EQUAL PROTECTION — MENTAL RETARDATION IS NOT A QUASI-SUSPECT CLASSIFICATION REQUIRING HEIGHTENED JUDICIAL SCRUTINY, BUT REQUIRING A SPECIAL USE PERMIT FOR THE OPERATION OF A GROUP HOME FOR THE MENTALLY RETARDED BASED ON IRRATIONAL PREJUDICES FAILS EVEN THE RATIONAL BASIS TEST.— *City of Cleburne v. Cleburne Living Center* (U.S. Sup. Ct. 1985).

Jan Hannah and Cleburne Living Centers, Inc. (CLC) proposed to operate a group home for the mentally retarded in Cleburne, Texas.[1] A municipal zoning ordinance, as interpreted by the city, made it necessary for CLC to obtain a special use permit.[2] Citing such factors as the attitude of neigh-

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1. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3252 (1985). Hannah, vice-president of CLC (now known as Community Living Concepts, Inc.), purchased a large four bedroom house at 201 Featherston Street, Cleburne, Texas. Joint Appendix at 92, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). Cleburne's first proposed group home for the mentally retarded was to house 13 mildly or moderately retarded individuals to be supervised at all times by CLC staff members. Joint Appendix at 93, City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3249. The home would be operated as a Level I Intermediate Care Facility for the Mentally Retarded (ICF-MR), under a program providing for joint federal and state funding for remedial services for the mentally retarded. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3252 n.2 (1985). *See* 42 U.S.C. 1396d (a) (15) (1982). TEX. HUM. RES. CODE § 32.001 (1980 & Supp. 1985). ICF-MR's are covered by extensive federal and state regulations. *Id. See* 42 C.F.R. 442.1 - .115, .250 - .254, .400 - .516 (1985); TEX. ADMIN. CODE tit. 40, § 27.101 *et seq.* (1981).

2. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3252-53. The proposed site was in an R-3 (apartment house) district. Joint Appendix at 90, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). Section 8 of the Cleburne Zoning Ordinance lists the following permitted uses:

> 1. Any use permitted in District R-2;
> 2. Apartment houses, or multiple dwellings;
> 3. Boarding and lodging houses;
> 4. Fraternity and sorority houses and dormitories;
> 5. Apartment hotels;
> 6. Hospitals, sanitariums, nursing 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 . . . .

Zoning Ordinance of Cleburne, Texas § 8 (1965). Joint Appendix at 60-61, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). Section 16, subdivision 9 sets out uses requiring a special use permit: "hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions." *Id.* at 63.

In response to CLC inquiries, the city classified the planned group home as a hospital for the insane or feeble-minded after consulting a dictionary to determine what constituted feeble-mindedness. Brief for Respondent at 2; Joint Appendix at 69, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

boring homeowners, location of the proposed facility, size of the home, concern over the legal responsibility for actions of the mentally retarded, and fears of the elderly, the city council denied the permit application of CLC at a public hearing.[3]

Hannah and CLC sought injunctive relief and damages in United States District Court for the Northern District of Texas.[4] They claimed that the zoning ordinance was invalid both on its face and as applied because it unconstitutionally discriminated against the mentally retarded in violation of the fourteenth amendment.[5] The district court found the ordinance valid on its face and as applied since it was found to be rationally related to the legitimate interests advanced by the city.[6] The Court of Appeals for the Fifth Circuit reversed on the equal protection claim.[7] Rather than applying the minimum level of scrutiny used by the lower court, the appellate court instead invoked heightened scrutiny since it determined that mental retardation was a "quasi-suspect" class.[8] The ordinance was struck down under

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3. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3253. Joint Appendix at 95, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

4. Cleburne Living Center v. City of Cleburne, No. CA 3-80-1576-F, slip op. at 1 (N.D. Tex. 1982); Joint Appendix at 92, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). Also joining as plaintiffs were Advocacy, Inc., a non-profit corporation providing legal services to disabled persons, and the Johnson County Association for Retarded Citizens (not joining on appeal). *Id.* at 88-89. Named defendants along with the city were the mayor, three council members, and the city attorney. *Id.* at 89.

5.. *Id.* The equal protection clause commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1. Other issues raised below were an alleged violation of the Revenue Sharing Act, 31 U.S.C.A. § 6716(b)(2) (1983), and a due process claim. Joint Appendix at 97, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). The district court found that federal funds were not used to finance the zoning activities of the city council so it rejected the federal statute violation claim; the due process issue was never reached. Joint Appendix at 100, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

6. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3253. The Court found that if potential residents were not mentally retarded but the home was the same in all other respects, it would be a permitted use under the zoning ordinance. Joint Appendix at 93, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). The ordinance was held to be rationally related to the city's legitimate interests in the legal responsibilities of CLC and its residents, the safety and fears of neighboring residents, and the potential overcrowding due to the number of people to be housed there. *Id.* at 103.

7. Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 193 (5th Cir. 1984).

8. *Id.* The court found mentally retarded persons to share some of the characteristics of a suspect class because discrimination against the mentally retarded was likely to reflect deep-seated prejudice and those persons have been subjected to a history of unfair and often grotesque mistreatment. *Id.* at 197. *See* Plyler v. Doe, 457 U.S. 202, 216-17 n.14 (1982) for a formulation of suspectness. The appellate court referred to denial of public schooling, compulsory sterilization, and segregation of the retarded in stigmatizing institutions as evidence of this prejudice . Cleburne Living Center v. City of Cleburne, 726 F.2d at 197. The court also concluded that the mentally retarded have lacked political power which was another reason to apply heightened scrutiny. *Id. See also* Plyler v. Doe, 457 U.S. at 216-17 n.14 (citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)); United States v.

heightened scrutiny because the court found that it did not substantially further any important governmental interests.[9] On writ of certiorari, the United States Supreme Court *held*, affirmed in part, vacated in part.[10] Mental retardation is not a quasi-suspect classification requiring heightened scrutiny, but requiring a special use permit for the operation of a group home for the mentally retarded based on irrational prejudices fails even the rational basis test. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

This case is of interest because the Supreme Court had not previously ruled on the appropriate level of scrutiny to be applied to classifications based on mental retardation.[11] Given the amount and extent of legislation affecting the mentally retarded,[12] higher scrutiny would have far reaching

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Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). As a matter of fact, most states disqualified mentally retarded citizens from voting. Cleburne Living Center v. City of Cleburne, 726 F.2d at 197. Finally, since mental retardation cannot be cured, it is an immutable condition, indicating the need for heightened scrutiny. *Id.* at 198. *See also* Parham v. Hughes, 441 U.S. 347, 351 (1979). Even though these factors were indicia of a suspect class, the court found strict scrutiny inappropriate since mental retardation is a relevant distinction in some cases. Cleburne Living Center v. City of Cleburne 726 F.2d at 198.

9. *Id.* at 200. The test applied was from *Craig v. Boren*, 429 U.S. 190, 197 (1976). *See also infra* note 30 and accompanying text.

10. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3260 (1985).

11. *See* Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 196 (5th Cir. 1982). The lower courts have not been consistent in this area. *See* Fowler v. United States, 633 F.2d 1258, 1262 (8th Cir. 1980)(mentally retarded federal worker denied equal protection in termination under rationality test); *but see* New York v. 11 Cornwall Co., 695 F.2d 34, 39 (2d Cir. 1982)(discrimination against the mentally retarded is invidious)(dictum); Association for Retarded Citizens v. Olson, 561 F. Supp. 473, 490 (D.N.D. 1982)(intermediate-level scrutiny applicable to mentally retarded), *aff'd on other grounds*, 713 F.2d 1384 (8th Cir. 1983); Development Disabilities Advocacy Center v. Melton, 521 F. Supp 365, 371 (D.N.H. 1981)(inmates of state institution for mentally retarded not a suspect class); Anderson v. Banks, 520 F. Supp. 472, 512 (S.D. Ga. 1981)(mentally retarded not a "quasi-suspect" class); New York Assoc. for Retarded Children v. Carey, 466 F. Supp. 487, 504 (E.D.N.Y. 1979)(decided on a rational basis standard).

12. For federal statutes promoting the development of community based residential settings and services see, *e.g.*, Developmental Disabilities Services and Facilities Construction Act of 1970, Pub. L. No. 91-517, 84 Stat. 1316; Developmentally Disabled Assistance and Bill of Rights Act 42 U.S.C. §§ 6000-6081 (1982); Education of the Handicapped Act, 20 U.S.C. §§ 1400-1461 (1982); Housing Acts of 1959, 12 U.S.C. § 1701q (1982); Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 210(c), 88 Stat. 633, 669-70; Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Pub. L. No. 88-156, 77 Stat. 273, 275 (1963); Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527; Mental Retardation Facilities and Community Mental Health Center Construction Act Amendments of 1965, Pub. L. No. 89-105, 79 Stat. 427; Vocational Rehabilitation and other Rehabilitation Services Act, 29 U.S.C §§ 701-796 (1982).

The Iowa legislature recently has put county zoning on the side of the mentally retarded, at least on the issue of classification of a group for zoning purposes. IOWA CODE § 358a.25 (1985). A licensed residential care facility serving not more than eight developmentally disabled persons, including the mentally retarded, shall be treated by county zoning authorities as a residential use of the property and shall be permitted in all residential zones without owners

implications in terms of its potential disruptive effect on that legislation. In addition, it is important to those seeking housing for the mentally retarded that the courts will not allow prejudices to influence decision-making regarding the establishment of group homes, given their importance as a living alternative for the mentally retarded.[13]

The *Cleburne* Court's analysis is significant for another reason as well. Even though a rational basis test was utilized,[14] the Court had little difficulty in striking down the legislation as applied to the CLC group home.[15] Justice Marshall, concurring only in judgment, argued that the probing inquiry used by the majority was the same as that associated with heightened scrutiny.[16] Marshall claimed that the test invoked was certainly not the rational basis test of earlier decisions.[17] In most cases, classifications required to be only rationally related to governmental objectives pass constitutional muster.[18] It is at the higher levels of scrutiny where classifications most

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and operators of such homes being required to "obtain a conditional use permit, special use permit, special exception, or variance." *Id.*

13. One person who is involved in developing and supervising group homes for the mentally retarded in Iowa communities such as Charles City, Mason City, Alma, Osage, and New Hampton said that, based on his experience, "these kinds of neighborhood fears and anxieties about the handicapped are not in the past, they lie just below the surface." Telephone interview with Rich Turpen, Executive Director of Comprehensive Systems, Inc. in Charles City. (April 1, 1986). Turpen said that he has noticed many of these people become supporters after the group homes are in place and they see how the facilities operate. *Id.* Before anything else is done, however, the best tactic is to "make sure zoning is on your side." *Id.*

14. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3258 (1985). The statute will be upheld "[a]s long as the classificatory scheme . . . rationally advances a reasonable and identifiable governmental objective . . . ." Schweiker v. Wilson, 450 U.S. 221, 235 (1981).

15. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3260. The Court restricted its ruling to finding the special use requirement unconstitutional in this case but not as to all classifications based on retardation. *Id.* at 3528. The only reason given was that it was the "preferred course of adjudication," an approach which drew a vigorous dissent by Justice Marshall. *Id. See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3272-74 (Marshall, J., concurring in part and dissenting in part).

Since the statute does not exclude all group homes for the mentally retarded, but merely establishes and additional procedural hurdle, there would seem to be room for constitutional application. In other words, a special use permit could properly be denied to a group home for the mentally retarded under appropriate circumstances. Apparently this is the reason the Court ignored the facial attack on the statute. It is difficult to tell since the as applied approach is so new to this area. Justice Marshall states that this is the first time. *Id.* at 3274. The Court did recite the virtues of allowing legislative discretion in this area. *Id.* at 3257 (majority opinion). Presumably this discretion was reserved for the next time the classification is attempted under the ordinance.

16. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3263-75 (Marshall, J., concurring in part and dissenting in part). The court of appeals used a very similar analysis in striking down the ordinance under heightened scrutiny. Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 202 (5th Cir. 1984).

17. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3264 (citing Williamson v. Lee Optical, 348 U.S. 483 1955).

18. *See infra* note 36.

often fail.[19] But classifications subjected to even minimum scrutiny have not always been upheld either.[20] A finding of unconstitutionality at this lowest level of scrutiny appears to represent a total failure of line-drawing.

Two cases cited by the Cleburne Court illustrated this failure. In *Zobel v. Williams*,[21] a classification based on duration of citizenship for distributing Alaskan mineral income was struck down as not rationally related to the state's purposes of creating residence incentives, encouraging prudent management of the fund, and recognizing contributions to the state by its residents.[22] The classification in *USDA v. Moreno*[23] fared no better.[24] In *Moreno*, the goals of minimizing fraud in the administration of the food stamp program, raising nutrition level amount to the low-income, and strengthening agricultural income was not rationally furthered by eliminating benefits to households containing unrelated individuals.[25] These cases seem to mark the boundary of the rational basis test. If a relationship between classification and asserted goal is too attenuated, the Court will strike the classification down as irrational or arbitrary. Indeed, the city council's actions in this case were found to rest on an irrational prejudice against the mentally retarded.[26] Accordingly, the holding in *Cleburne* in no way represented a departure from the Court's approach under the rational basis standard. It is clear that no classification can withstand even minimum scrutiny if it rests on grounds wholly irrelevant to the achievement of the state's objective.[27] No higher level of scrutiny would seem to be needed to strike down such irrational classifications.

The Court first reviewed the three levels of judicial scrutiny it employs to test statutes which have been challenged as a denial of equal protection.[28] The basic requirement of the equal protection clause is that all persons similarly situated be treated alike.[29] When a statute or other official action

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19. *See infra* notes 30-31, and accompanying text.

20. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)(state administrative scheme for processing employment discrimination claims); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)(eligibility for entitlements to Social Security benefits); Lindsey v. Normet, 405 U.S. 56 (1972) (double-rent appeal bond requirement in forcible entry and detainer actions); Reed v. Reed, 404 U.S. 71 (1971) (similarly situated candidates for appointment as administrators). *See also infra* notes 21-22 and accompanying text.

21. 457 U.S. 55 (1982).

22. *Id.* at 61-63.

23. 413 U.S. 528 (1973).

24. *Id.* at 535-36.

25. *Id.*

26. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3260.

27. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

28. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3254-55. The most explicit acknowledgement by the Court of three levels of scrutiny before the present case came in *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982).

29. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The equal protection clause commands that no state shall "deny to any person within its jurisdiction the equal pro-

treats a certain class differently than others, the classification may be subjected to varying levels of scrutiny by the Court.[30] Classifications based on race, alienage, and national origin, for example, are subjected to the highest level, strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.[31] Strict scrutiny also applies when state laws impinge on personal Constitutional rights.[32] Other classifications such as those based on gender or illegitimacy face a heightened standard of review.[33] This second level, intermediate scrutiny, demands that classifications will fail unless they are substantially related to a sufficiently important or legitimate state interest.[34] The third standard of review applies when social[35] or economic[36] legislation is involved.[37] The Court stated the "general rule"[38] to be that such legislation is presumed to be valid and will be upheld if the classification is rationally related to a legitimate state interest.[39]

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tection of the laws." U.S. CONST. amend. XIV, § 1.

30. *See supra* note 27. Justice Stevens, joined by Chief Justice Burger, explicitly rejected the three-tiered approach. City of Cleburne v Cleburne Living Center 105 S. Ct. at 3260-62 (Stevens, J., concurring). Justice Marshall was joined in dissent by Justices Brennan and Blackmun. Thus, the precedential value of this part of the opinion is questionable because it did not represent a majority of the Court.

31. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3255. *See* Palmore v. Sidoti, 104 S. Ct. 1879 (1984); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); *but see* Foley v. Connelie, 435 U.S. 291 (1978) (rational basis test applied to alienage classification); Oyama v. California, 332 U.S. 633 (1948) (national origin).

32. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3255.

33. *Id.* These are sometimes called fundamental rights. Plyler v. Doe, 457 U.S. 202, 217 (1982). *See also, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

34. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3255. *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (gender); Mills v. Habluetzel, 456 U.S. 91 (1982) (illegitmacy).

35. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3255. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981) (denial of comfort allowances to needy aged, blind, and disabled persons confined in public institutions not receiving medicaid funds).

36. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3254. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (grandfather clause in ordinance affecting pushcart vendors).

37. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3254.

38. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3254. For a contrary view on the existence of any general rule, *see* United States RR Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 n.10 (1980) (Brennan, J., dissenting).

39. Four cases cited by the Court in support of rationality are all very deferential. Schweiker v. Wilson, 450 U.S. 221, 235 (1981)("we must disregard the existence of other methods of allocation . . ." that the Court would have preferred); United States RR Retirement Bd. v. Fritz, 449 U.S. 166, 167 (1980) (only question is whether Congress achieved its purpose arbitrarily or irrationally); Vance v. Bradley, 440 U.S. 93, 108 (1979) (upheld a classification that was both overinclusive and underinclusive); City of New Orleans v. Dukes, 427 U.S. at 303, (substantially less than mathematical exactitude is required in classifications under rational basis).

The Court focused on the reasoning in *Massachusetts Board of Retirement v. Murgia*,[40] where age was rejected as a quasi-suspect class.[41] In *Murgia*, retirement of uniformed state police officers was mandatory at age fifty.[42] The statute was upheld by a finding that the classification rationally furthered the state interest in assuring physical preparedness of its police.[43] The Court appears to have taken from that case the idea that some discrimination is allowable so long as the class has not suffered from a "history of purposeful unequal treatment"[44] or been subjected to unique disabilities based on stereotypes "not truly indicative of their abilities."[45] In addition, if a class has distinguishing characteristics relevant to authorized state interests, only a rational relation between classification and interest is required.[46]

In *Cleburne*, which was the Court's first inquiry into the appropriate level of scrutiny to be applied to a classification based on mental retardation, the Court rejected any heightened standard.[47] According to the Court, the mentally retarded are immutably different[48] in two relevant respects.[49] First, they differ from others in that they have reduced ability to cope with the everyday world and function in it.[50] They also differ among themselves in degree of disability.[51] States may legitimately provide for and deal with the mentally retarded based on those differences.[52] Proper treatment of a class that is so large and diversified is often a technical matter best left to legislators.[53]

Both national and state legislators have responded to the unique

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40. 427 U.S. 307 (1976).

41. *Id.* at 314.

42. *Id.* at 308.

43. *Id.* at 314.

44. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3255. *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

45. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3255. For comparison of the appellate court's approach to these issues, see *supra* note 8.

46. *Id.*

47. *Id.* at 3258.

48. The Court in *Parham v. Hughes*, 441 U.S. 347 (1979) discusses immutability as a basis for higher scrutiny. *Id.* at 351. The *Cleburne* court appears to stand this factor on its head by using it to reject heightened scrutiny in pointing out relevant immutable differences. CIty of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3256.

49. *Id.* at 3256. Relevance in this context concerns how the distinguishing characteristic of a class relates to one's ability to perform or contribute to society. *Cf.* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

50. City of Cleburne v. Cleburne Living Center, 105 S. Ct at 3256.

51. *Id.*

52. *Id.* at 3257. The Court cited the Education of the Handicapped Act, 20 U.S.C. § 1401(1), as an example of how these relevant differences come into play. *Id.* An "appropriate" education for mentally retarded children is required, but not one that is necessarily equal in all respects to that of a non-retarded child. *Id.* It would be inappropriate to place the mentally retarded child in a class that exceeded his abilities. *Id.*

53. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3256.

problems of the mentally retarded.[54] The *Cleburne* Court viewed these responses as denying prejudice or antipathy on the part of lawmakers.[55] The Court stated that singling out the mentally retarded for special treatment is expected and approved by a civilized and decent society.[56] Furthermore, these legislative responses negated any claim that the mentally retarded are without political power since remedial efforts could not have occurred and survived without public support.[57] Of course, inability to directly mandate every desired legislative response alone is not sufficient to warrant heightened scrutiny since this inabililty, along with immutability, are shared by other classes to which the Court has refused to apply heightened scrutiny.[58]

The test employed by the *Cleburne* Court was whether there was any rational basis for believing that the group home would pose any special threat to the city's legitimate interests as compared to those uses not requiring a special use permit.[59] The city council members were worried about the negative attitude of those living close by, as well as fears of elderly neighbors.[60] Such negative attitudes and fears were rejected by the Court and deemed an impermissible basis for different treatment of the group home.[61] Similarly vague and undifferentiated fears of harrassment by students from a nearby junior high school could not be sustained as a basis of justification since the school was already attended by about thirty mentally retarded student.[62] The proposed home's location was blamed for another reason the permit was denied: it would be located on a 500 year flood plain, thus giving rise to concern for the dangers to residents of flooding.[63] But, as the Court noted, this concern could not be distinguished from concern for a nursing home or a home for the convalescent or aged in the area.[64]

Another concern of the council was legal responsibility for actions of the mentally retarded residents.[65] Again, the Court found that mildly or moderately retarded residents would not pose any special hazard different from other permitted uses.[66] The same was said for the concern for the number of

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54. *Id.* at 3256. *See supra* note 12.

55. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3256.

56. Id. at 3257.

57. *Id. Cf. supra* note 8.

58. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3257-58. The Court noted groups such as the aging, the disabled, the mentally ill, and the infirm. *Id.* at 3258.

59. *Id.* at 3259.

60. *Id.* One councilman testified at trial that he paid particular attention to the neighbors' fears that retarded residents might "walk around and scare people." Brief for Respondent at 21, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

61. *Id.* at 3259.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* The Court considered other factors such as avoiding overcrowding and concentration of population, lessening congestion in the streets, safety from fire and other hazards, pro-

residents (thirteen) and resulting overcrowding. No rational basis for disallowing operation of a group home for the mentally retarded could be found in a district that allowed dormitories, fraternity and sorority houses, and hospitals without a special use permit.[67] Thus, since requiring a special use permit did not rationally further any of the asserted interests, requiring the permit must have rested on an irrational prejudice against the mentally retarded.[68]

The foregoing demonstrates how the classification failed the rational basis test.[69] None of the interests advanced by the city could justify different treatment for the group home.[70] Since the special use permit requirement rested on irrational prejudices, the equal protection rights of the group home's proponents and those who would occupy it were violated.[71]

One problem with the *Cleburne* Court's approach is reconciling it with the reason given for applying low level scrutiny in the first place. As the Court stated, "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[72] If legislatures need flexibility in dealing with the mentally retarded, a less than perfect fit between legislative interests and legislative line drawing must be allowed.[73] On the other hand, deference to legislative determination must not go so far as to validate irrational action. When the classification reflects irrational prejudices, as in this case, it is the most appropriate time to intervene, even though the court is utilizing minimum scrutiny. The Court recognized that there will continue

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moting the general welfare and protecting both the CLC residents and their neighbors. *Id.* The Court summarily found these to be unrelated to their actions as well. *Id.* at 3260. It is clear that the Court could have struck the ordinance down on its face since, in effect, this is what it has done. These factors were the purposes advanced by the city in defense of the *statute* and not in defense of its denial of the special use permit *in this case.* Petitioner's brief at 24. *See* Joint Appendix at 50, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

67. *Id.*

68. *Id.*

69. The Court has stated that the rationality test is not a "toothless" one. *See* Matthews v. Lucas, 427 U.S. 495, 510 (1976). *See generally* Gunther, *Forward In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-25 (1972) [hereinafter Gunther]. It should be noted that Gunther's newer equal protection model is not completely descriptive of this case because here the Court rejected attitudes of neighbors and fears of the elderly as improper purposes. *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3259. It is Gunther's view that the aspect separating the rationality with "bite" approach from higher levels of scrutiny is that rationality focuses carefully on means while deferring to legislative discretion as to ends or interests. *See* Gunther, 86 HARV. L. REV. at 20-21.

70. *See supra* notes 58-68 and accompanying text.

71. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3260.

72. *Id.* at 3256.

73. *Id.* at 3257. *See* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

to be instances of invidious discrimination against the mentally retarded.[74] These are the cases properly subjected to judicial correction without the necessity of creating a new quasi-suspect classification.[75] The Court decided that sufficient protection will be obtained if a classification based on mental retardation is required to be rationally related to a legitimate governmental purpose.[76] In this way, legislatures may enjoy the latitude necessary to develop policies to deal with the mentally retarded and still insure against irrational prejudice.[77]

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment in part and dissented in part.[78] Marshall stated that the Court's free-wheeling discussion of the various levels of scrutiny was both unnecessary and contrary to the Court's stated principle of never formulating a rule of constitutional law wider than the case requires.[79]

Furthermore, as noted above, Marshall thought the searching inquiry engaged in by the majority was actually heightened scrutiny whether it was called that or not.[80] The problem is that the area of economic and commercial classifications will be opened up to similar heightened scrutiny, a step back toward the days of *Lochner v. New York*,[81] the height of judicial interventionism under substantive due process.[82] Also, by not acknowledging what was taking place, the lower courts are left with no principles for determining when heightened scrutiny is to be invoked.[83]

Once again Marshall advanced his sliding scale approach to equal protection.[84] The appropriate level of scrutiny, he reasoned, should be varied according to the importance of the interest advanced and the invidiousness of the classification.[85] Based on the importance of establishing a home and what he saw as the lengthy and tragic history of segregation and degradation suffered by the mentally retarded, heightened scrutiny was appropriate in this case.[86] Under this standard, he felt that the ordinance must fall; not

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74. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3258. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

75. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3258.

76. *Id.*

77. *Id.*

78. *Id.* at 3263 (Marshall, J., concurring in part and dissenting in part).

79. *Id.*

80. *Id.* at 3264-65. *See also supra* note 16 and accompanying text.

81. 198 U.S. 45 (1905).

82. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3265 (Marshall, J., concurring in part and dissenting in part).

83. *Id.*

84. *Id. See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)(Marshall, J., dissenting).

85. *Id.* City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3265 (Marshall, J., concurring in part and dissenting in part).

86. *Id.* at 3272. Part of Marshall's view of history included : "A regime of state-mandated segregation and degredation soon emerged that in its virulence and bigotry rivaled, and indeed

only as applied, as the majority found, but on its face as well, be invalid since the vague generalizations given for classifying the mentally retarded with drug addicts, alcoholics, and the insane, but excluding them where the elderly, the ill, the boarder, and the transient are allowed, were not important enough to overcome his suspicion that the ordinance rested on impermissible assumptions and prejudices.[87]

Justice Marshall expressed valid concerns as to the dangers attending the approach taken by the Court in this case. They relate primarily to the lack of clear direction this decision gives to the lower courts.[88] But classifications whose relevant characteristics may properly be taken into account by lawmakers demand such limitations. This approach allows the flexibility legislatures need to remedy what is agreed to be past and present prejudices. At the same time, wholly irrational classifications will not be tolerated, as this decision makes clear. Since the actions taken by Cleburne's city council could not withstand even minimum scrutiny, perhaps those persons seeking housing on behalf of the mentally retarded in the future will not be turned away solely on account of fears and prejudice on the part of decision makers. In concurring, Justice Stevens expressed his belief that no rational member of this disadvantaged class would ever approve of such a discriminatory application of a zoning ordinance.[89] Neither, it is hoped, would any court.

Kevin Rogers

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paralleled, the worst excesses of Jim Crow." *Id.* at 3266. *See also* the court of appeals discussion at note 8, *supra*.

87. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3268 (Marshall, J., concurring in part and dissenting in part). Justice Marshall also correctly noted the majority's focus on recent history regarding the mentally retarded rather than the more distant past. *Id.*

88. *Id.* At least one court has already found sufficient direction in this case. *See* Sullivan v. City of Pittsburg, 620 F. Supp. 935, 935 (W.D. Pa. 1985)(recovering alcoholics denied equal protection when city council voted to declare a moratorium on establishment of group homes under rational basis test).

89. City of Cleburne v. Cleburne Living Center, 105 S. Ct. at 3263 (Stevens, J., concurring).