Comment

CLEBURNE: AN EVOLUTIONARY STEP IN EQUAL PROTECTION ANALYSIS

In City of Cleburne, Tex. v. Cleburne Living Center the Supreme Court addressed an issue that will have a major impact on the evolution of equal protection analysis. The Court determined that a city zoning ordinance, requiring a special use permit for group homes for the mentally retarded, violated the equal protection clause of the fourteenth amendment. Notably, a majority of the Court struck down the ordinance "as applied" to the prospective mentally retarded residents of the group home, but did not strike down the ordinance as facially unconstitutional. This unprecedented result

2. The zoning ordinance in question permitted the following uses in areas designated as R-3 zones:
   "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, sanitoriums, nursing homes or homes for convalescents or aged, other than for the insane or feeble minded or alcoholics or drug addicts.
   "7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
   "8. Philanthropic or eleemosynary institutions, other than penal institutions.
   "9. Accessory uses customarily incident to any of the above uses . . . ."

Cleburne, 105 S. Ct. at 3252-53 n.3 (quoting § 8 of the Cleburne zoning ordinance, as set forth with emphasis added in Brief for Appellant at 60-61).

The City of Cleburne determined that the group home for the mentally retarded was, in effect, a "hospital for the feebleminded." Id. at 3252-53. As such, § 16, subdivision 9 of the Cleburne zoning ordinance required that the Cleburne Living Center (CLC) obtain a special use permit to operate the group home. Cleburne Living Center v. City of Cleburne, Tex., 726 F.2d 191, 194 (5th Cir. 1984), vacated, 105 S. Ct. 3249 (1985).

3. Cleburne, 105 S. Ct. at 3258-60.
4. Citing Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985); United States v. Grace, 461 U.S. 171 (1983); and NAACP v. Button, 371 U.S. 415 (1963), the plurality wrote that the preferred course of adjudication was to determine whether the ordinance deprived the respondents (CLC) of equal protection. In that case, it need not decide the constitutionality of the ordinance as it applied to mentally retarded persons generally. The plurality cited the need "to avoid making unnecessarily broad constitutional judgments." Cleburne, 105 S. Ct. at 3258. For further discussion of this argument, see infra notes 173-180 and accompanying text.

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in equal protection jurisprudence was reached after a plurality seemingly rejected a middle level of scrutiny for the mentally retarded as a class and applied what it termed a "rational basis" test.5

This Comment will discuss the plurality's rejection of middle level scrutiny for the mentally retarded and its application of the rational basis test. Due to the increasing effort to deinstitutionalize mentally retarded citizens and reintegrate them into the community, many federal and state courts are applying the equal protection clause in fact-situations similar to that of Cleburne.6 For this reason, Cleburne is important not for what the Court said, but for what it did.

In July 1980, Jan Hannah, Vice President of Cleburne Living Center, Inc. (CLC), purchased a home in Cleburne, Texas.7 Ms. Hannah intended to lease the home to CLC to be used as a group home for mentally retarded individuals. CLC planned to house thirteen moderately and mildly retarded men and women. In addition to twenty-four hour supervision, the group home staff planned to provide training in leisure time activities, independent living skills, and kitchen skills. All residents would eventually obtain jobs in the community or a position at a work activity center.

The house was located in an R-3 zone, that is, an area where apartment houses, boarding homes, and other multi-family dwellings were permitted.8 Due to the City's classification of the home as a hospital for the feebleminded, its operation in an R-3 zone would require a special use permit.9 The City subsequently denied CLC's application for the permit at two separate public hearings.10 CLC

5. 105 S. Ct. at 3258. The plurality stated: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." Id.


8. See supra note 2.

9. See supra note 2. If CLC had obtained the permit, it would have had to reapply on a yearly basis. Cleburne Living Center, 726 F.2d at 194.

10. The council members considered the following factors in denying the special use permit:
(1) The attitude of property owners within two hundred feet of the proposed home.
(2) The location of a junior high school right across the street from the proposed home.
(3) The fears of elderly neighborhood residents.
(4) The size of the home and the number of people it would house.
then filed for injunctive relief and damages in federal district court. Applying a rational basis test, the district court denied both the injunctive relief and damages.\textsuperscript{11} CLC appealed to the Court of Appeals for the Fifth Circuit which held that the mentally retarded were a quasi-suspect class.\textsuperscript{12} In reaching this conclusion the Fifth Circuit stated:

The combination of these factors—historical prejudice, political powerlessness, and immutability—calls for heightened scrutiny of classifications discriminating against the mentally retarded. We are not prepared to say that they are a full-fledged suspect class, however. Strict scrutiny has been reserved for classifications, such as race, that "tend to be irrelevant to any proper legislative goal." [citation omitted] Though mental retardation is irrelevant to many policies, it is a relevant distinction in some cases.\textsuperscript{13} Applying heightened scrutiny, the Fifth Circuit struck down the Cleburne zoning ordinance both on its face and as applied.\textsuperscript{14} The City filed a petition for a writ of certiorari which the Supreme Court granted.

Although the Court unanimously agreed to vacate the lower court’s judgment, its members disagreed on the appropriate analysis. In a plurality opinion written by Justice White, four members of the Court stated that mental retardation was not a quasi-suspect classification.\textsuperscript{15} Therefore, statutes singling out the mentally retarded for special treatment required no greater scrutiny than that traditionally given to social or economic legislation.\textsuperscript{16} Nonetheless, the plurality found that the statute, as applied, was not rationally related to the City’s purported objectives.\textsuperscript{17} As a result, the plurality concluded that the zoning ordinance, although constitutional on its face, was unconstitutional as it applied to the mentally retarded residents of the Cleburne group home.\textsuperscript{18}

\begin{itemize}
\item[(5)] The uncertainty of legal responsibility for the actions of any of the mentally retarded residents.
\item[(6)] The location of the home on a five hundred year flood plain.
\end{itemize}

\emph{Cleburne Living Center}, 726 F.2d at 194.

\textsuperscript{11} Id.

\textsuperscript{12} Id. at 197.

\textsuperscript{13} Id. at 198 (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

\textsuperscript{14} Id. at 200.

\textsuperscript{15} City of Cleburne, Tex. v. Cleburne Living Center, 105 S. Ct. 3249, 3255 (1985).

\textsuperscript{16} Id. at 3254, 3258.

\textsuperscript{17} Id. at 3259.

\textsuperscript{18} Id.
Justice Stevens and Chief Justice Burger concurred in the judgment but disagreed with the application of the traditional, three-tiered equal protection model. Instead, they espoused a simpler, more flexible standard under which a court examines the public purpose of challenged legislation and the class that it affects. Under this model, these two Justices found that the Cleburne ordinance unjustly discriminated against the mentally retarded residents because it served no legitimate governmental interest. Rather than protecting the prospective residents, the City in fact was catering to the irrational fears of the neighboring property owners. Because catering to these fears is not a legitimate legislative objective, the ordinance, according to Justice Stevens and Chief Justice Burger, was unconstitutional.

Finally, Justice Marshall, in a separate opinion, joined by Justices Brennan and Blackmun, maintained that classifications affecting the mentally retarded should be afforded heightened scrutiny. Examining the Cleburne ordinance under such a level of scrutiny, Justice Marshall determined that the ordinance was unconstitutionally overbroad and, therefore, invalid on its face.

An understanding of Cleburne requires a thorough grasp of the development of current equal protection jurisprudence. Before analyzing the Cleburne decision itself, this Comment will review current equal protection law with an emphasis on heightened scrutiny. In particular, Professor Gerald Gunther's model, which outlines the boundaries of heightened scrutiny, will be studied. Next, since heightened scrutiny developed through a series of gender-based discrimination cases, those cases will be discussed. The review of the gender-based cases will demonstrate the various tenets of the Gunther model. Having traced the development of middle level scrutiny through the Gunther model and the gender-based cases, this Comment will then analyze the Cleburne decision. The analysis will compare the decision to the Gunther model and the gender-based cases. This comparison should provide valuable insights into the future development of equal protection analysis.

19. Id. at 3260-61 (Stevens, J., concurring).
20. Id. at 3261-62.
21. Id. at 3262-63.
22. Id. at 3262.
23. Id. at 3263.
24. Id. at 3272 (Marshall, J., concurring in part and dissenting in part).
25. Id. at 3275.
I. CURRENT EQUAL PROTECTION JURISPRUDENCE

A. Rational Basis vs. Strict Scrutiny

Current equal protection jurisprudence involves a three-tiered model that requires different levels of scrutiny depending on the nature of a challenged statutory classification. The rational basis test requires only that there be a rational relationship between a statutory classification and a legitimate governmental interest.\(^{26}\) This test is usually applied in cases concerning economic or social legislation.\(^{27}\)

When applying the rational basis test, courts are free to supply or hypothesize a governmental interest that may relate to the statutory classification. As long as there is a "plausible reason"\(^{28}\) for a legislature's actions, it is constitutionally irrelevant whether those reasons, in actuality, underlie the legislation.\(^{29}\) Although the state is free to offer a rationale for its actions, it is not required to do so.\(^{30}\) Since the rational basis test requires only a minimal level of scrutiny, most social and economic legislation can withstand the test quite easily.

The most intensive level of judicial scrutiny, strict scrutiny, is afforded those statutory classifications that are either inherently suspect or infringe upon a fundamental right. Recognized suspect classifications include race,\(^{31}\) alienage,\(^{32}\) and national origin.\(^{33}\) A right is considered fundamental if it is "explicitly or implicitly guaranteed by the Constitution."\(^{34}\) Voting\(^{35}\) and the right to travel\(^{36}\) are two

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26. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (Railroad Retirement Act allowing dual railroad and social security benefits for some railroad workers but not for others depending on the number of years of railroad service upheld under rational basis standard); New Orleans v. Dukes, 427 U.S. 297 (1976) (City of New Orleans ordinance exempting certain vendors from a ban on selling food from push carts was an economic regulation and was upheld against an equal protection claim under the rational basis test); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland welfare legislation upheld under rational basis standard).

27. See supra note 26.


30. See, e.g., Zobel v. Williams, 457 U.S. 55, 61 (1982) (State of Alaska asserted three rationales for Alaskan oil dividend plan even though rational basis standard was used).


examples of rights so fundamental that any classifications impinging on them must be subject to strict scrutiny.\textsuperscript{37} A classification can survive strict scrutiny only if it is justified by a "compelling governmental interest."\textsuperscript{38}

Due to the rigorous nature of strict scrutiny and the limp nature of the rational basis test, the Court began in the early 1970s to develop a third, middle level of scrutiny, often referred to as "heightened scrutiny." As various classes with important interests brought their cases before the Court, some of the Justices recognized the need for an intermediate form of review that could fill the gap "between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny."\textsuperscript{39}

\textbf{B. Heightened Scrutiny}

In his review of the 1971 Supreme Court term\textsuperscript{40} Professor Gerald Gunther foresaw the development of this new, middle level of scrutiny:

The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends.\textsuperscript{41}

The Gunther model proposed basic changes in judicial treatment of equal protection questions. The rationale for the challenged classification was of major importance in Gunther's approach. Unlike the rational basis test, the new model required that the Court . . . be less willing to supply justifying ratio-

\textsuperscript{37} CLC could not invoke strict scrutiny by claiming that the right to housing was fundamental. In Lindsey v. Normet, 405 U.S. 56 (1972), the Court refused to recognize the "need for a decent shelter" and the "right to retain peaceful possession of one's home" as fundamental rights that trigger strict scrutiny. "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill . . . Absent constitutional mandate, the assurance of adequate housing . . .[is a] legislative, not judicial function[]." \textit{Id.} at 73-74.


\textsuperscript{39} L. Tribe, \textit{American Constitutional Law} § 16-30, at 1082 (1978).


\textsuperscript{41} \textit{Id.} at 20. As Gunther observed, the Court initially advanced this position in Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
nales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.\textsuperscript{42}

Thus, the first prong of the Gunther model precluded the Court from supplying any objective or purpose for a statutory classification.\textsuperscript{43} The burden of production lay with the party seeking to uphold the classification.\textsuperscript{44}

Second, Gunther suggested that the Court should put more emphasis on the nature of the classification than on the underlying legislative purpose.\textsuperscript{45} In this respect, the Gunther model is less rigorous than strict scrutiny. Under strict scrutiny, the Court examines the legislative purpose underlying a classification. Unless there is a compelling state interest for the classification, the statute must fall.\textsuperscript{46} As a result, strict scrutiny review pays little attention to the characteristics of the classification.

Even though Gunther emphasized the nature of the classification, he did not ignore legislative objectives.\textsuperscript{47} His approach, although less rigorous than strict scrutiny, was more searching than the traditional rational basis test.\textsuperscript{48} This method—"means-oriented" scrutiny—would, in effect, allow a legislature to select means that \textit{substantially} further its objectives. Thus, middle level scrutiny requires a close relationship between the classification and the legislative objective, but the fit need not be as tight as that required for strict scrutiny classifications.\textsuperscript{49}

\textsuperscript{42} Gunther, \textit{supra} note 40, at 21.

\textsuperscript{43} Professor Tribe also recognized that a court may not supply a rationale for a challenged rule under heightened scrutiny. However, he articulated another characteristic of intermediate review, called "limiting afterthought." Limiting afterthought requires that a proffered rationale "not be credited . . . if there are convincing reasons to believe that the objective is being supplied purely by hindsight." L. Tribe, \textit{supra} note 39, § 16-30, at 1085-88.

\textsuperscript{44} See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

\textsuperscript{45} Gunther, \textit{supra} note 40, at 21.

\textsuperscript{46} See \textit{supra} note 38 and accompanying text.

\textsuperscript{47} Indeed, as Professor Tribe noted, one of the requirements of the new level of scrutiny was that "the objective served by a challenged classification . . . be important 'even if the need not be as compelling' as strict scrutiny would demand." L. Tribe, \textit{supra} note 39, § 16-30, at 1083.

\textsuperscript{48} Gunther, \textit{supra} note 40, at 21.

\textsuperscript{49} Professor Tribe also identified this characteristic of heightened scrutiny. L. Tribe, \textit{supra} note 39, § 16-30, at 1083.
A third characteristic of the Gunther model involved its use as a technique that allowed the Court to avoid overly broad constitutional decisions. Gunther saw the new model as less intrusive than strict scrutiny because his model focused on the actual "purposes chosen by the legislatures, not 'constitutional' interests drawn from the value perceptions of the Justices." The new level of scrutiny allowed the Court to decide a case on narrower, statutory grounds, avoiding a constitutional issue altogether, if possible. In addition, the use of heightened scrutiny did not expand strict scrutiny beyond its already well-defined scope.

Over the course of the 1970s, the Supreme Court refined heightened scrutiny. The approach struck a balance between the deferential approach of the rational basis test, in which a statute is presumed to be constitutional, and the nondeferential strict scrutiny test. The Court's ratification of Gunther's model is best illustrated by the cases challenging gender-based classifications.

By comparing the application of heightened scrutiny in the gender-based classifications to its application in classifications based on mental retardation one can better understand the Cleburne decision.

C. Gender-Based Decisions

1. Reed.—Prior to the 1970s, classifications based on gender were subject to the rational basis test. In 1971, the Supreme Court began to provide some realistic protection against gender discrimination in state legislation. In Reed v. Reed the Court invalidated an Idaho probate statute that gave men priority over women in cases in which both had applied for appointment as the administrator of a

50. Gunther, supra note 40, at 31.
51. Although this Comment will focus here on gender-based classifications, the Court has afforded intermediate level treatment to classifications based on illegitimacy and alienage. For example, in Mills v. Habluetzel, 456 U.S. 91 (1982), the Court struck down a Texas statute that required a paternity suit to be brought before the child is one year old. The Court stated: "[T]his unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims." Id. at 101. The "substantial relationship" language reveals the Court's use of middle level scrutiny. Plyler v. Doe, 457 U.S. 202 (1982), is an example of the Court's treating alienage as a classification that justifies middle level scrutiny. In Plyler the Court struck down another Texas statute that allowed the state to withhold funds from local school districts for the education of children not legally admitted into the United States; the statute also gave those school districts the authority to deny such children enrollment. Although the Court did not label its analysis middle level or heightened scrutiny, it did say "the discrimination contained in . . . [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State." Id. at 224 (emphasis added).
52. 404 U.S. 71 (1971).
decedent’s estate. The Court purported to use a rational basis test, but it did not assume the normal deferential stance toward the statutory classification. Although the Court recognized that the statute did serve the legitimate objective “of reducing the workload on probate courts by eliminating one class of contests,” it struck down the statute as arbitrary.

Gunther, however, questioned whether the gender criterion in the Idaho statute was as arbitrary as the Court had stated:

> It is difficult to understand [this] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. Clear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. Even if the requirement be that the means bear a “significant relationship” to the state's purpose, or contribute substantially to its achievement, the test would seem to have been met in Reed. Only by importing some special suspicion of sex-related means from the new equal protection area can the result be made entirely persuasive. Yet application of new equal protection criteria is precisely what Reed v. Reed purported to avoid.

The Reed Court did not supply a rationale for the legislation as it normally would have done in applying the rational basis test. The Idaho Supreme Court, whose opinion the Court quoted, had proffered a legitimate purpose. By acknowledging that purpose, but overturning the classification as arbitrary, the Court used the means-focused scrutiny of the Gunther model. In addition, by using the means-focused approach, the Court avoided the broader constitutional question of gender as a suspect classification. Reed, then, illustrates all three prongs of Gunther's model.

2. Frontiero.—The Court shifted gears dramatically in Frontiero v. Richardson, a case in which a plurality treated classifications based on gender as inherently suspect. The Frontiero plurality struck down a federal statute that allowed a male military employee

53. Id. at 77.
54. Id. at 76.
55. Id.
56. Id. at 77.
57. Gunther, supra note 40, at 34.
58. Reed, 404 U.S. at 76.
60. Frontiero did not hold that classifications based on gender are inherently suspect. Rather, only four Justices—Brennan, Douglas, White, and Marshall—agreed that gender-based classifications are inherently suspect. Id. at 688.
to declare his spouse as a dependent for the purposes of determining benefits\(^1\) regardless of whether she was actually dependent. A female military employee, however, could not claim her spouse as a dependent unless he was actually dependent on her for over one-half of his support. The use of strict scrutiny in *Frontiero* necessarily precludes an analysis based on the Gunther model.\(^2\)

The *Frontiero* plurality, however, enumerated four factors necessary for the determination of a suspect classification: (1) the group within the classification must have suffered a long history of discrimination;\(^3\) (2) as a result of this discrimination, statutes must have become "laden with gross, stereotyped distinctions";\(^4\) (3) the classification must be based on an immutable characteristic, not within the control of the victims of discrimination;\(^5\) and (4) the group within the classification must historically have lacked political power.\(^6\)

The Court has also recognized a fifth factor: if a classification is an inadequate proxy for a legitimate objective,\(^7\) that classification

\(^1\) The benefits included increased allowances for quarters, as well as medical and dental benefits. *Id.* at 678.

\(^2\) In Gunther's opinion, middle level scrutiny made the rational basis test more rigorous, and essentially left the strict scrutiny test untouched. Gunther, *supra* note 40, at 24. The means-oriented nature of the model, however, requires a court to focus on the statutorily created classifications. As a result, the Supreme Court is more likely to afford a classification middle level scrutiny if it closely resembles a suspect classification. This approach is consistent with the Court's preference not to extend strict scrutiny to classifications other than race or nationality. Although other classifications will not receive strict scrutiny, they will receive heightened scrutiny if they substantially meet the criterion for a suspect classification. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (gender-based classifications need only serve important governmental objectives and be substantially related to those objectives).

\(^3\) *Frontiero*, 411 U.S. at 684-87.

\(^4\) *Id.* at 685.

\(^5\) *Id.* at 686.

\(^6\) The *Frontiero* plurality addressed the issue of political powerlessness in a footnote:

It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. *Id.* at 686 n.17.

\(^7\) For example, a legislature that wishes to insure judicial competence might pass a law requiring that all judicial nominees be white males. Neither the racial nor gender-based classification would meet the proxy requirement. Neither race nor gender has any bearing on judicial competence.
may be suspect. The *Frontiero* plurality considered the proxy requirement implicitly, if not expressly: "[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status *without regard to the actual capabilities of its individual members.*" Since gender generally has no effect on one's capabilities, it is an inadequate proxy for most, if not all, possible legislative objectives.

3. Craig.—In *Craig v. Boren* the Court retreated from the strict scrutiny analysis of the *Frontiero* plurality and, instead, adopted an approach that closely resembled the Gunther model. The *Craig* decision invalidated an Oklahoma statute that prohibited the sale of beer to males under the age of twenty-one and to females under the age of eighteen. The Court explicitly found that "[t]o withstand a constitutional challenge, . . . classifications by gender must serve some important governmental objectives and must be substantially related to achievement of those objectives."

The *Craig* Court, therefore, only partially followed the approach of *Frontiero*. The Court did not engage in an analysis of all five suspect-class indicia. The opinion did, however, discuss the inaccurate proxy characteristic. It also alluded to both the historical and stereotypical characteristics of suspect classes.

*Craig* demonstrates the various aspects of the Gunther model. The Court examined the objectives underlying the statute. Although it could not identify the actual purpose for the legislation, the Court assumed that the state's representation of that purpose was correct. However, in no way did the Court itself try to hypothesize a rationale for the statute. By relying heavily on the proxy

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68. See infra note 72.
70. 429 U.S. 190 (1976).
71. Id. at 197. Notably, the *Craig* Court attributed the "substantial relation" test to the *Reed* case. Id. at 204. Although the Court in *Reed* purported to decide on rational basis grounds, it also stated: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" *Reed v. Reed*, 404 U.S. 71, 76 (1971) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).
73. See id. at 198-99 ("outraged misconceptions").
74. See id. at 198 ("archaic and overbroad generalizations").
75. Id. at 199-204.
76. The State Assistant Attorney General asserted a traffic safety rationale. Id. at 199-200.
77. Although it assumed for purposes of the litigation that traffic safety was the objective underlying the statute, the Court reserved the question of whether a State Assis-
characteristic, the Court emphasized a means-oriented approach. Finally, the retreat from the Frontiero plurality's treatment of gender as a suspect classification illustrated the use of heightened scrutiny as an avoidance technique.

4. Mississippi University for Women.—The most recent equal protection case in the gender-based area is Mississippi University for Women v. Hogan 78 (MUW). This case provides a good review of the current state of heightened scrutiny because in it the Court struck a balance between a rational basis analysis and strict scrutiny.

In MUW the Court held that a state-supported college could not refuse to admit males to its nursing program. 79 Although the Court was more deferential to the state policy than it would have been had it applied strict scrutiny, it did not presume the constitutionality of the policy. The opinion contained language relating to all five indicia of a suspect class. 80 In this way the Court continued to emphasize means scrutiny. MUW also adhered to the final two prongs of the Gunther model. The Court required an "actual purpose," 81 and continued to use heightened scrutiny as an avoidance technique. 82 Even though the Court acknowledged that all the elements of a suspect classification were present, it still refused to apply strict scrutiny to gender-based classifications.

5. Summary.—The use of heightened scrutiny as an avoidance technique allows the Court to perceive itself as less interventionist because it need not impose its own views concerning the legitimacy and importance of legislative purposes. Heightened scrutiny permits a decision to be based on a narrower ground in two specific ways. First, it does not expand strict scrutiny beyond its already narrowly defined realm. Second, by emphasizing the legislative classification rather than the legitimacy of purpose for the classification, the Court is able to restrict the constitutional basis for its decision.

Means-oriented scrutiny truly represents a balance between the deferential rational basis and strict compelling interest standards.

78. 458 U.S. 718 (1982).
79. Id. at 733.
80. Id. at 725-26 & n.10.
81. Id. at 730. By explicitly requiring the actual purpose, MUW seems to go further in this respect than other cases. Id. at 730 n.16; cf. Craig, 429 U.S. at 199-200 & n.7 (accepting district court's identification of objective underlying contested statute but noting that may not be the true purpose).
82. See 458 U.S. at 728-31.
The balancing posture of Gunther's model is evident in its consideration not just of the statutory means but also of the relationship between the classification and the governmental objectives. Middle level scrutiny allows a classification to stand if that classification, although quasi-suspect in nature, is substantially related to and serves an important governmental objective. Implicit in this standard is the understanding that a classification may be relevant and upheld in some circumstances and irrelevant and struck down in others.

Having studied middle level scrutiny as it developed in the gender-based cases, we now apply those principles to the Cleburne decision. Applying a similar analysis to that decision will provide a basis upon which the Court's reasoning may be scrutinized.

II. THE CLEBURNEDECISION

A. Classification

As in the gender discrimination cases, the Court in Cleburne devoted considerable effort to an examination of the indicia of suspect classifications. Thus, the Cleburne analysis employs the means-focused scrutiny of the Gunther model. The plurality repeatedly tried to distinguish the mentally retarded from other quasi-suspect classes in its analysis of whether mental retardation is a quasi-suspect classification. Unfortunately for mentally retarded people, the plurality's lack of candor leads to a distorted view of reality.

1. Immutability.—The first factor the plurality considered was immutability. While acknowledging that retardation is an immutable characteristic, the plurality stated that the judiciary, with its "ill-informed opinions," is less capable than a legislature to make substantive judgments concerning mental retardation.

On a practical level, however, a court must often educate itself as to the issues before it. Indeed, a court will not be prepared to adjudicate legitimate legal questions until it is fully informed about

83. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding statutory rape law applying to males only); Califano v. Webster, 430 U.S. 313 (1977) (upholding statutory classification allowing different calculations for old age benefits depending on gender).
84. See, e.g., Mississippi Univ. for Women, 458 U.S. 718; Craig, 429 U.S. 190.
86. Id.
87. Id.
the factual issues in a case. If a neutral judiciary cannot so educate itself, a legislature certainly cannot be expected to escape the influence of prejudice and bias.

Trying to minimize the immutability characteristic, Justice White suggested that a state's interest in dealing with and providing for the retarded is legitimate because of the immutable nature of retardation. The plurality thus assumed that because retardation is often relevant to legitimate purposes it should not be subject to heightened scrutiny. In comparison, however, gender-based classifications have been held relevant in some circumstances and not in others. Yet gender-based classifications receive heightened scrutiny.

Mental retardation as a classification is no different. For example, some laws that single out the mentally retarded assure that they, as a class, receive equal educational opportunities. This type of classification is necessary to protect the educational rights of mentally retarded children and is, therefore, relevant to a legitimate governmental objective. On the other hand, laws requiring the indiscriminate sterilization of mentally retarded individuals serve no legitimate governmental objective.

Nevertheless, the plurality's attempt to minimize the immutability factor was ineffectual. Immutability is important because individuals should not be held responsible for traits over which they have no control. Certainly, the mentally retarded are not responsible nor should they be held accountable for their condition. Accordingly, the mentally retarded as a class meet the first test for qualification as a quasi-suspect class. Mental retardation is an immutable characteristic.

2. History of Discrimination.—The second trait of a suspect classification is historical discrimination. Indeed, the first gender-
based case to set forth these indicia, *Frontiero*, thoroughly recounted the history of discrimination against women. But the plurality opinion in *Cleburne* was surprisingly silent about historical prejudice against the mentally retarded. There can be no doubt, however, about the long and often cruel history of disparate treatment inflicted upon the mentally retarded citizens of this country. Justice Marshall, concurring in part and dissenting in part, summarized the history of discrimination against the mentally retarded:

During much of the nineteenth century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man"—the right to marry and procreate.

Dehumanizing conditions in institutions exist even today. In 1976, Wolf Wolfensberger, writing of the legacy of institutions for

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95. 411 U.S. at 684-87.


the mentally retarded, stated that the "institution [had become] a 
purgatory . . . an agency of dehumanization [where] residents are 
subjected to physical and mental abuse, to neglect and inadequate 
care and services, to environmental deprivation, and to restriction 
of the most basic rights and dignities of a citizen." 98

Perhaps the plurality could find no effective way to discuss the 
extensive history of discrimination against the retarded without ac-
knowledging the need for heightened scrutiny of classifications 
based on mental retardation. This may explain the conspicuous lack 
of discussion of the subject in the plurality opinion. Surely a group. 
whose members over the years have been referred to as "defectives" 
and "animals," 99 blamed for the moral and social ills of society, 100 
and subjected to the degrading and dehumanizing conditions of in-
stitutional living 101 can lay claim to extensive historical prejudice. 
That history is one of the strongest indications of the suspect nature 
of classifications based on mental retardation. To ensure that statu-
tory classifications based on retardation are free from the effects of 
historical prejudice, courts must employ a higher level of scrutiny.

3. Negative Stereotypes.—Historical discrimination is also re-
lected in the third characteristic associated with suspect classifica-
tions, that is, the presence of negative stereotypical views toward the 
class. Stereotypes are noted prominently in several of the gender-
based equal protection cases. 102 The Frontiero plurality suggested 
that the historical "romantic paternalism" 103 of the nineteenth cen-
tury resulted in "our statute books gradually bec[oming] laden with 
gross, stereotyped distinctions between the sexes . . . ." 104 The 
Court went on to discuss the effect of those stereotypical notions on 
the basic civil rights of women. Stereotypical notions kept women 
from holding office, serving on juries, voting, or holding property in

98. Wolfensberger, The Origin and Nature of Our Institutional Models, in Changing Patterns in Residential Services for the Mentally Retarded 70 (President's Committee on Mental Retardation 1976).
99. Id. at 39-40.
100. Id. at 54-56.
104. Id. at 685.
a legal capacity. Many of those same civil rights are still denied to the retarded today.

One need only consider the history of the eugenics movement to realize the pervasive effect of negative stereotypes on the civil rights of mentally retarded persons. During the early 1900s, the widely held stereotype of the mentally retarded as criminals, moral degenerates, inebriates, and prostitutes led to calls for total segregation and the eugenic sterilization laws. The legacy of institutionalization and the sterilization laws is still evident today. This legacy manifests itself in the deprivation or restriction of rights such as marriage, sexual freedom, procreation, property ownership, liberty, and voting.

In determining the level of scrutiny required, the plurality in Cleburne ignored the historical discrimination against the retarded. As a result, it failed to discuss adequately the effect of these negative stereotypes on legislatures. Perhaps the best example of the negative effects that stereotypes can have on legislation is the very ordinance before the Court in Cleburne. In fact, the plurality concluded "that requiring the [special use] permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . ."

Prejudicial views may generally be characterized as stereotypical. The Cleburne zoning ordinance, which the plurality viewed as prejudicial, was, in part, the product of the stereotypical views of the retarded held by the city council members who drafted and enforced the ordinance. Instead of changing the outmoded language in the zoning ordinance, the city council classified the group home as a "hospital for the feebleminded." The notion that hospitals for the feebleminded should be segregated, preferably out in the country, is one explanation for the city council's refusal to grant the special use permit. The denial may also reflect the stereotype that the retarded cannot live successfully in the community.

According to the Cleburne plurality, legislative efforts to provide

105. Id.
106. See S. HERR, supra note 96, at 22-24.
107. Id.
108. See supra note 92.
109. See Wald, Basic Personal and Civil Rights, in THE MENTALLY RETARDED CITIZEN AND THE LAW 2-26 (President's Committee on Mental Retardation 1976).
110. See supra note 2.
111. Cleburne, 105 S. Ct. at 3260.
112. Id. at 3253.
the mentally retarded with certain basic civil rights113 "belie[ ] a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."114 Legislative efforts to reduce discrimination based on gender, however, enjoyed a warmer reception from the Court. Indeed, in *Orr v. Orr*,115 the Court implicitly recognized the danger of statutes that reinforce stereotypes; thus, it applied heightened scrutiny:

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. . . . Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored.116

Similarly, because stereotypes about the mentally retarded still abound today, statutes that compensate them for past injustices must not reinforce those stereotypes. Courts, therefore, should carefully scrutinize classifications based on mental retardation. Legislators are no less affected by stereotypes concerning the mentally retarded than they are by stereotypes concerning women. Nor is the plurality spared the possible effects of stereotypes and prejudice in its own interpretation of these statutes. In fact, recent Supreme Court cases in the disability area show that these negative stereotypes have influenced the Court.

In three major decisions the Supreme Court has undercut the enforcement of statutes providing protection to mentally retarded persons. First, in *Board of Education v. Rowley*117 the Court interpreted certain provisions of Public Law 94-142, the Education for

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113. The Court noted several major pieces of legislation passed by Congress over the last several years. *Cleburne*, 105 S. Ct. at 3256. The list includes § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), (outlawing discrimination against the handicapped in federally funded programs); The Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1)-(2) (1982), recodified at 42 U.S.C. § 6009(1)-(2) (Supp. III 1985) (seemingly guaranteeing the retarded the right to appropriate treatment, services, and rehabilitation in the least restrictive setting); The Education for All Handicapped Children Act, 20 U.S.C. § 1412(5)(B) (1982) (assuring the right of retarded children to a free and appropriate education in the least restrictive setting). The Court, however, has severely limited the protections afforded by these statutes. *See infra* notes 118-128 and accompanying text.


115. 440 U.S. 268.

116. *Id.* at 283 (citations omitted).

All Handicapped Children Act,\textsuperscript{118} which guarantees a free appropriate public education to all handicapped children. The Court determined that the law did not mandate strict equality between handicapped and nonhandicapped individuals. Nor did it require states "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children."\textsuperscript{119} Instead, the Court construed the Act to require only access to a free education "sufficient to confer some educational benefit upon the handicapped child."\textsuperscript{120}

Second, in \textit{Pennhurst State School v. Halderman}\textsuperscript{121} the Court narrowly construed the Developmentally Disabled Assistance and Bill of Rights Act of 1975.\textsuperscript{122} It held that section 6010, the Act's Bill of Rights, created no new substantive rights for the mentally retarded.\textsuperscript{123} Rather, the Court said, section 6010 represented general findings and policy statements by Congress.\textsuperscript{124}

Finally, in \textit{Southeastern Community College v. Davis}\textsuperscript{125} the Court evaluated section 504 of the Rehabilitation Act.\textsuperscript{126} That statute, the Court held, imposed no obligation on state educational facilities "to lower or to effect substantial modifications of standards to accommodate a handicapped person."\textsuperscript{127}

In each of these cases the Court narrowly construed statutes intended to remedy prior injustices. The conflict between the \textit{Cleburne} plurality's view that the existence of these statutes is indicative of historical prejudice against the retarded, and the Court's consistently narrow interpretations of the protections created by these statutes, is patent. The Court cannot have it both ways. Perhaps the Court itself is unable to shake the effects of negative stereotypes.

4. \textit{Political Powerlessness}.—The \textit{Cleburne} plurality did discuss the fourth characteristic of suspect classifications, political powerlessness. It is readily apparent from the gender-based cases that political powerlessness has long been considered a characteristic of a

\textsuperscript{118} \textit{See supra} note 113.
\textsuperscript{119} \textit{Rowley}, 458 U.S. at 200.
\textsuperscript{120} \textit{Id}.
\textsuperscript{121} 451 U.S. 1 (1981).
\textsuperscript{122} \textit{See supra} note 113.
\textsuperscript{123} \textit{Id.} at 18.
\textsuperscript{124} \textit{Id.} at 22-23.
\textsuperscript{125} 442 U.S. 397 (1979).
\textsuperscript{126} \textit{See supra} note 113.
\textsuperscript{127} \textit{Southeastern Community College}, 442 U.S. at 413.
suspect classification.¹²⁸ Directly addressing the issue, the plurality suggested that recent legislation¹²⁹ "negates any claim that the mentally retarded are politically powerless . . .."¹³⁰ In a separate opinion, however, Justice Marshall noted that implicit in the plurality's reasoning is the view that "[o]nce society begins to recognize certain practices as discriminatory, in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court [should] refrain from approaching such practices with the added skepticism of heightened scrutiny."¹³¹

In neither the gender-based nor the racial classification decisions has the Court exercised the kind of restraint that the Cleburne plurality envisions. The enactment of the civil rights legislation of the 1960s demonstrates that Congress has long recognized the invidiousness of racial discrimination. Even so, in 1984, the Court applied strict scrutiny to a statute that employed a racial classification.¹³² Thus, despite increased awareness of racial discrimination and efforts to ameliorate its effects there has been no reduction in the level of judicial scrutiny.¹³³

When addressing the issue of political powerlessness in a gender-based context, the Court's reasoning was also different. In Fronterio the plurality noted that Congress had become increasingly sensitive to gender-based classifications.¹³⁴ Thus, Justice Brennan asserted, if Congress itself had taken notice of such classifications, the judiciary ought to afford gender-based classifications stricter scrutiny.¹³⁵ If increased legislative activity in the area of gender-based classifications justified stricter scrutiny, then increased legislative activities in the area of mental retardation also indicates a need for heightened scrutiny.

Since heightened legislative awareness is not enough to negate the political powerlessness requirement, the Court has yet to decide whether the retarded are politically powerless. In Fronterio the plurality concluded that women, even though they do not constitute a

¹²⁹. See supra notes 113, 117-127 and accompanying text.
¹³⁰. Cleburne, 105 S. Ct. at 3257.
¹³¹. Id. at 3268 (Marshall, J., concurring in part and dissenting in part).
¹³³. The same can be said of middle level scrutiny of gender-based classifications. In Mississippi Univ. for Women the Court used heightened scrutiny. But this was long after society had begun to correct gender-based discrimination.
¹³⁵. Id. at 687-89.
small and powerless minority, were nonetheless politically powerless.\textsuperscript{136} Inadequate representation in politics supported this conclusion. At that time there had never been a female Supreme Court Justice; and there were only fourteen female members of Congress—none of whom were United States Senators. Further, a similar situation existed at both the state and the local government levels.\textsuperscript{137}

Obviously, the mentally retarded are not even close to acquiring the same political power as women. This is especially true with reference to representation on decisionmaking panels or councils. In this sense the mentally retarded are truly a "discrete and insular minority . . . [whose] special condition . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."\textsuperscript{138} Discrimination against the mentally retarded, therefore, "may call for a correspondingly more searching judicial inquiry."\textsuperscript{139} Because of this, and because legislative efforts to protect the retarded are not a basis upon which to justify a lower level of judicial scrutiny, the mentally retarded are, in fact, a politically powerless group.

5. \textit{The Proxy Requirement}.—Through the proxy requirement, the Court attempts to determine whether the relationship between the legislative purpose and the classification is sufficiently close. The gender-based discrimination cases illustrate the Court's use of this requirement to determine the level of scrutiny that it affords to a certain classification.\textsuperscript{140} As the Court asserted in \textit{MUW}:

The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," . . . to establish a link between objective and classification.\textsuperscript{141}

The \textit{Cleburne} plurality did not explicitly discuss the proxy requirement. As Justice Marshall observed, however, it is implicit in the plurality's holding that "mental retardation \textit{per se} cannot be a

\textsuperscript{136} \textit{Id.} at 686 & n.17.
\textsuperscript{137} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{141} 458 U.S. at 726 (quoting \textit{Craig}, 429 U.S. at 198).
proxy for depriving retarded people of their rights and interests without regard to variations in individual ability." In other words, the use of the classification did not substantially further any of the asserted purposes of the Cleburne zoning ordinance.

In middle level scrutiny the proxy requirement is more flexible than it is under strict scrutiny. In some cases the classification may be legitimate and relevant, while in other cases it may not. Although middle level classifications for the most part must meet the five requirements of a suspect class, such classifications are at times legitimate. For this reason, Justice Marshall maintained that the Court should apply heightened scrutiny to classifications based on mental retardation.

Mental retardation may indeed be a legitimate classification in some circumstances but not in others. For example, mental retardation is certainly a legitimate classification in the federal law providing access to a free appropriate public education. As the Cleburne plurality found, however, in a zoning case the classification illegitimately rested upon an irrational prejudice against the mentally retarded.

That a given classification is legitimate at some times and not at others cannot be reconciled with the plurality's view that a group having characteristics that the state may take into account should virtually never be accorded heightened scrutiny. The plurality failed to distinguish the gender-based cases, in which the Court itself found gender to be an adequate proxy in some cases and not in others. According to the plurality, heightened scrutiny is inappropriate when many of the legislative classifications affecting the group are likely to be valid. Logically this argument cannot withstand scrutiny. As Justice Marshall noted: "An inquiry into constitutional principle, not mathematics, determines whether heightened scrutiny is appropriate."

In the final analysis, the proxy requirement is substantially the
same regardless of whether the classification is based on gender or mental retardation. Indeed, classifications based on mental retardation meet all of the criteria for application of heightened scrutiny. As the plurality acknowledged, mental retardation is an immutable characteristic. Historically, the retarded have been subjected to widespread prejudice. They are politically powerless, and have been burdened with significant stereotypes. Finally, as Justice Marshall remarked, in some circumstances mental retardation is not a legitimate proxy for the rights and interests of the retarded. Application of these principles demonstrate that heightened scrutiny is appropriate for classifications based on mental retardation.

6. The Plurality Opinion: Heightened Scrutiny in Disguise.—The Cleburne plurality stated that a rational basis standard is the appropriate level of scrutiny. The plurality's opinion, however, suggested the application of heightened scrutiny. The decision seems to reject the rational basis standard in two respects. First, the analysis generally fits Gunther's model of heightened scrutiny. Second, the rational basis standard does not normally result in an "as applied" test: The Court will normally uphold a statute that is applied unconstitutionally if the statute is constitutional on its face.

B. Application of Heightened Scrutiny Analysis

1. Scrutiny of the City’s Rationale.—The Cleburne plurality's analysis clearly adhered to the first prong of the Gunther model. When a court applies a rational basis test, it is free to hypothesize or supply its own legitimate governmental purpose that is rationally related to the classification. Under the heightened scrutiny approach as described in the Gunther model, however, courts required the legislature whose statute was being challenged to supply its own rationale. The Cleburne plurality not only refused to supply its own rationale, but also engaged in a searching inquiry into the rationale supplied by the City.

The City suggested several possible rationales for requiring a special permit for the group home. First, the negative attitudes of property owners within 200 feet of the proposed group home trou-

151. See supra note 85 and accompanying text.
152. See supra note 142.
153. See, e.g., United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973) (invalidating statute that denied food stamps to households with persons over eighteen years of age who had been declared dependent children for tax purposes in a prior year).
154. See supra note 43 and accompanying text.
155. Cleburne, 105 S. Ct. at 3259-60.
bled the City. The plurality dismantled this argument: "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible"156 objectives to justify the classification. The plurality cited a strict-scrutiny case for the proposition that the law may not give effect to private biases.157 Justice White refused to draw the inference that the City's concern had more to do with the safety of the retarded residents than with the negative attitudes of their neighbors.

Next, Justice White discussed the City's concern about the location of the group home. Because the home was to be located across the street from a junior high school, the City feared that the students might harass the home's residents.158 But the plurality found these fears insufficient to justify the classification, just as the negative attitudes of their neighbors were insufficient.159

The third reason the City offered involved the group home's location on a 500-year flood plain.160 The plurality could see no reason for this concern: the City had not required nursing homes, convalescent homes, or hospitals to obtain special use permits.161

Fourth, the City asserted that the home would house too many people. The plurality again found this argument meritless: similar restrictions under the zoning ordinance did not bind boarding houses, nursing homes, or family dwellings.162

The plurality's reasoning in this area seems inconsistent. Numerous federal and state statutes and regulations govern living conditions in various facilities, both institutional and community-based.163 The Court has never considered that these laws, which set size and density requirements, effect a denial of equal protection. In fact, the plurality cited one of these regulations, the ICF-MR square-footage-per-resident requirement,164 in its opinion. The plurality failed to explain why the City could not constitutionally impose its conditions on the location and number of residents in the group home.

156. Id. at 3259.
157. Id. (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
158. Cleburne, 105 S. Ct. at 3259.
159. Id.
160. Id.
161. Id.
162. Id. at 3259-60.
163. See, e.g., Md. Regs. Code tit. 10, § 22.03.23-24, for Maryland state regulations on per-square-foot requirements and general living conditions in group homes for the mentally retarded. For example, § 22.03.24B requires that there be at least three feet between each bed and, for multiple bedrooms, that there be at least 60 square feet per bed. See also 42 C.F.R. § 442.447 (1985) (setting out square footage requirements for bedrooms in intermediate care facilities for the mentally retarded (ICF-MR)).
own population density requirements on the home while the federal
government and the states are free to do so.

The plurality also suggested that the City's concerns about con-
centration of population, traffic congestion, fire hazards, and neigh-
borhood security did not adequately support the classification.165
Justice White pointed out that these concerns also apply to apart-
ment houses, fraternity and sorority houses, and hospitals, none of
which needs a special use permit.166

In the past, however, a legislature has always been free to ad-
dress public concerns "one step at a time"167 under the rational ba-
sis test. "If a classification has some 'reasonable basis,' it does not
offend the Constitution simply because the classification is not made
with mathematical nicety or because in practice it results in some
inequality."168 The failure to allow a "one step at a time" ap-
proach suggests that the plurality in fact applied a heightened scru-
tiny test.

Because it refused to supply justifications that were readily ap-
parent, and because it looked only to the record,169 the plurality's
analysis coincides with the first prong of Gunther's model.

2. Means Scrutiny.—The second prong of the Gunther model is
the means-scrutiny requirement.170 The Cleburne plurality thor-
oughly analyzed the classification, as the Gunther model required,
but refused to hold that mental retardation is a quasi-suspect
classification.171

Although the Court purported to apply the rational basis test,
consideration of all the factors can only lead to the conclusion that
the classification analysis was part of a de facto application of height-
ened scrutiny. Just as Gunther noted that the Reed case made no
sense without importing some special suspicion of gender-based
classifications,172 Cleburne makes no sense without importing an ele-
ment of increased suspicion of classifications based on mental retar-

165. Id. at 3260.
166. Id.
Carbonic Gas Co., 220 U.S. 61, 78 (1911)).
169. The plurality expressly stated: "[T]he record does not reveal any rational basis
..." Cleburne, 105 S. Ct. at 3259.
170. See supra notes 45-49 and accompanying text.
171. Cleburne, 105 S. Ct. at 3255-56.
172. See supra note 57 and accompanying text.
dation. In effect, the plurality engaged in a means-focused scrutiny which is sufficient to meet the second prong of the Gunther model.

3. Means-Scrutiny as an Avoidance Technique.—The final prong of the Gunther model is the use of means-scrutiny as an avoidance technique.\textsuperscript{173} The plurality opinion adheres to this final prong of the model, but with a slight variation from the gender-based cases.

In the gender-based cases, the Court applied a middle level of scrutiny to avoid a determination that a suspect classification could be based on gender.\textsuperscript{174} It is indicative of how well developed heightened scrutiny is today that the Cleburne plurality tried to avoid an extension of middle level scrutiny. Just as the Court's reluctance to extend strict scrutiny to gender-based classifications resulted in the creation of a new middle level of scrutiny, the plurality's reluctance to extend middle level scrutiny to new classifications, including mental retardation, foreshadows a new step in the evolution of equal protection analysis. This new step is the development of the "as applied" test.

C. The "As Applied" Test

The "as applied" test allowed the plurality to give redress to the potential residents of the group home without expressly extending heightened scrutiny to the mentally retarded as a class. Nor did the Court find it necessary to strike down the applicable section of the Cleburne zoning ordinance as unconstitutional on its face. Citing the desire to avoid unnecessarily broad constitutional judgments, the plurality suggested that the preferred course of adjudication would be to decide whether the zoning ordinance violated equal protection as applied in the present case.\textsuperscript{175} This approach relieved the Court of the duty of deciding whether the ordinance or one of its sections was facially invalid.\textsuperscript{176}

The decision to use an "as applied" test in an equal protection case is unprecedented. The authority cited by the plurality as supporting its view is easily distinguishable. All the cases cited dealt with first amendment, not equal protection, questions.\textsuperscript{177} More-

\textsuperscript{173} See supra note 50 and accompanying text.
\textsuperscript{174} Gunther, supra note 40, at 29-30.
\textsuperscript{175} Cleburne, 105 S. Ct. at 3258.
\textsuperscript{176} Id.
\textsuperscript{177} See Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985) (lower court should not have struck down Washington moral nuisance statute in its entirety since statute reached material inciting normal as well as prurient interest in gender); United States v. Grace, 461 U.S. 171 (1983) (statute prohibiting actions designed to bring into public
over, ample precedent exists to suggest that if a statute or subsection of a statute violates equal protection, the Court should strike down the entire statute.\textsuperscript{178} Justice Marshall recounted the case law on this point,\textsuperscript{179} and observed that "[i]f a discriminatory purpose infects a legislative act, the act itself is inconsistent with the equal protection clause and cannot validly be applied to anyone."\textsuperscript{180}

In effect, the "as applied" test allowed the plurality to assess the ordinance with heightened scrutiny. The result may reflect a compromise between restricting the use of heightened scrutiny for all classifications based on mental retardation and acknowledging that in some cases such classifications must receive more than a minimal level of scrutiny. The result is de facto heightened scrutiny under the rubric of a rational basis test. This is evident in the plurality's extensive analysis of suspect indicia, its refusal to supply readily available legislative purposes, and its inquiry into and rejection of the purposes supplied by the City. By refusing to explicitly label its treatment as heightened scrutiny, and by using the "as applied" test, the plurality forged new ground. Its new approach, however, will probably be short-lived.

\textbf{D. Future Directions}

\textit{1. The Future of the "As Applied Test."—}The "as applied" test is not likely to become a permanent fixture in equal protection jurisprudence. As Justice Marshall noted, the test is standardless: it does not indicate when the City might legitimately apply the ordinance to other retarded persons not directly affected by the \textit{Cleburne} decision.\textsuperscript{181} Furthermore, the plurality did not indicate when the Court should undertake a more searching inquiry under this invigorated rational basis test.\textsuperscript{182}

The "as applied" test can only lead to instability in both statute

\begin{itemize}
  \item notice any party, organization, or movement struck down only as it applied to sidewalks around Supreme Court, not areas on Supreme Court grounds or in the building); NAACP v. Button, 371 U.S. 415 (1963) (statutes may not prohibit certain modes of expression and association protected by first and fourteenth amendments).
  \item See Caban v. Mohammed, 441 U.S. 380 (1979) (striking down statute that required parental consent for adoption from unwed mothers but not unwed fathers); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking down maternity leave policy \textit{in toto} rather than as applied to plaintiff while assuming that the policy may have been justified as applied to some women).
  \item \textit{Cleburne}, 105 S. Ct. at 3274 (Marshall, J., concurring in part and dissenting in part).
  \item Id.
  \item Id. at 3273.
  \item Id. at 3265.
\end{itemize}
tory and constitutional law. It will allow courts, supposedly under a rational basis standard, to strike down an otherwise valid statute as it applies to a particular group. A statute such as the Cleburne zoning ordinance may be reviewed under the traditional rational basis test for some groups and under a more rigorous form of scrutiny for other groups. Not only may the same statute be reviewed under two different levels of scrutiny, it may end up being constitutional as applied to one group and unconstitutional as applied to another.

For example, in the future, the Cleburne ordinance will have little effect as it applies to group homes for the retarded; yet the City may apply the same section of that ordinance to a home for the mentally ill or a half-way house for convicts. Conceivably, if a court applied a true rational basis test, the statute could be upheld as it applied to one or both of these two groups.

Without further refinement of the standards that will trigger the "as applied" test, statutory law will be riddled with exceptions in favor of any group that can make a legitimate claim that the law rests upon an irrational prejudice. By rejecting mental retardation as a quasi-suspect classification, and by striking down the statute as applied because it was based on irrational prejudice, the plurality established an easy standard for other groups to meet. Once the Court sets out to define exceptions in the equal protection area, equal application of the law becomes elusive. Indeed, even if the Court does refine its standards, some statutes will inevitably be legitimate in some circumstances but not in others. The resulting uncertainty can only confuse those charged with enforcing those statutes.

Perhaps the Cleburne result stems from the inability of the current three-tiered system to adequately protect certain groups from discrimination. The Court’s desire to protect groups from unequal treatment on the one hand, and its desire to avoid interventionism on the other, has produced a dilemma. The Cleburne Court evidenced a special sensitivity for the mentally retarded. Yet, at least four members of the Court are unwilling, at least explicitly, to extend middle level scrutiny to classifications based on mental retardation. Because of the lack of standards and the instability that will most certainly surround application of the "as applied" test, Cleburne must be viewed beyond its narrow holding.

The "as applied" test is as an evolutionary step in equal protection analysis. In actuality, it is a step toward the extinction of the semantic distinctions represented by terms such as "tiered scrutiny," "rational basis," "heightened scrutiny," or "strict scrutiny."
Justices Stevens and Marshall have both proffered schemes that reject the three-tiered system.

2. The Stevens Model.—Justice Stevens' model proposes a "continuum of judgmental responses,"183 in which all cases are subject to a series of analytical questions.184 The questions, which are the same regardless of the classification, will pursue the issues of "legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."185

The Stevens model is easy to apply. The first questions are: Which class does the legislation harm; and, has that class been subject to a tradition of disfavor?186 A court could, but would not be required to, take notice of history, stereotypes, and political powerlessness. From a common sense point of view, however, heightened scrutiny should be expected for classifications based on groups, such as women and the mentally retarded, that have traditionally suffered discrimination.

The Stevens model would only scrutinize laws that are harmful to members of a particular class.187 Thus, statutory classifications that bestow a benefit upon the class would not violate the Constitution. Heightened scrutiny, therefore, could not have a chilling effect on legislation intended to benefit a particular group.

Next, Justice Stevens would inquire into the purpose that the law serves.188 Any given public purpose can fall within a continuum ranging from totally arbitrary to highly relevant. For example, if the purpose of a law is to provide training and job opportunities for the mentally retarded, the Court should perceive this as a relevant and worthy goal, especially since the class has traditionally been subject to disfavor. On the other hand, a law such as the zoning ordinance challenged in Cleburne should be considered arbitrary: it prevents

183. Id. at 3261 (Stevens, J., concurring).
184. Justice Stevens listed the following questions:
   (1) "What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws?"
   (2) "What is the public purpose that is being served by the law?"
   (3) "What is the characteristic of the disadvantaged class that justifies the disparate treatment?"
185. Id. at 3261.
186. See supra note 184.
187. By asking only what class is harmed by the legislation, Cleburne, 105 S. Ct. at 3261 (Stevens, J., concurring), Justice Stevens excluded from equal protection analysis legislation that benefits a given class.
188. Id. at 3261-62.
the establishment of group homes and, therefore, is harmful to the class.

Finally, Justice Stevens' model isolates the characteristics of the class that justified disparate treatment. The job training law in the example above would allow consideration of class members' ability to learn job skills if they receive the appropriate opportunity. Mental retardation, on the other hand, is not relevant to the location of living arrangements, as in a zoning ordinance such as Cleburne's.

In essence, the Stevens model provides a common sense balancing approach. When the answers to all three questions are weighed against each other, a neutral court will be able to determine the legitimacy of a given classification.

3. The Marshall Model.—Justice Marshall's model, although similar, is couched in different terms. Equal protection in the Marshall model depends on the constitutional and societal importance of the adversely affected interests, as well as the invidiousness of the basis upon which the particular classification is drawn.

The Marshall model's sensitivity to societal attitudes may be good or bad depending on the particular views society may espouse at a given time. Justice Marshall's approach will enable the law to reflect societal attitudes in a more contemporaneous fashion, rather than lagging behind society's views. Emphasis on the constitutional importance of the threatened interest may cut both ways depending on the makeup of the Court. Liberal Justices would view housing as an important constitutional interest. Other Justices, though, might not agree. By emphasizing the invidious nature of the classification, the Marshall model also takes into account historical prejudice, stereotypes, political powerlessness, and immutability. As in the Stevens model, however, these factors are balanced against constitutional and societal interests.

4. Combining the Marshall and Stevens Models.—By coupling Justice Marshall's emphasis on the constitutional and societal importance of the affected interests with Justice Stevens' emphasis on legislative goals, the Court could devise a model in which levels of scrutiny are not at issue. The Marshall model's emphasis on the constitutional and societal importance of affected interests provides a standard for determining whether a classification is harmful under

189. Id. at 3262.
190. Id. at 3265 (Marshall, J., concurring in part and dissenting in part).
191. See supra note 37.
the Stevens model. Furthermore, if these two models were combined, the Court could consider legislative purposes and objectives in light of statutory classifications. An emphasis on common sense would characterize the new model's interpretation.

This approach lends itself to a narrower, case-by-case analysis that employs a balancing test of relevant factors. Both models look to the characteristics of the group at issue, rather than pushing a classification into one of three or four preconceived levels into which it does not quite fit. In this sense, both models allow what Justice Stevens termed a "continuum of judgmental responses"\textsuperscript{192} under one standard—equal protection.

E. Conclusion

\textit{Cleburne} exemplifies the Court's struggle to deal with groups that meet most, if not all, of the characteristics of a suspect or quasi-suspect class.\textsuperscript{193} The plurality applied a type of heightened scrutiny that lacks a formal label. Through its "as applied" test, the plurality creatively avoided the formal extension of middle level scrutiny beyond its current bounds. The "as applied" standard, though, cannot last. Its lack of principled standards and its apparent tendency to create statutory and constitutional instability will, in all likelihood, lead to the next step in the evolution of equal protection. That next step will produce a model that de-emphasizes the levels of judicial scrutiny and allows the Court to proceed on a case-by-case basis.

\textit{Cleburne} takes a step toward an equal protection jurisprudence that will produce decisions that are more just and more principled than those of the past. Until then, however, \textit{Cleburne} strongly indicates that, regardless of the form of inquiry, the Court has served notice that arbitrary discrimination against the mentally retarded is intolerable. The rigorous treatment the Cleburne zoning ordinance received, despite the plurality's lack of candor, should, at the very least, dissuade other jurisdictions from attempting to implement discriminatory zoning practices.

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\textsuperscript{192} \textit{Cleburne}, 105 S. Ct. at 3261 (Stevens, J., concurring).

\textsuperscript{193} A classification based on mental illness is one such group. Classifications defined to include individuals carrying the AIDS virus may be another.

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