Loyola of Los Angeles Law Review

Volume 20 | Number 3 Article 9

4-1-1987

A Changing Equal Protection Standard: The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center

Ellen E. Halfon

A CHANGING EQUAL PROTECTION STANDARD? THE SUPREME COURT'S APPLICATION OF A HEIGHTENED RATIONAL BASIS TEST IN *CITY OF CLEBURNE v. CLEBURNE LIVING CENTER*

I. INTRODUCTION

The equal protection clause of the fourteenth amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] Courts have interpreted the clause to be an expression of the goal that all persons similarly situated should be treated alike.[2] However, the difficulty for courts has been to develop criteria for determining which persons are "similarly" situated and how to treat them "alike" under the law. Some inequality is inevitable in all laws because they draw distinctions which create special burdens on different groups of people.[3] Furthermore, in the interest of public policy, legislatures must retain the ability to create such distinctions.[4] Thus, courts have struggled to find a workable standard by which necessary legislation may be passed without conflicting with the goal of equal protection of the laws.

In *City of Cleburne v. Cleburne Living Center*,[5] the United States Supreme Court was again faced with this challenge. There, the Court

1. U.S. CONST. amend. XIV, § 5.

2. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (held unconstitutional a statute which taxed domestic corporations doing business within and without the state but exempted from taxation those corporations doing business solely outside the state), *overruled,* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); *see also* Tussman & ten-Broek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949). "The Constitution does not require that things different in fact be treated in law as if they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated with respect to the purpose of the law." *Id.* at 344.

3. This proposition was recognized by Justice Brewer in *Atchison, T. & S.F.R.R. v. Matthews* where, in his discussion of the issues of equality and constitutionality, he commented, "the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality [alone] in no manner determines the matter of constitutionality." 174 U.S. 96, 106 (1899).

4. The fact that such classifications are a necessary part of legislation was also recognized by Justice Frankfurter in *Tigner v. Texas*: "[L]aws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies." 310 U.S. 141, 147 (1940).

5. 105 S. Ct. 3249 (1985).

was asked to determine the proper standard of judicial review mandated under the equal protection clause for legislation affecting mentally retarded persons. The Court determined that the mentally retarded are not a quasi-suspect class[6] and that legislation affecting this group is subject only to minimal scrutiny.[7] This Note will examine these conclusions in light of the history of the application of the equal protection clause and will discuss the ramifications of the Court's ruling.

II. HISTORICAL BACKGROUND

Because federal judicial intervention into the state legislative process was disfavored, early cases interpreted the equal protection clause narrowly. The prevailing view was that the fourteenth amendment had been "primarily designed" to protect blacks from laws which discriminated against them on the basis of color.[8] In *Strauder v. West Virginia*,[9] one of the first cases in which the Court struck down a state law on equal protection grounds, it was held that a statute which restricted jury service to white males over twenty-one years of age denied a black male criminal defendant "equal legal protection."[10] However, the Court showed little willingness to expand its power under the equal protection clause into other areas of state legislation. In the *Slaughter-House Cases*,[11] the Court noted its disapproval of such expansion by implying it was unlikely that the equal protection clause would ever be applied to any situation other than action by a state which discriminated against blacks as a group.[12]

By 1885, however, there was some indication that the equal protection clause might be applied to legislation affecting other areas such as social and economic regulations. In *Barbier v. Connolly*,[13] the Court upheld a state law limiting the hours during which laundries could operate,

---

6. *Id.* at 3255-56. For a discussion of quasi-suspect classification, see *infra* text accompanying notes 62-67.

7. *Cleburne*, 105 S. Ct. at 3258. For a discussion of minimal scrutiny, better known as the rational basis test, see *infra* text accompanying notes 29-37.

8. Strauder v. West Virginia, 100 U.S. 303 (1879), *overruled*, Taylor v. Louisiana, 419 U.S. 522 (1975).

9. 100 U.S. 303 (1879).

10. *Id.* at 309.

11. 83 U.S. (16 Wall.) 36 (1872).

12. *Id.* at 81. The Court disfavored federal intervention into the state's legislative process, concluding that such intervention "would constitute [the] [C]ourt a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment." *Id.* at 78.

13. 113 U.S. 27 (1885).

concluding that such legislation fell within the states' police power to regulate health and safety.[14] Yet, the Court made it clear that these powers were still subject to the limitations of the due process and equal protection clauses of the fourteenth amendment.[15] The implication was that state legislative power was not unlimited.

A. The Doctrine of Reasonable Classification

The idea that the equal protection clause could have far broader application than that articulated in the *Slaughter-House Cases*[16] and *Strauder v. West Virginia*[17] and could limit the police powers of the states created a paradox for the Court. It was soon recognized that a balance must be struck between the necessity of legislative classifications which furthered legitimate state goals, and the requirement that these classifications not deny equal protection of the laws. Thus, a judicial view developed that permitted classifications which furthered a reasonable public purpose, but allowed the Court to strike down those classifications which were unreasonable or arbitrary.[18] This "doctrine of reasonable classification" allowed for broad enforcement of the equal protection clause while recognizing the states' right to legislate in their sovereign capacity.

The doctrine of reasonable classification[19] became the standard by

14. *Id.* at 31.

15. *Id.* at 32.

16. 83 U.S. (16 Wall.) 36 (1872). *See supra* text accompanying note 11.

17. 100 U.S. 303 (1879).

18. An early example of this view can be seen in Justice Brewer's opinion in Gulf, C. and S.F.R.R. v. Ellis, 165 U.S. 150 (1897). In that case, the Court held unconstitutional a state statute which imposed attorneys' fees upon railway corporations but not upon any other corporations. Although Justice Brewer confirmed that it was not within the scope of the fourteenth amendment that powers of classification be withheld from the states, he stated that such classifications could not be made arbitrarily. *Id.* at 159.

19. In *Lindsley v. Natural Carbonic Gas Co.*, the Court expressed the doctrine of reasonable classification as follows:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

220 U.S. 61, 78-79 (1911). See *supra* note 18 for a related discussion of Gulf, C. and S.F.R.R. v. Ellis, 165 U.S. 150 (1897). For a general discussion of reasonable classification, see Tussman & tenBroek, *supra* note 2.

which the Court scrutinized state legislative classifications during the early twentieth century. This doctrine expressed the view that although legislative classifications inevitably create some inequality, such classifications are necessary to further the states' police powers.[20] Therefore, these classifications were considered offensive to the fourteenth amendment only when they were found to be arbitrary or unreasonable.[21]

Laissez faire was the favored economic view in the early part of the twentieth century.[22] Thus, state regulation of business was disfavored and often viewed as "unreasonable" or "arbitrary" by the Court. Consequently, state laws regulating prices or taxation were frequently invalidated on equal protection grounds because the Court did not view such legislation as "reasonable."[23] During this time,[24] the doctrine of reasonable classification granted the judiciary broad power to question the wisdom of legislative actions. However, the idea that the Court could impose its own economic values upon the legislature soon came to be disfavored.[25]

---

20. *Lindsley*, 38 U.S. at 78-79. *See supra* note 19 and accompanying text.

21. *See supra* note 19 and accompanying text.

22. The term *laissez faire* is derived from the French verbs laisser (to let) and faire (to do). It loosely means "let people do as they think best." *Laissez faire* expresses "the principal that government should not interfere with individuals," especially in the areas of industry and trade. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1561 (12th ed. 1976). For a general discussion of *laissez faire* theory with respect to Supreme Court decisions, see B. TWISS, LAWYERS AND THE CONSTITUTION—HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1962).

23. State laws regulating taxation and prices were the most frequently invalidated. *See* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (held unconstitutional statute allowing dealers in business prior to arbitrarily chosen date to sell milk at lower prices than other dealers); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (held exemption from income tax in violation of equal protection clause where exemption allowed for domestic corporation doing business both outside and within state but not allowed for domestic corporation doing business solely outside state); Southern R.R. v. Greene, 216 U.S. 400 (1910) (held unconstitutional statute imposing special franchise tax on foreign corporation but not on domestic corporation carrying on similar business), *overruled,* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

24. This period is often referred to as the "Lochner-era." The term refers to *Lochner v. New York*, where the Court invalidated, under the due process clause of the fourteenth amendment, a statute which limited working hours of bakers. 198 U.S. 45 (1905). *Lochner* is representative of what is termed "substantive due process," a practice whereby the Court relies on the due process clause to invalidate substantive state regulation of personal liberties. For a general discussion of substantive due process, see Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958). During the "Lochner-era," much economic regulation was struck down merely because the Court deemed such regulation unwise. *See supra* note 23 and accompanying text. The same results occurred under the commerce clause at this time. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (child labor law held unconstitutional), *overruled*, United States v. Darby, 312 U.S. 100 (1941).

25. Justice Holmes was an early critic of the Court's action. He argued in *Lochner* that the Court should not impose its own economic values on the legislature because the

The year 1937 marked a change in the Court's attitude toward the ability of the states to exercise their police powers.[26] Greater deference was given to the states, thus permitting legislatures to pass laws with little interference from the judiciary. A "reasonable classification," formerly viewed as one that was reasonable from the subjective view of those sitting on the federal bench, now came to be viewed as one which had some "rational basis" in the states' powers.[27] Under this new "rational basis" test, state legislation was presumed valid until shown otherwise by a challenging party.[28] This rational basis test afforded states wide latitude to legislate in the areas of social and economic regulation.

One of the most frequently noted cases demonstrating the Court's new-found deference to state legislatures is *Williamson v. Lee Optical Co.*[29] *Williamson* involved an Oklahoma law prohibiting opticians from fitting or duplicating lenses in eye glasses without a prescription from an opthalmologist or optometrist, but exempted sellers of ready-to-wear eyewear from this requirement.[30] The Court concluded that as long as the legislature *may* have had a legitimate purpose[31] and *might* have thought that the regulation was a rational means of furthering that purpose, judicial intervention was improper.[32] Thus, with *Williamson*, the Court adopted an extremely lenient rational basis test. All that was required for state legislation to pass constitutional muster was: (1) that there exist a conceivably legitimate purpose that the state sought to

"[C]onstitution is not intended to embody a particular economic theory." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). For examples of cases upholding economic regulation, see Nebbia v. New York, 291 U.S. 502 (1934) (upheld statute fixing prices for sale of milk) and Bunting v. Oregon, 243 U.S. 426 (1917) (upheld statute providing maximum 10-hour day for factory workers).

26. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upheld minimum wage law and rebutted liberty of contract argument followed in *Lochner*).

27. The Court applied the rational basis test in cases involving substantive due process and equal protection issues, expressing its policy as follows: "[T]he existence of facts supporting the legislative judgment is to be presumed . . . [and] regulatory legislation affecting ordinary commercial transactions . . . [will not] be pronounced unconstitutional unless . . . facts . . . preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). *Carolene* upheld a federal regulation which prohibited, for health purposes, the sale of a milk substitute. For further discussion of *Carolene*, see *infra* notes 38-41 and accompanying text.

28. *Carolene*, 304 U.S. at 153-54.

29. 348 U.S. 483 (1955).

30. *Id.* at 486.

31. No particular purpose for the legislation was indicated. The Court speculated that the legislature might have concluded it was necessary to guarantee regular eye examinations and safe lenses or that advertising should be limited. *Id.* at 487-89 & n.2.

32. *Id.* at 488. "[T]he law need not be in every respect logically consistent with its aims [to be] constitutional." *Id.* at 487-89, 488 n.2.

achieve; and (2) that a legislature could rationally believe that the law could further that purpose.[33]

The Court has defended the rational basis test as not being "toothless."[34] However, the minimal scrutiny given to legislation under this test has also been criticized as being "none in fact."[35] As will be discussed later in this Note, the test has often been manipulated by the Court and may, in some circumstances, be applied in a slightly more "strict" form. However, in its most lenient form,[36] the test allows any conceivable basis for a law and is not concerned with whether the alleged purpose is *actually* furthered, only with whether the legislature could *reasonably have believed* it would be furthered by the law.[37] Therefore, the test has generally proved inadequate outside the areas of social and economic regulations.

B. Strict Scrutiny and Suspect Classifications

As early as 1896, Justice Harlan expressed his belief that color is "constitutionally irrelevant" and that governments may not legitimately discriminate on the basis of race.[38] In 1937, Justice Stone, in *United States v. Carolene Products*,[39] further articulated the need for a more searching judicial inquiry where legislation affects "discrete and insular" minorities who, because of a history of prejudice or bias, may not depend

33. Even if a completely different purpose is achieved, under the rational basis test, the law will be upheld if it *might* achieve the purported goal. Professor Tribe has argued that this rational basis test is often really a "conceivable basis test." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 996 (1978). In deference to state objectives in economic regulation, the Court's determinations may be based on a state of facts which "(1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) has ever been urged in the classification's defense by those who either promulgated it or have argued in its support." *Id.*

34. *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976) (upheld provision of Social Security Act concerning survivors benefits which denied presumption of dependency to certain classes of illegitimate children).

35. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

36. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (held valid statute banning sale of milk in plastic non-returnable containers but allowing sale in other types of non-returnable containers); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (held valid statute withholding retirement benefits from some railroad workers but not others); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (held valid provision allowing vendors in business as of certain date to remain in business but denying same opportunity to others). *But see* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Williams v. Vermont, 472 U.S. 14 (1985). *Ward* and *Williams* are discussed *infra* at text accompanying notes 277-95.

37. *See supra* text accompanying notes 30-33.

38. Plessy v. Ferguson, 163 U.S. 537, 554-55 (1896) (Harlan, J., dissenting) (upheld "separate but equal" seating on railway), *overruled,* Brown v. Board of Educ., 347 U.S. 483 (1954).

39. 304 U.S. 144 (1938).

on "those political processes ordinarily . . . relied upon to protect minorities."[40] The *Carolene* dicta conceded that a rational basis test was sufficient where normal political processes may be expected to correct unwise legislative decisions. However, Justice Stone recognized that legislation which discriminates against certain groups may be "suspect" due to such factors as: (1) a history of traditional bias or prejudice against the group; (2) a tradition of restricted access of the group to the polls and the political process; (3) the likelihood of a lack of empathy toward the group by the enacting legislature; and (4) the immutability of the characteristic which distinguishes the group from society at large.[41] Where these factors are present, it is more likely that legislation burdening a "discrete and insular" minority may not be corrected through traditional legislative channels. Thus, the Court has demanded that classifications drawn on the basis of such "suspect" criteria have a close relationship between the purpose of the legislation and the means chosen: the standard is one which requires the classification to have a compelling relation to a substantial government purpose.[42] Furthermore, where suspect classifications are involved, the burden of proving that this standard has been met is on the state rather than the party challenging the law.[43] Because this standard is so difficult to satisfy, this level of scrutiny has generally been termed "strict" scrutiny.

Thus far, the Supreme Court has designated few classifications as suspect and subject to strict scrutiny.[44] Because states can seldom demonstrate that classifying on the basis of race serves *any* state interest, strict scrutiny has been used to invalidate many racially discriminatory laws.[45] Even where racial groups are not discrete and insular "minori-

40. *Id.* at 152 n.4.

41. For a general discussion of these factors, see L. TRIBE, *supra* note 33, at 1000-03; *see also* J. ELY, DEMOCRACY AND DISTRUST 145-70 (1980); P. POLYVIOU, THE EQUAL PROTECTION OF THE LAWS 238-45 (1980).

42. *See infra* note 43. *See generally* Note, *Equal Protection: A Closer Look at Closer Scrutiny,* 76 MICH. L. REV. 771 (1978).

43. L. TRIBE, *supra* note 33, at 1003. The burden of proof in such cases rests upon the state to demonstrate: (1) that there is a substantial government purpose; and (2) that there is an extremely tight relationship between the purpose and the means chosen. Where strict scrutiny is applied, the Court will not recognize speculative purposes for legislation as it has done under the rational basis test. *Id.* In addition, such interests as efficiency, convenience or cost-saving, though sufficient to justify legislation under a rational basis test, are insufficient to justify legislation subject to a strict scrutiny analysis. *Id.*

44. For an arugment that mentally disabled persons should be granted suspect status, see Ryers, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped,* 26 ARIZ. L. REV. 205 (1984); *see also* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualification of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA L. REV. 855 (1975).

45. Hunter v. Underwood, 471 U.S. 222 (1985) (held invalid state statute disenfranchising

ties" in the *Carolene* tradition,[46] the Court has seen fit to continue using strict scrutiny because of other factors such as a long history of racial prejudice and political powerlessness.[47] For instance, the Court has held that laws which classify on the basis of national origin are also subject to strict scrutiny.[48] Such classifications, like those based on race, suggest a likelihood of ethnic prejudice. In addition, national origin, like race, is a characteristic over which an individual has no control.

State legislation classifying on the basis of alienage has also traditionally been subjected to strict scrutiny.[49] Because aliens are unable to vote and there is a likelihood that laws burdening aliens stem from irrational bias or animosity toward "foreigners," laws classifying on this basis are suspect. Thus, in *In re Griffiths*,[50] the Court invalidated a statute preventing resident aliens from practicing law because the state failed to demonstrate there was a "compelling state interest" that the law was "closely tailored" to further.[51] In many cases, alienage classifications are still subject to strict scrutiny.[52] However, recent developments indicate a trend toward more deference to the states in this area, particularly where a political rather than economic purpose is served by the law in question.[53]

Another area where the Court has applied strict scrutiny is where a law substantially impinges on "fundamental" rights. The Court has rec-

---

criminals convicted of acts of moral turpitude on basis that original purpose of law was racially discriminatory); Palmore v. Sidoti, 466 U.S. 429 (1984) (overturned ruling granting custody to father of white child because mother remarried to black man); Loving v. Virginia, 388 U.S. 1 (1967) (held invalid statute prohibiting marriage between blacks and whites); Brown v. Board of Educ., 347 U.S. 483 (1954) (held unconstitutional "separate but equal" policy in public education) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

46. *See supra* text accompanying notes 39-43.

47. Castaneda v. Partida, 430 U.S. 482 (1977) (held prima facie case of discrimination against Mexican-Americans in selection of grand jurors existed in spite of fact that they were a "growing [ethnic] majority" in county).

48. Hernandez v. Texas, 347 U.S. 475 (1954) (held discrimination against Mexican-Americans with respect to jury service subject to same scrutiny as discrimination against blacks where prejudice is result of community prejudice).

49. *See In re* Griffiths, 413 U.S. 717 (1973) (held invalid statute preventing resident aliens from practicing law); Sugarman v. Dougall, 413 U.S. 634 (1973) (held invalid state law barring aliens from civil service); Graham v. Richardson, 403 U.S. 365 (1971) (held invalid statute denying welfare benefits to aliens).

50. 413 U.S. 717 (1973).

51. *Id.* at 724-27.

52. *See supra* note 49.

53. *See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (held state has wider discretion in restricting aliens where political rather than economic purpose is served); Ambach v. Norwick, 441 U.S. 68 (1979) (held state may bar aliens from becoming public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (held state may prevent aliens from becoming state troopers because they execute "broad public policy").

ognized that certain basic human rights are either explicitly or implicitly protected by the Constitution and, therefore, any serious legislative impingement of these rights requires a high level of justification. Rights which have been held fundamental and subject to strict scrutiny under the equal protection clause are the right to vote,[54] the right to marry[55] and the right to travel.[56]

It has been said that the application of strict scrutiny to legislation is strict in theory but usually fatal in fact.[57] Because the state must show not only that it has a compelling interest but also that the law furthers that interest in the least discriminatory or burdensome manner,[58] few laws have survived the test. One exception is *Korematsu v. United States*,[59] where the Court upheld a post-Pearl Harbor military order excluding from certain west coast areas persons of Japanese ancestry, regardless of whether they were United States citizens or not. The Court concluded there was a compelling need to prevent espionage and sabotage and that, under the circumstances, the internment of these persons was the best means available.[60] However, *Korematsu* has been consistently criticized and is likely limited to its unique wartime facts.[61]

C. Intermediate Scrutiny, a "Grey Area"

As has been stated, legislation seldom fails the rational basis test or

54. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidated Tennessee residency duration requirement because it impaired right to vote and right to travel); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidated New York statute which restricted right to vote in school district elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (held unconstitutional requirement of poll tax as prerequisite to vote). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (held that where state is pursuing "special purpose" wider discretion for regulation of voting is allowed).

55. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (held invalid Wisconsin statute requiring court approval for marriage of any resident under court order to support minor child); Loving v. Virginia, 388 U.S. 1 (1967) (held invalid Virginia statute banning interracial marriage).

56. *See* Dunn v. Blumstein, 405 U.S. 330 (1972). *See supra* note 54; *see also* Shapiro v. Thompson, 394 U.S. 618 (1969) (held residency requirement for receiving welfare benefits impinged fundamental right to travel interstate).

57. *See* Gunther, *supra* note 35.

58. *See supra* note 43 and accompanying text.

59. 323 U.S. 214 (1944), *reh'g denied,* 324 U.S. 885 (1945).

60. *Id.* at 219-20.

61. *See generally* Rostrow, *The Japanese American Cases: A Disaster,* 54 YALE L.J. 489 (1945). Fred Korematsu, who was convicted of violating the exclusion order, brought a petition for a writ of *coram nobis* to vacate his conviction on grounds of governmental misconduct. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). His petition was granted. *Id.* at 1420; *see also* Hirabayashi v. United States, 320 U.S. 81 (1943) (upheld conviction for violation of military curfew); Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986) (petition for writ of *coram nobis* granted in part and denied in part).

survives a strict scrutiny analysis. The Court has, therefore, been consistently troubled by legislative classifications which do not fit easily into these two categories. Where a group possesses *some* of the characteristics which qualify a group as suspect, the Court has sometimes characterized the group as "quasi-suspect" and applied a somewhat heightened, or intermediate level of judicial scrutiny.[62] In addition, where a law substantially impinges on a right which is not fundamental but may be deemed "important," the Court has sometimes been prompted to employ more careful scrutiny.[63] Generally, however, it is a combination of these factors that triggers intermediate scrutiny.

Intermediate level equal protection analysis is often the most confusing level because the Court is generally vague in identifying the criteria it is using.[64] However, the standard is usually held to be one requiring a state to demonstrate that the law is substantially related to the achievement of an "important" state interest.[65] As with strict scrutiny, the burden of proof is on the state.[66] However, the Court does not require that the law be as closely tailored to the alleged purpose as under a strict scrutiny analysis.[67]

Legislative classifications based on gender have been held subject to this intermediate level of judicial scrutiny for equal protection purposes.[68] The Court has recognized that women possess many of the characteristics of a traditionally suspect class.[69] They have been sub-

62. See L. TRIBE, *supra* note 33, at 1082-92 for a general discussion of the Court's application of intermediate scrutiny to quasi-suspect classes.

63. *See* Plyler v. Doe, 457 U.S. 202 (1982) (held education to be an important interest which court may consider in determining applicable level of judicial scrutiny).

64. *See generally* Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777 (1981); Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MO. L. REV. 587 (1983).

65. *Plyler*, 457 U.S. at 218-19 & n.16; Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* L. TRIBE, *supra* note 33, at 1082-92.

66. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (held policy of excluding men from state supported nursing school invalid because state failed to demonstrate policy was substantially related to important interest).

67. Califano v. Webster, 430 U.S. 313 (1977) (held invalid section of Social Security Act providing greater old-age benefits for women than men); Craig v. Boren, 429 U.S. 190 (1976) (held invalid statute allowing females to purchase 3.2% beer at younger age than men).

68. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); *see also* Craig v. Boren, 429 U.S. 190 (1976). *But cf.* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upheld exclusion of women from Illinois bar).

69. Frontiero v. Richardson, 411 U.S. 677 (1973). In *Frontiero*, the Court actually applied strict scrutiny. *Id.* at 688. However, in subsequent cases, the Court retreated to an intermediate level of scrutiny for gender-based classifications. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

jected to societal discrimination on the basis of their sex[70] and, until recent years, have been politically powerless due to this immutable characteristic.[71] In addition, because gender is generally irrelevant to an individual's ability to contribute to society, laws which classify on the basis of sex are difficult to justify.[72]

Intermediate level scrutiny has been applied to all gender-based classifications, including legislation that discriminates against men. In *Mississippi University for Women v. Hogan*,[73] the Court held invalid a policy of limiting enrollment in a state nursing school to women while denying admittance to otherwise qualified men. The University claimed that the purpose of its admissions policy was to compensate for discriminatory barriers women faced in the past.[74] However, the Court concluded that the policy actually perpetuated the stereotype that nursing is exclusively a woman's profession.[75] Because the state had failed to establish the requisite nexus between the classification and the proposed objective, the policy was held invalid.[76]

Another legislative classification that has triggered this intermediate level of review is illegitimacy.[77] Recently, legislation classifying children of undocumented alien status has also been subjected to this higher level of scrutiny.[78] In *Plyler v. Doe*,[79] the Court applied intermediate scrutiny to invalidate a Texas law that withheld local school funding for undocumented alien children. The Court noted such factors as the importance of education, the stigma of illiteracy[80] and the immutability of the children's condition.[81]

However, the Court has demonstrated an increased reluctance to extend this heightened scrutiny to other classifications. In *Massachusetts Board of Retirement v. Murgia*,[82] it refused to apply a heightened level of

70. *Frontiero*, 411 U.S. at 684.
71. *Id.* at 685-86.
72. *Id.* at 686.
73. 458 U.S. 718 (1982).
74. *Id.* at 727.
75. *Id.* at 729-30.
76. *Id.* at 730.
77. *See* Trimble v. Gordon, 430 U.S. 762 (1977) (held invalid portion of Illinois intestate succession plan preventing illegitimate children from inheriting from their fathers).
78. Plyler v. Doe, 457 U.S. 202 (1982).
79. *Id.*
80. *Id.* at 222.
81. *Id.* at 220. It should be noted that under the standard in *Plyler*, the alienage classification does not, *of itself*, trigger heightened scrutiny. In *Plyler*, the Court granted heightened scrutiny due to the fact that the class affected was that of undocumented alien *children* who were being denied the *important* right of education. *Id.* at 220-22.
82. 427 U.S. 307 (1976).

scrutiny to an age-based classification. The Court conceded that "treatment of the aged . . . has not been wholly free of discrimination" but concluded that the aged "have not experienced a 'history of purposeful unequal treatment' " or suffered discrimination "on the basis of stereotyped characteristics . . . ."[83] Therefore, the Court declined to extend the heightened scrutiny afforded gender-based classifications to age-based classifications.

D. The Tiered Approach in Perspective

The tiered approach to equal protection analysis described above has prompted sharp criticism from members of the Court itself, particularly in recent years.[84] The criticism primarily expresses three views: (1) that the tiered approach invites vague, result-oriented decisions, often limited to facts of a particular case and of little guidance to lower courts;[85] (2) that increased judicial scrutiny of a classification based on a characteristic other than race or national origin is historically inconsistent with the purpose of the equal protection clause[86] and (3) that a *variable* standard of review with graduated levels of application is preferable to a rigidly applied tiered standard.[87] The decision in *City of Cleburne v.*

---

83. *Id.* at 313. The Court has also refused to apply heightened scrutiny to classifications based on wealth. *See* Ortwein v. Schwab, 410 U.S. 656 (1973).

84. *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). "[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so called 'standards' adequately explain the decisional process." *Id.* at 3260-61 (Stevens, J., concurring).

85. *See* Craig v. Boren, 429 U.S. 190 (1976).

> How is [a court] to determine whether a particular law is "substantially" related to the achievement of [an important] objective, rather than related in some other way to its achievement? . . . [T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

Id. at 221 (Rehnquist, J., dissenting).

86. See Shapiro v. Thompson, 394 U.S. 618 (1969), where Justice Harlan stated the following in his dissent: "I think that . . . the 'compelling interest' doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise." *Id.* at 659 (Harlan, J., dissenting); *see also* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (heightened review should apply only in those areas "in which the Framers obviously meant [the clause] to apply—classifications based on race or on national origin, the first cousin of race . . . ."). *See generally* J. ELY, *supra* note 41, at 148-50.

87. Justice Marshall has, for many years, advocated an approach to equal protection analysis which ignores "tiers" altogether. He believes that the level of scrutiny employed should vary with " 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is

Cleburne Living Center[88] reflects the Supreme Court's concerns regarding each of these criticisms. Because the court of appeals decision under review utilized the three-tiered approach,[89] the Court granted certiorari,[90] in part, to evaluate this approach and give guidance in the equal protection area. The results, however, are far from illuminating.

III. STATEMENT OF THE CASE

In July of 1980, Jan Hannah purchased a building in Cleburne, Texas, intending to lease it to Cleburne Living Centers (CLC).[91] CLC planned to use the four-bedroom, two-bath house to operate a group home for approximately thirteen mentally retarded men and women who would be constantly supervised by CLC staff.[92] CLC also intended to comply with all state and federal regulations applicable to the proposed home.[93]

CLC was informed by the City of Cleburne (City) that a special use

---

drawn.' " City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3265 (1985) (Marshall, J., concurring in part and dissenting in part) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting)); *see also* Plyler v. Doe, 457 U.S. 202, 230-31 (1982) (Marshall, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-27 (1976) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting). Under Justice Marshall's "sliding scale" approach, to determine how strictly a law should be scrutinized, a court should consider three factors: "the importance of the governmental benefits denied, the character of the class [affected], and the asserted state interests . . . ." *Murgia*, 427 U.S. at 322 (Marshall, J., dissenting).

Justice Marshall's approach is based on the idea that "all interests [that are] not 'fundamental' and all classes [that are] not 'suspect' are not [necessarily] the same." *Id.* at 321 (Marshall, J., dissenting). He has urged that the Court, rather than adhere to a rigid tiered approach, acknowledge that these variations in the importance of interests and in the invidiousness of classifications require a flexible standard of analysis. Justice Marshall's theory is that "[t]he advantage of a flexible equal protection standard . . . is that it can readily accomodate such variables." *Id.* at 325 (Marshall, J., dissenting).

88. 105 S. Ct. 3249 (1985).

89. Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 195 (5th Cir. 1984), *aff'd in part, vacated in part*, 105 S. Ct. 3249 (1985).

90. City of Cleburne v. Cleburne Living Center, 469 U.S. 1016 (1984).

91. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3252 (1985). By the time this case came before the Supreme Court, Cleburne Living Centers, Inc. had changed its name to Community Living Centers, Inc. ("CLC"), and Jan Hannah was vice-president and part owner of CLC. *Id.* at 3252 n.1. The Court in *Cleburne* referred to Hannah and CLC as "CLC" and the same shall be done throughout this Note.

92. *Cleburne*, 105 S. Ct. at 3252.

93. CLC planned to operate the home as a private Intermediate Care Facility for the Mentally Retarded (ICF-MR) under a joint federal and state reimbursement program for residential services to the mentally retarded. *Id.* at n.2.

permit, renewable each year, would be required to operate the home.[94] The City had determined that a zoning ordinance requiring such a permit for construction of " '[h]ospitals for the insane and feeble-minded' " was applicable to the proposed CLC home.[95] In accordance with the City's requirement, CLC applied for the permit. It was denied first by the City's Zoning and Planning Commission and then, following a public hearing, by a three-to-one vote of the City Council.[96]

CLC filed suit in federal district court against the City and several of its officials. CLC alleged that the zoning ordinance was invalid both on its face and as applied[97] because it discriminated against CLC and its proposed mentally retarded residents in violation of their equal protection rights.[98] The district court recognized that the City's requirement was " 'motivated primarily by the fact that the residents . . . would be mentally retarded. . . .' " but determined, under the rational basis test, that the ordinance was rationally related to the City's legitimate interests in regulating this group and thus valid both on its face and as applied.[99]

The Court of Appeals for the Fifth Circuit reversed, holding that because the mentally retarded share many of the characteristics of a tra-

---

94. *Id.* at 3252.

95. *Id.* (quoting Cleburne's zoning ordinance). The home was located in an area zoned "R-3," an "Apartment House District." *Id.* at n.3. Permitted uses for an R-3 district were listed in section eight of the ordinance and included:

> "1. Any use permitted in District R-2.
> 2. Apartment houses, or multiple dwellings.
> 3. Boarding and lodging houses.
> 4. Fraternity or sorority houses and dormitories.
> 5. Apartment hotels.
> 6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts.
> 7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
> 8. Philanthropic or eleemosynary institutions, other than penal institutions.
> 9. Accessory uses customarily incident to any of the above uses. . . ."

Id. (quoting Cleburne's zoning ordinance, emphasis added by Court). Section 16 of the ordinance listed those uses for which a special permit was required, including " '[h]ospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions.' " *Id.* In addition to a limitation on the special permit of one year, applicants were required " 'to obtain the signature of the property owners within two-hundred (200) feet of the property to be used.' " *Id.* (quoting Cleburne's zoning ordinance).

96. *Id.* at 3252-53 & n.4.

97. Invalidating the ordinance *on its face* would mean that it could never be imposed in its present form. Finding the ordinance invalid *as applied* would only mean that the requirement could not be imposed on CLC, but might be valid in other instances.

98. *Cleburne*, 105 S. Ct. at 3253.

99. *Id.* (quoting Cleburne Living Center v. City of Cleburne, No. CA 3-80-1576-F, slip op. (N.D. Tex. April 16, 1982)). The district court applied only the minimum level of judicial scrutiny after concluding that no fundamental right was involved and that mental retardation was neither a suspect nor a quasi-suspect classification. *Id.*

ditionally suspect class, heightened scrutiny was warranted.[100] In addition, the court held that although a fundamental right was not affected, an "important benefit" was denied by the ordinance.[101] Applying an intermediate level of scrutiny, the court determined that the City had not demonstrated that the ordinance was sufficiently related to its purported purpose.[102]

The United States Supreme Court granted certiorari,[103] affirming in part and vacating in part.[104] Rejecting the court of appeals' determination that mental retardation is a quasi-suspect classification, the Court held that only a rational basis test was required in this case.[105] Yet, after applying that test, the Court concluded there was no rational basis for the City's belief that the proposed group home threatened the City's legitimate interests in a way which permitted uses did not.[106] Therefore, the Court held that the ordinance, as applied,[107] denied CLC equal protection under the law.[108]

A. Reasoning of the Court

1. The majority

Justice White delivered the majority opinion in *City of Cleburne v.*

100. Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 105 S. Ct. 3249 (1985). In determining that the mentally retarded were a quasi-suspect class, the court noted the history of discrimination against the mentally retarded sparked by "deep-seated historical prejudice," their political powerlessness and the immutability of their condition. *Id.* at 197-98.

101. *Id.* at 199 (citing Plyler v. Doe, 457 U.S. 202 (1982)). In *Plyler*, the Supreme Court invalidated a statute authorizing local school districts to exclude undocumented alien children from public schools. The Court held that the children shared characteristics of a suspect class such as immutability and that education, though not a fundamental right, was an "important" benefit. *Plyler*, 457 U.S. at 222-23; *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (held education not a fundamental right). By analogy, the Fifth Circuit in *Cleburne* determined that the right of the mentally retarded to establish a home is an "important" right. 726 F.2d 191, 199.

102. *Cleburne*, 726 F.2d at 200. Rehearing en banc was denied with six judges dissenting. Cleburne Living Center v. City of Cleburne, 735 F.2d 832 (5th Cir. 1984). Judge Garwood, dissenting, argued that the factors cited by the court of appeals were insufficient to determine that the mentally retarded constituted a quasi-suspect class. *Id.* at 833. Stating that the special characteristics of the mentally retarded "are highly relevant to proper legislative goals in most respects," he concluded that in order to qualify as a quasi-suspect class, a class must first "[meet] a threshold level of lack of significant dissimilarity from the rest of society." *Id.* at 833-34.

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

104. *Cleburne*, 105 S. Ct. at 3252.

105. *Id.* at 3256, 3258.

106. *Id.* at 3260; *see supra* note 95.

107. *See supra* note 97.

108. *Cleburne*, 105 S. Ct. at 3260.

Cleburne Living Center.[109] The opinion began with an articulation of the general rule of equal protection analysis: that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[110] The Court stressed that particularly in the areas of social or economic legislation, states are given wide latitude as it is assumed the democratic process will serve to correct any "improvident" decisions.[111] The Court then delivered a brief historical overview of its application of the equal protection clause to various situations, noting those circumstances in which a strict,[112] intermediate[113] or rational basis[114] analysis is deemed appropriate.

The Court held that the court of appeals had erred in concluding that mental retardation is a quasi-suspect classification requiring a "more exacting standard" than that afforded economic and social legislation.[115] The Court set out the following four reasons in support of this conclusion.

First, the majority asserted that the mentally retarded persons' "reduced ability to cope" made them different in a way which is relevant to

109. 105 S. Ct. 3249 (1985). Chief Justice Burger and Justices Powell, Rehnquist, Stevens and O'Connor also joined in the opinion.

110. *Id.* at 3254 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

111. *Cleburne*, 105 S. Ct. at 3254.

112. *Id.* at 3255. The Court stressed that where a statute creates classifications based on race, alienage or national origin, "[t]hese factors are . . . seldom relevant to the achievement of any legitimate state interests . . . ." *Id.* Also, because such legislation is likely based on prejudice and antipathy towards these groups, there is less likelihood that it will be rectified through legislative means. *Id.* (citing McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Graham v. Richardson, 403 U.S. 365 (1971)). Thus, such legislation will only be sustained where it is closely tied to a compelling state interest. *Id.* Furthermore, the Court noted that strict scrutiny also applies where rights protected under the Constitution are impaired. *Id.* (citing Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)); *see also supra* text accompanying notes 38-56.

113. *Cleburne*, 105 S. Ct. at 3255. The Court noted that classifications such as gender and illegitimacy have been afforded a heightened level of scrutiny since these characteristics bear little or no relationship to an " 'individual's ability to participate in and contribute to society' " and are beyond the individual's control. *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)). Legislation based on these characteristics will only be sustained if "substantially related to a sufficiently important governmental interest." *Id.* at 3255 (citations omitted).

114. *Id.* The Court asserted that "[w]here individuals in [a] group affected by law have distinguishing characteristics relevant to interests the state has authority to implement . . . ," courts have been reluctant to scrutinize too closely. *Id.* (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)). *See infra* note 125 and *supra* text accompanying notes 82-83.

115. *Cleburne*, 105 S. Ct. at 3255-57.

the states' legitimate interests.[116] The Court noted that because treatment of the mentally retarded is determined by the degree of disability, this difficult and technical task should be left to legislators.[117] The majority reasoned that because legislators are in a position where they can be guided by qualified professionals, substantive judgments concerning the mentally retarded are better left in their hands than in the hands of an "ill-informed" judiciary.[118]

Second, the Court noted a "distinctive" response on the part of the legislature to the plight of the mentally retarded.[119] Expressing concern that a heightened level of scrutiny might impede legislation designed to *benefit* the mentally retarded, the Court held that legislatures must have flexibility to shape remedial efforts without being watched too closely by an intrusive judiciary.[120]

The Court's third reason for denying quasi-suspect status to the mentally retarded was the *degree* of response by the legislature.[121] It concluded that because federal and state legislatures have responded with legislation sensitive to the needs of the mentally retarded, claims that this group is politically powerless, with no ability to effect changes in the law, had been negated.[122] The Court minimized the fact that the mentally retarded often lack the ability to "assert direct control over the legislature," and expressed concern that if this were a criterion for triggering a higher level of scrutiny, much legislation in the social and economic area would be rendered suspect.[123]

Finally, the Court voiced its concern that if the mentally retarded were deemed a quasi-suspect class deserving of a heightened standard of legislative review, other groups similarly situated would demand the same treatment.[124] The Court cited such groups as the aged,[125] the dis-

116. *Id.* at 3256.

117. *Id.* The degree of disability that affects mentally retarded individuals varies within four categories. *Id.* at 3256 n.9. Most (approximately 89%) are only "mildly retarded" and possess an IQ between 50 and 70. Approximately 6% are categorized as "moderately retarded" having IQ's between 35 and 50. "Severely" mentally retarded individuals (IQ's of 20-35) and those who are "profoundly" retarded (IQ's below 20) together comprise only 5% of the mentally retarded population. *Id.* (citing testimony of Dr. Philip Roos). The Court concluded that these varying degrees of retardation may be relevant to legitimate state interests and that deference to legislative motives is preferred. *Id.* at 3256.

118. *Id.*

119. *Id.*

120. *Id.* at 3257.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 3257-58.

125. The Court has refused to apply heightened scrutiny to legislative classifications based

abled, and the mentally ill[126] as sources of this concern.[127]

After determining that the rational basis test was the appropriate standard in this case, the Court examined the City's justification for requiring the special use permit. The district court had determined that the City's reasons included concerns: (1) about the negative attitude of most of the property owners located within 200 feet of the home, as well as the fears of elderly residents of the neighborhood;[128] (2) that students attending the junior high school across from the CLC home might harass the residents;[129] (3) that the home was located on a "flood plain;"[130] and (4) that CLC intended the home to be occupied by too many people.[131] After considering the City's concerns, the Court concluded that none of them justified denial of the permit. Because there was no rational basis for the City's belief that the CLC home threatened its legitimate interests in a way that permitted uses did not, the Court found that the ordinance, as applied to the CLC home, was unconstitutional.[132]

---

on age. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); *see also supra* text accompanying notes 82-83.

126. The Court has never addressed the issue of whether the mentally ill are a suspect or quasi-suspect class. In Schweiker v. Wilson, 450 U.S. 221 (1981), mentally ill patients challenged § 1611 (e)(1) of the Supplemental Security Income Act (SSI) because it denied them Medicaid benefits due to the fact that they were institutionalized in public mental institutions. The Court ruled that this group had not been denied equal protection of the laws, as it was only a subset of a larger group of publicly institutionalized persons. *Id.* at 231-34. The Court refused, however, to reach the question of whether the mentally ill deserve heightened scrutiny. *Id.*

127. *Cleburne*, 105 S. Ct. at 3257-58.

128. *Id.* at 3259. The Court determined that

> mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from [other permitted uses]. . . . "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Id. (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

129. *Id.* at 3259. The Court found this concern unfounded, since the school itself was attended by approximately thirty mentally retarded students. *Id.*

130. *Id.* The Court determined that no increased hazard of flooding existed for this home than would exist if it were operated by a group that did not require a special permit. *Id.*

131. *Id.* at 3259-60. The Court rejected the argument that density requirements would be different for mentally retarded residents than for other potential residents. *Id.* The City had also argued that its ordinance was aimed at "avoiding congestion of population and at lessening congestion of the streets." *Id.* at 3260. This assertion was rejected as well. *Id.*

132. *Id.* at 3260. The Court did not affirm the court of appeals' decision to facially invalidate the ordinance. The Court's position was that upon a finding that the requirement of the special use permit denied the proposed CLC residents equal protection of the laws, there was no need to make a broader constitutional determination. *Id.* at 3258.

2. Justice Stevens' concurrence

Justice Stevens' concurring opinion centered on his belief that the three-tiered approach to equal protection analysis does not logically explain what the Court is doing. Justice Stevens asserted that although the Court's approach is often termed "rational," "intermediate," or "strict," in actuality the Court has really applied only one "rational basis" test encompassing all aspects of the equal protection challenge.[133] In addition, Justice Stevens rejected the idea that the "strict" or "heightened" scrutiny tests provide adequate standards since classifications such as residency, gender, age or mental retardation cannot be categorized into clearly defined classifications.[134] Noting that these classifications have never been well-defined, he suggested abandoning such labels altogether.[135]

Justice Stevens expressed the view that one rational basis test would be an adequate means of evaluating legislative classifications. Under his test, a court would be asked to examine what class had been harmed, whether that class had been subjected to a "tradition of disfavor" and whether the characteristic of the "disadvantaged class" justified its treatment.[136] Justice Stevens asserted that this inquiry would automatically invalidate racial classifications and, conversely, would validate most economic classifications.[137] Accordingly, this test would provide flexibility for a court evaluating classifications affecting groups possessing characteristics found to be "sometimes relevant and sometimes irrelevant to a valid public purpose."[138] Thus, legislation would be found invalid not because it failed an "intermediate" level of scrutiny, but because it was not rational in light of its purported purpose.[139]

Justice Stevens asserted that his proposed application of the rational

133. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3261 (1985) (Stevens, J., concurring).

134. *Id.* at 3261 (Stevens, J., concurring). Justice Stevens referred to his concurring opinion in United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180-81 (1980), where he advocated a test by which the Court would scrutinize the "correlation between the classification and either the actual purpose of the statute or a legitimate purpose that [the Court] may reasonably presume to have motivated an impartial legislature." *Id.* at 3261 n.5 (Stevens, J., concurring).

135. *Id.* at 3260-61 (Stevens, J., concurring); *see also supra* note 84 and accompanying text.

136. *Cleburne*, 105 S. Ct. at 3261-62 (Stevens, J., concurring). Justice Stevens warned that the Court must be "especially vigilant in evaluating the rationality" of legislative classifications concerning groups which have been traditionally disfavored because it is easy for "habit, rather than analysis" to create the appearance that such classifications are rational. *Id.* at 3261 n.6 (Stevens, J., concurring).

137. *Id.* at 3262 (Stevens, J., concurring).

138. *Id.* (Stevens, J., concurring).

139. *Id.* (Stevens, J., concurring).

basis test was adequate to evaluate legislation affecting groups such as the mentally retarded because their characteristics may be relevant to some legislative decisions, particularly those providing for special education or treatment.[140] He also noted that some restrictive legislation concerning the mentally retarded may be valid where the restrictions imposed are rationally related to a legitimate state interest.[141] However, with regard to Cleburne's zoning ordinance, Justice Stevens concluded that the permit requirement was not based on a legitimate concern for mentally retarded persons who would reside in the home, but on "irrational fears of neighboring property owners."[142] He therefore concurred in the majority's conclusion that the statute was invalid as applied, but maintained that the same result could have been achieved through application of his suggested test.[143]

3. Justice Marshall's opinion

Justice Marshall agreed with the majority's conclusion that the ordinance was invalid as applied to the mentally retarded, but dissented with respect to three aspects of the Court's analysis: (1) the Court's non-traditional application of the rational basis test; (2) the Court's conclusion that the mentally retarded were not a quasi-suspect class; and (3) the Court's decision only to invalidate the ordinance as applied rather than on its face.[144]

Justice Marshall criticized the majority's application of the rational basis test for two reasons. First, he stated his firm belief that a "more searching scrutiny" than the minimum scrutiny of a rational basis test was required to invalidate Cleburne's ordinance.[145] Second, he argued that the rational basis test applied by the majority was very different than the traditional test in that it required the City to justify the ordinance.[146]

---

140. *Id.* (Stevens, J., concurring). "A mentally retarded person could also recognize that he is a member of a class that might need special supervision in some situations, both to protect himself and to protect others." *Id.* (Stevens, J., concurring).

141. *Id.* (Stevens, J., concurring). Laws restricting the "right to drive cars or to operate hazardous equipment" may be based on a legitimate concern that the diminished abilities of the mentally retarded may increase the risk associated with such activities. *Id.* (Stevens, J., concurring).

142. *Id.* at 3262-63 (Stevens, J., concurring).

143. *Id.* at 3263 (Stevens, J., concurring).

144. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3263 (1985) (Marshall, J., concurring in part and dissenting in part). Justice Marshall was joined in his opinion by Justices Brennan and Blackmun.

145. *Id.* at 3264 n.2 (Marshall, J., concurring in part and dissenting in part).

146. *Id.* at 3264 (Marshall, J., concurring in part and dissenting in part) (citing Williamson v. Lee Optical Co., 348 U.S. 484 (1955); Allied Stores v. Bowers, 358 U.S. 522 (1959)). As evidence that the burden of proof had shifted to the City, Justice Marshall noted the fact that

Noting the danger of "[t]he suggestion that the traditional rational basis test allows this sort of searching inquiry . . . ," he expressed concern that the majority's analysis would create a precedent by which this stricter rational basis test could be applied to all economic and commercial classifications.[147] Alternatively, he warned that if the majority was actually invoking a "second order" rational basis test, lower courts would have no guidance as to when this test should apply.[148]

Justice Marshall argued that legislation classifying on the basis of the characteristic of mental retardation should be afforded a higher level of scrutiny. First, he noted that the interest of the mentally retarded in establishing a group home was substantial and could be considered a "fundamental" liberty deserving of a higher level of scrutiny.[149] He further asserted that the " 'lengthy and tragic history' of segregation and discrimination" of the mentally retarded called for a searching inquiry into legislation affecting their rights.[150] Justice Marshall advocated a system of analysis which would vary depending on the constitutional importance of the interest affected and the "recognized invidiousness" of the classification.[151] Thus, Justice Marshall concluded that consideration of the important interest involved (the right to establish a home), as well as the long history of prejudice against the mentally retarded, warranted closer scrutiny than that generally applied to commercial and economic legislation.[152]

Justice Marshall also criticized the majority's view that heightened scrutiny is inapplicable where distinguishing characteristics of a group may sometimes properly be taken into account by legislatures. He argued that if this view were adopted, classifications based on gender and illegitimacy could not be afforded this level of scrutiny since *many* tradi-

---

the majority had found it "difficult to believe" the City's purported justifications. This standard is contrary to the standard of proof under the traditional rational basis test in which the *challenging* party bears the burden of proof. *See supra* text accompanying notes 30-33.

147. *Id.* at 3265 (Marshall, J., concurring in part and dissenting in part). Justice Marshall criticized this analysis as reminiscent of the decision in Lochner v. New York, 198 U.S. 45 (1905). See *supra* note 24 and accompanying text for a discussion of *Lochner*.

148. *Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring in part and dissenting in part).

149. *Id.* at 3266 (Marshall, J., concurring in part and dissenting in part). Justice Marshall noted the district court's finding that " '[t]he availability of [a group] home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded . . . .' " *Id.* (Marshall, J., concurring in part and dissenting in part).

150. *Id.* at 3266-68 (Marshall, J., concurring in part and dissenting in part) (citations omitted).

151. *Id.* at 3265 (Marshall, J., concurring in part and dissenting in part). See *supra* note 87 and accompanying text for a discussion of this "sliding scale" approach.

152. *Cleburne*, 105 S. Ct. at 3265-66 (Marshall, J., concurring in part and dissenting in part).

tionally "suspect" characteristics may be relevant to a state's interest in *some* circumstances.[153] Justice Marshall disagreed with the majority's position that heightened scrutiny was not required simply because mental retardation is relevant to a state's interests in many instances.[154] He argued that just because a government may have legitimate reasons for classifying in some circumstances, this does not prevent the need for more "careful review" since there is still reason to suspect that the legislature may have acted with prejudice.[155]

The majority's conclusion that the mentally retarded are not politically powerless was flatly rejected by Justice Marshall.[156] He took issue with the majority's view that heightened scrutiny is no longer required due to the fact that some legislatures have recognized discriminatory practices against the mentally retarded and acted to correct them. Justice Marshall argued that this view was inconsistent with the historical application of the equal protection clause, noting that judicial concern has not lessened in the areas of gender-based and racial classifications merely because these groups are now politically mobilized or represented by others in the government.[157]

Justice Marshall's final criticism of the majority's opinion involved its failure to hold the City's zoning ordinance facially invalid. He voiced concern that because the majority only held the ordinance invalid as applied to the CLC group, mentally retarded groups wishing to establish group homes in the future would be subject to the imprecision of this ordinance and forced to "run the act's gauntlet."[158] He asserted that the ordinance was overbroad in that it excluded all "feeble-minded" persons without any specific delineations.[159] Furthermore, he noted that by striking down the ordinance only as applied to the CLC home, the majority had not given any indication of when the restrictions of the zoning

153. *Id.* at 3269-70 (Marshall, J., concurring in part and dissenting in part). Justice Marshall noted that classifications afforded intermediate scrutiny are also considered relevant under certain circumstances. For instance, classifications based on gender can seldom be justified, but permissible distinctions have been allowed if they "bear a reasonable relationship to their *relevant* characteristics." *Id.* at 3270 (Marshall, J., concurring in part and dissenting in part) (citing Zobel v. Williams, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (emphasis in original)).

154. *Id.* at 3270-71 (Marshall, J., concurring in part and dissenting in part).

155. *Id.* at 3270 (Marshall, J., concurring in part and dissenting in part).

156. *Id.* at 3268-69 (Marshall, J., concurring in part and dissenting in part).

157. *Id.* (Marshall, J., concurring in part and dissenting in part).

158. *Id.* at 3272 (Marshall, J., concurring in part and dissenting in part).

159. *Id.* at 3273 (Marshall, J., concurring in part and dissenting in part). The term "feeble-minded" is used here only because of its use in the Cleburne ordinance. *See supra* note 95 and accompanying text. Also, see *infra* note 320 for a discussion of the term "feeble-minded" and its negative inferences; *see also infra* notes 179-80 and accompanying text.

ordinance requirements *could* be imposed.[160] Justice Marshall concluded that because the ordinance was most likely rooted in irrational prejudice and because it created an overbroad presumption, the preferred course of action would be to strike it down on its face.[161]

IV. ANALYSIS

The Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*[162] raises four issues which require analysis. First, the majority's conclusion that the mentally retarded are not a quasi-suspect class, in spite of the fact that they possess many of the characteristics of a traditionally suspect class, leaves unclear what factors, if any, *will* trigger a heightened level of scrutiny. The concern is that lower courts will be unsure of the intent of the Court's analysis and whether future application of intermediate level scrutiny will be limited to those areas where the Court has already deemed it appropriate. The second issue concerns the rational basis test as applied in *Cleburne*, its inconsistency with prior cases applying this level of scrutiny and the problems faced by courts applying the test in the future. The third issue is whether the Court's "as-applied" invalidation of the Cleburne ordinance is consistent with the Court's approach in similar equal protection cases. Finally, the potential impact of this apparently ad hoc approach regarding the mentally retarded and similarly situated groups will be analyzed.

A. Rejection of Quasi-Suspect Classification for the Mentally Retarded: A Rationale for Preventing Entry Into the Class

The majority in *City of Cleburne v. Cleburne Living Center*[163] firmly rejected the court of appeals' assessment of relevant factors concerning the mentally retarded as well as its determination that the mentally retarded are a quasi-suspect class.[164] The court of appeals[165] had concluded that the City of Cleburne's ordinance was subject to an intermediate level of scrutiny for two reasons: (1) although the mentally retarded are not a "full-fledged suspect class," they share many characteristics of that class;[166] and (2) the ordinance as applied withheld a benefit which, though not fundamental, was extremely important to the

160. *Cleburne*, 105 S. Ct. at 3273 (Marshall, J., concurring in part and dissenting in part).
161. *Id.* at 3273-74 (Marshall, J., concurring in part and dissenting in part).
162. 105 S. Ct. 3249 (1985).
163. 105 S. Ct. 3249 (1985).
164. *See supra* text accompanying notes 115-27.
165. Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 105 S. Ct. 3249 (1985).
166. *Id.* at 198-99.

mentally retarded.[167] That court also cited other factors concerning the mentally retarded such as the immutability of their condition, their political powerlessness, the "history of unfair and often grotesque mistreatment" and the likelihood that discrimination against the mentally retarded reflects deep-seated prejudice.[168]

The Supreme Court's rejection of the court of appeals' analysis is a departure from precedent set by prior Supreme Court cases. Factors such as political powerlessness, immutability and a tradition of irrational prejudice have consistently been cited by the Court to justify a higher level of scrutiny for legislation classifying on the basis of race,[169] gender[170] or alienage.[171] The Supreme Court's conclusion that these factors are insufficient to render the mentally retarded quasi-suspect indicates a reluctance to grant any degree of "suspect" status to any more groups possessing characteristics analogous to classes previously recognized as suspect or quasi-suspect. The majority's response in *Cleburne* is not only perplexing in the light of past history, but, more importantly, may threaten future protection of such groups from discriminatory legislation.

Since the days of *United States v. Carolene Products Co.*,[172] the Court has recognized that where "prejudice against discrete and insular minorities, . . . tends seriously to curtail the operation of those political processes ordinarily . . . relied upon to protect minorities, . . . a correspondingly more searching judicial inquiry [may be called for]."[173] Thus, closer judicial scrutiny has been applied to classifications based on alienage,[174] gender[175] or race[176] because there is reason to suspect that a

167. *Id.* at 197-98.

168. *Id.* at 197. The court relied heavily on the analysis applied in *Plyler v. Doe*, discussed *supra* in text accompanying notes 78-81. For an argument that *Plyler* should have been limited to its facts, see Note, *Constitutional Law: Activating the Middle Tier After* Plyler v. Doe: Cleburne Living Center v. City of Cleburne, 38 OKLA. L. REV. 145 (1985).

169. *See supra* notes 38-47 and accompanying text.

170. *See supra* notes 68-76 and accompanying text.

171. *See supra* notes 49-53 and accompanying text.

172. 304 U.S. 144 (1938).

173. *Id.* at 152 n.4.

174. *See In re* Griffiths, 413 U.S. 717 (1973) (state may not prevent resident alien from practicing law); Sugarman v. Dougall, 413 U.S. 634 (1973) (state may not bar aliens from holding positions in state civil service); Graham v. Richardson, 403 U.S. 365 (1971) (state may not deny welfare benefits to aliens). *Griffiths, Sugarman* and *Graham* all were decided under a strict scrutiny analysis. *But cf.* Cabell v. Chavez Salido, 454 U.S. 432 (1982) (state has discretion to ban aliens from jobs as probation officers because the restriction serves a "political" purpose rather than economic; strict scrutiny still required if economic); Foley v. Connelie, 435 U.S. 291 (1978) (state may prevent aliens from becoming state troopers because state troopers are engaged in the execution of "broad public policy"); *see also* Plyler v. Doe, 457 U.S. 202 (1982) (intermediate level scrutiny applied to invalidate state statute preventing chil-

legislature which discriminates on the basis of these characteristics may have less than pure motives.

The similarity between the plight of the mentally retarded and these other protected groups is not difficult to see. As of 1979, most states did not allow the mentally disabled to vote.[177] Thus, this group has generally been dependent upon others to protect its interests. Furthermore, the mentally retarded have suffered a history of prejudice and discrimination which, as Justice Marshall stated, "can only be called grotesque."[178] Treatment of the mentally retarded has ranged from isolation in stigmatizing institutions[179] to forced sterilization urged by the Eugenics movement.[180] Only in recent years has the federal government mandated any

---

dren of undocumented aliens from attending public schools); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); *see supra* note 101 & notes 68-76 and accompanying text..

175. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (state nursing school's policy of refusing qualified male students held not substantially related to an important government interest); Craig v. Boren, 429 U.S. 190 (1976) (state statute forbidding sale of 3.2% beer to women under 18 and men under 21 held invalid under heightened scrutiny analysis); Frontiero v. Richardson, 411 U.S. 677 (1973) (statute that gave benefits to dependent wives of servicemen regardless of "actual" dependency but denied the same benefit to husbands of servicewomen without proof of actual support held invalid under heightened scrutiny standard). *See supra* notes 68-76 and accompanying text.

176. *See* Hunter v. Underwood, 471 U.S. 222 (1985) (state statute preventing convicted criminals from voting held invalid under strict scrutiny analysis because statute was rooted in racial prejudice); Palmore v. Sidoti, 466 U.S. 429 (1984) (ruling granting custody to father of white child because mother married a black man overruled under strict scrutiny analysis); Brown v. Board of Educ., 347 U.S. 483 (1954) (rejection of "separate but equal" doctrine regarding racially segregated educational facilities). *But see* Plessy v. Ferguson, 163 U.S. 537 (1896) ("separate but equal" accommodations for black and white passengers upheld), *overruled*, Brown v. Board of Educ., 347 U.S. 483 (1954); *see also supra* notes 38-47 and accompanying text.

177. *See infra* note 209 and accompanying text.

178. *Cleburne*, 105 S. Ct. at 3266 & n.8 (Marshall, J., concurring in part and dissenting in part).

179. Poor conditions in institutions for the mentally retarded continue to be the focus of much litigation. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman (II), 465 U.S. 89 (1984) (class action brought by mentally retarded citizens challenging dangerous and abusive treatment at state institution); Youngberg v. Romeo, 457 U.S. 307 (1982) (held due process clause of fourteenth amendment entitles institutionalized mentally retarded citizens to reasonably safe conditions of confinement, freedom from unreasonable restraints and such minimally adequate training as is reasonable); Pennhurst State School & Hosp. v. Halderman (I), 451 U.S. 1 (1981) (action brought against state institution alleging mistreatment and inadequate habilitation programs).

180. *See* S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE (1983). The Eugenics movement began in the late nineteenth century and lasted well into the 1930's. Because it was thought that mental retardation was a source of criminality and immorality, the movement sought to curb reproduction by the mentally retarded. *See, e.g.*, H. CAREY, A PLEA FOR THE STERILIZATION OF CERTAIN DEFECTIVES, PARTICULARLY THE FEEBLE-MINDED AND EPILEPTIC (1912); Fernald, *The Burden of Feeblemindedness*, 17 J. PSYCHO-ASTHENICS 87 (1912). In addition, many states prohibited marriage among the mentally retarded and some

policy concerning requirements for public education of the mentally retarded.[181] Yet, in spite of these factors, the majority in *Cleburne* ruled that the mentally retarded are not even a quasi-suspect class.[182]

The majority abruptly dismissed any question of continued antipathy or animus by legislatures toward the mentally retarded that would warrant increased protection of this group.[183] Noting recent federal and state legislative responses to the needs of the mentally retarded, the Court found that such responses belie any "continuing antipathy or prejudice."[184] Consequently, it concluded that there is a greater likelihood that legislation affecting the mentally retarded is based on legitimate concerns which the state may consider, rather than on any underlying prejudice.[185]

Applying the Court's logic, one would assume that because legisla-

---

continue to do so. *See, e.g.*, KY. REV. STAT. ANN. § 402.990 (2) (Baldwin 1984); MICH. COMP. LAWS ANN. § 551.6 (West 1967). *See generally*, Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons — The Eternal Child Grows Up*, 13 GONZ. L. REV. 625 (1978); Shaman, *Persons Who Are Mentally Retarded: Their Right to Marry and Have Children*, 12 FAM. L.Q. 61 (1978); Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. FAM. L. 463 (1977). At the height of the Eugenics movement, involuntary sterilization was seen as a way of protecting society from the perceived threat and burden of mentally retarded people. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927):

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

Id. Buck v. Bell has never been explicitly overruled.

181. *See* Education of the Handicapped Act, 20 U.S.C. § 1412 (5)(B); *see infra* note 184.

182. *Cleburne*, 105 S. Ct. at 3255-56.

183. *Id.* at 3256.

184. *Id.* at 3256-57. The Court noted such federal legislation as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which made it unlawful to discriminate against the mentally retarded in federally funded programs; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1)-(2), which declared that mentally retarded persons have a right to receive " 'appropriate treatment, services, and habilitation' " in an environment that is " 'least restrictive of [their] personal liberty;' " and the Education of the Handicapped Act, 20 U.S.C. § 1412 (5)(B) (1982) which conditioned state receipt of federal education funds on the state's assurance that the retarded children be provided with an education that is integrated with that of non-mentally retarded children " 'to the maximum extent appropriate.' " *Cleburne*, 105 S. Ct. at 3256-57. In addition, the Court recognized that Texas had also enacted legislation which paralleled the federal legislation by providing for the " 'right to live in the least restrictive setting appropriate to [their] needs and abilities' " including " 'the right to live . . . in a group home.' " *Id.* (citing Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1985)). CLC originally sought relief under this Act. *Cleburne*, 105 S. Ct. at 3257 n.11. The pendent state claim was voluntarily dismissed due to the possibility of federal abstention. *Id.* It is interesting to note that § 7 of the Texas statute has never been interpreted by that state. *Id.*

185. *Id.* at 3256.

tures have done "good things" for the mentally retarded, there is no longer a need for fear that legislation affecting this group may be motivated primarily by prejudice. However, the majority failed to recognize that favorable legislative action toward a group in *one* instance does not mean that the same group will not be prejudicially disfavored in another. Furthermore, the Court addressed no evidence indicating that the City of Cleburne *itself* had enacted any legislation favorable to the interests of the mentally retarded.[186] On the contrary, the majority itself, by concluding that the City's requirement of a special use permit for the CLC home was based on irrational prejudice,[187] recognized that legislatures *do* still act with antipathy toward the mentally retarded. The result of the Court's illogical conclusion is that the Cleburne ordinance, an unquestionable example of legislation antipathetic to the mentally retarded,[188] remains on that city's books.

The danger of the Court's reasoning is in its assumption that once legislation favorable to a group has been enacted, the "illness" of prejudice is somehow miraculously "cured." This same argument was put forth long ago in the *Civil Rights Cases*[189] when, in 1883, Justice Bradley asserted that since blacks had been freed from slavery, no further need for "favoritism" under the law was required.[190] A similar argument was presented in *Adkins v. Children's Hospital*,[191] where the Court invalidated a minimum wage law for women under the premise that women no longer required increased protection by the courts. In the *Civil Rights Cases*, Justice Harlan eloquently dissented from the majority's shortsightedness, arguing that although the "aid of beneficent legislation" may be present, the judiciary's responsibility to provide a watchful eye and prevent prejudicial legislative acts does not cease.[192] In more recent years, the idea that close judicial scrutiny equals mere favoritism has clearly been rejected in the Court's continued recognition of classifications based on race and gender as suspect.[193]

186. The Court did, however, note legislation enacted by the state of Texas acknowledging the "special status" of the mentally retarded. *Id.* at 3256-57; *see supra* note 184.

187. *Id.* at 3260.

188. *See infra* note 320 and accompanying text.

189. 109 U.S. 3 (1883).

190. *Id.* at 25. In the *Civil Rights Cases*, the Court held sections 1 and 2 of the Civil Rights Act of 1875 unconstitutional on the basis that Congress had no power to regulate, under the thirteenth or fourteenth amendments, acts of racial discrimination by individuals rather than by a state.

191. 261 U.S. 525 (1923). *Cf.* Muller v. Oregon, 208 U.S. 412 (1908) (sustained law barring employment of women in factory or laundry for more than 10 hours per day).

192. *Id.* at 61 (Harlan, J., dissenting).

193. *See supra* notes 38-48, 68-76 and accompanying text & *infra* note 194; *see also* Local 28

In addition, the majority's conclusion that recent legislation recognizing the special needs of the mentally retarded belies the need for continued close scrutiny is inconsistent with its actions in other areas. Despite the abundance of affirmative legislation to improve the rights of racial minorities and women, the Court has continued to recognize the need for close scrutiny of legislation classifying on the basis of race or gender.[194] In fact, legislative action in support of such groups has, in the past, been noted by the Court as *justification* for its application of heightened scrutiny. For instance, in *Frontiero v. Richardson*,[195] the Court cited congressional action against gender discrimination as a sign that the *judiciary* should also take action, through close analysis of challenged laws, to strike down laws based on invidious classifications.[196]

1. Political powerlessness and the legislative response

While concluding that a positive legislative response with respect to the mentally retarded negates suspicion of prejudicial motivation, the Court further asserted that such legislative action counters any claim that the mentally retarded as a group are politically powerless.[197] In one paragraph, the Court dismissed both the idea that this lack of power exists, as well as the concept that an inability to "assert direct control" over the legislature is even a criterion which triggers heightened scrutiny.[198]

The Court's conclusion ignores certain significant factors. First, as noted above, mentally retarded citizens have been, and continue to be, categorically disqualified from voting in most states.[199] Secondly, even with advocates working toward better recognition of the needs of the mentally retarded, such advocacy, although eliciting a legislative re-

---

of the Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986) and Local No. 93, Int'l Ass'n of Fireworkers v. Cleveland, 106 S. Ct. 3063 (1986). In both cases, decided July 2, 1986, racially based affirmative action programs were upheld.

194. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (racial discrimination still warrants strict scrutiny analysis). Despite tremendous changes in the social and political recognition of women's and men's rights, the Court still remains strong in its insistence on heightened scrutiny in this area. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (held invalid policy of excluding males from enrolling in state supported professional nursing school); Frontiero v. Richardson, 411 U.S. 677 (1973) (statute concerning medical and dental benefits for spouses of military personnel held invalid because it discriminated on basis of gender); Reed v. Reed, 404 U.S. 71 (1971) (invalidated statute which gave preferential treatment to males over females in the administering of intestate estates).

195. 411 U.S. 677 (1973).

196. *Id.* at 687-88.

197. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3257 (1985).

198. *Id.*

199. *See infra* note 209 and accompanying text.

sponse, does not of itself sustain the conclusion that a group's interests are being *adequately* asserted. Under the Court's reasoning, there would be little reason to continue applying heightened scrutiny in race and gender discrimination since groups such as the National Organization for Women (NOW) and the National Association for the Advancement of Colored People (NAACP) actively advocate the interests of women and blacks, and since federal and state governments have enacted legislation to enforce the rights of these groups. Yet, legislative classifications concerning these groups are still carefully scrutinized by the judiciary.[200]

Thirdly, the Court failed to recognize that although some legislators may *sympathize* with the needs and rights of the mentally retarded, there is little likelihood of great *empathy*.[201] For instance, a legislator passing laws limiting the rights of the mentally retarded will never be personally subject to that legislation. Furthermore, there is even less motivation for legislators to respond to the needs of the mentally retarded or to act without prejudice than to respond to similar needs of such protected groups as women and blacks; every political analyst knows the importance of the "black vote" or the "women's vote." However, since most mentally retarded citizens do not even vote, legislators are not likely to be as concerned with this group's needs or potential vote.[202]

Clearly, the majority has a strong argument if its assertion is that inability of a group to effect direct control on the political process should not, *of itself*, trigger heightened scrutiny of legislation affecting that group. Yet, in cases where such political powerlessness has been considered, it is in combination with other factors such as a history of prejudice and immutability of the classifying characteristic.[203] Thus, the Court's dismissal of this factor as a criterion which should *ever* be considered in applying heightened scrutiny is questionable in light of past precedent.

---

200. *See supra* 194.

201. Lack of empathy toward a "discrete and insular" group is one of the criteria which has been recognized by the Court in the tradition of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See supra* text accompanying note 41.

202. With respect to lack of empathy and political access by minorities, Dean John Hart Ely has noted:

> Political access is surely important, but (so long as it falls short of majority control) it cannot alone protect a group against [first-degree prejudice], out-and-out hostility, nor will it even serve effectively to correct the subtler self-aggrandizing biases of the majority. If voices and votes are all we're talking about, prejudices can easily survive.

J. ELY, *supra* note 41, at 161.

203. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982), discussed *supra* at text accompanying notes 78-81. See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), discussed *supra* at text accompanying notes 73-76.

2. Immutability, reduced ability to cope, and relevance of a characteristic

Immutability of a classifying characteristic is another factor the Court has considered relevant in past determinations that a group deserves suspect or quasi-suspect status.[204] The *Cleburne* majority, however, quickly dispensed with the fact that mental retardation is an immutable characteristic, determining it was irrelevant in this case.[205] The Court reasoned that immutability of a classifying characteristic will help trigger heightened scrutiny only where that characteristic is one that is generally irrelevant to *any* legitimate government purpose.[206] Thus, because the reduced ability of the mentally retarded is often relevant to legitimate state interests, the Court determined that substantive decisions concerning this "large and diversified" group are better left to an "informed legislature."[207]

At first glance, it appears a strong and logical conclusion that where a group's immutable characteristic is relevant to a legitimate state interest, the state should be afforded wide latitude to legislate the concerns of that group.[208] Yet, the Court's analysis is flawed in that it fails to recognize that where the immutable characteristic *itself* contributes to the political powerlessness of that group, the necessity for closer judicial scrutiny may correspondingly increase. For example, in the case of the mentally retarded, both the existence of extreme historical prejudice and this group's inability to vote (due to their immutable condition)[209] have

204. *See* Plyler v. Doe, 457 U.S. 202 (1982) (held immutability was relevant factor in applying heightened scrutiny to legislation affecting undocumented alien children); Frontiero v. Richardson, 411 U.S. 677 (1973) (held gender an immutable characteristic irrelevant to an individual's ability to contribute to society).

205. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3255-56 (1985).

206. *Id.*

207. *Id.* & n.10. The majority's position coincides with that of Dean Ely. J. ELY, *supra* note 41. His theory is that immutability is only relevant when the immutable characteristic is one which itself is generally irrelevant to any legitimate purpose. *Id.* at 150. Examples would be the immutable characteristics of race and gender which have, in almost all situations, no relevance to *any* legitimate state interest. The Court failed to note, however, that Dean Ely *does* recognize that immutability is not a completely irrelevant factor in determining whether a group is suspect. *Id.*; *see infra* note 211.

208. With regard to the mentally retarded, for instance, it may be necessary for the legislature to impose certain restrictions due to that group's reduced abilities. Driving, for example, or the operation of heavy machinery may be unsafe tasks for those with decreased mental abilities. *See Cleburne*, 105 S. Ct. at 3262 (Stevens, J., concurring).

209. Mental retardation is extremely relevant to the issue of political powerlessness because, as of 1979, most states did not allow the mentally disabled to vote. *See* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979). Such individuals have been disenfranchised for reasons varying from having been adjudicated incompetent to having been committed to mental institutions. *Id.* at 1645. At the time the Cleburne ordinance was enacted, the state of

contributed to their lack of political power. Though it may be true, as the Court noted, that when a classification is based on an immutable characteristic it is not automatically rendered suspect or quasi-suspect,[210] it also follows that immutability is not wholly irrelevant.[211]

The concern should be whether, as a result of a characteristic an individual cannot control or change, he or she may be subjected to legislation that discriminates on the basis of the characteristic and also be politically powerless to change the legislation *as a direct result* of the characteristic itself. Immutability of a distinguishing characteristic has never, of itself, been held to justify rendering a group suspect. Yet immutable characteristics such as one's illegitimate birth, gender or color have been held to be relevant to the level of scrutiny applied when other factors such as a history of prejudice and lack of political power are also present.[212] In the case of the mentally retarded, not only are these factors present, but, unlike blacks and women, the mentally retarded are generally unable to vote due to their condition.[213] Where a group is unable to effect *any* direct political change as a result of its disability, surely there is a need for a closer look at the motives of potentially discriminatory legislation.

Texas denied the right to vote to "idiots or insane persons." TEX. ELEC. CODE ANN. art. 5.01 (Vernon Supp. 1978). The Texas code has since been revised and as of January 1, 1986 holds, in relevant part, that only those "determined mentally incompetent by final judgment of the court" are denied voting rights. TEX. ELEC. CODE ANN. art. 11.002(3) (Vernon 1986).

The significance of the inability of the mentally retarded to vote can also be seen by comparison to other areas of constitutional law. For example, in reviewing state legislation under the commerce clause, the courts are particularly suspicious where the burden of adhering to the law falls primarily on out-of-state interests; these interests are unable to protect themselves because they have no direct access to the legislative process of that state. *See* Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). The same concern has prompted careful scrutiny under the privileges and immunities clause. *See* Toomer v. Witsell, 334 U.S. 385, 395 (1948).

210. *Cleburne*, 105 S. Ct. at 3256 & n.10. Even where immutability has been cited as a factor relevant for determining that heightened scrutiny is required, this has never been the *sole* factor. See Plyler v. Doe, 457 U.S. 202 (1982) discussed *supra* at text accompanying notes 78-81.

211. The Court quoted Dean Ely for the proposition that immutability is generally an irrelevant factor. *See supra* note 207. The Court neglected to acknowledge Ely's continued discussion:

> Immutability . . . cannot be the talisman that some have tried to make it, but it isn't entirely irrelevant either, since classifications geared to characteristics it is not within the power of the individual to change will not be amenable to immediate and innocent explanation in terms of altering the classifying characteristic's incidence.

J. ELY, *supra* note 41, at 155.

212. See, for example, the discussion *supra* at text accompanying notes 68-72 regarding gender-based classifications. See also *supra* text accompanying notes 78-81 discussing Plyler v. Doe, 457 U.S. 202 (1982).

213. *See supra* note 209 and accompanying text.

Perhaps the true reason for the majority's dismissal of immutability as a determining factor can be found in its conclusion that where a group has "distinguishing characteristics relevant to interests the state has the authority to implement," courts must be reluctant to apply a heightened level of scrutiny out of deference to the separation of powers.[214] The Court's rationale was that since, in many instances, a legislature is justified in considering a characteristic such as mental retardation relevant to its goals, heightened scrutiny is not required.[215]

As Justice Marshall noted, the Court addressed two principles in support of this view.[216] First, the Court held that heightened scrutiny is inappropriate where *individuals* in a group have distinguishing characteristics which a legislature may properly take into account in some circumstances.[217] Second, the Court asserted that heightened scrutiny is also inappropriate when many legislative classes that affect the *group* are likely valid.[218] The Court reasoned that it is the "likelihood that governmental action premised on a particular classification [such as mental retardation] is valid as a *general matter*," and not the mere "specifics" of a case that are important.[219]

The majority's analysis on both counts appears flawed. In the first instance, distinguishing characteristics possessed by individuals in a group may vary in degree.[220] Merely because some of the individuals in a group possess characteristics justifying restrictions in certain instances, restrictions imposed on all members of that group are not necessarily justified. This is particularly true where, as in the case of the mentally retarded, there is reason to suspect prejudice with respect to this distinguishing characteristic.

---

214. *Cleburne*, 105 S. Ct. at 3255.

215. Justice Marshall raised the valid question of whether the majority's view requires a calculation of the percentage of situations where a characteristic is relevant to the state's interest as a means of determining whether heightened scrutiny should apply. *Id.* at 3270-71 (Marshall, J., concurring in part and dissenting in part). He argued that an "undefined numerical threshold" of invalid situations is irrelevant to the constitutional issue of heightened scrutiny. The principles of equality, guaranteed under the equal protection clause, should be enforced when a classification is "*potentially* discriminatory" and not because of some mathematical conclusion. *Id.* (Marshall, J., concurring in part and dissenting in part). See *supra* note 102 and accompanying text for a discussion of Judge Garwood's dissenting comments in the court of appeals decision. The majority of the Supreme Court appears to have followed his reasoning.

216. *Cleburne*, 105 S. Ct. at 3269-70 (Marshall, J., concurring in part and dissenting in part).

217. *Id.* at 3255, 3258.

218. *Id.* at 3258.

219. *Id.* (emphasis added).

220. *See supra* note 117 and accompanying text.

A similar flaw exists in the Court's assertion that the appropriate standard of review is determined by reference to the *number* of classifications to which a characteristic could validly be considered relevant.[221] Just as it is illogical for the Court to presume that heightened scrutiny is unnecessary because legislatures have enacted some laws in favor of the mentally retarded,[222] it is equally illogical to suggest that because the characteristic of mental retardation is relevant in *many* circumstances, it should be presumed relevant where there is reason to suspect otherwise. As Justice Marshall noted, "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door."[223] By the same token, preventing a mentally deficient person from using dangerous machinery is quite different from denying that same individual access to a neighborhood which welcomes boarding houses, fraternities and sororities and institutions for the elderly.[224]

The majority's position suggests that unless a characteristic is virtually *always* irrelevant to any legitimate state interest, a rational basis test is all that is required. Yet, this position is inconsistent with the Court's stance in other heightened scrutiny cases. For instance, in *Plyler v. Doe*,[225] the Court determined that the status of a state resident's citizenship was of legitimate interest to the state and not a "constitutional irrelevancy."[226] However, because of the suspect characteristics of undocumented alien children and the interest involved,[227] the Court still chose to apply heightened scrutiny. In addition, gender is generally held to be irrelevant to any legitimate purpose and legislation classifying on the basis of gender is subject to heightened scrutiny.[228] However, certain gender-based legislation has been upheld because this characteristic may be relevant to state interests under some circumstances.[229] Thus,

221. *Cleburne*, 105 S. Ct. at 3258.

222. *See supra* text accompanying notes 186-96.

223. *Cleburne*, 105 S. Ct. at 3270 (Marshall, J., concurring in part and dissenting in part).

224. *See supra* note 88 and accompanying text.

225. 457 U.S. 202 (1982).

226. *Id.* at 223.

227. The Court considered the fact that although the alien parents voluntarily entered the country illegally, the children's status as undocumented aliens was an immutable characteristic. *Id.* at 220. Also, the Court held that education, though not a fundamental right guaranteed by the Constitution, was important because the stigma of illiteracy is an "enduring disability." *Id.* at 221-23.

228. *See supra* notes 68-76 and accompanying text.

229. *See* Rokster v. Goldberg, 453 U.S. 57 (1981) (upheld Military Services Act which authorized President to require registration of men but not of women for possible military service); Michael M. v. Superior Ct., 450 U.S. 464 (1981) ("statutory rape" law challenged as discriminatory because only men could be held criminally liable upheld as furthering compelling state interest of preventing unwanted teenage pregnancies).

although a characteristic may be relevant to legitimate state interests in some instances, where there is reason to suspect it is not, a need for heightened scrutiny should still exist.[230]

3. Reluctance to expand the class

It is clear that had the Court wished to expand the quasi-suspect classification to include the mentally retarded, it would have been fully justified in doing so in reliance on previous cases. As a group, the mentally retarded possess many characteristics that have prompted close judicial scrutiny of legislation burdening a suspect or quasi-suspect class. Like racial minorities, the mentally retarded have suffered a long history of deep-seated prejudice and hatred.[231] Like aliens, they have, for the most part, been unable to vote or participate directly in the political process.[232] Legislators are less likely to be empathetic regarding legislative burdens placed on the mentally retarded as there is little chance they will ever be subject to the laws they pass.[233] And, like undocumented alien children, mentally retarded persons are unable to alter their condition.[234] Therefore, precedent demonstrates that the court of appeals' analysis and conclusion that the mentally retarded should be given quasi-suspect status was entirely justified.

The primary motivation for the majority's conclusion, therefore, may lie elsewhere—possibly in the final reason stated by the Court. To explain its refusal to label the "large and amorphous class of the mentally retarded" as quasi-suspect, the Court stated that such a decision would render it difficult to distinguish the mentally retarded from "other groups who [also] have perhaps immutable disabilities . . . , who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large."[235] Citing such groups as the aged, the mentally ill, and the disabled, the Court indicated its reluctance "to set out on that course."[236]

The majority lamented what it perceived as a difficulty in finding a "principled way" to distinguish the mentally retarded from these other

230. *See supra* text accompanying notes 223-24.

231. *See supra* notes 45-47 and accompanying text; *see also supra* notes 178-81 and accompanying text.

232. *See supra* text accompanying notes 49-53; *see also supra* note 209.

233. *See supra* text accompanying notes 201-02.

234. See Plyler v. Doe, 457 U.S. 202 (1982) and *supra* note 227 and accompanying text for a discussion of this case.

235. *Cleburne*, 105 S. Ct. at 3257-58.

236. *Id.* at 3258; *see supra* notes 125-26 and accompanying text.

groups, indicating a fear of opening a floodgate of potential lawsuits.[237] However, a principled way of distinguishing these groups *does* exist. For instance, the mentally retarded can be distinguished from the elderly, one group which the Court has denied quasi-suspect status.[238] This group, unlike the mentally retarded, *can* vote. In addition, they have not suffered societal discrimination to the extent of that inflicted upon the mentally retarded. Lastly, there is a greater likelihood of empathy on the part of legislators as they, upon joining the ranks of the elderly, may personally be subject to the laws they create. Thus, whether or not one agrees that the rational basis test is appropriate for legislation affecting the elderly, it is clear that this group *can* be distinguished from the mentally retarded by analyzing and balancing factors such as the extent of societal and legislative prejudice or empathy, and the degree of the group's political powerlessness.

The majority's premise that granting the mentally retarded quasi-suspect status will make it too easy for other groups to get into court is also unwarranted. The Court should not shirk the responsibility of protecting constitutional rights of individuals or groups of individuals out of fear that "everyone will get in;" all constitutional adjudication necessarily requires a degree of balancing interests, both individual and governmental.[239] The Court's responsibility, therefore, is to frame a *principled* means of analysis, not merely to deny that one exists.

There is another danger in the Court's conclusion. By minimizing the importance of the suspect-like characteristics of the mentally retarded, the majority view threatens future protection of those classes already considered suspect or quasi-suspect. Considering that all of the factors raised and discarded by the Court in *Cleburne* have been cited by the same Court to *justify* greater judicial protection of aliens, racial minorities, and women, the majority's reasoning could seriously weaken the protected position of these groups. For instance, a future court could conclude, using the language of *Cleburne*, that state and federal affirmative action programs *also* belie any "continuing antipathy or prejudice . . . [or] corresponding need for more intrusive oversight by the judiciary."[240] Will the Supreme Court then have a "principled way" of distin-

237. *Cleburne*, 105 S. Ct. at 3257.

238. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), discussed *supra* at note 125.

239. *See* Shaman, *Cracks in the Structure: The Coming Breakdown of Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 174 (1984).

240. *Cleburne*, 105 S. Ct. at 3256.

guishing women and racial minorities from the mentally retarded and continue to guarantee close scrutiny of legislation affecting these groups?

At present, it appears that the Court intends continued recognition by courts that legislation classifying on the basis of certain characteristics must be subjected to either intermediate or strict scrutiny. The *Cleburne* Court acknowledged that strict scrutiny still applies where classifications are based on race or impinge on fundamental rights, and that classifications based on illegitimacy or gender still are subject to intermediate level scrutiny.[241] However, the Court's approach demonstrates a move away from its prior use of such relevant factors as immutability, political powerlessness and a history of prejudice as determinative of whether a class should be quasi-suspect. After *Cleburne*, these factors may do little to successfully raise the level of scrutiny applied by the Court. Instead, a *new* "rational basis" test may be applied.

B. A New Rational Basis Test: Heightened Scrutiny "Rationalized"

Although the majority concluded that only a rational basis test was appropriate in *City of Cleburne v. Cleburne Living Center*,[242] the test applied differed greatly from the conventional one. The traditional rational basis test is one of extreme deference to the state's legislative process; if it is determined that the state is acting in pursuit of a legitimate interest or purpose, all that is required is that the means chosen be rationally related to that interest.[243] Even where there is no stated purpose, the Court may presume a valid purpose.[244] Furthermore, where the means chosen either fails to further the alleged goal or produces another, the Court may still uphold the legislation as long as "it *might* be thought that the particular legislative measure was a rational way to [achieve the alleged purpose]."[245] Thus, legislation is presumed valid and a state is not required to convince a court of the wisdom of its classifying distinctions. Rather, unless a challenging party can demonstrate that the state's "means to an end" is totally unreasonable or arbitrary, the legislation will pass constitutional muster.

The test applied in *Cleburne*, however, more closely resembled the test applied under intermediate scrutiny, where the burden of proof is on the state to show that the law substantially furthers an important state

241. *Id.* at 3255.

242. 105 S. Ct. 3249 (1985).

243. *See supra* notes 30-33 and accompanying text.

244. *Id.*; *see also supra* note 28 and accompanying text.

245. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (emphasis added); *see supra* notes 29-33 and accompanying text.

interest.[246] The majority in *Cleburne* determined that the mentally retarded's reduced ability to cope was, indeed, relevant to the City's interests.[247] The Court then set out to determine if this relevant characteristic justified the City's requirement of a special use permit for the CLC home.[248] The question was whether a group of mentally retarded persons threatened the legitimate interests of the City in a manner that other permitted uses would not.[249] The Court's final conclusion was that the City had failed to "rationally justify denying to [the occupants of the Featherston home] what would be permitted to groups occupying the same site for different purposes."[250]

This analysis constitutes a departure from the usual rational basis approach. Rather than requiring that CLC demonstrate that there was no rational basis for the requirement of a special use permit, the Court required that the *City* "rationally justify" its decision. This is not the rational basis test of *Williamson v. Lee Optical Co.*;[251] it is more a "rational justification" test that falls somewhere between the minimal rational basis test and the intermediate scrutiny applied to gender-based classifications.

What is most disturbing about this tougher rational basis test is that, as Justice Marshall noted in his dissent, the Court never indicated *why* it was applied or what criteria triggered its application.[252] It is perplexing that, after presenting an exhaustive discussion of its reasons for *rejecting* quasi-suspect status for the mentally retarded, the Court proceeded to apply a test very similar to the intermediate level of scrutiny afforded legislation affecting such a class. Although apparently determined to limit further expansion of intermediate level scrutiny, the Court appeared equally determined to provide some protection for the mentally retarded

246. *See supra* notes 65-67 and accompanying text.

247. *Cleburne*, 105 S. Ct. at 3257.

248. *Id.* at 3258-60.

249. *Id.*

250. *Id.* at 3260.

251. 348 U.S. 483 (1955). *See supra* notes 30-33 and accompanying text. Under the *Williamson* test, it is likely that the ordinance would have been upheld. For instance, consider the Court's refusal to believe that the City could be more concerned with the density of a home occupied by mentally retarded persons than by a permitted group. *Cleburne*, 105 S. Ct. at 3259-60. Under the test in *Williamson*, the Court in *Cleburne* could have concluded that the City *might* have felt that a large group of mentally retarded persons living in the home might create special safety hazards, just as the legislature of *Williamson may* have felt opticians were somehow more in need of regulation than opthalmologists and optometrists. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955) discussed *supra* at text accompanying notes 30-33.

252. *Cleburne*, 105 S. Ct. at 3263 (Marshall, J., concurring in part and dissenting in part).

against prejudicial treatment by local governments.[253] The question then is what factors triggered the Court's approach and what are the criteria for applying this new approach.

1. "Second order" rational basis

As Justice Marshall suggested, the *Cleburne* Court actually employed a "second order" rational basis test, one that is slightly more strict than the traditional test.[254] The implication might be that the "toothless" test could still be applied in some cases but that this tougher test is required in others. As suggested above, however, the difficulty with this conclusion is that the Court failed to define what criteria may trigger such a test.

a. irrational prejudice and lack of a rational relationship

It may be that the same factors which the Court found insufficient to warrant quasi-suspect status for the mentally retarded triggered this "second order" test. In *Cleburne*, it was noted that although intermediate scrutiny was not required, there was a need to not "leave [the mentally retarded] entirely unprotected from invidious discrimination."[255] The majority seemed to acknowledge the possibility that deep-seated prejudice against the mentally retarded, rather than legitimate goals, may be the motivation of certain legislation burdening this group. This concern may explain its use of a "heightened" rational basis test in this case.

This would not be the first time the Court has manipulated the rational basis test and upgraded minimal scrutiny in pursuit of a desired result. In *United States Department of Agriculture v. Moreno*,[256] the Court struck down legislation under the rational basis test because it concluded that the means chosen was not related to the purported purpose. In *Moreno*, an amendment to the Food Stamp Act made unrelated persons living in the same household ineligible for food stamps.[257] The Court determined that this exclusion was not related in any manner to the Act's goals of helping the nation's agriculture and satisfying nutritional needs.[258]

Moreno, like *Cleburne*, represents a departure from the Court's

253. *Cleburne*, 105 S. Ct. at 3258 ("Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination.").

254. *Id.* at 3264 (Marshall, J., concurring in part and dissenting in part).

255. *Cleburne*, 105 S. Ct. at 3258.

256. 413 U.S. 528 (1973).

257. *Id.* at 530.

258. *Id.* at 534.

usual deference to the legislative body under minimal scrutiny in that the Court was unwilling to accept just any conceivable basis for the legislation. In *Moreno*, there was evidence that the provision to exclude unrelated persons from the benefits was motivated by a desire to exclude "hippie communes."[259] The Court indicated that a "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest."[260] Notably, the majority in *Cleburne* made reference to this language of *Moreno*,[261] indicating that Cleburne's ordinance was not only held invalid because the City had failed to demonstrate that the permit requirement was a rational means to further its interest. Rather, it was held invalid because the Court suspected that the *actual purpose* of the law was not legitimate since it was motivated by irrational prejudice against the mentally retarded as a group.

b. no articulated purpose

The Court has, at times, applied a heightened rational basis test in cases where the legislature has failed to articulate its purpose, leaving the Court to speculate as to what legitimate purpose is being furthered. *Logan v. Zimmerman Brush Co.*[262] was such a case. *Logan* concerned a state employment discrimination statute requiring the state Fair Employment Practices Commission to convene its review of timely filed complaints within 120 days of the filing.[263] The alleged purpose was to expedite processing of claims, but the actual result was that inadvertent delay by the Commission could cause a loss of jurisdiction over a claim.[264] The Court held that the provision was not a rational method of achieving the state's objective because it turned "similarly situated claims into dissimilarly situated ones."[265]

One important factor in *Logan* was that the classification, that is, the determination that the 120-day cut-off was jurisdictional, was not drawn by the legislature at all. This decision was made by the *judiciary*.[266] Therefore, in *Logan*, the Court rejected the classification, in part, on the basis that the legislature had not articulated a purpose consistent

259. *Id.*

260. *Id.* (emphasis in original).

261. *Cleburne*, 105 S. Ct. at 3258.

262. 455 U.S. 422 (1982).

263. *Id.* at 424.

264. *Id.* at 427.

265. *Id.* at 442. Justice Blackmun wrote the majority opinion which was founded on a denial of due process. He then wrote separately to address the equal protection issue.

266. *Id.* at 438-39.

with the resulting application.[267]

Similarly, the City of Cleburne did not articulate any purpose for enacting a requirement of a special use permit for the mentally retarded. The Court is sometimes more suspicious of purposes set forth *post hoc* by lawyers for the state.[268] This may explain the majority's questioning of the purposes put forth by the City in *Cleburne*. Thus, the lack of a stated purpose by the City may have triggered the "second order" rational basis test which required the City to justify that the requirement rationally furthered the purported goal.

c. carving out exceptions for the politically disadvantaged

Another area in which the Court has applied a more demanding rational basis test is where a law classifies on the basis of state residency, thus burdening out-of-state residents.[269] The rationale for this approach is one of fairness. Because out-of-state residents are unable to affect any direct political change within the state imposing the burden, courts are more suspicious of such legislation.[270] In *Zobel v. Williams*,[271] the Court held that an Alaska statute which distributed annual dividends from windfall oil revenues to state residents in amounts dependent upon the recipient's length of residency could not even pass the minimum rational basis test.[272] The Court in *Zobel* departed from its usual rational basis

267. *Id.* at 440 & n.3.

268. In United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980), the Court upheld a modification of retirement benefits for railroad workers which allowed those who had worked for railroads for more than 10 years but less than 25 and had not yet retired to retain certain "windfall" benefits. Others, who had worked for the same number of years but *had* retired, were denied the benefit. *Id.* at 178. Justice Brennan, joined by Justice Marshall, took issue with the majority and argued that legislation should be upheld "only if it is rationally related to the achievement of an *actual* legitimate governmental purpose" rather than *post hoc* "justifications" put forth by the government's attorneys. *Id.* at 187 (Brennan, J., dissenting).

The Court has, at times, shown a tendency to accept Justices Brennan's and Marshall's view by stating that a challenged classification must further a legitimate "*articulated* purpose." McGinnis v. Royster, 410 U.S. 263, 270 (1973) (emphasis added) (upheld statute denying "good-time" credit to some prisoners but not to others); *see also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (classification will be sustained only if it "rationally furthers purposes identified by the State"); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (challenged classification will pass constitutional muster only if it "rationally furthers some legitimate, articulated purpose"). However, it is unclear whether the Court has incorportated this requirement into its analysis, since it has continued to uphold, as in *Fritz*, laws which do not further any articulated purpose. It seems the Court employs this standard only when it suits the desired result. *See* Gunther, *supra* note 35, at 46.

269. See *supra* second paragraph of note 209 for a discussion of this view.

270. *Id.*

271. 457 U.S. 55 (1982).

272. *Id.* at 65.

analysis in which it either readily defers to the purported purpose or postulates hypothetical objectives to ensure the law's validity. Two other recent cases involving both a classification based on state residence and a similar departure from the traditional rational basis test are *Metropolitan Life Insurance Co. v. Ward*[273] and *Williams v. Vermont*.[274] It is possible, therefore, that the Court now has also carved out an exception for the mentally retarded because, like out-of-state residents, they are generally unable to vote or directly influence the political process.

All of these possible explanations for the Court's "second-order" approach in *City of Cleburne v. Cleburne Living Center*[275] are only speculative. Because the Court never clearly articulated its reasoning or what factors triggered this stricter rational basis test, a troubling precedent has been left for lower courts. The true danger in the Court's approach is that it gives lower courts little guidance as to future application.

2. A rational basis test "with teeth"

An alternative to the "second-order" explanation of the Court's rationale discussed above is that the Court's decision in *City of Cleburne v. Cleburne Living Center*[276] indicates an intent to strengthen the traditionally "toothless" rational basis test in general, thus tightening the scrutiny applied to *all* social and economic legislation. Two recently decided cases support this proposition. The first is *Metropolitan Life Insurance Co. v. Ward*,[277] in which the Court ruled that an Alabama statute that taxed out-of-state insurance companies more heavily than insurers based in Alabama did not pass the rational basis test.[278] The trial court had determined that the tax furthered at least two purposes in addition to raising revenue: (1) encouraging the formation of new domestic companies in Alabama; and (2) encouraging capital investment by foreign insurance companies in Alabama assets and governmental securities.[279] On appeal, however, the Supreme Court determined that the only *actual* purpose of the statute was to favor local business and found this purpose unacceptable and discriminatory.[280]

---

273. 470 U.S. 869 (1985). See *infra* notes 277-84 and accompanying text for a discussion of *Ward*.

274. 472 U.S. 14 (1985). See *infra* notes 285-95 and accompanying text for a discussion of *Williams*.

275. 105 S. Ct. 3249 (1985).

276. *Id.*

277. 470 U.S. 869.

278. *Id.* at 882-83.

279. *Id.* at 873.

280. *Id.* at 878.

In a scathing dissent, Justice O'Connor argued that the state's tax was based on "contemporary realities of insurance regulation and taxation . . . [which] justify a uniquely local perspective."[281] She criticized the majority's analysis, asserting that it had confused the two-step rational basis test by combining the inquiry regarding the state's purpose and the inquiry into the relationship of the classification to that purpose into "a single unarticulated judgment."[282] In conclusion, Justice O'Connor chastised the Court for ignoring evidence that there was a legitimate local interest which the tax furthered.[283] In her opinion, the majority had by-passed the conventional rational basis test and imposed "its own economic values on the Equal Protection Clause."[284]

The second case, *Williams v. Vermont*,[285] concerned a Vermont statute which provided that Vermont residents who purchased cars out of state were exempt from Vermont's use tax to the extent of any sales tax paid in the state of purchase.[286] However, non-residents who purchased cars out of state, paid the sales tax in the state of purchase, but later moved to Vermont were required to pay Vermont's use tax upon registration of their vehicles.[287] The plaintiff claimed this exemption was discriminatory because, theoretically, a resident could purchase a car in another state, remain in that state for a period of time, and still escape the use tax in Vermont upon his return.[288] The Court determined that no legitimate purpose was furthered by the exemption and that "residence at the time of purchase [was] a wholly arbitrary basis on which to distinguish among present Vermont registrants."[289]

Justice Blackmun dissented, arguing that the exemption had been based on the legitimate presumption that people will use their cars pri-

281. *Id.* at 891 (O'Connor, J., dissenting).

282. *Id.* at 884 (O'Connor, J., dissenting).

283. Justice O'Connor argued that the tax rationally furthered the legitimate purpose of promoting local insurance companies. She viewed this goal as in the public interest because local companies are more inclined to underwrite policies for "the urban poor, small businesses and family farms" than larger, out-of-state insurance companies. *Id.* at 891-92 (O'Connor, J., dissenting).

284. *Id.* at 900 (O'Connor, J., dissenting). The majority, according to Justice O'Connor, had collapsed the two prongs of the rational basis test, legitimate purpose and means rationally related to that purpose, into one undefined test. She took issue with the majority's unprecedented rationale that because the means appeared discriminatory, the purpose could not be legitimate. *Id.* at 898-99 (O'Connor, J., dissenting).

285. 472 U.S. 14.

286. *Id.* at 16.

287. *Id.*

288. *Id.* at 19.

289. *Id.* at 23.

marily in the states in which they reside.[290] He asserted that the residency classification would distinguish those likely to use Vermont's roads immediately after purchasing cars out of state and credit them if they had already paid a state tax. According to Justice Blackmun, it was not unreasonable for the state to deny the same benefit to non-resident purchasers because it was presumed they would use their cars in the state of purchase. If the non-resident subsequently moved to Vermont, payment of the Vermont tax over and above the prior tax paid was justified because he had used the highways of both states as a resident and should support their maintenance.[291]

Justice Blackmun concluded that the statute should be upheld since it was a rational means of furthering Vermont's legitimate goals of maintaining state highways and encouraging reciprocal purchases between states.[292] According to Justice Blackmun, the majority had employed a circular logic in concluding that because the statute discriminated against the out-of-state residents, it could not further a legitimate purpose.[293] He noted that this approach suggested "*a new level of scrutiny that [was] neither minimal nor strict, but strange unto itself.*"[294] Justice Blackmun viewed this analysis as a serious departure from the traditional rational basis test under which a tax classification "does not violate the demands of equal protection simply because it may not perfectly identify the class of people."[295]

Both *Ward* and *Williams* were tax cases and did not concern a possibly suspect minority class like *Cleburne*. However, they did involve classifications based on out-of-state residency; classifications of which the Court tends to be more suspicious.[296] These cases are therefore significant because in each, as in *Cleburne*, the Court applied a stricter level of scrutiny than the traditional rational basis test; in all three cases, the

290. *Id.* at 33-34 (Blackmun, J., dissenting).

291. *Id.* (Blackmun, J., dissenting).

292. *Id.* at 30-31 (Blackmun, J., dissenting). Generally the rationale for a compensating use tax is to protect local merchants from out-of-state competition. Thus, a purchaser may not benefit from another state's lower sales tax because any difference between the tax of that state and his own must be paid in the form of the use tax. Apparently no states charge sales tax to out-of-state purchasers. *Id.* at 36 n.5 (Blackmun, J., dissenting) (citing J.C. Penney Co. v. Hardesty, 264 S.E.2d 604, 613 (W. Va. 1980)).

293. *Id.* at 31-32 (Blackmun, J., dissenting) ("[The] statute is placed under a constitutional cloud because a state court failed to go out of its way to reject a hypothetical interpretation of one of the statute's terms."); *see also supra* note 284 and accompanying text.

294. *Williams*, 472 U.S. at 31 (Blackmun, J., dissenting) (emphasis added).

295. *Id.* at 34 (Blackmun, J., dissenting).

296. See *supra* second paragraph of note 209 for a discussion of this concept.

majority demanded a much closer relationship between the legislative purpose and the means of achieving that purpose.

A more rigorous rational basis test as applied in these cases may be desirable since the traditional test of *Williamson v. Lee Optical Co.*[297] has long been recognized as useful in theory but ineffective in application. Almost any statute may pass constitutional muster when challenged under the *Williamson* test.[298] However, what *is* troubling is that in *Ward, Williams* and *Cleburne*, the Court departed from the traditional test without explaining the *reason* for this departure or clearly articulating *criteria* for a new test. Thus, it is not surprising that both Justice O'Connor in *Ward*[299] and Justice Marshall in *Cleburne*[300] likened the Court's approach to the days of *Lochner v. New York*,[301] when legislation could be struck down merely because the Court viewed it as unwise.[302] The concern is not so much with the *result* of the decisions but with the Court's use of an approach motivated more by politics and personal judgment than by sound constitutional interpretation.

3. An unclear future

The majority's decision to apply a rational basis test in *City of Cleburne v. Cleburne Living Center*[303] and the manner in which that test was applied presents some difficulties for future equal protection cases. The major concern is, of course, how to determine what criteria should be used by lower courts in such cases. The Court appears to have rejected the traditional three-tier approach by refusing to apply an intermediate level scrutiny to the Cleburne ordinance despite the similarity of the mentally retarded to other groups afforded this level of scrutiny. Yet the Court's application of a "heightened" rational basis test leaves unclear whether the Court is aiming towards a stricter rational basis test to be applied across the board, or if the test represents a "second order" rational basis test, applicable only under certain unarticulated circumstances.

C. The Majority's "As Applied" Approach

The final issue of concern in *City of Cleburne v. Cleburne Living*

297. 348 U.S. 483 (1955). *See supra* notes 30-33 and accompanying text.
298. *See supra* notes 30-37 and accompanying text.
299. *Ward*, 470 U.S. at 899-900 (O'Connor, J., dissenting).
300. *Cleburne*, 105 S. Ct. at 3271 (Marshall, J., concurring in part and dissenting in part).
301. 198 U.S. 45 (1905).
302. *See supra* note 24 and accompanying text.
303. 105 S. Ct. 3249 (1985).

Center[304] is the majority's ruling that Cleburne's zoning ordinance was invalid only as applied.[305] Rather than affirming the court of appeal's conclusion that the ordinance was invalid on its face, the Court preferred a narrower course of adjudication so as to "avoid making unnecessarily broad constitutional judgments."[306] Since the Court concluded that the statute was invalid as applied to CLC, it deemed it unnecessary to decide whether the City of Cleburne "may *never* insist on a special use permit for a home for the mentally retarded" in the zoned area in question.[307]

The majority supported its position by citing *Brockett v. Spokane Arcades, Inc.*,[308] *United States v. Grace*[309] and *NAACP v. Button*.[310] These cases, however, concerned statutes that did not expressly mention the plaintiff's class but had been applied to them.[311] In contrast, the Cleburne ordinance on its face listed the "feeble-minded" as a group required to obtain a special use permit.[312] The issue in *Cleburne* concerned whether *this* group of "feeble-minded" should be required to obtain a special use permit, whereas the cases cited by the majority involved issues concerning whether the legislation in question was ever intended to be applied to the affected class in the first place.

It is interesting that the Court chose to ignore cases more on point with *Cleburne* than the ones cited. For instance, in the recent case of *Hunter v. Underwood*,[313] the plaintiff challenged a statute that prevented convicted criminals from voting. Although the statute was racially neutral on its face, it was held invalid because its original enactment was motivated by a racially discriminatory purpose.[314] In *Cleveland Board of Education v. LaFleur*,[315] the Court held invalid on its face a school board regulation requiring mandatory leave for any pregnant teacher at least

304. 105 S. Ct. 3249 (1985).
305. *Id.* at 3260.
306. *Id.* at 3258.
307. *Id.* (emphasis added).
308. 472 U.S. 491 (1985).
309. 461 U.S. 171 (1983).
310. 371 U.S. 415 (1963).
311. *Brockett* addressed whether the definition of "prurient interest" (part of the definition of obscenity) could encompass "normal, healthy, sexual desires." 472 U.S. at 495. *Grace* involved a statute that prohibited the display of flags, banners, or other such items and its application preventing an individual from distributing leaflets on a public sidewalk. 461 U.S. at 175-76. Lastly, *Button* concerned a Virginia statute that provided for disciplinary action against attorneys who improperly solicit business as applied to the NAACP's offer of services to challenge racial issues. 371 U.S. at 419.
312. *See infra* note 320 and accompanying text.
313. 471 U.S. 222 (1985).
314. *Id.* at 229-30.
315. 414 U.S. 632 (1974).

five months before the expected birth.[316] A primary reason for the Court's ruling in *LaFleur* was that the statute did not provide any means for rebuttal of the presumption that pregnant women cannot work four or five months after conception.[317] Both *Hunter* and *LaFleur* stand for the proposition that when a statute overtly employs an impermissible classification, the preferred method of adjudication is to hold the statute invalid on its face.[318]

The Cleburne ordinance is similar to the statutes in *Hunter* and *LaFleur*. The statute in *Hunter* was held facially invalid primarily because its legislative history indicated that the statute's original objective was to prevent blacks from voting and was thus prejudicial in nature.[319] Similarly, evidence suggests that the Cleburne zoning ordinance was also originally enacted for discriminatory reasons.[320] Moreover, like the statute in *LaFleur*, the Cleburne ordinance provided no standards by which to determine when application of the permit requirement would be valid or to rebut the presumed need for a special permit.[321] On the basis of

316. *Id.*

317. *Id.* at 644-45. "[T]he ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." *Id.* at 645.

318. *Cleburne*, 105 S. Ct. at 3274 & n.25 (Marshall, J., concurring in part and dissenting in part).

319. *Hunter*, 471 U.S. at 231-33.

320. The term "feeble-minded," used in the language of the Cleburne ordinance, is strongly reminiscent of a time when segregation and prejudice against the mentally retarded was at its highest point. *See supra* note 180. The *amicus curiae* brief filed on behalf of CLC by the American Association on Mental Deficiency, the Association for Persons with Severe Handicaps, American Psychological Association, American Psychiatric Association, American Orthopsychiatric Association, American Association of University Affiliated Programs for the Developmentally Disabled, and The Council for Exceptional Children, states that terms such as "feeble-minded," "fools," "morons," "imbeciles," and "idiots" are stigmatizing and archaic. Brief of *Amicus Curiae* at 5 n.8, Cleburne Living Center v. City of Cleburne, 735 F.2d 832 (5th Cir. 1984) (No. 84-468), *cert. granted*, 105 S. Ct. 427 (1984), *aff'd in part, vacated in part*, 105 S. Ct. 3249 (1985) [hereinafter *Amicus Brief*]. Futher, *amicus curiae* argued that such labels are "uniquely 'odious and . . . invidious.' " *Id.* at 5 n.3 (citing A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 119 (1975)). Recognized authorities in the field of mental deficiency have discredited such terms. *Id.* (citing *Information for Authors*, 89 AM. J. MENTAL DEFICIENCY 109 (1984); THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, GUIDELINES FOR REPORTING AND WRITING ABOUT PEOPLE WITH DISABILITIES (1984)).

In *Cleburne*, Justice Marshall noted that the City's ordinance itself appeared to have descended from other zoning ordinances dating back to 1929. *Cleburne*, 105 S. Ct. at 3268 n.17 (Marshall, J., concurring in part and dissenting in part) (citing Cleburne City's Act of September 26, 1947 and § 4 of Dallas Ordinance No. 2052, passed September 11, 1929). The time of the enactment and the terminology used suggest that the Cleburne ordinance was originally founded on prejudice towards the retarded. *Cleburne*, 105 S. Ct. at 3268 n.17 (Marshall, J., concurring in part and dissenting in part).

321. The CLC home was intended to house "mildly" retarded adults. Since the majority of mentally retarded individuals fall into this category, the Court's ruling would likely make the

these decisions, and the Court's own conclusion that the statute, as applied, rests on "irrational prejudice" against the mentally retarded, the Court reasonably could have required the City to redraft the ordinance in a more precise manner.[322] Or, the Court could have at least indicated when the City *would* be justified in requiring the permit.

The likely explanation for the Court's refusal to repeat the result of *Hunter* and *LaFleur* in *Cleburne* is that *Hunter* and *LaFleur* each concerned race or gender classifications which the Court had previously determined suspect and quasi-suspect, respectively.[323] In *Cleburne*, however, the Court flatly refused to recognize the mentally retarded as a quasi-suspect class. This distinction may explain the Court's unwillingness to facially invalidate Cleburne's ordinance.

When a statute is held invalid on its face, the state may respond in one of two ways: (1) legislatively, by enacting a new law cured of the old law's impermissible defects; or (2) judicially, by construing the statute as being limited in scope only to a defined permissible application. Both responses, however, require the state to "correct" the statute.[324]

Cleburne ordinance invalid as applied to almost 90% of the retarded population. *See supra* note 118 and accompanying text. As Justice Marshall noted, a statute which would be invalid in *most* situations is clearly overbroad. *Cleburne*, 105 S. Ct. at 3273 (Marshall, J., concurring in part and dissenting in part).

322. *Cleburne*, 105 S. Ct. at 3260. *See infra* note 324.

323. *Hunter*, 471 U.S. 222, also concerned the right to vote which, as a "fundamental" right, triggers strict scrutiny. *See supra* note 54 and accompanying text.

324. *See* J. ELY, *supra* note 41, at 106. Dean Ely has suggested that where the political power of a minority group has increased, the Court should employ a "second-look" approach to laws passed *before* the increase in power occurred. For instance, with respect to women, who cannot be said to be a minority and for whom access to the political process is no longer blocked, Ely has proposed remanding suspect legislation for this "second-look" by the legislature. If the law passes a second time, there is less reason to suspect discriminatory intent. Ely has noted, however, that "[i]n cases of first-degree prejudice, or self-serving stereotyping" where a disadvantaged group still is denied access, this second-look approach is unwise; "we don't give a case back to a rigged jury." *Id.*

Clearly, the Cleburne ordinance is a product of a time when prejudice against mentally retarded persons was extreme. *See supra* note 320. Since the Court concluded that the mentally retarded no longer lack political power nor is there continued antipathy toward this group by legislators, *see supra* text accompanying notes 119-23, it seems that at *minimum* a second legislative evaluation of the ordinance would be appropriate. The better approach would have been to strike the ordinance down as invalid on its face and force the legislature to reconsider. However, it may be that this case is one with the "rigged jury" referred to by Dean Ely.

If the *Cleburne* ordinance had been found facially invalid, a possible approach for the City would be the one suggested by Jo Ann Chandler and Sterling Ross, Jr. *See* Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 324 (1976). Chandler and Ross stress the importance of establishing residential group homes for the mentally retarded and suggest means by which legislators may enact zoning restrictions

In contrast, when the Court, as in *Cleburne*, determines that the law is merely invalid as applied, the state is free to continue using the statute as written. State courts then must determine on a case-by-case basis whether the application in question is permissible or not. Consequently, the chance of further unconstitutional application is great, particularly where, as here, the Supreme Court has not clearly articulated its reasoning or provided clear guidance as to intended application.

Although the Court's decision to only invalidate the ordinance as applied furthers the Court's goal of narrow constitutional rulings, it acts almost as a non-ruling. First, the Court's failure to indicate under what

---

that do not discriminate against mentally retarded persons. They identify components necessary for such legislation as follows:

> 1. A brief declaration of the need for normalizing the lives of mentally handicapped persons.
> 2. A description of how integration in residential zones meets this need.
> 3. A statement emphasizing that uniform integration can occur only through statewide legislation and that, therefore, the matter is one of statewide concern. (The relevant constitutional provisions and preemption cases of the appropriate jurisdiction should be consulted for suggested language.)
> 4. A provision making the statute expressly applicable to charter cities. (The home rule provisions of the state constitution should be consulted.)
> 5. The requirement that the foster home be a *permitted use* in all residential zones, including, but not limited to, single-family zones.
> 6. A grant of authority to the local entity to impose reasonable conditions on the use.
> 7. The type of home referred to in the statute, including the number of residents served and the range of handicaps which they possess, should be based on the licensing classification of small-group homes in the particular jurisdiction.

Id. at 336. Furthermore, Chandler and Ross suggest the following as a model nondiscriminatory zoning ordinance:

> Section __. *Legislative Intent*
>
> (a) It is the policy of this state that mentally and physically handicapped persons are entitled to share with nonhandicapped individuals the benefits of normal residential surroundings and should not be excluded therefrom because of their disability.
>
> (b) Pursuant to this policy it is the intent of the legislature that county and municipal zoning ordinances, and administrative interpretations thereof, should not deny the handicapped person the exercise of this right.
>
> Section __.
>
> (a) In order to achieve statewide implementation of the policy and legislative intent expressed in sections __, a state-authorized or -licensed family care home, foster home, or group home serving six (6) or fewer mentally retarded or otherwise handicapped persons shall be considered a residential use of property for the purpose of zoning and a permitted use in all residential zones including, but not limited to, single-family residential zones.
>
> (b) Nothing in this paragraph shall be construed to prohibit any city or county from imposing reasonable conditions on such use consistent with the policy and intent of section __ and necessary to protect the health and safety of the residents.
>
> (c) The provisions of sections __ and __ shall apply to charter cities.

Id. at 337 (footnote omitted). Although CLC had proposed that the home house 13 individuals, and the above statute only allows housing up to 6, the statute could clearly be adapted to accommodate the CLC home.

circumstances application of the ordinance *would* be valid leaves both the Texas legislature and potentially affected groups unsure as to future standards of application. Second, because the Court allowed a zoning ordinance that may be rooted in prejudice to remain on the books, future groups of mentally retarded persons will be forced to go to court to test this standardless ordinance. The result will be needless future litigation by mentally retarded groups as well as inefficient use of the judiciary.

V. CONCLUSION AND PROPOSAL

The Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*[325] leaves several unanswered questions. First, the Court's determination that the mentally retarded are not a quasi-suspect class is not only inconsistent with prior equal protection cases, but may threaten the future security of groups which have been granted greater judicial protection. Second, the Court's application of a "heightened" rational basis test leaves an unclear distinction as to whether lower courts are to apply a "second order" rational basis test only in certain cases, or whether the rational basis test has been tightened up overall. Lastly, the Court leaves a confusing precedent by striking only as applied an ordinance which had all of the characteristics of a law that should be held facially invalid.

Interestingly, many of the Justices did not completely agree with the reasoning set out in Justice White's majority opinion. Justice Stevens, joined by Chief Justice Burger, concurred in the majority's result, but advocated a single rational basis test.[326] Justice Marshall, along with Justices Brennan and Blackmun adamantly disagreed with the majority's analysis, arguing that a "sliding scale" approach was preferable to the application of three-tiered equal protection analysis.[327] Five justices, therefore, expressed some dissatisfaction with the *Cleburne* majority's analysis, and *all* of the justices appeared at least somewhat dissatisfied with the three-tiered approach. Thus, the *Cleburne* case dramatically illustrates that the Court must reevaluate its method of equal protection analysis rather than distorting the three-tiered approach to such a degree that lower courts are left in complete confusion.

A. A Suggested Approach

One possible alternative to the *Cleburne* Court's approach is the sin-

325. 105 S. Ct 3249 (1985).

326. *Id.* at 3260-61 (Stevens, J., concurring).

327. *Cleburne*, 105 S. Ct. at 3266 (Marshall, J., concurring in part and dissenting in part); *see supra* note 87 and accompanying text.

gle rational basis test advocated by Justice Stevens.[328] This approach would require a court to examine significant factors such as the possibility that the burdened class has suffered a tradition of disfavor, the public purpose being served by the law and the existence of characteristics of the burdened class that may justify special treatment.[329] Suggesting that an examination of these factors would lead a court to determine if a law is rational or not, Justice Stevens urged that this approach would "result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications."[330] But Justice Stevens also noted that "differing results" would occur where classifications are based on alienage, gender, or illegitimacy.[331]

The difficulty with Justice Stevens' approach is that it does not clearly indicate *how* a court is to know what is "rational" or not, particularly in cases where the group's characteristics are, in some instances, relevant to the state's interests. Granted, the three-tiered analysis may be too rigid because it attempts to pigeon-hole cases which involve various factors. However, Justice Stevens' approach is, perhaps, too broad because it allows for very subjective judicial review by justices who are expected to somehow know or feel that a law is irrational under the circumstances. Certainly, terms of art common to the three-tiered approach, such as "substantially related," "compelling interest," and "rational basis," all suffer from some subjective inconsistencies, but with careful definition by the court using them, they can give some guidance in later application. Thus, Justice Stevens' single rational basis test may make the Court's determinations even more subjective and vague than they are under the present test.[332]

Justice Marshall's approach, like Justice Stevens' approach, would also require a case-by-case analysis of relevant factors. He has suggested that a court examine the importance of the interest affected and the in-

328. *See supra* text accompanying notes 133-43.

329. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3261-62 (1985) (Stevens, J., concurring).

330. *Id.* at 3262 (Stevens, J., concurring).

331. *Id.*

332. In reality, the Court's analysis in *Cleburne* closely resembles Justice Stevens' approach. The result is an ad hoc but undefined approach to equal protection analysis. Professor Christopher May of Loyola Law School, Los Angeles has referred to this approach as a "black box" approach, whereby the Court, in a sense, places all the factors involved into a black box where no one but the Court can "see" how its decision is made. Then, miraculously, out comes the result and the Court's determination of whether the classification in question is "rational" or not! Even where the result favors the challenging party, the Court's refusal to allow others to "see" what process of analysis goes on in the black box further confuses an already unclear standard.

vidiousness of the basis on which a classification is drawn to determine the degree of scrutiny to be applied.[333] Where a fundamental constitutional right is affected and the basis of the classification is race, the court's scrutiny would be high. Where a right of less importance, such as education, is affected and the basis of the law is less invidious, such as classification of undocumented alien children,[334] the level of scrutiny would decrease accordingly. Justice Marshall's approach, therefore, falls between Justice Stevens' extremely subjective test and the rigid pigeonholing of the three-tiered analysis.

This "sliding scale" analysis[335] suggested by Justice Marshall is perhaps the most workable standard for two reasons. First, because many groups do not easily fit into one of the three tiers, courts need a flexible test that can accommodate the various factors involved in each case. The Court has essentially *treated* the test as flexible in cases like *Cleburne*, but when it does so under the pretense that only three tiers exist, the credibility of its decisions is threatened and lower courts are left with confusing precedent. Justice Marshall's approach would allow the Court the flexibility to tailor its equal protection analysis to the specific facts of a case, without imposing the limitations of only three tiers. Secondly, unlike Justice Stevens' or Justice White's approaches, the Court would be required to *justify* its reasons for applying a stronger or weaker level of scrutiny. Although each case would still be decided on an ad hoc basis, the factors which had been analyzed and balanced would at least be *identified.* The Court would not be able to simply determine that a law *appeared* rational or irrational, but would have to identify *where* the case fit on the "scale" and *why*.

It is difficult to predict future application of the test applied in *Cleburne*, particularly because of the disparity of opinions. The one issue on which all the members of the Court agreed was that the special use permit requirement for the CLC home was invalid as applied because it was based on irrational prejudice. Future cases involving the mentally retarded may be able to draw from *Cleburne* a precedent calling for a more "heightened" rational basis test. Possibly, future equal protection cases concerning minorities similarly situated to the mentally retarded may also receive some sort of "heightened scrutiny," although it is not clear what the Court will call this level of scrutiny.[336]

333. *Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring in part and dissenting in part) (citations omitted). *See supra* note 87 and accompanying text.

334. See *Plyler v. Doe* discussed *supra* at text accompanying notes 79-81.

335. *See supra* note 87 and accompanying text.

336. *See supra* text accompanying notes 254-75.

Another possibility is that a tougher rational basis test will be applied across the board.[337] However, a major goal of this Note has been to point out that the Court's application of a rational basis test in *Cleburne* could just as easily signal a trend toward limiting close judicial scrutiny of legislation affecting groups presently afforded suspect or quasi-suspect status.[338] The Court's failure to either clearly articulate its reasoning or the criteria it now considers relevant to its conclusions makes it difficult to confidently interpret the future impact of this case.

The lesson of *City of Cleburne v. Cleburne Living Center*[339] is that result-oriented decisions often make bad law. The Court can no longer continue merely to manipulate its analysis under the equal protection clause to achieve desired results without articulating analytical reasoning that can reasonably be applied by lower courts. The risk of continuing this action is that decisions will be misapplied and the credibility of the United States Supreme Court will be damaged. The Court must reevaluate its approach to equal protection analysis and adopt a flexible and workable standard that can accommodate those who come to the courts to invoke the equal protection of the laws.

Ellen E. Halfon

337. *See supra* text accompanying notes 276-302.
338. *See supra* text accompanying notes 237-40.
339. 105 S. Ct. 3249 (1985).