

WAS *CLEBURNE* AN ACCIDENT?

*William D. Araiza**

TABLE OF CONTENTS

INTRODUCTION.....	622
I. <i>CLEBURNE</i>	626
A. <i>The Background</i>	627
B. <i>At the Supreme Court</i>	629
II. THE JUSTICES' DELIBERATIONS	631
A. <i>The Remand Question</i>	632
1. <i>The May 29 Draft</i>	632
2. <i>Antecedents Of The Remand Decision</i>	633
3. <i>The Remand Discussion</i>	641
B. <i>A Facial Or As-Applied Strike-Down?</i>	648
1. <i>The Progress Toward The As-Applied Approach</i>	648
2. <i>The As-Applied Analysis</i>	653
III. WAS <i>CLEBURNE</i> AN ACCIDENT?	657
A. <i>The Decision Not To Remand</i>	657
B. <i>As-Applied Review/Heightened Rationality Review</i>	660
IV. LESSONS FROM A POSSIBLE ACCIDENT.....	665

* Professor of Law and Vice Dean, Brooklyn Law School. Thanks to Eric Berger, Katie Eyer, and Joel Gora, and the participants in the Barry University School of Law American Constitution Society's Constitutional Law Colloquium, for comments on this Article, as well to Renea Hicks, the plaintiffs' attorney in *Cleburne*, for helpful correspondence. Thanks are also due to the librarians at the Library of Congress for their assistance in retrieving many of the Justices' papers discussed here, and to Kathleen Darvil of Brooklyn Law School for her assistance in locating those papers. Finally, a special thanks is due to Annmarie Levins, who was the law clerk in charge of *Cleburne* in Justice Powell's chambers, who looked over an earlier draft. All errors and omissions remain the author's sole responsibility.

INTRODUCTION

*City of Cleburne v. Cleburne Living Center, Inc.*¹ is a seminal case. It marks the last time the Supreme Court performed a serious analysis of whether a group should be denominated a suspect class, and thus receive heightened judicial protection from discrimination. At the same time, its application of a heightened variant of rational basis review, and its conclusion that the challenged government action was based in “irrational prejudice,” has generated three decades of academic and judicial speculation about the conditions under which such heightened rational basis review would or should be performed.² *Cleburne* has also served as a font of the Court’s emerging “animus” doctrine, which has been at least responsible for, among other things, the remarkable string of victories gay-rights plaintiffs have won at the Court over the last two decades.³

And yet, important parts of this consequential case may have been accidents—that is, they may have emerged as consequences not intended by a majority of the Justices. Examination of several Justices’ papers⁴ reveals that the majority originally planned to decide only the suspect class question, and to remand the case to the lower court for application of rational basis review. It was only late in their deliberations—and late in the 1984–

¹ 473 U.S. 432 (1985).

² See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 525–26 (2004) (stating that the three-tiered section imposes rigorous judicial standards that apply under limited conditions); Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of City of Cleburne v. Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 605 (arguing that a statute’s rationality cannot be evaluated without some concept of the goal that it was meant to further); Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 477 n.14 (1997) (explaining the deferential nature of the rational basis inquiry); Neelum J. Wadhvani, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 804 (2006) (explaining the parameters and nature of the rational basis test); John D. Wilson, Comment, *Cleburne: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 185 (1986) (stating that under rational basis review the Court will normally uphold a statute that is applied unconstitutionally if it is constitutional on its face); sources cited *infra* note 3.

³ See, e.g., WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017); Dale Carpenter, *Windsor Products: Equal Protection From Animus*, 2013 SUP. CT. REV. 183, 204 (labeling *Cleburne* as an animus precedent); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 908 (2012) (discussing animus as stereotype and fear in *Cleburne*). See also Steven Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 696–98 (2014) (recognizing but critiquing the animus idea).

⁴ This Article is based on an examination of the publicly-available papers of Justices Brennan, White, Marshall, Blackmun, and Powell. Most duplicative references are supported by citations to Justice Powell’s papers, which are the only papers of this group of Justices to have been made available online. The papers of the other Justices are located in the Library of Congress. Citations to those other Justices’ papers are provided where appropriate.

85 term—when Justice White, the author of *Cleburne*, was prevailed upon to add the final substantive section of what became the majority opinion, which actually performed the rational basis review it had called for, and struck down the government’s action on that basis.

Those papers also reveal a late-erupting dispute between Justices White and Powell over whether that rational basis analysis ought to have resulted in a decision striking down the Cleburne ordinance on its face, or merely as applied to the plaintiffs’ particular group home. The resolution of that dispute ostensibly in favor of the latter approach helped create the more stringent, record-based tone of the majority opinion’s rational basis analysis. Thus, the as-applied nature of the decision—a decision Justice White defended as allowing municipalities *more* leeway to regulate⁵—helped color the opinion’s tone in a way that has since been interpreted as imposing *stricter* judicial review.

These discoveries are important in themselves.⁶ But they also suggest interesting lessons about the path of the Court’s equal protection doctrine, the nature of that doctrine, and the overall predictability—or unpredictability—of constitutional law more generally. For these reasons, it bears investigating the Court’s deliberations and thinking about what the results suggest, not just about *Cleburne*, and not just about equal protection, but about constitutional law and legal doctrine more generally.

This Article proceeds in four parts. Part I begins the Article by briefly recounting the *Cleburne* litigation. Part II then mines the Justices’ records to recount their deliberations that led to the majority opinion we know today. Part II.A. considers the Justices’ decision to decide the rational basis

5 See *infra* text accompanying notes 150–152 and 182–186 (explaining Justice White’s concerns with a facial strike-down).

6 This is not the first piece of legal scholarship to publicize the fact that the first draft of *Cleburne* would have remanded the case. Professor Earl Maltz noted this in 2014. Earl M. Maltz, *The Burger Court and the Conflict Over the Rational Basis Test: The Untold Story of Massachusetts Bd. of Retirement v. Murgia*, 39 J. SUP. CT. HIST. 264, 282 (2014). Professor Maltz focused on the Justices’ deliberations in *Cleburne* as the culmination of their discussion of the meaning of rational basis review. That discussion—and Professor Maltz’s focus—centers on earlier cases. This Article focuses more intensively on *Cleburne*, in which the Justices’ views about rationality review provided an important backdrop, see *infra* Part II.A.2., but were not front and center. Other scholars have cited small portions of the Justices’ *Cleburne* papers as part of their examinations of other, related, issues. See BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 251 (1990) (quoting Justice Powell’s view about tiered scrutiny in the context of the Court’s consideration of *Cleburne*); William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2262–64 (2002); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 246 n.152 (1991) (quoting Schwartz); Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967–1991: The View From the Marshall Papers*, 36 WM. & MARY L. REV. 473, 536–37 (1995) (citing Justice Powell’s objection to Justice White’s definition of the two-tier structure in *Cleburne*). None of these discussions focuses intensively on the deliberations in *Cleburne* itself.

issue, rather than remand the case to the lower court to do so. It focuses in particular on the role of Justice William Rehnquist. Justice Rehnquist insisted that the Court decide the suspect class question *Cleburne* posed, in favor of finding that discrimination against the intellectually disabled merited only rational basis scrutiny. But he was much more accommodating of Justice Powell's desire to have the Court decide the ensuing rational basis question itself, rather than remand the case. That combination of preferences, for which he found support in Justice O'Connor and Justice White himself, paved the way for White to accommodate Justice Powell's preference. That dynamic, in turn, created the oddly-sequenced majority opinion, criticized by Justice Marshall in his partial dissent, in which the Court began by rejecting the plaintiffs' suspect class argument but then continued on to hold that the challenged action violated the lower, default, rational basis standard.

Part II.B. turns to the Justices' deliberations on the facial/as-applied dispute. It reveals that, in contrast to his accommodating stance on the remand issue, Justice White held fast in his insistence on deciding the case on as-applied grounds, rather than striking the ordinance down on its face, as Justice Powell preferred. Part II.B. then examines White's rational basis analysis. It concludes that that analysis rested uncomfortably on the as-applied ground on which he successfully insisted. While he squarely posed the issue in terms of the particular permit denial issued to the particular group home in question, much of his analysis did not focus on those particularities, but instead rested on the rationality *vel non* of the city's discrimination against the intellectually disabled as a broad category of persons.

Part III reconsiders the oddities and tensions revealed as the results of the intra-Court dynamics recounted in Part II, to determine whether they allow us to draw broader conclusions about the Court and its doctrine. Part III.A. reconsiders *Cleburne*'s sequencing. It suggests that *Cleburne* may reflect a dynamic related to public choice theory, in which the Court's multi-member nature creates the possibility of logrolling, and results in the Court adopting an approach—here, the odd sequencing of its suspect class and rational basis analysis—that is both internally inconsistent and not fully reflective of the views of a majority of the Justices.

Part III.B. reconsiders the facial/as-applied issue. It begins by speculating that Justice White's firmness on this issue might have derived from the fact that, at that point in the 1984–85 term, he was also drafting the Court's opinion in *Brockett v. Spokane Arcades*,⁷ a First Amendment case where he was defending the appropriateness of an as-applied, rather than facial, strike-down of a law alleged to violate the First Amendment. If White's

⁷ 472 U.S. 491 (1985).

concern for consistency between his opinions in these two contemporaneous cases does indeed help explain his views on the facial/as-applied issue, then it suggests that the broader content of the Court's (and, indeed, a particular Justice's) agenda may influence that Justice's choices in particular cases.

This Part also suggests that White was motivated by his desire to allow municipalities leeway to regulate living situations for the intellectually disabled when the would-be residents were more profoundly disabled than the persons at issue in *Cleburne*.⁸ If this latter explanation provides all or part of the reason for White's position, then, ironically, his attempt to perform an as-applied analysis, which almost necessarily implies recourse to the record, had the unintended effect of making his analysis appear to be an unusually *stringent* application of judicial review—the “rational basis with bite” that has come to be associated with *Cleburne*. In other words, that unusually stringent rational basis scrutiny may have been an artifact of his choice on the facial/as-applied issue—which itself may have derived from a desire to allow government *more* leeway to regulate.

Part IV widens the lens even more broadly. As Part IV notes, the story *Cleburne* tells is a straightforward one: the Court began by considering whether a group merits heightened judicial protection; concluded, essentially, that the group came close but didn't quite satisfy the requisites for that protection; but then, armed with the evidence from that near-miss, proceeded to apply a more stringent version of rational basis scrutiny that yielded a win for that group.

The problem is that the Justices' papers reveal that this is not what happened. Yet, we are left with a text—the opinion—that tells exactly that compelling (but incorrect) story. Part IV concludes the Article by reflecting on this oddity. Given that what matters is the text of an opinion (rather than the deliberations that led to it), the example of *Cleburne* suggests that constitutional law doctrine—and, indeed, perhaps all legal doctrine—is more random than we might realize. Particularized “accidents,” such as those recounted in Parts II and III, may influence particular parts of opinions. But when those components are combined into a text, the creation process of which (the Justices' deliberations) is not easily available, and, at any rate, is not considered a valid interpretive aid,⁹ the result may be a compelling, but misleading story. Yet that story may influence both lawyers and lay consumers of the Court's work-product in ways unintended by the Justices. Such a story may especially influence those who teach the

⁸ This second explanation, which appears well-supported in the Justices' papers, is not inconsistent with the first explanation—that is, both may have played a role in convincing Justice White to stand firm on this issue.

⁹ See *infra* note 224.

case, who may feel a special temptation or obligation to create coherent-sounding narratives of constitutional doctrine for their students. This latter phenomenon may be especially pernicious, as the repetition of a compelling but inaccurate story eventually solidifies into an accepted, but inaccurate, truth.

I. *CLEBURNE*

Today, the Supreme Court's opinion in *Cleburne* is recognized as a watershed. It marked the last time the Court performed a serious analysis of whether a group should be considered a suspect class. The Court's identification of serious judicial competence-based issues with so denominating the intellectually disabled, and its rejection of that status for that group, presaged the Court's *de facto* abandonment of that approach to equal protection, even if that tradition continued on in lower federal courts and in state courts interpreting state constitutions' equality provisions.¹⁰

At the same time, its decision that the plaintiffs in that case were the victims of "irrational prejudice"¹¹ had significant generative force. In the immediate aftermath of *Cleburne*, lower courts engaged in a spate of heightened scrutiny of discrimination claims under the rational basis standard.¹² Eventually, the Supreme Court picked up on the related ideas of heightened rational basis review and animus, employing such ideas in the gay rights cases beginning with *Romer v. Evans*¹³ and extending at least to *United States v. Windsor*¹⁴ and arguably to *Obergefell v. Hodges*.¹⁵ More

¹⁰ See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (concluding that sexual orientation discrimination requires "heightened scrutiny"); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (concluding that "legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution").

¹¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

¹² See, e.g., *Pruitt v. Cheney*, 963 F.2d 1160, 1166 n.5 (9th Cir. 1991) (describing an earlier case, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), as employing "active rational basis" based on *Cleburne*); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1354–55 (10th Cir. 1987) (applying what the court called the "second order rational basis review" from *Cleburne* to handicapped persons denied admission to a federally funded housing project); *Buttino v. Fed. Bureau of Investigation*, 801 F.Supp. 298, 308 (N.D. Cal. 1992) (applying "active heightened scrutiny" on the authority of *Pruitt*); *Dubbs v. Cent. Intelligence Agency*, 769 F.Supp. 1113, 1117 (N.D. Cal. 1990) (describing the heightened rational basis utilized in *High Tech Gays*); *Coburn v. Agustin*, 627 F.Supp. 983, 988–97 (D. Kan. 1985) (applying what it called "second order rational basis review" from *Cleburne* and other cases to strike down a medical malpractice statute).

¹³ 517 U.S. 620 (1996) (holding that a Colorado referendum preventing municipalities from protecting people from discrimination due to sexual orientation violated the Equal Protection Clause).

¹⁴ 133 S.Ct. 2675 (2013) (invalidating the Defense of Marriage Act).

¹⁵ 135 S.Ct. 2584 (2015) (establishing a right to same-sex marriage pursuant to the Fourteenth Amendment). See also *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concur-)

generally, the work of lower courts and the Supreme Court itself in building upon *Cleburne* has raised the prospect of a new type of equal protection review, one that is more granular, rather than focused on across-the-board heightened scrutiny for a particular type of discrimination.¹⁶ Finally, *Cleburne* gave new force to the idea, first broached a dozen years before in *Department of Agriculture v. Moreno*,¹⁷ that “a bare . . . desire to harm a politically powerless minority”¹⁸ could not constitute a legitimate government interest. Indeed, *Cleburne* (with an assist from *Moreno*) can be understood as the font of what scholars now call the “animus” doctrine.¹⁹

Thus, *Cleburne* was important, both in its turn away from suspect class analysis and its suggestion of a new way forward for equal protection law. As such, its analysis—and how the Court arrived at that analysis—bears consideration.

A. The Background

The *Cleburne* litigation had its origins in July, 1980, when Jan Hannah purchased the home at 201 Featherston Street in Cleburne, Texas, a small community near Fort Worth, for use as a group home for approximately thirteen adults who suffered from mild or moderate intellectual disability.²⁰ Hannah was soon informed that the town’s zoning ordinance required that the facility, as a “hospital for the . . . feeble minded,” required a special use permit.²¹ Moreover, a different provision of the town’s zoning ordinance

ring in the judgment) (employing heightened rational basis scrutiny to vote to strike town Texas’s same-sex sodomy law).

16 See, e.g., WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 74–76 (2015) (discussing the Court’s modern sex discrimination jurisprudence as a more granular inquiry than the same across-the-board heightened scrutiny of each and every sex classification); William D. Araiza, *After the Tiers: Windsor, Congressional Authority to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 394 (2014) (considering the implications of the Court’s similar granular scrutiny of sexual orientation discrimination for Congress’s power to enforce the Equal Protection Clause).

17 413 U.S. 528, 534 (1973).

18 *Id.*

19 See *Windsor*, 133 S.Ct. at 2693 (2013); *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring in the judgment); *Romer*, 517 U.S. at 634 (1996) (all citing *Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973), and discussing the concept of animus); see also *Obergefell*, 135 S.Ct. 2584. *Obergefell* is a tougher case to slot within the animus doctrine; nevertheless, at the very least the Court’s reasoning in that case was grounded on principles that could be gleaned from the earlier animus cases. See, e.g., ARAIZA, *supra* note 3, at Chapter 12. For scholarly discussions of animus, see sources cited *supra* note 3.

20 The judicial decisions and contemporary documents describe this condition as “mental retardation.” That terminology is retained only in direct quotations from those documents.

21 *Cleburne Living Center v. City of Cleburne*, No. CA 3-80-1576-F, at ¶¶ 13, 15 (N.D. Tex. Apr. 16, 1982).

prohibited such a “hospital” in an area, like the one in which the Featherston property was located, which was zoned R-3. The town zoning commission denied the special use permit in August of that year. Two months later, the city council reaffirmed that denial.²²

After the city council’s action, Hannah, the entity she created to operate the home, an association comprised of and advocating for intellectually disabled persons, and other plaintiffs sued, alleging a variety of statutory and constitutional violations.²³ Most relevantly for our purposes, the plaintiffs alleged that the city’s actions violated the equal protection rights of the would-be residents. The district court rejected that claim.²⁴ It acknowledged that courts disagreed on whether intellectually disabled persons constituted a suspect or quasi-suspect class, but the court concluded that they were not. Thus, it upheld the city’s actions, even though that court found that among the factors the city council “considered” in its decision to deny the permit were both “the attitude of a majority of owners of property located within two hundred . . . feet” of the home and “concern for the fears of elderly residents of the neighborhood.”²⁵ It concluded that “[t]he location of the group home raises many legitimate concerns with the city and its residents,” and that, “[s]ubjected to [the] limited standard of review” required by the rational basis standard, “the zoning ordinance as written and as applied to Plaintiffs[] is rationally related to legitimate purposes and interests of the City of Cleburne.”²⁶

The Fifth Circuit reversed the lower court’s decision on the equal protection issue.²⁷ It concluded that the intellectually disabled satisfied the criteria for heightened scrutiny, even if the conceded appropriateness of some differential treatment of that group rendered it only a quasi-suspect, rather than a fully suspect, class. Applying that heightened scrutiny, the court held that the ordinance at issue was facially unconstitutional, and that the city council’s denial of the special use permit was also unconstitutional. The court dismissed as illegitimate several of the city’s justifications both for the ordinance and its denial of the particular permit for the Featherston home. It acknowledged the legitimacy of other justifications it proffered, such as the prevention of both traffic congestion and fire hazards; however,

22 For details about those actions, see Dan Bodine, *Proposed Retardation Facility Draws Fire*, CLEBURNE TIMES-REVIEW, Aug. 19, 1980, at 1; Dan Bodine, *Halfway House Filing Suit on Decision*, CLEBURNE TIMES-REVIEW, Oct. 15, 1980, at 1.

23 See *Cleburne Living Ctr. v. City of Cleburne*, No. CA3-30-1576-F (N.D. Tex., Dallas Div. 1982), at 1–2 (identifying the plaintiffs).

24 *Id.*

25 *Id.* at 9–10.

26 *Id.* at 19–20.

27 *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 195–202 (5th Cir. 1984).

it found that neither the ordinance nor the council's permit denial were sufficiently related to those latter interests.

B. At the Supreme Court

The Court affirmed the Fifth Circuit, but on a different ground. Writing for six Justices, Justice White began by considering, and rejecting, the lower court's conclusion that the intellectually disabled constituted a quasi-suspect class. His analysis consisted of an uneasy mixture of direct conclusions about the relevant differences distinguishing the intellectually disabled from mainstream society and standard political process reasoning. For example, he began his analysis by observing that the intellectually disabled "are . . . different, immutably so, in relevant respects," from mainstream society.²⁸ But he also noted that legislatures had enacted a variety of legislation benefitting that group, and thus concluded that the democratic process was in fact responsive to their needs.²⁹

Justice White concluded his suspect class analysis by a near-explicit confession of judicial inability to manage suspect class analysis if the Court granted the intellectually disabled suspect class status. He observed that other groups—"the aging, the disabled, the mentally ill, and the infirm"³⁰—might, along with the intellectually disabled, share some characteristics of suspectness. But exactly because those characteristics were relatively widely shared, he concluded that the Court should not grant that status to the plaintiffs, given the impossibility of justifying a decision to grant suspect class status to the intellectually disabled while denying it to those other groups.³¹

Despite that preliminary defeat, the plaintiffs nevertheless prevailed in the case. When the Court proceeded to scrutinize the city's actions under the rational basis standard, it concluded that they failed that scrutiny.³² As it had before the lower courts, the city offered several legitimate-sounding reasons for its decision, including concerns about flood evacuation, residential density, traffic congestion, and legal liability for the actions of the would-be residents. The Court rejected those reasons, on the grounds that they did not justify the permit requirement for the group home in question while dispensing with that requirement for other land uses in that area, including hospitals, convalescent homes, and fraternity houses.³³ Notably,

²⁸ City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

²⁹ *Id.* at 443–44.

³⁰ *Id.* at 445–46.

³¹ *Id.*

³² *Id.* at 447–50.

³³ *Id.*

the Court based its conclusion about the ordinance's poor fit with those concerns on a review of the record—a deviation from the normal rule that record-based justification is unnecessary in rational basis cases.³⁴

Another aspect of the Court's approach also merits mention. The Court began its rational basis scrutiny by stating that "the [City] Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the [proposed] facility, as well as with the fears of elderly residents of the neighborhood."³⁵ The Court made short work of these (and similar³⁶) sentiments, observing that "mere negative attitudes, or fear" were not "permissible bases" for the city's differential treatment of the group home from "apartment houses, multiple dwellings, and the like."³⁷ It is at least arguable that the Court's identification of these (illegitimate) negative attitudes at the outset of its analysis set the stage for its closer-than-normal scrutiny of the city's more legitimate justifications for its decision. Indeed, Justice White implicitly pointed back to those illegitimate grounds at the end of his opinion, when he concluded that "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."³⁸

Justice Stevens, joined by Chief Justice Burger, joined the majority but also wrote a separate concurrence to express his continued disagreement with the entire enterprise of suspect class/tiered scrutiny analysis.³⁹ Despite that disagreement, he joined Justice White's opinion,⁴⁰ concluding that "[t]he record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in [the proposed] home."⁴¹

Justice Marshall, writing for himself and Justices Brennan and Blackmun, concurred in the judgment only.⁴² Most of his opinion was de-

34 See *infra* note 140 (citing cases applying the traditional, deferential version of rational basis review).

35 *Cleburne*, 473 U.S. at 448.

36 In the next paragraph, after rejecting the justifications discussed in the text, the Court rejected, on similar grounds, the argument that the proposed group home was located across the street from a junior high school. See *id.* at 449.

37 *Id.* at 448.

38 *Id.* at 450.

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

40 Chief Justice Burger never appears to have formally joined Justice White's opinion, but it appears that his decision to join Justice Stevens' opinion, which itself joined the majority, sufficed to have him counted as having joined the majority. See *id.* at 433 (noting Chief Justice Burger as having joined the majority). See also *infra* note 186 (clerk's record of correspondence in the case, not noting any join letter from Burger).

41 *Cleburne*, 473 U.S. at 455 (Stevens, J., concurring).

42 *Id.* at 455 (Marshall, J., concurring in the judgment in part and dissenting in part).

voted to arguing that the intellectually disabled did in fact constitute a suspect class for which heightened scrutiny was appropriate.⁴³ For our purposes, however, what is most relevant about his opinion was his criticism of the Court's decision to decide the suspect class question when it would eventually conclude that the city's actions failed the default, rational basis, standard. He described the majority's methodology as a "two for the price of one" approach to constitutional decisionmaking that violated the Court's normal practice of deciding only the issues necessary to resolve the case in front of it.⁴⁴

II. THE JUSTICES' DELIBERATIONS

The records of several Justices reveal two aspects of the Court's analysis in *Cleburne* that suggest that its unusually stringent rational basis scrutiny arose either as an afterthought or a collateral consequence of its resolution of a different issue—phenomena this Article shorthands as "accidentals." First, the Court originally planned on remanding the case for the lower court to apply rational basis scrutiny, rather than applying it itself and deciding the case, as it eventually did. While there had always been support on the Court for deciding rather than remanding the case,⁴⁵ through the post-oral argument and initial opinion drafting phases that was a distinctly minority position, which a majority eventually accepted without recognizing the significance of that choice. Second, the more muscular tinge to that rational basis scrutiny seems to have flowed in part from Justice White's insistence on deciding the case on an as-applied, rather than a facial basis—a decision that in turn was motivated by a desire to give municipalities *more*, not *less*, leeway to regulate group homes for the intellectually disabled.

These revelations are interesting in themselves. But the fact that that unusually stringent scrutiny became *Cleburne*'s defining characteristic—indeed, a characteristic that subsequently became quite influential⁴⁶—makes them all the more important. More generally, these revelations raise

43 While Justice Marshall did not specify whether he would have denominated the intellectually disabled a full-blown suspect class or a quasi-suspect class, his statement of the scrutiny he believed appropriate in this case—that the action "substantially further[] legitimate and important purposes,"—suggests intermediate review. *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part). It should be noted, however, that he reached that conclusion based not just on the character of the group suffering the discrimination, but also on the nature of the right at issue—here, the right to establish a home.

44 *Id.* at 456 (Marshall, J., concurring in part and dissenting in part).

45 See text accompanying *infra* notes 52, 104, & 106.

46 See *supra* note 12; see also *supra* note 3 (citing sources noting *Cleburne*'s relevance to the Court's animus doctrine).

interesting and important questions about the nature of constitutional law decision-making, and the path of constitutional law doctrine.

A. *The Remand Question*

1. *The May 29 Draft*

Records of the Justices reveal that the analysis in Justice White's original draft opinion in *Cleburne* essentially concluded with the Court's rejection of suspect class status for the intellectually disabled.⁴⁷ That draft would have then remanded the case to the lower court for application of rational basis scrutiny. His draft opinion, circulated to the conference on May 29, considered and rejected the plaintiffs' argument for heightened scrutiny in Part III. It then moved on to a short concluding section (Part IV) that first cautioned that "[o]ur refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination," and reminded readers that the rational basis standard both prohibited "arbitrary [and] irrational" distinctions and ruled out "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—" as "legitimate state interests."⁴⁸

Second, that final section of the draft explained why it was appropriate for the Court to have the Court of Appeals apply the rational basis standard in the first instance. In support of that tentative decision, the draft noted that that lower court had not yet had an opportunity to apply that standard, since it had settled on intermediate scrutiny as the proper standard of review.⁴⁹ The draft also observed that the State of Texas had submitted an *amicus* brief to the Court, arguing both that the city's permit denial violated state mental health law, and that the city lacked the authority to make zoning decisions based on the capacity of intellectually disabled persons to live in a group home.⁵⁰ The draft concluded that this "ambiguity in state law" "cloud[ed]" the issue sufficiently to warrant giving the lower court the opportunity to address these questions, which had not been raised before that court.⁵¹

47 See, e.g., Papers of J. Lewis Powell in No. 84-468, *City of Cleburne v. Cleburne Living Center*, <http://law2.wlu.edu/powellarchives/page.asp?pageid=1581> [hereinafter Powell Papers] (including Justice White's May 29 draft).

48 Powell Papers, *supra* note 47, First Draft 12-13 (May 29, 1985) [hereinafter May 29 Draft] (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

49 *Id.* at 13.

50 *Id.* at 13 n.14.

51 *Id.* at 13.

2. *Antecedents Of The Remand Decision*

The May 29 draft's decision to remand the case to the Fifth Circuit did not appear out of the blue. Both Justice Powell's and Justice Blackmun's post-oral argument conference notes reveal majority support on the Court for that decision. Both Justices' notes indicate that Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor supported a reversal of the Fifth Circuit's suspect class decision and a remand to that court to apply the rational basis test.⁵²

Thus, the draft's remand decision seemed to enjoy the initial support of a five-Justice majority. Of the remaining four Justices, three—Brennan, Marshall, and Blackmun—would have affirmed the lower court's conclusion that the intellectually disabled merited explicitly heightened scrutiny. The final Justice—Stevens—supported a decision affirming the lower court's result on a rational basis ground; however, according to Justice Powell's notes, he also believed that the ordinance would “clearly” be invalid if it was subjected to heightened scrutiny.⁵³

a. *The Crisis of Suspect Class Analysis*

The support for the remand option should not be surprising, even if it would have mooted the heightened rational basis review for which *Cleburne* is known today. As explained below,⁵⁴ the Justices in *Cleburne*

⁵² See Papers of J. Harry A. Blackmun in No. 84-468 *City of Cleburne v. Cleburne Living Center* (on file with the Library of Congress, Box 428, Folder 1) [hereinafter Blackmun Papers] (reflecting these five justices' preferences from the Court's April 26 conference, and including the notation “5=RR”); Powell Papers, *supra* note 43, Conference Notes (Mar. 20, 1985) (reflecting these five justices' preferences from the Court's March 20 conference). Based on examination of his papers, “RR” appears to have been Justice Blackmun's shorthand for “reverse and remand.” Justice Powell's notes, in addition to reflecting a preference for a remand, also indicate that he could also have supported the Court itself affirming the result on a rational basis ground; Justice Blackmun's notes indicate the same openness on the part of Justice O'Connor. See Powell Papers, *supra* note 43, Conference Notes (Mar. 20, 1985); Blackmun Papers, *supra*.

In addition to this evidence, at oral argument the attorney for group home was asked why it didn't make sense to remand the case, with another justice expressing agreement with that idea. Transcript of Oral Argument at 40, *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (No. 84-468), 1985 U.S. Trans. LEXIS 54; *id.* at 41-42; Transcript of Oral Argument at 25, *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (No. 84-468), 1985 U.S. Trans. LEXIS 93; *id.* at 27. Justice Powell's notes indicate that that questioner was Justice White, and that it was Justice Rehnquist who agreed with that suggestion. See Powell Papers, *supra* note 47. It should be noted that the case was argued twice apparently because of an illness that kept Justice Powell off the bench for the first oral argument. See Eskridge, *supra* note 6, at 2263; see also E-mail from Renea Hicks, attorney for *Cleburne* plaintiffs, to author (Mar. 8, 2016) (on file with author). In light of the 4-4 split that seemed likely after the March argument, it is not surprising that the Court scheduled reargument in the case.

⁵³ Powell Papers, *supra* note 47, Conference Notes 2 (Mar. 20, 1985) (reflecting Justice Stevens's belief that the ordinance would “clearly” be invalid).

⁵⁴ See *infra* Parts II.A.3. and III.A.

were far more focused on the suspect class question that case posed, and less interested in the proper outcome of any rational basis review of the city's actions. Indeed, with the benefit of hindsight, we can see that *Cleburne* came at a crisis point of suspect class analysis. After a decade of experimentation, a variety of difficulties with suspect class analysis had become manifest by the mid-1980s. Some of those problems were acknowledged at the start of this period. For example, in *Frontiero v. Richardson*,⁵⁵ an early exemplar of suspect class analysis, Justice Brennan, seeking to explain why some classifications that otherwise satisfied his criteria for suspectness should not be granted that status, argued that suspect classifications, in addition to their other characteristics, also “frequently bear[] no relation to ability to perform or contribute to society.”⁵⁶ Of course, as commentators have recognized, such an overt recourse to the relevance of the classification to a legitimate government interest contradicted the promised value neutrality and process orientation of suspect class analysis.⁵⁷

Such recourse to the substantive reasonableness of the classification—and thus vulnerability to claims of *Lochner*-izing⁵⁸ equal protection law⁵⁹—also arose in the context of distinguishing between suspect *classes* and suspect *classifications*, and, by extension, in determining what conduct constituted discrimination against whom. For example, in *Craig v. Boren*, the Court struck down an Oklahoma law barring the sale of low-alcohol beer to young males but allowing such sale to females of the same age.⁶⁰ In dissent, Justice Rehnquist wondered, among other things, why the Court was solicitous of discrimination against males, given their presumed lack of suspect class status according to the standard political process-based criteria.⁶¹ The Court's response, intimated only in a footnote, was that such seemingly favorable treatment of females reflected demeaning and opportunity-limiting stereotypes about female fragility and meekness.⁶²

55 411 U.S. 677 (1973) (plurality opinion).

56 *Id.* at 686. Justice Brennan identified “intelligence” and “physical disability” as examples of classifications that were in fact relevant in the way he explained, and thus did not merit suspect class status. *Id.*

57 *See, e.g.*, Michael J. Klarman, *The Puzzling Reistance to Political Process Theory*, 77 VA. L. REV. 747, 787 (1991) (using similar terminology); *id.* at 787 n.171 (citing other scholars' similar arguments).

58 *Lochner v. New York*, 198 U.S. 45 (1905).

59 *See, e.g.*, Maltz, *supra* note 6, at 268 (quoting a draft concurring opinion by Justice Rehnquist in *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), in which he referred to “the history of this Court's half century of adjudication ending in 1940” as a caution against overly-careful rational basis review).

60 429 U.S. 190 (1976).

61 *Id.* at 219 (Rehnquist, J., dissenting).

62 *Id.* at 202 n.14 (majority opinion).

Craig did not constitute the first instance of the Court having to determine what exactly constituted sex discrimination, or, more precisely, discrimination against women. In particular, Ruth Bader Ginsburg's sex equality campaign for the ACLU in the 1970s often selected male plaintiffs, in order to press the point that sexual stereotyping injured both men and women, and that, as in *Craig*, the sex discrimination the Court should care about often ostensibly benefitted women.⁶³ For our purposes, the important point is that the stereotyping argument forced Justices to go beyond straightforward application of value-neutral political process reasoning, and make substantive judgments about which types of differential treatment constituted invidious (or at least potentially invidious) discrimination.

Other problems with suspect class analysis also manifested during this period. In 1978, in *Regents of the University of California v. Bakke*,⁶⁴ Justice Powell forcefully rejected the applicability of *Carolene Products*-style political process analysis to the question of the degree of scrutiny appropriate for race-based affirmative action programs.⁶⁵ While he was only one Justice, four of his colleagues were perceived to have been even more hostile to affirmative action than he was; thus, his rejection of a political process rationale for less-than-strict scrutiny did not bode well for the migration of such analysis into the area of race.⁶⁶ A decade later, the Court firmly rejected such analysis, without giving it particularly serious consideration.⁶⁷ The Court's rejection of political process reasoning in race cases—the context where Justice Stone likely intended it to primarily apply, and that constituted the most pressing concern of equal protection in the middle decades of the twentieth century—quite likely helped blunt the

63 See, e.g., Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 84–88 (2010).

64 438 U.S. 265 (1978).

65 *Id.* at 290–99 (opinion of Powell, J.); see also Klarman, *supra* note 6, at 310–11 (noting the tension in affirmative action jurisprudence between the political process model of equal protection and the model that deems any government use of certain characteristics presumptively unconstitutional regardless of how political process theory would treat it).

66 It is true that Justice Stevens, one of the members of this more hostile bloc in *Bakke*, eventually grew more accommodating to affirmative action. See, e.g., *Adarand v. Peña*, 515 U.S. 200, 242–45 (1995) (Stevens, J., dissenting) (arguing for more latitude for race-based affirmative action policies, and explicitly distinguishing such policies, in terms of their invidiousness, from Jim Crow legislation). Nevertheless, during his early years on the Court he appeared far less accepting of government uses of race. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (suggesting that racial definitions for purposes of affirmative action set-asides might parallel those found in the Nazi race laws).

67 *City of Richmond v. J.A. Croson, Co.* 488 U.S. 469, 493 (1989). This part of *Croson* was a plurality, gaining the assent only of four Justices. *Id.* at 476, 493. Justice Scalia's concurrence, however, rejected the constitutionality of such plans with even more force, and thus by necessary implication rejected a political process rationale for less than strict scrutiny. *Id.* at 520 (Scalia, J., concurring in the judgment).

momentum toward its further expansion. When combined with Justice Brennan's failure in *Frontiero* to find a fifth vote for a political-process rationale for according heightened scrutiny to sex classifications, the *Bakke* majority's rejection of an analogous rationale in the context of race surely did not bode well for that approach to equal protection.

Finally, political process analysis was plagued by a more prosaic, but still important, problem: the difficulty of actually applying the history of discrimination, immutability/irrelevance, and current political powerlessness criteria Justice Brennan had set forth in *Frontiero*.⁶⁸ As noted earlier,⁶⁹ even in *Frontiero* itself Justice Brennan was forced to acknowledge that immutability was not a foolproof criterion for suspect class status, given the reality that many immutable criteria were in fact quite reasonable classification tools.⁷⁰ Other cases also indicated that Brennan's approach suffered from similar complexities. For example, in *Mathews v. Lucas*,⁷¹ the Court was forced to acknowledge, in the context of legitimacy discrimination, the necessarily-nuanced answers to the questions Justice Brennan's criteria posed. In *Mathews*, the Court conceded that legitimacy (the status of being born out of wedlock) was an immutable condition that was irrelevant to persons' abilities to contribute to society.⁷² Nevertheless, it concluded that children born out of wedlock did not merit "extraordinary protection from the majoritarian political process," in part because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."⁷³ Such a statement suggested at least the possibility of a multi-tiered, and perhaps even a sliding scale approach to the level of scrutiny appropriate for a given type of classification, with all the uncertainty attending such methodologies.⁷⁴

68 See *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (Brennan, J., concurring) (setting forth these criteria).

69 See *supra* text accompanying note 56.

70 In addition, the argument that immutability is not, in most cases, a physical law of nature, but potentially socially constructed, eventually arose in the academic commentary about equal protection. See, e.g., Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CON. LAW 646 (2001) (proposing a theory by which the immutability prong of suspect class analysis should be understood as referring to socially-constructed notions of which traits are immutable).

71 427 U.S. 495 (1976).

72 *Id.* at 505.

73 *Id.* at 506 (internal quotations omitted from first quotation).

74 To be sure, *Mathews* itself declined to adopt or apply a multi-tiered approach to equal protection. Rather, the Court's ambivalence about rational basis review in the 1970s, see *infra* text accompanying notes 80–87, allowed it to insist that even such low-level review required a non-trivial showing from of the government. See *Mathews*, 427 U.S. at 505 (citing cases where the level of scrutiny applicable in *Mathews* nevertheless resulted in the rejection of arbitrary classifications); *id.* at 510 (stating that such scrutiny is not "toothless"); but see *id.* (insisting that the challenger bore the burden of demonstrating the "insubstantiality" of the relationship between the challenged

Justice Rehnquist, the decade's most vocal opponent of expanding the list of suspect classifications, made similar points, but more caustically. He protested, in the context of the Court's consideration of alienage classifications, that it didn't take enormous ingenuity to craft arguments for suspect status for a large variety of classifications.⁷⁵ Relatedly, in his *Craig* dissent he criticized the components of intermediate scrutiny as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."⁷⁶ His critique further highlighted the malleability and vagueness of both Justice Brennan's criteria and the multi-tiered scrutiny structure it generated.

This is not to say that suspect class doctrine was a dead letter at the Court by 1985. Certainly, the Court's liberals remained interested in considering expanding the list of suspect classes. Beyond *Cleburne* itself, this willingness is reflected in Justice Brennan's dissent from the denial of cert. in *Rowland v. Mad River Local School District*.⁷⁷ *Rowland* dealt with a school district's discrimination against a bisexual teacher. Only a month before the Court's first argument in *Cleburne*, Justice Brennan, joined by Justice Marshall, dissented from that cert. denial, criticizing the Court for refusing to consider whether sexual orientation should be a suspect class. Making no secret of his view on that question, he also provided a skeletal political process-based argument in favor of suspect class status.⁷⁸

Thus, the conceptual difficulties with suspect class analysis had become sufficiently clear by 1985 that it was perhaps unsurprising that the *Cleburne* majority saw its main task as cutting off further expansion of the list of suspect classifications. At the same time, as implied by Justice Brennan's cert. denial dissent in *Rowland*, enough sentiment for further expansion remained that, again, the majority might have viewed the main question in *Cleburne* to be the fate of suspect class analysis. Indeed, both times the Court met to discuss *Cleburne*, Brennan and Marshall, now

classification and a legitimate government interest). Nevertheless, *Mathews* was eventually cited as support for the proposition that legitimacy classifications merited an intermediate position in the Court's eventual three-tiered scrutiny structure. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

75 *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). In addition to being caustic, his critique was prescient, given that Justice White's final explanation in *Cleburne* for denying heightened scrutiny to the intellectually disabled reflected similar concerns about the lack of principled limits to decisions to denominate groups as suspect or quasi-suspect. See *supra* text accompanying notes 30–31.

76 *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

77 470 U.S. 1009 (1985).

78 *Id.* at 1014 (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

joined by Justice Blackmun, spoke in favor of according heightened scrutiny to the city's actions.⁷⁹

b. The Struggle Over Rational Basis Review

But the fate of suspect class analysis was not the only question that might have been on the Justices' minds as they considered *Cleburne*. A separate, but related, issue confronting them in 1985 was the fate of rational basis review. *Cleburne* arose in the aftermath of an almost two decade-long debate among the Justices about such review.⁸⁰ By the late 1960s the Court had begun striking down laws as violating equal protection without explicitly disturbing the ostensible doctrinal structure under which all classifications other than racial ones received the same, minimal judicial scrutiny. Beginning with legitimacy classification in a pair of 1968 cases,⁸¹ and then continuing with sex classifications beginning in 1971,⁸² the Court had begun to deviate from that rigid two-tiered model of equal protection. This evolution was noticed by legal scholars, most notably Gerald Gunther, who discussed it in his influential *Harvard Law Review* Foreword in 1972.⁸³ In turn, Gunther's analysis (and praise) of this development was noted by individual Justices, who relied on his analysis as support for attempting to further extend the scope of this more muscular rationality review.⁸⁴

By the mid to late 1970s, the Justices' discussions had progressed to the point where they were openly debating the appropriate sharpness of rational basis scrutiny. For example, in 1976, in *Craig v. Boren*, Justice Powell explicitly suggested that "the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification."⁸⁵ Justice Powell was responding to a majority opinion that he understood as likely to be read as adopting an intermediate level of scrutiny for the type of classification at issue (those based on sex).

79 See Powell Papers, *supra* note 47; see also Blackmun Papers, *supra* note 52 (making, in his notes of the March 20 conference, the notation "3 HS +"). Examination of his papers suggests that "HS" was his shorthand for "heightened scrutiny," and "+" his shorthand for affirmance.

80 For a more detailed exposition of this debate, see generally Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014); Maltz, *supra* note 6.

81 *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

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

83 Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

84 See Eyer, *supra* note 80, at 550–51 (citing Justice Powell's attempt in his abortive opinion in *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), to rely heavily on Gunther's analysis).

85 *Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (addressing gender-based classification).

Justice Powell's approach was not necessarily a matter of opposition to explicit recognition that sex discrimination required more heightened scrutiny. Instead, as Professors Earl Maltz and Katie Eyer have each recently recounted, Justices Powell and Brennan worked over the course of several years in the mid-to-late 70s to convince the Court to adopt an approach to rational basis scrutiny that was more stringent than the toothless review that had come to prevail during the Warren Court's reaction to the perceived excesses of the *Lochner* era.⁸⁶ That effort covered not just cases involving allegedly-suspect classes; rather, both justices made clear that they were advocating for a tougher understanding of rational basis review even in contexts involving garden-variety social and economic regulation.⁸⁷

Leading the opposition to this effort was Justice Rehnquist, who consistently insisted on keeping equal protection rational basis review exceptionally deferential.⁸⁸ Indeed, as Katie Eyer has persuasively argued, that imperative influenced him strongly enough to prompt him to characterize the Court's review in *Craig* as a new, intermediate, level of scrutiny. According to Eyer, Rehnquist's goal in making that move—counter-intuitive as it might seem for someone who opposed extending heightened scrutiny to new groups⁸⁹—was to immunize rational basis review from the more muscular scrutiny in *Craig*, by describing *Craig* as introducing an entirely new level of equal protection scrutiny, one limited to a circumscribed category of cases.⁹⁰

Eventually, Justice Rehnquist triumphed, with the Court by and large continuing to embrace a very deferential understanding of garden-variety equal protection rationality review.⁹¹ But while Justices Powell and Bren-

86 See generally Maltz, *supra* note 6 (describing Justice Brennan and Justice Powell's efforts to develop a stricter form of rational basis review); see also Eyer, *supra* note 80, at 549–551 (noting Justice Powell's attempt in *Murgia* to set forth a more rigorous approach to rational basis review as a general matter).

87 See *Schweiker v. Wilson*, 450 U.S. 221, 239–47 (1981) (Powell, J., dissenting) (applying a more discerning form of rational basis scrutiny to the allocation of SSI benefits to certain individuals); *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 183–84 (1980) (Brennan, J., dissenting) (endorsing a more stringent rational basis standard to the unequal award of retirement benefits based on seniority status); see also *supra* note 86 and accompanying text.

88 See, e.g., Maltz, *supra* note 6, at 267–68 (recounting Justice Rehnquist's strong opposition to the more muscular rational basis scrutiny suggested in early drafts of the Court's opinion in *Murgia*); see also *Fritz*, 449 U.S. at 175–77 (insisting on highly deferential judicial review under the rational basis test).

89 See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 649–54 (1973) (Rehnquist, J., dissenting) (opposing heightened scrutiny for alienage classifications); *Weber v. Aetna*, 406 U.S. 164, 177–82 (1972) (Rehnquist, J., dissenting) (opposing the more careful review the Court accorded a legitimacy classification).

90 Eyer, *supra* note 80, at 533; see also Maltz, *supra* note 6, at 267–68 (citing similar sentiments Justice Rehnquist expressed to his colleagues during the Court's deliberations on *Murgia*).

91 See *Fritz*, 449 U.S. 166 (six-Justice majority adopting Justice Rehnquist's highly deferential formulation of the rational basis test). A little over a decade later, the Court was nearly unanimous

nan ultimately failed in making such review more stringent, the issue remained undecided in 1985. Indeed, in the few years prior, the Court decided several equal protection cases where the majority's ostensible application of rational basis review was viewed by many as more stringent than the classic, toothless scrutiny featured in such canonical cases as *Railway Express v. New York*⁹² and *Williamson v. Lee Optical*.⁹³

This backdrop makes clear that, in *Cleburne*, the prospect of relatively more stringent rational basis review remained a viable option, with multiple supporters on the Court.⁹⁴ And, indeed, at least some Justices were already

in embracing an extremely deferential version of rational basis scrutiny. In *Nordlinger v. Hahn*, 505 U.S. 1, 3–18 (1992), Justice Blackmun wrote for seven Justices upholding an acquisition-value property tax valuation scheme under very deferential rational basis review. Justice Thomas concurred, arguing for an even more deferential approach. *Id.* at 25–28 (Thomas, J., concurring). Only Justice Stevens, in dissent, argued for more careful scrutiny. *Id.* at 28–31. The next year in *FCC v. Beach Communications*, 508 U.S. 307, 309–17 (1993), Justice Thomas wrote for eight Justices (with Justice Stevens again the outlier, *id.* at 320 (Stevens, J., concurring)) in upholding a television satellite regulation, again employing very deferential review. After the early 1980s, the only garden-variety equal protection case resulting in a loss for the government was the unanimous opinion authored by then-Chief Justice Rehnquist in *Allegheny Pittsburgh Coal v. Commission of Webster County*, 488 U.S. 336, 344–46 (1989). At first blush it might appear ironic that Rehnquist (by then the Chief Justice) authored *Allegheny County*. But the irony disappears when one realizes that, as Chief Justice, he would have had the power to assign the majority opinion, and that he might well have assigned it to himself in order to ensure that the opinion was written in a limited fashion.

⁹² 336 U.S. 106, 110–11 (1949).

⁹³ 348 U.S. 483, 484 (1955). *But see* *Hooper v. Bernalillo County*, 472 U.S. 612, 618–23 (1982) (holding that a New Mexico tax exemption statute benefitting some veterans but not others violated equal protection); *Plyler v. Doe*, 457 U.S. 202, 216–30 (1982) (holding that a state law denying education to undocumented children was irrational and thus violated equal protection); *Zobel v. Williams*, 457 U.S. 55, 55–65 (1982) (finding that Alaska dividend distribution plan violates the Equal Protection Clause because it irrationally distinguished between citizens who established their residence before 1959 and those who did so afterward). Perhaps reflecting this lack of consensus, Justice Blackmun's notes of the April 26 conference appear to attribute the following statement or viewpoint to Justice Stevens: "we here [or have] no agree on rational basis." Blackmun Papers, *supra* note 52.

⁹⁴ In addition to Brennan and Powell, as noted earlier in the text, Justice Stevens indicated that he might have viewed the *Cleburne* ordinance as failing his own understanding of rational basis review. *See* Powell Papers, *supra* note 47; *see also infra* note 96. And, indeed, his concurrence, joined by Chief Justice Burger, embraced such a view. Nor was this the only time Justice Stevens voted based on this more stringent understanding of what equal protection required in a garden-variety case of social and economic regulation. *See Fritz*, 449 U.S. at 180. Moreover, the *Cleburne* Court itself relied on then-recent stringent applications of rational basis review. In particular, the May 29 draft cited a 1982 case featuring such review as support for the proposition that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render that distinction arbitrary or irrational." May 29 Draft, *supra* note 44 (citing *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982)).

In addition to Justice Stevens, at least one other justice was perceived by Justice Blackmun as amenable to the Court deciding the case by affirming the Fifth Circuit's result on a rationality ground. *See* Blackmun Papers, *supra* note 52, Conference Notes (Mar. 20, 1985) (including the

thinking in those terms when *Cleburne* came to the Court. What appear to be Justice Powell's notes on his law clerk's bench memo indicate that he (Powell) was open to the argument that the city's permit denial failed rational basis scrutiny.⁹⁵ Justice Powell's conference notes also suggest that Justice Stevens believed that the city's permit denial should fail, under his own, unified, standard of equal protection review.⁹⁶ Justice Brennan believed, at least from the date of the post-argument conference, that the intellectually disabled constituted a suspect class;⁹⁷ thus, his views on the rational basis question are unknown. Interestingly, Justice Powell's notes indicate that even Justice Rehnquist was not sure the city's actions could satisfy rationality review.⁹⁸

3. *The Remand Discussion*

It was against this backdrop that the Court considered *Cleburne* in the spring of 1985. As noted earlier, Justices Powell's and Blackmun's conference notes reveal that five Justices (Burger, White, Rehnquist, Powell, and O'Connor) favored a remand to the lower court to apply rational basis review,⁹⁹ of whom three (Rehnquist, Powell, and O'Connor) suggested the ordinance could not satisfy.¹⁰⁰ Perhaps unsurprisingly, then, when Justice

notation "2 rationality +"). The record suggests that he might have had in mind either Justice Powell or Justice O'Connor.

⁹⁵ See Powell Papers, *supra* note 47, Memorandum from Annmarie Levins to Powell, J., 4 (Mar. 5, 1985) (depicting the handwritten notation "I agree" next to the memo's statement, underlined in the same color as the notation, that "the City's action can be held unconstitutional as applied under the rational relationship test").

⁹⁶ See Powell Papers, *supra* note 47, Conference Notes (Mar. 20, 1985) (containing Justice Stevens' notes of March 20 conference indicating his position on rational basis review); *see also Cleburne*, 473 U.S. at 451 (Stevens, J., concurring).

⁹⁷ See Blackmun Papers, *supra* note 52, Conference Notes (Apr. 26, 1985); Powell Papers, *supra* note 47, Conference Notes (Mar. 20, 1985).

⁹⁸ See Powell Papers, *supra* note 47, Conference Notes (Mar. 20, 1985). Justice Blackmun's notes are not as clear on Rehnquist's position. The only clue is that his notes of Rehnquist's position at the April 26 conference conclude with what appears to read "cd go to JPS?" Blackmun Papers, *supra* note 52, Conference Notes (Apr. 26, 1985). If that notation means that Rehnquist would have considered joining an opinion written by Justice Stevens, that would support Justice Powell's notes of the March 20 conference, since Justice Stevens believed that the Court should strike the city's action down on a rational basis ground.

⁹⁹ See *supra* note 52 (including the Justices' notes regarding rational basis review).

¹⁰⁰ See Powell Papers, *supra* note 47, Conference Notes (Mar. 20, 1985) (indicating that Powell, Rehnquist, and O'Connor thought the ordinance might fail rational basis scrutiny); *but see* Blackmun Papers, *supra* note 52, Conference Notes (Mar. 20, 1985) (counting only two votes for the proposition that the ordinance failed rational basis scrutiny). Justice Blackmun's notes seem to suggest that Justice Powell did not actively participate in the March 20 conference or did not speak. This would make sense given that he was ill at the time and did not participate in the oral argument. See Eskridge, *supra* note 6, at 2263; E-mail from Renea Hicks, *supra* note 52. This would also explain the discrepancy in vote-counting between the two Justices. Nevertheless,

White circulated the first draft of that opinion, on May 29, it focused almost exclusively on rejecting the Fifth Circuit's conclusion that the intellectually disabled merited explicitly heightened scrutiny.

The draft concluded with a short section remanding the case to the Fifth Circuit to apply the rational basis standard. That section noted that that standard gave the government the latitude it needed to respond to the needs of that group. But, perhaps hinting at the concerns expressed by some of the Justices,¹⁰¹ it also cautioned that, even under such review, the "relationship" to the "asserted goal" of the statute must not be "so attenuated as to render the distinction arbitrary or irrational."¹⁰² Addressing the other component of rational basis scrutiny, the draft also warned that "some objectives—such as 'a bare . . . desire to harm a politically powerless group'—are not legitimate state interests."¹⁰³ Observing that the Court of Appeals had not applied rational basis scrutiny, given its conclusion that intermediate scrutiny was the proper standard, and noting that the issue was "clouded" by a state law question that had not been presented originally, the draft would have remanded the case.

On June 3, five days after Justice White circulated his draft, there was a flurry of activity in the case. Justice Rehnquist joined the opinion, Justice Brennan wrote that he would "await the dissent," and, perhaps most significantly of all, Justice Stevens wrote to reiterate his view that the Court should decide the merits of the case rather than remanding.¹⁰⁴ While it was probably not surprising, Justice Stevens' communication confirmed that at

Powell's own notes provide extensive commentary on his own position, and suggest he was a third vote in the remand bloc for the possibility that the ordinance would fail rational basis scrutiny.

Justice Blackmun's April 26 conference notes indicate that he counted five votes in favor of reversing and remanding. *See* Blackmun Papers, *supra* note 52, Conference Notes (Apr. 26, 1985). Those notes also suggest that Justices Powell and O'Connor harbored doubts about the ordinance's ability to survive rational basis, with Justice O'Connor open to the possibility of affirming the Fifth Circuit's decision on a rational basis ground, rather than remanding. Interestingly, Blackmun records Justice Rehnquist as saying, "cd go to JPS?"—presumably meaning that he could see himself joining an opinion by Justice Stevens. Throughout the Justices' deliberations Justice Stevens favored affirming the Fifth Circuit on a rational basis ground. *See* Powell Papers, *supra* note 43, March 20 conference notes; *see also* Blackmun Papers, *supra* note 46, Conference Notes (Mar. 20, 1985); *id.* at Conference Notes (Apr. 26, 1985).

¹⁰¹ *See supra* note 100 (noting particular Justices' doubts that the city's actions satisfied even rational basis review).

¹⁰² May 29 Draft, *supra* note 48, at 12.

¹⁰³ *Id.* at 13 (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973)). The Court also observed that any substantive rights the plaintiffs had been deprived of remained subject to judicial protection as well. *Id.*

¹⁰⁴ *See* Powell Papers, *supra* note 47 (including letters from Justices Rehnquist, Brennan, and Stevens); Blackmun Papers, *supra* note 52 (same). Justice O'Connor joined Justice White's opinion the next day. *See* Blackmun Papers, *supra* note 52, Letter from O'Connor, J. to White, J. (June 4, 1985).

least four members of the Court—the three Justices (Brennan, Marshall, and Blackmun) who urged the application of heightened scrutiny, and Justice Stevens himself—would call for deciding the case, rather than remanding it.¹⁰⁵

These developments put Justice Powell in the familiar position of swing vote, given his earlier-noted¹⁰⁶ ambivalence about remanding or deciding the case. Two days later, he wrote Justice White, urging that the Court decide the case, and do so on rational basis grounds, rather than remanding the case for consideration of the rational basis argument.¹⁰⁷ Importantly, after laying out his argument for the Court itself to strike the law down on rational basis grounds, he then offered that, if the Court adopted his suggestion, “[i]t would then be unnecessary to consider the quasi-suspect class question.”¹⁰⁸

Focusing for now on the remand issue,¹⁰⁹ perhaps the most interesting repercussion of Justice Powell’s June 5 letter is the reaction it generated from Justice Rehnquist. That same day, Rehnquist wrote to White to urge rejection of Powell’s suggestion that the Court jettison the May 29 draft’s analysis of the suspect class issue. After then restating his support for the draft’s remand result, he continued: “but it would not bother me greatly to see the Court opinion decide the validity of the ordinance under the rational basis test.”¹¹⁰

Justice Rehnquist’s willingness to decide the case on rational basis grounds is a surprise. As scholars have noted after examining both his opinions and his internal communications at the Court, Justice Rehnquist was a leading force for adopting an extremely deferential brand of rationality review.¹¹¹ Just five years before *Cleburne*, in *Railroad Retirement Board v. Fritz*,¹¹² his majority opinion sharply engaged Justice Brennan’s dissent urging a more muscular level of rationality review.¹¹³ Given the

¹⁰⁵ *But see* Blackmun Papers, *supra* note 52 (indicating that as of the March 20 conference there were five votes for deciding the case: two votes for affirming the Fifth Circuit’s result for the plaintiffs, but on a rational basis ground, in addition to the three votes who would have applied heightened scrutiny and affirmed on that basis).

¹⁰⁶ *See supra* note 52.

¹⁰⁷ Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 5, 1985).

¹⁰⁸ *Id.* Justice Powell’s letter also introduced another issue into the Court’s deliberation—the distinction between invalidating the law on its face, as opposed to applied. This issue is treated later in this Article. *See infra* Part II.B.

¹⁰⁹ *Cf.* Letter from Powell, J. to White, J., *supra* note 107 (introducing the facial/as-applied issue into the justices’ deliberations).

¹¹⁰ Powell Papers, *supra* note 47, Letter from Rehnquist, J. to White, J. (June 5, 1985).

¹¹¹ *See, e.g.,* Eyer, *supra* note 86; Maltz, *supra* note 6; Saphire, *supra* note 2 (describing Justice Rehnquist as “a leading proponent for an exceptionally deferential rational bas[i]s standard”).

¹¹² 449 U.S. 166 (1980).

¹¹³ *See id.* at 176 n.10.

seeming strength of his preference, it is striking to see him in *Cleburne* casually remarking that “it would not bother [him] greatly” to see the Court use “the rational basis test” to decide this case.¹¹⁴

To be sure, Justice Rehnquist may not have thought that such a decision would in fact go against the city—it’s possible that he foresaw Chief Justice Burger and Justice O’Connor rejecting that outcome, with the result that a rational basis strike-down would be embraced only by a minority of the Court (Powell, Stevens, and possibly White¹¹⁵). Nevertheless, it bears remembering that he did not dissent from the heightened rational-basis review expressed in the final Court opinion. In terms of pure results, such a dissent might not have mattered: between the Brennan-Marshall-Blackmun bloc that would have struck down the city’s action as failing heightened scrutiny and the nascent Powell-Stevens position favoring a rational basis strike-down, five votes existed for the plaintiffs.¹¹⁶

But such a dissent might have mattered in terms of methodology. Even though the final opinion garnered six votes, and thus did not depend on Rehnquist’s assent, two of those six votes (Stevens, joined by Burger) expressed dissatisfaction with the entire idea of tiered scrutiny.¹¹⁷ Thus, if he had defected from the rational-basis part of Justice White’s opinion, only three Justices would have fully subscribed to the combination of the tiered scrutiny structure *and* a muscular application of the lowest level of scrutiny. If Justice Rehnquist had dissented on that latter point, his opinion could have pointed out the lack of consensus within the majority, and would have set the stage for his continued campaign against a more searching version of rational basis review. But yet he did not dissent.¹¹⁸

Why not? One obvious possibility—which we should not discount—is that he simply and forthrightly thought that the city’s actions did in fact fail even his deferential approach to rational basis review, or at least that he

114 Powell Papers, *supra* note 47, Letter from Rehnquist, J. to White, J. (June 5, 1985).

115 See Eyer, *supra* note 80 at 547–53 (noting Justice White’s support for proposed stronger applications of rational basis review in *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)); but see *supra* note 98 (Powell and Blackmun notes suggesting that Rehnquist was unsure whether the city’s actions could survive rational basis scrutiny).

116 See also Blackmun Papers, *supra* note 52 (noting that at the April 26 conference there appeared to be two votes to affirm the Fifth Circuit on rational basis grounds).

117 *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., joined by Burger, C.J., concurring).

118 Of course, it is possible that Justice Rehnquist would not have known how Justices Stevens and Burger would eventually vote and write in *Cleburne*. Still, he clearly should have known that Justice Stevens would likely have questioned the tiered scrutiny enterprise, or at least not signed on to it wholeheartedly. See, e.g., *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) (expressing doubt about that doctrine). Thus, Justice Rehnquist could have foreseen that the combination of adherence to that structure and muscular application of rational basis review would have garnered a majority only if he signed on to it.

was sufficiently unsure about that question that he was somewhat indifferent to the result.¹¹⁹ A hint to his thinking comes in the second paragraph of his June 5 letter to Justice White. After reiterating his support for the May 29 draft's remand result but expressing a willingness to concede the point and have the Court decide the constitutionality of the city's actions, Justice Rehnquist then went on to what seemed to be his real objection to Powell's suggestion. The second (and final) paragraph of his letter is quoted fully here:

Lewis [Powell] in his letter also suggests that in this event [*i.e.*, that the Court decides the case on rational-basis grounds] it would be "unnecessary to consider the quasi-suspect class question." I would hope that you would not subscribe to this idea, because it would result in the case deciding absolutely nothing that was not already well known before we took it. The issue presented by the case was whether or not "heightened scrutiny" should be employed to review equal protection claims where made by the mentally retarded: the Court of Appeals held that it should be, and we granted certiorari, I thought, to decide that question. To simply "punt" and turn this case into one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance would, to my mind, rob the decision of any importance which it would otherwise have.¹²⁰

Clearly, it mattered to Justice Rehnquist that the Court decide the suspect class question. Avoiding that issue would, in his view, "result in the Court deciding absolutely nothing that was not already well known."¹²¹ The Court "granted certiorari, [he] thought, to decide that question."¹²² (Circumstantial support for that last assertion comes from Justice Powell's conference notes, which identify Rehnquist, joined by O'Connor and Burger, as voting to grant certiorari, with White and Blackmun each "joining three" to provide the necessary numbers for a grant.¹²³ Rehnquist and O'Connor were, along with White, perhaps the Justices most insistent on deciding the suspect class question.)¹²⁴ Finally, it is striking, in light of his campaign against more stringent rational basis scrutiny, that he minimized the significance of a rational basis decision: as he dismissively stated, "[t]o

119 See *supra* note 98 and accompanying text.

120 Powell Papers, *supra* note 47, Letter from Rehnquist, J. to White, J. (June 5, 1985).

121 *Id.*

122 *Id.*

123 See Powell Papers, *supra* note 47.

124 The Court's grant of certiorari was not accompanied by specific questions the Court wished to see briefed. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1984). However, the city's certiorari petition presented two questions, both of which related to the suspect class status of intellectual disability. See Petition for Writ of Certiorari, *Cleburne*, 473 U.S. 432 (No. 84-468), 1984 U.S. Supreme Court Briefs LEXIS 506, 506 ("Questions Presented: 1. Whether mentally retarded persons are a 'quasi-suspect' class for purposes of Equal Protection analysis. 2. Whether for Equal Protection analysis, all legislation affecting mentally retarded persons must be tested by an 'intermediate' or 'heightened' level of scrutiny.").

simply ‘punt’ and turn this case into one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance would, to [his] mind, rob the decision of any importance which it would otherwise have.”¹²⁵

Justice Rehnquist’s insistence on deciding the level of scrutiny issue, when combined with his seemingly casual willingness to accede to Justice Powell’s suggestion that the Court itself apply rational basis scrutiny rather than remand that issue to the Court of Appeals, likely provided the impetus for what turned out to be the Court’s seemingly odd, “two for the price of one”¹²⁶ approach to the case. Justice White himself quickly echoed Justice Rehnquist’s relative preferences.¹²⁷ Responding to Justice Powell the next day (June 6), White insisted on the appropriateness of the Court deciding the suspect class question.¹²⁸ He used strong language similar to Rehnquist’s,¹²⁹ even suggesting a reassignment of the opinion if a majority felt differently.¹³⁰ By contrast, after repeating his preference for remanding the case for the lower court to apply the rational basis standard, he concluded by saying that he “could perhaps accommodate [himself]” to deciding the validity issue. Even more strikingly, he continued that, should the Court wish to reach that issue, he could also accommodate himself “to either result that the majority might reach on that question.”¹³¹

To be sure, it might not be that surprising that Justice White was “accommodating” on the question of the ultimate result. The Justices’ internal deliberations in other cases—most notably in *Massachusetts Bd of Retirement v. Murgia* from nine years earlier—reflected that White was at least somewhat sympathetic to the more muscular, Powell/Brennan approach to rationality review.¹³² Thus, unlike Justice Rehnquist’s seeming willingness

¹²⁵ Powell Papers, *supra* note 47, Letter from Rehnquist, J. to White, J. (June 5, 1985).

¹²⁶ *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in part and dissenting in part) (internal quotations omitted).

¹²⁷ Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985). Justice O’Connor also quickly signaled her agreement with Justice Rehnquist’s approach, in a brief note to Justice White, copied to Justices Powell and Rehnquist, dated June 6. See Powell Papers, *supra* note 47, Letter from O’Connor, J. to White, J. (June 6, 1985).

¹²⁸ Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985).

¹²⁹ *Id.* (“I see no persuasive reason for not announcing that rationality is the governing standard. This is the issue we took this case to decide, there is a clear majority for that standard, and not saying so will leave in place an erroneous Fifth Circuit precedent that will govern the District Courts in that Circuit. I doubt that we would have granted this case had it involved only whether the rational basis standard had been properly applied; yet confining our decision to the rationality of the zoning law indicates a contrary result.”).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). See Eyer, *supra* note 80, at 547–53 (noting Justice White’s support for proposed stronger applications of rational basis review in *Murgia*).

to accept a rational basis strike-down of the Cleburne ordinance, Justice White's willingness is at least somewhat consistent with his past positions. But just like Justice Rehnquist, Justice White was also primarily concerned with settling the standard of review question—recall that it was on answering that question that he insisted on his way, at the cost of his giving up the authorship of the opinion.

Perhaps this priority should not be surprising. After all, in *Cleburne* the Court was dealing with a circuit court decision explicitly conferring heightened scrutiny on a particular class. That decision had direct and immediate applications, at least within the circuit itself.¹³³ Justices, such as Rehnquist, who may otherwise have cared more about stopping implicit moves toward more muscular rationality review may have been even more concerned about stopping lower courts from expanding the set of classifications receiving explicitly heightened scrutiny. The same might have been even truer for Justices, such as White, who were more sympathetic to such muscular rationality review.

In other words, compromising with Justice Powell on whether the Court should perform the rational basis analysis itself—and even on the result of that analysis—might have been perceived as an acceptable price for ensuring a majority for rejecting the appellate court's suspect class analysis. After all, with three Justices planning on endorsing the lower court's analysis, and Justice Stevens coy on the question,¹³⁴ there was no margin for error if the remaining Justices wished to use *Cleburne* as a vehicle to discourage lower courts from expanding the universe of suspect and quasi-suspect classifications.¹³⁵ Perhaps other of those Justices might have agreed with Rehnquist that a rational-basis strike-down of the ordinance would have counted as simply, in his words, “one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance.”¹³⁶ Certainly, before Justice White circulated his draft rational basis analysis on June 11, the risk of *Cleburne* becoming an important rational basis precedent seemed, at most, highly speculative. Given that fact,

133 See Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985).

134 See Blackmun Papers, *supra* note 52, Conference Notes (Mar. 20, 1985) (noting that Stevens might be willing to join Brennan, Marshall, and Blackmun).

135 It bears repeating that Burger, Rehnquist and O'Connor—three of the justices most skeptical of expanding the list of suspect classifications—were the three to vote to grant certiorari in *Cleburne*, with White and Blackmun “joining three” and thus granting the petition. See Powell Papers, *supra* note 47.

136 Cf. Powell Papers, *supra* note 47, Letter from Powell, J. to Brennan, J. (June 10, 1985), (predicting that *Cleburne*'s suspect class “will be the precedent that counts”).

it is perhaps not surprising that, for the major players involved, the suspect class issue loomed larger than the rational basis issue.¹³⁷

B. A Facial Or As-Applied Strike-Down?

1. The Progress Toward The As-Applied Approach

For many scholars, the defining feature of *Cleburne*'s unusually muscular rational basis analysis is its insistence on record evidence supporting the rationality of the statute's classification.¹³⁸ As conceived in its most deferential form, rational basis review does not demand such actual evidentiary support. Instead, as expressed in a foundational statement of such deferential review coming at the very start of the post-*Lochner* era, "the existence of facts supporting the legislative judgment is to be presumed," and laws reviewed under this standard are "not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."¹³⁹ In later years, and extending into the Warren Court, that foundational statement blossomed into canonical equal protection rational basis cases in which the Court indulged in extravagant speculation about the possible support for challenged legislation that seemed to fit poorly with its asserted justifications.¹⁴⁰ *Cleburne*, by faulting the city's justifications for lacking

¹³⁷ To be sure, this explanation encounters the difficulty that, after Justice White circulated the fourth draft of the opinion, and the first to feature his rational basis analysis, Justice Rehnquist nevertheless immediately joined. See Powell Papers, *supra* note 47, Letter from Rehnquist, J. to White, J. (June 12, 1985). Thus, when confronted with what became *Cleburne*'s unusually stringent rationality review, Justice Rehnquist still demurred (as did Justice O'Connor, who on June 12 sent Justice White a note reading simply "Dear Byron, I am still with you on this."). Powell Papers, *supra* note 47, Letter from O'Connor, J. to White, J. (June 12, 1985).

¹³⁸ See, e.g., Saphire, *supra* note 2, at 613, 621.

¹³⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). To be sure, in *Carolene Products*, Justice Stone explicitly referred to "regulatory legislation affecting ordinary commercial transactions" as the type of legislation subject to this deferential judicial review. *Id.* Nevertheless, as the Court's tiered scrutiny structure rigidified, this type of extremely deferential review was held to apply to equal protection challenges to laws of any type except those that drew suspect (or, later, quasi-suspect) classifications or those that implicated fundamental rights. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (describing a statute to which the Court applied such deferential review as "involv[ing] the most basic human needs of impoverished human beings").

¹⁴⁰ See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (speculating that a law that banned advertising on some trucks but not others, based on the ownership of the truck, furthered the city's asserted interest in traffic safety); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.") (citations omitted). See also Maltz, *supra* note 6, at 265 (citing *McGowan* as an example of the Warren Court's embrace of highly deferential rational basis review).

support in the record,¹⁴¹ deviated from this rule. As noted earlier, scholars have cited this deviation as one of the defining characteristics of both this case and the more muscular rational basis review that became associated with it.¹⁴²

The previous section suggested how this aspect of *Cleburne*—and, indeed, its rational basis analysis more generally—did not attract unusual attention from the Justices, other than on the basic question whether the Court would perform that analysis at all or simply remand the case for the lower court to perform it.¹⁴³ But the Justices' papers suggest that the record-evidence requirement might itself have been the unintended by-product of their resolution of another conflict: between striking down the Cleburne ordinance as applied to the plaintiffs' particular group home, as opposed to on its face.

The as-applied/facial issue arose early in the Justices' deliberations. Justice Powell's post-oral argument notes indicate that he believed that the Cleburne ordinance failed rational basis review "on its face."¹⁴⁴ Moreover, on May 29, during the early discussion of whether the Court should remand the case for application of rational basis scrutiny, Justice Powell's clerk, arguing against remand, raised the as-applied/facial issue, urging that the facial validity of the ordinance was properly before the Court for decision.¹⁴⁵ Justice Powell's handwritten notes on that memo state that the clerk "makes a persuasive argument for holding the ordinance invalid on its face."¹⁴⁶

Nevertheless, it was only after Justice White acquiesced to Justice Powell's wish that the Court itself apply rational basis review that the as-applied/facial issue fully manifested. On June 5, Powell wrote White, arguing that resolving the standard of review question in favor of rational basis still left open questions about the ordinance's facial and as-applied validity.¹⁴⁷ He argued (apparently for a second time, given his post-oral argument conference notes¹⁴⁸) in favor of a facial strike down. Because the

141 See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 450 (1984); see also *id.* at 455 (Stevens, J., concurring) (referring to the record as well).

142 See, e.g., Saphire, *supra* note 2, at 613, 621.

143 Most notably, Justices Rehnquist and O'Connor reconfirmed their joins of Justice White's opinion one day after he circulated the first full draft opinion including his rational basis analysis, without any comment. See Powell Papers, *supra* note 47, Letter from O'Connor, J. to White, J. (June 12, 1985); *Id.* Letter from Rehnquist, J. to White, J. (June 12, 1985). But see *infra* note 170 (noting one small change Justice Rehnquist requested in that analysis when it was circulated to the Court before being incorporated into a complete draft opinion).

144 See Powell Papers, *supra* note 47, Conference Notes (Mar. 20, 1985).

145 See Powell Papers, *supra* note 47, Memorandum from Annmarie to Powell, J. (May 29, 1985).

146 *Id.*

147 Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 5, 1985).

148 See Powell Papers, *supra* note 47 (notes of the March 20 conference).

discussion became somewhat confused, it might help to specify what Justice Powell meant by a facial strike-down. Justice Powell argued that the ordinance's lumping together of the intellectually disabled with other groups, such as insane persons and drug addicts, lacked any rational basis on its face—that is, without any reference to the particulars of a given group home for intellectually disabled persons.¹⁴⁹

Justice White responded the next day, in a letter to Justice Powell on which he copied the conference, disagreeing with that approach.¹⁵⁰ He noted the Court's general preference for performing as-applied review before considering a facial strike-down. Turning to the Cleburne ordinance, he cited the wide variance in intellectual disability, and concluded that he "[found] it difficult to believe that the special permit requirement would be invalid with respect to each and every group of the mentally retarded."¹⁵¹ He concluded that "[i]t may be that in light of the characteristics of the group involved in this case and in light of the city's proffered justifications, the special permit cannot constitutionally be denied. But this would not be a facial invalidity holding."¹⁵²

The same day Justice White circulated his letter to Justice Powell to the conference, Justice O'Connor stepped in to offer her support to Justice White. In a note to White, copies of which she circulated only to Powell and Rehnquist, O'Connor wrote that she "will still be with [White] if [White] decide[d] the statute is facially invalid, as Lewis [Powell] suggest[ed]."¹⁵³ However, again reflecting the priorities shared by her and Justice Rehnquist, she continued: "[B]ut I also agree with Bill Rehnquist that we should decide the quasi-suspect class issue in any event."¹⁵⁴

Justice O'Connor's note made clear that White had support regardless of what he did on the as-applied/facial issue, as long as he held firm on the Court deciding the suspect class question. At this point, we can begin to see the outlines of *Cleburne's* various oddities. Consider first the eventual opinion's decision both to decide the suspect class question and strike down the city's action on rational basis grounds—the "two for the price of one" decision-making Justice Marshall criticized in his dissent. The individual Justices' preferences suggest that Justice White may have had no real choice but to decide both issues. With three dissenters planning on arguing that the intellectually disabled constituted a suspect or quasi-suspect class, and with Justice Stevens having expressed ambivalence about the

149 Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 5, 1985).

150 Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985).

151 *Id.*

152 *Id.*

153 Powell Papers, *supra* note 47, Letter from O'Connor, J. to White, J. (June 6, 1985).

154 *Id.*

need to perform suspect class analysis, Justice White had no further votes to lose on the suspect class question.¹⁵⁵ With Justice Powell now insisting that the Court should itself use rational basis scrutiny to decide the case, and with White's allies (Rehnquist and O'Connor) acquiescing in such an approach as long as the Court committed itself to deciding the suspect class issue, we can see how perhaps Justice White, despite his continued preference for remanding the case to the lower court for application of rational basis review,¹⁵⁶ might have decided to give in to Powell as the price of keeping his majority on the suspect class issue. But when Powell notified White on June 7 that he had come around to accepting the appropriateness of deciding the suspect class question,¹⁵⁷ there was no longer any need to press him on that question. Instead, for Justice White the path of least resistance lay through addressing both the suspect class and rational basis issues.

But the facial/as-applied issue remained unresolved. Justice O'Connor's letter suggested that she and, by implication, Justice Rehnquist remained relatively unconcerned about that issue. But Justice White remained firm on this question: in contrast to his accommodating attitude on the remand question, he insisted that any application of rational basis review result, at most, in a strike-down of the city's actions as applied to its conduct in this particular case.

Now it was Justice Powell's turn to bend. Perhaps convinced by his law clerk, who wrote a memo to him on June 6 suggesting that an as-applied strike-down was also appropriate,¹⁵⁸ Justice Powell wrote to Justice White the next day, June 7, expressing a willingness to "join four to make a Court" striking down the city's action on an as-applied basis.¹⁵⁹

This might have resolved the question, and cemented the Court's ultimate approaches to both the remand and the facial/as-applied issues. But one last flurry, from a perhaps unexpected source, provided a final bit of drama. June 7, 1985, was a Friday.¹⁶⁰ The following Monday, June 10,

155 Justice Stevens eventually joined Justice White's opinion for the Court, even though his own concurrence—especially its critique of suspect class analysis—stands in considerable tension with much of the opinion he joined.

156 Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985) (noting that he "much prefer[red]" remanding to the lower court to apply rational basis scrutiny).

157 See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 7, 1985) ("In my letter of June 5 [to White, the recipient of the June 7 letter], I expressed the view that if we held the ordinance facially invalid it would be unnecessary to consider the quasi-suspect class question. There is a good deal to your point, however, that the question is here and needs resolving. I would be willing to join an opinion holding that only the rational basis standard is applicable.").

158 See Powell Papers, *supra* note 47, Memorandum from Annmarie Levins to Powell, J. (June 6, 1985).

159 See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 7, 1985).

160 See Calendar for Year 1985 (United States), TIMEANDDATE.COM, <http://www.timeanddate.com/>

Justice Brennan wrote Justice Powell, copying the conference. That brief note stated that Brennan had reviewed Powell's correspondence with White, and observed that, given Powell's preference for a facial strike-down of the statute, there appeared to be a majority for that proposition, "although perhaps on varying grounds."¹⁶¹ (Those varying grounds, of course, would have been the differing standards that embryonic coalition might have deemed appropriate for reviewing the ordinance: rational basis for Powell, and perhaps Stevens, and heightened scrutiny for Brennan, Marshall, and Blackmun.¹⁶²)

It was now Justice Powell's turn to defend his prior commitments. Responding that same day, he wrote Brennan that he had already committed to "consider[ing]" an opinion striking down the action on as-applied basis.¹⁶³ Powell may have felt obliged to say that, and thus reject Brennan's proposed new coalition, because that same day (June 10), White had written Powell stating that he was going to "make a try" at an opinion invalidating the law on an as-applied basis, and reminding him of Powell's openness to joining four on such an opinion, which he (Powell) had expressed the previous Friday.¹⁶⁴ Tantalizingly, Justice White's June 10 note referred to a "conversation" he and Powell had had earlier that day. It is quite possible, then, that Justice Brennan's note of that same date, offering a majority for a facial strike-down, triggered Justice White to reach out to Powell either by phone or in person, perhaps to remind him of his June 7 commitment to joining four for an as-applied strike down.

As noted above, Justice Powell responded to Justice Brennan that same day, reminding Brennan of the commitment he (Powell) had made to

calendar/?year=1985&country=1 (last visited Jan. 3., 2017).

161 Powell Papers, *supra* note 47, Letter from Brennan, J. to Powell, J. (June 10, 1985); *see also* Blackmun Papers, *supra* note 52.

162 On this point it is worth noting that Justice Powell's clerk had earlier in the process (May 29) suggested to Powell that, if Powell agreed to it, Justice Marshall's draft dissent might become the majority, given that Justices Brennan and Blackmun were known to agree with Marshall, and that Justice Stevens was planning on announcing his willingness to join an opinion striking down the ordinance on its face. *See* Memorandum from Annmarie Levins to Powell, J., *supra* note 135, at 2 n.1. Moreover, the clerk informed Justice Powell that Marshall's opinion was likely to be written in a way that would allow a Justice to join any one (or more) of several different rationales for striking the law down. *Id.* at 2. Perhaps Brennan had that structure in mind when he suggested that Powell might be able easily to join the part of that anticipated opinion that struck down the law on its face for failing rational basis scrutiny, without having to join the part arguing for and applying heightened scrutiny. Indeed, Marshall did not circulate a draft of his dissent until June 24, two weeks after Brennan's overture to Powell.

163 Powell Papers, *supra* note 47, Letter from Powell, J. to Brennan, J. (June 10, 1985); Blackmun Papers, *supra* note 52.

164 Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 10, 1985); *see also* Blackmun Papers, *supra* note 52.

White.¹⁶⁵ But, interestingly, he also noted that he had come to believe that the opinion should in fact establish rational basis as the appropriate standard—a real evolution from his earlier thinking where he had wondered whether a rational-basis strike-down by the Court would render the suspect class analysis “unnecessary.”¹⁶⁶ Indeed, in a final statement of the evolution of his thinking, he concluded his rejection of Brennan’s overture by stating that “[t]his [the suspect class analysis] will be the precedent that counts.”¹⁶⁷

2. *The As-Applied Analysis*

Perhaps motivated by Justice Brennan’s lobbying of Powell, or perhaps simply spurred on by the looming end of the term, Justice White acted quickly to draft the rational basis analysis striking down the city’s action. He appears to have circulated a partial revised draft, focusing on that analysis, on June 10, although records of this draft do not appear in the papers examined.¹⁶⁸ A full draft was circulated the next day.¹⁶⁹ With the important exception of the as-applied versus facial nature of the Court’s final decision, the analysis in his June 11 draft largely took the form that would eventually appear in the final opinion for the Court. Most notably, it began by noting the neighborhood opposition to the group home, and rejecting that opposition (to the extent it was motivated by fear or dislike of the would-be residents) as a legitimate interest that might justify the permit denial.¹⁷⁰

¹⁶⁵ That commitment was made in a June 7 letter from Powell to White, on which Powell copied the conference. See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 7, 1985). Thus, Brennan would have been aware of that commitment.

¹⁶⁶ See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 5, 1985).

¹⁶⁷ Powell Papers, *supra* note 47, Letter from Powell, J. to Brennan, J. (June 10, 1985).

¹⁶⁸ See Papers of J. Byron White (on file with the Library of Congress, Box II:28, Folder 1) [hereinafter White Papers], Letter from Rehnquist, J. to White, J. (June 11, 1985), (referring to “the partial draft which you sent down yesterday,” and continuing “I assume that the part of the opinion presently circulating which holds that ‘heightened scrutiny’ is not required will remain as is.”).

¹⁶⁹ See Powell Papers, *supra* note 47, Third Draft (June 11, 1985) [hereinafter June 11 Draft]; see also Blackmun Papers, *supra* note 52; White Papers, *supra* note 168.

¹⁷⁰ June 11 Draft, *supra* note 169. One change on this point was prompted by Justice Rehnquist. After beginning its analysis with the following statement, “[f]irst, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood,” the thus-far unrecovered June 10 draft apparently moved directly and unambiguously to condemn such attitudes and fears. In his June 11 letter, Justice Rehnquist requested a softening of that condemnation. He wrote:

I agree with you that just “negative attitude” or “fear” of neighbors, without any substantiation of reasons for it, may not properly be considered by a zoning commission. But I would like to at least reserve the question of whether “negative attitude” or “fear” that has some sort of reasonable basis -- fear of decline in property value, and the like, may not be considered as a factor.

Continuing to follow the template that would appear in the final opinion, Justice White then considered the more legitimate justifications for the city's actions—flood evacuation, population density, and the like. In rejecting those justifications, his draft opinion expressed skepticism about the existence of relevant differences differentiating the group home from other land uses, such as sanitariums and old age homes, which did not require a permit.¹⁷¹ The Court's skepticism is notable, of course, given its tension with conventional rational basis review, which indulges every presumption favoring the government.¹⁷² Indeed, it was in this draft that Justice White's famous reference to the lack of record evidence appears—a reference that reinforces the unusual skepticism of the Court's analysis.¹⁷³

For our purposes, the interesting point here is the connection between this unusually stringent review and the as-applied character of the draft's analysis. Justice White began his rational basis review by squarely identifying its as-applied nature. He even took the time to justify that decision, explaining (perhaps as a final argument to Justice Powell or perhaps simply as reflecting his views on the issue) that as-applied review was favored over facial review in constitutional cases, as it allows the Court to avoid making “unnecessarily broad constitutional judgments.”¹⁷⁴

But ambiguities immediately crept in to his description of the Court's analysis as as-applied. He noted the zoning ordinance's lack of a permit requirement for many multi-resident land uses, but then observed that the ordinance did require such a permit for the Featherston home, “because it would be a facility for the mentally retarded.”¹⁷⁵ He then posed the question he set out to answer: “May the city deny the permit to this facility when other care and multiple dwelling facilities are freely permitted?”¹⁷⁶

White Papers, *supra* note 168, Letter from Rehnquist, J., to White, J. (June 11, 1985). He therefore requested the insertion of a new sentence immediately after the one quoted above, “to this effect,” then offering the following sentence:

“But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, is not a permissible basis for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”

Id. Justice White incorporated this suggestion verbatim in the June 11 draft. *See* June 11 Draft, *supra* note 169. It appears in the final version of the opinion. *See* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1984).

¹⁷¹ June 11 Draft, *supra* note 169, at 13–14.

¹⁷² *See supra* notes 139–140 (noting instances of deferential review that were resolved in the government's favor).

¹⁷³ *See* June 11 Draft, *supra* note 169, at 16 (pointing out that the record fails to clarify why “the characteristics of the intended occupants . . . justifies denying to those occupants what would be permitted to [other] groups”).

¹⁷⁴ *Id.* at 13.

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.*

Justice White's framing of the question reflects the ambiguity of the as-applied/facial distinction, at least as that distinction applied in this case. On the one hand, he squarely stated that the review was as-applied. In addition, this draft focused on the permit denial (a particularized decision) rather than the underlying (general) requirement that *any* group home for the intellectually disabled obtain a permit. Yet, quoting the trial court, he framed the city's action as resting on the fact that the would-be residents were intellectually disabled, without any reference to the particular characteristics of the individuals who sought to live in the Featherston home. In other words, it was possible to see the city's action, as Justice White framed it, as presenting a facial challenge to the inclusion of intellectual disability within the list of characteristics that would trigger the permit requirement—as a general matter, without reference to the qualities of the would-be occupants of the Featherston home, such as their location on the intellectual disability spectrum.

This ambiguity was reflected in the analysis that followed in his draft. While Justice White led off by citing the neighborhood opposition to the particular facility at issue (the Featherston home), he then moved on to other objections (flood evacuation and the like), which the Court rejected in general terms, rather than as applied to the would-be Featherston residents. Justice Powell's clerk—who, like her boss, had pushed for a facial invalidity ruling throughout the Justices' deliberations—identified this ambiguity.¹⁷⁷ She also raised the issue whether White's draft addressed only the permit denial, rather than the underlying requirement that the home obtain a permit. In her view, because the plaintiffs challenged both decisions (that a permit was required, and denying that permit), a decision striking down only the denial did not fully dispose of the case.¹⁷⁸

Justice Powell raised this latter point with Justice White in a letter dated June 15.¹⁷⁹ He stated that he believed that “modest changes” would make clear that the (particular) denial and the (general) underlying permit requirement both violated equal protection. Justice White, in a draft dated June 17, made those changes, substituting references to the permit denial with references to the permit requirement itself.¹⁸⁰ In a letter of that same

¹⁷⁷ See Powell Papers, *supra* note 47, Memorandum from Annmarie to Justice Powell (June 13 1985).

¹⁷⁸ See Powell Papers, *supra* note 47, Memorandum from Annmarie to Justice Powell (June 14, 1985).

¹⁷⁹ See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 15, 1985); see also Blackmun Papers, *supra* note 52, Letter from Powell, J. to White, J. (June 15, 1985).

¹⁸⁰ See Powell Papers, *supra* note 47, Fourth Draft (June 17, 1985) [hereinafter June 17 Draft]; White Papers, *supra* note 168. The matter, however, is not simple as this. The relevant changes Justice White made to the June 11 draft simply replaced references to the city's permit denial with references to its requirement that the home obtain a permit. Compare June 11 Draft, *supra*

date, however, he cautioned Powell that, “[i]f these changes do not satisfy you, it seems to me that you are insisting on deciding the facial validity issue, which I thought you had agreed could be put aside.”¹⁸¹

In the next paragraph of that letter, Justice White set forth his concern with a broader ruling. Such a ruling, he explained (again),¹⁸² could call into question the city’s ability to insist on a permit in a case of more profoundly intellectually disabled persons seeking to live together in a group setting.¹⁸³ He expressed concern that a facial strike-down of the Cleburne ordinance would make such regulation impossible.¹⁸⁴ At this point Justice Powell stopped pushing. That same day, June 17, he joined the opinion.¹⁸⁵ Justice

note 169, at 13 (“We inquire first whether *denying* a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws.”) with June 17 Draft, *supra* at 13 (“We inquire first whether *requiring* a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws.”). Compare June 11 Draft, *supra* note 169, at 14 (“May the city *deny* the permit to this facility when other care and multiple dwelling facilities are freely permitted?”) with June 17 Draft, *supra* at 14 (“May the city *require* the permit for this facility when other care and multiple dwelling facilities are freely permitted?”). Compare June 11 Draft, *supra* note 169, at 14 (“The District Court found that the City Council’s *denial* of the permit rested on several factors.”) with June 17 Draft, *supra* at 14 (“The District Court found that the City Council’s *insistence* on the permit rested on several factors.”). Compare June 11 Draft, *supra* note 169, at 16 (“The short of it is that *denial* of the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”) with June 17 Draft, *supra* at 16 (“The short of it is that *requiring* the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”) (all emphases added). Justice White’s simple—and perhaps artful—substitution of “require” for “deny” thus addressed the (general) permit requirement, aiming to satisfy Justice Powell, while nevertheless retaining the opinion’s ostensible as-applied focus on the particular action of the city in requiring an ordinance for this particular group home. The problem here is that that requirement, even if White styled it a particularized imposition on the home at 201 Featherston, was imposed by the generally-applicable terms of the ordinance. Thus, it appears as though Justice White might have been trying to convince Justice Powell that the Court really was deciding the constitutionality of the permit requirement, while perhaps preserving the opinion’s as-applied nature of the ordinance’s permit requirement.

181 Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 17, 1985). Indeed, despite the changes Justice White made to accommodate Justice Powell’s June 15 request, *see supra* note 180, he retained the language disclaiming facial review of the ordinance and defending his prioritization of as-applied review. Compare June 11 Draft, *supra* note 169, at 13 with June 17 Draft, *supra* note 180, at 13.

182 See Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985) (raising the concern that the classification “mentally retarded” is so broad that a decision addressing that group as a whole could invalidate otherwise lawful permits).

183 See *id.* (expressing the same concern); *supra* note 181 (citing a letter explaining Justice White’s concern with a broad ruling).

184 See Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985) (expressing the same concern); *supra* note 181.

185 See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 17, 1985).

es Stevens followed shortly, with Chief Justice Burger soon thereafter joining Justice Stevens' concurring opinion.¹⁸⁶

III. WAS *CLEBURNE* AN ACCIDENT?

Part II recounted the sequence of the Justices' deliberations in *Cleburne*, from the certiorari vote to Justice Powell's decision to accept the as-applied nature of Justice White's analysis and join White's opinion. Part III reconsiders those deliberations, to examine what they suggest about the decisional process in that case. This reconsideration will set the stage for more general reflections about the Court, and the impact of its decisional processes on legal doctrine, in Part IV.

A. *The Decision Not To Remand*

The Court's decision not to remand, but rather to decide the rational basis issue itself, constitutes the threshold puzzle in *Cleburne*. As noted in Part I, Justice Marshall began his dissent by critiquing the Court's performance of suspect class analysis, in light of its ultimate decision that the law failed rational basis scrutiny. As Part II indicated, Justice Powell harbored the same concern, although he eventually overcame his qualms and, indeed, predicted that the suspect class analysis "will be the precedent that counts."¹⁸⁷

The evidence identified in Part II suggests that the need to build a majority coalition might have lay behind Justice White's decision to address both issues. Justices Rehnquist and O'Connor appeared relatively indifferent to the prospect of the Court itself applying the rational basis standard, as long as it also reached (and rejected) the lower court's suspect class analysis.¹⁸⁸ Given the different weights to those preferences, Justice White—who shared Rehnquist's and O'Connor's inclination to remand the

¹⁸⁶ Justice Stevens joined it on June 19. See Powell Papers, *supra* note 47, Letter from Stevens, J. to White, J. (June 19, 1985). Oddly, Chief Justice Burger appears never to have joined Justice White's majority, although he is customarily described as having done so. See *supra* note 47 (summarizing correspondence from Annmarie, not noting Chief Justice Burger's decision to join Justice White's opinion). It may be that Burger's join of Stevens' opinion, which explicitly noted that Stevens "join[ed]" White's opinion, constituted Burger's own join. *Id.*

¹⁸⁷ Powell Papers, *supra* note 47, Letter from Powell, J. to Brennan, J. (June 10, 1985).

¹⁸⁸ Indeed, Justice Rehnquist's relatively mild reaction to Justice White's rational basis analysis—requesting nothing more than a mild caveat to the (possibly-lost) June 10 draft's statement about the inadmissibility of neighbors' "negative attitudes" and "fear," (see *supra* note 170)—suggests that he was also not particularly concerned about the substance of that analysis. The papers examined lack any other reference to any objection to that analysis by either Rehnquist or O'Connor (or anyone else on the Court).

case—was free to accede to Justice Powell's insistence and decide the issue.

Of course, it is ironic that Justice Rehnquist appeared to have given Justice White the green light to cater to Justice Powell and apply the rational basis scrutiny the Court called for. As Part II explained, Justice Rehnquist cared very much about limiting judicial review under the rational basis standard. That preference was strong enough to lead him to characterize the Court's analysis in cases such as *Craig* as instituting a new, explicitly intermediate, level of scrutiny, if that move helped immunize rational basis scrutiny from the prospect of more intrusive judicial review.¹⁸⁹

Yet *Cleburne* appears to have raised for Justice Rehnquist an even more serious threat: the prospect of continued expansion of suspect and quasi-suspect classifications. While he might have been willing to characterize an otherwise-unclear majority opinion in *Craig*¹⁹⁰ as instituting a new, "intermediate," scrutiny level in exchange for cabining more muscular rational basis review when the Court's analysis itself was at issue,¹⁹¹ the situation might have looked very different to him when what was at stake was a *lower court's* decision *explicitly* enshrining such heightened review. Such a decision, if left undisturbed by the Court, might well expand, both to other courts and to other groups.

On this point it is useful to recall two facts. First, Justice White, channeling Justice Rehnquist's concern about the Fifth Circuit's bestowal of heightened scrutiny, noted in his June 6 letter to Justice Powell the fact that the appellate court's suspect class decision, if not rejected, would govern district court cases from that circuit.¹⁹² Second, the lower courts in *Cleburne* concluded that federal courts had disagreed on the question of the scrutiny status required for intellectual disability.¹⁹³ Combined, these observations focus our attention on what might have concerned Justice Rehnquist and his like-minded colleagues: the possibility that failure to address the suspect class issue would, in White's words, "leave in place an

189 *Craig v. Boren*, 429 U.S. 190 (1976). See *supra* notes 88–90 and accompanying text (noting Rehnquist's insistence that the rational basis test remain deferential and the consequences of that position). This move cannot be explained by suggesting that Rehnquist in fact agreed with the idea of heightened scrutiny for sex classifications. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 468 (1981) (plurality opinion) (Rehnquist, J.) (refusing to acknowledge that previous cases, including *Craig* itself, had instituted tougher-than-normal scrutiny of sex classifications, and focusing instead on the Court's rejection of strict scrutiny in *Frontiero*, 411 U.S. 677).

190 The Court in *Craig* did not explicitly state that it was instituting an intermediate scrutiny level.

191 See Eyer, *supra* note 80.

192 Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985).

193 See *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 196 n.7 (5th Cir. 1984) (listing cases in which federal courts had come to varied opinions on the level of scrutiny question); *Cleburne Living Ctr., Inc. v. City of Cleburne*, No. CA3-80-1576-F, slip op. at 18–19 (N.D. Tex., Dallas Div. 1982) (same).

erroneous Fifth Circuit precedent”¹⁹⁴ that, if left undisturbed by the Court, might also tip the balance in other lower courts considering the same issue.

When combined with the Court’s liberals’ continued call for expanding the list of suspect classes,¹⁹⁵ one might understand how the more conservative Justices understood the relative stakes of the two questions posed in *Cleburne*. In contrast to his focus on the suspect class issue, Rehnquist’s dismissive description of *Cleburne*’s character as a rational basis decision—“one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance”—suggests his lack of concern about that part of the opinion.¹⁹⁶ The irony of that dismissiveness will not be lost on anyone who knows the important role that aspect of the opinion has played in the evolution of the Court’s subsequent equal protection doctrine.¹⁹⁷

Of course, identifying Justice Rehnquist’s motives involves, at best, informed speculation. Without indulging further in such speculation, what *Cleburne* suggests is that when a case presents multiple issues, a Justice’s decision to focus on one issue (such as Rehnquist’s focus on the suspect class question) may influence those other results in ways that are quite unintended. Moving beyond the role played by Justice Rehnquist, this dynamic highlights the imperatives of institutional dynamics—the need to count to five, in Justice Brennan’s well-known phrasing.¹⁹⁸ In *Cleburne*, Justice Rehnquist’s willingness to indulge Justice Powell’s insistence that the Court decide the case rather than remanding—a willingness that appears, at least inferentially, to have been driven by his desire to cement a majority for the Court’s suspect class analysis—paved the road to the

194 Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985).

195 See *supra* notes 77–78 and accompanying text (discussing Justice Brennan’s dissent from the denial of certiorari in *Rowland*, 470 U.S. 1009 (Brennan, J., joined by Marshall, J., dissenting from the denial of certiorari)). Recall also that in the post-oral argument conferences Justice Blackmun joined Justices Brennan and Marshall in committing to supporting heightened scrutiny for the intellectually disabled, and Justice Stevens left open that possibility. See Powell Papers, *supra* note 47, Conference Notes (Mar. 20, 1985) (appearing to make the notation, “apply *heightened* standard” under Justice Blackmun’s name); Powell Papers, *supra* note 47, Letter from Stevens, J., to White, J. (June 3, 1985) (agreeing that the court of appeals did not need to apply a “somewhat heightened” standard of scrutiny but expressing willingness to move forward to the conclusion that the discrimination at issue was unconstitutional).

196 Letter from Justice Rehnquist to Justice White (June 5, 1985), in Thurgood Marshall Papers, Library of Congress, box 371, file 11.

197 Cf. *supra* note 136 (highlighting Powell’s statement that *Cleburne*’s suspect class analysis “will be the precedent that counts”).

198 See, e.g., Anthony Lewis, *In Memoriam, William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997) (“Justice Brennan used to joke that a critical talent for a Supreme Court Justice was the ability to count to five.”). See generally William D. Araiza, *Playing Well with Others—But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court*, 46 GA. L. REV. 1059 (2012) (explaining how institutional dynamics can impact the path of constitutional doctrine).

Court's rational basis analysis. It also led to the oddity—criticized by Justice Marshall—of the Court's "two for the price of one" sequencing of the issues in that case. Thus, the Court's multi-member dynamic appears to have led to results that were subject to objective critique (the Court's sequencing decision), unintended by some critical, seemingly victorious, players in that dynamic (the creation of heightened rational basis review), and, indeed, probably unintended by a majority of the Court.¹⁹⁹

B. *As-Applied Review/Heightened Rationality Review*

Beyond the decision to reach the rational basis issue, the substance of the Court's rational basis analysis appears to have been the unintended result of a dispute among the Justices on yet another seemingly distinct issue. As Part II.B. set forth, once Justice White agreed to expand his opinion by resolving the case rather than remanding it, he and Justice Powell engaged in an extended discussion over whether that resolution appropriately entailed a facial strike-down of the *Cleburne* ordinance or a strike-down as applied only to the particular group home and its would-be residents. But unlike their discussion of the remand issue, this dialogue ended with Justice White successfully holding his position in favor of an as-applied, rather than a facial, strike-down.

Beyond generally accepting the majority position that facial strike-downs were disfavored in comparison to more limited as-applied decisions,²⁰⁰ in June 1985 Justice White was deeply invested in the outcome of the as-applied/facial question. Pending during his discussions with Justice Powell was his draft for the Court in *Brockett v. Spokane Arcades*,²⁰¹ a First Amendment case where Justice White, writing for the majority, insisted that as-applied strike-downs were favored over facial invalidations.

Spokane Arcades's subject-matter—the First Amendment—matters to the facial/as-applied distinction: First Amendment "overbreadth" doctrine provides the strongest case for deviating from the preference for as-applied strike downs. First Amendment "overbreadth" analysis contemplates that a plaintiff whose expression could be validly regulated may nevertheless ar-

¹⁹⁹ Recall that both Justices White and Rehnquist expressed a preference for remanding the case, and that Justice White, in particular, described that as a course he "much prefer[red]." Powell Papers, *supra* note 47, Letter from White, J. to Powell, J. (June 6, 1985).

²⁰⁰ See *United States v. Salerno*, 481 U.S. 739, 740, 745 (1987) (majority opinion, joined by White, J.) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully"). Justice White also wrote an important opinion cautioning against widespread use of First Amendment overbreadth doctrine. *Broadrick v. Oklahoma*, 413 U.S. 601, 610–16 (1973). Overbreadth doctrine, and its relation to the facial/as-applied issue, is explained in the next paragraph in the text.

²⁰¹ 472 U.S. 491, 501–02 (1985). *Spokane Arcades* was handed down on June 19, 1985. *Id.* at 491.

gue that *others'* expression was unconstitutionally infringed by the law that ensnared him. The Court's willingness to allow such a plaintiff to cite the "chill" the law exerted on others' speech deviates from its normal preference for deciding whether a given law is valid as applied to that plaintiff—indeed, the Court has gone so far as to ground that preference in the general rule that a plaintiff lacks standing to assert the legal rights of third parties.²⁰² Nevertheless, in *Spokane Arcades*—a First Amendment case—Justice White insisted that as-applied invalidation of the law at issue was the appropriate response, because the plaintiffs themselves were the victims of unconstitutional regulation of their expression.

Thus, *Spokane Arcades* presented a plausible reason for departing from First Amendment overbreadth analysis and striking the law down only in part. Nevertheless, it might still have been seen as odd for Justice White to have authored two majority opinions in short order, one of them (*Spokane Arcades*) insisting that as-applied invalidation was the appropriate course of action, even in a First Amendment case, and the other (*Cleburne*) striking down an ordinance on its face.²⁰³

Regardless of whether his pending opinion in *Spokane Arcades* was the cause, in *Cleburne* Justice White held fast to the as-applied approach he initially proposed. In turn, that approach logically required that his analysis focus on the details of the particular group home that was forced to seek a special permit and that was then denied that permit. Given that more particularized, factual focus, one can understand why his rational basis analysis explicitly centered on whether record evidence supported the city's ex-

202 See, e.g., *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected [by the First Amendment] may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.") (citations omitted); *Broadrick*, 413 U.S. at 612 ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)); see also Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 867 (1991) ("The most common account of the First Amendment overbreadth doctrine justifies a departure from ordinary standing principles in procedural or prophylactic terms.").

203 Indeed, Justice White's authorship of *Broadrick*, a case that came to be influential for insisting that overbreadth challenges be strictly limited even given the unique First Amendment-based concerns over laws chilling protected speech, suggests the strength of his commitment to a rule generally preferring as-applied rather than facial invalidations. See *Broadrick*, 413 U.S. at 610–16.

planations for its actions.²⁰⁴ After all, if the proper scope of the analysis was limited to the particular facts of the group home Jan Hannah sought to establish, one would naturally seek those facts in the record of the litigation involving her home.

In turn, reliance on that record implies, even if it does not mandate, a shift in the burden of proof. Even if it is conceivable that a court in an equal protection case could refer to the record but nevertheless maintain a heavy thumb on the scale in favor of the government, such a reference nevertheless changes the tone of the Court's analysis. Quite simply, reference to the record seems conceptually, if admittedly not ineluctably, inconsistent with a rational basis doctrine²⁰⁵ that allows a court to embrace completely speculative, non-record based facts supporting the rationality of the government's action.²⁰⁶

These characteristics of *Cleburne*—the insistence on record evidence supporting the city's action, the resulting conceptual shift in the burden of proof, and, more generally, the Court's more probing tone—all became hallmarks of that case's more searching version of rational basis scrutiny. As explained above, it is plausible to believe that the first of these characteristics—the insistence on record evidence—triggered the latter two. In turn, that insistence on record evidence may well have flowed unwittingly from Justice White's insistence on an as-applied analysis.

Circumstantial evidence for this thesis arises from the flaws in that as-applied analysis. As earlier parts of this Article noted, Justice Powell and his clerk had long believed that the *Cleburne* ordinance should be struck down on its face. After examining the first draft of Justice White's rational basis analysis, that clerk remarked that, while she approved of the analysis, it struck her as supporting a facial, rather than an as-applied, strike-down.²⁰⁷ She concluded that White's analysis said much about intellectual-

204 See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1984) (“Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.”); *id.* at 450 (“At least this record does not clarify how . . . the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.”); *cf. id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (“The ‘record’ is said not to support the ordinance’s classifications 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.”) (quoting majority opinion) (citation omitted).

205 See, e.g., *supra* notes 139–140 (citing cases adopting this highly deferential approach, under which laws can satisfy the rational basis standard without reference to the record).

206 See *supra* note 204 (quoting Justice Marshall’s similar critique of the majority opinion’s recourse to the record).

207 See Powell Papers, *supra* note 47, Memorandum from Annmarie Levins to Powell, J. (June 13, 1985).

ly disabled persons in general as occupants of a neighborhood, but nothing about the particular would-be residents of the Featherston home.²⁰⁸

That critique, even as slightly corrected,²⁰⁹ implies either that Justice White was more committed to the idea of as-applied review than its full application (which would have required a more intensive granular focus on the particular residents of the Featherston home), or, alternatively or additionally, that a case such as *Cleburne* posed a vexing problem for the as-applied/facial issue. The first possibility has already been mentioned in the context of his then-pending decision in *Spokane Arcades*,²¹⁰ but its resolution must remain speculative.

As for the second possibility, the evidence tends to support, tentatively, the hypothesis that *Cleburne* illustrates the complexity of the as-applied/facial distinction, and the difficulty that distinction poses for judges.²¹¹ Consider that evidence. During the aforementioned White-Powell correspondence about Justice White's rational basis analysis, White insisted that an as-applied analysis was appropriate because the city might be justified in requiring a permit for group homes for the intellectually disabled in some circumstances: either when the would-be residents were more profoundly disabled, or when such persons proposed to live together without supervision.²¹² Thus, there was a reason for White's insistence on an as-applied approach, beyond his mere abstract commitment to that approach (an approach that, to repeat, he was then in the course of defending and explaining in his *Spokane Arcades* draft). Nevertheless, the granularity of his analysis in the letter he sent to Justice Powell defending the as-applied approach was largely absent in the rational basis analysis he expressed in the opinion himself. Justice Powell's clerk noted this absence—she remarked that White's analysis was “quite good,” but “support[ed] [Justice Powell's] position for a ‘facial’ challenge better than it support[ed] [Justice White's] position for an ‘as-applied’ challenge.”²¹³

208 *Id.* In fact, the June 11 draft's rational basis analysis the clerk was reviewing did contain two references to the particular characteristics of the intellectually disabled persons who sought to occupy the Featherston home. See June 11 Draft, *supra* note 169, at 15 (referring to the “mildly or moderately mentally retarded individuals who would live at 201 Featherston”); *id.* at 16 (noting that “[t]hose who would live in the Featherston home are the type of individuals who . . . satisfy federal [and] state standards for group housing in the community”). Both of these references survived into the final opinion. See *Cleburne*, 473 U.S. at 449–50.

209 See *supra* note 208.

210 See *supra* note 201 and accompanying text.

211 Cf. Powell Papers, *supra* note 47, Memorandum from Annmarie Levins to Powell, J. (June 13, 1985), at 2 (describing “a somewhat artificial distinction between facial and as applied challenges” in White's June 11 draft).

212 See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 17, 1985).

213 Powell Papers, *supra* note 47, Memorandum from Annmarie Levins to Powell, J. (June 13, 1985). Ironically, one point in Justice White's analysis where he did carefully focus on the dif-

Evaluating that critique, we should recognize that, had Justice White in fact suggested that the city might have been justified in denying more profoundly disabled persons the opportunity to occupy the Featherston home, he would have been indulging in the same type of judicial review of technocratic judgments about the effect of differing degrees of intellectual disability that he had already criticized earlier in his opinion. Recall that in the prior part of his opinion, dealing with the suspect class issue, he cited courts' *inability* to draw such fine lines as one of the reasons for rejecting heightened scrutiny for the intellectually disabled as a general matter.²¹⁴ Had he then suggested, in the next part of his opinion, that courts might endorse the rationality of municipalities' restrictions on the living arrangements of more profoundly disabled persons, he would essentially have been calling on lower courts to make those same technocratic judgments.²¹⁵

Scholars have long debated the concepts of facial and as-applied judicial invalidations of statutes. Some have suggested that the distinction between the two is less bright than it seems, and may reflect underlying substantive doctrine rather than a generally-applicable trans-substantive rule about the proper scope of judicial strike-downs.²¹⁶ In this case, there does seem to exist a basic doctrinal tension at the core of Justice White's ostensibly as-applied analysis in *Cleburne*. It seems likely from the communications recounted above that Justice White's concern for allowing Cleburne

ferent levels of intellectual disability was in his suspect class analysis. *See Cleburne*, 473 U.S. at 442 ("Nor are [the intellectually disabled] all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for."); *id.* (referring to the intellectually disabled as a "large and *diversified* group") (emphasis added). As noted in the next paragraph of the text, this reference may have been telling: his anxiety about courts closely scrutinizing differential treatment of the intellectually disabled in light of their differing capacities may have also led him to shrink back from carefully testing the city's permit denial against the particular capabilities of the would-be residents of the Featherston home.

214 *Cleburne*, 473 U.S. at 442–43 ("[The intellectually disabled] range from those whose disability is not immediately evident to those who must be constantly cared for. . . . How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.").

215 Indeed, one can get a sense of the difficulties courts would encounter in credibly making such judgments when one reads one of the instances of Justice White himself making just such a judgment in the course of reviewing the rationality of the city's action. *See Id.* at 449 ("If there is no concern about legal responsibility with respect to other uses that would be permitted in the area . . . it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.").

216 *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000) ("[T]he incidence and success of facial challenges are not . . . governed by any general formula defining the conditions for successful facial challenges. Instead, the availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable *substantive* tests of constitutional validity.").

and other municipalities leeway to limit group homes depending on the severity of the would-be residents' disabilities led him intuitively to favor an as-applied approach. That choice, in turn, logically led him to the more record-intensive review he performed in *Cleburne*.

Yet at the same time, his seeming hesitancy to rely heavily on the characteristics of the would-be residents of the Featherston home caused his "as-applied" analysis to take on a more facial tinge: even if Justice Powell's clerk was not completely correct when she stated that nothing in that analysis turned on the particular capabilities of the persons who wished to occupy that home, his analysis remained heavily focused on the intellectually disabled as a group. As noted two paragraphs above, there may have been good reason for Justice White's reticence: after all, his suspect class analysis rested in part on concerns that courts could *not* competently evaluate the needs and appropriate treatment of different groups of intellectually disabled persons. Thus, the coherence of Justice White's as-applied analysis may have been undermined by his own recognition of courts' difficulty in making the judgments that analysis required.

Ultimately, whether or not his pending opinion in *Spokane Arcades* led Justice White to insist on an as-applied approach, and even whether or not that approach was internally coherent, matters less than the consequences of his choice to embrace that approach. As explained above, that choice led him to refer to the record. In turn, that reference led, logically if not inexorably, to the more muscular tone (and reality) of his analysis. But at the same time, such as-applied analysis did not reach full flower, perhaps because of White's caution about making the very judgments he cautioned courts against trying to make. Thus, his rational basis analysis took on a more facial tone, but retained the reference to the record that implied to readers that something more muscular than traditional rational basis review was afoot. As we know, that tone reverberated far beyond that case.²¹⁷

IV. LESSONS FROM A POSSIBLE ACCIDENT

It is interesting in itself that the *Cleburne* opinion we know may have resulted, at least in part, from the unintended dynamics of the Justices' interactions, or from their interest in other issues that collaterally, but crucially, affected *Cleburne* itself. *Cleburne* is an important case that has significantly influenced the evolution of the Court's constitutional doctrine. Realizing that it may have been even partially, or possibly, an "accident" adds to our understanding of our constitutional history.

²¹⁷ See *supra* note 12 (describing the aftermath of *Cleburne*).

But this insight matters also for what it might tell us more generally about the Court, the legal doctrines that emanate from it, and the public's understanding of those doctrines. A striking aspect of *Cleburne* is that, for generalists and non-lawyers, the story it tells is a coherent one. On this understanding of the case, the Court began by considering whether the intellectually disabled merited explicitly heightened scrutiny. After finding at least some support for that argument but nevertheless rejecting it, it then (logically, on this telling) considered whether the city's action was so irrational or infected with animus as to fail rational basis scrutiny. As one might expect on this telling, it conducted that search with the more careful eye warranted by the evidence it uncovered during its suspect class inquiry. In this more lay understanding of the case, the Court's sequencing of its analysis did not constitute the illogical or (as Justice Marshall charged) illegitimate deciding of constitutional questions unnecessary to the resolution of the case. Instead, that sequencing made complete sense.²¹⁸

The force of this narrative is buttressed by the reasons the Court gave for rejecting the intellectually disabled's claim to explicitly heightened protection. As is well known, the majority's analysis of the suspect class question was suffused by anxiety about the Court's proper role. It expressed concern that courts could not easily distinguish between benign differentiation and invidious mistreatment of the intellectually disabled.²¹⁹ It also worried that intrusive judicial review would dissuade states from treating the intellectually disabled differently, even when that differential treatment was benign, for example, as with special education.²²⁰ More generally, it noted the difficult medical and social science issues surrounding the entire area, and expressed concern that courts lacked the competence to second-guess such treatment.²²¹ And, in a final statement of anxiety about the argument for suspect class status, the Court wondered how, if it granted that

218 Indeed, this sequencing appears to have made sense to specialists as well. See, e.g., Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986) (characterizing Justice Marshall's dissent as, in turn, describing the majority's "second order rational basis" analysis in *Cleburne* as "occur[ring] in cases in which the law in question approaches, but falls short, of the . . . suspect classifications usually triggering strict scrutiny"); cf. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 41–46 (2010) (discussing the concept of "acoustic separation," in which the Court speaks to elites and the general public in ways that convey different messages to the two groups).

219 See *Cleburne*, 473 U.S. at 442–46 (acknowledging the existence of discrimination against the intellectually disabled, but refusing to "subject all government action based on that classification" to a higher scrutiny merely due to the chance that the action rises above simple differentiation).

220 See *id.* at 444–45.

221 See *id.* at 442–43 (describing the treatment under the law of the intellectually disabled as a "technical matter," involving myriad medical distinctions, which the legislature, "guided by qualified professionals," is better-equipped to address than the "perhaps ill-informed . . . judiciary").

status to the intellectually disabled, it could legitimately deny it to a bevy of other groups who could claim an analogous history of mistreatment and current social subordination.²²²

All told, these anxieties do more than buttress the Court's decision on the suspect class issue. They also reinforce the plausibility of a narrative in which insurmountable practical and jurisprudential obstacles prevented the Court from granting the intellectually disabled suspect class status as a general matter, but which nevertheless gave the Court reason to worry about that group's vulnerability to majoritarian oppression. In this narrative, the Court addressed that vulnerability through the heightened, but more granular, review it performed under the aegis of the rational basis standard.

But that (plausible) story is not the one told by the Justices' papers. Their papers instead reflect a divided Court, a bloc of which was deeply interested in rejecting the appellate court's suspect class analysis, and which was willing to compromise on rational basis analysis in order to secure a majority for their more intensely desired result. The contrast between this history—the real story of *Cleburne*—and its possible readings by persons outside the Court reminds us that court opinions, like any text, can take on meanings of their own, as readers impose their own assumptions, understandings, and order on the content.

This is as well-known an idea in law as it is in literature.²²³ In both fields, theories of interpretation insist that it is the text that matters, not the intentions of the authors who wrote (or, in the case of opinions, Justices who joined) that text.²²⁴ (To be sure, these theories are not unquestioned; indeed, even adherents to such theories might maintain that, while text is in fact what matters, evidence of the authors' intentions can help elucidate that textual meaning.)²²⁵ In the case of *Cleburne*, that text tells a seemingly

222 See *id.* at 445–46 (illustrating the difficulty in distinguishing between prejudice or discrimination suffered by the intellectually disabled and, say, the physically disabled or elderly).

223 See, e.g., T.S. ELIOT, THE SACRED WOOD AND MAJOR EARLY ESSAYS 30 (1998) (“Honest criticism and sensitive appreciation is directed not upon the poet but upon the poetry.”).

224 See, e.g., Tushnet, *supra* note 6, at 473 (“Lawyers and historians agree that almost everything we need to know about constitutional law is found in the Supreme Court’s published opinions. Internal Court documents, like Justice Thurgood Marshall’s papers, tell us something about the dynamics within the Court but relatively little about constitutional law.”). To be sure, it is possible to argue that the meaning of those opinions—that is, the law that emanates from them—can or should be derived in part by investigation of the Court’s internal papers, in a way analogous to the use of legislative history to determine the meaning of a statutory text. For a thorough consideration of this possibility, see Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311 (1999).

225 See, e.g., Vermeule, *supra* note 224 (concluding that, while understandably excluded on structural and institutional grounds, internal “judicial history” could still prove valuable for interpretive purposes); cf. E. D. HIRSCH, JR., VALIDITY IN INTERPRETATION 17 (1967) (claiming the “obvious fact” that a reader can never know an author’s subjective intentions “should not be allowed to

coherent story about the Justices applying one approach (suspect class analysis), and then, when that approach did not satisfactorily dispose of the case, turning to another (heightened rationality review). Indeed, it does so in a context where the Court recognizes the force of the plaintiffs' argument for suspect class status, finds itself unable to accept that argument, but ends up not only ruling for the plaintiffs, but doing so in a way that honors that first argument's core concern with protecting socially-subordinated groups. That story may have been an "accident," as this Article has defined that term (that is, as a consequence that was not intended by a majority of the Justices). But it had effect nonetheless.

If all this is true, then judicial doctrine may be more random than we think. If the need to garner majority support for all aspects of an opinion leads the authoring Justice to bob and weave—essentially, to logroll—so as to cobble together a majority coalition, then those maneuvers may combine to create a product that lacks full majority support for any of its components.²²⁶ Moreover, when the resulting opinion tells a seemingly coherent story—as the *Cleburne* opinion does—the distortion of the law may be even greater. In other words, when the components of an opinion combine to tell such a story, then the text as a whole may carry even more communicative content than the sum of its parts—even when that content, and indeed, even those component parts, lack active majority support. To the extent that underlying narrative is embraced by influential consumers of the Court's work-product—for example, by professors who strive to harmonize a set of cases into a coherent, understandable doctrine for their students—the distortion is carried forward and threatens to become "the law" those cases "stand for."

To be sure, this may not be the full story of *Cleburne*. The fact remains that there *was* majority support for Justice White's rejection of suspect class status for the intellectually disabled—at least eventually, when Justice Powell finally came around to recognizing the importance of a statement from the Court on that issue.²²⁷ But the application of more muscular rational basis review does appear to have been an afterthought—not just an afterthought to Justice White, who was prevailed upon to draft that final section of the opinion only on the insistence of Justice Powell, but also an afterthought to both Justices Rehnquist and O'Connor, who appeared to

sanction the overly hasty conclusion that the author's intended meaning is inaccessible and is therefore a useless object of interpretation").

226 As two scholars defined it, "logrolling" refers to the practice of "combining of unpopular proposals into one omnibus initiative that will command majority support." Robert D. Cooter & Michael D. Gilbert, *Reply to Hasen and Matsusaka*, 110 COLUM. L. REV. SIDEBAR 59, 60 (2010).

227 See Powell Papers, *supra* note 47, Letter from Powell, J. to White, J. (June 7, 1985); *id.*, Letter from Powell, J. to Brennan, J. (June 10, 1985).

prioritize ensuring that the Court remained committed to the initial draft's suspect class analysis.²²⁸

The muscular character of that rational basis review itself may also have been not fully intended. Instead, it may have flowed in part from Justice White's insistence on invalidating the city's action as-applied, rather than facially—an insistence that may have led him to rely on the record, which in turn suggested to readers that something more than traditional rational basis review was afoot. If White's insistence on as-applied review flowed from the impending release of his opinion in *Spokane Arcades*, then we are left to conclude that the happenstance of his other writing assignment ultimately influenced his tone in *Cleburne*. The other explanation for his insistence—his desire to allow governments maximum leeway to regulate the living situations of more profoundly disabled persons—presents an even bigger irony. As noted earlier, if the as-applied nature of his analysis pushed him to refer to the record, then his desire to provide government with *more*, not *less*, room to regulate resulted, ironically, in the more stringent tone of his rational basis analysis.²²⁹

These indicia of accidentalness matter, especially from the vantage point of 2017, when *Cleburne* has come to be understood not just as the death knell for suspect class analysis at the Court, but also as a milestone in heightened rational basis review. Today, such review is well-acknowledged by the lower courts and by commentators, if not by the Court itself²³⁰ (even if the Court still performs it). *Cleburne* really did point the way toward that new approach to equal protection. But in pointing toward that direction, the Court may simply have been shooing away a fly. In other words, the overall impact of the *Cleburne* opinion may constitute the biggest accident of all.

228 It bears repeating that both Justices Rehnquist and O'Connor reaffirmed their joins of Justice White's opinion very quickly after White circulated the new part of his opinion applying rational basis analysis. See *supra* note 137.

229 Indeed, as noted earlier, the irony is compounded by the fact that Justice White could not fully perform that as-applied analysis, since it would have required him to engage in the judicial line-drawing between different levels of disability that he had abjured in his suspect class analysis. See *supra* note 214 and accompanying text. But see *supra* note 208 (identifying parts of White's opinion that did note the particular degree of disability experienced by the would-be residents of the Featherston home).

230 But see *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in the judgment) (describing the rational basis review performed in *Moreno*, *Cleburne*, and *Romer* as “more searching”).