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Constitutional Law - Mental Health - The Mentally Handicapped Do Not Consitute a Quasi-Suspect Class for Purposes of Equal Protection Analysis

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CONSTITUTIONAL LAW — MENTAL HEALTH — THE MENTALLY HANDICAPPED DO NOT CONSTITUTE A "QUASI-SUSPECT CLASS" FOR PURPOSES OF EQUAL PROTECTION ANALYSIS

Cleburne Living Centers, Inc., (CLC) sought to lease a building in the city of Cleburne, Texas to operate a group home for thirteen mentally retarded adults and CLC staff.[1] The city informed CLC that because mentally handicapped people would live in the home, a special use permit was required pursuant to a Cleburne zoning ordinance.[2] CLC applied for the permit, but the

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1. City of Cleburne, Texas v. Cleburne Living Center, 105 S. Ct. 3249, 3252 (1985). CLC sought to operate a group home as a private, intermediate care facility for the mentally retarded. *Id.* at 3252 n.2.

2. *Id.* at 3252-53. *See* CLEBURNE, TEX., CODE OF ORDINANCES, Zoning Ordinance § 16 (June 8, 1965), *quoted in Cleburne,* 105 S. Ct. at 3253 n.3. CLC sought to operate the group home in an "apartment house district." 105 S. Ct. at 3252 n.3. A Cleburne zoning ordinance allowed the following uses in an apartment house district:

> 1. Any use permitted in District R-2 ["Two-Family Dwelling District"].
> 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. . . .

CLEBURNE, TEX., CODE OF ORDINANCES, Zoning Ordinance § 8 (June 8, 1965), *quoted in Cleburne,* 105 S. Ct. at 3252 n.3 (emphasis added).

Section 16 of the zoning ordinance required a special use permit for "hospitals for the insane or feeble-minded" operated anywhere in the city. *Id.* § 16, quoted *in Cleburne,* 105 S. Ct. at 3253 n. 3. Permits were limited to one year in duration, and applicants were required to obtain signatures from owners of property within two hundred feet of the special use property. *Id.*

The city determined that the proposed group home would be a "hospital for the feeble-minded," and was therefore subject to the permit requirement. 105 S. Ct. at 3252-53.

city council denied the application after a public hearing on the issue.[3] CLC then filed suit in Federal District Court against the city and several officials, alleging that the ordinance violated the United States Constitution by discriminating against retarded citizens.[4] The trial court applied a "minimum rationality" standard of review[5] and determined that the ordinance was constitutional.[6] The United States Court of Appeals for the Fifth Circuit reversed, ruling that mentally handicapped persons are members of a "quasi-suspect" class,[7] and that the ordinance was invalid both on its face[8] and as applied to CLC.[9] The United States Supreme Court *held* that the mentally handicapped are not a quasi-suspect class,[10] but that the Cleburne ordinance, as applied to CLC, nevertheless violated the equal protection clause of the fourteenth amendment to the United States Constitution.[11] *City of Cleburne, Texas v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

The equal protection clause requires that the government treat all similarly situated persons equally.[12] A statute that

3. 105 S. Ct. at 3253. Section 16 of the Cleburne zoning ordinance provided that special use permits may be issued by "the governing body, after public hearing, and after recommendation of the Planning Commission." CLEBURNE, TEX., CODE OF ORDINANCES, Zoning Ordinance § 8 (June 8, 1965), *quoted in Cleburne,* 105 S. Ct. at 3252 n.3. For a discussion of the reasons advanced by the City of Cleburne as justification for denying a special use permit to CLC, see *infra* notes 6, 50-62, and accompanying text.

4. 105 S. Ct. at 3253. CLC alleged that the Cleburne zoning ordinance violated the equal protection clause of the fourteenth amendment. *Id. See* U.S. CONST. amend. XIV, § 1. The equal protection clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

5. *See* 105 S. Ct. at 3253. Under the "minimum rationality" standard, legislation is upheld if it is rationally related to a legitimate governmental purpose. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). For further discussion of the minimum rationality standard of review, see *infra* note 15. For a discussion of equal protection standards of review in general, see *infra* notes 15-17.

6. 105 S. Ct. at 3253. The trial court found that the Cleburne ordinance was rationally related to the city's legitimate interests in the legal responsibility of CLC and its residents, the safety and fears of neighboring residents, and the number of persons to be housed in the home. *Id.*

7. Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191, 198 (5th Cir. 1984), *aff'd,* 105 S. Ct. 3249 (1985). Suspect or quasi-suspect classes are granted greater judicial protection under the equal protection clause than are non-suspect classes. *See* G. GUNTHER, CONSTITUTIONAL LAW 621-22 (11th ed. 1985). For further discussion concerning suspect and quasi-suspect classes, see *infra* notes 16-17.

8. Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191, 200 (5th Cir. 1984), *aff'd,* 105 S. Ct. 3249 (1985). The Court of Appeals for the Fifth Circuit stated that "[t]he standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly underinclusive." *Id.* The court noted that the city failed to show that retarded persons presented special problems that would justify subjecting them to restrictions that were not imposed on other groups. *Id.* at 200-01.

9. *Id.* at 202. The court noted that even if the ordinance were constitutional on its face, the application of the ordinance was based on prejudice and unjustified distinctions between the mentally handicapped and other groups. *See id.* at 201-02.

10. 105 S. Ct. at 3255.

11. *See id.* at 3259.

12. Plyler v. Doe, 457 U.S. 202, 216, *reh'g denied,* 458 U.S. 1131 (1982). *See* U.S. CONST. amend. XIV, § 1. For the text of the equal protection clause, see *supra* note 4. Whether persons are "similarly situated" depends upon the objectives of the statute. *Plyer,* 457 U.S. at 216. Thus, the equal protection clause "does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals." J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 586 (1983) [hereinafter cited as NOWAK].

explicitly allows differential treatment of a group of people may be challenged under the equal protection clause as being facially invalid.[13] In addition, a statute that appears neutral on its face is constitutionally invalid if it is applied in a discriminatory manner.[14] Courts apply one of three levels of scrutiny to determine whether a statute is constitutionally acceptable: rational basis review,[15] strict scrutiny,[16] or intermediate level review.[17] The level of scrutiny

13. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (a state statute that explicitly barred blacks from juries was invalid on its face).

14. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). In *Yick Wo*, a city ordinance required persons to obtain a license prior to operating a laundry. *Id.* at 357. All but one of the non-Chinese applicants, but none of the 200 Chinese applicants, were granted licenses. *Id.* at 359. The United States Supreme Court concluded that the statute was applied with the intention of racial discrimination. *Id.* at 374. The Court stated: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand,. . . the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373-74.

To avoid unnecessarily broad constitutional judgements, the court has not addressed the facial validity of a statute that is unconstitutional as applied. *See* Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794, 2801 (1985). This distinction between constitutionality as applied and facial constitionality had, however, been recognized prior to *Cleburne* only in cases involving infringements upon the freedom of speech. *See infra* notes 58-59.

15. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (classification based on whether vendor operated from a pushcart need only be "rationally related to a legitimate state interest"). Rational basis analysis — the least scrutinizing level of judicial review — is considered appropriate for most legislation, particularly social and economic regulation. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175-76 (1980) (retirement fund distribution scheme subject to minimum level of judicial scrutiny). Legislation subject to rational basis review is presumed to be valid, and is upheld if it is conceivable that the challenged classification promotes a legitimate governmental interest. *See id.* at 179 (Court sought only "plausible reasons for Congress' action"); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (economic and social regulation does not violate the equal protection clause merely because the classifications created are imperfect and result in some inequity).

Under traditional rational basis analysis, courts routinely uphold challenged legislation. *See* 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). One commentator has labeled rational basis scrutiny as "minimal scrutiny in theory and virtually none in fact." *Id.*

16. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying "the most rigid scrutiny" to racial classifications). Strict judicial scrutiny is applied to legislation that impinges upon a "fundamental right" — an interest that is protected explicitly or implicitly by the Constitution. *See* NOWAK, *supra* note 12, at 594-95 n.21. The Supreme Court has articulated several fundamental rights thus far. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (interstate travel); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966) (voting); Skinner v. Oklahoma, 316 U.S. 353, 541 (1942) (marriage and procreation).

In addition, legislation that disadvantages a "suspect class" of persons is reviewed under strict scrutiny. *See Korematsu,* 323 U.S. at 216 (racial classifications are "immediately suspect"). The Supreme Court has recently indicated the general disabilities, originally recognized only in racial minorities, characteristic of a "suspect class" as follows: (1) a history of purposeful discrimination against the class; (2) political powerlessness, such that the class needs protection from the majoritarian political process; and (3) a general denial of legal benefits on the basis of stereotypes not truly indicative of class members' abilities. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam). The immutability of the characteristic on which the classification is based is also an important consideration in determining whether the classification is "suspect." *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). The Supreme Court has recognized only three suspect classes: race (*Korematsu,* 323 U.S. at 216); national origin (Oyama v. California, 332 U.S. 633, 646 (1948)); and alienage (Graham v. Richardson, 403 U.S. 365, 371-72 (1971)).

The strict scrutiny test requires the government to show a compelling purpose for the law — one so great as to justify a limitation of the fundamental constitutional value of equality. *See* NOWAK, *supra* note 12, at 591-92. The Court will then make an independent determination of whether the law is necessary to achieve its purpose. *See id.* at 592. Legislation subject to strict scrutiny is rarely found constitutional, and the test has been labeled "'strict' in theory and fatal in fact." Gunther, *supra* note 15, at 8.

17. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197, *reh'g denied,* 429 U.S. 1124 (1976) (gender-based legislation must be "substantially related to an important governmental objective"). Intermediate

applied depends primarily on the classification established by the challenged statute.[18]

Prior to *Cleburne*, the United States Supreme Court had not addressed the level of scrutiny applicable to classifications based on mental retardation.[19] The Court had addressed, however, the possible application of strict scrutiny beyond the three traditionally recognized "suspect classes" of race, national origin, and alienage in *Massachusetts Board of Retirement v. Murgia*.[20] In *Murgia* the Court stated that the aged, unlike members of recognized suspect classes, have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[21] The Court suggested that strict judicial scrutiny of legislation is inappropriate when the classifying characteristic involved adequately reflects an individual's abilities.[22] Moreover, the Court noted that two characteristics which are present in previously recognized suspect classes — a history of purposeful discrimination and a need for protection from the majoritarian political process — were not present in the aged classification.[23] Thus, the Court applied the rational basis test to legislative classifications based on age.[24]

Unlike the Supreme Court, several lower federal courts have addressed the question of which standard of review is applicable to

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level scrutiny is applied when legislation affects a "quasi-suspect" class — a class of persons who share some disabilities with members of the suspect classes, but whose classifying characteristics may often be legitimate targets of legislation. *Compare Craig,* 429 U.S. at 198-99 (classifications based on sex often reflect outdated misconceptions concerning the proper roles of females and males, and do not reflect actual abilities of individuals) *with* Califano v. Webster, 430 U.S. 313, 320-21 (1977) (per curiam) (sex-based classification may be a legitimate remedy for past discrimination against women).

Intermediate level, or "heightened," scrutiny requires the government to show that the classification is substantially related to the achievement of an important governmental interest. *Craig,* 429 U.S. at 197. Unlike the strict scrutiny and rational basis tests in which application of the standard virtually determines the outcome, use of the intermediate level of scrutiny has led to varying results. *Compare Califano,* 430 U.S. at 321 (upholding classification based on sex) *with Craig,* 429 U.S. at 210 (striking down sex-based classification).

The Supreme Court has extended intermediate scrutiny to classifications based on sex (*Craig,* 429 U.S. at 197), legitimacy of birth (Lalli v. Lalli, 439 U.S. 259, 265 (1978)), and status as the child of an illegal alien (Plyler v. Doe, 457 U.S. 202, 224, *reh'g denied,* 458 U.S. 1131 (1982)).

18. *See* Plyler v. Doe, 457 U.S. 202, 216-18, *reh'g denied,* 458 U.S. 1131 (1982). For a discussion of how the classification created by a statute determines the standard of review to be applied, see *supra* notes 15-17.

19. *See* Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 196 (5th Cir. 1984), *aff'd,* 105 S. Ct. 3249 (1985) (finding no controlling precedent for determining the proper standard of review for classifications based on mental retardation).

20. 427 U.S. 307 (1976). The plaintiff in *Murgia* challenged Massachusetts' mandatory retirement age for state troopers. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 308 (1976). *See* MASS. GEN. LAWS ANN. ch. 32, § 26 (3)(a) (West 1966). The Court noted that age, although not a perfect indicator of fitness, does reflect a general diminution in physical abilities. 427 U.S. at 315-16. Thus, the Court found that Massachusetts had a legitimate concern with the age of its employees, and upheld the imposition of a mandatory retirement age. *Id.* at 314-15.

21. 427 U.S. at 313.

22. *See id.* at 313-14.

23. *Id.*

24. *Id.* at 314. For a discussion of rational basis analysis, see *supra* note 15.

classifications based on mental retardation.[25] In *Association for Retarded Citizens of North Dakota v. Olson*,[26] the Federal District Court for the District of North Dakota found that recent reforms in the legal rights of mentally retarded persons indicated that the mentally handicapped are not politically powerless.[27] The court also determined that the differential treatment afforded mentally retarded persons is often related to the actual disabilities they possess.[28] Thus the court held that mentally retarded individuals do not constitute a suspect class.[29] However, the court noted that mentally handicapped people still suffer some discrimination unrelated to their actual disabilities.[30] Intermediate level scrutiny, rather than rational basis review, was therefore applied.[31]

In *J. W. v. City of Tacoma*[32] the Court of Appeals for the Ninth Circuit considered the constitutionality of a zoning ordinance similar to the ordinance at issue in *Cleburne*.[33] The court determined

25. *See, e.g.,* Romeo v. Youngberg, 644 F.2d 147, 163 n.35 (3rd Cir. 1980) (en banc) (indicating in dicta that the mentally handicapped may be a discreet and insular minority deserving heightened scrutiny due to their minimal impact on society and the political process), *vacated on other grounds,* 457 U.S. 307 (1982); Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975) (dictum) (discrimination against mentally retarded persons should be subject to scrutiny heightened beyond the minimal rationality test); Colin v. Schmidt, 536 F. Supp. 1375, 1388 (D.R.I. 1982) (the mentally handicapped are not a suspect class), *aff'd on other grounds,* 715 F.2d 1 (1st Cir. 1983); Doe v. Koger, 480 F. Supp. 225, 230 (N.D. Ind. 1979) (dictim) (seriously doubting that the mentally handicapped constitute a suspect class), *aff'd,* 710 F.2d 1209 (7th Cir. 1983). For a general discussion supporting heightened scrutiny for classifications based on mental and physical handicap, see Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA LAW. 855, 902-08 (1975).

26. 561 F. Supp. 473 (D.N.D. 1982), *aff'd,* 713 F.2d 1384 (8th Cir. 1983).

27. Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473, 490 (1982), *aff'd,* 713 F.2d 1384 (8th Cir. 1983). Courts generally consider political powerlessness to be a factor indicating the need for suspect class status. *See Murgia,* 427 U.S. at 313. For a discussion of *Murgia* and the factors indicating the need to treat a group as a suspect class, see *supra* notes 16, 20-24, and accompanying text.

28. 561 F. Supp. at 490. Discrimination based on stereotypes not reflective of class members' abilities is one factor that is characteristic of traditionally recognized suspect classes. *See Murgia,* 427 U.S. at 313. For a discussion of *Murgia* and the factors indicating the need to treat a group as a suspect class, see *supra* notes 16, 20-24, and accompanying text.

29. 561 F. Supp. at 490.

30. *Id.* The court stated that discrimination against the mentally retarded "has often been a reflection of the fact that the mentally retarded do have a reduced capacity for personal relations, economic choice, and physical control," but went on to note that the mentally retarded do suffer from *some* discrimination that is not related to actual disabilities. *Id.*

31. *Id.* The court explained its decision to apply intermediate scrutiny to classifications based on mental retardation as follows:

> Although this court does not grant "suspect class" status to the plaintiffs, it is acutely aware, from the evidence received at trial, of the extent to which the mentally retarded still suffer from some discrimination that is not related to actual disabilities. For this reason, the court believes that state action concerning retarded persons must be reviewed under a level of scrutiny higher than the rational basis test. To this end, the court will adopt the intermediate level of scrutiny applied by the United States Supreme Court on several occasions.

Id.

32. 720 F.2d 1126 (9th Cir. 1983).

33. *Compare* J.W. v. City of Tacoma, Washington, 720 F.2d 1126, 1127 (9th Cir. 1983) *with Cleburne,* 105 S. Ct. at 3252. The Tacoma zoning ordinance at issue in *J. W.* required a special use permit for the operation of a group home for newly-released mental patients. *J. W.,* 720 F.2d at 1127.

that the intermediate level of scrutiny was appropriate because the availability of group homes is an important benefit, and because the mentally ill are frequently victims of prejudice and unjustified stereotypes.[34] The *Cleburne* Court of Appeals cited *J. W.* as support for its holding that zoning restrictions affecting the mentally handicapped should be subject to intermediate level scrutiny.[35]

The Supreme Court in *Cleburne* determined for several reasons that rational basis was the appropriate standard of review for classifications based on mental retardation.[36] The Court first cited *Murgia* for the general rule that heightened scrutiny is inappropriate if members of a class have a characteristic that reflects their abilities in an area relevant to a legitimate state interest.[37] The Court noted that the mentally handicapped have a reduced ability to cope in everyday life,[38] and that retarded individuals differ greatly from one another in this respect.[39] These genuine and varying disabilities were found to be a legitimate concern of the state, and thus the rule in *Murgia* was satisfied.[40] Moreover, because

An identical group home that did not include newly-released mental patients would not require a permit. *Id.* The plaintiff brought an action in federal court challenging the zoning ordinance as an unlawful discrimination against persons who have suffered from mental illness. *Id.* at 1127-28.

The Court of Appeals for the Fifth Circuit, in *Cleburne,* distinguished the decision in *J. W.* on the grounds that "mental retardation is functionally different from mental illness." Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 198 n.11 (5th Cir. 1984), *aff'd,* 105 S. Ct. 3249 (1985).

34. 720 F.2d at 1129. *Accord* Galioto v. Department of Treasury, 602 F. Supp. 682, 686 (D.N.J. 1985) (former mental patients are a quasi-suspect class). *But see* Doe v. Colautti, 454 F. Supp. 621, 631 (E.D. Pa. 1978) (mentally ill persons differ from suspect classes in that their condition is not an immutable one determined at birth and that their condition truly reflects their abilities), *aff'd* 592 F.2d 704 (3rd Cir. 1979). *See generally,* Note, *Mental Illness: A Suspect Classification?,* 83 YALE L.J. 1237, 1258-59 (1974) (mental illness should be considered a suspect classification); Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment,* 86 HARV. L. REV. 1282, 1294 n.62 (1973) (the institutionalized mentally ill should be granted suspect class status). The United States Supreme Court has specifically reserved the issue of whether the mentally ill constitute a suspect or quasi-suspect class. *See* Schweiker v. Wilson, 450 U.S. 221, 231 n.13 (1981).

35. Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 199-200 (1984), *aff'd,* 105 S. Ct. 3249 (1985).

36. 105 S. Ct. at 3255-58.

37. *See id.* at 3255 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)). For a discussion of *Murgia,* see *supra* notes 16, 20-24, and accompanying text.

The *Cleburne* Court contrasted the mentally handicapped with women, a class accorded intermediate scrutiny, by noting that gender "generally provides no sensible ground for differential treatment. '[W]hat differentiates sex from such nonsuspect statutes as *intelligence* or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.' " *Id.* (emphasis added) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).

38. *Id.* at 3256. Mental retardation is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Brief for American Association on Mental Deficiency as *Amicus Curiae* at 3, City of Cleburne, Texas v. Cleburne Living Center, 105 S. Ct. 3249 (1985) (quoting AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATIONS IN MENTAL RETARDATION 1 (H. Grosman ed. 1983)). Deficits in adaptive behavior are defined as "limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group." *Id.* at 4 n.1.

39. *See* 105 S. Ct. at 3256 & n.9. The Court noted that the mentally retarded are not "cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for." *Id.* at 3256.

40. *Id.* Justice Marshall concurred in the result but criticized the Court's reliance on *Murgia* as support for its rejection of heightened scrutiny. *Id.* at 3269 n.19 (Marshall, J., dissenting in part).

treatment of retarded persons is a "difficult" and "technical" matter, the Court stated that the "perhaps ill-informed" judiciary should defer to the legislature in this area.[41]

Second, the Court found that recent legislative action in favor of the mentally handicapped indicated that lawmakers harbor no continuing prejudice toward retarded people, and that the handicapped have captured the attention of lawmakers and the public.[42] According to the Court, applying heightened scrutiny to laws concerning the mentally handicapped may be detrimental to retarded persons by chilling such legislative response.[43] Thus the Court concluded that the mentally handicapped are no longer politically powerless,[44] and that they do not need heightened

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The Court in *Murgia* rejected strict scrutiny of age-based classifications, but the intermediate standard of review had not yet been acknowledged by the Court. *Id. See* Craig v. Boren, 429 U.S. 190, 210-11 (Powell, J., concurring) (recognizing intermediate level review), *reh'g denied*, 429 U.S. 1124 (1976). Thus Justice Marshall reasoned that *Murgia* could support a rejection of strict scrutiny in *Cleburne*, but it could not support rejection of intermediate level review. *See* 105 S. Ct. 3269 n.19 (Marshall, J., dissenting in part). For a discussion of intermediate review, see *supra* note 17.

Justice Marshall also criticized the Court's conclusion that the reduced abilities of retarded persons calls for the rejection of heightened scrutiny in all cases involving the mentally handicapped. *Id.* at 3270 (Marshall, J., dissenting in part). According to Justice Marshall, "that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist." *Id.* Because retardation may be irrelevant in some circumstances, Justice Marshall concluded that classifications based on retardation should be subjected to heightened scrutiny. *Id.*

41. 105 S. Ct. at 3256.

42. *Id. See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982) (prohibiting discrimination against otherwise qualified handicapped individuals in federally funded programs); Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B) (1982) (to the maximum extent appropriate, handicapped children must be educated along with non-handicapped children); 5 C.F.R. § 213.3102(t) (1985) (exempting mentally retarded individuals from certain competitive Civil Service examinations).

Among various legislative and administrative action cited by the *Cleburne* Court as favoring the mentally handicapped, the Court cited the Developmental Disabilities Assistance and Bill of Rights Act as legislation providing mentally retarded persons with the "right to receive 'appropriate treatment, services, and habilitation' in a setting that is 'least restrictive of [their] personal liberty.' " 105 S. Ct. at 3256 (quoting Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1)-(2) (1982)). This statement, however, appears in contradiction with the Court's ruling in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). *Compare Cleburne*, 105 S. Ct. at 3256 *with* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). In *Pennhurst* the Supreme Court held that the Developmental Disabilities Assistance and Bill of Rights Act did not guarantee the right to appropriate treatment in the least restrictive environment. *Pennhurst*, 451 U.S. at 18. The Court determined that Congress had neither intended to require the states to provide funds for such services, nor had it conditioned the receipt of federal funds on state action. *Id.* at 18, 22. The Court stated that by enacting the provision, Congress had merely expressed a policy of preferred, not mandatory, state action. *Id.* at 19-20. *See generally* Comment, *The "Bill of Rights" of the Developmentally Disabled Assistance and Bill of Rights Act Did Not Create Substantive Rights for the Mentally Retarded to Appropriate Treatment in the Least Restrictive Environment*, 58 N.D.L. REV. 119 (1982).

43. *See* 105 S. Ct. at 3257. For examples of the types of legislative actions the Court feared might be chilled by applying heightened scrutiny to laws concerning the mentally handicapped, see *supra* note 42.

The Court stated that legislation intended to benefit retarded persons might include provisions that appear to disadvantage them. *Id.* As an example, the Court noted that the Education of the Handicapped Act requires only an "appropriate" education, not necessarily one equal in all respects to that of a nonretarded child. *Id. See* 20 U.S.C. § 1412(2)(B) (1982). The Court reasoned that subjecting such provisions to increased judicial scrutiny would eliminate the flexibility lawmakers need to enact legislation for the general benefit of disabled persons. *See* 105 S. Ct. at 3257.

44. 105 S. Ct. at 3257. In contrast to the Supreme Court's conclusion that mentally handicapped persons are not politically powerless, the Fifth Circuit in *Cleburne* noted recent action favoring the mentally handicapped and stated as follows:

judicial protection.[45]

As a final rationale demonstrating the inapplicability of heightened scrutiny in *Cleburne*, the Court stated that mentally retarded persons constitute a "large and amorphous class."[46] The Court feared that according quasi-suspect status to such a class would set a precedent for heightened scrutiny of legislation affecting a variety of other groups.[47] Thus, the Court determined that rational basis review was the proper approach to legislative classifications based on mental retardation.[48]

Applying the rational basis test to the Cleburne ordinance, the Court first rejected reliance upon private prejudice as a basis for the city's action.[49] Catering to the fears and negative attitudes of

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> We do not believe, however, that the mentally retarded have suddenly become politically powerful in Texas. They are still a relatively small bloc, notwithstanding the existence of organizations like the Johnson County Association of Retarded Citizens. Moreover, their right to vote was unclear as late as 1982. . . . The powerlessness of the minority is especially clear in our case, for the Cleburne Ordinance was passed in 1965, long before the [recent legal action].

Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 198 n.10 (5th Cir. 1984), *aff'd*, 105 S. Ct. 3249 (1985).

45. *See* 105 S. Ct. at 3257. *Cf.* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (legislation discriminating against politically powerless groups is subject to strict scrutiny). Justice Marshall criticized the idea that the existence of legislation favoring the handicapped reduced the need for heightened scrutiny. 105 S. Ct. at 3268-69 (Marshall, J., dissenting in part). He indicated that recent legislation favoring the handicapped resulted from public recognition of the invidiousness of laws restricting such groups. *Id. See supra* note 42 (examples of legislation favoring the mentally handicapped). This recognition, he suggested, should be supported by the courts through increased scrutiny of restrictive laws. *Id.* at 3269. Justice Marshall analogized classifications based on mental retardation to classifications based on sex or race, and noted that these latter classifications became no less suspect once extensive legislation was enacted on the subject. *Id. See* Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973) (plurality opinion) (Congressional action favoring women's rights suggests the appropriateness of heightened scrutiny for sex-based classifications).

46. 105 S. Ct. at 3257.

47. *See id.* at 3257-58. As examples of classes in addition to the mentally handicapped that suffer from immutable disabilities, political handicaps, and social prejudice, the Court specifically mentioned the aging, the disabled, the mentally ill, and the infirm. *Id.*

48. *See id.* at 3258. Several members of the Court disagreed with the idea that cases should be categorized into three distinct standards of review. Justices Stevens and Burger believed that prior decisions, rather than illustrating three well-defined standards, actually "reflect a continuum of judgmental responses to differing classifications." *Id.* at 3260-61 (Stevens, J., concurring). They would examine any challenged legislation by determining whether an impartial legislator would believe the law serves a legitimate purpose, and whether an actual correlation exists between the classification and its actual or presumed purpose. *Id.* at 3261 & n.4.

Justice Marshall, joined by Justices Brennan and Blackmun, also criticized the rigid three-tier approach. *Id.* at 3265 (Marshall, J., dissenting in part). Justice Marshall stated that the level of judicial scrutiny should depend upon two factors: the importance of the interest affected and the recognized invidiousness of the classification drawn. *Id.* Justice Marshall noted that the societal interest in establishing group homes is "substantial," as group homes provide the primary means by which retarded persons interact in a normal community environment. *Id.* at 3266 (Marshall, J., dissenting in part). He further observed that the mentally handicapped have been victims of a lengthy history of segregation and discrimination. *Id.* Justice Marshall therefore concluded that a heightened degree of scrutiny was appropriate for the *Cleburne* case. *Id.* at 3268 (Marshall, J., dissenting in part).

49. *Id.* at 3259. The Court noted that the Cleburne City Council had insisted on the special use permit for CLC partly because of negative attitudes of nearby property owners, fears of elderly neighbors, and the possibility of harrassment from students at a nearby junior high school. *Id.*

people living near the proposed group home could not, according to the Court, justify such invidious discrimination.[50]

The Court then addressed the differential treatment between mentally handicapped persons and other groups under the Cleburne ordinance.[51] The ordinance imposed a permit requirement on homes for the mentally handicapped, but freely allowed the operation of such other facilities as nursing homes and fraternity houses.[52] Such a distinction, the Court stated, could be made only if the mentally handicapped presented unique problems for the city.[53] The Court found that mentally handicapped persons presented no unique problems in the following areas of concern raised by the city: (1) the safety of the residents in light of the fact that the home was located on a 500-year flood plain;[54] (2) the legal responsibility for actions by the home's residents;[55] and (3) the over-crowded conditions, traffic congestion, fire hazards, and disruption of the neighborhood resulting from housing thirteen people in the home.[56]

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50. *Id. See* Palmore v. Sidoti, 104 S. Ct. 1879, 1882 (1984) (legislation must not give effect to private biases).

51. 105 S. Ct. at 3258-59.

52. *Id.* The Court stated as follows:

> The constitutional issue is clearly posed. The City does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple dwelling facilities are freely permitted?

Id. For the text of the zoning ordinance challenged in *Cleburne*, see *supra* note 2.

53. *Id.* at 3259.

54. *See id.* At least one council member was concerned that the CLC residents would not be able to get to or from the home in the event of a flood. *Petition for Cert.*, City of Cleburne, Texas v. Cleburne Living Center, 105 S. Ct. 3249 joint app. 28 (1985). The Court addressed this concern by stating that:

> [t]his concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit.

105 S. Ct. at 3259.

55. *Id.* The Court stated as follows:

> [I]f there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Id.

56. *See id.* at 3259-60. In addressing the concerns of the city arising from the number of people to be housed in the home, the Court stated:

> It is true that [the mentally retarded] suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all

Because the mentally handicapped presented no unique problems for the city, the Court concluded that application of the challenged ordinance to CLC was based on "irrational prejudice against the mentally retarded."[57] The Court also stated that when legislation is invalid as applied to a particular plaintiff, it will not address the question of whether the legislation is facially invalid.[58] Thus, the Court held the ordinance unconstitutional as applied to CLC, but did not strike it in its entirety.[59]

Justice Marshall argued that the Court, although purporting to apply a rational basis review, actually employed intermediate level scrutiny.[60] In his opinion, " 'second order' rational basis

> apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type.

Id. at 3260. *See* 42 C.F.R. § 442.447 (1985) (federal density requirements for group homes for the mentally handicapped.)

57. 105 S. Ct. at 3260.

58. *Id.* at 3258. In order to avoid unnecessarily broad constitutional judgments, the Court has refused to address the facial validity of a statute that is unconstitutional as applied. *See id.*; Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985) (obscenity statute invalid only as to the inclusion of "lust" within the realm of obscenity); United States v. Grace, 461 U.S. 171 (1983) (statute restricting speech on Supreme Court grounds invalid only as applied to sidewalks); NAACP v. Button, 371 U.S. 415 (1963) (statute prohibiting attorney referral invalid as applied to NAACP). This distinction between facial constitutionality and constitutionality as applied, however, has been made only in cases involving legislative infringement on the freedom of speech. *See* 105 S. Ct. at 3274 (Marshall, J., dissenting in part). For Justice Marshall's objection to extending this distinction to cases involving infringements upon equal protection, see *infra* note 59.

59. 105 S. Ct. at 3260. Justice Marshall criticized the Court's refusal to strike down the ordinance *in toto*. *Id.* at 3273 (Marshall, J., dissenting in part). He stated that the invalidation of a statute as applied, rather than *in toto*, had never occurred in an equal protection case before. *Id.* at 3274 (Marshall, J., dissenting in part). *See supra* note 58. Justice Marshall argued that precedent requires legislation based on "impermissibly overbroad generalizations," such as the Cleburne ordinance, to be struck down in its entirety. *Id. See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (maternity leave policy struck down *in toto* because its application to some employees would fail to further its purpose). Justice Marshall further stated that even if invalidation as applied were permissible, the Court provided no guidelines for determining when the Cleburne ordinance might be validly applied. 105 S. Ct. at 3273 (Marshall, J., dissenting in part). Thus, the mentally handicapped citizens of Cleburne are still confronted with an ordinance that is not properly tailored to serve legitimate governmental interests. *Id.*

60. 105 S. Ct. at 3264 (Marshall, J., dissenting in part). Justice Marshall stated that "Cleburne's ordinance [was] invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny." *Id.* According to Justice Marshall, the majority departed from normal rational basis review in three ways. First, the majority ignored the "one step at a time" principle of traditional rational basis analysis, which allows legislatures to pass underinclusive legislation. *Id. See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (legislatures may implement their program step by step, adopting regulations that only partially ameliorate a perceived evil). Pursuant to this principle, restrictions on retarded individuals based upon safety concerns should survive rational basis review despite the fact that groups posing similar concerns are excluded. *See* 105 S. Ct. at 3264 (Marshall, J., dissenting in part). The majority, however, struck down the Cleburne ordinance largely because it was an underinclusive means of accomplishing the city's purported purpose. *See id.* at 3259-60. For a discussion of the majority's treatment of the underinclusive nature of the ordinance, see *supra* notes 52-56 and accompanying text.

Second, Justice Marshall noted that the majority scrutinized the record closely in an attempt to find factual justifications for the ordinance. *Id.* at 3264 (Marshall, J., dissenting in part). Under the traditional rational basis standard, however, courts will not review the record of a case. *Id. See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (refusing to examine evidence to determine whether a statute serves its purpose), *reh'g denied*, 450 U.S. 1027 (1981).

review'' would be a more appropriate label for the majority's analysis.[61] Justice Marshall believed that refusal to acknowledge the use of heightened scrutiny was unfortunate because it gave lower courts no direction regarding when the more searching review used in *Cleburne* should be invoked.[62] He also noted that labeling the *Cleburne* analysis as ''rational basis'' scrutiny might create a precedent for lower courts to apply a searching review to legislation traditionally subject to minimal scrutiny.[63] Justice Marshall therefore concluded that the *Cleburne* decision might lead courts to intrude too far into areas of legislative prerogative.[64]

In addition to its potential impact upon application of rational basis review, the *Cleburne* decision may direct future judicial treatment of groups similar to the mentally retarded. The Court indicated that it did not wish to set a precedent for heightened scrutiny of groups such as ''the aged, the disabled, the mentally ill, and the infirm.''[65] In light of this statement, it would appear that

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Finally, Justice Marshall argued that the majority deviated from traditional rational basis review by placing the burden on the lawmakers to justify their action. 105 S. Ct. at 3264-65 (Marshall, J., dissenting in part). Justice Marshall stated: ''in normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a state 'is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference' to its goals.'' *Id.* at 3265 (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). *See also* McGowen v. Maryland, 366 U.S. 420, 425-26 (1961) (legislation is presumed constitutional, despite the fact that the law results in some inequity).

61. 105 S. Ct. at 3265 (Marshall, J., dissenting in part).

62. *Id.* Justice Marshall found that the searching review employed by the majority resembled the standard of review employed in Zobel v. Williams, 457 U.S. 55 (1982), and in United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). In *Zobel* the Court closely scrutinized a state revenue distribution scheme before declaring that it was not rationally related to its purpose. 457 U.S. at 61-63 & nn. 9-10. Similarly, in *Moreno* the Court claimed to apply rational basis scrutiny but reviewed the ''practical effect'' of the legislation involved, and rejected its purported purpose. 413 U.S. at 533-34, 537. Justice Marshall referred to *Zobel* and *Moreno* as ''intermediate review decisions masquerading in rational basis language.'' 105 S. Ct. at 3265 n.4 (Marshall, J., dissenting in part). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1090 n.10 (1978) (labeling *Moreno* as an ''intermediate review'' case). Similarly, professor Herman Schwartz of American University stated that the *Cleburne* decision was ''an effort by the Court to disguise the fact that they [were] applying the test for a quasi-suspect class.'' *See* Stewart, *A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 112.

63. 105 S. Ct. at 3265 (Marshall, J., dissenting in part). Justice Marshall was particularly concerned that courts would apply searching review to economic and commercial legislation — traditionally areas for minimal scrutiny. *Id.* For a discussion of the various standards of review applied in equal protection cases, and of the types of legislation traditionally fitting within each, see *supra* notes 15-17.

64. *See* 105 S. Ct. at 3265 (Marshall, J., dissenting in part). Legislatures are given wide latitude by the courts when drawing legislative classifications along economic and commercial lines because, as stated by Justice Holmes, ''a constitution is not intended to embody a particular economic theory.'' Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Thus equality in these areas has not been constitutionally required. *See Cleburne,* 105 S. Ct. at 3271 (Marshall, J., dissenting in part). At least one commentator has noted, however, that the *Cleburn* decision may illustrate an expanding view of the equal protection clause. *See* Stewart, *supra* note 62, at 112-14. It is suggested that future ''rational basis'' decisions will involve a greater degree of scrutiny than the traditional, very deferential, standard of review. *Id.* And, when a court is presented with a class that is not traditionally accorded intermediate level scrutiny, it may rely on the increased scrutiny of *Cleburne* to avoid injustice in that particular case. *Id.* at 112.

65. *See* 105 S. Ct. at 3257-58. For discussion of the Court's treatment of classes similar to the mentally handicapped, see *supra* note 47 and accompanying text.

the Court will not grant quasi-suspect status to these groups.[66]

The *Cleburne* decision may have particular impact in North Dakota due to recent statutes and case law concerning the rights of mentally handicapped individuals in that state. In 1981 the North Dakota legislature passed a statute guaranteeing developmentally disabled persons the right to treatment in the "least restrictive appropriate setting."[67] IN *Association for Retarded Citizens of North Dakota v. Olson,*[68] the Federal District Court for the District of North Dakota relied partly on that legislation to order the deinstitutionalization of many residents of the state's two main facilities for the mentally handicapped.[69] North Dakota is expected to experience a significant increase in the number of mentally

66. *See* 9 MENTAL AND PHYSICAL DISABILITY LAW REP. 278 (1985). One commentator has suggested that the *Cleburne* Court's refusal to extend heightened scrutiny to mentally retarded persons "indirectly also included mentally ill, elderly, disabled, and infirm persons." *Id.*

It is particularly unlikely that heightened scrutiny will be granted for the mentally ill, a group frequently associated with the mentally retarded. The two groups share disabilities, such as a history of discrimination. *Compare* Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 198 (mentally retarded persons suffer from historical prejudice) *with* J.W. v. City of Tacoma, 720 F.2d 1126, 1129 (1983) (mentally ill persons suffer from prejudice based on "archaic and stereotypic notions"). However, three factors indicate that the mentally ill are less likely to receive suspect class status. First, mental illness raises greater safety concerns than does mental retardation. *See Cleburne,* 726 F.2d at 198 n.11. Legislative control of the field is therefore more likely to receive judicial deference. *See id.* Second, unlike mental retardation, mental illness is considered reversible. *Id.* Since the immutability of a characteristic is considered in determining whether a class is granted suspect status, the mentally ill are less likely to be granted special judicial solicitude. *See id.* For a discussion of the factors indicating the need to treat a group as a suspect class, see *supra* notes 16, 21-23, and accompanying text. Finally, "mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation." *Id.* The *Cleburne* Court refused to extend heightened scrutiny to mentally retarded persons, in part because it determined that such persons comprise a "large and amorphous class." *See* 105 S. Ct. at 3257. The mentally ill appear to be an even more amorphous class than the mentally retarded. *See Cleburne,* 726 F.2d at 198 n.11.

67. *See* Rights of the Developmentally Disabled Act, ch. 294, 1981 N.D. Sess. Laws 756 (codified at N.D. CENT. CODE § 25-01.2-02 (Supp. 1985)). Section 2 of the Act provides as follows: "All persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for those disabilities. Treatment, services, and habilitation for developmentally disabled persons shall be provided in the least restrictive appropriate setting." *Id.* § 2.

Subsection 1(3) of the Act defines "least restrictive appropriate setting" as "that setting which allows the developmentally disabled person to develop and realize his fullest potential and enhances the person's ability to cope with his environment without unnecessarily curtailing fundamental personal liberties." *Id.* § 1(3) (codified at N.D. CENT. CODE § 25-01.2-01(3) (Supp. 1985)).

Though Texas has a statute similar to North Dakota's, the *Cleburne* plaintiffs chose to sue under the equal protection clause rather than under state law. 105 S. Ct. at 3257 & n.11. *See* Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1985). Several other states have also indicated a legislative policy favoring the integration of mentally handicapped persons into the community. *See, e.g.,* FLA. STAT. ANN. §§ 393.13(2)(b)(2), 393.13(2)(d)(3), (7) (West Supp. 1986); LA. REV. STAT. ANN. tit. 28, §§ 390(B)(1), 476 (West Supp. 1985); ME. REV. STAT. ANN. tit. 34-B, § 5604 (Supp. 1985); MD. PUB. HEALTH CODE ANN. §§ 7-102(4)-(6) (Supp. 1985); NEB. REV. STAT. § 83-1, 141(3) (1981).

68. 561 F. Supp. 473 (D.N.D. 1982), *aff'd,* 713 F.2d 1384 (8th Cir. 1983). The A.R.C. suit involved the treatment and care of residents at two of North Dakota's institutions for the mentally handicapped. Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473, 475 (D.N.D. 1982), *aff'd,* 713 F.2d 1384 (8th Cir. 1983). The institutions involved were two campuses of the Grafton State School: one located in Grafton, and the other in Dunseith. *Id.*

69. *Id.* at 494-95. The district court determined that the system of care at two North Dakota institutions for the mentally handicapped was inadequate to meet the needs of the residents. *Id.* at 478-81. Both institutions were overcrowded, unsafe, and understaffed. *Id.* In addition, individualized habilitation plans for the residents were not properly implemented. *Id.* at 479. The court ordered that the number of residents be reduced from approximately 1050 to not more than 450 by July 1, 1987, and not more than 250 by July 1, 1989. *Id.* at 477, 495.

handicapped persons living in community-based facilities once the judicial orders of the A.R.C. suit are carried out.[70]

Moreover, in 1983 the North Dakota legislature prohibited restrictive zoning against group homes serving small numbers of developmentally disabled individuals.[71] As a result, North Dakota cities may not use zoning to prohibit the housing of six or fewer mentally retarded persons in a single-family residence, nor may they use zoning to prohibit the housing of eight or fewer residents in a non-single-family district.[72] Moreover, a city must exercise great care in drafting restrictions on group homes serving larger numbers of retarded persons, because the decision in *Cleburne* may be read to require that all facilities posing similar concerns be subjected to similar restrictions.[73]

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70. *See* NORTH DAKOTA STATE COUNCIL ON DEVELOPMENTAL DISABILITIES, NORTH DAKOTA STATE PLAN FOR DEVELOPMENTAL DISABILITIES SERVICES UNDER P.L. 95-602 § 4.1.1 (1983). The situation in North Dakota resembles the national trend toward development of community-based residences. *See* Brief for National Conference of Catholic Charities as *Amicus Curiae* at 9, City of Cleburne, Texas v. Cleburne Living Center, 105 S. Ct. 3249 (1985). The number of group homes in America has increased from 611 in 1971-72 to 6302 in 1983. *Id.*

71. *See* Residential Zoning for Group Homes Act, ch. 317, 1983 N.D. Sess. Laws 782 (codified at N.D. CENT. CODE § 25-16-14(2)). The Act provides as follow:

> A licensed group home serving six or fewer developmentally disabled persons shall be considered a permitted use in a single family or equivalent least density residential zone, and a licensed group home serving eight or fewer developmentally disabled persons shall be considered a permitted use in any area zoned for residential use of greater density than single family use.

Id.

72. *Id.* For the text of the North Dakota statute affecting zoning of group homes for the mentally handicapped, see *supra* note 71.

73. *See* 105 S. Ct. at 3259-60. For a discussion of the requirement in *Cleburne* that zoning ordinances affecting the mentally handicapped must likewise affect other groups raising similar concerns, see *supra* notes 51-57 and accompanying text.