

1-15-1986

Equal Protection and the New Rational Basis Test: the Mentally Retarded are not Second Class Citizens in Cleburne

Gordon W. Johnson

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Disability Law Commons](#), [Fourteenth Amendment Commons](#), and the [Housing Law Commons](#)

Recommended Citation

Gordon W. Johnson *Equal Protection and the New Rational Basis Test: the Mentally Retarded are not Second Class Citizens in Cleburne*, 13 Pepp. L. Rev. Iss. 2 (1986)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol13/iss2/3>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Equal Protection and the New Rational Basis Test: the Mentally Retarded are not Second Class Citizens in *Cleburne*

Recently, the Fifth Circuit held that classifications involving the mentally retarded were quasi-suspect and should be reviewed under a heightened scrutiny analysis. The Supreme Court reversed that holding but granted the retarded a remedy by applying a more genuine scrutiny under the rational basis test. The Court's decision in City of Cleburne, Texas v. Cleburne Living Center, Inc. raises the question whether the Court intends to apply an increased level of scrutiny under the rational basis test or whether this case merely represents another ad hoc decision made on the horns of a dilemma. This Note discusses the uncertain impact of Cleburne on the retarded and similarly situated individuals.

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 Yet in the process of making legislative judgments, the legislature creates classifications which burden some groups of people and benefit others.² The United States Supreme Court, in its effort to single out invidious political judgments, has developed three standards of review to determine whether classifications are unduly burdensome and discriminatory.³ However, a controversy has arisen from the Court's failure to articulate a coherent set of principles for applying these standards. Furthermore, special scrutiny raises the question of the legitimacy of judicial review in a democratic society.⁴

In July, 1985, in the case of *City of Cleburne, Texas v. Cleburne*

1. U.S. CONST. amend. XIV, § 1.

2. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

3. See generally *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (rational basis); *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (strict scrutiny).

4. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1013-16 (1984) (discussing the "countermajoritarian difficulty" with judicial review). See generally Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (the seminal article on the equal protection clause, arguing for constraints on judicial power lest the legislature be rendered impotent as a governing body). See also *infra* note 23.

Living Center, Inc.,⁵ the Supreme Court was presented with another opportunity to clarify standards of judicial review by responding to a Fifth Circuit Court of Appeals holding that mental retardation is a "quasi-suspect" classification which warrants heightened scrutiny review.⁶ The Court, in an opinion by Justice White, rejected the quasi-suspect standard of review, instead relying on the rational basis test to invalidate the zoning ordinance as applied to the mentally retarded residents of the Featherston home.⁷ The holding in *Cleburne Living Center* raises the question whether the Court intends to apply an increased level of scrutiny under the rational basis test and if so, to which classifications.⁸

In attempting to address these questions, this Note briefly examines the development of the standards of judicial review under the equal protection clause as applied to legislative classifications. Additionally, this Note analyzes the content of the *Cleburne* Court's majority, concurring and dissenting opinions which established the level of review for legislative classifications concerning the mentally retarded and discusses the possible ramifications of this decision on future equal protection claims.

II. HISTORICAL BACKGROUND

A. *History of the Equal Protection Clause*

The equal protection clause was enacted to prohibit state and local governments from abusing their legislative power by arbitrarily classifying persons. It guarantees that classifications will be drawn properly to accomplish a permissible state interest, either to advance a social good or to remedy a social mischief.⁹ Equal protection requires that those who are similarly situated be treated similarly.¹⁰ In making this determination a court will consider first, whether the legislative end is legitimate and second, whether the classification relates to

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

6. See *Cleburne Living Center, Inc. v. City of Cleburne, Texas*, 726 F.2d 191, 198 (5th Cir. 1984).

7. 105 S. Ct. at 3260.

8. Professor Gunther suggested that the Burger Court's application of an "intensified means scrutiny" would eventually raise "the level of . . . minimal [scrutiny] from virtual abdication to genuine judicial inquiry." Gunther, *The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 24 (1972).

9. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 587 (2d ed. 1983) [hereinafter cited as J. NOWAK]. See also Tussman & tenBroek, *supra* note 2, at 346.

10. Similarly situated refers to possession of a common trait by members of a class. However, the real test appears to be whether a classification "includes all persons who are similarly situated with respect to the purpose of the law." Tussman & tenBroek, *supra* note 2, at 346. See also *id.* at 344-46 for a discussion of the reasonableness of classifications.

that end.¹¹ If the state interest is found to be illegitimate or the classification unrelated or unduly burdensome, the classification will not be upheld.¹²

The equal protection clause has evolved from being what Mr. Justice Holmes called, "the last resort of constitutional arguments,"¹³ into "a potent egalitarian instrument."¹⁴ For nearly eighty years following its ratification in 1868, the equal protection clause was interpreted under a very lenient "rational basis" standard which afforded great deference to legislative classifications.¹⁵ During the 1940's, the elements of the present equal protection analytical structure began to take shape with the creation of a "suspect classification."¹⁶ Even so, at the beginning of the 1960's judicial intervention was still virtually unknown except in racial discrimination cases.¹⁷

The Warren Court then developed a "two-tiered" analysis based on "a broadly-conceived egalitarianism."¹⁸ The two-tiered analysis applied a strict scrutiny standard to classifications involving "funda-

11. *Id.* at 367. For a discussion of legitimate state purposes, see *infra* note 25 and accompanying text.

12. Tussman and tenBroek list five ways in which classifications can relate to a legislative end: (1) *perfect classification* — the classifying trait exactly fits the legislative purpose; (2) *totally imperfect* — the classification bears no relation to the legislative purpose; (3) *under-inclusive* — the classification includes a small number that fit the purpose but excludes a large number that are similarly situated; (4) *over-inclusive* — the classification burdens more persons than necessary to accomplish the legislative purpose; and (5) *over- and under-inclusive* — the classification does not include all those similarly situated but includes many who are dissimilarly situated. *Id.* at 347-53. See also J. NOWAK, *supra* note 9, at 588.

13. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

14. Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 945 (1975).

15. See, e.g., *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (holding that Louisiana's legislatively created slaughterhouse monopoly was beyond the scope of the fourteenth amendment). The classical statement of this view is found in *Barbier v. Connolly*, 113 U.S. 27, 31 (1885), where it was held that "neither the [fourteenth] amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations . . ."

16. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944). The Court held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must be subjected to "the most rigid scrutiny." The Court nevertheless found compelling governmental interests for enforcing the Japanese-American wartime curfew. *Id.* at 216. See also Tussman & tenBroek, *supra* note 2, at 381 (predicting that the equal protection clause was about to come into "the most fruitful and significant period of its career").

17. See Gunther, *supra* note 8, at 8.

18. See Wilkinson, *supra* note 14, at 945 (quoting A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 103 (1970)).

mental rights”¹⁹ and “suspect classifications” while applying minimal scrutiny or mere rationality review in all other cases.²⁰ Due to its ever-increasing attention to equal protection claims,²¹ the Burger Court became dissatisfied with the rigid two-tiered, all-or-nothing analysis. This dissatisfaction led to the development of a “middle tier” of intermediate review during the 1970’s.²² The Burger Court’s current approach to equal protection claims therefore involves the application of three standards of review: (1) rational basis, (2) strict scrutiny, and (3) intermediate scrutiny.

1. Rational Basis Review

Rational basis review,²³ the minimal level of scrutiny, requires that there be “some rationality in the nature of the class singled out”²⁴ as it relates to furthering a legitimate state interest. A legitimate state interest is one which is designed to promote the general good of the people.²⁵ Under this standard of review, the Court does not require a

19. Professor Nowak lists six substantive categories of fundamental rights: (1) first amendment rights, (2) right to vote, (3) right to interstate travel, (4) right to fairness in the criminal process, (5) right to fairness in procedures concerning deprivations of life, liberty, or property, and (6) right to privacy, which includes right to freedom of choice in marital decisions. J. NOWAK, *supra* note 9, at 460-61. The concept of “fundamental rights” is outside the scope of this note. Some commentators believe that the right to live in the “least restrictive setting” is a fundamental right which zoning exclusions violate. See, e.g., Lippincott, “A Sanctuary for People”: *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767, 783 (1979).

20. See Gunther, *supra* note 8, at 8.

21. Regarding the increased time spent addressing equal protection claims, Professor Edward L. Barrett calculates that “[d]uring the sixteen terms of the Warren Court, equal protection claims were discussed in an average of five and one-half opinions per year. During the ten terms of the Burger Court the average has been eighteen opinions a year and twenty-two during the 1978 term.” Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 856 (1979-80).

22. See Gunther, *supra* note 8, at 12. Professor Gunther identifies three themes in Burger Court decisions: (1) reluctance to expand the scope of the new equal protection, (2) mounting discontent with the rigid two-tier formulations of the Warren Court, and (3) willingness to use the equal protection clause as an interventionist tool without resorting to strict scrutiny language. *Id.*

23. Rational basis review manifests the Court’s concern with issues of federalism and maintaining an independent judiciary in a democratic government. See Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, 42 OHIO ST. L.J. 209, 214-21 (1981) (judicial power should be constrained by federalism concerns). The Court, whose members are appointed for life, is reluctant to overrule decisions made by an elected body whose actions are subject to popular review at every election. See J. ELY, *DEMOCRACY AND DISTRUST* 4-9 (1980). See also *supra* note 4.

24. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 995 (1978) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966)).

25. Legitimate state interests are those which benefit the general good of a state, such as regulations which “promote the health, peace, morals, education, and good order of the people, and [which] . . . increase the industries of the State, develop its resources, and add to its wealth and prosperity.” *Barbier v. Connolly*, 113 U.S. at 31. The phrase “rationally related to a legitimate state interest” is frequently used by the

close fit between the classification drawn and the legislative end.²⁶ Instead, the Court will uphold a classification if it can find any conceivable rational relationship to a legitimate state interest.²⁷

Traditionally, the Court has given great deference to the legislature as being the branch of government best suited to find the facts and to carefully balance burdens and benefits.²⁸ This deference by the Court has become the "equivalent of a strong presumption of constitutionality"²⁹ rendering the test "toothless" for the purpose of invalidating economic and social welfare legislation. Even though rational basis review has been considered a rubber stamp for such legislation, the Court has, on several occasions, invalidated statutes under this test.³⁰

2. Strict Scrutiny Review

The maximum level of review applied by the Court is strict scrutiny. It is triggered when legislation affects a "suspect classification" or a "fundamental right."³¹ A classification becomes "suspect" when it is based on characteristics possessed by members of a class which have no relevance to any legitimate state interest.³² The state bears a

Court in its application of the minimal level of scrutiny. *See, e.g.,* Vance v. Bradley, 440 U.S. 93, 97 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

26. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (allowing reform to take "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

27. *See generally* *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam) (statute excluding some vendors from city while allowing others to remain was rationally related to city's interest in maintaining a tourist atmosphere).

28. *See* L. TRIBE, *supra* note 24, § 16-2, at 995.

29. *Id.* § 16-2, at 996. The *Lochner* era, 1897-1937, exemplified a deviation from this presumption of constitutionality during which time the Court invalidated a significant number of state and federal statutes under the rationality test. *See id.* §§ 8-3 to 8-7, at 434-55.

30. At times the Court has employed an intermediate level of scrutiny under the guise of the rational basis test. *See, e.g.,* *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). *See also* *Levy v. Louisiana*, 391 U.S. 68 (1968) (where Court used greater scrutiny than that used with general economic or social welfare legislation because "sensitive personal rights" of illegitimate children were involved). *See generally* *Barrett, supra* note 21, at 856-66 (listing cases in which the Court has invalidated legislation by applying the rational basis test and discussing increased judicial scrutiny of the rational relation of the legislation to the state interest); *Gunther, supra* note 8.

31. *See supra* notes 16 & 19.

32. *See Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) ("Classifications treated as suspect tend to be irrelevant to any proper legislative goal."); *cf. id.* at 223 (illegal alien status is not a "constitutional irrelevancy"). The color of one's skin can never be constitutionally relevant. *See Strauder v. West Virginia*, 100 U.S. 303, 307 (1880) (stating

heavy burden in proving that the suspect classification is precisely tailored and necessary to achieve a permissible goal of "compelling" importance.³³ The purpose of the test is to preserve substantive values of equality by closely scrutinizing governmental choices.³⁴

Suspect classifications are determined by whether a group's status is "discrete and insular."³⁵ Courts and commentators have recognized certain indicia for determining a group's discreteness and insularity, such as immutability,³⁶ historical prejudice,³⁷ and political powerlessness.³⁸ Courts also look to whether the classification is one "more likely than others to reflect deep-seated prejudice."³⁹ Only a

"that all persons, whether colored or white, shall stand equal before the laws of the States, and . . . no discrimination shall be made against them because of their color").

33. *Plyler v. Doe*, 457 U.S. at 224-26 (governmental interest in deporting illegal aliens insufficient to justify denial of education). A constitutionally compelling end has a value so great that it justifies the limitation of fundamental constitutional values. J. NOWAK, *supra* note 9, at 591-92. The only interests thus far considered compelling have been war, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); and threat of loss of life to prisoners in custody of the state, e.g., *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (where separation of persons in prison by race, in order to stop an outbreak of violence based on racial conflict, was held to be a compelling state interest). This has led at least one author to term classifications burdening minority races as "prohibited." See Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

34. L. TRIBE, *supra* note 24, § 16-13, at 1012. Only in rare cases has the classification been upheld. See *supra* note 16. The strict scrutiny test has been referred to as "strict in theory but fatal in fact." Gunther, *supra* note 8, at 8.

35. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (prejudice against discrete and insular minorities may be a special condition calling for heightened scrutiny). See also generally Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (developing the history of Justice Stone's classic phrase, as well as its future impact on equal protection claims).

36. An immutable characteristic cannot be controlled or altered by those bearing it. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . ."); *Plyler v. Doe*, 457 U.S. at 220 (illegal alien status of minors is a "characteristic over which children can have little control"). But see *id.* at 219 n.19 (illegal alien status of adults is a "product of voluntary action").

37. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (Court looks to "history of purposeful unequal treatment"). Compare *Frontiero v. Richardson*, 411 U.S. at 684 (in which the Court comments on classification regarding women, stating that the "Nation has had a long and unfortunate history of sex discrimination.") with *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1980) (in which the Court finds "nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts").

38. This factor is designed to protect groups which are under represented in the majoritarian political process and therefore cannot have an effect on the democratic system. See, e.g., J. ELY, *supra* note 23, at 164 ("women have been operating at an unfair disadvantage in the political process"). Political powerlessness was a primary factor in extending protection to aliens, *Graham v. Richardson*, 403 U.S. 365, 372 (1971), and denying it to age classifications, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

39. *Plyler v. Doe*, 457 U.S. at 216 n.14. This determination can be made on the basis of stereotypical characteristics. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458

few classifications have been designated suspect: race,⁴⁰ national origin,⁴¹ and, in some circumstances, alienage.⁴² It seems unlikely that the Burger Court will declare additional classifications to be suspect.⁴³

3. Intermediate Scrutiny Review

When legislation involves an important fundamental interest or a "quasi-suspect" classification,⁴⁴ the Court will apply intermediate scrutiny.⁴⁵ Under intermediate scrutiny the state must show that the legislative means employed are "substantially related" to an important state goal.⁴⁶ This requirement implies that the state must have more than a legitimate interest and the classification must closely relate to the governmental end.⁴⁷ The Court will not engage in hypothetical theorizing but will only examine the articulated or actual purpose for the classification.⁴⁸

U.S. 718, 729-30 (1982) (where policy of excluding men from nursing school perpetuated the stereotypical notion of nursing as a "woman's job").

40. See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (where the Court invalidated an anti-interracial marriage statute as being an invidious classification); *Korematsu v. United States*, 323 U.S. 214 (1944) (racial classifications are "immediately suspect").

41. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (where exclusion of Mexican-Americans from jury service was considered as equally suspect as racial discrimination).

42. Alienage in this context refers to non-citizenship. Congress may classify according to alienage with respect to the admission of aliens into this country, but once admitted, discrimination based on alienage becomes suspect. Compare *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (declaring a classification based on legal alienage inherently suspect) with *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (rejecting the claim that "illegal aliens" are a suspect class).

43. See, e.g., *L.A. Times*, Sept. 20, 1984, § 1, at 1, col. 4 (Justices Blackmun, Stevens and Marshall criticizing the Court for its conservative bent).

44. The phrase "quasi-suspect" classification was used by Chief Justice Burger in his dissent in *Plyler v. Doe*, 457 U.S. at 244 (Burger, C.J., dissenting). For a general treatment of these classifications, see Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981).

45. The Court first acknowledged its use of intermediate review in *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring) ("our decision today will be viewed by some as a 'middle-tier' approach.").

46. *Id.* at 199. To withstand a constitutional challenge, quasi-suspect classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives. See generally L. TRIBE, *supra* note 24, §§ 16-30 to 16-31, at 1082-92 (describing circumstances which trigger intermediate scrutiny). See also generally Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525 (1980) (analyzing and comparing Tribe's model with the "new equal protection" model proposed by Gunther); Gunther, *supra* note 8.

47. See *infra* note 50.

48. L. TRIBE, *supra* note 24, § 16-30, at 1083-84.

The ad hoc quality of intermediate review seems to result from the Court's application of a balancing test by which quasi-suspect classifications are independently examined and balanced against the importance of the state interest.⁴⁹ Although the Court's use of intermediate review has been sporadic,⁵⁰ it has been applied to classifications involving gender,⁵¹ illegitimacy,⁵² and minor children of illegal aliens.⁵³ Courts have declined to extend intermediate review to classifications based on age⁵⁴ or wealth.⁵⁵ In order to qualify as a "quasi-suspect" classification, the group upon which the classification is based must bear a close resemblance to "discrete and insular minorities", thereby warranting more than minimal judicial scrutiny.⁵⁶ The criteria used for determining the quasi-suspectness of a class are essentially the same as those used for suspect classifications. The difference between the two is that the quasi-suspect classification need only further an important state interest.

B. *History of the Mentally Retarded*

1. Institutionalization

Approximately six and one half million Americans are classified as legally retarded.⁵⁷ These citizens have been historically mistreated⁵⁸

49. J. NOWAK, *supra* note 9, at 595.

50. For a discussion on how each Justice regards intermediate review, see Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 909-17 (1980). Professor Tribe points out five techniques of analysis used by the United States Supreme Court which suggest that intermediate scrutiny has been applied: (1) assessing the importance of the legislative objective; (2) demanding a close fit between the classification and the legislative objective; (3) requiring current articulation of the statutory objective; (4) limiting the use of after-thought to supply a legislative objective; and (5) requiring that an individual be permitted to contest denial of the right on the grounds that such denial does not further the objectives of the statute. L. TRIBE, *supra* note 24, § 16-30, at 1082-89.

51. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1981) (nursing school policy of excluding men was not substantially related to governmental interest in benefiting women because women have not been historically discriminated against in the nursing profession); *Craig v. Boren*, 429 U.S. 190 (1976) (gender-based age differential in state drinking law did not substantially further state interest in reducing drunk driving). But see *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (where Court upheld a state "statutory rape" law holding only men criminally liable).

52. *Mills v. Habluetzel*, 456 U.S. 91 (1982) (statute setting one year limitation within which to bring paternity suit to identify natural father was not "substantially related" to state's interest of preventing fraudulent claims).

53. *Plyler v. Doe*, 457 U.S. 202 (1982) (intermediate review applied to statute prohibiting education of illegal alien children).

54. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (elderly have not experienced a history of discrimination).

55. The Court has consistently applied the rational basis test to legislation burdening the poor. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221 (1981) (welfare benefits); *James v. Valtierra*, 402 U.S. 137 (1971) (public housing).

56. L. TRIBE, *supra* note 24, § 16-31, at 1090.

57. L.A. Times, July 2, 1985, § 1, at 5, col. 2. Paul Friedman, Director of the Mental Health Law Project, stated that:

and considered "a menace to society and civilization; . . . responsible to a large degree for many, if not all, of our social problems."⁵⁹ During the 1920's, in an effort to protect society from the "deviant" retarded, states engaged in large-scale institutionalization of the mentally retarded.⁶⁰ Legislation limited the rights of the retarded to marry and procreate⁶¹ as well as to vote.⁶² It was not until a half century later that professionals began to recognize the ability of retarded persons to be habilitated.⁶³ Mental health professionals now believe that the institutionalization of the retarded causes social and cultural deprivation which hinders them from reaching their full potential as contributing members of society.⁶⁴

2. Normalization

The goal of the "normalization" movement⁶⁵ is to make available to the retarded, "conditions of every day living which are as close as possible to the regular circumstances and ways of life of society."⁶⁶ The group home concept is the direct progeny of the normalization movement and is considered the principal alternative to institutional living. Group homes aim to provide a less restrictive environment in

A person is mentally retarded when "we" say he is. Mental retardation is not a fact but a label or classification applied to a very diverse group of people — often for purposes of segregating or restricting them, although sometimes for purposes of providing services not available to all in the community.

P. FRIEDMAN, *THE RIGHTS OF THE MENTALLY RETARDED PERSONS* 14 (1976).

58. The leading work on the developmental approach and philosophy of the mentally retarded is W. Wolfensburger, *The Origin and Nature of Our Institutional Model*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* (R. Kugel & W. Wolfensburger eds. 1969) (containing a discussion of the historical mistreatment of the mentally retarded). As early as the Puritans, the retarded were hanged and burned, being suspected as witches. *Id.* at 35-36.

59. Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, in *PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW* 305, 307 (M. Kindred ed. 1976) (quoting from Wolfensburger, *supra* note 58, at 102-03).

60. *Id.*

61. See MENOLASCINO, *CHALLENGES IN MENTAL RETARDATION* 54-55 (1977).

62. At least half of the states prohibit the retarded from voting. See generally Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979) (contending that state disenfranchisement provisions are unconstitutional).

63. See Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Power*, 25 VILL. L. REV. 273, 273-74 (1980).

64. See Lippincott, *supra* note 19, at 768.

65. See generally Nirje, *The Normalization Principle*, in *PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* (rev. ed. R. Kugel & A. Shearer 1976). Nirje, a Scandinavian, developed the concept of normalization.

66. *Id.* at 231.

which retarded persons can develop to their full potential.⁶⁷ Typically, a small number of retarded persons live in a family-type environment with trained supervisors acting as parents.⁶⁸ One of the major obstacles to the establishment of group homes for the retarded has been community resistance manifested through local zoning ordinances.⁶⁹

III. STATEMENT OF THE CASE

In July of 1980, Jan Hannah purchased a building in Cleburne, Texas to establish a group home for thirteen mentally retarded men and women. Cleburne Living Centers, Inc. (CLC)⁷⁰ was to supervise the home. Because the site was located in an R-3 district, Cleburne's applicable zoning ordinance required that a special use permit, renewable annually, be obtained from the Cleburne City Council for the construction of "hospitals for the insane or *feeble-minded*, or alcoholic [sic] or drug addicts, or penal or correctional institutions."⁷¹ CLC accordingly applied for the permit. It was denied by a three-to-one vote at a public hearing on October 14, 1980, based on the recommendation of the Cleburne Planning and Zoning Commission.⁷²

Having exhausted administrative remedies, CLC, Advocacy, Inc.,⁷³ and the Johnson County Association for Retarded Citizens (JCARC)⁷⁴ filed suit against the city and several officials in federal district court alleging that the zoning ordinance was invalid both on its face and as applied because it violated the equal protection rights of the mentally retarded.⁷⁵ The district court upheld the ordinance and its application to the group home despite its determination that the city council's decision "was motivated primarily by the fact that

67. See Chandler & Ross, *supra* note 59, at 308. See generally O'Connor v. Donaldson, 422 U.S. 563 (1975) (where court declared involuntary hospitalization of mentally ill to be a violation of the constitutional right to liberty); Nirje, *supra* note 65 (discussing development of normalization movement).

68. Lippincott, *supra* note 19, at 769.

69. Included among the reasons given for resistance to group homes by community home owners are decreased property values, safety, traffic, and noise level. *Id.*

70. Hannah is the vice president and part owner of CLC (presently called Community Living Concepts, Inc.). 726 F.2d at 193. For expediency, Hannah and CLC will both be referred to as CLC in this Note.

71. CLEBURNE, TEX., ZONING ORDINANCES § 16 (1965) (emphasis added). An R-3 district is zoned for apartment housing and allows such uses as: apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, *hospitals*, *sanitariums*, *nursing* or *convalescent* homes. *Id.* § 8 (emphasis added).

72. 726 F.2d at 194. See also *infra* note 97.

73. Advocacy, Inc. is "a non-profit corporation that provides legal services to developmentally disabled persons." 105 S. Ct. at 3252 n.1.

74. JCARC was found to lack standing by both the district court and the court of appeals. 726 F.2d at 203.

75. CLC also alleged violation of the Revenue Sharing Act, 31 U.S.C. § 6716(b)(2) (1983), and the due process clause of the fourteenth amendment. Both claims were dismissed by the district court and court of appeals. 726 F.2d at 194.

the residents of the home would be mentally retarded.'"⁷⁶

CLC subsequently filed suit in the United States Court of Appeals for the Fifth Circuit. On March 5, 1984, the court of appeals reversed, holding that mental retardation was a quasi-suspect classification and legislation utilizing this classification must be subjected to intermediate level scrutiny.⁷⁷ The appellate court cited several factors for arriving at its determination: (1) historical mistreatment, (2) discrimination likely reflecting deep-seated prejudice, (3) political powerlessness, and (4) immutability of the mentally retarded condition.⁷⁸ Applying a heightened scrutiny test, the court held the zoning ordinance invalid both facially and as applied because it did not substantially further an important governmental interest.⁷⁹

After a petition for a rehearing *en banc* was denied, the United States Supreme Court granted certiorari.⁸⁰ The Supreme Court vacated the judgment of the appellate court on July 1, 1985, holding that mental retardation was not a quasi-suspect classification.⁸¹ Nevertheless, by applying the rational basis standard of review, the Court held the ordinance invalid as applied to the respondents, potential residents of the CLC group home.⁸²

IV. MAJORITY OPINION

A. *The Mentally Retarded are not a Quasi-Suspect Class*

Justice White,⁸³ giving the opinion for the Court, began his analysis of whether mental retardation should be deemed a "quasi-suspect" classification by recounting the history of the three standards of review.⁸⁴ He proceeded to analyze why the appellate court's

76. 105 S. Ct. at 3253 (quoting App. 93, 94). The district court held the ordinance constitutional based on the traditional rational basis test giving great deference to the legislature.

77. 726 F.2d at 198. This decision of the fifth circuit is the "first appellate court decision to unequivocally adopt the intermediate level of scrutiny when dealing with legislative discrimination against mentally retarded persons." Note, *Expanding the Quasi Suspect Class to Include Mentally Retarded Persons: Cleburne Living Center, Inc. v. City of Cleburne*, 18 AKRON L. REV. 141 (1984) (discussing the case after the court of appeals decision but before the Supreme Court reversed).

78. 726 F.2d at 197-98. See also *supra* notes 58-68 and accompanying text.

79. 726 F.2d at 201.

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

81. 105 S. Ct. at 3260.

82. *Id.*

83. Justice White was joined by Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and O'Connor.

84. 105 S. Ct. at 3254-55.

heightened scrutiny test was inappropriate,⁸⁵ primarily whether the indicia of the group's classification was "discrete and insular" in nature. Justice White pointed out that the immutable characteristic of mental retardation is "a reduced ability to cope with and function in the everyday world."⁸⁶ This is a characteristic which legislators, with the help of "qualified professionals," may legitimately take into consideration in dealing with the specific needs of such a diverse class.⁸⁷

The Court admitted that there has been a continuing trend of legislative antipathy or prejudice toward the mentally retarded, but asserted that the federal government had responded by enacting legislation to provide equality to retarded persons.⁸⁸ This positive legislative response to the plight of the retarded led the Court to conclude that the retarded are not "politically powerless, in the sense that they have no ability to attract the attention of the lawmakers."⁸⁹ The Court stated further that applying a heightened scrutiny test would stifle new legislation by requiring legislative bodies to more fully justify their efforts.⁹⁰

The Court argued that granting the mentally retarded quasi-suspect status would open the "quasi-suspect" flood gates to equally amorphous groups like the aging, the disabled, the mentally ill, and the infirm.⁹¹ This would certainly pose new problems in reviewing classifications. Relying on the presumption that governmental action is legitimate and the fact that retardation is a characteristic which is relevant to state interests,⁹² the majority refused to recognize the

85. His disqualification of the quasi-suspectness of the class appears to hinge on the warning in *Murgia* that "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued." *Id.* at 3255. See also *supra* notes 4, 15, 22, 23 and accompanying text.

86. 105 S. Ct. at 3256. See also *infra* note 140.

87. 105 S. Ct. at 3256.

88. See, e.g., Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982) (outlawing discrimination against the handicapped in federally funded programs); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1), (2) (1976 & Supp. V 1981) (providing for appropriate treatment, services, and habilitation in least restrictive setting); Education for All Handicapped Children Act, 20 U.S.C. § 1412(5)(B) (1975) (basing federal funds on integration of retarded children with non-mentally retarded children "to the maximum extent appropriate").

89. 105 S. Ct. at 3257. Compare Note, *supra* note 62 (where it is argued that retarded have no democratic voice) with *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (plurality opinion) (discussing underrepresentation of women in our nation's decision-making bodies). See also *infra* notes 134-35 and accompanying text.

90. 105 S. Ct. at 3257.

91. *Id.* at 3257-58. In an analogous case, the ninth circuit held that heightened scrutiny was appropriate in reviewing an ordinance which excluded former mental patients from an R-2 zone. *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983). Although the Supreme Court has not directly addressed the status of the mentally ill, some commentators believe they should be designated a suspect or quasi-suspect class. See generally Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

92. 105 S. Ct. at 3258.

mentally retarded as a quasi-suspect class.⁹³ Therefore, the Court found rational basis to be the appropriate level of review for classifications based on retardation.

B. Rational Basis For the Retarded

Applying the rational basis standard, Justice White stated that legislation distinguishing between the retarded and others must be "rationally related to a legitimate governmental purpose."⁹⁴ The question was whether Cleburne's zoning ordinance provided such a rational relationship. The majority felt that if requiring a special use permit did deprive the respondents of their constitutional rights, there would be no occasion to address the broader issue of whether the ordinance was facially invalid or invalid as against all retarded persons.⁹⁵

Justice White pointed out that the zoning ordinance did not require a special use permit for numerous other facilities.⁹⁶ Addressing the factors for requiring the permit,⁹⁷ the Supreme Court's analysis virtually repeated the appellate court's analysis.⁹⁸ Both opinions asserted that negative attitudes and unsubstantiated fears are not permissible bases for treating a home for the retarded differently than apartment houses or nursing homes.⁹⁹ The city's interest in reducing traffic and noise was not supported by proof that the retarded

93. *Id.* The Court's primary reason for not deeming the retarded quasi-suspect seems to be that:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, 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.

Id. at 3257-58.

94. *Id.* at 3258. See also *supra* note 25.

95. See *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985) (stating that a constitutional holding should not be broader than the question presented); *United States v. Grace*, 461 U.S. 171 (1983) (Court attempts to construe statute so as to avoid the constitutional question if possible).

96. See *supra* note 71 and accompanying text. Boarding houses, fraternities, hospitals, sanitariums and nursing homes were among the permitted uses.

97. The factors in the city council's decision included: (1) the negative attitude of property owners located within 200 feet; (2) the fears of elderly residents of the neighborhood; (3) the location of a junior high school across the street; (4) location of the group home on a five hundred year flood plain; and (5) the size of the home and number of people to be housed. 726 F.2d at 194.

98. Compare 105 S. Ct. at 3258-60 with 726 F.2d at 200-02.

99. 105 S. Ct. at 3259.

"drive more cars," "wander aimlessly into the streets" or create more noise than others.¹⁰⁰

The city's stated desire to protect the retarded from harassment by teenagers at the junior high school across the street was rejected as a justification after looking to the extrinsic fact that there were some thirty retarded students attending the school. The city's interest in protecting the future residents from the danger of flood damage which occurs every five hundred years was also held to be insufficient justification. The retarded were likely to be better prepared than most residents due to strict federal standards imposed on intermediate care facilities.¹⁰¹ In fact, the Court could find no satisfactory basis for requiring a special use permit of the mentally retarded while not requiring it of other groups. Justice White concluded that enforcement of the permit requirement in this case rested on "irrational prejudice against the mentally retarded"¹⁰² and was invalid as applied to the Featherston home.

V. JUSTICE STEVENS' CONCURRING OPINION

Justice Stevens, in his concurring opinion,¹⁰³ agreed with the majority's application of the rational basis test as the appropriate standard of review. His philosophy of judicial review, however, is uniquely different.¹⁰⁴ For Justice Stevens, there are not three standards of review but rather "a continuum of judgmental responses . . . ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."¹⁰⁵ The tiered analysis is simply "'a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.'"¹⁰⁶ According to Justice Stevens, the rational basis test is the only standard to be applied when reviewing equal protection decisions.¹⁰⁷

Justice Stevens posed the following three questions which he believed would determine, in most cases, whether a statute has a rational basis: "What class is harmed by the legislation, and has it been

100. The City's asserted interest in reducing noise and traffic problems as a justification for the restrictive zoning suggests that the ordinance was being enforced based on stereotypes of the mentally retarded. *Id.* at 3260.

101. The retarded must be able to satisfy the federal standards imposed on an Intermediate Care Facility for safety, including knowing how to evacuate in an emergency. Telephone interview with Jan Hannah, vice president and part owner of CLC (Oct. 22, 1985).

102. 105 S. Ct. at 3260.

103. Justice Stevens was joined in his concurrence by Chief Justice Burger.

104. On Justice Stevens' philosophy, see generally Comment, *Mr. Justice Stevens: An Examination of a Juridical Philosophy*, 23 ST. LOUIS U.L.J. 126 (1979).

105. 105 S. Ct. at 3260-61 (Stevens, J., concurring).

106. *Id.* at 3261 (quoting *Craig v. Boren*, 429 U.S. at 212 (Stevens, J., concurring)).

107. *Id.*

subjected to a 'tradition of disfavor' by our laws?"¹⁰⁸ "What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?"¹⁰⁹ Asking these basic questions will result in "virtually automatic invalidation of racial classifications and in the validation of most economic classifications."¹¹⁰ Justice Stevens points out that there is never a rational relationship between the color of one's skin and a legitimate state interest, whereas there is almost always some rationality between economic classifications and legitimate state interests.¹¹¹

Applying this approach, Justice Stevens balanced historical mistreatment of the retarded against the state's legitimate interest in dealing with the mentally retarded because of their reduced ability to function in society. Therefore, Justice Stevens would also invalidate the ordinance as applied to the CLC home.¹¹² It appears however, that Justice Stevens' rational basis continuum would be less deferential toward economic or social legislation than the test used by the majority,¹¹³ subjecting all legislation to equal scrutiny and to a balancing of burdens and benefits.¹¹⁴

VI. JUSTICE MARSHALL'S CONCURRING AND DISSENTING OPINION

Justice Marshall¹¹⁵ began his analysis by agreeing with the majority that the retarded should have a remedy under the equal protection clause.¹¹⁶ Having thus concurred, he attacked the majority on

108. *Id.* (footnote omitted). Justice Stevens notes that "[t]he Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor . . .'" *Id.* at 3261 n.6 (quoting *Mathews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting) (emphasis added)). This special vigilance seems to belie Justice Stevens' application of an intermediate form of review. Weidner, *supra* note 50, at 915.

109. 105 S. Ct. at 3261-62 (Stevens, J., concurring) (footnote omitted).

110. *Id.* at 3262.

111. *Id.* at 3261-62.

112. *Id.* at 3263.

113. It appears that Justice Stevens would be willing to subject all legislation to a more realistic scrutiny.

114. This philosophical approach bears close resemblance to that recognized by Professor Gunther as an early trend in the Burger Court. *See generally* Gunther, *supra* note 8.

115. Justices Brennan and Blackmun joined in Justice Marshall's partial concurrence and partial dissent.

116. 105 S. Ct. at 3263 (Marshall, J., concurring in part and dissenting in part). Justice Marshall advocates a sliding scale approach to equal protection claims in which the level of scrutiny "should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which

several points: first, the majority engaged in a wide ranging heightened scrutiny discussion while purportedly applying a rational basis standard;¹¹⁷ second, the majority was creating a “second order rational basis test”;¹¹⁸ third, the majority applied the wrong standard;¹¹⁹ and fourth, the majority provided a novel, truncated as-applied remedy.¹²⁰

A. *Two For The Price of One*

Justice Marshall first criticized the Court for violating one of the cardinal rules governing the federal courts: “[N]ever . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”¹²¹ When a lower court properly decides a case by reaching unnecessary constitutional issues, the Supreme Court has generally affirmed on the narrower ground available without reaching the broader interpretation.¹²² Thus, having decided on the rational basis test, the Court should have declined to address heightened scrutiny.¹²³

B. *Second Order Rational Basis*

Justice Marshall next pointed out that the majority, though purporting to apply rational basis review, nonetheless subjected the ordinance to “precisely the sort of probing inquiry associated with heightened scrutiny.”¹²⁴ The standard used by the majority is not the traditional rational basis test set out in *Williamson v. Lee Optical Co.*,¹²⁵ which gave great deference to the legislature. Rather, it is one which “sift[s] through the record to determine whether policy decisions are squarely supported by a firm factual foundation.”¹²⁶ The

the particular classification is drawn.’” *Id.* at 3265 (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting)). See also Weidner, *supra* note 50, at 912.

117. 105 S. Ct. at 3263 (Marshall, J., concurring in part and dissenting in part).

118. *Id.* at 3264. This new rational basis test is the result of applying heightened scrutiny analysis under the guise of rational basis. The Court has done this on previous occasions. *Id.* at 3265 n.4. See *supra* note 8 and accompanying text.

119. 105 S. Ct. at 3268 (Marshall, J., concurring in part and dissenting in part).

120. *Id.* at 3272. Justice Marshall felt the remedy was truncated because it did not strike down the ordinance on its face but merely invalidated it as applied to the CLC home residents. *Id.*

121. *Id.* at 3263 (quoting *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. at 2801). Interestingly, this is precisely what the majority purported to be doing. See *supra* note 95 and accompanying text.

122. See, e.g., *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

123. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724 n.9 (declining to address strict scrutiny when heightened scrutiny is sufficient).

124. 105 S. Ct. at 3264 (Marshall, J., concurring in part and dissenting in part).

125. 348 U.S. at 489 (where “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind”).

126. 105 S. Ct. at 3264. See also *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983).

Court has thus shifted the burden to the legislature to prove a rational relationship to the classification.¹²⁷

Justice Marshall criticized the Court's application of the rational basis test as "a small and regrettable step backward" toward *Lochner*.¹²⁸ As the Court has provided no principled foundation for applying a more searching inquiry under the rational basis standard, lower courts are left in the dark and are likely to follow the precedent set in this case by invalidating more economic and social legislation in the future.¹²⁹

C. Equal Protection Demands Heightened Scrutiny

Justice Marshall, after discussing at length the history of heightened scrutiny review, focused his attention on the factors relating to the mentally retarded which demand this standard. First, the exclusion of group homes deprives the retarded of a fundamental liberty.¹³⁰ Second, the retarded have been subjected to a "lengthy and tragic history"¹³¹ of discrimination which rivaled and paralleled "the worst excesses of Jim Crow."¹³²

Further, Justice Marshall pointed out the inconsistency in the majority's argument that because Congress had enacted legislation benefiting the retarded, the retarded could not be considered politically powerless.¹³³ The Court applied the opposite analogy regarding gender in *Frontiero v. Richardson*, where it was indicated that because "Congress itself has concluded that classifications based on sex are

127. See 105 S. Ct. at 3260 (majority opinion) ("The City never *justifies* its apparent view . . .") (quoting 726 F.2d at 202) (emphasis added).

128. *Id.* at 3265 (Marshall, J., concurring in part and dissenting in part). See *Lochner v. New York*, 198 U.S. 45 (1905) (where the court invalidated legislation regulating number of hours bakery personnel could work). See also *supra* note 29.

129. 105 S. Ct. at 3265 (Marshall, J., concurring in part and dissenting in part).

130. *Id.* at 3266. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right to "establish a home" is a fundamental liberty). See generally Chandler & Ross, *supra* note 59. Currently group homes are the principle alternative to institutionalization that the retarded have for living in the community. See *supra* note 67.

131. 105 S. Ct. at 3266 (Marshall, J., concurring and dissenting). See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978) (using "lengthy and tragic history" to distinguish racial classifications from classifications based on gender). See also Chandler & Ross, *supra* note 59, at 306-07.

132. 105 S. Ct. at 3266 (Marshall, J., concurring and dissenting). See generally Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982) (discussing racial prejudice under Jim Crow laws).

133. 105 S. Ct. at 3268 (Marshall, J., concurring in part and dissenting in part).

inherently invidious,'” the Court likewise should do the same.¹³⁴ The Court has never suggested that a classification becomes less suspect simply by virtue of extensive beneficial legislation.¹³⁵ Justice Marshall concluded that “[f]or the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same.”¹³⁶

D. Applied Analysis of An As-Applied Remedy

Justice Marshall finally addressed the majority’s “preferred course of adjudication”, which invalidated the ordinance only as applied to the respondents in this case.¹³⁷ The paradox is that the majority, having held that the ordinance rested on “irrational prejudice *against the mentally retarded, including* those who would occupy the Featherston facility,”¹³⁸ still invalidated it only as applied to the respondents. However, the Court was apparently acting under the belief that the ordinance might be “rational” in relation to a sub-group of the retarded.¹³⁹

Criticizing this reasoning, Justice Marshall pointed to the overinclusiveness of the ordinance. Nine-tenths of the group covered by the statute were similarly situated.¹⁴⁰ Nevertheless, the nine-tenths were excluded on the basis of the one-tenth. Justice Marshall further stated that the Court had deviated from former precedent which struck down “impermissibly overbroad generalizations.”¹⁴¹ This type of as-applied remedy poses future problems by placing on the courts “the task of redrafting the statute through an ongoing and cumber-

134. *Id.* at 3269 (quoting *Frontiero v. Richardson*, 411 U.S. at 687).

135. *Id.* See *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984) (racial classifications are still suspect).

136. 105 S. Ct. at 3269 (Marshall, J., concurring in part and dissenting in part).

137. *Id.* at 3258. The majority preferred this course in order to avoid making “unnecessarily broad constitutional judgments.” *Id.*

138. *Id.* at 3260 (emphasis added).

139. Since the rational basis test does not require a close fit between the classification and legislative purpose the Court could justify not invalidating the ordinance completely.

140. 105 S. Ct. at 3273 (Marshall, J., concurring in part and dissenting in part). There are four categories of mental retardation which are based on the level of intelligence quotient (I.Q.): (1) Mild - I.Q. 50 to 70 (89% of all retardates are educable), (2) Moderate - I.Q. 35 to 50 (6% are trainable), (3) Severe - I.Q. 20 to 35, and (4) Profound - IQ under 20 (remaining 5% fall into categories 3 & 4 and are totally dependent). 105 S. Ct. at 3256 n.9. These categories seem to have been drawn for administrative purposes, but legislation which pertains to five percent of the class can never justify exclusion of the whole class. Furthermore, due to the high federal standards placed on group homes, it is unlikely that the ordinance would pertain to even five percent of the group as the severely and profoundly retarded are rarely admitted as residents to these facilities.

141. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating *in toto* a maternity leave policy which was rationally related to only a small percentage of teachers).

some process of 'as-applied' constitutional rulings."¹⁴² The alternative approach and the preferred course of adjudication, in Justice Marshall's view, would have been to invalidate the ordinance *in toto*, thus putting the responsibility back on the legislature to redraft outmoded and discriminatory legislation.¹⁴³

VII. IMPACT

The Supreme Court's holding in *City of Cleburne, Texas v. Cleburne Living Center* appears to be another "ad hoc doctrine flexible enough to accommodate a cautious Court's preference for mildly progressive results."¹⁴⁴ This case presented to the Court the question of whether mental retardation was a quasi-suspect classification. In the process of deciding that question, the holding raises many more questions. How will the Court apply standards of judicial review in future equal protection claims? Is the rational basis test evolving? How has this decision helped retarded citizens? What does this decision mean for other groups?

The Court has emphatically embraced the fact that it uses three standards of review: rational basis, heightened scrutiny and strict scrutiny. By refusing to deem the mentally retarded a "quasi-suspect" class, the Court has reaffirmed its unwillingness to broaden current suspect and quasi-suspect categories, the implication being that the current suspect and quasi-suspect categories will be frozen to the existing classifications. Heightened scrutiny will be applied to gender, illegitimacy and minor children of illegal aliens, and strict scrutiny to classifications based on race, national origin and alienage. Other classifications will be reviewed under the rational basis test.

Perhaps the reason for not granting the retarded quasi-suspect status was pragmatic: the Court would have had to deal with an influx of equally amorphous groups like the aged, the disabled, the mentally ill, the poor and others. The Court seems to have ascertained, however, that the immutable characteristic of a reduced ability to cope in the everyday world is relevant to many state interests, both to benefit the retarded and to protect other citizens.

Has the Court created a second order rational basis test? The Court has on previous occasions used a stricter rational basis test, so

142. 105 S. Ct. at 3274. (Marshall, J., concurring in part and dissenting in part).

143. *Id.* at 3273. Justice Marshall notes that the current Cleburne zoning ordinance was a redrafted version of a previous ordinance dating back to 1929, a time when discrimination against the retarded was at its worst. *Id.* at 3268 n.17.

144. Wilkinson, *supra* note 14, at 946.

one cannot legitimately say this is a new test.¹⁴⁵ Perhaps a better question is whether this form of rational basis scrutiny will become a precedent or will it simply be limited to the facts of this particular case?

Considering the nature of this case, and the history of prejudice against the retarded, it seems obvious that justice requires a remedy in favor of the retarded. On this point, all nine justices unanimously agreed. A remedy could have been supplied under heightened scrutiny, requiring a holding that retardation is a quasi-suspect classification, or under a rational basis test involving more genuine scrutiny. (It could not have been supplied under the traditional deferential rational basis test.) Faced with these two alternatives, the majority once again chose the more cautious course, "the preferred course of adjudication." Having made the decision, the remainder of the opinion seems to be a justification and limitation of its consequences.

The natural consequences might have been a "small and regrettable step back" toward the *Lochner* era. However, the Court's intent in utilizing an "as-applied" remedy appears to be to impede such a constitutional step by limiting the decision to the facts. This adequately constrains judicial intrusion into legislative decisions and sends out the message that "the courts [are] very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices."¹⁴⁶ The Court still believes that legislators, with the help of qualified professionals, are best suited to the task of dealing with the special needs of diverse classes of people.¹⁴⁷ Although an as-applied remedy may lead to a greater congestion in the courts by requiring a case by case adjudication, courts could still summarily dispose of a case if the facts are similar enough to *Cleburne*. The Court may have intended to discourage such an influx of equal protection claims by rendering a narrow holding.

Will such a narrow holding help retarded citizens? Certainly "the justices have given out the message that the retarded aren't second class citizens and can't be pushed aside into industrial areas of the city."¹⁴⁸ At the same time, the Court has determined that "the retarded don't pose any more of a threat to the community than any other group,"¹⁴⁹ such as fraternities or nursing home residents. The

145. See *supra* note 30.

146. 105 S. Ct. at 3255.

147. *Id.* at 3256.

148. L.A. Times, July 2, 1985, § 1, at 5, col. 2 (quoting Diane Shisk, supervising attorney for Advocacy, Inc.).

149. Telephone interview with Diane Shisk, supervising attorney for Advocacy, Inc. (Oct. 22, 1985). Diane Shisk mentioned that this decision would definitely help the mentally retarded. As a result of this decision, Texas passed a law allowing group homes of up to six residents to be established in any residential district in any city.

Court's holding in *Cleburne* may allow bigotry and prejudice to continue on the books;¹⁵⁰ it may also determine how cities will interpret similar ordinances.¹⁵¹ It is ironic, in view of the expressed fears of the Cleburne residents, that two weeks after the Featherston Home began operating, it held an open house for the community; at that time, most of the neighboring residents were unaware that the home had been functioning.¹⁵² Though the retarded would have benefitted far more by a determination that they constituted a quasi-suspect class, the real import of the decision may be its future impact on other equally amorphous groups.

The logical effect is that other amorphous groups like the mentally ill, the infirm, the aged, the poor and homosexuals will likewise be reviewed under this second order rational basis test. The Court has already indicated in *Murgia*¹⁵³ that classifications based on age will receive rational basis review. Although the Ninth Circuit held the mentally ill to be a quasi-suspect class in *City of Tacoma*,¹⁵⁴ the *Cleburne* decision will probably alter that status. For groups which have a medical disability, science and medicine will probably provide the basis for determining whether the classification is rationally related to a legitimate state end.

AIDS victims, for example, will probably have to await a medical explanation to determine whether they may legitimately be excluded from campuses or schools. As long as the communicability of the disease remains uncertain, however, the state's interest in protecting the lives of its citizens will probably override the individual's interest in pursuing an education on campus. Although homosexuals have had difficulty obtaining intermediate review (due to the questionable nature of the class' "immutable" characteristic), unless science or medicine can prove immutability from birth, this group will likely be

However, at the time of the telephone conversation, Ms. Shisk was involved in litigation in another city, representing a group home which was excluded from an area based on a restrictive covenant. *Id.*

150. *Id.*

151. Shortly after the litigation in this case began, Concepts in Community Living, Inc. (formerly Cleburne Living Center, Inc.) established a group home in Keen, Texas. Keen has an ordinance which is almost identical to the ordinance in Cleburne. The City Council in Keen, however, analogized the mental retardation facility to a boarding house or a fraternity thereby circumventing the necessity of a special use permit. Telephone interview with Jan Hannah, Vice President and part-owner of Concepts in Community Living, Inc. (Oct. 22, 1985).

152. *Id.*

153. 427 U.S. 307 (1976).

154. 720 F.2d 1126 (9th Cir. 1983).

subject to a heightened rational basis scrutiny. However, there still exists the possibility that homosexuals will ultimately find refuge under the fundamental right to privacy doctrine.¹⁵⁵

Some statutes may have to be rewritten "through an ongoing and cumbersome process of 'as applied' constitutional rulings."¹⁵⁶ Nevertheless, for many groups, it appears that the holding in *Cleburne Living Center* will lead to a more scrutinizing judicial inquiry into legislative classifications thereby requiring the government to prove its motivation as something more than mere stereotypes and prejudice.¹⁵⁷

VIII. CONCLUSION

Equal protection claims are a constant reminder of the paradox inherent in many democratic ideals. The Supreme Court has struggled with equal protection standards of review because it must balance, on the one hand, "liberty," and on the other, "justice for all." The paradox presented by these concepts is, as one commentator has stated, that "equality is liberty's great enemy and can be purchased only at an unacceptable price to freedom."¹⁵⁸

The Court must balance these two fundamental ideals of democracy through the equal protection clause. It is unlikely that the controversy surrounding standards of judicial review of classifications will be quickly resolved. Moreover, the democratic system inherently questions judicial review of majoritarian decisions by a countermajoritarian body. Although the Supreme Court is still wrestling with this problem, the holding in *Cleburne Living Center* indicates that it is unwilling to allow injustice.

While the Court's application of a heightened rational basis scrutiny seems to be preferable to deeming the mentally retarded a "quasi-suspect" class, the majority's as-applied remedy remains inadequate. Zoning exclusions present a great obstacle to the ultimate goal of training the educable retarded to be contributing members of society. Ordinances of the *Cleburne* type are unnecessarily limiting.

155. The Court has thus far refused to review whether there might be a constitutional right to privacy involving a homosexual act between consenting adults. *E.g.*, *Enslin v. Wallford*, 565 F.2d 156 (4th Cir. 1977), *cert. denied sub nom. Enslin v. Bean*, 436 U.S. 912 (1978). See generally Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORDHAM L. REV.* 1281 (1977). Some commentators believe there should be a constitutional right to live a particular lifestyle. See, *e.g.*, Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 *CORNELL L. REV.* 563 (1977).

156. 105 S. Ct. at 3274 (Marshall, J., concurring in part and dissenting in part).

157. *Wash. Post*, July 2, 1985, at A5, col. 1 (quoting Burt Neuborne, Litigation Director, American Civil Liberties Union). The ACLU was one of many groups to submit an amicus brief.

158. L. TRIBE, *supra* note 24, § 16-1, at 991.

Such ordinances are intended to be applied only to the noneducable retarded who comprise only five percent of all retarded persons; however, they remain in effect against all of the retarded. Had the majority invalidated the ordinance on its face, it would have placed the onus on the legislature to more closely tailor its ordinance to meet the legislative end. This would have had far reaching implications for all poorly drafted zoning ordinances.

Nevertheless, for the retarded and other groups upon which the decision will have an impact, the Court's "preferred course of adjudication" can be seen as another small step in the direction of narrowing the gap between strict scrutiny and minimal scrutiny "by raising the level of the minimal from virtual abdication to genuine judicial inquiry."¹⁵⁹ For the retarded and these other groups, *Cleburne Living Center* may hold a promise of equal protection under the rational basis test.

GORDON W. JOHNSON

159. Gunther, *supra* note 8, at 24.

