

MARSHALL, J., Concurring and Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

473 U.S. 432

City of Cleburne, Texas v. Cleburne Living Center, Inc.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-468 Argued: March 18, 1985 --- Decided: July 1, 1985

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feeble-minded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation, *per se*, cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. [p456] With this holding and principle I agree. The Equal Protection Clause requires attention to the capacities and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of Cleburne's equal protection violation. The Court holds the ordinance invalid on rational basis grounds, and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review -- the heightened scrutiny -- that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of the "feeble-minded" only as applied to respondents, rather than on its face, the Court radically departs from our equal protection precedents. Because I dissent from this novel and truncated remedy, and because I cannot accept the Court's disclaimer that no "more exacting standard" than ordinary rational basis review is being applied, *ante* at 442, I write separately.

I

At the outset, two curious and paradoxical aspects of the Court's opinion must be noted. First, because the Court invalidates Cleburne's zoning ordinance on rational basis grounds, the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case. This "two for the price of one" approach to constitutional decisionmaking -- rendering two constitutional rulings where one is enough to decide the case -- stands on their head traditional and deeply embedded principles governing exercise of the Court's Article III power. Just a few weeks ago, the Court

call[ed] to mind two of the cardinal rules governing [p457] the federal courts: "One, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

Brockett v. Spokane Arcades, Inc., [472 U.S. 491](#), 501 (1985) (WHITE, J.) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, [113 U.S. 33](#), 39 (1885)).^[n1] When a lower court correctly decides a case, albeit on what this Court concludes are unnecessary constitutional grounds,^[n2] "our usual custom" is not to compound the problem by following suit, but rather to affirm on the narrower, dispositive ground available. *Alexander v. Louisiana*, [405 U.S. 625](#), 633 (1972).^[n3] The Court offers no principled justification for departing from these principles, nor, given our equal protection precedents, could it. See *Mississippi University for Women v. Hogan*, [458 U.S. 718](#), 724, n. 9 (1982) (declining to address

strict scrutiny when heightened scrutiny sufficient to invalidate action challenged); *Stanton v. Stanton*, [421 U.S. 7](#), 13 (1975) [p458] (same); *Hooper v. Bernalillo County Assessor*, [472 U.S. 612](#), 618 (1985) (declining to reach heightened scrutiny in review of residency-based classifications that fail rational basis test); *Zobel v. Williams*, [457 U.S. 55](#), 60-61 (1982) (same); cf. *Mitchell v. Forsyth*, [472 U.S. 511](#), 537-538 (1985) (O'CONNOR, J., concurring in part).

Second, the Court's heightened scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational basis review, rather than "heightened scrutiny." But however labeled, the rational basis test invoked today is most assuredly not the rational basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, [348 U.S. 483](#) (1955); *Allied Stores of Ohio, Inc. v. Bowers*, [358 U.S. 522](#) (1959), and their progeny.

The Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the rational basis test, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.*, *supra*, at 489; see *American Federation of Labor v. American Sash Co.*, [335 U.S. 538](#) (1949); *Semler v. Dental Examiners*, [294 U.S. 608](#) (1935). The "record" is said not to support the ordinance's classifications, *ante* at 448, 450, but under the traditional standard, we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation. *Exxon Corp. v. Eagerton*, [462 U.S. 176](#), 196 (1983); *Minnesota v. Clover Leaf Creamery Co.*, [449 U.S. 456](#), 461-462, [p459] 464 (1981); *Firemen v. Chicago, R. I. & P. R. Co.*, [393 U.S. 129](#), 138-139 (1968). Finally, the Court further finds it "difficult to believe" that the retarded present different or special hazards inapplicable to other groups. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference" to its goals. *Allied Stores of Ohio, Inc. v. Bowers*, *supra*, at 527; *Metropolis Theatre Co. v. City of Chicago*, [228 U.S. 61](#), 68-70 (1913).

I share the Court's criticisms of the overly broad lines that Cleburne's zoning ordinance has drawn. But if the ordinance is to be invalidated for its imprecise classifications, it must be pursuant to more powerful scrutiny than the minimal rational basis test used to review classifications affecting only economic and commercial matters. The same imprecision in a similar ordinance that required opticians but not optometrists to be licensed to practice, see *Williamson v. Lee Optical of Oklahoma, Inc.*, *supra*, or that excluded new but not old businesses from parts of a community, see *New Orleans v. Dukes*, *supra*, would hardly be fatal to the statutory scheme.

The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate in at least two respects.^{[In41](#)} The suggestion that [p460] the traditional rational basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational basis review -- a small and regrettable step back toward the days of *Lochner v. New York*, [198 U.S. 45](#) (1905). Moreover, by failing to articulate the factors that justify today's "second order" rational basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.

I have long believed the level of scrutiny employed in an equal protection case should vary with the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

San Antonio Independent School District v. Rodriguez, [411 U.S. 1](#), 99 (1973) (MARSHALL, J., dissenting). See also *Plyler v. Doe*, [457 U.S. 202](#), 230-231 (1982) (MARSHALL, J., concurring); *Dandridge v. Williams*, [397 U.S. 471](#), 508 (1970) (MARSHALL, J., dissenting). When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes. *Plyler, supra*; *Mississippi University for Women v. Hogan*, [458 U.S. 718](#) (1982); *Frontiero v. Richardson*, [411 U.S. 677](#) (1973); *Mills v. Habluetzel*, [456 U.S. 91](#) (1982); see also *Buchanan v. Warley*, [245 U.S. 60](#) (1917). [p461]

First, the interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. See *Meyer v. Nebraska*, [262 U.S. 390](#), 399 (1923). For retarded adults, this right means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. The District Court found as a matter of fact that

[t]he availability of such a home in communities 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.

App. to Pet. for Cert. A-8. Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment -- the ability to form bonds and take part in the life of a community. ^[n5]

Second, the mentally retarded have been subject to a "lengthy and tragic history," *University of California Regents v. Bakke*, [438 U.S. 265](#), 303 (1978) (opinion of POWELL, J.), of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous, and the retarded were largely left to their own devices. ^[n6] By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme [p462] xenophobia of those years, ^[n7] leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." ^[n8] A regime of state-mandated segregation and degradation soon emerged that, in its virulence and bigotry, rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." ^[n9] Retarded children were categorically excluded from [p463] public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. ^[n10] State laws deemed the retarded "unfit for citizenship." ^[n11]

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man" -- the right to marry and procreate. *Skinner v. Oklahoma ex rel. Williamson*, [316 U.S. 535](#), 541 (1942). Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. ^[n12] The purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. ^[n13] To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931. J. Landman, *Human Sterilization* 302-303 (1932). See *Buck v. Bell*, [274 U.S. 200](#), 207 (1927) (Holmes, J.); cf. *Plessy v. Ferguson*, [p464] [163 U.S. 537](#) (1896); *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring in judgment).

Prejudice, once let loose, is not easily cabined. See *University of California Regents v. Bakke*, 438 U.S. at 395 (opinion of MARSHALL, J.). As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.^[n14] Not until Congress enacted the Education of the Handicapped Act, 84 Stat. 175, as amended, [20 U.S.C. § 1400 et seq.](#), were "the door[s] of public education" opened wide to handicapped children. *Hendrick Hudson District Board of Education v. Rowley*, [458 U.S. 176](#), 192 (1982).^[n15] But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.^[n16]

In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation.^[n17] The searching scrutiny I would give to restrictions [p465] on the ability of the retarded to establish community group homes leads me to conclude that Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded and perhaps invidious stereotypes. See *Plyler v. Doe*, [457 U.S. 202](#) (1982); *Roberts v. United States Jaycees*, [468 U.S. 609](#) (1984); *Mississippi University for Women v. Hogan*, [458 U.S. 718](#) (1982); *Mills v. Habluetzel*, [456 U.S. 91](#) (1982).

III

In its effort to show that Cleburne's ordinance can be struck down under no "more exacting standard . . . than is normally accorded economic and social legislation," *ante* at 442, the Court offers several justifications as to why the retarded do not warrant heightened judicial solicitude. These justifications, however, find no support in our heightened scrutiny precedents, and cannot withstand logical analysis.

The Court downplays the lengthy "history of purposeful unequal treatment" of the retarded, see *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 28, by pointing to recent legislative action that is said to "beli[e] a continuing antipathy or prejudice." *Ante* at 443. Building on this point, the Court similarly concludes that the retarded [p466] are not "politically powerless," and deserve no greater judicial protection than "[a]ny minority" that wins some political battles and loses others. *Ante* at 445. The import of these conclusions, it seems, is that the only discrimination courts may remedy is the discrimination they alone are perspicacious enough to see. Once society begins to recognize certain practices as discriminatory, in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court would refrain from approaching such practices with the added skepticism of heightened scrutiny.

Courts, however, do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare *Plessy v. Ferguson*, [163 U.S. 537](#) (1896), and *Bradwell v. Illinois*, *supra*, at 141 (Bradley, J., concurring in judgment), with *Brown v. Board of Education*, [347 U.S. 483](#) (1954), and *Reed v. Reed*, [404 U.S. 71](#) (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality. In an analysis the Court today ignores, the Court reached this very conclusion when it extended heightened scrutiny to gender classifications and drew on parallel legislative developments to support that extension:

[O]ver the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications [p467] [citing examples]. Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

Frontiero v. Richardson, 411 U.S. at 687. [\[n18\]](#)

Moreover, even when judicial action has catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject. See *Palmore v. Sidoti*, [466 U.S. 429](#) (1984).

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the [Fourteenth Amendment](#).

The Court also offers a more general view of heightened scrutiny, a view focused primarily on when heightened scrutiny does *not* apply, as opposed to when it does apply. [\[n19\]](#) Two [p468] principles appear central to the Court's theory. First, heightened scrutiny is said to be inapplicable where *individuals* in a group have distinguishing characteristics that legislatures properly may take into account in some circumstances. *Ante* at 441-442. Heightened scrutiny is also purportedly inappropriate when many legislative classifications affecting the *group* are likely to be valid. We must, so the Court says,

look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us,

in deciding whether to apply heightened scrutiny. *Ante* at 446.

If the Court's first principle were sound, heightened scrutiny would have to await a day when people could be cut from a cookie mold. Women are hardly alike in all their characteristics, but heightened scrutiny applies to them because legislatures can rarely use gender itself as a proxy for these other characteristics. Permissible distinctions between persons must bear a reasonable relationship to their relevant characteristics, *Zobel v. Williams*, 457 U.S. at 70 (BRENNAN, J., concurring), and gender *per se* is almost never relevant. Similarly, that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.

The Court's second assertion -- that the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant -- is similarly flawed. Certainly the assertion is not a logical one; that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very [p469] different on a bathroom door than a courthouse door. *But see Bradwell v. Illinois*, 16 Wall. 130 (1873).

Our heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny. *Plyler*, for example, held that the status of being an undocumented alien is not a "constitutional irrelevancy," and therefore declined to review with strict scrutiny classifications affecting undocumented aliens. 457 U.S. at 219, n.19. While *Frontiero* stated that gender "frequently" and "often" bears no relation to legitimate legislative aims, it did not deem gender an impermissible basis of state action in all circumstances. 411 U.S. at 686-687. Indeed, the Court has upheld some gender-based

classifications. *Rostker v. Goldberg*, [453 U.S. 57](#) (1981); *Michael M. v. Superior Court of Sonoma County*, [450 U.S. 464](#) (1981). Heightened but not strict, scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage^[n20] because the Court views the trait as relevant under some circumstances, but not others.^[n21] That view -- indeed the very concept of heightened, as opposed to strict, scrutiny -- is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions." *Ante* at 446. Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation. [p470]

The fact that retardation may be deemed a constitutional irrelevancy in *some* circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens. Although the Court acknowledges that many instances of invidious discrimination against the retarded still exist, the Court boldly asserts that, "in the vast majority of situations," special treatment of the retarded is "not only legitimate, but also desirable." *Ante* at 444. That assertion suggests the Court would somehow have us calculate the percentage of "situations" in which a characteristic is validly and invalidly invoked before determining whether heightened scrutiny is appropriate. But heightened scrutiny has not been "triggered" in our past cases only after some undefined numerical threshold of invalid "situations" has been crossed. An inquiry into constitutional principle, not mathematics, determines whether heightened scrutiny is appropriate. Whenever evolving principles of equality, rooted in the Equal Protection Clause, require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant.

Potentially discriminatory classifications exist only where some constitutional basis can be found for presuming that equal rights are required. Discrimination, in the [Fourteenth Amendment](#) sense, connotes a substantive constitutional judgment that two individuals or groups are entitled to be treated equally with respect to something. With regard to economic and commercial matters, no basis for such a conclusion exists, for as Justice Holmes urged the *Lochner* Court, the [Fourteenth Amendment](#) was not "intended to embody a particular economic theory. . . ." *Lochner v. New York*, 198 U.S. at 75 (dissenting). As a matter of substantive policy, therefore, government is free to move in any [p471] direction, or to change directions,^[n22] in the economic and commercial sphere.^[n23] The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists, see *Williamson v. Lee Optical of Oklahoma, Inc.*, [348 U.S. 483](#) (1955), or new businesses as old, see *New Orleans v. Dukes*, [427 U.S. 297](#) (1976).

But the [Fourteenth Amendment](#) does prohibit other results under virtually all circumstances, such as castes created by law along racial or ethnic lines, see *Palmore v. Sidoti*, 466 U.S. at 432-433; *Loving v. Virginia*, [388 U.S. 1](#) (1967); *McLaughlin v. Florida*, [379 U.S. 184](#) (1964); *Shelley v. Kraemer*, [334 U.S. 1](#), 23 (1948); *Hernandez v. Texas*, [347 U.S. 475](#) (1954), and significantly constrains the range of permissible government choices where gender or illegitimacy, for example, are concerned. Where such constraints, derived from the [Fourteenth Amendment](#), are present, and where history teaches that they have systemically been ignored, a "more searching judicial inquiry" is required. *United States v. Carolene Products Co.*, [304 U.S. 144](#), 153, n. 4 (1938).

That more searching inquiry, be it called heightened scrutiny or "second order" rational basis review, is a method of [p472] approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. The government must establish that the classification is substantially related to important and legitimate objectives, see, e.g., *Craig v. Boren*, [429 U.S. 190](#) (1976), so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and

compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the [Fourteenth Amendment](#). Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate. ^{In241} [p473]

As the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of action the Equal Protection Clause condemns. With respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility, heightened scrutiny is surely appropriate.

IV

In light of the scrutiny that should be applied here, Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents. I must dissent from the novel proposition that "the preferred course of adjudication" [p474] is to leave standing a legislative Act resting on "irrational prejudice," *ante* at 450, thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet.

The Court appears to act out of a belief that the ordinance might be "rational" as applied to some subgroup of the retarded under some circumstances, such as those utterly without the capacity to live in a community, and that the ordinance should not be invalidated *in toto* if it is capable of ever being validly applied. But the issue is not "whether the city may never insist on a special use permit for the mentally retarded in an R-3 zone." *Ante* at 447. The issue is whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the "feeble-minded," or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.

By leaving the sweeping exclusion of the "feeble-minded" to be applied to other groups of the retarded, the Court has created peculiar problems for the future. The Court does not define the relevant characteristics of respondents or their proposed home that make it unlawful to require them to seek a special permit. Nor does the Court delineate any principle that defines to which, if any, set of retarded people the ordinance might validly be applied. Cleburne's City Council and retarded applicants are left without guidance as to the potentially valid, and invalid, applications of the ordinance. As a consequence, the Court's as-applied remedy relegates future retarded applicants to the standardless discretion of low-level officials who have already shown an all too willing readiness to be captured by the "vague, undifferentiated fears," *ante* at 449, of ignorant or frightened residents.

Invalidating on its face the ordinance's special treatment of the "feeble-minded," in contrast, would place the responsibility for tailoring and updating Cleburne's unconstitutional [p475] ordinance where it belongs: with the legislative arm of the city of Cleburne. If Cleburne perceives a legitimate need for requiring a certain well-defined subgroup of the retarded to obtain special permits before establishing group homes, Cleburne will, after studying the problem and making the appropriate policy decisions, 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 subclass of the retarded for whom even group homes could legitimately be excluded. Special treatment of the retarded might be ended altogether. But whatever the contours such an ordinance might take, the city should not be allowed to keep its ordinance on the books intact, and thereby shift to the courts the responsibility to confront the complex empirical and policy questions involved in updating statutes affecting the mentally retarded. A legislative solution would yield standards and provide the sort of certainty to retarded applicants and administrative officials that case-by-case judicial rulings cannot

provide. Retarded applicants should not have to continue to attempt to surmount Cleburne's vastly overbroad ordinance.

The Court's as-applied approach might be more defensible under circumstances very different from those presented here. Were the ordinance capable of being cleanly severed, in one judicial cut, into its permissible and impermissible applications, the problems I have pointed out would be greatly reduced. *Cf. United States v. Grace*, [461 U.S. 171](#) (1983) (statute restricting speech and conduct in Supreme Court building and on its grounds invalid as applied to sidewalks); *but cf. id.* at 184-188 (opinion concurring in part and dissenting in part). But no readily apparent construction appears, nor has the Court offered one, to define which group of retarded people the city might validly require a permit of, and which it might not, in the R-3 zone. The Court's as-applied holding is particularly inappropriate here, [p476] for nine-tenths of the group covered by the statute appears similarly situated to respondents, *see ante* at 442, n. 9 -- a figure that makes the statutory presumption enormously overbroad. *Cf. Stanley v. Illinois*, [405 U.S. 645](#) (1972) (invalidating statutory presumption despite State's insistence that it validly applied to "most" of those covered).

To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face. ^[n25] We do not instead leave to the courts the task of redrafting the statute through an ongoing and cumbersome process of "as applied" constitutional rulings. In *Cleveland Board of Education v. LaFleur*, [414 U.S. 632](#) (1974), for [p477] example, we invalidated, *inter alia*, a maternity leave policy that required pregnant schoolteachers to take unpaid leave beginning five months before their expected due date. The school board argued that some teachers became physically incapable of performing adequately in the latter stages of their pregnancy, and we accepted this justification for purposes of our decision. Assuming the policy might validly be applied to some teachers, particularly in the last few weeks of their pregnancy, *id.* at 647, n. 13, we nonetheless invalidated it *in toto*, rather than simply as applied to the particular plaintiff. The Court required school boards to employ "alternative administrative means" to achieve their legitimate health and safety goal, *id.* at 647, or the legislature to enact a more carefully tailored statute, *id.* at 647, n. 13.

Similarly, *Caban v. Mohammed*, [441 U.S. 380](#) (1979), invalidated a law that required parental consent to adoption from unwed mothers, but not from unwed fathers. This distinction was defended on the ground, *inter alia*, that unwed fathers were often more difficult to locate, particularly during a child's infancy. We suggested the legislature might make proof of abandonment easier or proof of paternity harder, but we required the legislature to draft a new statute tailored more precisely to the problem of locating unwed fathers. The statute was not left on the books by invalidating it only as applied to unwed fathers who actually proved they could be located. When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down. *See also United States Dept. of Agriculture v. Moreno*, [413 U.S. 528](#) (1973); *Stanley v. Illinois*, *supra*; *Vlandis v. Kline*, [412 U.S. 441](#), 453-454 (1973); *Carrington v. Rash*, [380 U.S. 89](#) (1965); *Sugarman v. Dougall*, [413 U.S. 634](#), 646-649 (1973); *Weber v. Aetna Casualty & Surety Co.*, [406 U.S. 164](#) (1972); *Levy v. Louisiana*, [391 U.S. 68](#) (1968).

In my view, the Court's remedial approach is both unprecedented in the equal protection area and unwise. This doctrinal [p478] change, of course, was not sought by the parties, suggested by the various *amici*, or discussed at oral argument. Moreover, the Court does not persuasively reason its way to its novel remedial holding nor reconsider our prior cases directly on point. Instead, the Court simply asserts that "this is the preferred course of adjudication." Given that this assertion emerges only from today's decision, one can only hope it will not become entrenched in the law without fuller consideration.

V

The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less

important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's free-wheeling, and potentially dangerous, "rational basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together. Moreover, the Court's narrow, as-applied remedy fails to deal adequately with the overbroad presumption that lies at the heart of this case. Rather than leaving future retarded individuals to run the gauntlet of this overbroad presumption, I would affirm the judgment of the Court of Appeals in its entirety, and would strike down on its face the provision at issue. I therefore concur in the judgment in part and dissent in part.

Notes:

¹ See also *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"); see generally *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Even today, the Court again "calls to mind" these principles, *ante* at 447, but given the Court's lengthy dicta on heightened scrutiny, this call to principle must be read with some irony.

² I do not suggest the lower court erred in relying on heightened scrutiny, for I believe more searching inquiry than the traditional rational basis test is required to invalidate Cleburne's ordinance. See *infra* at 458-460.

³ See also *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157-158 (1984); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979).

⁴ The two cases the Court cites in its rational basis discussion, *Zobel v. Williams*, 457 U.S. 55 (1982), and *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), expose the special nature of the rational basis test employed today. As two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational basis standard, these cases must be, and generally have been, viewed as intermediate review decisions masquerading in rational basis language. See, e.g., L. Tribe, *American Constitutional Law* § 16-31, p. 1090, n. 10 (1978) (discussing *Moreno*); see also *Moreno*, *supra*, at 538 (Douglas, J., concurring); *Zobel*, *supra*, at 65 (BRENNAN, J., concurring).

⁵ Indeed, the group home in this case was specifically located near a park, a school, and a shopping center so that its residents would have full access to the community at large.

⁶ S. Herr, *Rights and Advocacy for Retarded People* 18 (1983).

⁷ On the role of these ideologies in this era, see K. Stampf, *Era of Reconstruction, 1865-1877*, pp. 18-22 (1965).

⁸ H. Goddard, *The Possibilities of Research as Applied to the Prevention of Feeble-mindedness*, *Proceedings of the National Conference of Charities and Correction* 307 (1915), cited in A. Deutsch, *The Mentally Ill in America* 360 (2d ed. 1949). See also Fernald, *The Burden of Feeble-mindedness*, 17 *J. Psycho-Asthenics* 87, 90 (1913) (the retarded "cause unutterable sorrow at home and are a menace and danger to the community"); Terman, *Feeble-Minded Children in the Public Schools of California*, 5 *Schools & Society* 161 (1917) ("[O]nly recently have we begun to recognize how serious a menace [feeble-mindedness] is to the social, economic and moral welfare of the state. . . . [I]t is responsible . . . for the majority of cases of chronic and semi-chronic pauperism, and for much of our alcoholism, prostitution, and venereal diseases"). Books with titles such as "The Menace of the Feeble Minded in Connecticut" (1915), issued by the Connecticut School for Imbeciles, became commonplace. See C. Frazier, (Chairman, Executive Committee of Public Charities Assn. of Pennsylvania), *The Menace of the Feeble-Minded In Pennsylvania* (1913); W. Fernald, *The Burden of*

Feeble-Mindedness (1912) (Mass.); Juvenile Protection Association of Cincinnati, *The Feeble-Minded, Or the Hub to Our Wheel of Vice* (1915) (Ohio). The resemblance to such works as R. Shufeldt, *The Negro: A Menace to American Civilization* (1907), is striking, and not coincidental.

⁹ A. Moore, *The Feeble-Minded in New York 3* (1911). This book was sponsored by the State Charities Aid Association. See also P. Tyor & L. Bell, *Caring for the Retarded in America* 71-104 (1984). The segregationist purpose of these laws was clear. See, e.g., Act of Mar. 22, 1915, ch. 90, 1915 Tex.Gen.Laws 143 (repealed 1955) (Act designed to relieve society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

¹⁰ See *Pennsylvania Assn. for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294-295 (ED Pa.1972); see generally S. Sarason & J. Doris, *Educational Handicap, Public Policy, and Social History* 271-272 (1979).

¹¹ Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294.

¹² See, e.g., Act of Mar.19, 1928, ch. 156, 1928 Ky.Acts 534, remains in effect, Ky.Rev.Stat. § 402.990(2) (1984); Act of May 25, 1905, No. 136, § 1, 1905 Mich.Pub.Acts 185, 186, remains in effect; Mich.Comp.Laws § 551.6 (1979); Act of Apr. 3, 1920, ch. 210, § 29, 1920 Miss. Gen. Laws 288, 300, remains in effect with minor changes, Miss.Code Ann. § 41-21-45 (1972).

¹³ See Chamberlain, *Current Legislation -- Eugenics and Limitations of Marriage*, 9 A.B.A.J. 429 (1923); *Lau v. Lau*, 81 N. H. 44, 122 A. 345, 346 (1923); *State v. Wyman*, 118 Conn. 501, 173 A. 155, 156 (1934). See generally Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons -- The Eternal Child Grows Up*, 13 Gonz.L.Rev. 625 (1978); Shaman, *Persons Who Are Mentally Retarded: Their Right to Marry and Have Children*, 12 Family L. Q. 61 (1978); Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Family L. 463 (1977).

¹⁴ See Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

¹⁵ Congress expressly found that most handicapped children, including the retarded, were simply shut out from the public school system. See 20 U.S.C. § 1400(b).

¹⁶ See generally G. Allport, *The Nature of Prejudice* (1958) (separateness among groups exaggerates differences).

¹⁷ This history of discrimination may well be directly relevant to the issue before the Court. Cleburne's current exclusion of the "feeble-minded" in its 1965 zoning ordinance appeared as a similar exclusion of the "feebleminded" in the city's 1947 ordinance, see Act of Sept. 26, 1947, § 5; the latter tracked word for word a similar exclusion in the 1929 comprehensive zoning ordinance for the nearby city of Dallas. See Dallas Ordinance, No. 2052, § 4, passed Sept. 11, 1929.

Although we have been presented with no legislative history for Cleburne's zoning ordinances, this genealogy strongly suggests that Cleburne's current exclusion of the "feeble-minded" was written in the darkest days of segregation and stigmatization of the retarded, and simply carried over to the current ordinance. Recently we held that extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). But in any event, the roots of a law that, by its terms, excludes from a community the "feebleminded" are clear. As the examples above attest, see n. 7, *supra*, "feebleminded" was the defining term for all retarded people in the era of overt and pervasive discrimination.

¹⁸ Although *Frontiero* was a plurality opinion, it is now well established that gender classifications receive heightened scrutiny. See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁹ For its general theories about heightened scrutiny, the Court relies heavily, indeed virtually exclusively, on the "lesson" of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). The brief per curiam in *Murgia*, however, was handed down in the days before the Court explicitly acknowledged the existence of heightened scrutiny. See *Craig v. Boren*, 429 U.S. 190 (1976); *id.* at 210 (POWELL, J., concurring). *Murgia* explains why age-based distinctions do not trigger strict scrutiny, but says nothing about whether such distinctions warrant heightened scrutiny. Nor have subsequent cases addressed this issue. See *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

²⁰ Alienage classifications present a related variant, for strict scrutiny is applied to such classifications in the economic and social area, but only heightened scrutiny is applied when the classification relates to "political functions." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); see also *Bernal v. Fainter*, 467 U.S. 216, 220-222 (1984). Thus, characterization of the area to which an alienage classification applies is necessary to determine how strongly it must be justified.

²¹ I express no view here as to whether strict scrutiny ought to be extended to these classifications.

²² Constitutional provisions other than the Equal Protection Clause, such as the Contracts Clause, the Just Compensation Clause, or the Due Process Clause, may constrain the extent to which government can upset settled expectations when changing course and the process by which it must implement such changes.

²³ Only when it can be said that "Congress misapprehended what it was doing," *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 193 (1980) (BRENNAN, J., dissenting), will a classification fail the minimal rational basis standard. Even then, the classification fails not because of limits on the directions which substantive policy can take in the economic and commercial area, but because the classification reflects no underlying substantive policy -- it is simply arbitrary.

²⁴ No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide. The "political powerlessness" of a group may be relevant, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors, and I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny. Similarly, immutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances. See ante at 442-443, n. 10.

The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

The discreteness and insularity warranting a "more searching judicial inquiry," *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938), must therefore be viewed from a social and cultural perspective, as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste, or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

²⁵ The Court strongly suggests that the loose fit of the ordinance to its purported objectives signifies that the ordinance rests on "an irrational prejudice," ante at 450, an unconstitutional legislative purpose. See *Mississippi University for Women v. Hogan*, 458 U.S. at 725. In that event, recent precedent should make clear that the ordinance must, in its entirety, be invalidated. See *Hunter v. Underwood*, 471 U.S. 222 (1985). *Hunter* involved a 1902 constitutional provision disenfranchising various felons. Because that provision had been motivated, at least in part, by a desire to disenfranchise Negroes, we invalidated it on its face. In doing so, we did not suggest that felons could not be deprived of the vote through a statute motivated by some purpose other than racial discrimination. See *Richardson v. Ramirez*, 418 U.S. 24 (1974). Yet that possibility, or the possibility that the provision might have been only partly motivated by the desire to disenfranchise Negroes, did not suggest the provision should be invalidated only "as applied" to the particular plaintiffs in *Hunter*, or even as applied to Negroes more generally. Instead we concluded:

Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race, and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights [v. Metropolitan Housing Development Corp.]*, [429 U.S. 252](#) (1977)].

471 U.S. at 233. If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the Equal Protection Clause, and cannot validly be applied to anyone.