarded persons is constitutional.

60. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979); New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

61. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

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