Denver Law Review

Volume 63 | Issue 4 Article 3

February 2021

# The City of Cleburne v. Cleburne Living Center and the Supreme Court: Two Minorities Move toward Acceptance

Charles T. Passaglia

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Charles T. Passaglia, The City of Cleburne v. Cleburne Living Center and the Supreme Court: Two Minorities Move toward Acceptance, 63 Denv. U. L. Rev. 697 (1986).

This Note is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

# *The City Of Cleburne v. Cleburne Living Center* and The Supreme Court: Two Minorities Move Toward Acceptance

## I. Introduction

The plight of this nation's mentally retarded citizens was brought to the fore recently by the United States Supreme Court in the case of *City of Cleburne v. Cleburne Living Center.*[1] On its face, *Cleburne* is simply the Court's affirmation of a renewed societal awareness of one of the forgotten minorities in the United States, and the next logical step in a judicial process which guarantees that this group will have an adequate and fair opportunity to assimilate into the mainstream of our culture.[2] However, the case indicates a noticeable shift in the undercurrent of judicial interpretation practiced by the Burger court. More specifically, the traditional method of judicial review is perhaps being supplanted by a newer model of equal protection analysis.

This Comment will highlight the growing dissatisfaction with the inconsistency and rigidity of the traditional standard of review, and will probe the *Cleburne* decision in order to gain valuable insight into both the direction of the Court and the future of the equal protection doctrine. Particular attention will be focused on the concurring opinion of Justice Stevens, an individual who shows increasing signs of leadership on a Court which lacks direction.

## II. The Equal Protection Doctrine — An Overview

### A. *Historical Background*

*Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.*

Aristotle[3]

To say that equal protection has undergone a significant metamorphosis in the course of the Twentieth Century would certainly be an understatement. From its humble origins in the fourteenth amendment,[4] as the most deferential form of judicial scrutiny[5] focusing merely

1. 105 S. Ct. 3249 (1985).

2. Professionals within the area of mental retardation have developed the concept of "normalization" to define the goal and process of helping retarded citizens lead a "normal" life. Achievement of this goal involves undoing the multitude of formal restrictions placed on retarded citizens, such as, restrictions on residence, education, and the right to marry. *See* Chambers, *The Principle of the Least Restrictive Alternative: The Constitutional Issues*, in The President's Committee On Mental Retardation, The Mentally Retarded Citizen And The Law 486-487 (1976).

3. Aristotle, Ethica Eudemia VII § 1241(b) (W. Ross ed. 1925).

4. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

5. Justice Holmes noted that equal protection was "the usual last resort of constitutional arguments . . . . " Buck v. Bell, 274 U.S. 200, 208 (1927).

on legislative means,[6] the equal protection clause was transformed during the Warren era and particularly in the political and intellectual explosiveness of the 1960's. Equal protection literally became a symbol for combatting unjust governmental classifications of persons. While the Supreme Court did not dispose of the minimal standard of review, it developed a much stronger level of scrutiny to delve into the social inequalities that plagued the American culture, most notably, racial discrimination.[7] Additionally, the advent of "new" equal protection required a closer relationship between the legislative classification and its purpose — careful scrutiny of the goals of the particular legislation.[8]

"New" equal protection, strict scrutiny under the Warren Court, developed into strands. First, strict scrutiny would be appropriate where a legislative classification burdened "a fundamental right or interest."[9] Second, a more intensive review was applied where the presence of a "suspect classification" necessitated intervention into inequities in governmental categorization of a group of persons.[10]

Although the legacy of "new" equal protection under the Warren Court passed to its successor, the Burger Court has been reluctant to adopt the spirit of hope and anticipation which permeated the Warren Court. In fact, the Burger Court has taken a "thus far and no further" stance with regard to equal protection.[11] Although the Supreme Court still adheres to the traditional model, it has not been as loyal to the bifurcated system as it may have envisioned. For instance, the Court today utilizes a three-tiered approach, having inserted a middle tier of heightened or intermediate scrutiny.[12] This intermediate level of scrutiny has

6. G. GUNTHER, CONSTITUTIONAL LAW 670 (10th ed. 1980). Professor Gunther cites Railway Express Agency v. New York, 336 U.S. 106 (1949) (Jackson, J., concurring) ("[I]nvocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact."), as indicative of the fact that "old" equal protection emphasized only the rationality of classifications, not the objectives of the legislature.

7. Thus the Warren Court adhered to a rigid "two-tiered" model of review: the "older" rational basis test, or deferential standard of review; and strict scrutiny, the aggressive brand of review. Borrowing a phrase from Professor Gunther, strict scrutiny was " 'strict' in theory and fatal in fact; whereas old equal protection used " 'minimal' scrutiny in theory and virtually none in fact." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

8. GUNTHER, *supra* note 6, at 671.

9. Fundamental rights or interests protected by the Court include: Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (the political franchise of voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (freedom of interstate migration); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Douglas v. California, 372 U.S. 353 (1963) (the right to criminal appeals).

10. Suspect classifications triggering strict scrutiny are limited to race, Loving v. Virginia, 388 U.S. 1 (1967); ancestry or national origin, Korematsu v. United States, 323 U.S. 214 (1944); and alienage, Graham v. Richardson, 403 U.S. 365 (1971) (resident aliens could not be denied welfare benefits). One should note however that the Court's scrutinization of alienage classifications has wavered in recent years, especially where governmental functions are involved. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978).

11. GUNTHER, *supra* note 6, at 672.

12. Of critical importance in this commentary are the limitations imposed on the equal protection clause by the Burger Court. Therefore, it may be prudent to identify the adjectival phraseology which distinguishes the three levels of scrutiny. Strict scrutiny is the most intense level of review, requiring that a classification be necessary to achieve a

clearly affected classifications based upon gender,[13] alienage,[14] and illegitimacy.[15]

Another significant change under the Burger Court is a new perspective on the "old" equal protection standard. Where social and economic legislation had been perfunctorily sustained under "old" equal protection, the Burger Court has been increasingly willing to invalidate legislation using the supposedly deferential rational basis test, in what has been termed new "bite" for the "traditionally toothless minimal scrutiny standard."[16]

Therefore, equal protection clearly is no longer "a last resort of constitutional arguments," but has developed into a concept overshadowing the express language of the fourteenth amendment. Therein lies the source of the doctrinal confusion which pervades the Court's equal protection analysis. The Supreme Court, in essence, created an ideal which may be reflected only in specific instances before the Court. Thus, the Burger Court is left to examine each problem confronting a disadvantaged class on a case by case method.

B. *Growing Discontent With the Present Status of Equal Protection*

While the Warren Court ushered in a new age of equal protection analysis, the transition was not completely welcomed into the arms of jurisprudential thought. True, the emergence of the intermediate level of scrutiny seemed to pacify some critics of the bifurcated model; however, the result of the middle tier of review has been merely to create an interventionist tool for making so-called "just" decisions without extending the analysis beyond the importance of the personal interest or the value of the legislative end.[17] Therefore, equal protection has come under attack from various groups and, as a result, has led to further factionalization on the Court and a corresponding reduction in deliberation.[18]

Justice Marshall figures most prominently in the mounting dissatisfaction with the multi-tiered system of review. In a series of dissenting opinions beginning in 1970,[19] Justice Marshall has called for a reexami-

---

compelling governmental interest. Dunn v. Blumstein, 405 U.S. 330, 342 (1972). Middle-level scrutiny demands that the means chosen by the state must be substantially related to achievement of an important governmental objective or end. Craig v. Boren, 429 U.S. 190, 197 (1976). Finally, the rational basis test is the most deferential and relaxed standard, whereby the Court will uphold any classification rationally related to an articulated legitimate state interest. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

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

14. *See* Plyler v. Doe, 457 U.S. 202 (1982) (illegal aliens).

15. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

16. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972). *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

17. Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MO. L. REV. 587, 616 (1983).

18. *Id.* at 615.

19. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Mar-

nation of the Warren Court model, with its Burger Court modifications,[20] and reformulation of an appropriate method of review. He has suggested a "sliding scale" analysis, whereby the level of scrutiny would be adjusted along a multifactored spectrum depending on the invidiousness of the governmental classification, the "relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive," and the strength of the interests asserted by the state in defense of the classification.[21] In *Chicago Police Department v. Mosley*,[22] Justice Marshall proposed a single standard which consolidated the tiers of review into one question appropriate in all equal protection cases; that is, is there "an appropriate governmental interest suitably furthered by the differential treatment?"[23] One need only look to the Court's subsequent refinement of the intermediate standard to determine the less than enthusiastic response of the Court toward Justice Marshall's opinion in *Mosley*.

A number of Justices, including those outside Justice Marshall's liberal bloc, have also shown their dissatisfaction with the multi-tiered approach. Justice Rehnquist, dissenting in *Craig v. Boren*,[24] the first case to articulate the intermediate level of scrutiny, opposed heightened scrutiny on the literalist ground that "the Equal Protection Clause contains no such language, and none of our previous cases adopt that standard."[25] Moreover, Justice Rehnquist observed that the Court has "had enough difficulty with the two standards of review . . . to counsel weightily against the insertion of still another 'standard' between those two."[26]

Justice Stevens, writing a concurring opinion in *Craig v. Boren*, argued for a single standard of review for, after all, there "is only one Equal Protection Clause."[27] Responding to Justice Rehnquist's adherence to the two-tiered approach, Justice Stevens commented that "whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard."[28] Justice Stevens, sounding much like Justice Marshall, was inclined to believe that equal protection analysis "does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that apply a single standard in a reasonably consistent fashion."[29]

---

shall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

20. Even with the addition of a third level of review, Justice Marshall remains critical of the present system of equal protection review. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring).

21. Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

22. 408 U.S. 92 (1972).

23. *Id.* at 95.

24. 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

25. *Id.* at 220 (Rehnquist, J., dissenting).

26. *Id.* at 220-21 (Rehnquist, J., dissenting).

27. *Id.* at 211 (Stevens, J., concurring).

28. *Id.* at 212 (Stevens, J., concurring).

29. *Id.*

Perhaps the most compelling evidence of the Court's discontent with the multi-level approach is its frequent departure from it. The Court implements several means for achieving this result. First, the Court may vary the strength of the tests used to review the law.[30] For example, the Court may upgrade minimal scrutiny or downgrade intermediate scrutiny to either invalidate or uphold governmental objectives, respectively.[31] Second, the Court has been known to create exceptions to strict scrutiny through judicial sophistry in order to bypass a heightened standard of review.[32] For example, although the Court has accorded special constitutional protection to aliens through use of strict scrutiny, it has recently exempted alienage classifications from the most intensive review when they relate to matters "firmly within a state's constitutional prerogatives."[33]

## III. *City of Cleburne v. Cleburne Living Center*

### A. *Factual Background and the Lower Courts' Response*

The genesis of this decision was a zoning dispute in which the City of Cleburne, Texas, pursuant to its comprehensive zoning ordinance,[34]

---

30. The Court utilizes various techniques for altering the standard of review. First, the less drastic means or least restrictive alternatives theory requires that the legislature impose restrictions that result in the least intrusion upon individual rights. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Trimble v. Gordon, 430 U.S. 762, 770 (1977). Second, the actual state interest theory requires the legislature to show an actual justification for imposition of a restriction. Therefore, the Court will not accept rationalizations concocted solely for litigation purposes, *see, e.g.*, McGinnis v. Royster, 410 U.S. 263, 270 (1973); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Third, rational basis testing counters the actual state interest theory in that it involves hypothesizing by the Court, hence the Court may accept any rationalization which conceivably justifies a challenged law. *See, e.g.*, Dandridge v. Williams, 307 U.S. 471, 485 (1970). Last, the Court may incorporate "deed-intent translocation" to repair constitutional peculiarities in legislation which causes unintended violations of equal protection. Comment, *Suspect Classifications: A Suspect Analysis*, 87 Dick. L. Rev. 407, 432-34 n.213 (1983); *see, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981).

31. *See* Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 166-69 (1984). Professor Shaman cites United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) and Zobel v. Williams, 457 U.S. 55 (1982) as examples of the Court's technique of upgrading minimal scrutiny. The Court critically examines governmental objectives, i.e., rejects the legitimate purpose, in order to invalidate the legislation. Alternatively, the Court may not grant wide latitude to governmental means, thereby striking down legislation using minimal scrutiny. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Furthermore, the Court has taken at least one occasion to downgrade intermediate scrutiny in order to sustain a classification usually deserving a heightened level of scrutiny. Thus, in Michael M. v. Superior Court, 450 U.S. 464, 468 (1981), Justice Rehnquist's plurality opinion succeeded in upholding a gender-based classification which made only males criminally liable for statutory rape by reducing intermediate scrutiny to a level "somewhat" sharper than the rational basis standard.

32. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 170-72 (1984).

33. *Id.* at 172. *See* Foley v. Connelie, 435 U.S. 291, 296 (1978) (quoting Sugarman v. Dugare, 413 U.S. 634, 648 (1973)).

34. Under Section 8 of the ordinance, the following uses are permitted in a district zoned R-3, the district in which the Featherston Street home is situated: any use permitted in District R-2; apartment houses or multiple dwellings; boarding and lodging houses; fraternity or sorority houses and dormitories; apartment hotels; hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble

required Jan Hannah, owner of the house and lot located at 201 Featherston Street in Cleburne, to obtain a special use permit for operation of the house as a group home for the mentally retarded.[35] Hannah, acting on behalf of Cleburne Living Center (CLC), purchased the building in July, 1980, with the express intention of establishing and operating a group home for thirteen mentally retarded adults in the moderate to mild range of retardation.[36] On July 28, 1980, Hannah applied to the City for the special use permit, but on August 18, 1980, the City's Planning and Zoning Commission voted to deny the permit. The City Council, at a public hearing concerning the permit application, denied the permit by a vote of three to one.[37]

CLC and Hannah brought suit in the United States District Court for the Northern District of Texas against the City, alleging equal protection violations committed against them and potential residents of the home. The district court found that the availability of group homes in the community was an "essential ingredient of normal living patterns" for mentally retarded persons and that the denial of the permit was "motivated primarily by the fact that the residents of the home would be persons who are mentally retarded."[38] Nevertheless, the court concluded that the permit on its face was constitutional and that the Council's denial of the permit was constitutional. After deciding that the ordinance had no impact on a fundamental right and that mental retardation was not a suspect or quasi-suspect classification, the court applied a weak standard of review.[39] Therefore, emphasizing the legal responsibility of CLC and its residents, the safety and fears of the residents in the adjoining neighborhood, and the number of people to be housed in the home as legitimate interests of the city, the court found the ordinance rationally related to the interests, and not "arbitrary, capricious, or

---

minded or alcoholics or drug addicts; private clubs or fraternal orders, except those whose chief activity is carried on as a business; philanthropic or eleemosynary institutions, other than penal institutions; and accessory uses customarily incident to any of the above uses. Section 16, subsection 9 of the zoning ordinance requires the issuance of an annual special use permit for: "[h]ospitals for the insane or feebleminded, or alcoholic or drug addicts, or penal or correctional institutions." Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 193-94 (5th Cir. 1984).

35. The group home, classified as a Level 1 Intermediate Care Facility for the Mentally Retarded would be subject to extensive federal and state regulations and guidelines. 105 S. Ct. at 3252 n.2 (1985).

36. Roughly 89% of retarded persons are categorized as "mildly" retarded, meaning their IQ is between 50 and 70. "Moderately" retarded persons have an IQ between 35 and 50. A small minority of retarded persons are either "severely" retarded (IQ between 20 and 35) or "profoundly" retarded (IQ under 20). *Id.* at 3256 n.9.

37. City Council members considered the following factors in their decision to deny the special use permit: "(a) the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston; (b) the location of a junior high across the street from 201 Featherston; (c) concern for the fears of elderly residents of the neighborhood; (d) the size of the home and the number of people to be housed; (e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take; (f) the home's location on a five hundred (500) year flood plain; and (g) in general, the presentation made before the City Council." 726 F.2d at 202.

38. *Cleburne*, Joint App. at 94, Findings 30, 28.

39. *Id.* at 102-103.

irrational."[40]

The United States Court of Appeals for the Fifth Circuit reversed,[41] finding that mental retardation was a quasi-suspect classification and that, under heightened scrutiny, the zoning ordinace was invalid on its face and as applied because it did not substantially further any important governmental interest. The Fifth Circuit relied on the indicia of suspectness identified in *San Antonio Independent School District v. Rodriguez*[42] to conclude that, first, mentally retarded persons have been subject to a history of grotesque mistreatment which has led to popular fears and uncertainty;[43] second, mentally retarded people have been relegated to a position of political powerlessness;[44] and third, mental retardation is an immutable condition deserving of special consideration.[45] The court hinted that the mentally retarded may be a "discrete and insular" minority meriting protection.[46] The Fifth Circuit then proceeded to apply the heightened standard of scrutiny, rejecting all of the objectives posited by the City in defense of the ordinance and all the factors which influenced the Council's decision to deny the permit.

### B. *The Response of the United States Supreme Court*

#### 1. The Majority Opinion

The majority opinion, authored by Justice White,[47] sent a mixed message to the developmentally disabled and the advocates who championed their cause, leaving the taste of a bittersweet victory. On one hand, the Supreme Court voted nine to zero that the special use permit requested by the Cleburne Living Center (CLC) and Jan Hannah was unconstitutional. At the same time, this substantial triumph for CLC was marred by the Court's decision, in a vote of six to three, that people with mental retardation are not entitled to be recognized as a suspect or quasi-suspect class deserving the special constitutional protection of heightened scrutiny. Observers of constitutional trends received a similarly mixed signal from the Court and bore witness to the rare phenomenon of rationality with bite[48] when the Court struck down the ordinance as providing no rational relation to the City's legitimate interests.

Justice White began his analysis with an overview of past equal protection cases in an attempt to reaffirm the Court's adherence to the

40. *Id.* at 103.
41. 726 F.2d 191 (5th Cir. 1984).
42. 411 U.S. 1 (1973).
43. 726 F.2d at 197.
44. *Id.* at 197-98.
45. *Id.* at 198.
46. *Id.* This criterion is taken from Justice Stone's famous footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").
47. 105 S. Ct. 3249 (1985).
48. *See supra* note 16 and accompanying text.

multi-tiered standard of review.[49] He set the tone of the decision by indicating that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude . . . and the Constitution presumes that even important decisions will eventually be rectified by the democratic processes."[50] Armed with this constitutional premise, Justice White foreshadowed his ultimate conclusion by noting that deferential treatment based on age had yet to be accorded intermediate scrutiny.[51]

Against this background, the majority concluded that mental retardation would receive the treatment normally accorded any other classification based on social and economic legislation. Justice White advanced several arguments to support his decision. First, mentally retarded persons' reduced ability to cope with the everyday world legitimizes the state's interest in dealing with and protecting them.[52] Moreover, mental retardation covers such a broad array of conditions[53] that decisions on how to treat retarded people are best left to legislators aided by qualified professionals, and not the judiciary.[54]

Justice White's second point stresses the recent legislative solutions to the problems facing the mentally retarded at both the federal and state levels that "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[55] The abundance of legislation, for Justice White, reflects the undeniable distinction between retarded persons and others.[56] Therefore, the approval of such legislation indicates that governmental, and not judicial, consideration of the differences should be the desirable end. Given the "wide variation" in the abilities and needs of retarded persons, governmental bodies must be accorded some freedom in shaping their remedial efforts.[57]

Third, the significant legislative response to the needs of this group persuaded Justice White that the mentally retarded were not politically powerless.[58] This proposition is indeed ironic if one closely examines the majority opinion. Previously, Justice White had cited the Developmental Disabilities Assistance and Bill of Rights Act[59] as reflecting the affirmative response the legislature has taken toward the plight of the mentally retarded citizen. However, in *Pennhurst State School and Hospital v. Halderman*[60] (*Pennhurst* I), the Supreme Court concluded that the rights provisions of the Act were merely advisory guidelines and not ab-

---

49. *See generally* Part II *supra*.
50. 105 S. Ct. at 3254.
51. *Id.* at 3255.
52. *Id.* at 3256.
53. *See supra* note 36.
54. *Id.* at 3256.
55. *Id.*
56. *Id.* at 3257.
57. *Id.*
58. *Id.*
59. 42 U.S.C. § 6000 (1982).
60. 451 U.S. 1 (1981).

solute obligations which could be enforced against the states.[61] Congress has yet to make these guidelines enforceable.

Last, Justice White predicted that if mental retardation was recognized as a quasi-suspect classification, then the floodgates would be open for other groups with "immutable disabilities setting them off from others" to claim special constitutional deference.[62] Instead of creating a new quasi-suspect class, "we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us."[63] Therefore, the majority settled on the rational relationship standard which afforded government the latitude both to assist the retarded and to engage in activities which would burden retarded persons in "incidental matters."[64]

Surprisingly, despite use of the minimum level of scrutiny, the Court invalidated the zoning ordinance insofar as it required a special use permit for group homes.[65] Because the requirement of a special use permit, as applied under the circumstances of this case, violated equal protection of the laws, the Court did not decide whether the special use permit was facially invalid where mentally retarded persons were concerned, leaving unanswered questions concerning the rights of mentally retarded persons to live in the community.[66] The majority focused its decision on the fact that the City required a special use permit for the operation of a facility for the mentally retarded, while other uses, such as hospitals, dormitories, and nursing homes for convalescents or the aged, did not require a special use permit. Justice White concluded that mentally retarded persons as a class may be different from those persons occupying facilities permitted in an R-3 zone without a special permit, but the difference was "largely irrelevant" to any legitimate interests of the City.[67] The record revealed no rational basis for the City of Cleburne to believe that the group home posed any special threat to legitimate interests of the City.[68]

Justice White proceeded to specifically reject the factors upon which the decision of the district court purportedly rested. First, and most significantly, the negative attitudes or fears of neighborhood residents, "unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[69] The City's concern for the location of the facility across the street from a junior high school (itself attended by about 30 mentally

61. *Id.* at 17.
62. 105 S. Ct. at 3258.
63. *Id.*
64. *Id.*
65. *Id.* at 3258-60.
66. *Id.* at 3254 n.8. The Court in *Cleburne* refused to address the issue of "single family" zoning restrictions on group homes.
67. *Id.* at 3259.
68. *Id.*
69. *Id.*

retarded persons) and the fact that the home was situated on a 500 year flood plain were quickly dismissed by Justice White as "vague, undifferentiated fears" especially when considered with the other dwellings similarly situated which were not required to obtain the special permit.[70] Additionally, doubts raised by the City about the legal responsibility for actions which the mentally retarded might take; the size of the home and number of people that would occupy it; fire safety; congestion of the streets; concentration of population; and the serenity of the neighborhood, failed to rationally justify singling out this particular group home for a special permit when no restrictions were imposed on the other uses freely permitted in the neighborhood.[71]

Justice White ended his analysis by noting that the requirement of the special use permit for the Featherston facility was based on an "irrational prejudice" against the mentally retarded.[72] Therefore, *Cleburne* is certain to remain a useful precedent in attacks on zoning ordinances which discriminate against the housing needs of people who are mentally retarded, especially where the fears and prejudices of neighbors lie at the heart of the community's decision to exclude a group home.[73]

2. The Concurring Opinion

Justice Stevens, joined by Chief Justice Burger, wrote a separate concurring opinion to express a shared view of equal protection analysis. Quite succinctly, Justice Stevens reaffirmed his opinion first expressed in *Craig v. Boren*[74] that equal protection cases have delineated no separate, identifiable strands of review; but instead, 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."[75]

In an interesting development, Justice Stevens focused on the special needs and limitations which the mentally retarded, and for that matter, any disadvantaged group could recognize in themselves. Thus, there are many legitimate legislative decisions placing mentally retarded persons in a special class, which although they disadvantage retarded persons, are not presumptively irrational.[76] For example, restrictions on a retarded person's right to operate an automoblile, which deprive him of the employment opportunities and freedom to travel that other citizens enjoy, seem rational. However, in this particular case, Justice Stevens stated that the court of appeals was correct when it "observed

70. *Id.*
71. *Id.* at 3259-60.
72. *Id.* at 3260.
73. Ellis & Luckasson, *Discrimination Against People with Mental Retardation: A Comment on the* Cleburne *Decision*, 23 MENTAL RETARDATION 249, 251 (1985).
74. *See supra* notes 27-29 and accompanying text.
75. 105 S. Ct. at 3261. Justice Steven's reference to a "continuum of judgmental responses" is outwardly similar to the "sliding scale" analysis of Justice Marshall posited in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99, *reh'g denied*, 411 U.S. 959 (1973) (Marshall, J., dissenting).
76. 105 S. Ct. at 3262.

that through ignorance and prejudice the mentally retarded 'have been subjected to a history of unfair and often grotesque mistreatment.' "[77] Justice Stevens agreed with the majority's reasoning with regard to invalidation of the special use permit, concluding that "a rational member of this disadvantaged class" would never "approve of the discriminatory application of the City's ordinance in this case."[78]

3. The Opinion of Justice Marshall

Justice Marshall, joined by Justices Brennan and Blackmun, agreed with the outcome of the case, but vigorously dissented from the majority's "novel and truncated" proposition that mentally retarded persons were not entitled to a quasi-suspect classification.[79] The first part of Justice Marshall's opinion amounted to a scathing criticism of Justice White's majority decision. Justice Marshall initially raised two paradoxes in the majority decision: first, a discussion of heightened scrutiny was superfluous to an invalidation of the zoning ordinance on rational basis grounds;[80] and second, the Court, while labeling its decision a rational basis review had, in fact, utilized a heightened standard of review — dubbed "second order" rational basis — to declare the requirement of a special use permit unconstitutional.[81]

Justice Marshall continued, stating that normally "the burden is not on the legislature to convince the Court that the lines it has drawn are sensible," yet in this case, the majority required a justification from the City.[82] Additionally, under the traditional rational basis standard, the Court does not rely on the record to judge whether policy decisions are supported by a firm factual foundation.[83] In Justice Marshall's view, the *Cleburne* majority, by refusing to acknowledge that a heightened standard of review was being used, created a precedent for a rationale review, and not a rational basis standard of review. The Supreme Court and lower courts now have a license to search for rationales which support economic and commercial classifications in a manner similar to the dark days of equal protection.[84] Furthermore, in failing to articulate the factors which justify invocation of this "second order" rational basis standard, Justice Marshall believes the majority has left the lower courts "in the dark" as to when the more searching scrutiny is required.

The second part of Justice Marshall's opinion reiterated his long-held belief[85] that "the level of scrutiny . . . should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular clas-

77. *Id.* at 3262 (quoting *Cleburne Living Center*, 726 F.2d at 197).
78. *Id.* at 3263.
79. *Id.*
80. *Id.*
81. *Id.* at 3264.
82. *Id.* at 3265.
83. *Id.* at 3264.
84. *Id.* at 3265. *See also* Lochner v. New York, 198 U.S. 45 (1905).
85. *See supra* notes 19-23 and accompanying text.

sification is drawn.' "[86] He then set forth his test by which the zoning law should be judged; that is, the ordinance should "be convincingly justified as substantially furthering legitimate and important purposes."[87] Analyzing the case, Marshall found that mentally retarded persons have a substantial interest in establishing group homes.[88] Second, mentally retarded persons have been subjected to a "grotesque" history of segregation and discrimination based only on vague generalizations.[89]

Justice Marshall proceeded to reexamine the justifications used by the majority to support its opinion, only to conclude that they could not "withstand logical analysis."[90] In spirited language, Justice Marshall presented a forceful argument for judicial interventionism, since courts "do not sit or act in a social vacuum."[91] Developing an evolving doctrine of constitutional equality, Justice Marshall advocated a Court which advances, or "catalyzes," legislative changes that would constantly remain loyal to the fundamental undercurrent of equality running through the law.[92] Justice Marshall then noted that the fact that mentally retarded persons are no longer politically powerless does not indicate that they are no longer a group with special characteristics and needs. For example, simply because legislation has been enacted to deal with racial discrimination, does not mean that the Court has made race-based classifications any less suspect.[93]

Justice Marshall continued by criticizing the two principles apparently central to the majority opinion. First, the belief that heightened scrutiny is inapplicable where the individuals in a group are different and that the legislature properly may take this into account, is unsound. Women have distinctive characteristics, and yet heightened scrutiny applies to them.[94] Similarly, the fact that legislation affecting a group is likely to be valid has no logical application to the denial of heightened scrutiny, especially where similarly situated groups — women, illegitimates, and aliens — have the benefit of a higher standard.[95]

Last, Justice Marshall expressed his concern that the majority merely invalidated the ordinance as it applied to the respondents in this case, and did not strike down the permit requirement on its face. He dissented "from the novel proposition that 'the preferred course of adjudication' is to leave standing a legislative act resting on 'irrational prej-

86. 105 S. Ct. at 3265 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99, *reh'g denied*, 411 U.S. 959 (1973) (Marshall, J., dissenting)).

87. 105 S. Ct. at 3265. *See* Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); Plyler v. Doe, 457 U.S. 202, 230-31 *reh'g denied*, 458 U.S. 1131 (1982) (Marshall, J., concurring); *see also*, Mills v. Habluetzel, 456 U.S. 91, 99-100 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973).

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

89. *Id.* at 3266-68.

90. *Id.* at 3268.

91. *Id.*

92. *Id.* at 3268-69.

93. *Id.* at 3269.

94. *Id.* at 3269-70.

95. *Id.* at 3270-71.

udice' . . . thereby forcing individuals in the group discriminated against to continue to run the act's gauntlet."[96] In effect, the Court left unanswered questions for the future "[b]y leaving the sweeping exclusion of the 'feeble-minded' to be applied to other groups of the retarded."[97] Instead, facial invalidation of the ordinance's treatment of the mentally retarded would have placed the responsibility for tailoring a new ordinance on the City of Cleburne.[98]

## IV. THE COURT AFTER *CLEBURNE*: JUSTICE STEVENS' PRAGMATIC STABILITY AMIDST THE REIGN OF CONFUSION

The discussion thus far has attempted to expose equal protection adjudication as a constitutional procrustean bed which forces governmental classifications into three inflexible positions on an anachronistic scale. Disenchantment with the multi-tiered standard of review has transformed the equal protection clause into a talisman for the Court's divination of legitimate state goals when weighed implicitly against the interests of disadvantaged persons. In *Cleburne*, though, lies an inkling of hope that the seeds of transition have been sown by Justice Stevens. The concurring opinion of Justice Stevens, summarized above,[99] is therefore worthy of special attention in that it proposes a viable alternative to traditional equal protection.

The concurring opinion of Justice Stevens presages an increased willingness by the Supreme Court to redefine equal protection. Indeed, it is significant to note that the concurrences of Justices Stevens and Burger, when grouped with the dissents of Justices Marshall, Brennan and Blackmun, constitute a five Justice bloc which would not have applied the same quality of equal protection analysis as the Court. As a result, the Court left the door open for the lower courts to apply a level of review running the gamut from somewhere just below heightened scrutiny to something a little more than the deference of the rational basis standard.[100]

Admittedly, upon examination, Justice Stevens' early opinions in the area of equal protection are as obfuscated as the opinions of the rest of the Court. In *Mathews v. Lucas*,[101] where the court upheld a classification scheme based on illegitimacy, Justice Stevens, in dissent, argued for a more intensive scrutiny of legislative categorizations based on the "habit" of considering illegitimates as undeserving of special protection.[102] Aside from a discomfort with the multi-tiered standard and a fierce loyalty to traditionally disfavored groups, the Justice's dissent in *Lucas* provided little insight into a unique interpretive philosophy. How-

96. *Id.* at 3272.
97. *Id.* at 3273.
98. *Id.*
99. *See supra* notes 74-78 and accompanying text.
100. *Summary, Analysis, and Commentary*, 9 MENTAL DISABILITY L. REP., 242, 243 (1985).
101. 427 U.S. 495 (1976).
102. *Id.* at 520-21 (Stevens, J., dissenting).

ever, *Craig v. Boren*,[103] a case presenting a challenge to a statute which set the minimum age for purchasing 3.2 percent beer at age eighteen for women and age twenty-one for men, marked Justice Stevens' abandonment of the three-tiered system in favor of a "single standard" of review.[104] Although Justice Stevens' refusal to articulate a proper standard of review may have frustrated those in search of a well-defined judicial decree from on high, perhaps *Boren* foreshadowed a loftier purpose. Justice Stevens, in opting for a balancing approach, recognized that attempting to define an appropriate standard is futile,[105] because the range of potential "modes" of review between utter deference and the strictest scrutiny is infinite.

*Cleburne* suggests that Justice Stevens finally has synthesized the doctrinal threads running through the fabric of equal protection into a workable theory destined to be implemented in Supreme Court practice. More importantly, *Cleburne* reflects a dialectical progression by Justice Stevens which transcends the muddled confusion that pervades equal protection analysis. It is indeed prophetic that a man who has confused conservatives, liberals, and scholars alike with his refusal to be typecast should lead the Court from chaos into coherence.[106] In a similar fashion, Justice Stevens has purposely avoided categorizing his approach to equal protection, and therefore, it is difficult to label a test which the Court and practitioners may employ in every equal protection case. Some characteristics of Justice Stevens' interpretive philosophy, though, are readily identifiable and, in all likelihood, will be honed into a newer equal protection.

First, Justice Stevens deliberately eschews the troika of traditional standards in equal protection. In *Cleburne*, he stated that he has "never been persuaded that these so-called 'standards' adequately explain the decisional process."[107] Second, the Justice has a "pronounced streak of Frankfurterianism tempered by a willingness to apply the law vigorously"[108] in those areas where the rights and interests of a disadvantaged group outweigh countervailing interests of judicial restraint and federalism. In other words, Justice Stevens engages in a "balancing of interests" approach which determines the strength of conflicting interests — which presumably exist outside of the judge's mind — and balances them objectively.

Justice Stevens' balancing formula is three-pronged. First, an initial determination of the character of the challenged governmental classification, as it relates to the class that has been allegedly harmed, is made.

103. 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977).

104. *Id.* at 211-12 (Stevens, J., concurring).

105. Special Project, *Justice Stevens: The First Three Terms*, 32 VAND. L. REV. 671, 713-15 (1979).

106. Ball & Ulhman, *Justice John Paul Stevens: An Initial Assessment*, 1978 B.Y.U. L. REV. 567, 569 (1978).

107. 105 S. Ct. at 3261.

108. Beytagh, *Mr. Justice Stevens and the Burger Court's Uncertain Trumpet*, 51 NOTRE DAME LAW. 946 (1976).

Justice Stevens looks to either: the nature of the classification itself, that is, if the class has been subjected to a "tradition of disfavor"[109] as in *Cleburne* and *Lucas*; or, the effect of the legislation on those persons affected by it, as in *Zablocki v. Redhail*.[110] In *Zablocki*, the Court invalidated a Wisconsin statute which provided that a resident "having minor issue not in his custody and which he is under an obligation to support by any court order" could not marry without court permission.[111] Justice Stevens, in a concurring opinion, concluded that although the state had a legitimate interest in protecting children who were not in custody, the statute, in effect, deliberately discriminated against the poor. Thus, Justice Stevens provides both a qualitative and quantitative aspect, respectively, to a determination of the character of a classification.

Second, after characterizing the classification, Justice Stevens considered whether the proffered legislative purpose was the actual basis for the decision to create the restrictive classification. He concluded, in *Cleburne*, that the proffered purpose for the requirement of an annual special use permit — protection of the mentally retarded persons who would live in the group home — was merely a guise for the actual basis, the irrational fear and prejudice of the neighboring land owners.[112]

In theory, after satisfaction of the requirement of an actual purpose, Justice Stevens' formula is applied to closely examine the justifications urged to support the governmental action. Therefore, this third step comprises the actual balancing of the state's legitimate purposes and the interests of the disadvantaged group. Justice Stevens quickly concluded in *Cleburne* that zoning ordinances are not usually justified by an unconvincing desire to protect mentally retarded persons from "the hazards presented by the neighborhood."[113] This prong operates to discourage legislative bodies from conjuring up unconvincing and irrational justifications solely in defense of challenges to a classification.[114] Another significant characteristic of Justice Stevens' equal protection analysis is his redefinition of the term "rational" and the consequent bolstering of the "old" rational relationship test.[115] *Cleburne* advises that "rational basis" demands a stronger showing by the legislature: that the classification be actually a legitimate interest of the state; and that, as applied, the classification treat all whom it affects impartially.[116]

Moreover, the intellectual merit of Justice Stevens' approach cannot be overestimated. As mentioned above, Justice Stevens' opinion in

109. 105 S. Ct. at 3261. *See* Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 155, 214 (1978).

110. 434 U.S. 374 (1978).

111. *Id.* at 375.

112. 105 S. Ct. at 3262. *See* Special Project, *supra* note 105 at 714 ("[T]he principal concern in Justice Stevens' equal protection analysis is finding an actual legislative purpose. If he finds none, the classification is invalid; if an actual legislative purpose is evident, he generally defers to it.").

113. 105 S. Ct. at 3263.

114. *See* Special Project, *supra* note 105 at 714.

115. *See supra* note 16 and accompanying text.

116. 105 S. Ct. at 3263.

*Cleburne* represents a dialectical progression towards a workable reformulation of equal protection. If one reads *Cleburne* in the order of Justice White's majority opinion, then Justice Marshall's dissent, and finally, Justice Stevens' concurrence, the dialectical synthesis is self-evident. In other words, Justice Stevens retained the best elements of both Justice White's thesis — rationality with bite — and Justice Marshall's antithesis — intermediate scrutiny — to develop a wide-ranged synthesis fully capable of filling the immeasurable void between the traditional tiers of review, and thus competently adjudicate the broad scope of equal protection challenges intrinsic to this generation. For example, one of the characteristics comprising intermediate scrutiny — the assessment of the importance of the governmental interest — has been appropriated into the first prong of Justice Stevens' balancing approach, the characterization of the governmental classification.[117] This type of intellectual innovation is certain to distinguish Justice Stevens from the rest of the Court and solidify a position of Court leadership and constructive influence.

However, one would be most neglectful in analyzing Justice Stevens' approach if one refused to unmask the inherent flaws in his argument. While Justice Stevens' equal protection analysis frees the Court from the doctrinal confines of the three-tiered model, it gives no guidance to legislatures as to the limits of constitutionally permissible legislation.[118] Another criticism of Justice Stevens' balancing approach, which by its very nature contains elements of a more searching rational basis test, is the potential for the Court to review an even broader array of governmental classifications and thereby infringe upon that which is properly within the legislative domain.[119]

## V. Conclusion

*Cleburne* marks a transition in equal protection analysis. The divergent opinions of Justices White and Marshall reflect the inconsistency of the three-tiered model, and therefore, indirectly reinforce Justice Stevens' substitute method of review.

The decision is also noteworthy in that it signals a change in the personality of the Court, guided by the pragmatism of Justice Stevens. *Cleburne* reflects the shift of Justice Stevens from the undifferentiated middle to the intellectual standard-bearer of the Court. Therefore, the future of the Court appears much brighter if the skillfully structured consistency of Justice Stevens can unseat the strong ideologies — both liberal and reactionary — that constitute the Supreme Court.

*Charles T. Passaglia*

117. Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. Chi. L. Rev. 155, 214 (1978).
118. *Id.* at 216.
119. *Id.*