The Burger Court Opinion Writing Database

Cleburne v. Cleburne Living Center, Inc.

473 U.S. 432 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1985

Re: No. 84-468 - City of Cleburne v. Cleburne Living Center

Dear John:

I join your concurring opinion.

Regards,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1985

Re: No. 84-468 - City of Cleburne v. Cleburne Living Center

Dear John:

In your June 21 draft concurrence, you have enlarged note 6 (page 3) quoting your "especially vigilant" language from Matthews v. Lucas.

That seems to me inconsistent with what I read your initial draft to advocate, i.e., opposition to the range of tests; it seems to me this footnote may well be read as suggesting yet another level or "test" of "especially vigilant" scrutiny at least for illegitimacy.

I can join your earlier draft which did not tie me so pointedly to your Matthews dissent, but your second draft unhinges me!

Regards,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1985

Re: 84-468 - City of Cleburne v. Cleburne Living Center

Dear John:

I "rejoin."

Regards,

Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 29, 1985

No. 84-468

Cleburne, Texas v. Cleburne Living Center

Dear Thurgood,

Harry, you and I thought heightened scrutiny should be applied here. Would you undertake the dissent in support of that position?

Sincerely,

Bill

Justice Marshall

Copies to Justice Blackmun

Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1985

No. 84-468

City of Cleburne
v. Cleburne Living Center

Dear Byron,

I'll await the dissent in the above.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 10, 1985

No. 845-468

City of Cleburne v. Cleburne Living Center

Dear Lewis,

I have read your correspondence with Byron. Is not my impression correct that, if you adhere to your view that the ordinance is facially invalid, there is a Court for that holding although perhaps on varying grounds?

Sincerely,

Bill

Justice Powell
82 JUN 10 AM 11:22
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 27, 1985

No. 84-468

City of Cleburne v. Cleburne Living Center

Dear Thurgood,

Please join me.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 2 9 1985

Recirculated: _____

BRW
In due course I shall
Circulate a dissent—

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. Because we conclude that a lesser standard of scrutiny is appropriate, we reverse and remand for reconsideration.

I

In July, 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Centers, Inc. (CLC),[1] for the operation of a group home for the mentally retarded. It was anticipated that the home would house thirteen retarded men and women, who would be under the constant supervision of CLC staff members. The

[1] Cleburne Living Centers, Inc., is now known as Community Living Concepts, Inc. Hannah is the Vice-President and part owner of CLC. For convenience, both Hannah and CLC will be referred to as "CLC." A third respondent is Advocacy, Inc., a non-profit corporation that provides legal services to developmentally disabled persons.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 4 1985

- pp. 6, 7 & stylistic changes -

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. Because we conclude that a lesser standard of scrutiny is appropriate, we reverse and remand for reconsideration.

I

In July, 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Centers, Inc. (CLC),[1] for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had

[1] Cleburne Living Centers, Inc., is now known as Community Living Concepts, Inc. Hannah is the Vice-President and part owner of CLC. For convenience, both Hannah and CLC will be referred to as "CLC." A third respondent is Advocacy, Inc., a non-profit corporation that provides legal services to developmentally disabled persons.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 6, 1985

84-468 - City of Cleburne v. Cleburne Living Center

Dear Lewis,

In response to your letter of yesterday about this case, I note first your agreement that the appropriate Equal Protection standard is rationality. This is in line with the Conference vote, and it is therefore evident that the Court of Appeals judged this case under the wrong rule of law. In such cases, the usual practice is to remand for reconsideration in light of the proper standard. This also was the Confence vote, and the present draft follows that course. I much prefer it.

Even if the validity of the ordinance is to be decided here, I see no persuasive reason for not announcing that rationality is the governing standard. That is the issue we took this case to decide, there is a clear majority for that standard, and not saying so will leave in place an erroneous Fifth Circuit precedent that will govern the District Courts in that Circuit. I doubt that we would have granted this case had it involved only whether the rational basis standard had been properly applied; yet confining our decision to the rationality of the zoning law indicates a contrary result.

On the issue of validity, you assert that the ordinance is invalid on its face and pay no attention to the as-applied issue, which you say is before us. But I had thought that a state law is not facially invalid unless it is uncontitutional in all of its reasonably possible applications. To put it the other way, if the law has one or more acceptable applications, it cannot be facially invalid. This means to me that the as-applied issue should be decided first and the proffered grounds for sustaining the ordinance in this context either accepted or rejected. If accepted, the ordinance is neither invalid as applied or on its face. If rejected, the ordinance is invalid as applied, and there is no need to strike it down entirely. As I have said, the as-applied issue would be best addresssed by the lower courts in the first instance.

You suggest that the ordinance is facially infirm because no reasons are given for classifying, for special permit purposes, the mentally retarded with the insane, alcoholics, and drug addicts. But this issue is not how alike or different from those groups the mentally retarded are but whether they can constitutionally be required to have a housing permit when others, such as sanatoriums and nursing homes for the aged, need not do so. In view of the fact that mental retardation covers a wide spectrum in terms of the degree of disability involved, I find it difficult to believe that the special permit requirement would be invalid with respect to each and every group of the mentally retarded, regardless of the degree of their retardation. It may be that in light of the characteristics of the group involved in this case and in light of the city's proffered justifications, the special permit cannot constitutionally be denied. But this would not be a facial invalidity holding.

I should say that if the Court is not to announce the proper standard of review, the case should be reassigned. If the opinion deals with that issue, I perhaps can accommodate myself to the majority's desires as to whether to reach the validity issue, as well as to either result that the majority might reach on that question.

Sincerely,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1985

84-468 -

City of Cleburne v. Cleburne Living Center

Dear Lewis,

In response to your letter of June 7 and following our conversation of today, I shall make a try at invalidating the ordinance on an as-applied basis. You indicate that you could join if there were four others for this approach. We shall see if it flies.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

pp. 1, 3, 4-5, 8, 11, 12, 13-17

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 11 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

I

In July, 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Centers, Inc. (CLC),[1] for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had

[1] Cleburne Living Centers, Inc., is now known as Community Living Concepts, Inc. Hannah is the Vice-President and part owner of CLC. For convenience, both Hannah and CLC will be referred to as "CLC." A third respondent is Advocacy, Inc., a non-profit corporation that provides legal services to developmentally disabled persons.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1985

84-468 - City of Cleburne v. Cleburne Living Center

Dear Lewis,

Thanks for your letter. I should be quite willing to make the indicated changes on pages 13, 14, and 16. These changes emphasize the irrationality of requiring the permit in this case rather than an arbitrary denial of the permit. If these changes do not satisfy you, it seems to me that you are insisting on deciding the facial validity issue, which I thought you had agreed could be put aside.

Of course, the principal reason for putting the issue aside is to avoid deciding it. There is obviously a division among us on the question, as for example between you and me. Since under both federal and state law the mentally retarded involved in this case should not live together without supervision, and since the more severely retarded would even more clearly require care in group living situations, it seems to me that the City could insist on a special permit to make sure that proper supervision was planned for. If it was proposed that a group of retarded individuals proposed to live together without the proper staff being available, the City should be able to insist on a permit. But this is arguing the facial validity point, and because we can affirm the relief given respondents on an as-applied basis, I hope we can put aside the facial issue.

Sincerely,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1985

84-468 -

City of Cleburne v. Cleburne Living Center

Dear Lewis,

In response to your letter of today, I am making some changes in the circulating draft. I hope they will suffice.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

pp. 13, 14, 16

Circulated: _____

Recirculated: JUN 17 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

I

In July, 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Centers, Inc. (CLC),[1] for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 19, 1985

MEMORANDUM TO THE CONFERENCE

Re: 84-468 - City of Cleburne v. Cleburne Living Center

Petitioners have filed a motion for leave to file a supplemental brief and a supplemental brief. I have asked Al Stevas to add it to this week's list, and it should be discussed. The brief points to the recent enactment of a Texas statute that effectively prohibits the exclusion from residential zoning districts of group homes that serve six or fewer mentally retarded residents. Respondents have filed a response opposing the motion, which Al Stevas will circulate today. Although I would grant the motion, I see nothing in the brief that affects the result or the opinion in this case. Petitioners argue that after the statute takes effect on September 1, 1985, CLC will be able to house no more than six residents at 201 Featherston. Supplemental Brief at 3. But the statute, which is attached to the brief as an appendix, does not address what local authorities may do with regard to group homes that serve more than six residents. Presumably, the situation with regard to such homes will be no different after the statute is enacted: as far as state law is concerned, the City may require or not require permits for such homes, as it sees fit.

Assuming that the Court grants petitioners' motion for leave to file this brief, I intend to add the following paragraph to the end of footnote 7, on page 5 of the currently circulating draft:

> After oral argument, the City brought to our attention the recent enactment of a Texas statute, effective September 1, 1985, providing that "family homes" are permitted uses in "all residential zones or districts in this state." The statute defines a "family home" as a community-based residence housing no more than six disabled persons, including the mentally retarded, along with two supervisory personnel. The statute does not appear to affect the City's actions with regard to group homes that plan to house more than six residents. The enactment of this legislation therefore does not affect our disposition of this case.

BRW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 26, 1985

84-468 - City of Cleburne v. Cleburne
v. Cleburne Living Center

Dear Thurgood,

I shall recirculate in this case by adding to footnote 7 the few lines mentioned in my Memorandum to the Conference of June 19, which referred to a new Texas statute. But I shall at this late date forego any response to your dissenting opinion.

Sincerely yours,

Justice Marshall
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 5, 1985

Re: No. 84-468-City of Cleburne, Texas v. Cleburne Living Center, et al.

Dear Byron:

In due course I shall circulate a dissent.

Sincerely,

T.M.

Justice White

cc: The Conference

No.84-468

City of Cleburne v. Cleburne Living Center

JUSTICE MARSHALL, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feebleminded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation per se cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. With this holding and principle I agree. The equal protection clause requires attention to the capacities and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for Cleburne's equal protection violation. The Court holds the ordinance invalid on rational basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid the traditional rational basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review--the heightened scrutiny--that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 25 1985

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE MARSHALL, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feebleminded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. With this holding and principle I agree. The equal protection clause requires attention to the capacities and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for Cleburne's equal protection violation. The Court holds the ordinance invalid on rational basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of the "feebleminded" only as applied to respondents, rather than on its face, the Court radically de-

P. 4

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 27 1985

2nd ~~1st~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feebleminded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. With this holding and principle I agree. The equal protection clause requires attention to the capacities and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for Cleburne's equal protection violation. The Court holds the ordinance invalid on rational basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of the "feebleminded" only as applied to re-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 27, 1985

Re: No. 84-468, City of Cleburne v. Cleburne Living Center

Dear Thurgood:

Please join me in your opinion concurring in the judgment in part and dissenting in part.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1985

84-468 City of Cleburne v. Cleburne Living Center

Dear Byron:

I agree that the appropriate standard is the rational basis test.

The case still presents two questions under that test: (i) facial validity of the ordinance, and (ii) its validity as applied. The facial validity question was argued here and presents a straightforward legal question. As I read the papers before us, the City offered no basis, rational or otherwise, for the classifications the ordinance draws. It has submitted no justification for treating the mentally retarded as comparable - for zoning purposes - to the insane, alcoholics and drug addicts. These are excluded from §8 of the zoning ordinance that permits within the zone: hospitals, sanitariums, nursing homes, homes for convalescence or the aged, fraternity or sorority houses and dormitories. Of course, a legislative body has wide discretion in zoning classifications, but in this case the City has failed to show any legitimate interest for the curious classifications at issue. I would hold it facially invalid under the rational basis analysis. It then would be unnecessary to consider the quasi-suspect class question.

If you prefer not to address and decide the facial validity issue, I may write a brief opinion concurring in part and dissenting in part.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1985

84-468 City of Cleburne v. Cleburne Living Center

Dear Byron:

This is in reply to your letter of the 6th.

I enclose copies of my longhand notes prepared prior to our Conference. My view was that the "ordinance on its face [is] invalid under the rational basis standard." I also enclose my Conference notes that are a bit conclusory. I recorded an alternative vote: "Remand to CA (or could affirm on rational basis)". I also noted my view that the "ordinance flunks rational basis test on its face". I can understand, however, that my statement at Conference was unclear as to my preference.

In my letter of June 5, I expresed the view that if we held the ordinance facially invalid it would be unnecessary to consider the quasi-suspect class question. There is a good deal to your point, however, that the question is here and needs resolving. I would be willing to join an opinion holding that only the rational basis standard is applicable.

Finally, you suggest that perhaps it would be inappropriate to make a facial invalidity holding. I am still inclined to think, in view of the record before us, that such a holding would be entirely appropriate. The ordinance certainly discriminates against the mentally retarded in that it requires a special permit to maintain a group home for mentally retarded residents. The ordinance also makes the irrational distinction (as I view it) between all mentally retarded persons and residents of other types of homes permitted in this district, as well as treating the retarded as if they invariably were fairly comparable to the insane, drug addicts and alcoholics. I find nothing in the record that suggests a legitimate state interest for this discriminatory treatment.

Thus my preference continues to be to hold the ordinance facially invalid. I would join four to make a Court, however, in a holding that the ordinance was invalid as applied in this case as it flunks the rational basis standard.

In view of the last paragraph in your letter, I take it that our views can be reconciled.

Sincerely,

Lewis

Justice White
lfp/ss
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1985

84-468 City of Cleburne v. Cleburne Living Center

Dear Bill:

In my recent letter to Byron, I said that although my preference was to hold the ordinance facially invalid on rational basis analysis, I would consider joining an opinion that invalidated the ordinance as applied.

I also now agree that we should decide explicitly that rational basis is the proper standard. This will be the precedent that counts.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 15, 1985

84-468 Cleburne

Dear Byron:

I have read the third draft of your opinion addressing the validity of the ordinance on an as-applied basis. I agree with what you have written and - though I continue to think the ordinance is facially invalid I will make the fifth vote for your opinion if you clarify one point that I think is important.

My understanding is that the respondents challenged the ordinance as applied on two grounds: (i) the requirement of a permit, and (ii) the denial of the permit. As I read your opinion, you conclude that the denial of the permit was irrational under equal protection analysis. This leaves unanswered whether the requirement for a special use permit in this case itself violated the Equal Protection Clause. As you note on p. 13, the R-3 zone permits a wide variety of uses, but requires a special use permit only for the "insane or feeble minded or alcoholic or drug addicts". Nothing in the record supports or identifies any legitimate city interest that justifies this singling out of homes for the mentally retarded or for treating them as invariably comparable to homes for the insane, alcoholics and drug addicts.

I believe that modest changes in your opinion could make clear that requiring respondents to obtain a special use permit, as well as denial of the permit, rests on irrational prejudice against the mentally retarded.

Sincerely,

'85 JUN 17 A10:32

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 17, 1985

84-468 City of Cleburne v. Cleburne Living Center

Dear Byron:

Please join me.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985

Re: No. 84-468 City of Cleburne v. Cleburne Living Center

Dear Byron,

Please join me.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1985

Re: No. 84-468 City of Cleburne v. Cleburne Living Center

Dear Byron,

Lewis in his letter to you of June 5th suggests that the Court opinion decide the question of the facial validity of the city ordinance under the rational basis standard of review. I prefer the way in which your opinion now treats the question, and I had thought that it was in accord with five votes at Conference; but it would not bother me greatly to see the Court opinion decide the validity of the ordinance under the rational basis test.

Lewis in his letter also suggests that in this event it would be "unnecessary to consider the quasi-suspect class question." I would hope you would not subscribe to this idea, because it would result in the case deciding absolutely nothing that was not already well known before we took it. The issue presented by the case was whether or not "heightened scrutiny" should be employed to review equal protection claims where made by the mentally retarded: the Court of Appeals held that it should be, and we granted certiorari, I thought, to decide that question. To simply "punt" and turn the case into one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance would, to my mind, rob the decision of any importance which it would otherwise have.

Sincerely,

wrw

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1985

Re: No. 84-468 City of Cleburne v. Cleburne Living Center

Dear Byron,

I agree with your third draft in this case.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 3, 1985

Re: 84-468 - City of Cleburne v. Cleburne Living Center

Dear Byron:

Although I agree that there was no need for the Court of Appeals to apply the "somewhat heightened" standard of review in order to reach the conclusion that discrimination against the mentally retarded evidenced by this record was unconstitutional, I continue to believe that the Court should decide the merits of the case and affirm the judgment of the Court of Appeals.

In all events, I shall await further writing and perhaps add a few words of my own.

Respectfully,

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 19 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE STEVENS, concurring.

The Court of Appeals disposed of this case as if a critical question to be decided were which of three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded.[1] In fact, our cases have not delineated three—or even one or two—such well defined standards.[2] Rather, our

[1] The three standards—"rationally related to a legitimate state interest," "somewhat heightened review," and "strict scrutiny" are briefly described *ante*, at 5–8.

[2] In *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 176–177, n. 10 (1980), after citing 11 cases applying the rational basis standard, the Court stated: "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." Commenting on the intermediate standard of review in his dissent in *Craig* v. *Boren*, 429 U. S. 190, 220–221 (1976), JUSTICE REHNQUIST wrote:

"I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of 'rational basis,' and the 'compelling state interest' required where a 'suspect classification' is involved—so as to counsel weightily against the insertion of still another 'standard' between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 19, 1985

Re: 84-468 - City of Cleburne v. Cleburne Living Center

Dear Byron:

Please join me.

Respectfully,

John

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 21 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 3, 4, 5

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, concurring.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

7.3

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 26 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS
v. CLEBURNE LIVING CENTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June ——, 1985]

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, concurring.

The Court of Appeals disposed of this case as if a critical question to be decided were which of three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded.[1] In fact, our cases have not delineated three—or even one or two—such well defined standards.[2] Rather, our

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 4, 1985

Re: 84-468 City of Cleburne, Texas v. Cleburne Living Center

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 6, 1985

Re: 84-468 City of Cleburne v. Cleburne Living Center

Dear Byron,

I will still be with you if you decide the statute is facially invalid, as Lewis suggests, but I also agree with Bill Rehnquist that we should decide the quasi-suspect class issue in any event.

Sincerely,

Sandra

Justice White

Copies to: Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 12, 1985

No. 84-468 City of Cleburne, Texas v.
Cleburne Living Center

Dear Byron,

I am still with you on this.

Sincerely,

Sandra

Justice White

Copies to the Conference