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Constitutional Law: Activating the Middle Tier After *Plyler v. Doe: Cleburne Living Center v. City of Cleburne*

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NOTES

Constitutional Law: Activating the Middle Tier After *Plyler v. Doe: Cleburne Living Center v. City of Cleburne*

In the period following Justice Stone's famous footnote four in the *Carolene Products* case,[1] the Supreme Court has been engaged in a continual and difficult process of defining the situations that should trigger a higher level of judicial suspicion when the Court reviews legislative enactments.[2] When the Court uses a higher level of scrutiny, it more closely examines the relationship between the purpose for which the legislation is drafted and the means the legislature has used to meet that purpose. The use of heightened scrutiny places the Court in a closer and more exacting oversight relationship with the legislature.

Some commentators have advocated the Court's use of a higher level of scrutiny in examining legislative action as a means of furthering social goals.[3] This expansion of the categories and situations triggering heightened judicial scrutiny under the equal protection clause[4] has also consistently provoked criticism from academic commentators and members of the Court who feel that it is an improper exercise of judicial activism.[5]

There has also been some support for a complete abandonment of the traditional criteria necessary for the Court to invoke heightened scrutiny in

1. Justice Stone stated in United States v. Carolene Products Co., 304 U.S. 144 (1938), that the Court had not inquired into "whether 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.* at 152 n.4.

2. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949): "[S]elf restraint is no virtue if the court has a unique function to perform. If, on the other hand, the self restraint is justified, the belief in a unique judicial function is untenable. These difficulties plague the court at every stage in the process of applying the Equal Protection clause." *Id.* at 366.

3. *See, e.g.*, Tussman & tenBroek, *supra* note 2; L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) [hereinafter cited as TRIBE]; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777 (1981); Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771 (1978).

4. The fourteenth amendment in pertinent part states that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting). "I think that this branch of the compelling interest doctrine is sound when applied to racial classifications, for historically the equal protection clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise." *Id.* at 659.

the examination of legislative actions. For example, Justice Marshall has argued for a "spectrum of standards" in reviewing discrimination allegedly violating the equal protection clause.[6] The Court, in each instance, would make an ad hoc determination of the proper level of judicial suspicion to use in reviewing the legislative enactment. Marshall's argument is that it would be more candid and realistic to examine each case under a "sliding scale" of judicial suspicion, depending on the interests affected and the need for the legislation. The adoption of this viewpoint would greatly enlarge the parameters of the Court's review of legislative action.

This note will examine the method the Court used in deciding the proper level of scrutiny in *Plyler v. Doe*.[7] The note will then examine how this apparently new method of triggering heightened scrutiny used in *Plyler* was applied by the Fifth Circuit Court of Appeals in *Cleburne Living Center v. City of Cleburne*.[8] The *Cleburne* decision raises strong questions as to whether the *Plyler* approach to equal protection questions should be applied outside of the unusual facts and circumstances of the *Plyler* case.

The Traditional Methods of Triggering Heightened Scrutiny Under the Equal Protection Clause

The underlying principle of the equal protection clause is that statutes cannot create classifications affording different treatment to persons who are similarly situated.[9] Under traditional equal protection analysis, courts examine legislation under a rational basis standard. A statute is presumed valid and is upheld if the statutory classification rationally relates to any legitimate state goal.[10] The rational basis standard is highly deferential to the legislative process.[11]

6. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting):

> The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis on which the particular classification is drawn.

Id. at 98-99. *Rodriguez* was an unsuccessful equal protection challenge to the Texas method of public school funding which results in differences in per pupil allotments in different school districts.

7. 457 U.S. 202 (1982).

8. 726 F.2d 191 (5th Cir.), *reh'g denied*, 735 F.2d 832 (5th Cir.), *cert. granted*, 105 S. Ct. 427 (1984).

9. *See Plyler*, 457 U.S. at 216. *See also* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Note, *Undocumented Aliens' Rights to Medicaid after Plyler v. Doe*, 7 FORDHAM INT'L L.J. 83 (1983).

10. City of New Orleans v. Duke, 427 U.S. 297 (1976).

11. *See Plyler*, 457 U.S. at 216.

An example of how the rational basis test operates was the Court's decision in *Williamson v. Lee Optical.*[12] An Oklahoma law required an optometrist's prescription each time a person had eyeglasses fitted or duplicated. There was no legislative history accompanying the Oklahoma statute to explain the rationale behind the legislature's actions. Nonetheless, the Supreme Court postulated possible reasons that could have compelled the passage of the bill and this was sufficient to pass the scrutiny of the rational basis test. This deference to the possible intent of the legislature demonstrates how slight the judicial scrutiny of legislative action is under the rational basis test. The underlying concept is that if there is nothing within the legislation to trigger the Court's suspicion, the Court should defer to the legislative process and separation of powers.

If the Court in *Plyler* had examined the Texas statute[13] under the traditional rational basis test, the statute would likely have been upheld as constitutional. The Texas legislature's desire to conserve educational resources could have been a rational basis for barring illegal alien children from the state's public schools. However, the Court in *Plyler* rejected the rational basis test as an inappropriate standard of review.

The Supreme Court has opted for a more stringent level of scrutiny when legislation infringes on fundamental rights or burdens a suspect class.[14] Under this strict scrutiny standard the legislation must substantially further a compelling state interest.[15] The Supreme Court has to date recognized three suspect[16] classes that trigger strict scrutiny: race,[17] national origin,[18] and alienage.[19] In *Plyler* the Court held that illegal alienage was not to be accorded

12. 348 U.S. 483 (1955).

13. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972 & Supp. 1982). Section 21.031 provides in pertinent part that "(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of twenty-one years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year."

14. Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

15. *Plyler*, 457 U.S. at 217: "With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."

16. *Id.* at 216 n.14:

> Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in the pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.

See Note, *Constitutional Law: Equal Protection Rights of Illegal Alien School Children*, 23 HARV. INT'L L.J. 389 (1983).

17. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954).

18. *See* Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948); Hirabayashi v. United States, 320 U.S. 81 (1943).

19. *See* Mathews v. Diaz, 426 U.S. 67 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

the same status as alienage and rejected the claim that illegal aliens are a suspect class. "Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime."[20] Therefore, in *Plyler* the Court rejected the strict scrutiny standard of review.

The second area in which the Court applies strict scrutiny is when a right infringed by a statutory classification is considered by the Court to be fundamental.[21] The *Plyler* Court did not find that a fundamental right had been infringed upon. Therefore, this was not the trigger for the *Plyler* Court's use of heightened scrutiny. In *Plyler* the Court declined to hold that public education is a fundamental right.[22] In a later opinion, *Martinez v. Bynum*,[23] the Court explicitly stated that public education is not a fundamental right invoking strict scrutiny.

Before *Plyler*, dissatisfaction with the two-tiered equal protection system, under which either strict scrutiny or the rational basis test were the exclusive standards of review, had emerged in both the academic community and on the Court.[24] The basic problem was that the net effect of strict scrutiny analysis was to strike down legislation because the legislature had to meet the very difficult standard of demonstrating a compelling state interest. Moreover, the use of the rational basis test on legislative enactments amounted to almost no review at all. The two tests were applied almost mechanically, pigeonholing cases into either strict or rational categories with little room for judicial flexibility.

The Emergence of "Middle Level" Scrutiny

The next major step in the development of the scrutiny doctrine was the Court's recognition of a middle or intermediate level of scrutiny. The first application of a middle-level test was in cases involving gender and il-

20. *Plyler*, 457 U.S. at 219 n.19.

21. In *Plyler* the Court gave a nonexclusive list of fundamental rights to be used in determining whether a class-based denial of a particular right is deserving of strict scrutiny under the equal protection clause.

> [W]e look to the Constitution to see if the right infringed has its source, explicitly or implicitly therein. But we have also recognized the fundamentality of participation in state elections on an equal basis with other citizens in the jurisdiction. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) . . .; San Antonio Independent School District v. Rodriguez, 411 U.S. 1, . . .; Harper v. Virginia Bd. of Elections 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Yick Wo v. Hopkins, 118 U.S. at 356, 370 (1886).

457 U.S. at 217 n.15.

22. *Id.* at 221.

23. 461 U.S. 321, 328 n.7 (1983).

24. Craig v. Boren, 429 U.S. 190 (1976) (Powell, J., concurring). Powell stated that: "There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the courts' decisions in the past decade." *Id.* at 210. He added that, "[C]andor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender based classification." *Id.* at 211. *See also* TRIBE, *supra* note 3, at 1082.

legitimacy. Commentators have said that the basis for the Court's use of heightened scrutiny in these situations was that "sensitive although not necessarily suspect criteria of classification are employed."[25]

Until recently, the Supreme Court applied the deferential rational basis standard of review to gender classifications.[26] Legislation was upheld if the Court could find it to be rationally related to some legitimate state objective. This state objective was often the preservation of women's "proper role" in society.[27] In the early 1970s, however, the Court began to use a form of heightened review on gender-based classifications.[28]

The Court now uses an intermediate or middle level of review for gender classifications. This standard was articulated in *Craig v. Boren*.[29] *Craig v. Boren* involved a successful challenge to an Oklahoma statute that allowed the sale of 3.2 beer to males over the age of twenty-one and to females over the age of eighteen. The constitutional claim was that the statute denied equal protection to males aged eighteen to twenty. The Court held that the appropriate standard of review of gender-based classifications was that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[30]

Another area in which the Court has used middle-level scrutiny is in cases involving illegitimacy.[31] In *Trimble v. Gordon*[32] the Court invalidated a portion of an Illinois intestate succession plan that prevented illegitimate children from inheriting from their fathers. The Court used a heightened standard of review. Justice Rehnquist, however, in his dissenting opinion, contended that anything more than the most deferential equal protection review should be used only "in the area of the law in which the framers honestly meant the clause to apply, classifications based on race or national origin, the first cousin of race."[33]

It has also been suggested that the Supreme Court applies an intermediate standard of review to classifications that involve rights that, although not fundamental, are considered by the Court to be of special importance.[34] The

25. *See* TRIBE, *supra* note 3, at 1090; Note, *Undocumented Children: A Sensitive Class*, 8 J. JUV. L. 87, 89 (1984).

26. *See* Goesaert v. Cleary, 335 U.S. 464 (1948).

27. *Id.* at 466.

28. *See* Reed v. Reed, 404 U.S. 71 (1971).

29. 429 U.S. 190 (1976).

30. *Id.* at 197.

31. *See* Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972). *See also* Note, *Undocumented Children, supra* note 25.

32. 430 U.S. 762 (1977). *See also* Mills v. Habluetzal, 456 U.S. 91, 99 (1982): "Such restrictions will survive equal protection scrutiny to the extent that they are substantially related to a legitimate state interest."

33. *Trimble*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

34. TRIBE, *supra* note 3, at 1090.

> The court has employed intermediate forms of review where governmental deprivations affected such important interests of the individual as the interest in retaining driver's licenses [Bell v. Burson, 402 U.S. 535, 539 (1971)], in obtaining a higher education at an affordable tuition [Vlandis v. Kline, 412 U.S. 441, 459 (1973)

argument is that the Court uses a higher standard of review even though it purports to use the rational basis test. This is a questionable thesis in light of the Court's decision in *San Antonio Independent School District v. Rodriguez*.[35] In *Rodriguez*, the limitation of a right (education) recognized by the Court as important, but not fundamental, apparently did not cause the Court to raise the standard of review from the traditional rational basis test.

The Method of Triggering Heightened Scrutiny in Plyler v. Doe

Rather than applying traditional equal protection analysis, the *Plyler* Court stepped outside of the methods that had previously been used to determine the applicable level of scrutiny. The Court in *Plyler* stated that:

> [W]e have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in those limited circumstances we have sought the assurance that the classification reflects a reasonable judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the state.[36]

Thus, instead of separately examining the classification and the benefit denied, which under traditional analysis would have resulted in the application of the rational basis test, the *Plyler* Court based its use of a heightened standard of review on the interaction between the class (illegal alien children) and the importance of the benefit (education).[37]

This expanded method of triggering heightened scrutiny received stiff criticism from Chief Justice Burger in his dissent: "by patching together bits and pieces of what might be termed quasi-suspect class and quasi-fundamental-rights analysis, the court spins out a theory custom-tailored to the facts of these cases."[38]

(White, J., concurring)], in receiving subsistence benefits such as food stamps [United States Department of Agriculture v. Murry, 413 U.S. 508, 519 (1973) Marshall, J., concurring].

Tribe concludes that "either a significant interference with liberty or a denial of a benefit vital to the individual triggers intermediate review." *Id.*

35. 411 U.S. 1, 37 (1973).

36. *Plyler*, 457 U.S. at 217-18.

37. *Id.* at 223-24:

> In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the state.

See Note, *Equal Protection, Education, and the Undocumented Alien Child: Plyler v. Doe*, 7 HOUS. L. REV. 899 (1984).

38. *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting).

The Test for Heightened Scrutiny in Plyler v. Doe

A second difference from the previous cases that used an intermediate form of review is that *Plyler* used a different standard for intermediate scrutiny. The Court mentioned but did not use the *Craig v. Boren* test.[39] Rather than using the traditional middle-level test that classifications must serve important governmental objectives and must be substantially related to the achievement of those governmental objectives, the *Plyler* Court used the formulation that the statute "can hardly be considered rational unless it furthers some substantial goal of the state."[40] The opinion concludes that "[i]f the state is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."[41]

It is unclear whether the majority in *Plyler* was attempting to restate the intermediate test in a different form or if this is a different test, perhaps due to the unique circumstances of the case.[42] Chief Justice Burger criticized this method, stating in his dissent that:

> In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of public education. . . . If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.[43]

Application of Heightened Scrutiny in Plyler v. Doe

In applying the test, the Court rejected Texas' principal argument that the statute was valid because it was consistent with federal policies embodied in the immigration laws regarding undocumented aliens.[44] The Court also rejected the second argument offered by the appellants that the state's desire to conserve educational resources provided constitutionally sufficient grounds for denying free public education to illegal alien children.[45]

The majority noted that the state might in some circumstances have an interest in employing a classification that disfavored illegal aliens when that classification would limit serious economic effects of sudden shifts in popula-

39. *Id.* at 218 n.16.

40. *Id.* at 224.

41. *Id.* at 230.

42. *See* Note, *Constitutional Law: The Equal Protection Clause: The Effect of Plyler v. Doe on Intermediate Scrutiny*, 36 OKLA. L. REV. 321 (1983); Note, *Undocumented Childen, supra* note 25, at 93.

43. 457 U.S. at 244 (Burger, C.J., dissenting).

44. *Id.* at 215.

45. *Id.* at 227. The Court stated that a state's desire to conserve resources could not justify the denial of public education.

tion.[46] The Court held, however, that Texas had not demonstrated that the educational services were the cause of the illegal migration. The Court also rejected the state's argument that the exclusion would benefit public education. The Court noted that the exclusion of this group of illegal alien children would not necessarily improve the education for other children in the school district.[47] Finally, the state could not demonstrate that undocumented children were less likely than other children to remain within the borders of the state because the state has no assurance that any child receiving a public education will remain within its borders.[48]

The denial of the state's arguments demonstrate that the burden of meeting the test of "furthering a substantial governmental interest" is a difficult one.[49] It is unclear whether the test formulated is a stricter standard than the *Craig v. Boren* test due to the special needs of the illegal alien children. If the *Plyler* standard proves to be stricter, the Court is seemingly free to formulate different standards of review in each particular situation. This result would be similar to the "spectrum" of standards suggested by Justice Marshall in his dissent in *San Antonio Independent School District v. Rodriguez.*[50]

Cleburne's Interpretation of Plyler

The methodology espoused in *Plyler* is now being interpreted by the lower courts. Thus, to understand the impact that *Plyler* may have on judicial review, it is instructive to examine how one court interpreted and applied that methodology.

In *Cleburne Living Center v. City of Cleburne,*[51] the Fifth Circuit Court of Appeals examined a Cleburne, Texas zoning ordinance that excluded a group home[52] for mentally retarded persons from the permitted uses in an apartment house district.[53] The owners of the proposed group home challenged the ordinance under the Federal Revenue Sharing Act and the equal protection clause of the fourteenth amendment.[54] Because the zoning ordinance regulated mentally retarded persons, the *Cleburne* court held that the ordinance must be examined under the, " 'intermediate' level of scrutiny established by the Supreme Court."[55] Subjected to this level of scrutiny, the

46. *Id.* at 224.

47. *Id.* at 229.

48. *Id.* at 230.

49. *See* Note, *Constitutional Law: Equal Protection Rights of Illegal Alien School Children, supra* note 16, at 392.

50. *Rodriguez,* 411 U.S. at 70.

51. 726 F.2d 191 (1984).

52. The court noted that: "The . . . home would be subject to extensive regulations and guidelines established and administered by the United States Department of Health and Human Resources, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation and the Texas Department of Health." *Id.* at 193.

53. *Id.* at 192.

54. *Id.* The *Cleburne* court found the Revenue Sharing Act argument inapplicable.

55. *Id.* at 193.

city of Cleburne failed to demonstrate that the ordinance substantially furthered a significant governmental interest; the court therefore held that the ordinance violated the equal protection clause.[56]

In examining the zoning ordinance,[57] the court relied on the statement in *Plyler* that if the classification, while not facially invidious, gives rise to recurring constitutional difficulties, some form of heightened scrutiny is appropriate.[58] The court acted on *Plyler*'s enunciation of an alternative method of triggering heightened equal protection analysis.[59]

The *Cleburne* court adopted the *Plyler* reasoning that the interaction between the classification and the object of the classification combined to trigger heightened scrutiny. However, the court did not use the constitutional test in *Plyler* that the denial of the benefit must further a substantial state interest.[60] Instead, it used the middle-level *Craig v. Boren* test previously applied to cases involving gender and illegitimacy.[61]

The *Cleburne* court centered its analysis in deciding the appropriate level of scrutiny on the question of whether the class of mentally retarded persons is "suspect" or at least possesses sufficient characteristics of a "suspect" class to warrant intermediate review. The court interpreted the *Plyler* decision to hold implicitly that if a class of persons possess sufficient characteristics of a "suspect" class, the statutory classification should undergo heightened scrutiny. Similar to the analysis in *Plyler*, the court noted that if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection by the use of heightened scrutiny.[62] The court noted that some federal district courts had discussed this issue,[63] but it found no appellate opinions that used a heightened review for legislation that classified on the basis of mental retardation.

56. *Id.*

57. The permitted uses under the ordinance were:

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.
3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels.
6. Hospitals, sanitariums, nursing homes, or houses for convalescents or aged, *other than for the* insane or *feebleminded* 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. at 193 (emphasis added).

58. *Id.*

59. *Id.* at 191, *citing* Plyler v. Doe, 457 U.S. at 216.

60. *Plyler*, 457 U.S. at 230. See *supra* notes 39-43 and accompanying text.

61. 429 U.S. 190 (1976).

62. *See* Parham v. Hughes, 441 U.S. 347, 351 (1979) (illegitimate children have no control over their situation). *Cf. Plyler*, 457 U.S. at 220 (minor children of illegal aliens are not in this country voluntarily and, therefore, are not comparably situated with their parents).

63. *Cleburne*, 726 F.2d at 196 n.7:

See Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp.

The *Cleburne* court stated that discrimination against the mentally retarded is likely to reflect deep-seated prejudice. The court noted the presence until comparatively recently of mandatory sterilization laws[64] and mentioned the trial court's finding of the impact on the mentally retarded of remote, stigmatizing living centers.[65] The court also stated that "once technical terms for mental retardation (e.g., idiots, imbeciles, and morons) have become popular terms of derision."[66] In addition, the court recognized that mentally retarded persons have historically lacked political power.[67] The court believed that the motivation behind the Cleburne zoning ordinance was a deep-seated prejudice against the mentally retarded.[68]

The *Cleburne* court concluded that they were not prepared to hold that the mentally retarded persons were a full-fledged suspect class[69] because mental retardation is a relevant distinction in some cases. Instead, the court held that mentally retarded persons are only a "quasi-suspect class"[70] and that laws discriminating against the mentally retarded should be examined under intermediate scrutiny. However, the court did not decide the question of whether heightened scrutiny is appropriate for classifications concerning the mentally ill.[71]

473, 490 (D.N.D. 1982) (intermediate scrutiny appropriate for classifications discriminating against mentally retarded persons); Fialkowski v. Shapp, 405 F. Supp. 946, 957-59 (Ed. Pa. 1975) (dictum); Cf. Frederick L. v. Thomas, 408 F. Supp. 832, 836 (Ed. Pa. 1976) (classification discriminating against learning disabled should be tested under intermediate scrutiny) (dictum). But see, New York State Assoc. for Retarded Children v. Rockefeller, 357 F.Supp. 752, 762 (Ed. N.Y. 1973) (inmates of a state institution for mentally retarded not a suspect class); Developmental Disabilities Advocacy Center v. Melton, 521 F.Supp. 365, 371 (D.N.H. 1981) (same); Anderson v. Banks, 520 F.Supp. 472, 512 (S.D. Ga. 1981) (mentally retarded persons not a "quasi-suspect class").

64. *Cleburne*, 726 F.2d at 197. *See also* Buck v. Bell, 274 U.S. 200 (1927) (upholding Virginia compulsory sterilization law); O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 30 (1956).

65. *Cleburne*, 726 F.2d at 193:

> Group homes currently are the principal community living alternatives for persons who are mentally retarded. The 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.

Id. The court relied on the district court finding in Cleburne Living Ctr. v. City of Cleburne, No. CA 3-80-1576F, slip op. at 7 (N.D. Tex. 1982).

66. *Cleburne*, 726 F.2d at 197.

67. *Id.* "The Cleburne ordinance discriminates between the mentally retarded and other groups—e.g. the elderly that also require supervision but may establish group homes in the R-3 district without a special use permit. This distinction is likely to reflect the deep-seated historical prejudice against the mentally retarded."

68. *Id. See also* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979).

69. *Cleburne*, 726 F.2d at 198.

70. *Id.* "The combination of these factors—historical prejudice, political powerlessness, and immutability call for heightened scrutiny of classifications discriminating against the mentally retarded."

71. *Id.*

> Some courts and commentators have suggested that mentally ill persons are a suspect or a quasi-suspect class. See e.g. Sterling v. Harris, 478 F. Supp. 1046

Central to the court's decision in *Cleburne* was the interaction of the classification and the benefit used to invoke heightened scrutiny in *Plyler*.[72] The court noted that heightened scrutiny was "particularly appropriate to the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded."[73]

The *Cleburne* court also relied upon a recent Ninth Circuit decision that used the same triggering approach found in *Plyler*.[74] In *J. W. v. City of Tacoma*,[75] the court reviewed a local zoning ordinance that required a special use permit before the establishment of a home for former mental patients. Intermediate scrutiny was held to be applicable because the class shared some of the characteristics of "suspect" classes and because the ordinance denied important benefits.[76] For the same reasons, the *Cleburne* court concluded that "intermediate scrutiny is particularly appropriate in reviewing an ordinance that restricts the availability of group homes for the mentally retarded."[77]

Cleburne's Application of the Middle-Level Test

As noted previously, the *Cleburne* court applied the test formulated in *Craig v. Boren*.[78] As in *Plyler*, there was not a sufficiently close relationship between

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(N.D. Ill. 1979); Doe v. Colautti, 592 F.2d 704, 710 (3rd Cir. 1979); Schweiker v. Wilson, 450 U.S. 221 (1981) (mentally ill a "quasi-suspect" class). But see Benham v. Edwards, 678 F.2d 511, 515 n.9 (5th Cir. 1982). In any event, mental retardation is functionally different from mental illness and the differences cut in favor of heightened scrutiny for the retarded. Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental illness. More important, mental retardation, unlike many mental illnesses is an immutable disorder. The mentally retarded cannot be cured. Finally, mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation.

Id. at 198 n.11.

72. *Id.* at 199: "See Plyler v. Doe, supra, 102 S. Ct. at 2398; Tribe, supra at 1089-90. . . . The Court held that heightened scrutiny was appropriate not only because the children shared some of the characteristics of a suspect class, but also because they were denied an important benefit."

73. 726 F.2d at 199:

> In the same way, the exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state sanctioned isolation further stigmatizes the group and provides additional barriers to their hope for self improvement.

74. *Id.* at 199.

75. 720 F.2d 1126 (9th Cir. 1983).

76. *Cleburne*, 726 F.2d at 199 *citing* J.W. v. City of Tacoma, 720 F.2d at 1129:

> We note . . . that the benefits the ordinance restricts are the former mental patients' access to housing and rehabilitative purposes. While they are not fundamental rights, they like education at issue in *Plyler*, are essential to individuals full participation in society. Indeed, for former mental patients, a reintegration into society accomplished through living in a moderately structured setting in a residential neighborhood is an essential part of therapy.

77. 726 F.2d at 200.

78. *Craig*, 429 U.S. at 197 (requiring a closer fit between the legislative objective and

the ordinance's goal and the ordinance's means of achieving that goal. The *Cleburne* court held that the requirement of a special use permit for all group homes for the mentally retarded was both vastly overbroad and vastly underinclusive.[79] The court then examined the factors that went into the city council's decision to deny the special use permit.[80] The court concluded that none of the proffered reasons for denying the permit substantially served an important governmental interest. As a result of the analysis, the court concluded that the application of the ordinance denied equal protection.[81]

As in *Plyler*, the legislative rationales did not survive heightened scrutiny. As evidenced by the state's arguments in *Plyler* and the Cleburne City Council's arguments in *Cleburne*, this heightened scrutiny is a comparatively stringent test. Apart from the semantical differences between the test used in *Plyler* and the test used in *Cleburne*, it is apparent that it is difficult to meet the burden of this intermediate level of scrutiny.

A Dissent to the Cleburne Approach

The *Cleburne* decision was appealed through a petition for rehearing and suggestion for rehearing en banc. The petition was denied.[82] Judge Garwood wrote a forceful dissenting opinion.[83] In his dissent, Judge Garwood contended that the case, due to its exceptional importance and novelty, clearly deserved en banc consideration.[84] He argued that a classification based on mental retardation is generically different from that based on gender or illegitimacy, the prototypical quasi-suspect classifications:

> Women have as much need for, and ability to benefit from, the same kinds of education as men, and illegitimate children have as much need for and can equally benefit, from parental support as legitimate children. Thus, for example, governmental distinctions between the sexes respecting education, or between legitimate or il-

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statutory means than is required under rational basis review).

79. *Cleburne*, 726 F.2d at 200. The city of Cleburne claimed that the objectives of the ordinance were: (1) to avoid undue concentrations of population; (2) to lessen congestion in the streets; (3) to ensure safety from fire and other dangers; and (4) to protect the health, safety and welfare of the city's population, in particular (a) to protect the serenity of the existing neighborhoods, (b) to protect the neighbors from harm, and (c) to protect the mental retardates themselves by providing an appropriate living environment.

80. *Id.* The Cleburne City Council considered (a) the attitude of a majority of owners of property located within 200 feet of the group home; (b) the location of a junior high school across the street from the home; (c) concern for the fears of elderly residents of the neighborhood; (d) the size of the home and the number of people to be housed; (e) concern over the legal responsibility for any actions the mentally retarded residents might take; (f) the home's location on a 500-year floodplain; and (g) in general the presentation be made before the city council.

81. *Id.* at 202.

82. Cleburne Living Center v. City of Cleburne, 735 F.2d 832 (5th Cir. 1984).

83. Garwood, circuit judge, with whom Brown, Gee, Reavley, Jolly, and Davis, circuit judges, joined, dissenting.

84. 735 F.2d at 832.

> legitimate children respecting the obligation of parental support, are quasi-suspect.[85]

Judge Garwood noted that the characteristics that define the retarded as a class, present from birth or early childhood, limit the individual's ability to perform a wide range of functions and are highly relevant to proper legislative goals in most respects.[86]

Judge Garwood believed that the factors relied on by the *Cleburne* court for its determination that the retarded are a quasi-suspect class[87] are not sufficient for such purpose, "absent the class' meeting a threshold level of lack of significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of either its member's needs and abilities to function, either generally or in respect of the regulatory area under consideration."[88] Finally, Judge Garwood argued that:

> State regulations will inevitably often distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the test we use to invalidate distinctions based on gender, constitutes in my view a major and unwarranted extension of federal judicial power, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded.[89]

Conclusion

The majority opinion in *Cleburne* and the dissent to the denial of rehearing en banc help to illustrate the split in the judiciary on the extension of the use of heightened scrutiny in equal protection cases. This reflects the continual debate about the reach of the equal protection clause since the *Carolene Products* footnote. The original purpose of the scrutiny doctrine flowing out of the *Carolene Products* footnote and post-World War II jurisprudence was to effectuate the application of the thirteenth, fourteenth, and fifteenth amendments

85. *Id.* at 832-33: "As observed in Frontiero v. Richardson, 477 U.S. 677, 686 (1973): What differentiates sex from such nonsuspect statuses as intelligence or physical disability and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." 735 F.2d at 833 n.3.

86. 735 F.2d at 833.

87. Id. at 834 n.5:

> The factors cited by the panel may be summarized as follows (1) likely to reflect "deep-seated prejudice"; (2) "history of unfair and often grotesque mistreatment," including "universally denied admissions into public schools" (until 1970's), segregation "in remote, stigmatizing institutions," and "often have been subject to ridicule;" (3) "have lacked political power;" (4) "their condition (though ameliorable) is immutable."

88. *Id.* at 834.

89. *Id.*

to "discrete and insular minorities." Because the original purpose of these amendments was to protect the rights of blacks, the use of heightened scrutiny in examining legislative classifications based upon race had a comparatively strong textual and historical base. The original categories of race or alienage were expanded to include gender in a series of decisions culminating in *Craig v. Boren*. Conservatives on the Court, among them Chief Justice Burger and Justice Rehnquist, have strongly criticized the expansion of the traditional categories triggering heightened scrutiny. Their main argument is that the extension of the doctrine is not a principled outgrowth of either the text or the history surrounding the adoption of the Civil War amendments.

The new method of triggering heightened scrutiny used in *Plyler* and *Cleburne* can be interpreted as the next step in broadening the application of judicial scrutiny under the equal protection clause. In the eyes of conservative jurists and academic commentators, the further expansion of the application of heightened scrutiny by the Court in *Plyler v. Doe* is not authorized explicitly or implicitly by the text of the Constitution. The opposing argument by Justice Marshall is that the Court has, under the guise of the rational basis test, struck down legislation without recognizing that it has in fact used heightened scrutiny. To Marshall, a more candid approach is to acknowledge that the Court has used heightened scrutiny at different levels whether it has recognized this or not. However, the implications of institutionalizing a wider variety of triggering mechanisms for heightened judicial suspicion raise several questions.

One great danger in a shift to the *Plyler* method of triggering heightened scrutiny is that the use of this method could undermine the use of heightened scrutiny in the traditional areas of race and alienage or the newer area of gender. If the Court looks at both the classifications *and* the importance of the benefit to that class, arguably a lower level of scrutiny could be implicated if an apparently less important benefit is denied to persons on the basis of race or gender. The *Plyler* method of aggregating the classification and the importance of benefit to the group could well become not an alternative method of triggering heightened scrutiny but the only method.

Despite the criticisms of the original scrutiny doctrine as mechanical, it has created a strong foundation for the protection of constitutional rights. An expansion of the *Plyler* doctrine could well become a general balancing test creating an extension of judicial suspicion into areas such as housing for the mentally retarded, but weakening judicial suspicion in the vital and original areas of equal protection.

Also, for the purposes of simplicity and precedent, the tests that the Court uses after heightened scrutiny has been triggered should have at least some degree of uniformity of application. If each case is decided under a different standard drawn from a "spectrum" of standards, without a clear articulation of how to choose levels and the consequences of each choice, there is no clear precedential value to future decision makers as to what level of scrutiny is appropriate in later situations.

An alternative method that would allow for extended judicial protection of