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CASENOTES

CLEBURNE LIVING CENTER v. CITY OF CLEBURNE:* THE IRRATIONAL RELATIONSHIP OF MENTAL RETARDATION TO ZONING OBJECTIVES

A mentally retarded person's right to treatment in the least restrictive environment has recently assumed constitutional dimensions¹ and has prompted the use of group homes as normative habilitation settings for mildly to moderately retarded adults.² In *Cleburne Living Center v. City of Cleburne*,³ the United States Supreme Court addressed whether the proposed residents of a group home for the mentally retarded were a sufficiently suspect class to require intermediate scrutiny under the equal protection clause of

* 105 S. Ct. 3249 (1985).

1. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (1972), *modified sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); 42 U.S.C. § 6010 (1982) (all developmentally disabled persons entitled to treatment and habilitation in an environment least restrictive to their civil liberties); 29 U.S.C. § 794 (1982) (federally supported programs and activities shall not discriminate against any "otherwise qualified handicapped individual"); Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN. art. 5547-300 (Vernon Supp. 1985) (establishing "right to live in the least restrictive habilitation setting appropriate to the individual's needs and to be treated in the least intrusive manner appropriate for the individual's needs").

2. Group homes are the principal non-institutional living alternatives for the mentally retarded. The Fifth Circuit found that the existence of group homes "is critical to assimilation" into society. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 193 (5th Cir. 1984). *Contra* S. BERCOVICI, BARRIERS TO NORMALIZATION: THE RESTRICTIVE MANAGEMENT OF RETARDED PERSONS 8-9 (1982); PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, ANNUAL REPORT 33 (1974).

The deinstitutionalization of mentally retarded persons and other dependent groups has created a need for community residential alternatives that have yet to be developed. *See generally* Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1981) (discussion of local resistance that group homes encounter in residential locations). *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218 (Gregory, J., dissenting) ("[t]o allow Bibb County to 'zone out' the proposed group home would unquestionably frustrate the implementation of a clearly articulated state policy"), *dismissed for want of a federal question*, 105 S.Ct. 57 (1984). The dissent, in *Macon Association*, noted that the group home would be an unobtrusive use because the outward physical appearance would remain unchanged and the residents would function as a single house-keeping unit like other families in the neighborhood. *Id.* at 492, 314 S.E.2d at 225.

3. 105 S. Ct. 3249 (1985).

the fourteenth amendment.⁴ The *Cleburne* Court held that classifications based on mental retardation were not quasi-suspect,⁵ but nonetheless concluded that the challenged zoning ordinance was unconstitutionally applied to Cleburne Living Center because it violated the mentally retarded residents' equal protection rights.⁶

Cleburne Living Center (the Center) planned to establish a licensed residential facility for mildly to moderately retarded adults⁷ in a multi-residential district of Cleburne, Texas.⁸ The Cleburne Planning and Zoning Commission classified the Center as a "hospital for the feeble-minded" and required the Center to apply for a special use permit.⁹ Following a public hearing and commission and

4. *Id.* The fourteenth amendment of the United States Constitution provides, in relevant part, that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV

5. *Cleburne Living Center*, 105 S. Ct. at 3258. Justice White wrote the majority opinion in the six to three decision. Although concurring in the result, Justices Marshall, Brennan, and Blackmun would have found the mentally retarded a quasi-suspect class and, therefore, dissented from the majority's refusal to apply heightened scrutiny. For a discussion of quasi-suspect classification analysis see *infra* notes 20, 29.

6. *Id.* at 3260.

7. Cleburne Living Center is a Texas corporation organized for the purpose of establishing and operating supervised group homes for the mentally retarded. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 193 (5th Cir. 1984). Cleburne Living Center currently operates a group home in Keene, Texas, which would serve as a model program. Joint Appendix at 35, *Cleburne Living Center v. City of Cleburne*, 105 S. Ct. 3249 (1985). Jan Hannah is Vice President and a one-third shareholder of Cleburne Living Centers, Inc. *Id.* at 4. Hannah purchased the house at 201 Featherston Street in Cleburne with the intention of establishing a group home for the mentally retarded. *Cleburne Living Center*, 105 S. Ct. at 3252.

8. Cleburne zoning ordinance, Section 8, District R-3 Apartment House District, use regulations provide:

In District R-3, no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved or altered, except for one or more of the following uses . . . :

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.
3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels.
6. *Hospitals*, sanitariums, nursing homes or homes for convalescents or aged, *other than for the insane or feeble-minded* or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
8. Philanthropic or eleemosynary institutions other than penal institutions.
9. Accessory uses customarily incident to any of the above uses and located on the same lot, not involving the conduct of a business or industry.
10. Signs as provided in sect. 21.

Joint Appendix at 60-61, *Cleburne Living Center*, 105 S. Ct. at 3249 (emphasis added).

9. Cleburne Living Center was advised that a special use permit would be required for the proposed group home because "although a home for 'mentally deficient' persons is not specifically excluded, WEBSTER'S NEW IDEAL DICTIONARY defines the term 'feeble-minded' as 'mentally deficient.'" The Center was then referred to

council meetings, the city denied the Center's permit request,¹⁰ stating that the proposed location was unsuitable¹¹ and that property owners neighboring the proposed site, fearing that crime and other aberrant behavior would increase, vehemently opposed its establishment.¹² The Center filed suit against the city in the District Court for the Northern District of Texas, seeking injunctive relief from the permit denial and monetary damages for lost profits.¹³

Finding the challenged ordinance rationally related to the city's legitimate interest in the location of facilities serving the mentally retarded, the district court affirmed the permit denial.¹⁴ The United

the exclusionary classification of "hospitals for the feeble-minded" under section 16 of the Cleburne zoning ordinance. *Cleburne Living Center*, 105 S. Ct. at 3252-53; Plaintiff's Exhibit No. 2, Letter from Robert Miller, assistant city attorney, to Ms. Northrup of Cleburne Living Center (September 29, 1980), Joint Appendix at 69, *Cleburne Living Center v. City of Cleburne*, 105 S. Ct. 3249 (1985).

10. On July 28, 1980, the Cleburne Planning and Zoning Commission held a hearing and subsequently denied the Center's special use permit application. On October 14, 1980, following a public hearing, the Cleburne City Council voted three-to-one to again deny the Center a special use permit. *Cleburne Living Center*, 726 F.2d at 194.

11. *Cleburne Living Center*, 105 S. Ct. at 3259. The four bedroom and two bath house has 2700 square feet of living space and is located on a corner lot measuring 156 by 103 feet. The Texas Department of Health and Human Services had tentatively approved its use as a licensed group home. Joint Appendix at 74, *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 202 (5th Cir. 1984).

12. The Fifth Circuit found the challenged ordinance overbroad because it allowed the city to exclude all group homes based on the vocal opposition of neighboring landowners. *Cleburne Living Center*, 726 F.2d at 201. "In effect, prejudice becomes its own excuse." *Id.* at 202.

13. The original plaintiffs included Cleburne Living Center, Jan Hannah, Johnson County Association for Retarded Citizens (dismissed for lack of standing), and Advocacy, Inc. (lacked standing to represent the individual claims of Hannah and Cleburne Living Center but provided legal representation). The defendants included the Cleburne mayor, whom also acted as chairman of the city council; the three elected councilmen; and the city attorney who was responsible for the prosecution of zoning violations. Joint Appendix at 60-61, *Cleburne Living Center*, 105 S. Ct. at 3249.

The first amended complaint filed January 11, 1982 alleged violations of Title 42 of U.S.C. § 1983, the fourteenth amendment to the United States Constitution, and first amendment guarantees of freedom of association and the right to travel. *Id.* at 11-12. State claims included violations of the equal protection and due process clauses of the Texas Constitution and statutory violation of the Texas Mentally Retarded Persons Act of 1977. *Id.* at 12-13. The plaintiffs sought a permanent injunction against the prohibition of operating the group home, monetary losses of rent to Hannah, lost profits to the Center, and the permanent enjoinder of the city's use of general revenue sharing funds. *Id.* at 13-15.

14. The district court applied the lowest level of scrutiny, rational review, and upheld the ordinance even after finding that the city's action "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." *Cleburne Living Center*, 105 S. Ct. at 3253. Under the first tier of the equal protection test, all legislative enactments are presumed valid unless a suspect classification is used or a fundamental right is abridged. See *New State Ice Co. v. Liebman*, 285 U.S. 262, 285 (1932) (Brandeis J., dissenting) (State action held valid unless clearly arbitrary, capricious or unreasonable). Justice Stewart stated: "In the absence of invidious discrimination, however, a court is not free under the aegis of the

States Court of Appeals for the Fifth Circuit reversed, concluding that because mentally retarded persons experienced historical prejudice, political powerlessness, and immutable disabilities, they are a quasi-suspect class.¹⁵

Applying the intermediate scrutiny standard of review appropriate to the quasi-suspect finding, the Fifth Circuit held the municipal ordinance facially unconstitutional because its discriminatory treatment of the mentally retarded failed to further any important governmental interest.¹⁶ The court of appeals further found the ordinance unconstitutional as applied¹⁷ to the Center, based on the city's lack of justification for treating group homes for the mentally retarded as a special use.¹⁸ The Supreme Court of the United States granted the city *certiorari* to determine whether a traditional level of scrutiny, rational review, should apply to classifications based on mental retardation and whether the city ordinance was valid under the appropriate standard of review.¹⁹

The Court carefully scrutinized the characteristic of mental retardation against the traditional indicia of suspect classifications.²⁰

equal protection clause to substitute its judgment for the will of the people of a state as expressed in the laws passed by their popularly elected legislatures." *Parham v. Hughes*, 441 U.S. 347, 351 (1979) ("[l]egislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others").

15. The Fifth Circuit found that these factors, in addition to the effects of segregation, isolation, and exclusion, were sufficient to invoke intermediate scrutiny. *Cleburne Living Center*, 726 F.2d at 198-99. See also *infra* note 29.

16. In applying intermediate scrutiny, the court of appeals held the ordinance unconstitutional on its face. *Cleburne Living Center*, 726 F.2d at 200. Assuming that the stated legislative goals are substantial, in each instance "there is not a sufficiently close correspondence between the goal and the ordinance's means of achieving it." *Id.*

In response to the denial of the city's petition for rehearing *en banc*, six judges filed a dissenting opinion on the ground that regulatory statutes which treat the mentally retarded differently should not be invalidated under a heightened scrutiny analysis when no fundamental rights are at stake and the classification has a rational basis. *Cleburne Living Center v. City of Cleburne*, 735 F.2d 832 (5th Cir. 1984) (*per curiam*).

17. The Supreme Court affirmed the Fifth Circuit finding that the mentally retarded were denied equal protection of the laws not because of the language of the ordinance but because of its application to residential facilities for the mentally retarded. *Cleburne Living Center*, 105 S. Ct. at 3259. See also *Id.* at 3263 (Marshall, J., concurring in part and dissenting in part) (discusses majority development of novel "as applied" standard).

18. *Cleburne Living Center*, 726 F.2d at 200-01. The Cleburne zoning ordinance discriminates between persons having mild to moderate mental retardation and other groups, such as the elderly, that require supervision but are permitted to establish group homes in the apartment-zoned district without a special use permit. *Id.* at 201. See *infra* note 60; see also *Shepard v. Woodland Township Comm. and Planning Bd.*, 71 N.J. 230, 238, 364 A.2d 1005, 1013 (1976) (ordinances which regulate use by regulating the identified user are valid so long as the classifications are reasonably drawn and the conditions they impose bear a real and substantial relationship to regulation of land use).

19. *Cleburne Living Center v. City of Cleburne*, 105 S. Ct. 427 (1984).

20. See *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938)

Finding insufficient suspect indicia in the classification, and noting the social and economic nature of the legislation, the *Cleburne* Court allowed the city broad regulatory latitude.²¹ In support of its holding that only minimal scrutiny was warranted, the Court found the Center's equal protection claim analogous to the age based classification asserted in *Massachusetts's Board of Retirement v. Murgia*.²² The Court reasoned that rational review was appropriate because a classification based on mental retardation, like that based on age, related to individual ability.²³ Using this lower level of scrutiny, the Court held the city's classification of the Center as a "hospital for the feeble-minded" constitutional²⁴ and focused on how the challenged ordinance's special use permit was then applied.²⁵

The Court determined that although the city had a legitimate interest in the location of special uses within its borders, the city could not apply the special use ordinance based on concerns which were irrelevant to the classification.²⁶ The ordinance's special use permit provision denied the Center equal protection of the laws because similarly situated multi-family and care residences were not

(prejudice against "discrete and insular minorities may be a special condition" calling for severe scrutiny). See also W. COHEN & J. KAPLAN, CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 774-75 (2d ed. 1982).

21. *Cleburne Living Center*, 105 S. Ct. 3249, 3254-56. The Court found a legitimate governmental interest in providing for the distinctive needs and capabilities of the mentally retarded. Relying on *United States R.R. Bd. v. Fritz*, 449 U.S. 166 (1980), and *New Orleans v. Dukes*, 427 U.S. 297 (1976), the *Cleburne* Court granted the city "wide latitude" in legislating for social and economic purposes. *Cleburne Living Center*, 105 S. Ct. at 3254.

22. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). But see *Cleburne Living Center*, 105 S. Ct. at 3269 n.19 (Marshall, J., concurring in part and dissenting in part) (majority reliance on *Murgia* is misplaced because it predates intermediate scrutiny and only stands for the proposition that age based classifications do not warrant strict scrutiny).

23. *Cleburne Living Center*, 105 S. Ct. at 3255.

24. *Id.* at 3255-58.

25. *Id.* at 3258-60. The Court required the city to show "any rational basis" for its belief that the group home would impact differently on legitimate interests than would other multi-family and care residences. *Id.* at 3259.

26. Each of the reasons which the city asserted to justify denying the Center's permit application violated equal protection of the laws. The prejudice of neighboring property owners, "unsubstantiated by factors" relevant to a zoning procedure, was found impermissible as were the generalized concerns of legal liability and the location on a 500-year flood plain near a school. *Id.* See PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, ANNUAL REPORT 118-19 (1976) (mental retardation is just one category of handicap included in the legislative classification of "developmentally disabled" used to denote groups with similar problems). See also ISSUES IN COMMUNITY RESIDENTIAL CARE 79-80 (R. Budson ed. 1981) (recent legal challenge against exclusionary zoning practices have made it clear that land use regulations, naively believed to be concerned with purely physical aspects of community development, have significant social impacts that have been overlooked too long). Cf. Note, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped*, 26 ARIZ. L. REV. 205 (1984) (advocating that heightened judicial scrutiny be applied to mental retardation classifications only in the context of zoning).

subject to this permit requirement and could locate as of right anywhere within that zoned district.²⁷ Finding that the application of the special use permit provision to the Center denied its mentally retarded residents equal protection, the Court did not reach the issue of whether the ordinance was facially invalid.²⁸

The *Cleburne* Court then engaged in an apparently heightened scrutiny²⁹ of the classification and advanced four reasons for reversing the Fifth Circuit's holding that mentally retarded persons are a quasi-suspect class.³⁰ First, classifications that govern as large and diverse a group as the mentally retarded require substantive social and economic policy decisions best suited to the legislature, not the judiciary.³¹ Second, special legislation for the mentally retarded at both the state and federal levels weighs against the need for extra judicial scrutiny.³² Third, the special legislative response to the unique needs of the mentally retarded contradicts the Fifth Circuit's finding that the group is politically powerless.³³ Fourth, granting in-

27. *Cleburne Living Center*, 105 S. Ct. at 3259.

28. *Id.* at 3258 (Court did not address issue of whether the city "may never insist on a special use permit" for a mentally retarded group residence).

29. The Supreme Court has developed an intermediate tier in its equal protection analysis to provide greater judicial protection from the denial of very important benefits to certain quasi-suspect classes. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute authorizing public schools to deny enrollment to children of illegal aliens found unconstitutional under a heightened standard of review). *See generally* Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 *YALE L.J.* 912 (1981). *But see* *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973) ("the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *Doe v. Colautti*, 592 F.2d 704, 710 (3d Cir. 1979) (without judicial recognition of suspectness, large budget allocations for treatment of mentally ill "are warnings against judicial creation of a new suspect classification").

30. *Cleburne Living Center*, 105 S. Ct. at 3255-58.

31. *Id.* at 3256. The *Cleburne* Court used intermediate scrutiny even though it claimed to have used minimal scrutiny. *Id.* at 3264-65 (Marshall, J., concurring in part and dissenting in part). The Court's deference to the legislature because of "perhaps ill-informed opinions of the judiciary" is ironic because the record clearly shows that the city officials lacked professional guidance in their classification and treatment of the potential group home residents. Councilman Bass admitted not knowing what mental retardation was and Councilman Johns stated he had never met a retarded person even though he was formerly on the board of directors of a local sheltered workshop. Joint Appendix at 24-31, *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984). Mr. Johns characterized the mentally retarded as "mentally unbalanced." *Id.* at 26-27.

32. *Cleburne Living Center*, 105 S. Ct. at 3256. *See also supra* note 1.

33. *Cleburne Living Center*, 105 S. Ct. at 3257. The developmentally disabled, as a diverse handicapped population, have in recent years gained important statutory rights which courts have enforced against local interests. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, ANNUAL REPORT 155 (1976). Courts have entered declaratory judgments on behalf of the mentally retarded regarding the right to appropriate education, the right to treatment, the right to due process, the right to employment and minimum wages, the right to access to public transportation, the right to reside in the community, and the right to treatment and habilitation services in the community.

intermediate scrutiny to a group as amorphous as the mentally retarded opens the flood gates to a myriad of heretofore unrecognized claims of the aged, physically disabled, and mentally ill.³⁴

The Court was correct in finding that the mentally retarded do not constitute a quasi-suspect class because mental retardation is a mutable classification based on intelligence tests and social adaptation skills.³⁵ Both the status and degree of an individual's retardation are often uncertain because interpretations of scores vary widely and intelligence and social adaptation are dynamic.³⁶ The Court, however, did not go far enough in striking down the application of the zoning ordinance. Rather, the Court should have facially invalidated the ordinance, under a rational review standard, because of the city's impermissible exercise of its police power.

The standardized test scores underlying the label of mental retardation, although subject to variable interpretation, are objective indicators of individual ability.³⁷ Because there is a relationship between the individual's degree of retardation and his actual ability to function in society,³⁸ state and federal legislatures have enacted statutes to enhance societal accommodation of the mentally retarded person's intellect and coping skills.³⁹ The Court generally has upheld legislative classifications against equal protection claims under a rational relation level of scrutiny where the classifications legitimately

"In sum, the right to be different and to have that difference accommodated." *Id.* Cf. W. COHEN & J. KAPLAN, CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 775 (2d ed. 1982).

34. *Cleburne Living Center*, 105 S. Ct. at 3257-58.

35. The plaintiff's expert, Dr. Roos, testified at trial that the status of mental retardation is determined by the composite result of three different kinds of tests: "[e]ssentially mental retardation is a problem of learning. . . . There is a wide variability among retarded individuals [as to degree of retardation]. . . . We use basically three criteria [to determine whether an individual is retarded]: Measured intelligence, adaptive behavior and medical classification." *Cleburne Living Center*, 726 F.2d at 192 n.1.

36. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, ANNUAL REPORT 32 (1974). Approximately six million persons are labeled mentally retarded in the United States. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, ANNUAL REPORT 67 (1976). Ninety-five percent of all mentally retarded persons are only mildly to moderately impaired and are candidates for total assimilation into society. *Id.*

37. One commentator has noted that some suspect classifications are mutable, for example, alienage, and some immutable characteristics such as physical disability and intelligence are legitimate classifications. Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981).

38. See *infra* note 42.

39. The mentally retarded do not require extra judicial protection: "[t]he bulwark of constitutional protection for mentally retarded persons, therefore, lies in the enforcement of their substantive rights under the Due Process Clause. . . . Accordingly, a determination that heightened scrutiny does not apply would simply represent a sound interpretation of the Equal Protection Clause, not an abdication of judicial majoritarian excess." Amicus Brief for the United States at 20, *Cleburne Living Center*, 105 S. Ct. at 3249.

reflect individual ability.⁴⁰

The Supreme Court's refusal to apply intermediate scrutiny was proper because the mentally retarded are insufficiently suspect.⁴¹ Mental retardation, as a defining characteristic, is mutable and rationally related to actual ability.⁴² The suspect class analysis was unnecessary, however, because the zoning ordinance on its face would not have passed the *Cleburne* Court's rational relation standard of

40. See *Schweiker v. Wilson*, 450 U.S. 221 (1981) (unsuccessful challenge to statutory termination of welfare benefits to institutionalized persons under age sixty-five). The Court sustained the challenged statute without determining whether the mentally ill plaintiffs were a suspect class. *Id.* at 234. In dissent, Justice Powell found the classification irrational under the rational relation test. *Id.* at 241 n.2 (Powell, J., dissenting). *Accord* *Frederick L. v. Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976); *Fialkowski v. Shapp*, 405 F. Supp. 946, 959 (E.D. Pa. 1975); *Pennsylvania Ass'n Retarded Children v. Commonwealth of Pa.*, 343 F. Supp. 279, 302-03 (E.D. Pa. 1972) (court enforced a consent agreement in which the defendant school district agreed to protect the right of mentally retarded children to free public education appropriate to their needs). The rational relation test was applied to sustain governmental hiring practices which preferentially discriminated against mentally retarded applicants. *Fowler v. U.S.*, 633 F.2d 1258, 1262 (8th Cir. 1979). The same test was used to invalidate differential classifications for employment benefits once a retarded individual was placed in a job. *Id.* See also *North Carolina Ass'n for Retarded Citizens v. State of N.C.*, 420 F. Supp. 451, 458 (M.D.N.C. 1976) (statute providing mandatory sterilization of sexually active mentally retarded citizens upheld under rational relation standard of review).

Mental illness classifications have similarly been reviewed under the rational relation test. See *Benham v. Edwards*, 678 F.2d 511, 519 (5th Cir.), *vacated on different grounds*, 463 U.S. 1222 (1982); *Romeo v. Youngberg*, 644 F.2d 147, 159 (3d Cir. 1980), *vacated on different grounds*, 457 U.S. 307 (1982), *Doe v. Colautti*, 592 F.2d 704, 710-711 (3d Cir. 1979); *People v. Chavez*, 629 P.2d 1040, 1051-52 (Colo. 1981) (*en banc*). Similarly, old age has been consistently held not to constitute a suspect classification because of its relationship to declining abilities. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (the elderly have not been subject to unique disabilities on the basis of stereotyped characteristics "not truly indicative of their abilities"); *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (1977).

Discrimination on the basis of intelligence is not suspect because it is not directed at a discrete and insular minority. Note, *Equal Protection and Intelligence Classifications*, 26 STAN. L. REV. 647, 655 (1974).

41. The issue of whether persons having mental retardation are suspect was one of first impression for an appellate court. *Cleburne Living Center*, 726 F.2d at 196. Courts have denied extraordinary protection to the mentally retarded, as well as other developmentally disabled groups, because of the rational relation that could exist between their diminished abilities and the objective of the legislation. Amicus Brief for the United States at 10, *Cleburne Living Center*, 105 S. Ct. at 3249 ("[m]ore is needed to justify heightened scrutiny, and that something extra is the absence of significant differentiating needs and capabilities"). The only other court to apply intermediate scrutiny to a classification based on mental retardation was reversed by the Supreme Court without reaching the issue of suspectness. *Sterling v. Harris*, 542 F.2d 1260 (7th Cir. 1976), *rev'd sub nom. Schweiker v. Wilson*, 450 U.S. 221 (1981). *But cf.* *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473 (D.N.D. 1982) (intermediate scrutiny necessary because of continuing discrimination against mentally retarded).

42. See *supra* note 41. *Cf.* *Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979) (even though the court found that the blind were a politically weak minority with a history of prejudice and discrimination, the legitimate relationship of the classification to differential abilities undermined any suspectness).

review.⁴³ The statute facially discriminated against mentally retarded persons, violating their equal protection rights. Because it limited relief to the facts of the case, the Court's "as applied" analysis neither clarifies equal protection standards of review nor protects identically situated claimants from future discrimination.⁴⁴

It is apparent, however, that the *Cleburne* Court applied a more stringent rational relation test than is traditionally applied to zoning challenges.⁴⁵ The Court could have upheld the city ordinance under an even more deferential standard of review because the fourteenth amendment does not proscribe all which confers social and economic legislation⁴⁶ benefits or burdens.⁴⁷ Rather than give deference to any fanciful relation between the classification and a legitimate legislative purpose, the Court demanded that the City prove an actual legislative objective.⁴⁸

Fourteenth amendment standards require that Cleburne officials enact and administer zoning laws in a manner rationally related to the grant of state police power.⁴⁹ State action that isolates a

43. Texas courts have yet to construe the Texas statute establishing the right to treatment in conjunction with zoning powers. The Center voluntarily dismissed the pendent state claims after a judicial order was issued stating the intent of the trial judge to resolve the case solely on those grounds. *Cleburne Living Center*, 105 S. Ct. at 3257 n.11.

44. *Id.* at 3272-73 (Marshall, J., concurring in part and dissenting in part).

45. Three of the justices viewed the scrutiny level as a heightened or "second order" rational basis review. *Id.* at 3264. See *supra* note 31. Justice Stevens, in a separate concurring opinion, viewed the equal protection analysis as another example of a "single standard" continuum in which the interests of the disadvantaged class are weighed against the intended public purpose in determining whether the disparate treatment is justified. *Id.* at 3261-62 n.4.

46. It is the long-standing policy of the Supreme Court to avoid deciding constitutional issues where other grounds are available for resolution of the case. *Harris v. McRae*, 448 U.S. 297, 307 (1980). See also *Cleburne Living Center*, 105 S. Ct. at 3263 (Marshall, J., concurring in part and dissenting in part) ("permissible discriminations between persons must bear a rational relation to their relevant characteristics"). Cf. *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (state classification of optometrists upheld under traditional rational relation test).

47. *Cleburne Living Center*, 105 S. Ct. at 3259.

48. *Id.* at 3264-65 (Marshall, J., concurring in part and dissenting in part). *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (because legislators and administrators are properly concerned with balancing numerous competing considerations, courts refrain from reviewing the merits of their legislation, absent a showing of arbitrariness or irrationality). Ascertaining actual legislative purpose is "an essential step in equal protection" clause analysis. See *Schweiker v. Wilson*, 450 U.S. 221, 244 n.6 (1981) (Powell, J., dissenting); *F. S. Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920). See generally Gunther, *The Supreme Court 1971 Term: Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 46 (1972) (requiring the legislature to state its own reasons for classifications as the means to a particular objective will encourage a fuller airing in the political arena of the grounds for legislative action). The goal of group home residences is to assimilate the mentally retarded into society.

49. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

person in a manner not in keeping with "a just and proper relation to the attempted classification" is proscribed.⁵⁰ Even under a deferential standard of review, ordinances which expressly prohibit particular residential land uses, while permitting other like uses, are irrational and exclusionary.⁵¹ The *Cleburne* Court properly found that the city's zoning practice of classifying residential facilities for socially undesirable groups in a manner unrelated to the achievement of any legitimate governmental interest is violative of the fourteenth amendment.⁵²

Regardless of the suspect nature of a classification, any legislation conferring a burden should be narrowly drawn, reasonable, and rest upon "some ground of difference having a fair and substantial relationship to the object of legislation."⁵³ The *Cleburne* Court carefully scrutinized the city's purported reasons for denying the Center the right to locate its group home without a special use permit and

50. *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 165 (1897).

51. *United States v. Carolene Products*, 304 U.S. 144, 154 (1938) (stricter scrutiny necessary "because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition"). State courts, although using more restrictive standards for rational review than federal courts, have found impermissible exclusions in factual circumstances analogous to those in *Cleburne, Texas*. See, e.g., *People of Cahokia v. Wright*, 11 Ill. App. 3d 124, 131, 296 N.E.2d 30, 34 (1973), *aff'd*, 57 Ill. 2d 166, 311 N.E.2d 153 (1974) (in determining whether a zoning classification violates the equal protection clause, it is fundamental that "there [be] a reasonable basis for differentiating between the class to which the law is applicable and the class to which it is not"). *PDM Construction v. Welsh*, 89 N.J. Super. 460, 461, 215 A.2d 382, 383, *aff'd*, 91 N.J. Super. 125, 219 A.2d 343 (1966) (court defined nursing home as "nothing more than a boarding house or hotel for elderly disabled persons" when the zoning ordinance prohibited the former use and permitted as of right the latter two uses).

When the effect of an ordinance's application to a particular land use is to exclude it, courts will look for a legitimate governmental objective for excluding the activity. See *Berenson v. New Castle*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979) (zoning ordinance could be invalidated on due process grounds if enacted for improper purpose, or if enacted without regard to regional and local housing needs and if it had an exclusionary effect). *Ellick v. Board of Supervisors*, 17 Pa. Commw. 404, 333 A.2d 239 (1975) (when an individual challenging a zoning ordinance proves a total prohibition of an otherwise lawful use, the burden shifts to the municipality to prove that such prohibition bears a relationship to public health, safety, morals, and general welfare); Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. Va. L. Rev., 669, 680-81 (1981).

52. The State of Texas, in support of the Center, contended that the ordinance was invalid under the rational relation test because the discriminatory distinction that ordinance created between group homes for the mentally retarded and multiple-occupant residential facilities for nonretarded persons, including facilities for other special needs populations, does not rationally advance any valid governmental objective. Amicus Brief for State of Texas at 13-15, *Cleburne Living Center*, 105 S. Ct. at 3249. See P. ROOS, B. McCANN, AND M. ADDISON, *SHAPING THE FUTURE: COMMUNITY-BASED RESIDENTIAL SERVICES AND FACILITIES FOR MENTALLY RETARDED PEOPLE* 157 (1980) (even though the classification of mental retardation is suspect in some contexts, "there is no need to make that showing [because t]he classifications are without rational basis").

53. *F. S. Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

found each reason insufficiently related to legitimate interests.⁵⁴ The Court concluded that the Center's proposed use of the apartment-zoned land was no different than other residential uses permitted as of right.⁵⁵ The *Cleburne* Court focused on the narrow application of the city's classification in finding that it did not further any legitimate zoning objective.⁵⁶

The Cleburne ordinance excluded facilities of any kind for the mentally retarded, including the Center's group home, unless they were granted a special use permit.⁵⁷ Classifying residential land uses according to the mental ability of its occupants is insubstantially related to the general welfare as required under the exercise of police power.⁵⁸ Because the legitimate focus of zoning regulations is on the purpose and use of the property rather than the learning skills and familial relationships of the users, the city impermissibly used its police power to exclude the Center's group home.⁵⁹ After this im-

54. *Cleburne Living Center*, 105 S. Ct. at 3259-60.

55. Although the Court refused to recognize the mentally retarded as a quasi-suspect class, it clearly stated that the mental retardation of potential residents was not a legitimate zoning concern. *Id.* at 3258. ("[T]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational").

56. *Id.* at 3259.

57. *Cleburne Living Center*, 726 F.2d at 200. No other facilities existed to serve the mentally retarded in Cleburne. Joint Appendix at 94, *Cleburne Living Center*, 105 S. Ct. at 3249. The same number of unrelated occupants would have been permitted to reside as of right at the same location if the use was not zoned out of Cleburne entirely as a "hospital for the feeble-minded." *Cleburne Living Center*, 726 F.2d at 200. "Because the Featherston house is located in a R-3 zone and, more generally, because it is located anywhere within Cleburne, its use as a group home is not automatically permitted but requires a special use permit from the Cleburne City Council." *Id.* at 194. The councilmen's preferred location for the group home was in a structure the state regulatory authorities found inappropriate. Joint Appendix at 46-48, *Cleburne Living Center*, 105 S. Ct. at 3249. "The authority and responsibility to determine how the unique service needs of the mentally retarded affect their need and ability to live in community-based group homes is expressly granted to Amicus Texas Department for the Mentally Handicapped and Mentally Retarded and not to local zoning authorities." Amicus Brief for The State of Texas and The Texas Department of Mental Health and Mental Retardation at 4, *Cleburne Living Center*, 105 S. Ct. at 3249.

58. *New State Ice Co. v. Liebman*, 285 U.S. 262, 302 (1932) (Brandeis, J., dissenting) ("means of regulation selected shall have a real or substantial relation to the object sought to be obtained"). See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 683 (9th ed. 1975) (rational review "with a bite" is less strict and, therefore, preferable to the new three-tier doctrine, in that it "would have the court take seriously a constitutional requirement that has never been formally abandoned: that legislative means substantially further legislative ends).

59. The Cleburne City Council's paternalistic concerns for the safety and well-being of the Center's occupants was not a legitimate special use condition:

ZONING ORDINANCE OF CLEBURNE TEXAS
SECTION 16 SPECIAL USE PERMITS

Any of the following uses may be located in any district by Special Use Permit of the Governing Body, after public hearing, and after recommendation of the Planning Commission, under such conditions as to operation, site development, parking signs, and time limit as may be deemed necessary in order that

permissible exclusion from locating in Cleburne as of right,⁶⁰ the city then declined the Center a special use permit on grounds unrelated to legitimate zoning objectives.⁶¹

The city claimed to have rejected the Center's special use permit application based on potential overcrowding in the group home, negative perceptions of mentally retarded persons, and concern for the safety of the Center's residents.⁶² The city council, however, de-

such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purpose of this Ordinance. . . . To better facilitate supervision of the special use permits, a limitation of one year is applicable to each such permit issued.

Each applicant shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used for the following purposes under the special use permits: 9. Hospital for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.

Joint Appendix at 62-63, *Cleburne Living Center*, 726 F.2d at 191. See Comment, *Can the Mentally Retarded Enjoy "Yards That are Wide?,"* 28 WAYNE L. REV. 1349, 1377 (1982).

60. *Cleburne Living Center*, 726 F.2d at 200-02. Texas Mental Health and Mental Retardation Act of 1965, TEX.REV.CIV.STAT.ANN. art. 5547-202 217(a) (Vernon Supp. 1985); Texas Mentally Retarded Persons Act of 1977, TEX.REV.CIV.STAT.ANN. art. 5547-300 58-60 (Vernon Supp. 1985). See *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 291-95 (1982) (a municipality may not prohibit an activity that state sanctions); *Leslz v. Kavanaugh*, (E.D. Tex. July 19, 1983) (unpublished order and memorandum opinion) (the State and the Texas Department for the Mentally Handicapped and Mentally Retarded agreed to identify and overcome legal, programmatic, financial and attitudinal barriers to the creation of facilities and programs for habilitation outside of institutions), cited with approval in Amicus Brief for The State of Texas and The Texas Department of Mental Health and Mental Retardation at 10, *Cleburne Living Center v. City of Cleburne*, 105 S. Ct. 3249 (1985). "The exercise of local zoning powers to exclude such privately operated (but state regulated and jointly state and federally financed) group homes from normal residential neighborhoods frustrates state public policy." *Id.* at 3.

Impermissible uses of police powers against suspect classes are found in exclusionary zoning practices. For example, in racial and economic discrimination cases a court has found proof of discriminatory intent in the administration of regulations and local zoning histories sufficient to invalidate the application of the ordinance under the constitutional guarantees of due process and equal protection. *Hope, Inc. v. County of DuPage, Ill.*, 717 F. 2d 1061, 1076 (7th Cir. 1983) ("[d]istinctions and differentiation among citizens based upon their racial or economic compatibility cannot be a legitimate government interest under the equal protection clause"). *Accord* *Penhurst State School v. Halderman*, 451 U.S. 1 (1981); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Kropf v. Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974).

61. *Cleburne Living Center*, 105 S. Ct. at 3260.

62. The factors the city council listed in reaching its decision to deny the special use permit included:

- (a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;
- (b) the location of a junior high across the street from 201 Featherston;
- (c) concern for the fears of elderly residents of the neighborhood;
- (d) the size of the home and the number of people to be housed;
- (e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

nied the permit because it was ignorant and unjustifiably fearful of mildly to moderately retarded persons.⁶³ In allowing neighboring landowners to control the issuance of special use permits, the city council impermissibly delegated its police power to a vocal majority.⁶⁴ The Court concluded that none of these factors were related to legitimate zoning objectives,⁶⁵ but allowed the city to retain the challenged classification in its ordinance.⁶⁶

The Supreme Court's decision, however, will negatively affect the access of group homes to residential communities because it affirmed the use of discriminatory classifications in municipal ordinances to exclude socially undesirable residents. The Supreme Court should have facially invalidated the entire ordinance based on the City of Cleburne's impermissible use of police power to classify residential uses without an actual relation to any legitimate governmental interest. In focusing on the city's application of the permit provision to the Center, the Court failed to vindicate the right of

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- (f) the home's location on a five hundred (500) year flood plain; and
(g) in general, the presentation made before the City Council.

Cleburne Living Center, 726 F.2d at 202. See Okolo and Guskin, *Community Attitudes Toward Community Placement of Mentally Retarded Persons*, 12 INT'L REV. OF RESEARCH IN MENTAL RETARDATION 25 (1984) (the prevalent fears of increased crime, sexual deviance, and decreased property values neighbors experienced in most communities have proven unfounded). *Accord Society of Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1340 (E.D.N.Y.), *vacated on other grounds*, 737 F.2d 1259 (2d Cir. 1983).

63. The city council's vote on October 14, 1980, as well as the city planning and zoning commission's earlier vote on August 18, 1980, to deny a special use permit for the Featherston street group home "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." *Cleburne Living Center*, 105 S. Ct. at 3253. "In effect, prejudice and fear becomes its own excuse." *Cleburne Living Center*, 726 F.2d at 202. Cf. *Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), *modified*, 718 F.2d 22 (1983) (*en banc*) (neighbors formed partnership to defeat state's acquisition of a single-family dwelling for use as a group home); *East House Corp. v. Riker*, 72 Misc. 2d 823, 339 N.Y.S.2d 511 (1973) (opposition to express intent of ordinance to permit group homes for the "mentally restored"); *Gage v. Plymouth Woods Corp.*, 402 Pa. 244, 167 A.2d 292 (1961) (neighbors lost suit to enjoin operation of nursing home because they could not prove any disruption of quiet enjoyment or traffic hazards); *Mongony v. Bevilacqua*, 432 A.2d 661 (N.H. 1981) (adjoining property owners sued director of State Department of Mental Health, Retardation and Hospitals alleging fifth and fourteenth amendment violations for locating a group home in their neighborhood). For a critical analysis of community acceptance of group homes for the mentally retarded, see Boyd, *Strategies in Zoning and Community Living Arrangement for Retarded Citizens: Parens Patriae Meets Police Power*, 25 VILL. L. REV. 273 (1981); Comment, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 OHIO N.U.L. REV. 64 (1980).

64. *Cleburne Living Center*, 726 F.2d at 200. See *Washington v. Roberge*, 278 U.S. 116 (1928) (denial of a special use permit for a philanthropic nursing home in a residential district violated the fourteenth amendment when it was based solely on the lack of consent of adjoining property owners).

65. *Cleburne Living Center*, 105 S. Ct. at 3253, 3260.

66. *Id.* at 3258, 3274.

similarly situated group homes to locate in residential communities across the country.

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