Pace Law Review

Volume 6
Issue 2 *Winter 1986*

Article 4

January 1986

A House Is Not a Home: City of Cleburne v. Cleburne Living Center

Elizabeth T. Sharpe

A House Is Not A Home: *City of Cleburne v. Cleburne Living Center*

I. Introduction

In *City of Cleburne v. Cleburne Living Center*,[1] the Supreme Court invalidated a zoning ordinance which prohibited the establishment of a home for the mentally retarded in a neighborhood zoned to allow nursing homes, dormitories, and apartment hotels.[2] The Court found that to exclude the retarded from such a neighborhood reflected irrational prejudice[3] and thus, the ordinance violated the equal protection clause of the fourteenth amendment. In so holding, the Court declined to designate mentally retarded persons as either a suspect or a quasi-suspect class[4] because their distinguishing characteristics were considered to be relevant to permissible state interests.[5] The Court's conclusion was that although the ordinance was constitutional on its face, it was unconstitutional as applied in this case.[6]

Part II of this Note reviews the history of the Court's application of the equal protection doctrine. Part III examines the Court's previous dealings with the retarded. Part IV summarizes the decision of the Supreme Court in *City of Cleburne v. Cleburne Living Center*. Part V analyzes the Court's decision and concludes that the class of mentally retarded persons bears a close resemblance to those classes which the Court has deemed "suspect" and thus, is worthy of heightened scrutiny, if not strict scrutiny. Part VI concludes that the Court, in the name of judicial restraint, abdicated its proper role as it concerns mentally retarded persons.

---

1. 105 S. Ct. 3249 (1985).
2. *Id.* at 3260.
3. *Id.*
4. *Id.* at 3255.
5. *Id.* at 3258.
6. *Id.* at 3260.

II. Background

A. *The Equal Protection Doctrine*

The guarantee of equal protection embodied in the fourteenth amendment has evolved into "the single most important concept in the Constitution for the protection of individual rights."[7] The equal protection clause[8] had "long been treated by the Court as a dubious weapon in the armory of judicial review"[9] and had been characterized by Justice Holmes as the "last resort of constitutional arguments."[10] As recently as the 1960's, "judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases."[11] The emergence of the equal protection clause as a means of promoting individual rights during the Warren Court's last decade brought about a dramatic change.[12]

The origin of the doctrine of equality can be traced to The Declaration of Independence.[13] The language which embodied the doctrine, however, was not incorporated into the Constitution until the adoption of the fourteenth amendment.[14] It is the only clause of section one of the amendment that added new language to the Constitution.[15] The clause was designed to impose a positive duty upon the states to supply protection to all persons in the enjoyment of their natural and inalienable rights, and to do so equally.[16]

The equal protection clause of the fourteenth amendment,

---

7. J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 585 (2d ed. 1983).

8. U.S. CONST. amend. XIV, § 1. "No state shall . . . deny to any person within its jurisdiction the equal protection of the law."

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

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

11. Gunther, *The Supreme Court 1971 Term - Foreward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

12. *Id.* Earl Warren was Chief Justice of the Supreme Court from 1953 to 1968.

13. The Declaration of Independence para. 1 (U.S. 1776).

14. Tussman & tenBroek, *supra* note 9, at 341. The phrase "equal protection" was found in virtually all forms of the proposed amendment in the Thirty-ninth Congress. Embodied explicitly in the Freedman's Bureau, Civil Rights, and other bills, it was the common meeting ground of those who carried the fourteenth amendment through the Thirty-ninth Congress. *Id.* at 341-42.

15. *Id.* at 341.

16. *Id.*

by its own terms, applies only to state and local governments.[17] The guarantee of equal protection, however, applies to the federal government as well. With regard to the federal government, it is derived from the implied equal protection guarantee of the due process clause of the fifth amendment.[18] Judicial review under the due process clause and the equal protection clause is identical.[19]

An understanding of what the equal protection clause means must begin with an acknowledgement of the extent of its mandate. A formulation by Justice Matthews in *Yick Wo v. Hopkins*[20] is indicative of its sweep. As Justice Matthews stated, "The equal protection of the laws is a pledge of the protection of equal laws."[21] "[This] statement . . . makes it abundantly clear that the quality of legislation as well as the quality of administration comes within the purview of the clause."[22]

When reviewing the validity of legislation under the equal protection clause, a distinction must be drawn between general legislation which applies without qualification to all persons, and special legislation which applies to a limited class of persons. Equal protection cannot command that all laws apply universally to all persons, since almost any legislative action imposes special burdens upon, or grants special benefits to, special groups or classes of individuals.[23] As Justice Brewer stated in

---

17. U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the law."

18. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation in the District of Columbia public schools was a denial of due process guaranteed by the fifth amendment); Weinberger v. Wiesenfield, 420 U.S. 636, 638 n.2 (1975) (gender-based distinction of Social Security Act held to discriminate against female wage earners under equal protection guarantee of due process clause of fifth amendment); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (gender-based distinction favoring female line officers in Navy held not to violate due process clause).

19. NOWAK, *supra* note 7, at 585.

20. 118 U.S. 356 (1886).

21. *Id.* at 369. Professors Tussman and tenBroek stated that this expression of the doctrine's meaning "has been frequently cited with approval and has never been challenged by the Court." Tussman & tenBroek, *supra* note 9, at 342.

22. Tussman & tenBroek, *supra* note 9, at 342.

23. *Id.* at 343. The classical statement of this unchallenged view is found in Barbier v. Connolly, 113 U.S. 27 (1885):

> [N]either 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 to promote the

Atchison, Topeka & Santa Fe Railroad v. Matthews,[24] "It is the essence of a classification that upon classes are cast . . . burdens different from those resting upon the general public. . . . Indeed, the very idea of classification is that of inequality."[25]

In order to resolve the contradicting terms of equality and classification in laws, the Court has developed the concept of reasonable classification. Stated simply, reasonable classification requires that those similarly situated should be similarly treated — the measure of reasonableness of a classification is the degree of its success in meeting this two-fold "similarity" requirement.[26]

In determining the reasonableness of a classification it is essential that the Court look beyond the classification to the purpose of the law: "A reasonable classification is one which includes all persons who are similarly situated *with respect to the purpose of the law.*"[27] The essential determination of whether a classification drawn is reasonable in light of its purpose provides the Court with a scope of review.[28] Thus, equal protection tests whether the classification is properly drawn in light of the purpose of the law.

---

health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote . . . the general good.

Id. at 31-32.

24. 174 U.S. 96 (1899).

25. *Id.*

26. Tussman & tenBroek, *supra* note 9, at 344. A clarification can perhaps be made by describing what the test of "similarity" does not mean. It does not mean that the law applies equally to all those to whom it applies; as Professors Tussman and tenBroek point out, King Herod's mandate that all male children born on a particular day be killed would pass muster under this definition. *Id.* at 351. Furthermore, similarity does not require that the classes correspond to some natural grouping, or that they separate those who naturally belong together. *Id.* at 346.

27. Tussman & tenBroek, *supra* note 9, at 346 (emphasis added).

28. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 995 (1978).

B. *The Judicial Task*

Legislatures, as well as courts, are bound by the mandate of equal protection.[29] To the legislator, "the equal protection clause is a demand that, as he promulgates laws, the classifications he creates be reasonably related to the purpose of the law."[30] Favoritism or inequality must be guarded against, and special burdens or benefits must be imposed only because of their contribution to the general good.[31]

The judicial task begins with the identification of the purpose of the law in question.[32] Whether the classification within the law satisfies the equal protection guarantee depends upon two things: the purpose attributed to the legislative act, and the determination of whether there is a sufficient relationship between the asserted governmental end and the classification.[33]

When the court defers to the choice of goals made by the legislature, or its determination of whether the classification relates to those goals, the court "ha[s] in fact taken the position that it is the function of the legislature rather than the judiciary to make the equal protection determination as to the particular law."[34] Conversely, when the court takes the position that the judiciary is able to assess issues "in a manner superior to, or at least different from"[35] the legislature, it is making an independent judgment of whether the law has a purpose which conforms to the Constitution.[36]

The threshold question for the court presents two alternatives: first, whether it will engage in a searching evaluation of the legislative classifications, thereby assuming the position that it may override the democratic process of legislative decisionmaking; or second, whether it will defer to the legislature, limiting the concept of a unique judicial function.[37]

---

29. Tussman & tenBroek, *supra* note 9, at 365.
30. *Id.*
31. *Id.*
32. *Id.* at 366.
33. NOWAK, *supra* note 7, at 590.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* These two divergent theories of judicial decisionmaking under the doctrine of equal protection reflect what Professors Tussman and tenBroek see as the two views

C. *Selection of a Standard of Review*

1. *The Rational Basis Test*

The Warren Court produced two standards of review which correspond to the two courses of action — deference to or independent evaluation of legislative determinations — open to the court under the doctrine of equal protection. Each standard represents a distinct method of analysis, and the choice of one over the other is based upon the nature of the particular question posed to the court.[38]

The first standard of review has been characterized as the rational basis test.[39] This standard is generally utilized when the case before the court concerns social or economic legislation.[40]

---

of the institution of judicial review:

> One's view of the judge's task will depend to a large extent upon whether one thinks of judicial review in terms of a system of functional differentiation or in terms of a system of checks and balances. . . . The 'functional' view rests upon the assumption that the judicial task differs radically from the legislative task, and that for the judiciary to address itself to the same questions that the legislature has answered is an invasion of the legislative function by the courts. The theory of 'checks,' on the other hand, really requires that the court reconsider the same questions that the legislature has already considered.
>
> Both theories have their difficulties. The functional theory is hard pressed to delineate distinct functions. The theory of checks has to win its way against the undemocratic character of judicial lawmaking. The United States Supreme Court attempts to meet these difficulties by maintaining that it is not its function, as it reviews legislation, to substitute its views about what is desirable for that of the legislature. It thus bows in the direction of the functional separation theory. But at the same time the Court speaks of judicial self-restraint as the answer to the undemocratic aspects of the check and balance system. Kept apart from each other, the essential incompatibility of these two attitudes often escapes notice. For self-restraint is no virtue if the Court has a unique function to perform. If, on the other hand, the self-restraint is justified, the belief in a unique judicial function is untenable. These difficulties plague the Court at every stage in the process of applying the equal protection clause.

Tussman & tenBroek, *supra* note 9, at 365-66.

38. A complete history of the evolution of the standards of review is beyond the scope of this Note. Since judicial intervention under the doctrine of equal protection was virtually unknown at the beginning of the 1960's outside of racial discrimination cases, the discussion of "standards of review" begins with what has become known as "the two-tier attitude" of the Warren Court. Gunther, *supra* note 11, at 8.

39. This standard is also referred to as "minimal scrutiny" and the "rational relationship test." TRIBE, *supra* note 28, § 16-2, at 994-995; NOWAK, *supra* note 7, at 591.

40. TRIBE, *supra* note 28, at 994-95. *See also*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (upholding the state's mandatory retirement age of 50 for state police officers); Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (upholding a Con-

By the Court's own admission, this inquiry "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task . . . ."[41] The Court does not demand perfection in making classifications, acknowledging that this is "neither possible or necessary."[42]

The rational basis standard, then, is the choice of deference, one which presumes constitutionality. In short, when applying the rational basis test, the judiciary does not sit as a superlegislature to judge the wisdom or desirability of legislative policy determination.[43]

Thus, when the question involves general social or economic legislation, the Court has determined that it has no unique function to perform; that the judiciary has no special capability to assess legitimate governmental ends or the reasonableness of classifications that is superior to that of the legislature.[44] The check employed by the judiciary is a requirement that a rational basis be put forth by the legislative body or that a state of facts can be conceived to justify the legislative classification.[45]

---

gressional act which excluded inmates of public institutions from a subsistance allowance under the Supplemental Security Income program of the Social Security Act).

41. *Murgia*, 427 U.S. at 314.

42. *Id.* (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)). *Dandridge* concerned a Maryland welfare regulation which provided needy families with aid. Under the regulation most families received an amount in accordance with a standard of need, but a ceiling of about $250 per month was imposed by the state, regardless of the size of the family and its actual need. The Supreme Court, granting the state great latitude in dispensing its available funds, held that Maryland's regulation was an acceptable means of allocating its limited financial resources. The state's purposes of sustaining as many families as possible and encouraging employment were rationally supportable and free from invidious discrimination.

43. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). This case concerned a New Orleans ordinance which prohibited pushcart food sales in the French Quarter, a major tourist attraction of the city. By a "grandfather clause," however, pushcart vendors who had operated in the Quarter for at least eight years were exempted from the prohibition. A vendor who had operated a pushcart for less than the eight-year period brought suit challenging the application of the grandfather provision as a denial of equal protection. The Court held that only invidious discrimination would void such economic regulation, and finding none, upheld the ordinance.

44. NOWAK, *supra* note 7, at 591.

45. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959). The question presented in *Allied* concerned an exemption from a tax levy which applied only to nonresidents. The law dealt with merchandise or agricultural products warehoused in the state; if the items in storage were used in a business in the state, they were subject to

2. *Strict Scrutiny*

The second standard of review under the equal protection guarantee is referred to as strict scrutiny.[46] This method of analysis is the converse of the deferential rational basis test and is more complex.

Where rational basis affords legislative judgment the widest discretion,[47] strict scrutiny provides for a "narrower scope for operation of the presumption of constitutionality."[48] This "narrower scope," a more searching inquiry into the legislative purpose and the classifications drawn, describes the essence of strict scrutiny. This method of analysis is employed when legislation classifies people in terms of their ability to exercise a fundamental right,[49] or when a classification distinguishes between persons

---

taxation; if the items belonged to a non-resident of Ohio and were held in a storage warehouse for storage only, no tax was applied. The difference in the levy of a tax was based upon a state of facts which could reasonably be conceived and since the distinction was neither invidious nor arbitrary, it was not a prohibited classification under the equal protection clause.

46. NOWAK, *supra* note 7, at 591.

47. McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (criminal statute prohibiting an unmarried interracial couple from living in or occupying the same room declared invalid).

48. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The *Carolene Products* case concerned regulation regarding the sale and shipment of "filled" milk; since the legislation was one that affected ordinary commercial transactions, the rational basis standard was applied. Chief Justice Stone stated that the "existence of facts supporting the legislative judgment is to be presumed . . . [and] is not to be pronounced unconstitutional unless the facts are made known to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Id.* at 152.

Chief Justice Stone's footnote to this statement delineated when a "narrower scope" for the presumption of constitutionality is appropriate: (1) when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first 10 amendments, which are deemed equally specific when held to be embraced within the fourteenth amendment; (2) when legislation restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, a more exacting judicial scrutiny will be utilized, e.g., legislation which restricts the right to vote, restrains the dissemination of information, interferes with political organizations, or prohibits peaceable assembly. Justice Stone added that similar considerations would enter into the review of statutes directed at particular religious, national, or racial minorities — or any other group considered "discrete and insular" — because they are special conditions which tend to curtail the operation of the political processes ordinarily to be relied upon to protect minorities and, therefore, call for a correspondingly more searching judicial inquiry. *Id.* at n.4 (citations omitted).

49. *See infra* notes 55, 57, and 59.

based upon a "suspect"[50] basis. In order to survive this level of scrutiny, the legislation in question must promote a compelling state interest and the particular classification must be necessary to promote that compelling state interest.[51]

Strict scrutiny acknowledges that political processes burdening fundamental rights or suggestive of prejudice against certain minorities must be closely analyzed in order to preserve the values of equality and liberty.[52] The relationship of those classes of persons deemed "suspect" and the operation of political processes is close and complex.[53] It is the existence of this close relationship which moves the Court to invoke the strict scrutiny standard, since the election of that standard allows the Court to override the democratic processes and render an independent decision regarding the correctness of legislative action.[54]

During the Warren era strict scrutiny was utilized to expand the equal protection clause to protect indigent criminal sus-

---

50. The term "suspect" originated in Korematsu v. United States, 323 U.S. 214 (1944): "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny . . . ." *Id.* at 216. The word race in that opinion referred to the Japanese. Despite the invocation of strict scrutiny, *Korematsu* upheld the temporary exclusion and detention of persons of Japanese ancestry; the opinion gave great deference to the combined war powers of the President and Congress within the context of the needs of the nation at the start of World War II.

Korematsu established three points for future analysis of classification based on race or national origin: first, these classifications were "suspect," which meant they were likely to be based on an impermissible purpose; second, they were to be subjected to the "most rigid scrutiny"; and third, the classification would be invalid if based on racial antagonism and upheld only if it were based on public necessity. NOWAK, *supra* note 7, at 633.

51. NOWAK, *supra* note 7, at 591-92.

52. TRIBE, *supra* note 28, § 16-6, at 1000.

53. *Id.* at 1002.

54. NOWAK, *supra* note 7, at 590.

55. Douglas v. California, 372 U.S. 353 (1963). The issue presented in *Douglas* was whether or not an indigent should receive the assistance of counsel on his first appeal as a matter of right. California's practice regarding a requested appeal for an indigent person was to submit the trial record for an ex parte proceeding in the district court (the intermediate appeal court in California). The district court, looking only at the record, decided whether the case had merit for appeal purposes; if the court decided that there was no appealable issue, the indigent was without recourse. The proceeding was based solely on the record; no briefs or oral arguments were allowed. The Supreme Court, noting that federal courts honor requests for counsel regardless of what they think the merits of the case may be, found the state practice "lacking that equality demanded by the

pects,[55] illegitimate children,[56] the disenfranchised,[57] or underenfranchised,[58] and newly-resident applicants for state welfare.[59] New fundamental interests were also recognized — the right to a criminal appeal,[60] the right to vote,[61] and the right to travel.[62]

The legacy of the Warren Court was one of anticipation and accomplishment.[63] Its last decade brought about a dramatic change in the annals of equal protection, deemed the "new equal

---

Fourteenth Amendment." *Id.* at 357-58.

56. Levy v. Louisiana, 391 U.S. 68 (1968). The question in *Levy* derived from a claim on behalf of five illegitimate children under a Louisiana statute for the wrongful death of their mother. The trial court and the court of appeals dismissed the suit, holding that a surviving "child" under the statute did not include an illegitimate child. The denial was based on a policy of discouraging the birth of children out of wedlock while encouraging morals and general welfare. The Supreme Court found that the denial of a right to recovery created an invidious discrimination which contravened the equal protection clause. *Id.* at 70-72.

57. Kramer v. Union Free School Dist., 395 U.S. 621 (1961). The *Kramer* Court considered a New York law which provided that residents in certain school districts who were otherwise eligible to vote in state and federal elections, could vote in school district elections only if they owned or leased taxable realty in that district or had children enrolled in the local public schools. Kramer was a bachelor who neither owned nor leased real property. The Supreme Court required a compelling state interest to justify the necessity of such an exclusion but found none. Such careful examination was considered necessary since the exercise of the right to vote constitutes the foundation of our representative society, and any infringement has to be meticulously scrutinized. *Id.* at 626-28.

58. Avery v. Midland County, 390 U.S. 474 (1968). *Avery* concerned the voting procedures for electing commissioners to a county governing body in Texas. The county consisted of four districts, each of which elected one commissioner to the governing board; each commissioner cast one vote. The problem lay in the fact that, although each district had an equal vote, one of the districts covered 95% of the county's population. The Court found this apportionment to be inequitable since the equal protection clause demands that those qualified to vote have the right to an equally effective voice in the election process.

59. Shapiro v. Thompson, 394 U.S. 618 (1969). In *Shapiro*, the Court examined Connecticut, Pennsylvania, and District of Columbia statutes which denied welfare assistance to residents who met all eligibility requirements except that they had not resided within the jurisdictions for at least one year preceding their applications for assistance. Each of the statutes was declared unconstitutional. The Supreme Court rejected the argument that a "mere showing of a rational relationship" between the waiting period and the states' objectives would suffice. Instead, the Court held that the act of moving from one state to another was an exercise of a constitutional right. Any classification which restricts such a right requires a showing of a compelling state interest. The argument that the waiting periods facilitated budget predictability was rejected by the Court as "wholly unfounded." *Id.* at 634.

60. *Douglas*, 372 U.S. 353 (1963). *See supra* note 55.

61. *Kramer*, 395 U.S. 621 (1961). *See supra* note 57.

62. *Shapiro*, 394 U.S. 618 (1969). *See supra* note 59.

63. Gunther, *supra* note 11, at 8.

protection," because of the interventionist approach of the strict scrutiny standard.[64] The list of interests designated as fundamental by the Warren Court is broad.[65] In the area of the rational basis standard, however, the choice of deference was preserved.[66] The standards formed during these years were dramatically polar. One commentator described minimal review (rational basis) as a "virtual rubber stamp" and strict scrutiny as a "virtual death blow."[67]

D. *The Burger Court*

Certain equal protection decisions of the Burger Court indicate new dimensions within the standards of review inherited from the Warren era.[68] These decisions involved questions of gender discrimination[69] and the rights or status of illegitimate children.[70] Legislative classifications pertaining to these questions receive a "heightened" standard of review.[71]

Reed v. Reed[72] involved an Idaho statute which mandated that males be preferred to females among those persons equally entitled to become estate administrators.[73] Chief Justice Burger announced for the first time that a classification based on sex established a "classification subject to scrutiny under the Equal Protection Clause."[74] In seeking a rational relationship between the preference for males and the operation of the statute, Chief Justice Burger stated that the classification "must be *reasona-*

---

64. Gunther described the strict scrutiny of the Warren Court as "strict in theory and fatal in fact." *Id.*

65. *See supra* notes 55, 57 and 59.

66. *See supra* note 45. *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961). Gunther described the Warren Court's rational basis standard as "minimal scrutiny in theory and virtually none in fact." Gunther, *supra* note 11, at 8.

67. TRIBE, *supra* note 28, § 16-30, at 1089.

68. TRIBE, *supra* note 28, §§ 16-30 to 16-31.

69. Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

70. Lalli v. Lalli, 439 U.S. 259 (1978); Mathews v. Lucas, 427 U.S. 495 (1976); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); Trimble v. Gordon, 430 U.S. 762 (1977).

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

72. 404 U.S. 71 (1971).

73. *Id.* at 72.

74. *Id.* at 75.

ble, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relationship* to the object of the legislation . . . ."[75] The Court concluded that a choice between qualified persons "may not lawfully be mandated on the basis of sex."[76]

Shortly thereafter, in *Frontiero v. Richardson*,[77] Justice Brennan, joined by Justices Douglas, White, and Marshall, found implicit support in *Reed* to designate sex as an inherently suspect classification, and thereby subject to close judicial scrutiny.[78] Justice Brennan likened sex to race and national origin in that it was "immutable . . . determined solely by the accident of birth . . . [and] bears no relation to ability to perform or contribute to society."[79] Under the close judicial scrutiny, the statutory scheme in question was found to be constitutionally invalid, since the government had conceded that the purpose of the classification was solely administrative convenience.[80]

The designation of sex as an inherently suspect classification was not followed in *Stanton v. Stanton*,[81] since there the Court found nothing rational[82] in a statute requiring child support for males until the age of twenty-one, but requiring support for female children only to the age of eighteen.[83] *Stanton* relied on *Reed*, rather than *Frontiero*, in finding that a strict scrutiny was unnecessary because rationality was lacking in the classifica-

---

75. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (emphasis added).

76. *Id.* at 77.

77. 411 U.S. 677 (1973). This case was brought to the Court under the due process clause because it involved federal statutes 37 U.S.C. §§ 401, 403 (1962) and 10 U.S.C. §§ 1072, 1076 (1956). These statutes denied the status of "dependent" to spouses of uniformed servicewomen unless it could be proven that they were in fact dependent for one half of their support. No such requirement was demanded of female spouses.

78. 411 U.S. at 682.

79. *Id.* at 686.

80. The Court stated that the demand of strict judicial scrutiny is not met by the empirical argument that wives are frequently dependent on their husbands while husbands are rarely dependent on their wives. Thus, "Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact." *Id.* at 688-89.

81. 421 U.S. 7 (1975).

82. *Id.* at 14.

83. *Id. See also* UTAH CODE ANN. § 15-2-1 (1953) (current version at UTAH CODE ANN. § 15-2-1 (1976)).

tion drawn.[84]

The 1976 decision in *Craig v. Boren*[85] has been hailed by one commentator as the first open adoption of a judicial standard of review based on intermediate scrutiny.[86] The language used in *Craig* to describe the requirement of the relationship between governmental objectives and the classifications employed to achieve those objectives was that it must be "substantially related" to serve "important governmental objectives."[87] Importantly, this is the language used in *Reed* which was decided under the rational basis standard.

Illegitimate children have also benefited from the Burger Court's solicitude. Although cases involving illegitimates have never received the most exacting scrutiny, the rational basis tests have not been "toothless."[88] *Weber v. Aetna Casualty & Surety Co.*[89] was the first case concerning illegitimate children heard by the Burger Court. The case involved a claim for a death benefit by the decedent's illegitimate children under Louisiana State workmen's compensation law. A restriction allowed the receipt of such benefits by legitimate children, but not by illegitimate children of the decedent. The Louisiana Supreme Court had held that the restriction reflected the state's interest in legitimate family relationships.[90] The Burger Court found no rational or significant relationship between the promotion of legitimate family relationships and the wrongful death statute which assigned inferior rights to illegitimate children.[91] The Court stated, "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[92]

---

84. *Stanton*, 421 U.S. at 14.

85. 429 U.S. 190 (1976).

86. TRIBE, *supra* note 28, § 16-25, at 1066.

87. *Craig*, 429 U.S. at 197.

88. Mathews v. Lucas, 427 U.S. at 510.

89. 406 U.S. 164 (1972).

90. *Id.* at 173.

91. *Id.* at 175.

92. *Id.* The Warren Court in deciding Levy v. Louisiana, 391 U.S. 68 (1968) used nearly identical language: "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . . [I]t is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the

Two later cases, *Mathews v. Lucas*[93] and *Lalli v. Lalli*,[94] found permissible classifications relating to illegitimates. *Mathews*, decided under the due process clause because it concerned federal legislation, upheld a provision in the Social Security Act[95] which required illegitimate children to prove dependency in order to receive survivors' benefits. Legitimate children were accorded a presumption of dependency.[96] The Court held that the required showing of dependency for illegitimates was a reasonable way of qualifying for this entitlement.[97] The petitioner in *Lalli* challenged a requirement that paternity be declared in a judicial proceeding some time before the father's death in order for an illegitimate child to inherit by intestacy. The Court held that the requirement was "substantially related to the important state interest of the orderly distribution of property at death."[98]

Another case, *Trimble v. Gordon*,[99] centered on a question very similar to the one presented in *Lalli*. The *Trimble* Court, however, held that the statute in question was invalid; the reasoning in the case elucidates previous and subsequent holdings regarding illegitimates.[100]

The Illinois Probate Act[101] challenged in *Trimble* allowed illegitimate children to inherit by intestate succession only from their mothers. Although the appellant in *Trimble* had been determined to be the decedent's child in a state court paternity action, she was still barred from inheriting unless her parents had subsequently married.[102] The Court, citing *Weber*, acknowledged that although the standard to be applied was that of rational basis, the scrutiny would be stricter when statutory classi-

---

harm that was done the mother." *Id.* at 72. The statute in *Levy* also had as one of its goals discouraging the birth of children out of wedlock. The Louisiana Court of Appeals did not consider illegitimate children to be persons. *Id.* at 70.

93. 427 U.S. 495 (1976).

94. 439 U.S. 259 (1978).

95. 42 U.S.C. § 16(h)(3) (1973). *See supra* note 18 and accompanying text.

96. *Mathews*, 427 U.S. at 516.

97. *Id.* at 507.

98. *Lalli*, 439 U.S. at 275-76.

99. 430 U.S. 762 (1977).

100. *Id.* at 776.

101. ILL. REV. STAT. ch. 3, § 12 (1973).

102. *Trimble*, 430 U.S. at 764-65.

fications approach sensitive and fundamental rights,[103] and, therefore, it is "not a toothless one."[104] The Court reiterated that it found illegitimacy to be analogous in many respects to the personal characteristics that have been held to be suspect, although it declined to exert its most exacting scrutiny.[105]

The statute in *Trimble*, however, was different from those in *Lalli* and *Mathews*, because it constituted what the Court viewed as an absolute bar to the illegitimate child's right to inherit; it provided no "alternative" means for the illegitimate child to further her claim.[106] The state's interest in *Trimble* was similar to Louisiana's in *Weber* — the promotion of legitimate family relationships. As in *Weber*, it was rejected as insufficient to justify a classification based on status at birth.[107]

Zobel v. Williams[108] and *United States Department of Agriculture v. Moreno*[109] are further examples of the Burger Court's distinct use of the rational basis standard.[110] The issue in *Zobel* arose from Alaska's plan for distribution of oil profits to its residents. The plan discriminated among citizens on the basis of duration of residency.[111] This statute was enacted following

---

103. *Id.* at 767.

104. *Id.* (citing *Mathews*, 427 U.S. at 510).

105. *Id.* at 707.

106. The statutes in both *Lalli* and *Mathews* did not wholly prevent the illegitimate child from receiving a benefit. In both cases the Court permitted the government to place burdens on illegitimates which were at least rationally related to legitimate governmental interests. *See generally* TRIBE, *supra* note 28, § 16-23.

The fact that the child could petition the courts on the issues of paternity and child support, but could not petition to establish her right to inherit, was found to be the constitutional defect of the Act. The same adjudication that established the paternity of the child and ordered her support "should be equally sufficient to establish . . . [her] right to claim a child's share of . . . [the] estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way. . . ." *Trimble*, 430 U.S. at 772.

107. The Court in *Trimble* held the following: "[W]e have expressly considered and rejected the argument that a state may attempt to influence the actions of men and women by imposing sanctions on the children . . . ." 430 U.S. at 769 (This was also the holding in Levy v. Louisiana, 391 U.S. 68 (1968). *See supra* note 92.).

108. 457 U.S. 55 (1982).

109. 413 U.S. 528 (1982).

110. Gunther stated in 1971 that: "The Court is prepared to use the clause as an interventionist tool without resorting to . . . strict scrutiny . . . ." Gunther, *supra* note 11, at 12.

111. The Court stated that:

> The Alaska statute does not simply make distinctions between native-born

the discovery of oil in 1967 on state-owned land in the Prudhoe Bay area of Alaska. The statute established a "Permanent Fund" into which the state must deposit at least twenty-five percent of its oil income each year.[112] Although the Court cited *Shapiro v. Thompson*,[113] in which a residency requirement for welfare benefits was invalidated on the basis of a strict scrutiny analysis, it found Alaska's scheme unacceptable at the minimum rationality level.[114]

Moreno involved the distribution of federally-sponsored food stamps which, with certain exceptions, excluded from participation any household containing an individual who was unrelated to any other member of the household.[115] Moreno, a fifty-six year old diabetic, had moved in with an indigent family in order to share common living expenses.[116] The family's allowing her to continue to live with them would have deprived them of the food stamps by reason of the statute's exclusion of non-related persons.[117]

Justice Brennan, writing for the Court, examined the legislative history of the Act to discover a legitimate governmental purpose. Justice Brennan found from the history of the exclusion that it "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[118] This purpose could not be sustained because, according to Justice Brennan, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politi-

---

Alaskans and those who migrate to Alaska from other states; it does not discriminate only against those who have recently exercised the right to travel, as did the statute involved in Shapiro v. Thompson, 394 U.S. 618 (1969). The Alaska statute also discriminates among long-time residents and even native-born residents. For example, a person born in Alaska in 1962 would have received $100 less than someone who was born in the State in 1960. Of course the native Alaskan born in 1962 would also receive $100 less than the person who moved to the State in 1960.

Zobel, 457 U.S. at 59 n.5.

112. *Zobel*, 457 U.S. at 57.

113. 394 U.S. 618 (1969). *See supra* note 59.

114. *Zobel*, 457 U.S. at 61.

115. *Moreno*, 413 U.S. at 529. *See also* The Food Stamp Act of 1964, 7 U.S.C. § 2012(e) (1964) (amended 1971, 1972, 1973).

116. *Moreno*, 413 U.S. at 538.

117. *Id.*

118. *Id.* at 534.

cally unpopular group cannot constitute a *legitimate* governmental interest."[119] Another asserted purpose, the prevention of fraud, was disposed of in a similar manner.[120] The classification was deemed imprecise and devoid of any rational basis.[121]

E. *Identifying Intermediate Review*

The "sharper focus" described by Justice Powell in *Craig v. Boren*,[122] has been described as a form of review "poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny . . . ."[123] The small sampling of cases considered above is indicative of a closer look and shows an independent determination by the Court of what are permissible classifications or interests of the government.

It is evident that in this form of review the Court places a high priority on assessing the objectives served by the challenged legislation. These objectives must be important, not compelling; the objectives of administrative convenience[124] or reduced workload in the probate courts[125] were found insufficient to sustain the use of overt gender classifications. The orderly disposition of property at death, however, did meet the Court's criteria.[126] Importance was also demanded for the interest of the individuals involved. A child's right to support from his parent[127] and his right to inherit,[128] while not fundamental, were deemed important enough to invalidate the statutory classifications which inhibited these rights.[129]

The notion of reasonableness, "having a fair and substantial relation to the object of the legislation,"[130] was present in all the above-cited gender classification cases decided under the banner

---

119. *Id.*
120. *Id.* at 537.
121. *Id.* at 538.
122. 429 U.S. at 211 n. * (Powell, J., concurring).
123. TRIBE, *supra* note 28, § 16-30, at 1082.
124. *Frontiero*, 411 U.S. at 688. *See supra* notes 77-80 and accompanying text.
125. *Reed*, 404 U.S. at 76. *See supra* notes 72-76 and accompanying text.
126. *Lalli*, 439 U.S. at 259 (1978). *See supra* note 98 and accompanying text.
127. *Stanton*, 421 U.S. at 14-15. *See supra* notes 81-84 and accompanying text.
128. *Trimble*, 430 U.S. at 772. *See supra* notes 99-107 and accompanying text.
129. *Stanton*, 421 U.S. at 17; *Trimble*, 430 U.S. at 776.
130. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

of rational scrutiny.[131] With respect to illegitimate children, any classification whose purpose was to promote *legitimate* family relations was deemed to be unfair.[132] Imposing disabilities on the illegitimates in order to condemn the irresponsible liaisons of the parents was considered illogical, unjust, and "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[133] Thus, the substantial relationship requirement demands a "closer fit" between purpose and means than is required under the minimal rationality test.[134] The Court, by utilizing this language or this test, has refrained from expanding the "suspect" classes,[135] while affording some protection to groups it considers worthy of solicitude.[136]

III. The Supreme Court's Recent Decisions Regarding the Mentally Retarded

The Supreme Court has recently decided two important cases concerning the rights of retarded individuals. The first,

---

131. *Craig*, 429 U.S. 190; *Stanton*, 421 U.S. 7; *Frontiero*, 411 U.S. 677; *Reed*, 404 U.S. 71.

132. *Trimble*, 430 U.S. at 776; *Weber*, 406 U.S. at 173.

133. *Weber*, 406 U.S. at 175.

134. TRIBE, *supra* note 28, § 16-30, at 1083. The important function of state and local governments to promote health and safety was deemed "unduly tenuous" to the regulation prohibiting the sale of beer to males in *Craig*, 429 U.S. at 202.

135. "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect." *Stanton*, 421 U.S. at 13. "[I]llegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect . . . . We nevertheless concluded that the analogy was not sufficient to require 'our most exact scrutiny.'" *Trimble*, 430 U.S. at 767 (citing Mathews v. Lucas, 427 U.S. at 505-06).

136. Gunther's examination of the 1971 term of the Supreme Court included "tentative conclusions" about what he saw and what it might portend for the equal protection doctrine. The cases examined by Gunther attest to his accuracy and may illuminate the decision in City of Cleburne v. Cleburne Living Center. Those "conclusions" were that:

> (1) The Burger Court is reluctant to expand the scope of the new equal protection, although its best established ingredients retain vitality. (2) There is mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine. (3) The Court is prepared to use the clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection. The first two themes confirm Burger Court trends observable before last term. The third theme — equal protection bite without 'strict scrutiny' — is a surprising new development that warrants special attention in the search for reasoned bases of constitutional evolution on a changing Court.

Gunther, *supra* note 11, at 12-24.

Pennhurst State School and Hospital v. Halderman,[137] involved an interpretation of the term "appropriate treatment" as it was used in the Developmentally Disabled Assistance and Bill of Rights Act.[138] At issue in the case was the "bill of rights" provision.[139] Advocates for the retarded argued that this provision created a substantial right to treatment designed to maximize developmental potential in a setting that was the "least restrictive of the person's personal liberty."[140]

The Court held that the Act was a "policy" statement with financial incentives to induce the states to provide better care and treatment for retarded individuals. The Court found no "requirement" in the Act to provide certain kinds of treatment.[141] It was, according to the Court, a "typical funding statute."[142]

In *Youngberg v. Romeo*[143] the Court considered, for the first time, the substantive due process rights of involuntarily committed mentally retarded persons.[144] The respondent, Nicholas Romeo, was a profoundly retarded thirty-three year old man with the mental capacity of an eighteen-month-old child. His IQ was

---

137. 451 U.S. 1 (1981).

138. 42 U.S.C. §§ 6000-6081 (1976 & Supp. III) (current version at 42 U.S.C.A. §§ 6000-6083 (1983 & Supp. 1985)) [hereinafter referred to as Act]. The Act is one of the federal-state grant programs whereby the federal government provides financial assistance to participating states to aid them in creating programs to care for and treat the developmentally disabled. (Retarded persons were among those defined as such when the Act was originally proposed.) Like other federal-state cooperative programs, the Act is voluntary and the states are given the choice of complying with the conditions set forth or foregoing the benefits of federal funding. *Pennhurst*, 451 U.S. at 11.

139. 42 U.S.C. § 6010 (1976 & Supp. III). The relevant parts of the Act were:

> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

Id. § 6010 (1), (2).

140. "Least restrictive setting" refers to the goal of providing services for the handicapped in the most "normal" setting. An institution is considered the most restrictive setting; a classroom in a public school for special education students is less restrictive. A handicapped person who is taught solely in classrooms where other non-special education students are taught is in the least restrictive setting.

141. *Pennhurst*, 451 U.S. at 31.

142. *Id.* at 22.

143. 457 U.S. 307 (1982).

144. *Id.* at 314.

between eight and ten; he was unable to talk and lacked the most basic of self-help skills.[145] He had been committed to Pennhurst State School and Hospital by his mother, through proper procedures, at the age of twenty-six.[146]

The Court, in an opinion delivered by Justice Powell, initially held that the mere fact that Romeo had been committed under proper procedures did not deprive him of all substantial liberty interests under the fourteenth amendment.[147] Additionally, the Court stated that Romeo had a right to safe conditions,[148] as well as freedom from bodily restraint,[149] but these interests were "not absolute" in the sense that the hospital's right to protect other residents was as strong as Romeo's rights.[150]

Romeo's assertion of a right to "minimally adequate habilitation"[151] was more troubling for the Court.[152] The Court defined minimal training as that which would be "reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints."[153]

The Court stated that the determination of what was reasonable under the circumstances was the province of qualified professionals,[154] and that the Court would not interfere with a professional judgment unless it was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[155] Finally, the Court commented that: "It may well be unreasonable not to provide training when training could significantly reduce the need for re-

145. *Id.* at 309.

146. *Id.*

147. *Id.* at 315.

148. *Id.* The state had conceded in its brief that Romeo had a right to adequate food, shelter, clothing, and medical care. *Id.* at n.17.

149. *Youngberg*, 451 U.S. at 316. Justice Powell noted that the claims to safe conditions and freedom from bodily restraint are not extinguished even when one is confined for penal purposes. *Id.* at 315-16.

150. *Id.* at 320.

151. Habilitation refers to training and development of needed skills; the range can encompass self-help skills to employment training.

152. *Youngberg*, 457 U.S. at 316.

153. *Id.* at 322.

154. *Id.*

155. *Id.* at 323.

straints or the likelihood of violence."[156]

IV. City of Cleburne v. Cleburne Living Center

A. *Facts*

In July 1980, Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC) for the operation of a group home for the mentally retarded.[157] It was anticipated that the group home would house thirteen retarded men and women who would be under the constant supervision of CLC staff members.[158] CLC planned to comply with applicable state and federal regulations.[159]

The city informed CLC that a special use permit would be required because the city had concluded that the group home should be classified as a "hospital for the insane or feeble-minded"[160] under a zoning ordinance covering the area in which the proposed home would be located.[161] After holding a public

---

156. *Id.* at 324. Justice Blackmun stated in the concurrence that habilitation should at least consist of the training necessary to *preserve* these basic self-care skills possessed upon entry to institutions, or such training necessary to keep those skills from *deteriorating*. The concurrence went on to note that "for many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know." *Id.* at 327 (Blackmun, J., concurring).

157. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3252 (1985). Hannah was the vice-president and part owner of CLC; both Hannah and CLC will be referred to as CLC.

158. *Id.* The house had four bedrooms and two baths with a half bath to be added.

159. *Id.* It was anticipated that the home would be operated as a private care facility for the mentally retarded. *Id.* at n.2.

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

161. The zoning ordinance provided that:

> The site of the home is in an area zoned 'R-3', an 'Apartment House District. . . . Section 8 of the Cleburne zoning ordinance, in pertinent part, allows the following uses in an R-3 district:
>
> '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.

hearing on CLC's application, the city council voted three to one to deny a special use permit.[162] The council members considered the following factors important in denying the permit: the attitude of a majority of owners of property located within 200 feet of the proposed home; the location of a junior high school across the street from it; concern for the fears of elderly residents of the neighborhood; the size of the home and the number of people to be housed; concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take; and the home's location on a 500-year flood plain.[163]

After exhausting administrative remedies, CLC sued for injunctive relief and damages in the United States District Court for the Northern District of Texas. They were joined in the suit by the Johnson County Association for Retarded Citizens[164] and Advocacy, Inc.[165]

B. *Procedural History*

1. *District Court*

At the district court level,[166] CLC asserted that the zoning ordinance was invalid on its face, and as applied, because it discriminated against the mentally retarded in violation of the

---

'8. Philanthropic or eleemosynary institutions, other than penal institutions.

'9. Accessory uses customarily incident to any of the above uses. . . .' (emphasis added).

Section 16 of the ordinance specifies the uses for which a special use permit is required. . . . All special use permits are limited to one year, and each applicant is required 'to obtain the signatures of the property owners within two hundred (200) feet of the property to be used.'

Id. at n.3 (citations omitted).

162. *Cleburne*, 105 S. Ct. at 3253. The city's Planning and Zoning Commission had earlier held a hearing and had also voted to deny the permit. *Id.* at n.4.

163. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984). (A 500-year flood plain means that the area is in danger of a flood once every 500 years. *Id.* at 194.)

164. *Id.* Johnson County Association for Retarded Citizens was found to lack standing to prosecute the suit. *See Id.* at 203.

165. *Id.* at 195. Advocacy, Inc. is a nonprofit corporation that provides legal services to the developmentally disabled. "CLC" will include Advocacy, Inc. when referred to herein.

166. All references to the district court action are to synopses contained in either the circuit court or Supreme Court opinion. The district court opinion is unreported.

equal protection clause.[167] After a bench trial, the district court held the zoning ordinance and its application constitutional.[168]

The district court, applying the minimum level of scrutiny applicable to equal protection claims, concluded that the zoning ordinance was rationally related to the city's legitimate interests. Those interests were identified as concern for the legal responsibility of CLC and its residents, the safety and fears of residents in the neighborhood, and the number of people to reside in the home.[169] The district court also found that the use would be permitted under the zoning ordinance but for the character of the potential residents. The court acknowledged that the city council's decision was motivated primarily by the fact that the residents of the home would be mentally retarded persons.[170]

2. *The Court of Appeals*

The Fifth Circuit Court of Appeals[171] reversed the district court, stating that "[t]he real problem with the Cleburne ordinance is that it denies equal protection both facially and as applied."[172] The court, for the first time,[173] addressed the "proper characterization of mentally retarded persons for Equal Protection analysis,"[174] and concluded that the appropriate level of analysis was intermediate review,[175] requiring that the classification serve important governmental objectives and be substantially related to the achievement of those objectives.[176]

The circuit court identified several characteristics of the retarded to support its invocation of heightened level of review.

---

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

168. *Id.*

169. *Id.*

170. *Id.* The district court also rejected CLC's other claim that the city had violated due process by improperly delegating its zoning powers to the owners of adjoining property. The court of appeals did not address this argument, and it was not raised at the Supreme Court level. *Id.* at n.5.

171. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984).

172. *Id.* at 195.

173. *Id.* at 196.

174. *Id.*

175. *Id.*

176. *Id.* Judge Goldberg, author of the opinion, relied on language in Trimble v. Gordon, 430 U.S. 762, 767 (1977), Craig v. Boren, 429 U.S. 190, 197 (1976), and L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1090 (1978), in designating his analysis as "intermediate."

While citing the indicia of suspect classes, as articulated in recent Supreme Court decisions,[177] the court found that the retarded were: (1) the victims of discrimination that was likely to reflect deep prejudice;[178] (2) had historically been subjected to unfair, often grotesque, mistreatment, often segregated in remote, stigmatizing institutions;[179] (3) lack political power;[180] and (4) have an immutable condition.[181] The court did not conclude, however, that the retarded were a full-fledged suspect class,[182] since mental retardation is a condition that *is* a relevant distinction to some legitimate state interests such as school programs

---

177. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 196-97 (5th Cir. 1984). Judge Goldberg cited San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the Court considered the traditional indicia of suspectness: "[whether] the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. He also cited Plyler v. Doe, 457 U.S. 202 (1982):

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudices is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.

Id. at 216 n.14.

Judge Goldberg finally stated that "if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection." Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984) (citing Parham v. Hughes, 441 U.S. 347, 351 (1979)).

178. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984).

179. *Id.* (stating the fact that the retarded were universally denied admittance into public schools in the United States and that they were subject to a eugenics movement whereby the retarded were sought to be eradicated entirely through euthanasia and compulsory sterilization). *See also* Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Assoc. of Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 270 (E.D. Pa. 1972) (landmark cases which outlawed the classifying of retarded children as uneducable and excluding them from public schools, respectively). Judge Goldberg noted also that once technical terms for various degrees of retardation, e.g., "idiots," "imbeciles," "morons," have become popular terms of derision. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 194 (5th Cir. 1984).

180. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 194 (5th Cir. 1984). "[A]s of 1979 most states disqualified mentally retarded individuals from voting." *Id. See generally* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979). Texas excludes "idiots" and "lunatics" from voting. TEX. CONST. art. VI, § 1; TEX. ELEC. CODE ANN. art. 5.01 (Vernon 1982).

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

182. *Id.*

or qualifications for employment.[183]

The court of appeals reiterated its conclusion that heightened scrutiny was particularly appropriate because the zoning ordinance withheld a benefit which was "important," though not fundamental;[184] the exclusion of group homes from Cleburne operated to prevent mentally retarded persons from assimilating into and contributing to society.[185] Moreover, it was held that the ordinance did not substantially further any important governmental interest; the correspondence between the relevance and the interests was not sufficiently close.[186] The ordinance would have permitted the same number of occupants if they were not mentally retarded[187] and traffic flow would not have been hampered since retarded persons neither drive nor have visitors in disproportionate numbers.[188] According to the court, the record also failed to show that the ordinance protected the serenity of the neighborhood or shielded the neighbors from harm.[189] The goal of safety from fire and other dangers was found to be similarly remote.[190] The proximity of the junior high school was seen as a minimal danger, since retarded children attended the school.[191] The court could not accept the possible hostility of the "normal students" as a substantial concern.[192] In response to the city's concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take, the court stated that the goal of insuring legal responsibility for potential actions was not sufficiently important because there had been no reason proffered why the retardates alone must prove their financial solvency to live in the neighborhood.[193] Finally, the argument that the home would be on a 500-

183. *Id.*

184. *Id.* at 199 (citing TRIBE, *supra* note 28, § 16-31, at 1089-90).

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

186. *Id.* at 200 (citing TRIBE, *supra* note 28, § 16-30, at 1083).

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

188. *Id.* at 200-01.

189. *Id.* at 201.

190. *Id.*

191. *Id.* at 202.

192. *Id.*

193. *Id.*

year flood plain was found to be "somewhat" strained.[194] In short, none of the reasons for denying the Featherston permit "substantially served an important government interest."[195] Thus, the court concluded that the application of the ordinance violated equal protection.[196]

A rehearing en banc was denied, with six judges dissenting in an opinion urging that the court reconsider the adoption of a heightened standard of review.[197]

C. *The Supreme Court*

1. *The Majority*

The Supreme Court disagreed with the court of appeals on the level of scrutiny to be applied and on the designation of the mentally retarded as a class of persons deserving a heightened scrutiny. Nevertheless, it concluded that even under the lesser, minimum level of scrutiny, the zoning ordinance was invalid as applied in this case.[198]

The majority opinion[199] began with a summary of the standards of review available to the Court under the equal protection clause, stating that the "general rule" in deciding an equal protection question was the rational basis test,[200] and further noting that wide latitude should be given the state when the legislation in question involves social or economic policies.[201] The Court stated that the general rule gives way, however, when race, alienage, or national origin is the basis of classification, or when state laws impinge on personal rights protected by the Constitution.[202] Under such conditions, legislation will be subjected to strict scrutiny, and will be sustained only if the classifications are suitably tailored to serve a compelling state

194. *Id.*
195. *Id.*
196. *Id.*
197. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *reh'g denied*, 735 F.2d 832 (5th Cir. 1984) (Garwood, J., dissenting).
198. *Cleburne*, 105 S. Ct. at 3260.
199. Justice White wrote the opinion for the Court, joined by Chief Justice Burger, and Justices Powell, Rehnquist, Stevens, and O'Connor. *Id.* at 3252.
200. *Id.* at 3254.
201. *Id.*
202. *Id.* at 3255.

interest.[203]

A heightened standard of review[204] was acknowledged by the majority as proper for legislation involving gender-based classifications because such classifications "very likely reflect out-moded notions."[205] The test for this standard was identified as requiring that the classification bear a substantial relationship to a legitimate state interest.[206]

Citing *Massachusetts Board of Retirement v. Murgia*,[207] the majority crystalized the posture it would take regarding the retarded when it compared them to the aged,[208] a class to which the Court has declined to apply the standard of heightened review.[209] The majority then stated that the lesson of *Murgia* was that:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has authority to implement, 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. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.[210]

With this "lesson" as background, the majority concluded "for several reasons that the court of appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation."[211]

The majority next listed what it considered "distinguishing characteristics," to wit: those who are mentally retarded have a reduced ability to cope with and function in the everyday world;[212] and the range within the class itself[213] varies from those

---

203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. 427 U.S. 307 (1976).
208. *Cleburne*, 105 S. Ct. at 3255.
209. *Id.*
210. *Id.*
211. *Id.* at 3255-56.
212. *Id.* at 3256.
213. The Court explained that:

whose disability is not immediately evident to those for whom there must be constant care.[214] The state's interests in providing for the range of disabilities among the group — from perhaps total residential care to educational programming within a public school — were deemed legitimate by the Court.[215]

As "[h]eightened scrutiny inevitably involves substantive judgments,"[216] the majority concluded that such substantive judgments should be made by legislators as guided by qualified professionals.[217] The Court further postured that the "ill-informed opinions" of the judiciary were inappropriate when the classification dealt with mental retardation.[218]

A second reason advanced by the majority for declining to implement heightened scrutiny was "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded . . . ."[219] The Court stated that this "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[220] In support of this position the Court cited the Developmental Disabilities Assistance and Bill of Rights Act[221] and the Education of the Handi-

---

> Mentally retarded individuals fall into four distinct categories. The vast majority — approximately 89% — are classified as 'mildly' retarded, meaning that their IQ is between 50 and 70. Approximately 6% percent [sic] are 'moderately' retarded, with IQs between 35 and 50. The remaining two categories are 'severe' (IQs of 20 to 35) and 'profound' (IQs below 20). These last two categories together account for about 5% of the mentally retarded population . . . .
>
> Mental retardation is not defined by reference to intelligence or IQ alone, however. The American Association on Mental Deficiency (AAMD) has defined mental retardation as 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.' . . . 'Deficits in adaptive behavior' are limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group. . . . Mental retardation is caused by a variety of factors, some genetic, some environmental, and some unknown . . . .

Id. at n.9 (citations omitted).

214. *Id.* at 3256.

215. *Id.*

216. *Id.*

217. *Id.* This "professional judgment" is the same standard iterated in Youngberg v. Romeo, 457 U.S. 307, 321 (1982). This standard is discussed in Part III.

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

219. *Id.*

220. *Id.*

221. 42 U.S.C. §§ 6010 (1), (2). The substance of this act was the issue in

capped Act.[222] The former, according to the Court, has provided the retarded with the right to receive appropriate treatment, services and habilitation in a setting that is least restrictive of their personal liberty.[223] The latter conditioned federal funds on the state's assurance that "retarded children will enjoy an education that, 'to the maximum extent appropriate,' is integrated with that of non-mentally retarded children."[224] The majority concluded that such legislation "occurred and survived with public support . . . [which] negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the law makers."[225]

The majority next gave its reasons for declining to set out on the course of deeming the retarded quasi-suspect.[226] The Court reasoned that if it were done for the retarded "it would be difficult to find a principled way to distinguish a variety of other groups . . . 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."[227] The Court gave as examples of such other groups the aging, the disabled, the mentally ill and the infirm.[228]

The majority went on to state that regardless of its failure to designate the retarded as a quasi-suspect class, the retarded "have and retain their substantive constitutional rights,"[229] including the right to equal protection.[230] *Zobel v. Williams*[231] and *United States Department of Agriculture v. Moreno*[232] (cases in which the rational basis standard was sufficient to invalidate the questioned legislation) were cited as support for the assertion that rational basis review afforded adequate protection for the

---

Youngberg, 457 U.S. 307 (1982).

222. 20 U.S.C.A. §§ 1400-1461 (1970) (current version at 20 U.S.C.A. §§ 1400-1454 (1982 & Supp. 1985)).

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

224. *Id.* (quoting 20 U.S.C. § 1412(5)(B) (1970)).

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

226. *Id.* at 3258.

227. *Id.* at 3257-58.

228. *Id.* at 3258.

229. *Id.*

230. *Id.*

231. 457 U.S. 55 (1982).

232. 413 U.S. 528 (1973).

retarded.[233] "This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner."[234]

The Court next considered the issue of the validity of the zoning ordinance insofar as it required a special use permit for homes for the mentally retarded.[235] The Court stated that the preferred course of adjudication under an equal protection analysis is to inquire into the application of the law. When a decision can be made on this narrower basis, the Court can avoid the unnecessarily broad constitutional judgment of facial invalidity.[236] Acknowledging that there were "differences" presented by mentally retarded individuals, the Court stated that those differences are "irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not."[237] Finding no evidence in the record to support such a threat by the presence of retarded individuals, the Court held that the ordinance was invalid as applied.[238]

The Court then examined the reasons given by the city at the district court level to support its denial of the permit. Singling out what the city had characterized as "negative attitude of the majority of the property owners located within 200 feet of the Featherston facility,"[239] the Court stated "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for

---

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

234. *Id.*

235. *Id.*

236. *Id.* A finding that an ordinance is *facially* invalid means that by its language alone it violates equal protection. This is distinct from a finding of invalidity *as applied* to the particular circumstances. A *facially* invalid statute (or law or ordinance) is declared unconstitutional *in toto*; it must be replaced or removed entirely from its context. A statute (or a section of one) found to be a violation of equal protection *as applied* may remain intact, but it may not be applied under the circumstances or against the group that a court has held to be offensive to the Constitution. *See generally* Tussman & tenBroek, *supra* note 9.

237. *Cleburne*, 105 S. Ct. at 3259. *See supra* note 161 for a list of the uses permitted in this zone.

238. *Id.*

239. *Id.*

treating a home for the mentally retarded differently . . . ."[240] The Court went on to say "it is plain that the electorate as a whole . . . could not order city action violative of the Equal Protection Clause . . . and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."[241] In finally disposing of this concern the Court quoted its language in *Palmore v. Sidoti*:[242] "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[243]

The majority also disposed of the question regarding the home's location. The proximity of the home across from a junior high school and the feared harassment from students was an example of "vague, undifferentiated fears . . . again permitting some portion of the community to validate what would otherwise be an equal protection violation."[244] The Court reacted similarly to the location of the home on a flood plain. The presence of nursing homes or homes for convalescents was seen as presenting hazards of equal importance; these uses, however, required no special use permit.[245] The concerns for legal responsibility for the residents and the number of persons occupying the home were also found to be groundless.[246]

The majority elucidated its conclusions stating "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[247]

---

240. *Id.*

241. *Id.* (citations omitted).

242. 104 S. Ct. 1879 (1984). This case involved a custody dispute between the parents of a minor child. The mother, who was Caucasian, was divorced from the father but had retained custody of the child. She subsequently married a black man. The father brought the action to recover custody, asserting that the mother's interracial marriage was unacceptable to him *and to society*. The Court found that such a bias was not sufficient grounds for removal of the child from her natural mother. *Id.* at 1882 (emphasis in original).

243. *Id.* at 1882.

244. *Cleburne*, 105 S. Ct. at 3259.

245. *Id.*

246. *Id.*

247. *Id.* at 3260.

2. *Concurring Opinion of Justice Stevens*

Justice Stevens limited his concurring opinion to a discussion of the character of judicial review under the equal protection clause; he was joined in this opinion by Chief Justice Burger.[248]

Justice Stevens began by addressing the court of appeals' discussion of the standards of review, specifically its delineation of three standards.[249] The Justice stated that: "The Court of Appeals disposed of this case as if a critical question to be decided were which of the three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded."[250] According to Justice Stevens, the "cases have not delineated three — or even one or two — such well defined standards. Rather our 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."[251] In Justice Stevens' view, these "so called" standards do not explain the decisional process.[252]

Justice Stevens stated that the tiered analysis of equal protection[253] "does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[254] In discussing the rational basis test, Justice Stevens commented that, to him, the word rational "includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."[255] Justice Stevens stated that the rational basis test, properly understood, would invalidate most racial

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

249. *Id.* at 3260-61.

250. *Id.* at 3260. Justice Stevens identified these as "rationally related to a legitimate state interest," "somewhat heightened review," and "strict scrutiny." *Id.* at n.1.

251. *Id.* at 3260-61.

252. *Id.* at 3261.

253. *Id.* Justice Stevens is referring to the "two-tiered" approach of either strict scrutiny or rational basis which was prominent during the Warren era. *See supra* note 38 and accompanying text. *See generally* Gunther, *supra* note 11.

254. *Cleburne*, 105 S. Ct. at 3261 (Stevens, J., concurring) (quoting his own concurring opinion in Craig v. Boren, 429 U.S. 190, 212 (1976)).

255. *Cleburne*, 105 S. Ct. at 3261.

classifications and validate most economic classifications.[256] Accordingly, that test would produce differing results when questions regarding alienage, gender, or illegitimacy were considered "because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve."[257]

Justice Stevens characterized the discrimination against the mentally retarded in the case at bar as the result of irrational fears of neighboring property owners.[258] However, he did not believe that every law which places the retarded in a special class should be presumptively irrational.[259] Justice Stevens, therefore, concurred in the majority's decision which was reached on a rational basis test without a designation of suspect or quasi-suspect for the retarded as a class.

3. *The Dissent/Concurrence*

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the result of the decision, but dissented because he could not agree with the way in which the Court reached its result.[260] Justice Marshall described the Court's invalidation of the zoning ordinance as it applied to the retarded in this case as a "novel and truncated remedy,"[261] because it was not invalidated on its face.[262] Justice Marshall could not accept the Court's disclaimer that it did not engage in a more exacting standard than an ordinary rational basis review.[263]

On the question of the type of review utilized by the majority, Justice Marshall stated, "To be sure, the Court does not label its handiwork heightened scrutiny . . . . But however labeled, the rational basis test invoked today is most assuredly not the rational basis test" previously articulated by the Court.[264]

---

256. *Id.* at 3262.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 3263 (Marshall, J., concurring in part, dissenting in part).
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 3264 (citations omitted).

According to Justice Marshall, the Court had refused to acknowledge that something more than minimal rationality was at work, and this refusal would produce two unfortunate effects.[265] First, "[t]he suggestion that the traditional rational basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational basis review . . . ."[266] Second, by failing to articulate the factors that justify the rational basis review applied, "the Court provides no principled foundation for determining when more searching inquiry is to be invoked."[267] These two effects, Justice Marshall believed, would leave lower courts in the dark as to what standard to apply in equal protection decisions, and makes the Supreme Court "unaccountable" for its decisions to employ or not to employ certain levels of scrutiny.[268]

Justice Marshall went on to delineate the particular factors which justified the invalidation of the zoning ordinance. First, Marshall termed the right to "establish a home" as one of the "fundamental liberties embraced by the Due Process Clause."[269] Furthermore, for the retarded, these homes have become the "primary means" by which they can enter life in the community,[270] and therefore, excluding group homes deprived the retarded of much of what constitutes "human freedom and fulfillment — the ability to form bonds and take part in the life of a community."[271]

Second, Justice Marshall found that the mentally retarded have been subject to a " 'lengthy and tragic history,' . . . of segregation and discrimination that can only be called grotesque."[272] Marshall termed their history as one whose "virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim

265. *Id.* at 3265.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 3266 (citations omitted).
270. *Id.*
271. *Id.*
272. *Id.* (citation omitted). Justice Marshall described the history as including a regime of state-mandated segregation and degredation to which the retarded were subjected in the early 20th century because they were thought of as a menace to society and responsible for many of our social problems. *Id.*

Crow."[273]

It was this combination of the importance of establishing a home and the history of discrimination that caused Marshall to call for invocation of a "searching scrutiny"[274] — one which would seek substantial and important relationships between legislation and classifications.

Justice Marshall's final criticism concerned the substance of the Court's equal protection analysis.[275] He characterized the Court's analysis as placing the formal label of review above the careful identification of the interests at stake.[276] Marshall stated that because the Court focused obsessively on the appropriate label to give its standard of review, it ignored the principle that "classifications based on mental retardation must be carefully examined to assure that they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need."[277]

Justice Marshall felt that the rational basis test used in this case was potentially dangerous for two reasons.[278] First, the as-applied remedy was too narrow because it left the statute intact;[279] Justice Marshall felt that such an ordinance could only be based on invidious discrimination against the retarded, and therefore should be completely stricken.[280]

Second, invocation of the rational basis standard left the retarded to "run the gauntlet." Since future legislation would benefit from a presumption of constitutionality, the retarded would still bear the full burden of proving that legislation containing classifications based on mental retardation is irrational. Marshall would have affirmed the court of appeals' decision in all respects.[281]

---

273. *Id.* "Jim Crow" refers to the period of history in which "separate but equal" was the law regarding a Negro's place in society. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

274. *Cleburne*, 105 S. Ct. at 3267-68.

275. *Id.* at 3272-73.

276. *Id.* at 3275.

277. *Id.*

278. *Id.*

279. *Id. See supra* note 236.

280. *Cleburne*, 105 S. Ct. at 3275.

281. *Id.*

V. Analysis

A. *Principles of Evaluation*

The analysis of any Supreme Court case is essentially a search for the principles and values expressed by the Court which should transcend the immediate result. The crucial inquiry is not so much the nature of the question, but rather, the nature of the answer.[282]

An examination of the reasoning in *City of Cleburne v. Cleburne Living Center* reveals an inherent ambivalence. While the Court stated that it will presume the constitutionality of any given legislative action which draws a distinction for retarded individuals,[283] it concluded that requiring a permit for the Featherston home was an action which could not be rationally justified.[284] Thus, the presumption of constitutionality advocated by the Court was weakened in its first application.

This was the first time an equal protection challenge relating to the retarded was before the Court. Therefore, it was incumbent upon the Court to provide a careful analysis of the characteristics of the retarded. The Court found the retarded to have distinguishing characteristics relevant to legitimate state interests.[285] Therefore, the Court reasoned, the judiciary should be very reluctant to scrutinize legislative choices.[286] The Court doubted that there was a predicate for judicial oversight where the classification dealt with mental retardation.[287] This conclusion was also an expression of the Court's unwillingness to expand the group of quasi-suspect classes.[288]

The Court's preference for judicial restraint is truly an abdication of its proper role in protecting the retarded. An examination of the characterisitics of the retarded reveals that they resemble the classes deemed suspect more than those designated as quasi suspect. Furthermore, virtually all the legislative re-

---

282. H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

283. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3258 (1985).

284. *Id.* at 3260.

285. *Id.* at 3255.

286. *Id.*

287. *Id.* at 3256.

288. *Id.* at 3257-58.

forms benefitting the retarded have been the *result* of judicial action.[289] Thus, the Court's role has already been defined.

B. *The Mentally Retarded as a Class*

The seminal description of the conditions under which the Court will extend strict scrutiny to a group or class of individuals is contained in *United States v. Carolene Products Co.*.[290] *Carolene Products* described those groups which would receive special consideration as "discrete and insular"[291] — because those two conditions "tend to curtail the operations of the political processes ordinarily relied upon to protect minorities."[292] Such groups are designated as "suspect," and legislation affecting such groups is subjected to the most rigid scrutiny, and therefore, is upheld only if it is based on a public necessity.[293] Over the years other factors have been added by the Court to indicate "suspectness." The class may be saddled with such disabilities,[294] or subjected to such purposeful unequal treatment,[295] or relegated to such a position of political powerlessness that it will command extraordinary protection from the Court.[296] If the Court believes that a classification is based on a condition that is "immutable," determined solely by accident of birth,[297] it may invoke strict scrutiny.[298] As each of these charateristics is applied to the retarded, a profile of "suspectness" emerges.

When political processes are at issue, the class of mentally retarded persons must qualify as politically powerless per se. The retarded are almost universally disenfranchised;[299] they do

---

289. S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 4, 39-40 (1983).

290. 304 U.S. 144, 152 n.4 (1938). *See supra* note 48.

291. *Carolene Prods.*, 304 U.S. at 152 n.4.

292. *Id. See supra* note 50.

293. *See supra* note 50 and accompanying text.

294. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). These characteristics were deemed the "traditional indicia of suspectness." *Id. See supra* note 188.

295. *Rodriguez*, 411 U.S. at 28.

296. *Id.*

297. Frontiero v. Richardson, 411 U.S. 677, 686 (1973). Justice Brennan added this in his effort to add women to the group of "suspect" classes. *See supra* text accompanying note 69.

298. *Frontiero*, 411 U.S. at 688.

299. *See supra* note 180.

not and indeed, cannot vote. Therefore, the political processes can never be expected to provide protection. The fact that it took until 1970 for Congress to enact the Education for All Handicapped Children Act,[300] speaks most eloquently for the absence of political power of the retarded. As recently as 1974, the United States Office of Education estimated that 1.75 million handicapped children were entirely excluded from schooling.[301] Any progress made on behalf of retarded individuals is solely the result of the work or the votes of others; the retarded are and will be inherently dependent on others to make the political processes work in their favor.

The class of mentally retarded individuals is also, by definition, saddled with disabilities.[302] Because of these disabilities, the retarded have been subjected to purposeful unequal treatment. The legacy of this treatment has not been simply unequal; it has been dismal.[303] The Supreme Court dealt indirectly with this subject when it considered *Pennhurst State School and Hospital v. Halderman*.[304] The Supreme Court quoted the "undisputed findings of fact"[305] regarding conditions at one state institution: "[C]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded."[306] The Court also found that the physical, intellectual, and emotional skills of some residents had deteriorated.[307]

This "treatment" then, can be called more than unequal; in-

---

300. 20 U.S.C.A. §§ 1400-1461 (1970) (current version at 20 U.S.C.A. §§ 1400-1454 (1983 & Supp. 1985)).

301. HERR, *supra* note 289, at 3.

302. *See supra* note 226.

303. HERR, *supra* note 289, at 9-29. Herr chronicled the treatment of the retarded from the English roots when the King gained custody of the lands of "natural fools." Colonial laws were shaped by the general patterns set by England; retardates were excluded whenever possible and regimented whenever necessary. The "Age of Asylums" followed in the 19th century. The retarded were also the object of a eugenics movement, which sought to sterilize them and even advocated euthanasia. A case involving a state law compelling eugenic sterilization was upheld by the Supreme Court. In Buck v. Bell, 274 U.S. 200 (1927), Justice Holmes stated that "three generations of imbeciles are enough." *Id.* at 207.

304. 451 U.S. 1 (1981). *See supra* Part III.

305. *Pennhurst*, 451 U.S. at 7.

306. *Id.*

307. *Id.*

stitutions such as Pennhurst contribute to the disabilities. The purpose for the establishment of group homes such as the one at issue in *Cleburne* is to remove the retarded from such institutions.

The condition of retardation is also "immutable" and determined solely by accident of birth. When this was added to the indicia of suspectness, the Court applied it to the gender classifications as it discriminated against women.[308] While the gender charateristic is as immutable as retardation, the experiences of women and the retarded are too diverse to be compared. Further, although alienage has been designated as suspect, this is a condition that is removed by going through the process of becoming a citizen.

Clearly, the retarded possess the characteristics that have been described as requiring a "more exacting judicial scrutiny."[309] However, the majority in *Cleburne* relied on what it termed the "lesson of *Murgia*"[310] which proclaimed that age, like retardation, is relevant to those interests the state has the authority to implement.[311] The analogy to the aged is apt only insofar as it applies to legislative interests. The aged have extraordinary control through their right to vote compared to the retarded who possess none. The disabilities of the aged are also predictable and universal in contrast to the permanent disadvantages of the retarded.

The two categories which the majority cited for heightened review[312] — classifications based on gender or illegitimacy — are less similar to the retarded than those designated as suspect. The two groups protected by the heightened scrutiny — women and illegitimate children — do not suffer from political powerlessness in the sense of the retarded. Women also have the important advantage of comprising more than half of the population — the converse of a "discrete and insular minority."[313] Neither women nor illegitimates have been confined to institutions or deprived of public education as a result of their

308. *Frontiero*, 411 U.S. at 686.
309. *Carolene Prods.*, 304 U.S. at 152 n.4.
310. *Cleburne*, 105 S. Ct. at 3255. *See* text accompanying note 210.
311. *Cleburne*, 105 S. Ct. at 3255.
312. *Id.*
313. *Carolene Prods.*, 304 U.S. at 144 n.4.

characteristics.

Nevertheless, if the retarded cannot command the most rigid scrutiny despite their similarity to the suspect classes, it must be concluded that they deserve a heightened, more searching scrutiny. The interest in a home in the community was termed "a fundamental liberty"[314] by Justice Marshall. Such an important interest, along with characteristics which bear enough resemblance to minorities to warrant more than a casual judicial response are two touchstones of the so-called intermediate review.[315] The fact that some of the distinctions involving illegitimates were relevant to legislative purposes[316] did not deprive them of this enhanced scrutiny.[317] A "legitimate" state interest cannot be used as an excuse for the Court to exercise restraint when the retarded are before the Court as a last resort — the legislative process has already failed them.

C. *The Judicial Role*

The Court stated that the "large and diversified group" of retarded individuals should be guided by legislators and qualified professionals rather than "the ill-informed opinions of the judiciary."[318] One does not have to be "informed," however, to make a judgment on the conditions described at Pennhurst School.[319] The terms, "dangerous," "physically abused," and "inadequate for the retarded" do not require professional interpretation for clear understanding.

Two important cases illustrate that the judiciary has a vital role to play on behalf of the retarded despite the fact that the legislature may be the preferred forum for implementing policy on the retarded. *Wyatt v. Stickney*,[320] the first class action suit

---

314. *Cleburne*, 105 S. Ct. at 3266.

315. TRIBE, *supra* note 28, § 16-30, at 1082.

316. In Lalli v. Lalli, 439 U.S. 259 (1978), the purpose of orderly disposition of property at death was sufficient to uphold a restriction; in Mathews v. Lucas, 427 U.S. 495 (1976), a requirement that an illegitimate child prove dependency in contrast to the legitimate child whose dependency, for benefits under the Social Security Act was presumed, was also upheld.

317. Trimble v. Gordon, 430 U.S. 762, 767 (1977).

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

319. *See Pennhurst*, 451 U.S. at 7.

320. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

on the right to treatment for retarded individuals, questioned the very legitimacy of state institutions in future programming for the retarded.[321] The suit in *Wyatt* was brought on behalf of residents of three Alabama institutions for the mentally disabled. The *Wyatt* court held that mentally retarded persons possess "an inviolable constitutional right to habilitation."[322] Furthermore, the court found that applicable legal principles "[c]lear beyond cavil" require that people involuntarily committed through non-criminal procedures to institutions for the mentally retarded have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society.[323] Even more importantly, the facts unearthed in *Wyatt* provoked a national examination of the role of institutions and the services required to free retarded people for community living.[324]

The real breakthrough in *Wyatt* was that it demonstrated that the right to habilitation posed a judicially manageable dispute. The *Wyatt* court had framed minimum standards, and thus avoided the pitfalls of case by case adjudication — an impractical task for a plaintiff class with over 8000 members.[325]

The second case, *New York State Association for Retarded Children v. Rockefeller*,[326] (the "Willowbrook" case), produced plans to dismantle the Willowbrook Developmental Center.[327] The judgment in the case produced relief in two stages. First, the court ordered certain steps to *prevent* further deterioration and harm to residents: a total prohibition on seclusion, sharp increases in ward attendants, recreation therapists, nurses, physicians and physical therapists; second, the court required periodic reports on implementing health, safety, and care mea-

---

321. HERR, *supra* note 289, at 124.

322. *Wyatt*, 344 F. Supp. at 390.

323. *Id.*

324. HERR, *supra* note 289, at 124.

325. *Id.* at 125.

326. 357 F. Supp. 752 (E.D.N.Y. 1973), *judgment approved sub nom.* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

327. At the time this suit was filed, Willowbrook State School was the world's largest retardation institution, housing 5209 residents — "a desperately overcrowded, antitherapeutic environment." HERR, *supra* note 289, at 132.

sures.[328] Ultimately, the case produced a consent order[329] by which the state of New York agreed to reduce, in phases, the institutionalized population at Willowbrook and to furnish residents with habilitation services to prepare them for living in new homes outside the institutions.[330] In an opinion approving the consent decree the court explained that protection from harm necessitates extensive relief because such harm results "not only from neglect but from conditions which cause regression or which prevent development of an individual's capabilities."[331]

These two cases clearly show an appropiate judicial role. There is no virtue in judicial self-restraint when legislatures have *failed* to assume responsibility for the retarded.[332] Reform followed judicial action when the judiciary in these two cases recognized that the processes ordinarily relied upon had not worked. This is precisely the role the Court should assume to protect those outside the political processes, as the retarded are. The Court's failure here to treat the retarded as suspect, or at least quasi suspect, is a failure of judicial confidence in its unique role within our three-branch system of government.

The Court's statement that the "relevant inquiry . . . is whether heightened scrutiny is constitutionally mandated in the first instance"[333] is followed by a caution that requiring a substantial relationship, or merely requiring the legislature to justify its efforts "may lead it to refrain from acting at all."[334] This posture toward the legislature was strengthened by the Court's pronouncement that it doubted that "the predicate for such judicial oversight is present where the classification deals with mental retardation."[335] By this statement, the Court seemed to proscribe any role for itself. Its deference to legislative and pro-

328. *Rockfeller*, 357 F. Supp. at 768-69.

329. *See supra* note 326.

330. HERR, *supra* note 289, at 132.

331. New York State Ass'n For Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 718 (E.D.N.Y. 1975). Spurred by the Willowbrook decree and subsequent advocacy pressure, New York has placed approximately 3000 persons with profound and severe developmental disabilities in community residential settings. HERR, *supra* note 289, at 41.

332. *See generally* HERR, *supra* note 289, at 107-59 for an extensive review of progress from litigation.

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

334. *Id.*

335. *Id.* at 3256.

fessional judgments, rather than the "ill-informed opinions of the judiciary,"[336] echoes the attitude toward the retarded expressed in *Youngberg v. Romeo*.[337] Professional judgment there produced conditions which were undisputedly found to be "dangerous," "inadequate," and rife with physical abuse.[338]

As neither professional judgment nor legislative interest modified these conditions, judicial oversight must. Intervention in these situations is the proper role for the Court. It must act when the ordinary processes relied upon have failed. The legacy of the retarded and the persistence of dangerous, physically abusive conditions such as those identified in *Pennhurst* demand more from the Court. The *Cleburne* decision offers the retarded only a momentary victory. Local governments remain free from judicial intervention but legislation runs the risk of invalidation under an unpredictable invocation of a rational basis test.

VI. Conclusion

In *City of Cleburne v. Cleburne Living Center*,[339] the Supreme Court, for the first time, considered the status of mentally retarded individuals under the equal protection clause. *Cleburne* emphasized what the Court thought the judicial role should be in any equal protection question, rather than dealing with the characteristics of the retarded or the importance of the issue presented. Under the banner of judicial restraint, the Court surrendered its responsibility to legislators and professionals. Despite this, the Court struck down the ordinance as it applied to the facts of this case. The Court's failure to adopt even a heightened level of scrutiny leaves the retarded without protection except from irrational prejudice; and it allows legislatures to promulgate laws without concern for substantially relating them to legitimate interests. The paradoxical character of the decision lies in the assurance of restraint toward legislatures, coupled with the intervention of the Court. Such a process of decisionmaking gives no protection to the retarded and no guidance to

336. *Id.*

337. 457 U.S. 307, 322-23 (1982).

338. *Pennhurst*, 451 U.S. at 7. The institution involved in *Romeo* was the same one involved in *Pennhurst*.

339. 105 S. Ct. 3249 (1985).

law-making bodies. The Court has belittled its own role and, consequently, the value of this decision.

Elizabeth T. Sharpe