CONSTITUTIONAL LAW—EQUAL PROTECTION CLAUSE—ZONING ORDINANCE THAT REQUIRES SPECIAL USE PERMIT IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE AS APPLIED TO THE MENTALLY RETARDED—*City of Cleburne Texas v. Cleburne Living Center*, 473 U.S. 432 (1985).

Primitive societies believed that the maladies associated with mental retardation were the result of demons and supernatural powers imposing punishment.[1] Consequently, retarded persons were subjected to bizarre and brutal tortures in order to exorcise the evil spirits.[2] In the thirteenth century, England fashioned its laws to provide for the allocation of the disabled person's property and thus completely ignored the benefits of supervision or habilitation of the person.[3] If a mentally disabled person was legally defined as an "idiot" under English law, then the King often seized his property, voided his contracts, and denied judicial remedies for wastage of his estate.[4] Those who were poor became part of the "mass of deviants."[5]

English law helped to shape the attitudes of Americans in the nineteenth and early twentieth centuries.[6] Dehumanization of the retarded continued in this country with compulsory eugenic sterilization laws,[7] total exclusion from public schools, and involuntary institutionalism with grotesque living conditions.[8] However, by the 1950's and 1960's legal reforms were initiated as a

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[1] S. BRAKEL, J. PARRY & B. WEINER, THE MENTALLY DISABLED AND THE LAW, 9 (3d ed. 1985) [hereafter S. BRAKEL].

[2] *Id.*

[3] S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE, 9-10 (1983). *See* S. BRAKEL, *supra* note 1, at 10-11.

[4] S. HERR, *supra* note 3, at 10-15. The English law marked a distinction between "lunatics" and "idiots." *Id.* at 10. "Idiots" were deemed to have no "understanding of their nativity" and therefore were deprived of their property. *Id.* In comparison, "lunatics" were not deprived of their property. *Id.* To evade the harsh legal consequences and financial hardships imposed on "idiots," juries were reluctant to render verdicts of mental retardation. *Id.* at 11. Thus distinctions between "lunatics" and "idiots" were intentionally blurred by the juries. *Id.* English law shaped the prejudices of the American colonists. *Id.* at 15. The colonists also blurred the distinctions between the mentally retarded and mentally ill and often confused or grouped together these two types of people in the law. *Id.* Even today, mental retardation is confused with mental illness. *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 27; *see also* Buck v. Bell, 274 U.S. 200 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles is enough.") (citation omitted).

[8] S. HERR, *supra* note 3, at 15-28.

result of the cultural shift which recognized the human rights and abilities of retarded persons.[9] In the 1970's substantial improvements were made in the area of care, treatment, rehabilitation, and community services for the mentally disabled.[10] Although legal reforms ensure some basic civil rights for the retarded, stereotypical attitudes and fears toward this group continue to persist.[11] The mentally disabled "pose a classic example of a 'discrete and insular minority,' a minority for whom the conventional political processes have failed."[12]

The prejudices the mentally retarded continue to encounter are exemplified in *City of Cleburne Texas v. Cleburne Living Center, Inc.*[13] Cleburne Living Center, Inc. (CLC), engaged in the business of providing supervised group homes for mentally retarded persons.[14] In July 1980, Jan Hannah, the Vice President and major shareholder in CLC, purchased a building located on Featherston Street in Cleburne, Texas.[15] Hannah proposed to lease the building to CLC for the purpose of housing thirteen mildly to moderately retarded men and women.[16] CLC staff members were to provide twenty-four hour supervision and to instruct the residents in household maintenance, daily chores, obtaining jobs in the community, using transportation, enjoyment of leisure activities, and other "academics related to independent living."[17] Before the operation commenced, however, CLC encountered difficulties complying with the city's zoning ordinance.[18]

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9 *Id.* at 38.

10 S. BRAKEL, *supra* note 1, at 607.

11 S. HERR, *supra* note 3, at 237-50.

12 *Id.*; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), where Justice Stone noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*

13 City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

14 Cleburne Living Center, Inc. v. City of Cleburne Texas, 726 F.2d 191, 193 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985).

15 *Id.* For convenience, the Supreme Court refers to plaintiffs Jan Hannah and CLC as "CLC." *Cleburne*, 473 U.S. at 435 n.1.

16 *Id.* at 435. The Featherston building contains four bedrooms and two baths. The home is located on a corner lot and across the street from a public junior high school which is also attended by thirty mentally retarded children. *Id.*

17 *Cleburne*, 726 F.2d at 193. The home was classified as a Level I Intermediate Care Facility and was to be extensively regulated by statutes, ordinances and codes, established and administered by the United States Department of Health and Human Resources, the Texas Department of Mental Health and Mental Retardation and the Texas Department of Health. CLC intended to follow all applicable guidelines. *Id.*

18 *Id.* at 194.

Since the Featherston Street location was classified as an apartment house district, the use of the property was regulated by the Code of City Ordinances, Sections 8 and 16.[19] Under Section 8 of the zoning ordinance, "[h]ospitals, sanatoriums, nursing homes or homes for the convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts," were permitted uses in the district.[20] In September 1980, the city advised CLC that the Featherston home would be classified as a "hospital for the feeble-minded" and therefore subject to Section 8 of the zoning ordinance.[21] The classification invoked the operation of Section 16 which mandated that before any of the proscribed uses mentioned in Section 8 were initiated, the Cleburne City Council had to issue a "special use permit."[22] In October 1980, the city council denied the special use permit application pursuant to the decision made at a public hearing.[23]

CLC instituted suit in the Federal District Court for the Northern District of Texas, challenging the validity of Sections 8 and 16 of the zoning ordinance.[24] Naming as defendants the City of Cleburne, individual city employees, and council members, the

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19 *Cleburne*, 473 U.S. at 436 n.3.

20 *Cleburne*, 726 F.2d at 193. More specifically, Section 8 of Cleburne's zoning ordinance permits the following uses in an R-3 zone:

> 1. Any use permitted in District R-2.
> 2. Apartment houses, or multiple dwellings.
> 3. Boarding and lodging homes.
> 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. . . .

Id. (emphasis in original).

21 *Cleburne*, 473 U.S. at 436-37.

22 *Id.* at 436. More specifically, under Section 16(9) of Cleburne's zoning ordinance, the use of property for "[h]ospitals for the insane or feebleminded, or alcoholic or drug addicts, or penal or correctional institutions," require that the city Council issue a special use permit after the recommendation of the Cleburne Planning and Zoning Commission and a public hearing. The special use permit had to be renewed annually. *Id.* at 436 n.2.

23 *Id.* at 437. This was the second time CLC was denied the special use permit. In July 1980, the Cleburne Planning and Zoning Commission also denied the permit pursuant to the decision of a hearing. *Id.* at 437 n.4.

24 *Id.* at 432.

plaintiff alleged that the ordinance, as written and as applied,[25] was violative of the equal protection clause of the United States Constitution.[26] The district court determined that because neither a fundamental right[27] nor a suspect classification[28] was involved, minimal level scrutiny[29] was appropriate.[30] Reasoning that the statute bore a rational relation to the city's legitimate objectives and interests in the welfare of proposed residents and the adjoining neighborhood, the court declared the ordinance constitutional.[31]

On appeal, the Court of Appeals for the Fifth Circuit held that heightened judicial review was applicable and reversed the trial court.[32] The circuit court held that the ordinance restricted the availability of group homes which were a very important benefit, although not a fundamental right,[33] and the mentally retarded were a quasi-suspect class.[34] The court concluded that

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25 U.S. CONST. amend. XIV § 1 provides:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the . . . equal protection of the laws.

26 *Cleburne*, 473 U.S. at 437.

27 *See infra* note 114 and accompanying text.

28 *See id.*

29 *Cleburne*, 473 U.S. at 437.

30 *See infra* note 136 and accompanying text.

31 *Cleburne*, 473 U.S. at 437. The district court did find that the ordinance discriminated against the mentally retarded and stated that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home would be was the same in all other respects, its use would be permitted under the city's zoning ordinance." *Id.* The district court found further that the city council's decision "was motivated primarily by the fact the residents of the home would be persons who were mentally retarded." *Id.* However, since the district court found that the city had a legitimate interest, the ordinance was upheld under minimal scrutiny. *Id.*

32 *Cleburne*, 726 F.2d at 202.

33 *Id.* at 199. The circuit court relied on the trial court's finding that:
. . .[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.
The Fifth Circuit also relied on Plyer v. Doe, 457 U.S. 202 (1982) for the proposition that, although not a fundamental right, education is an important benefit and statutes affecting it would be examined under heightened scrutiny. *Cleburne*, 726 F.2d at 199.

34 *Id.* The Fifth Circuit concluded that the mentally retarded are considered "quasi-suspect" as they suffered "from a history of unfair and often grotesque mistreatment, political powerlessness, and immutability. . . ." *Id.* at 197-98. *See infra* note 139 and accompanying text.

the ordinance failed to pass heightened review because the ordinance was not substantially tailored to any important state interests.[35]

On petition by the City of Cleburne, the United States Supreme Court affirmed the decision of the Fifth Circuit insofar as it invalidated the ordinance as applied to the proposed residents of the Featherston home but vacated the rest of the decision.[36] The *Cleburne* Court held that retarded persons do not carry any of the indicia of quasi-suspect classifications.[37] However, while intermediate scrutiny was inappropriate, the class was not entirely devoid of protection under equal protection analysis.[38] The Court concluded that requiring a special use permit for the proposed residents of the Featherson home was unconstitutional because there was no rational basis for their exclusion.[39]

The equal protection clause was originally invoked solely for the purpose of countering the discriminatory effects of slavery on the "negro race".[40] The Supreme Court of the United States has indicated that it would be hard-pressed to imagine any other set of circumstances which would fall within the purview of the clause other than those involving race.[41] For instance, an initial application of the clause involved a case where a Louisiana statute prohibited all entities other than the corporation created under the statute from engaging in activities connected with the slaughtering of animals.[42] Upholding the statute and refusing to expand the scope of the provision, Justice Miller stated that the equal protection clause was "so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."[43] In contrast to the multi-dimensional

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35 *Cleburne*, 726 F.2d at 202.

36 *Cleburne*, 432 U.S. at 447.

37 *Id.* at 442-47.

38 *Id.* at 446.

39 *Id.* at 450.

40 *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 394, 407 (1873). The Court opined that the "existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause. . . ." *Id.* at 410.

41 *Id.*

42 *Id.* at 397.

43 *Id.* at 410. *See* Civil Rights Cases, 109 U.S. 3,45 (1883) (Harlan, J., dissenting; Strauder v. West Virginia, 100 U.S. 664, 665 (1880). The majority's narrow interpretation of the equal protection clause in the Slaughter-House Cases was in fact aligned with the historical setting at that time. *See* F. BEYTAGH & P. KAUPER, CONSTITUTIONAL LAW, CASES AND MATERIALS, 567 (5th ed. 1980) [hereafter cited as F. BEYTAGH]. The Civil War Amendments which included the thirteenth, fourteenth and fifteenth amendments recognized certain basic rights of the recently emanci-

and far-reaching character of the equal protection clause as applied today, it was first construed narrowly invalidating relatively few legislative schemes.[44]

One of the earliest cases where the equal protection clause was used to invalidate a state statute was *Yick Wo v. Hopkins*.[45] In *Yick Wo*, a Chinese alien who owned a laundry business petitioned for a writ of habeaus corpus.[46] The petitioner had been imprisoned for failing to pay a fine propounded upon him for violating a San Francisco ordinance which deemed it unlawful for any person to operate a laundry in a wooden building without securing a license from the board of supervisors.[47] The petitioner, a Chinese alien, operated a laundry business in the same premises for twenty-two years.[48] After receiving a satisfactory rating from health officials concerning the conditions of his premises, he petitioned the board of supervisors for a license.[49]

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pated negroes. Despite the broad and sweeping language of the fourteenth amendment, it was applied only with a single objective. As a result, the Slaughter House Cases impeded the development of those provisions as "viable protections of individual rights for decades to come." *Id.*

44 *See, e.g., Civil Rights Cases*, 109 U.S. at 3; *Strauder, 100 U.S. at 664; Slaughter House Cases*, 83 U.S. (16 Wall.) at 394.

45 118 U.S. 356 (1886).

46 *Id.* at 356-57.

47 *Id.* at 357. The pertinent provisions of the San Francisco ordinance are set out as follows:

> Order No. 1569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located. "The people of the city and county of San Francisco do ordain as follows:
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> SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed eight of brick or stone.
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> SEC. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment."
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> Order No. 1587, passed July 28, 1880, the following section:
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> SEC. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

Id. at 357-58.

48 *Id.* at 358-59.

49 *Id.*

All of the petitions of those who were not of Chinese descent, except one, secured a license from the board.[50] In contrast, all the petitions of Chinese aliens, including the petitioner's, were denied.[51]

Justice Matthews initially recognized that the Court was powerless to decide the lawfulness of the petitioner's imprisonment.[52] The Court limited its evaluation to the constitutionality of the ordinance and its administration.[53] In overturning the California Supreme Court's decision, Justice Matthews stated that the ordinance conferred "naked and arbitrary power to give or withhold consent not only as to places, but as to persons."[54] The Justice asserted that the officials were unfairly permitted to exercise their will in a purely arbitrary fashion disregarding guidance and restraint.[55] Therefore, the Court reasoned that while a law may appear neutral, if it is administered unequally to persons in similar circumstances, it will be struck down.[56]

Although by the turn of the century the Court had not yet formulated the concept of tiered scrutiny, it had already begun to formulate the theory of modern rational basis review.[57] In *Lindsley v. Natural Carbonic Gas Co.*,[58] the owner of the Natural Carbonic Gas Company sought to enjoin the state of New York from enforcing a statute which prohibited the pumping of mineral waters holding an excess of carbonic acid gas from wells bored or drilled into the rock for the purposes of "extracting, collecting, compressing, liquifying or vending such gas as a commodity."[59]

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50 *Id.*

51 *Id.* The California Supreme Court denied the writ of *habeaus corpus*, holding that the ordinances were not in "contravention of common right or unjust or unequal, partial or oppressive." *Id.* at 360.

52 *Id.* at 365-66.

53 *Id.* at 366.

54 *Id.* The Court poignantly stated, "[f]or, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any county where freedom prevails, as being the essence of slavery itself." *Id.* at 370.

55 *Id.* at 366-67.

56 *Id.* at 373-74.

57 Under rational basis review, states were afforded wide latitude in creating statutory classifications affecting economic concerns. *See* Michigan Central R.R. Co. v. Powers, 201 U.S. 245, 293 (1906); Columbus S. Ry. Co. v. Wright, 151 U.S. 470, 478-79 (1894); Pacific Express Co. v. Seibert, 142 U.S. 339, 351-53 (1892); Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890).

58 220 U.S. 61 (1911).

59 *Id.* at 62-66. The New York Statute approved May 20, 1908, provided:

> Pumping, or otherwise drawing by artificial appliance, from any well made by boring or drilling into the rock, that class of mineral waters

The plaintiff owned twenty-one acres of land containing the class of mineral waters specified in the statute.[60] Consequently, the plaintiff alleged that the statute deprived it both of the rightful use of the property and of equal protection of the laws, in contravention of the fourteenth amendment.[61] The circuit court dismissed the claim.[62] On appeal, the United States Supreme Court affirmed.[63]

In its decision, the Court articulated several rules of construction to be applied in all equal protection claims.[64] First, it noted that a state is permitted a wide scope of discretion, pursuant to its police powers, to make reasonable statutory classifications.[65] Secondly, classifications having some reasonable basis are not deemed offensive merely because they lack "mathematical nicety" or result in some degree of inequality.[66] Thirdly, if any reasonable basis existed at the time the law was enacted, the classifications will be deemed valid.[67] Lastly, the Court declared that the party challenging a classification sustains the burden of proving its invalidity.[68]

> holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, collecting, compressing, liquifying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful.

Id. at 62-63 (citation omitted).

60 *Id.* at 61.

61 *Id.* at 64. The plaintiff also alleged that the statute deprived it of its property without due process of law. The Court, in upholding the statute, stated that the State has the power to prohibit an owner from pumping on his land, water, gas, and oil which injuriously affected the subterranean supply shared by other owners. *Id.* at 74.

62 *Id.* at 64.

63 *Id.* at 83.

64 *Id.* at 78.

65 *Id.*

66 *Id.* This principle has been frequently employed by the Court in equal protection analysis under the rational basis review. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Dandridge v. Williams, 397 U.S. 471, 475 (1970); Madden v. Kentucky, 309 U.S. 83, 88 (1940).

67 *Lindsley*, 220 U.S. at 78-79. This standard is also a component of rational basis review currently employed by the Supreme Court. *See Fritz*, 449 U.S. at 174-75; Vance v. Bradley, 440 U.S. 93, 111 (1979); *Dandridge*, 397 U.S. at 485.

68 *Lindsley*, 220 U.S. at 78-79. This concept is often articulated by the Supreme Court under rational basis review. *See Vance*, 440 U.S. at 111; McGinnis v. Royster, 410 U.S. 263, 274 (1973); United States v. Maryland Savings Ins. Corp., 400 U.S. 4, 6 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955).

Applying those principles to the case at bar, the *Lindsley* court determined that the plaintiff failed to sustain its burden of proving that the statute was arbitrary.[69] The Court observed that the bill did not disclose the reasons for making such classifications.[70] Moreover, the nature of the problem was beyond the range of common knowledge or judicial notice.[71] The Court concluded that absent any contradictory evidence, there may exist a substantial difference between pumping from wells bored or drilled into the rock and pumping from wells not penetrating the rock as opposed to pumping for the purpose of collecting and vending gas apart from the water and pumping for other purposes.[72] Based on the briefs of counsel and oral arguments, the Court found that the proscribed conduct injuriously affected the common water supply.[73] Thus, the classification was supported by a reasonable basis.[74]

From the outset, rational basis analysis in the context of the equal protection clause has been applied inconsistently by the Supreme Court. For instance, the *Lindsley* Court affirmed the premise that states are granted a wide scope of discretion pursuant to their police powers.[75] Yet a few years later, in *F.S. Royster Guano Co. v. Commonwealth of Virginia*,[76] the Court substantially narrowed the states' discretion in the areas of economic concern.[77] In *Royster*, the plaintiff corporation challenged the validity of two statutes which imposed a tax on income derived from business conducted within and without state boundaries.[78]

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69 *Lindsley*, 220 U.S. at 79-80.

70 *Id.* at 79.

71 *Id.*

72 *Id.*

73 *Id.* at 80.

74 *Id.* at 81.

75 *Id.* at 78.

76 253 U.S. 412 (1920). Today, it is generally an accepted proposition of law that only the most minimal amount of judicial scrutiny will be applied to economic legislation. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935).

77 *See Royster*, 253 U.S. at 417.

78 *Id.* at 413-14. State officials imposed tax on income derived within and without the state on local corporations by mandate of c.472 of the Virginia Acts of 1916 which imposed an

> income tax on 1 per centum upon 'the aggregate amount of income of each person or corporation,' subject to specified deductions and exemptions; including in income 'all profits from earnings of any partnership or business done in or out of Virginia' and also 'all other gains and profits derived from any source whatever.'

Under the statute, however, corporations that owed their existence to the same laws but derived income from business done solely without the state were exempt from such taxes.[79] Plaintiff corporation was created by and existed under the laws of Virginia for the purpose of manufacturing and selling commercial fertilizer.[80] Plaintiff reported income for the purpose of taxation based upon income derived only within state limits, and omitted income derived from out-of-state business.[81] Officials, however, added the latter amount and assessed taxes based on the aggregate.[82] The plaintiff challenged the statute as violative of the equal protection clause.[83]

In reaching its decision, the Court enunciated several basic rules of law.[84] It recognized that the equal protection clause did not forbid states from resorting to classifications for purposes of legislation.[85] States are afforded a wide range of discretion, particularly in creating classifications of property for tax purposes.[86] Departing from precedent, the *Royster* Court held that classifications 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, so that all persons similarly circum-

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Royster, 253 U.S. at 413-14. This statute was considered in conjunction with c. 495 of the Virginia Acts of 1916 which read as follows:

> Whereas certain corporations have been organized under the laws of Virginia, and it is anticipated that certain others will be organized thereunder, which do no business within this State; therefore - 1. Be it enacted by the general assembly of Virginia, that no income tax nor ad valorem taxes, State or local shall be imposed upon the stocks, bonds, investments, capital or other intangible property owned by corporations organized under the laws of this State which do no part of their business within this State. . . .

Royster, 253 U.S. at 414.

79 *Id.* at 412.

80 *Id.*

81 *Id.* at 413.

82 *Id.*

83 *Id.* The Corporation Court of the City of Norfolk dismissed plaintiff's allegation that an arbitrary burden was placed upon domestic corporations doing business both within and without of state as violative of the equal protection clause. The Supreme Court of Appeals of the State affirmed the judgment of the Corporation Court. *Id.*

84 *See id.* at 415.

85 *Id.* at 415.

86 *Id.* The Supreme Court had long since recognized that states were afforded wide latitude in creating statutory classifications with respect to economic concerns under equal protection analysis. *See* Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132, 139 (1918); Citizens Tel. Co. v. Fuller, 229 U.S. 322, 329 (1913): Keeney v. New York, 222 U.S. 525, 536 (1912); Michigan Cen. R.R. Co. v. Powers, 201 U.S. 245, 293 (1880); Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1880).

stanced shall be treated alike."[87]

The Court then examined whether a substantial difference between the two classes of domestic corporations existed.[88] It recognized that the purpose in exempting corporations from income taxes when they do no business within Virginia was based on the notion that they derive no governmental protection from the state warranting the imposition of taxes.[89] The *Royster* Court observed that to hold otherwise would be unjust because such a corporation was also subject to taxation in the state where its income-producing business occurred.[90] However, the Court found that no conceivable basis existed to justify why the exemptions did not apply with "equal or greater force" to domestic corporations producing income both within and without the state.[91] Under the standard of review articulated in *Royster*, the Court held that in the absence of a fair and substantial relation to the state's proffered objective, the classifications drawn were illusory, arbitrary, and void.[92]

In comparison to previous case law, *Royster* transformed the equal protection clause into a powerful tool with which to invalidate economic regulations. However, its utility was short lived.[93] In the 1930's and 1940's, litigants, asserting equal protection violations more frequently as a result of the "demise" of the due process commercial concept, met with little success.[94] The modern rational basis test emerged from these cases.[95] Since then, rational basis has been extended to cases involving social con-

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87 *Royster*, 253 U.S. at 415.

88 *See id.* at 415-17.

89 *Id.*

90 *Id.* at 415-16.

91 *Id.* at 416. More specifically, the Court noted that local corporations receive no more protection from the State in which they are located with respect to business derived outside the State than corporations which fall within the exempt class under the statute. *Id.* Ironically, the State receives a greater benefit from local corporations which do business within and without the State, yet these local corporations are penalized. *Id.*

92 *Id.* at 415-17. Justice Brandeis, with whom Justice Holmes concurred, sharply criticized the more stringent standard employed by the Court in his dissenting opinion. *Id.* at 417 (Brandeis, J., dissenting). The Justice stated that the fourteenth amendment did not preclude reasonable classifications of property, occupations, persons or corporations for the purpose of taxation. It only prohibited inequality resulting from clearly arbitrary action, especially hostile discrimination against certain groups. *Id.* (Brandeis, J., dissenting).

93 F. BEYTAGH, *supra* note 43, at 891.

94 *Id.*

95 *Id.* at 891-97. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949); Kotch v. Board of River Port Pilot Comm'r, 330 U.S. 552 (1947); Tigner v. Texas,

cerns where a suspect classification or a fundamental right is not at stake.[96]

While the Court generally adopts a deferential posture when social or economic concerns are at stake, the Court, at times, has relied on the more rigorous standard of review to strike down a statute affecting an unpopular group. For instance, in *United States Department of Agriculture v. Moreno*,[97] a class action was instituted seeking declaratory judgment and injunctive relief against the enforcement of the Food Stamp Act of 1964, as amended in 1971.[98] The food assistance program was intended to aid needy families and was initially applied to a group of *related or non-related* individuals who lived "as one economic unit sharing common cooking facilities and for whom food [was] customarily purchased in common."[99] Subsequently, in 1971, Congress reassessed the term "household" to mean only groups of related individuals.[100] In *Moreno*, one of the plaintiffs was an elderly diabetic woman who was denied federal assistance, despite her poverty, because

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310 U.S. 141 (1940); Borden's Farm Prod. Co. v. Ten Eyck, 297 U.S. 251 (1936); Liberty Warehouse Co. v. Burley Tobacco Growers Ass'n, 276 U.S. 71 (1928).

During this period, the "two-tiered" level of review emerged. While the cases involving economic regulation developed the rational basis test, suits involving suspect classifications such as race developed the strict scrutiny test. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944). After Japanese civilians were ordered to assembly centers for detention during World War II, the Court, in articulating the test for strict scrutiny, held "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that Courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions." *Id.* at 216. Despite the rigid review granted by the Court, the order was upheld due to the war-time necessity. *Id.* at 219.

96 *See infra* notes 97 to 135 and accompanying text.

97 413 U.S. 528 (1973).

98 *Id.* at 532.

99 *Id.* at 530 (citation omitted) (footnote omitted).

100 *Id.* The Secretary of Agriculture promulgated regulations stating the following: "(jj) 'Household' means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: Provided, That:

"(1) When all persons in the group are under 60 years of age, they are all related to each other; and

"(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older. "It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse." *Id.* at 530 n.3.

she lived with an unrelated family.[101] The district court held that the "unrelated provision" of the amendment created an "irrational classification" in violation of the "equal protection component of the Due Process Clause of the Fifth Amendment."[102] The United States Supreme Court affirmed.[103]

Justice Brennan, in delivering the opinion of the Court, noted that a legislative classification will be upheld if it is rationally related to a legitimate state interest.[104] The Justice posited that a statute is not offensive simply because it results in mathematical imprecision.[105] The *Moreno* Court then examined the governmental interest by reviewing the congressional policy of the Food Stamp Act.[106] The purpose was "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households."[107]

The Court failed to find any legitimate governmental interest to justify the classification.[108] The *Moreno* Court noted that the legislative history of the amendment to the Food Stamp Act revealed that it was designed to prevent "hippies" and "hippie communes" from participating in the food assistance program.[109]

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101 *Id.* at 531.

102 *Id.* at 532-33. The Court noted that although the fifth amendment does not contain an equal protection clause, the fifth amendment "forbids discrimination that is 'so unjustifiable as to be violative of due process.' " *Id.* at 533 n.5 (citations omitted).

103 *Id.* at 533.

104 *Id.* at 534.

105 *Id.* at 538.

106 *See id.* at 533.

107 *Id.* (citation omitted). The declaration of policy further stated:

> The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.

Id. at 533-34.

108 *Id.* at 535-36. The Court stated that " '[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their ability to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.' " *Id.* at 535 (quoting United States Dep't of Agriculture v. Moreno, 345 F. Supp. 310, 313 (D.D.C. 1972)).

109 *Id.* at 534.

The majority, however, stated that the concept of equal protection mandates that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[110] The Court, in declaring the statute invalid, reasoned that the real effect of the amendment was to exclude those groups who were so desperately in need of assistance that they could not even afford to alter their living arrangements to maintain eligibility.[111]

The inconsistent application of rational basis review was again demonstrated in a case involving an unpopular group. In contrast to *Moreno*, however, the Court articulated the more deferential and traditional standard of rational basis review while upholding the statute at issue in *Massachusetts Board of Retirement v. Murgia*.[112] In *Murgia*, a statute mandating the automatic retirement of state police upon reaching the age of fifty was challenged as violative of the equal protection clause.[113] In a per curiam opinion, the Court deemed rational basis review appropriate because the aged were not considered a suspect class.[114] The

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110 *Id.* The Court further dismissed the government's claim that the amendment was initiated to minimize fraud. The *Moreno* Court observed that special safeguards and penalties were built into the statute to prevent fraud. The unrelated provision was not rationally calculated to prevent that abuse and combat similar concerns. *Id.* at 535-36.

111 *Id.* at 537. Justice Rehnquist, joined by Chief Justice Burger, in a dissenting opinion, sharply criticized the majority for expanding the scope of rational basis review. *Id.* at 545-47 (Rehnquist, J., dissenting). The dissenting Justice argued that the majority exceeded its authority by ruling against the adoption of the limitation placed in the Act by Congress. The Justice stated that the Court's role is merely to determine whether any conceivable rational basis existed for the limitation in question. *Id.* at 545-46 (Rehnquist, J., dissenting). The Justice further argued that a reasonably conceivable basis existed for the limitation which was to prevent groups from forming households merely to take advantage of the food stamp program. *Id.* at 547 (Rehnquist, J., dissenting).

112 427 U.S. 307 (1976) (per curiam).

113 The statute, MASS. GEN. LAWS ANN. ch. 32, § 26(3)(a) (West 1966), provided as follows:

> (a). . .Any. . .officer appointed under section nine A of chapter twenty-two. . .who has performed services in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

Murgia, 427 U.S. at 309 n.1.

114 The Court reasoned that statutes affecting certain groups will automatically be suspect and thus subject to strict judicial scrutiny. The Court defined a suspect class as one " 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Id.* at 313 (citation omitted).

Strict judicial review will be applied when suspect classes are peculiarly disad-

Murgia Court observed that the aged have not experienced a history of purposeful and unequal treatment nor have they been subjected to discrimination on the basis of stereotyped characteristics not truly indicative of their abilities so as to warrant the application of a more rigorous standard of review.[115]

Examining the validity of the mandatory retirement provision, the Court found that the classification was not irrelevant to the state's proffered objective of furnishing adequate police service to the community.[116] The Court stated that physical ability generally declines at the age of fifty and that the provision was a legitimate means to ensure job fitness.[117] The Court asserted that it was immaterial whether the state could have chosen alternative methods such as individual testing to ensure physical suitability for the job because imperfect classifications do not fall within the constitutional prohibition of the equal protection clause.[118]

A slightly higher level of rational basis review was again articulated by the Court to invalidate an employment discrimination statute in *Logan v. Zimmerman Brush Co.*[119] The plaintiff, Logan, was purportedly discharged from his job because one of his legs was shorter than the other.[120] The employer alleged that Logan's handicap prevented him from properly performing his job.[121] Logan filed an action against his employer for unlawful conduct pursuant to the Illinois Fair Employment Practices Act.[122] Under the statute, the Illinois Fair Employment Practices Commission had to conduct a fact-finding conference within 120 days of the filing of a complaint to determine whether substantial evidence supported the charges so as to proceed on the claim.[123]

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vantaged. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. FLorida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry).

Similarly, strict judicial review is also invoked when fundamental rights are infringed; *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right of privacy); Bullock v. Cater, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968) (first amendment rights); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 135 (1942) (right to procreate).

115 *Murgia*, 427 U.S. at 313.

116 *Id.* at 315-17.

117 *Id.* at 315.

118 *Id.* at 316.

119 455 U.S. 422 (1982).

120 *Id.* at 426.

121 *Id.*

122 *Id.*

123 *Id.* at 424-26.

The Commission scheduled the hearing after the expiration date.[124] The Commission denied the employer's motion to dismiss the case for failure to hold a timely conference.[125] The Illinois Supreme Court reversed the decision on appeal, holding that the statutory period expired.[126] Logan appealed alleging due process and equal protection violations and the United States Supreme Court reversed.[127]

Justice Blackmun,in a separate opinion, evaluated the classifications under rational basis review.[128] Defining minimal level scrutiny, Justice Blackmun observed that while a state may not have difficulty in passing this test, the standard is not a " 'toothless one.' "[129] The Justice stated that the statutory scheme must " 'rationally advanc[e] a reasonable and identifiable governmental objective.' "[130] Applying this standard, Justice Blackmun determined that the statute was not rationally calculated to further the express purposes of the Act which were to eliminate employment discrimination and to protect employers from unfounded charges of discrimination.[131] Rather, the effect of the artificial deadline was possibly to allow frivolous claims to be judicially reviewed because a timely conference was held while denying potentially meritorious claims judicial review because the state failed to hold a timely conference.[132] The Justice concluded that the statutory classifications were arbitrary because certain randomly selected claims, processed too slowly by the State, are ir-

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124 *Id.* at 426.

125 *Id.*

126 *Id.* at 126-28.

127 *Id.* at 428, 438.

128 *See id.* at 439. The opinion of the Court disposed of the case as violative of the due process clause. The Court held that the plaintiff's right to utilize the FEPA's adjudicatory procedures was a property right violated by the guarantees of the due process clause. *Id.* at 429. Justice Blackmun stated that "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' " *Id.* at 430 (citation omitted). The due process clause mandates that an aggrieved party be given the "opportunity to present his case and have its merits fairly judged." *Id.* at 433. The State may not destroy a property interest without first giving the owner the chance to present his claim of entitlement, particularly where governmental error was the source of the termination of plaintiff's rights. *Id.* at 434.

129 *Id.* at 439 (citations omitted).

130 *Id.* (citation omitted).

131 *Id.* at 439-440.

132 *Id.* at 440. Justice Blackmun stated: "In other words, the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe, is the very essence of arbitrary state action. *Id.* at 442.

revocably terminated without review.[133]

Addressing a statutory classification affecting another unpopular group, the mentally retarded, the Court substituted the traditional deferential rational basis test with the more aggressive rational basis standard in order to invalidate the classification at issue in *City of Cleburne, Texas v. Cleburne Living Center*.[134] Justice White, writing for the *Cleburne* majority, first recognized that the operative standard to evaluate state action is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[135] This standard is employed when social or economic legislation is challenged.[136] Justice White indicated that the "general rule gives way," however, when a statute makes a distinction based upon race, alienage, or national origin which are suspect classifications.[137] In such instances, the court will only sustain a statute based on suspect classifications if it is suitably tailored to serve a compelling state interest.[138] The general rule also gives way when distinctions are based on gender or illegitimacy as they are deemed to be quasi-suspect classifications.[139] Justice White declared that these types of classifications will only be upheld if they substantially further a sufficient governmental objective.[140]

The *Cleburne* majority held that the court of appeals inappro-

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133 *Id.* at 442.

134 473 U.S. 432 (1985).

135 *Id.* at 440.

136 *Id. See* Schweiker v. Wilson, 450 U.S. 221 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Vance v. Bradley, 440 U.S. 93 (1979); City of New Orleans v. Dukes, 427 U.S. 297 (1976).

137 *Cleburne*, 432 U.S. at 440. The majority stated the classifications are suspect because they are often the result of prejudice and antipathy and thus seldom support any legitimate state interest. *Id. See supra* note 114 and accompanying text.

138 *Cleburne*, 432 U.S. at 440. *Compare* Graham v. Richardson, 403 U.S. at 365, 376 (a state statute which denied welfare benefits to aliens struck down under strict judicial scrutiny) *with* Foley v. Connelie, 435 U.S. 291, 295-96 (1978) (statute precluding aliens from holding "important nonelective . . . positions" held by "officers who participate directly in the formulation, execution, or review of broad public policy" upheld under the intermediate level review).

139 *Cleburne*, 432 U.S. at 441. The majority observed that quasi-suspect classifications differ from non-suspect classifications because the characteristics of the groups frequently bears no rational relation to their ability to perform in society. *Id. See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Mathews v. Lucas, 427 U.S. 495 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

140 *Cleburne*, 432 U.S. at 441. Justice White noted that not every statute which makes some type of classification is necessarily subject to close judicial review. Differential treatment of the aged is permitted when it is rationally related to a legitimate end. *Id.*

priately applied intermediate level review to the class of mentally retarded persons because they do not possess any of the indicia of quasi-suspect classification.[141] Justice White reasoned that while the mentally retarded possess an immutable trait, it is precisely that trait which renders legislative action, guided by professional advice, necessary and appropriate.[142] The Justice explained that the retarded are a large and diverse group, ranging from the mildly to the profoundly afflicted.[143] Consequently, the judiciary is ill-informed of their particularized needs and is therefore unequipped to apply heightened scrutiny wisely.[144]

The majority then observed that the distinctive legislative response to the plight of the mentally retarded, on a local and national scale, undermines any claim of prejudice and antipathy.[145] The federal government has enacted several statutes aimed at remedying discrimination against the mentally retarded in the areas of education, employment, and housing.[146] The Court asserted that such legislation emphasized the "real and undeniable differences between the retarded and others."[147] Based on these differences, the legislature must have a "certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts."[148] The Court further held that the legislative response also undermines the allegation that the mentally retarded are politically powerless.[149]

The *Cleburne* Court affirmed the lower court's judgment that the ordinance was invalid as applied.[150] Justice White stated that

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141 *Id.* at 442.

142 *Id.* at 443.

143 *Id.* at 442.

144 *Id.* at 443. The Court held that "[h]eightened scrutiny inevitably involves substantive judgments about legislative decisions." *Id.*

145 *Id.*

146 *Id. See* Education of the Handicapped Act, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. § § 1400-1485 (1982 and Supp. 1986)).

147 *Cleburne*, 473 U.S. at 444.

148 *Id.*

149 *Id.* at 445. The Court stated that "[a]ny minority can be deemed powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." *Id.* at 445.

150 *Id.* at 450. The Court, in reviewing the legitimacy of the State's proffered goals, relied on the findings of the district court. The district court stated that the city council's insistence on a special use permit for the insane, feeble-minded, alcoholics and drug addicts, but not for multiple dwellings, boarding houses and lodging houses, fraternity or sorority houses, dormitories, apartments, hotels, hospitals, sanitoriums, nursing homes for convalescents and the aged, was based on the negative attitude of the majority located in the vicinity of the Featherston home.

the state's interest in making the classification was not rationally related to any legitimate government interest.[151] For instance, the council's concern that students from the junior high school located across the street would harass the occupants of the Featherston home was considered by the Court as "vague [and based on] undifferentiated fears."[152] The Court also dismissed as arbitrary the council's objection to the mentally retarded occupying the home because it was located on a "five year flood plain" while permitting the land's use for a nursing home, sanatorium, or family dwelling.[153] The council further argued that the use of the home was not suitable for the number of proposed occupants.[154] The Court, however, determined that no restrictions would have been placed on the number of occupants if the home was used for the purposes of a boarding home, fraternity house, or multiple dwelling.[155] Therefore, the majority concluded that the council failed to justify its decision to exclude the mentally retarded from occupying the Featherston home.[156] The Court held that since the statute was violative of the equal protection clause as applied to the proposed residents of the group home, the Court did not have to address the facial validity of the ordinance.[157]

In his concurring opinion, Justice Stevens disapproved of the majority's use of the "tiered approach" as an illogical means of deciding cases.[158] In his view, it was an inaccurate description of the Court's approach.[159] He stated that in reality, the Court applies a single standard in a "reasonably consistent fashion."[160]

Id. at 448. However, "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not a permissible basis for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* Significantly, the Court determined that since the statute was violative of the equal protection clause, as applied, it need not reach the facial validity of the ordinance. *Id.*

151 *Id.* at 450.

152 *Id.* at 449.

153 *Id.*

154 *Id.* at 449-50.

155 *Id.*

156 *Id.* at 450.

157 *Id.* at 447.

158 *Id.* at 451 (Stevens, J., concurring). The Justice criticized the court of appeals for disposing of the case as if the only question to be decided was "which of the three clearly defined standards of equal protection review should be applied. . . ." *Id.*

159 *Id.* The Justice argued that an analysis of case law did not "reveal three or even two distinct standards of review." *Id.*

160 *Id.*

The Justice opined that the cases "reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."[161] This is supported by the fact that classifications such as alienage, gender, age, and mental retardation do not fit well into any clearly defined category.[162]

Justice Stevens further stated that in all equal protection cases several basic questions must be asked: "What class is harmed by the legislation and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?"[163] According to the Justice, answers to these questions will result in the invalidation of most racial classifications and the validation of most economic classifications.[164] Various results will occur, however, in cases involving alienage, gender, and illegitimacy as well as the mentally retarded.[165] For example, statutes restricting a retarded person's right to operate hazardous equipment in employment situations because of his reduced capabilities may be relevant to the public interest and therefore will likely be valid.[166] Alternatively, legislation restricting the retarded's right to vote for laws providing for special education are irrelevant to any public interest and thus are invalid.[167]

Justice Marshall, writing separately, concurred with the result, but dissented from the Court's reasoning.[168] The Justice criticized the majority's proffered use of rational basis when, in fact, heightened scrutiny was applied.[169] In his view, the ordi-

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161 *Id.*

162 *Id.* This supports the fact that the Court inconsistently applies each standard of review. *See supra* notes 45 to 135 and accompanying text.

163 *Id.* at 453 (Stevens, J., concurring) (citation omitted) (footnote omitted). Justice Stevens, in applying his method of deciding cases under the equal protection clause, inquired as to whether a "rational basis" for the classification at hand existed. *Id.* at 452 (Stevens, J., concurring). He further defined the term rational as requiring that an "impartial law maker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* (footnote omitted).

164 *Id.* at 453 (Stevens, J., concurring).

165 *Id.*

166 *Id.* at 454 (Stevens, J., concurring).

167 *Id.*

168 *Id.* at 455 (Marshall, J., concurring in part and dissenting in part).

169 *Id.* at 456 (Marshall, J., concurring in part and dissenting in part). Justice Marshall further criticized the court's in-depth analysis of heightened scrutiny as "wholly superfluous" to the decision. The Justice stated that the "two for the price

nance was invalidated "only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."[170] For instance, the Council's concern for fire hazards and neighborhood serenity were viewed as insufficient to justify the differential treatment of the mentally retarded.[171] Justice Marshall pointed out that under traditional rational basis review, however, the legislature may address reform one step at a time.[172] Moreover, under rational basis review, the Court does not scrutinize the entire record to determine whether "policy decisions are squarely supported by a firm factual foundation," as the majority did in this case.[173] Justice Marshall observed that the majority review of the record inappropriately shifted the burden to the legislature to prove that the classifications drawn were reasonable.[174]

Additionally, the dissenting Justice argued that the mentally retarded possess the indicia often invoked when applying "heightened judicial solicitude."[175] For instance, the retarded have experienced a long and tragic history of discrimination.[176] The Justice pointed to the nineteenth century laws which sought termination of the retarded as a group by halting reproduction.[177] The mentally retarded were also denied the right to marry, and to receive education and adequate housing.[178] The Justice stated that even up until 1979, states passed blanket laws excluding the retarded, regardless of capacity, from exercising

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of one" approach was unwise. *Id.* It violates two cardinal rules. The first is " 'never [] anticipate a question of constitutional law in advance of the necessity of deciding it.' " Second, " 'never [] formulate a rule of constitutional law broader than is required by the precise facts.' " *Id.* at 457 (Marshall, J., concurring in part and dissenting in part) (citation omitted).

170 *Id.* at 458 (Marshall, J., concurring in part and dissenting in part).

171 *Id.*

172 *Id.* at 459 (Marshall, J., concurring in part and dissenting in part).

173 *Id.*

174 *Id.* at 460 (Marshall, J., concurring in part and dissenting in part). Justice Marshall opined that the majority's failure to acknowledge that it utilized a more vigorous level of review was unfortunate in several aspects. First, it paved the way for the courts to apply a more searching level of review under the guise of rational basis to areas of economic and commercial legislation in the future. *Id.* Further, the majority failed to articulate the circumstances which would trigger the "second order" rational basis test, thus leaving the lower courts in the dark. *Id.*

175 *Id.* at 463-65 (Marshall, J., concurring in part and dissenting in part). *See supra* notes 1 to 12 and accompanying text (discussing plight of mentally retarded).

176 *Cleburne*, 473 U.S. at 463-65 (Marshall, J., concurring in part and dissenting in part).

177 *Id.* at 463 (Marshall, J., concurring in part and dissenting in part).

178 *Id.* at 463-64 (Marshall, J., concurring in part and dissenting in part).

their fundamental right to vote.[179]

Consequently, Justice Marshall was compelled to dissent from the Court's unprecedented decision to leave an ordinance which rested on "irrational prejudice" standing.[180] In his view the majority perhaps believed that the same application of the statute was constitutional with respect to a subgroup of the mentally retarded under different circumstances.[181] The dissent argued that a new carefully tailored statute should be drafted that would exclude a well defined subgroup of the mentally retarded under special circumstances.[182] However, as a result of the majority's opinion, a statute containing a sweeping exclusion of all mentally persons remained controlling.[183] The Justice asserted that this approach was problematic in that no guidelines were established as to what applications of the statute would be valid.[184] Consequently, the same Council members who originally applied the statute based on "vague, undifferentiated fears," were still left to employ their "standardless discretion" in future cases.[185] Justice Marshall condemned the Court for invalidating the statute only as applied.[186] In his view, statutes resting on impermissibly overbroad generalizations result in the invalidation of the presumption of validity.[187]

The *Cleburne* decision has reaffirmed the proposition that the Court actually employs one rather than three distinct levels of

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179 *Id.* at 464 (Marshall, J., concurring in part and dissenting in part). The Justice reasoned that because the mentally retarded continue to experience the "ignorance, irrational fears, and stereotyping that long have plagued them," statutes affecting them should be given "searching" judicial review. *Id.* (footnote omitted). Consequently, Cleburne's "vague generalizations for grouping the 'feeble-minded' with drug addicts, alcoholics, and the insane" and excluding them from establishing homes, while at the same time granting this right to the "elderly, the ill, the boarder, and the transient" are unfounded and overbroad. *Id.* at 465 (Marshall, J., concurring in part and dissenting in part) (citation omitted).

180 *Id.* at 473 (Marshall, J., concurring in part and dissenting in part).

181 *Id.* at 474-75 (Marshall, J., concurring in part and dissenting in part).

182 *Id.* at 475 (Marshall, J., concurring in part and dissenting in part). More specifically, Justice Marshall noted that the city should study the nature of the problem, make the "appropriate policy decisions [and] enact a new, more narrowly tailored ordinance. That ordinance might well look very different from the current one; it might separate group homes (presently treated nowhere in the ordinance) from hospitals and it might define a narrow sub-class of the retarded from whom even group homes could legitimately be excluded." *Id.*

183 *Id.*

184 *Id.*

185 *Id.* at 474 (Marshall, J., concurring in part and dissenting in part).

186 *Id.*

187 *Id.* at 476 (Marshall, J., concurring in part and dissenting in part)(footnote omitted).

review.[188] In *Cleburne*, the Court articulated the traditional deferential rational basis review, yet reached its decision only after conducting a probing inquiry into the reasonableness of the legislative goals and means, the specific interests at stake, and the relative importance of those interests to the burdened class.[189] As Justice Stevens correctly stated in his concurrence, the tiered approach to equal protection claims " 'is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.' "[190] This pretense is, however, unwise. Personal rights and interests do not fit well into clearly defined categories. Therefore, the Court will often base its decisions on factors not encompassed within the articulated standard.[191] As a result, interested parties are provided with no notice of the standards which may govern their cases and lower courts are left with no framework within which to reach their decisions.[192] The entire process undermines the need for predictability and legitimacy.

The unprecedented and novel use of the as applied doctrine in *Cleburne*, is the product of the Court's pretense in applying the tiered approach to equal protection claims. For instance, the majority, in attempting to maintain its deferential posture under rational basis review, invalidated the ordinance only as-applied to the proposed residents of the group home.[193] Thus, the ordinance was left intact. This doctrinal change in the area of equal protection yields precisely the opposite result that the Court traditionally wishes to achieve under minimum level review. The effect of the decision was to expand the scope of minimal level review by paving the way for litigants to challenge social and economic legislation as applied to each particular plaintiff.

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188 *Id.* at 451 (Stevens, J., concurring).

189 *Id.* at 458-59 (Marshall, J., concurring in part and dissenting in part).

190 *Id.* at 452 (citation omitted) (Stevens, J., concurring). An analysis of the case law reveals that the articulated standards applied under equal protection analysis are always shifting. While the articulated tests may change with each case, the Court really approaches each case in the same manner. The Court defines the specific interests at stake and the relative importance of those interests to the burdened class and to the legislative goals and means. *See supra* notes 45 to 135 and accompanying text.

191 *See supra* notes 151-157 and accompanying text.

192 Justice Marshall noted that because the Court based its decision on factors not encompassed within the standard, the interested parties were not afforded with notice that the Court was going to use the as applied approach. Consequently, the parties did not address the standard in their briefs or at oral argument. *Cleburne*, 473 U.S. at 477-78 (Marshall, J., concurring in part and dissenting in part).

193 *Id.* at 447.

The decision also increased the scope of mere rational scrutiny and the power to review social and economic legislation. As a result, the Court has unwisely assumed the burden of addressing complex policy questions involved in updating statutes like the one in *Cleburne*. Legislation, as opposed to case-by-case judicial rulings, would provide certainty to both the retarded community and to administrative officials in applying the ordinance. Ironically, the majority in *Cleburne* declined to apply heightened review because the judiciary was deemed "ill-informed" to make substantive judgments concerning the special needs of the large and diverse group of retarded persons.[194] However, the effect of the "as-applied" approach will inevitably involve substantive judgments concerning matters which should be addressed by state legislatures.

The problem with the tiered approach in equal protection analysis is that courts dispose of cases as if the only question to be decided is what level of scrutiny should be applied.[195] Relatively little attention is devoted to the most crucial question, namely, whether a person has been unfairly denied equal protection of the laws. The Court's "style emphasizes [a] formalized doctrine expressed in elaborately layered sets of 'tests' or 'prongs' or 'requirements' or 'standards' or 'hurdles,' "[196] over the fundamental importance of identifying the interests at stake and whether a classification rests on false stereotypes regarding individual groups. As Justice Holmes stated in *Lochner v. New York*, "[g]eneral propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[197]

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194 *Id.* at 443.
195 *Id.* at 451 (Stevens, J., concurring).
196 Nagel, *The Formulaic Constitution*, 84 MICHIGAN LAW REV. 165, 165 (1985).
197 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).