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THE MENTALLY RETARDED—A QUASI-SUSPECT CLASS?:
CLEBURNE LIVING CENTER V. CITY OF CLEBURNE

In recent years, the mentally retarded have been increasingly deinstitutionalized.¹ One major factor responsible for this trend has been the acceptance of the theory of normalization, which proposes that mentally retarded individuals must be exposed to normal life patterns and conditions in order to develop their full potential.² Mental health officials have attempted to implement normalization by the relocation of the mentally retarded into group homes.³ The group home format offers the benefits of family living through the placement of small groups of mentally retarded individuals into homes in residential areas.

The use of group homes has resulted in an explosion of litigation on behalf of the mentally retarded.⁴ *Cleburne Living Center v. City of Cleburne*,⁵ a recent decision from the Court of Appeals for the Fifth Circuit, reflects the problems encountered when the mentally retarded attempt to reenter a society which is laden with stereotypical attitudes and prejudices against them.⁶

This comment will consider the degree to which mentally retarded persons, as a group, merit special judicial protection under the equal protection clause.⁷ The development by the Supreme Court of an intermediate level of scrutiny will be examined, to show that the Court generally applies a heightened level of scrutiny to laws which discriminate against a class with certain characteristics. This comment will then identify those

1. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421 (1984). Congress has mandated the concept of deinstitutionalization in a series of statutes designed to encourage community living arrangements and services for persons with developmental disabilities. See The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1982).

2. See Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 499 (1976) [hereinafter cited as PRESIDENT'S COMMITTEE].

3. Bogin, *Group Homes for Persons with Handicaps: Recent Developments in the Law*, 5 W. NEW ENG. L. REV. 423 (1983).

4. Wald, *Basic Personal and Civil Rights*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 3 ("With an increasing acceptance of the principle of 'normalization,' future litigation probably will involve rights to community services . . . [and] also deal with the legal, personal, and civil rights of these special people as they move out into the community.").

5. 726 F.2d 191 (5th Cir.), *cert. granted*, 105 S. Ct. 427 (1984).

6. For example, at issue in *Cleburne Living Center* was a zoning ordinance that accorded different treatment to mentally retarded individuals because they were allegedly more disruptive or dangerous than non-mentally retarded individuals. *Id.* at 201.

7. The question of which equal protection standard to apply to the mentally retarded is one of first impression. *Id.* at 196.

criteria which historically have triggered heightened scrutiny, and which should guide the Court's analysis of a classification based upon mental retardation. Finally, this comment will examine the *Cleburne Living Center* decision,⁸ which attributes a "quasi-suspect" classification to the mentally retarded, and would apply intermediate scrutiny to any law which discriminates against that class.

I. BACKGROUND TO *Cleburne*: AN EQUAL PROTECTION ANALYSIS

The equal protection clause of the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁹ The intent behind this clause is to prevent legislatures from treating similarly situated people or activities discriminatorily.¹⁰

In the creation and application of laws, governments often categorize individuals sharing a personal trait for the purpose of imposing a burden on or providing a benefit to those individuals. Legislative categories are used to address problems in gross rather than requiring individual determinations based upon the merits of each case. By identifying those personal traits which a single group may have in common, a government can effectuate its intended purpose through the incorporation of the personal trait into legislation.¹¹

The legislature has often used the characteristic of mental retardation as convenient shorthand for the purpose of obtaining a governmental objective.¹² Equal protection of the law, however, demands that governmen-

8. See *infra* notes 56-60 and accompanying text.

9. U.S. CONST. amend. XIV, § 1.

10. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991-93 (1978). The Supreme Court has never interpreted this provision to require that a statute treat every person identically in all circumstances. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.") (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *United States v. Horton*, 601 F.2d 319, 324 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979) ("Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same.").

11. For example, assume the intended purpose of a law is to maintain discipline in a bar and that women, unlike men, are unable to prevent disturbances of the peace. The government can effectuate its intended purpose, i.e., maintaining the peace, by incorporating the common personal trait (female) into a law which allows men but not women to be bartenders. The law then burdens a particular group which shares the common characteristic of being female. See, e.g., *Goesaert v. Clery*, 335 U.S. 464 (1948) (upholding a law which denied bartender's licenses to all women except the wives or daughters of male owners of bars), *criticized in Craig v. Boren*, 429 U.S. 190 (1976) (where a gender-based differential in a state law prohibiting sale of alcohol to males under 21 and females under 18, was found to violate equal protection).

12. By equating mental retardation with the characteristics of dependency, irresponsibility, and dangerousness, a lawmaking body can simplify its statutes. See, e.g., 18 U.S.C. §

tal distinctions between individuals be based only upon those personal traits which identify individuals in terms of a meritorious or blameworthy character.¹³ In applying the equal protection clause of the fourteenth amendment to such classification-based statutes, courts have used differing levels of review¹⁴ depending upon the basis of the classification, the nature of the interest impaired by the classification, and the state interests offered in support of the classification.¹⁵ The threshold consideration of any equal protection claim is, then, the determination of the applicable standard of review.

A. *Standards of Judicial Review Under the Equal Protection Clause*

Traditionally,¹⁶ there have been two standards of review for equal protection claims.¹⁷ The first standard of review, the rational basis test, requires that the governmental classification bear any rational relationship to a governmental purpose that is not prohibited by the Constitution.¹⁸ Legislation is rarely invalidated under the rational basis test because the

922(h)(4) (1982) ("It shall be unlawful for any person who has been adjudicated as a mental defective or who has been committed to any mental institution to receive any firearm").

13. See *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[T]he basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing.").

14. The ultimate conclusion as to whether a statutory classification meets the equal protection guarantee depends largely upon the degree of review exercised by the judiciary. The court has the option of either deferring or independently determining the appropriateness of the legislature's choice of goals and the relationship of the classification to those goals. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 590 (2d ed. 1983) [hereinafter cited as NOWAK].

15. See *Plyler v. Doe*, 457 U.S. 202 (1982) (Marshall, J., concurring) (striking down a Texas statute denying free public education to illegal aliens).

16. "Traditionally" refers to the Warren Court era (1953-1968) during which the two-tier system of review emerged. The equal protection clause of the fourteenth amendment has undergone dramatic transformation in recent decades. Prior to the 1950's, in the absence of race discrimination, the Court interpreted the equal protection guarantee as imposing only a minimal restraint on the government's ability to use classifications in awarding benefits or imposing burdens. The review of government action under the clause was so restrained during this period that Justice Holmes referred to equal protection as "the usual last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927). But during the Warren era, especially in the 1960's, the equal protection guarantee became a prime tool for overturning legislation. See G. GUNTHER, *CONSTITUTIONAL LAW CASES & MATERIALS* 670-71 (10th ed. 1980).

17. "Standard of review," as a term of art, refers to the constitutional analysis by the judiciary, consisting of an examination of the relationship between the legislative purpose asserted and the statutory classification created.

18. See *McGowan v. Maryland*, 366 U.S. 420, 425-28 (1961) (In rejecting a claim that the exemptions of certain businesses from the Maryland Sunday closing law violated equal protection, a unanimous Court declared that, under the rational basis test, equal protection is violated only by classifications that are wholly arbitrary and bear no reasonable relation to any legitimate governmental purpose.).

Supreme Court defers to the legislature's choice of goals and its determination of whether the classification relates to those goals.¹⁹ The second and more rigorous standard of review, strict scrutiny, requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.²⁰ A compelling state interest has been described as one of so great a value as to justify the limitation of a fundamental constitutional value.²¹ The Court employs this strict standard whenever the challenged legislation sufficiently impairs a fundamental right²² or is based upon an inherently suspect classification.²³ The application of a strict standard of judicial review is almost always fatal to the legislation being tested.²⁴

Some members of the Supreme Court have indicated dissatisfaction with the inflexibility of this two-tiered analysis.²⁵ The Court has recently

19. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (New York law restricting type of methods used in pumping mineral wastes withstood due process challenge. Using the rational basis test, the Court stated that legislatures are presumed to have acted rationally, so that classifications are to be set aside only when a court finds no conceivable basis for the classification.). See also Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. Rev. 525, 526 n.3 (1980). But see *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (the Court invoked the due process clause of the fifth amendment to strike down a classification which allowed only households whose members were all related to one another to receive food stamps).

20. Nowak, *supra* note 14, at 524-25. In practice the courts have been reluctant to find an adequate compelling government justification for suspect classifications, i.e., those groups of individuals who share an immutable characteristic which is irrelevant to the ability of each individual within the group. See *infra* note 24 and accompanying text. See Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

21. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Supreme Court applied strict scrutiny to statute which used different criteria for ability of servicemen and service women to claim spouses as dependents).

22. The Court considers a right to be fundamental only if the right is explicitly or implicitly guaranteed by the Constitution. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (education not found to be among rights explicitly protected by Constitution). In addition to those rights explicitly identified in the Constitution, the Court has found other implicit fundamental rights: the right to marry, see *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); the right to vote, see *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); the right to interstate travel, see *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969); the right to freedom of association, see *William v. Rhodes*, 393 U.S. 23, 30-31 (1968).

23. The Court has recognized only three classifications as suspect: alienage, *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (state statute that denied welfare benefits to aliens violated equal protection clause); race, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (state statute that prohibited marriage between people of different races violated equal protection clause); and national origin, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restraints which curtail civil rights of a single racial group are immediately suspect.").

24. Only in *Korematsu*, 323 U.S. 214, has explicit discrimination against a suspect class been upheld after application of strict scrutiny.

25. Gunther, *supra* note 20, at 17. The two-tiered approach has been criticized as too rigid and mechanistic because it permits only two widely variant levels of scrutiny without protecting those rights which are between the rational and strict standard of review. See,

retreated from the rigid two-tiered test by creating an intermediate level of review.²⁶ Even though a majority of the Court refuses to expressly²⁷ adopt the intermediate standard, it has in reality applied such a standard under the guise of a minimum rationality test.²⁸ Numerous phrases have been used to describe the intermediate level of scrutiny.²⁹ The most common definition requires that the challenged classification be substantially related to an important state interest.³⁰ Under the intermediate standard of judicial review, the state must produce credible evidence demonstrating a substantial relationship between the statutory classification and the statutory goal.³¹ This new middle-tier approach allows the court to avoid finding a particular classification totally prohibited, or conversely, completely under legislative control. Such an approach indicates a major re-

e.g., *Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).

26. Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 Mo. L. Rev. 587, 614 (1983).

27. In *Plyler v. Doe*, 457 U.S. 202 (1982) (plurality opinion), a majority of the Court departed from the traditional equal protection analysis and applied an intermediate standard of review. The majority opinion did not convincingly explain, however, why the standard was appropriate, nor did it adhere to the traditional definition of intermediate review. *Id.* at 218-23. In addition, the opinion did not explicitly use the words "sensitive" or "quasi-suspect."

28. NOWAK, *supra* note 14, at 595; Comment, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence*, 132 U. PA. L. Rev. 1547, 1551-52 (1984). A majority of the current Supreme Court has refused to openly retreat from the bifurcated analysis for fear that this would usurp the legislative function. See *Rodriguez*, 411 U.S. at 31. However, in several instances the Court has used some form of intermediate scrutiny by refusing to blindly accept the interest asserted by the state and by testing the proffered state interest through independent analysis. See, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Massachusetts statute that prohibited distribution of contraceptives to unmarried persons was struck down because it was deemed to be only marginally related to the proffered objective.)

29. For an extensive list of phrases used by the Supreme Court in the intermediate standard of review, see Comment, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 409 n.17 (1983).

30. *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). The *Califano* court recognized the important government objective in lessening the disparity in economic conditions between the sexes, which had been caused by a long pattern of discrimination against women. Section 215 of the Social Security Act, which provided a higher level of monthly old-age benefits for retired female wage earners than for otherwise similarly situated male wage earners, was found to be substantially related to this objective.

The level of scrutiny involved and the intensity of the interests necessary to meet the test are still undetermined. It appears that intermediate scrutiny does not occupy any fixed point between rational basis analysis and strict scrutiny, but rather, changes according to the importance of the interest involved and the degree of the infringement on individual rights. See *Plyler*, 457 U.S. at 209.

31. *Plyler*, 457 U.S. at 209; *cf.* *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (rejecting a challenge to a statute requiring mandatory retirement of Foreign Service personnel at age sixty; applying a rationality standard and stating that a statutory classification that has any conceivable rational basis will pass equal protection analysis, even though the state never produces evidence supporting the classification).

treat from the all or nothing approach of the traditional rational basis-judicial deference and strict scrutiny-judicial invalidation dichotomy. A middle tier of review may allow interventionism on the part of the Court, because it can independently assess the relationship of the classification to the goal.

B. *Judicial Attempts to Define a Quasi-Suspect Class*

Although the majority of the Supreme Court has not explicitly recognized the existence of a quasi-suspect class,³² past decisions indicate that intermediate scrutiny will be applied to those classes which are comprised of certain distinguishing characteristics.³³ The characteristics which identify a class as quasi-suspect can be determined through an analysis of those classes which have been afforded the status of suspect and quasi-suspect.

1. Determining Suspectness

The Court presently recognizes the classifications of race, alienage, and national origin as suspect.³⁴ Traditionally, three characteristics have been considered in the determination of whether a class should be accorded suspect status.³⁵ First, the Court determines if the class has suffered a history of discrimination.³⁶ In evaluating this factor, the Court focuses on whether the resulting discrimination has created a discrete and insular minority which has been inhibited from participating in the political pro-

32. "Quasi-suspect" classes (sensitive classes) are those subject to an intermediate level of review under the equal protection clause.

33. The Court presently applies *de facto* intermediate scrutiny to laws which employ gender and illegitimacy classifications, giving rise to an unarticulated quasi-suspect classification. See *Craig v. Boren*, 429 U.S. 190 (1976); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

34. See *supra* note 23.

35. Many commentators stress the fact that the Supreme Court has never clearly articulated the criteria for determining suspectness. See, e.g., Comment, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1241 (1974) ("The Supreme Court has indicated with varying degrees of explicitness that certain classifications are or are not suspect. It has not, however, articulated the criteria used in deciding whether or not a classification is suspect.") (footnotes omitted). Thus, these three factors are not as well-defined as one might believe. However, numerous commentators have acknowledged the Court's reliance upon these factors in their analysis of whether a class is suspect. See, e.g., Comment, *supra* note 28, at 1552. The present list is by no means limited. See Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 356 (1949) ("[A suspect class] contents, at any particular time, will depend upon the area in which the principle of equality is struggling against the recurring forms of claims to special and unequal status . . .").

36. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) ("[C]entral purpose of Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

cess.³⁷ If such discrimination has occurred, judicial intervention is deemed to be justified to correct the failures of the legislative process.³⁸

Second, the Court considers whether the class has been repeatedly disadvantaged or stigmatized.³⁹ The concern of the Court is whether the classification of the group in and of itself creates a societal and individual reaction of inferiority and degradation.⁴⁰

Third, the Court determines whether the classification is based upon traits which are unchangeable or immutable.⁴¹ The focus on immutability is based upon the underlying principle that legal burdens should bear some relationship to individual responsibility or wrongdoing.⁴²

In addition to these three traditional characteristics of suspectness, the Court has also indicated two elements which may enter into the determination of suspect status. In *Massachusetts Board of Retirement v. Murgia*,⁴³ the Court, rejecting age as a suspect class, stated that a suspect class should be "unique" and based on "stereo-typed characteristics not truly indicative of [the class's] abilities."⁴⁴ In *Mathews v. Lucas*,⁴⁵ the

37. This criteria of suspectness is derived from Justice Stone's footnote in *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

38. For example, a class, while able to vote, may still be an "outside group," and in need of judicial intervention. Blacks can vote but may still be effectively excluded from the political process without certain judicial correction. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 n.85 (1973) (explanation of the failures of the legislative process in protecting minorities).

39. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (plurality opinion) (any statute which stigmatizes is an unconstitutional violation of equal protection) (dictum).

40. *Id.*

41. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (sex should be a suspect classification in part because it is an "immutable characteristic determined solely by the accident of birth"); but see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (refusing to extend strict scrutiny to a large, diverse and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts).

42. See *supra* note 13. However, the importance of immutability as a characteristic of suspectness should not be over-emphasized because alienage, which is a suspect class, is not an immutable characteristic.

43. 427 U.S. 307 (1976). In *Murgia*, the Court ruled that a state statute mandating retirement for uniformed state police officers at age 50, did not violate the equal protection clause of the fourteenth amendment. The Court based its holding on two factors. First, testimony clearly established that the risk of physical failure increases with age so that mandatory retirement at age 50 serves to remove from the force those whose fitness for police work has presumptively diminished with age. Discrimination was based, therefore, on a characteristic, i.e., age, that was, in fact, indicative of ability. Second, old age does not comprise a unique group because presumably all people will eventually belong to that group.

44. *Id.* at 313. The Court also rejected the elderly as a suspect class because it was not a discrete and insular group. *Id.*

Court rejected illegitimacy as a suspect class, stressing the additional requirement of degree or severity of the past discrimination. Justice Blackmun, drawing upon the definition of a suspect class set out in *San Antonio Independent School District v. Rodriguez*,⁴⁶ indicated that a suspect class must also be characterized by an "obvious badge" which is evidenced by a history of severe and pervasive legal and political discrimination.⁴⁷

2. Determining Quasi-Suspectness

The Court has extended quasi-suspect status to classifications based upon gender⁴⁸ and illegitimacy.⁴⁹ The Court is unclear as to how many of the suspect characteristics a class must possess in order to be afforded quasi-suspect status.⁵⁰ Determination of whether a classification is quasi-suspect, however, will likely depend upon whether the class shares at least some of the indicia of suspectness.⁵¹

45. 427 U.S. 495 (1976) (upholding a provision of the Social Security Act which imposed a more stringent burden of proving dependency for death benefits on some classes of illegitimate children).

46. 411 U.S. 1 (1973) (upholding under mere rational scrutiny a property tax system which favored the school aged children of the more affluent, because the system was not shown to discriminate against any definable class of poor people); *see infra* note 50.

47. *Mathews*, 427 U.S. at 506.

48. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976). In *Craig*, the Court ruled that an Oklahoma statute which prohibited the sale of beer to females under the age of eighteen and to males under the age of twenty-one constituted an invidious discrimination against males eighteen to twenty years of age, in violation of the equal protection clause. In its decision, a majority of the Court held that gender classification must be substantially related to an important state interest, and therefore treated gender as a quasi-suspect class. *Id.* at 204-10.

49. *See, e.g.*, *Mills v. Habluetzel*, 456 U.S. 91 (1982) (treating illegitimacy as de facto quasi-suspect by holding that a shorter time period for illegitimate children to bring suit was not substantially related to the legitimate goal of preventing fraudulent claims).

50. Commentators themselves do not agree on this point. Compare J. ELY, DEMOCRACY AND DISTRUST 250 n.64 (1980) (suggesting the presence of one of the indicia of suspectness may not indicate a reason for extreme judicial solicitude, but a combination of several factors makes a significant argument for protection of the group) with Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 906 (1975) ("[a] class may thus establish its eligibility for suspectness by qualifying under any one of these three criteria") (referring to *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), stating that strict scrutiny will apply to those groups which are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection for the majoritarian political process") (emphasis added).

51. For example, gender and illegitimacy share many of the same criteria which characterize racial classifications. Both gender and illegitimacy are similar to race in that the affected person has no more control over his birth status or sex than the black man has over the color of his skin. Sex, like race and national origin, is a visible and immutable biological characteristic that bears no necessary relation to ability. *Frontiero v. Richardson*, 411 U.S.

In *Plyler v. Doe*⁵² the Supreme Court broadened the boundaries of intermediate scrutiny. The majority opinion by Justice Brennan refused to recognize illegal aliens as a suspect class.⁵³ However, a heightened form of scrutiny was applied because the class shared some of the characteristics of suspectness, and more significantly, the class was denied an important governmental benefit.⁵⁴ Thus, *Plyer* indicates that the Court's identification of an important individual or societal interest in its equal protection analysis will broaden the scope of intermediate scrutiny.⁵⁵

II. *Cleburne Living Center v. City of Cleburne*⁵⁶—CREATION OF A QUASI-SUSPECT CLASS

Cleburne Living Centers, Inc. (CLC) acquired property within the city of Cleburne, Texas for the operation of a group home, classified as a level one intermediate care facility. It was planned that the facility would house thirteen mildly retarded men and women who would be provided jobs in the community and in a work activity center. The residents would receive twenty-four hour supervision from CLC staff members who would handle the cooking, cleaning, and teach the mentally retarded such skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent learning (such as how to read

677, 686 (1973). However, neither gender nor illegitimacy contains all of the elements of suspectness. See J. BARRON & C. DIENS, *CONSTITUTIONAL LAW: PRINCIPLES & POLICY* 603 (1982) (legislation affecting women does not impose stigma of inferiority); see also *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) ("illegitimacy does not carry an obvious badge as race and sex do"). Therefore, even though gender and illegitimacy do not contain all of the indicia of suspectness, they do contain enough in the proper degree to trigger intermediate review.

52. 457 U.S. 202 (1982). See *supra* note 31 and accompanying text.

53. *Plyler*, 457 U.S. at 220 (the status of being an illegal alien is not "an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action"). Note, however, that *legal* aliens are afforded suspect status. See *supra* note 23.

54. *Id.* at 218-22. This is the first indication that intermediate scrutiny is a sliding scale rather than a rigid point between rationality and strict scrutiny. The important benefit at stake in *Plyler* was education. Education is deemed an important interest because it affects the person's ability to function in society and its lack deprives the individual of any opportunity to advance personal or economic interests on the basis of individual merit. *Id.*

55. The Court's recognition of an important individual or societal interest in its equal protection analysis is significant. Even in those circumstances where the class alone does not contain enough of the characteristics of suspectness to trigger intermediate scrutiny, the Court may take into consideration the existence of an "important interest" which would be denied without the Court's judicial protection. The Court, in essence, combines those suspect criteria which do exist with the important interest at stake in order to justify the use of an intermediate form of scrutiny. The dissenting Justices, Burger, White, Rehnquist and O'Connor, denounce the use of an "important interest" in the equal protection analysis. "Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate purpose." *Plyler*, 457 U.S. at 247-49.

56. 726 F.2d 191 (5th Cir. 1984).

classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities."⁵⁷

The local law applicable to the CLC project is section 8 of the city of Cleburne's zoning ordinance, which controls the developmental use of the property. Although the zoning ordinance permits property purchased within zone R-3 to be used for hospitals, sanitariums, and nursing homes, it requires that a special use permit be obtained from the Cleburne City Council for a hospital for the insane or feeble-minded. CLC applied for a special use permit but the City Council denied its request. After exhausting administrative remedies, CLC brought suit challenging the ordinance under the equal protection clause of the fourteenth amendment.⁵⁸

In addressing this equal protection claim, the Court of Appeals for the Fifth Circuit held that the mentally retarded constitute a quasi-suspect class requiring an intermediate level of scrutiny.⁵⁹ Because the city failed to prove that the ordinance substantially furthers a significant governmental interest, the court held that the ordinance violated the equal protection clause.⁶⁰ The court's finding that the mentally retarded constitute a quasi-suspect class was based upon the premise that the mentally retarded share enough of the characteristics of suspectness to warrant heightened scrutiny.⁶¹ The following analysis will consider the justifications offered by the court for giving judicially protected status to the mentally retarded.

A. *Mentally Retarded: A Suspect Class?*

The standard of strict scrutiny was rejected in *Cleburne Living Center* because, the court held, this standard is reserved for classifications such as race, which are irrelevant to any proper legislative goal.⁶² The court stated that the classification of mental retardation is irrelevant to many policies, but noted that in some instances, a classification based upon

57. *Id.* at 194.

58. The basis of the equal protection claim is that the ordinance discriminates against the mentally retarded by requiring them to first obtain a special use permit before living in the home. *Id.*

59. *Id.* at 193.

60. *Id.*

61. *Id.* at 198. Note that the issue of whether the mentally retarded should be regarded as a quasi-suspect class is one of first impression. Thus, the court in *Cleburne Living Center* was guided by other equal protection decisions up to this point, rather than case law dealing specifically with the mentally retarded. "Although some district courts have discussed this issue, we can find no appellate opinions directly deciding the proper characterization of mentally retarded persons for Equal Protection analysis. Therefore, we face the issue as one of first impression." *Id.* at 196.

62. 726 F.2d 191, 198 (5th Cir. 1984) (citing *Plyler v. Doe*, 457 U.S. 202, 216-17, n.14 (1982)).

mental retardation is a relevant distinction.⁶³

There are several reasons for concluding that the court was correct in rejecting strict scrutiny as the appropriate standard of review. First, the court's rationale is in accordance with Justice Brennan's plurality opinion in *Frontiero v. Richardson*, in which a statute discriminating between the sexes was held to be unconstitutional.⁶⁴ According to *Frontiero*, the Court applies heightened scrutiny to protect those classes whose characteristics bear no relation to their ability to contribute to society.⁶⁵ It is clear that the mentally retarded's characteristics do have a direct relation to their ability to contribute and perform.⁶⁶ Therefore, the mentally retarded, as a class, fail to satisfy this characteristic of suspectness.

Furthermore, the present trend of Supreme Court decisions supports the court's rationale rejecting strict scrutiny as a standard of review.⁶⁷ In *San Antonio Independent School District v. Rodriguez*, the Court indicated a reluctance to expand the range of suspect classifications beyond those already recognized.⁶⁸

Finally, the characteristic of mental retardation is not an immutable, inherited trait and, therefore, should not qualify for strict scrutiny.⁶⁹ A suspect class is one characterized by an immutable characteristic deter-

63. For example, the court noted that learning difficulties may have an impact upon the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. *Id.*

64. 411 U.S. 677, 686 (1973). "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Since *Frontiero*, the Supreme Court has retreated from its identification of sex as a suspect class. See *supra* note 48 and accompanying text.

65. Both the present suspect classes—race, alienage, national origin, and the present quasi-suspect classes—illegitimacy and gender, are defined by characteristics which bear no relation to their ability to contribute and perform. See, e.g., *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("[T]he legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."). Since this element appears to be a common thread throughout the determination of both suspect and quasi-suspect status, it most likely will be given a greater degree of weight in the equal protection analysis.

66. Burt, *Beyond the Right to Habilitation*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 428 (differences between blacks and whites are purely social, whereas differences between many mentally retarded persons and other persons reflect true differences in endowment and potential).

67. Suspect classifications have become closed categories during the tenure of the Burger Court. J. BARRON & C. DIENS, *supra* note 51, at 475.

68. 411 U.S. 1 (1973) (refusing to recognize poor people as a suspect class).

69. The *Cleburne Living Center* court relied on expert testimony in finding that mental retardation is irreversible and, therefore, immutable. *Cleburne Living Center*, 726 F.2d at 198. However, empirical evidence exists that contradicts this finding.

mined *solely* by the accident of birth.⁷⁰ Although the majority of mentally retarded individuals have been retarded since birth,⁷¹ mental retardation does not occur exclusively through congenital birth defects.⁷² Therefore, mental retardation is not a characteristic determined *solely* by the accident of birth. Also, some forms of mental retardation are not immutable.⁷³ In the case of the mildly retarded, whose condition has been caused by circumstances of poverty, lack of developmental stimulation, and differing cultural values,⁷⁴ recent studies have indicated that improvement and stimulation of the environment increase the intelligence of such individuals, changing their legal status.⁷⁵ In addition, social perceptions⁷⁶ and clinical techniques of identification⁷⁷ can affect whether an individual is labeled mentally retarded. Thus, a change in either clinical definition or social perception can alter the individual's legal status.⁷⁸

B. *Mentally Retarded: A Quasi Suspect Class?*

In *Cleburne Living Center*, the court found that the mentally retarded

70. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

71. See C. BARLOW, *MENTAL RETARDATION AND RELATED DISORDERS* 3 (1978).

72. Accidents and diseases incurred during life may result in brain damage and impairment of the mental process. See Kramer, *The Right Not to Be Mentally Retarded*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 31-38; see also *Cleburne Living Center*, 726 F.2d at 192 n.2. ("[Mental retardation's] onset is sometimes from birth or during childhood.") (emphasis added).

73. *But see* Comment, *Zoning the Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 385 ARIZ. ST. L.J. 385, 401 n.109 (1979) ("[Although] the mentally retarded as a class may not fall within the phrase 'immutable inherited characteristics' . . . this . . . should bear no import upon the mentally retarded as a suspect class. The mentally retarded still suffer from an immutable trait that sets them apart from society and brands them as deviants.").

74. THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *MENTAL RETARDATION: THE KNOWN AND THE UNKNOWN* 36 (1976).

75. THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *MENTAL RETARDATION: PAST AND PRESENT* 145 (1977) [hereinafter cited as PAST & PRESENT] ("Epidemiological studies have consistently shown a 'disappearance' of mildly retarded persons in the adult years.") In *Cleburne Living Center*, the court identifies this as mere amelioration. It states, however, that a significant improvement in condition can remove the individual from the class of the mentally retarded. *Cleburne Living Center*, 726 F.2d at 198.

76. A person is labeled mentally retarded when he is not able to conform to the intellectual and adaptive standards set by society. PAST & PRESENT, *supra* note 75, at 147.

77. "Mental retardation, as an inclusive concept, is currently defined in behavioral terms involving these essential components: intellectual functioning, adaptive behavior and age of onset. . . . Within this broad functional definition, the deficits indicated in a diagnosis of mental retardation may or may not be permanent and irreversible." *Id.* at 147. (emphasis added).

78. For example, in 1973 the American Association on Mental Deficiency lowered the boundary lines of mental retardation by two standard deviations, thereby abolishing the classification of borderline mental retardation. Therefore, millions of American citizens were relieved of the burden of being presumed mentally retarded. Dybwad, *Beyond the Right to Habilitation*, in PRESIDENT'S COMMITTEE, *supra* note 2, at 439.

share enough characteristics of suspectness to warrant heightened scrutiny.⁷⁹ The court stated that the mentally retarded historically have been the subject of unfair and grotesque mistreatment,⁸⁰ and have been excluded from the political process.⁸¹

There is ample reason for finding that the mentally retarded have experienced a history of unequal treatment.⁸² Although the term "mentally retarded" denotes a group of people who have the common characteristic of below average intellectual functioning,⁸³ this classification does not mean that all of those individuals are similar in all areas of their functioning.⁸⁴ This misconception has created a history of severe and pervasive discrimination⁸⁵ against the mentally retarded.⁸⁶

In addition to finding a history of mistreatment, the court contended that the mentally retarded are a discrete *and* insular minority.⁸⁷ It is clear that the mentally retarded are a discrete minority because they have been rendered politically powerless by statutes in many jurisdictions.⁸⁸

79. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 197 (5th Cir. 1984). The court includes the existence of immutability in its finding that the mentally retarded are a quasi-suspect class, but this contention may not be in accordance with existing precedent. See *supra* notes 69-78 and accompanying text. The nonexistence of immutability, however, does not prevent the application of heightened scrutiny. See *supra* note 42.

80. *Cleburne Living Center*, 726 F.2d at 197 (citing O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 30 (1956)). The court states that the mentally retarded have been universally denied admittance to public schools. In addition, euthanasia and compulsory sterilization were common practices during the first half of the century. See *Buck v. Bell*, 274 U.S. 200 (1927) (upholding Virginia compulsory sterilization law).

81. The court finds that most states disqualify the mentally retarded from voting and few political organizations exist to represent the mentally retarded. *Cleburne Living Center*, 726 F.2d at 197.

82. See *supra* notes 36-38 and accompanying text.

83. See C. TELFORD & J. SAWREY, *THE EXCEPTIONAL INDIVIDUAL* 247 (1977).

84. The variance among mentally retarded persons in their intellectual functioning and adaptive behavior has led the American Association on Mental Deficiency (AAMD) to subdivide the mentally retarded into four classifications: borderline, mild (educable), moderate (trainable), and severe and profound (totally dependent). *Id.* at 163. The gap of intelligence between the profoundly retarded and the mildly retarded is greater than the gap between the mildly retarded and the normal person. *Id.* The mild and moderate classifications comprise approximately 95 percent of the entire retarded population. *Id.* at 220-21.

85. In addition to the examples given by the court, see *supra* notes 80-81, most states proscribe marriage where one of the parties is mentally retarded. See, e.g., KY. REV. STAT. ANN. § 402.020(1) (Baldwin 1970). A number of states prohibit mentally retarded people from entering into contracts. See, e.g., GA. CODE ANN. § 13-3-24 (1982).

86. "A group of persons labeled 'mentally retarded' in this society has been subjected to discrimination as brutal and dehumanizing as were imposed on the slave population." Burt, *supra* note 66, at 426.

87. See *Romeo v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1982) (dictum) ("the mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude"), *vacated and remanded*, 457 U.S. 307 (1982).

88. See, e.g., VA. CODE ANN. §§ 8.01-2, -338 (Repl. Vol. 1984) (disqualifying the mentally

However, the existence of surrogate voices for the mentally retarded may affect the requirement of insularity. In *Association for Retarded Citizens of North Dakota v. Olson*,⁸⁹ it was held that the mentally retarded are no longer a politically powerless group because their interests now are represented in the political process.⁹⁰ There are presently four major political organizations which play a prominent role in protecting the rights of the mentally retarded,⁹¹ but whether the existence of these organizations will disqualify the mentally retarded as a insular minority is unknown.⁹² Their presence does represent a significant factor in determining whether the mentally retarded are being excluded from the political process.

The presence of a stigma is another characteristic of suspectness which can trigger intermediate scrutiny,⁹³ however, the court in *Cleburne Living Center* fails to consider this aspect in its equal protection analysis.⁹⁴ The classification of an individual as mentally retarded is generally believed to have a stigmatizing affect which "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁹⁵

C. *Mentally Retarded: Denial of Important Benefits*

Intermediate scrutiny as a standard of review may be applicable even though the particular class does not contain a sufficient number or degree

retarded from jury service); WIS. CONST. art. 3, § 2 (disqualifying the mentally retarded from voting).

89. 561 F. Supp. 473, 490 (D.N.D. 1982) (holding that the mentally retarded should be reviewed under intermediate scrutiny rather than strict scrutiny because the mentally retarded are not a politically powerless group; furthermore, the characteristics of mentally retarded persons are often indicative of their true ability).

90. *Id.* at 490 ("This fact is evidenced by the sweeping legal reforms concerning the rights of the mentally retarded that have occurred in nearly every state as well as by the enactments of federal legislation aimed at improving the conditions of the handicapped.")

91. The American Association on Mental Deficiency (AAMD), the Council for Exceptional Children (CEC), the Joseph P. Kennedy, Jr. Foundation, and the National Association for Retarded Citizens (NARC). PAST & PRESENT, *supra* note 75, at 63.

92. Effective representation of the mentally retarded by a political organization is the key to determining whether the organization will cause the mentally retarded to be disqualified as an insular minority. The *Cleburne Living Center* court discredits the importance of political organizations by suggesting that they have little power. *Cleburne Living Center*, 726 F.2d at 198. Although the total impact is hard to determine, it is clear that the organizations are a growing force.

93. See *supra* note 39 and accompanying text.

94. The court relies only upon the combination of historical prejudice, political powerlessness, and lack of immutability to justify intermediate scrutiny. *Cleburne Living Center*, 726 F.2d at 198.

95. Burt, *supra* note 66, at 429; see also *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 293-95 (E.D. Pa. 1972) (noting the stigma which our society attaches to the label of mental retardation).

of suspect criteria.⁹⁶ The court in *Cleburne Living Center*, relying upon the decision in *Plyler v. Doe*,⁹⁷ justifies the use of intermediate scrutiny by stating that the Cleburne ordinance withholds from the mentally retarded the important governmental benefit of group home living.⁹⁸ In *Plyler*, education was deemed an important benefit because it affected the person's ability to function in society; without an education, the individual was deprived of the opportunity to advance.⁹⁹ Similarly, group home living for the mentally retarded is necessary to implement the theory of normalization, which will enable the individual to develop to his full potential.¹⁰⁰ Because group home living is necessary to the development and improvement of mentally retarded individuals, its denial, coupled with those suspect criteria which characterize the mentally retarded, should trigger intermediate scrutiny.

III. CONCLUSION

The term "mentally retarded" covers a diverse group of people who vary enormously in talent, personality, and aptitude. The laws and perceptions of our society, however, evidence a misconception concerning the heterogeneity of this group. Although there is a small group of mentally retarded people who will never be capable of a meaningful existence outside an institutional setting, the vast majority of the mentally retarded are capable of functioning within society.

The present trend towards reintegration of the mentally retarded into society has been hindered by prejudicial and archaic laws. Equal protection of the law requires that those who are similarly situated not be treated differently. Although classification alone does not deprive a group of equal protection, laws which incorrectly classify and burden individuals do infringe upon their constitutional rights. It is legally impermissible to treat the mildly and moderately retarded persons in a manner similar to the profoundly and severely retarded; the capacity of each person should be judged individually before that person is denied civil and legal rights.

An increased form of judicial scrutiny is required to successfully challenge laws which misclassify and unduly burden the mentally retarded. Because classifications based upon mental retardation are sometimes an irrelevant distinction, a heightened form of scrutiny is justified. On the other hand, the uncertainty as to whether mental retardation is absolutely immutable, and the presence of surrogate voices, weigh against the

96. See *supra* note 51 and accompanying text.

97. 457 U.S. 202 (1982).

98. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 199 (5th Cir. 1984).

99. See *supra* note 54.

100. See *supra* notes 2-3 and accompanying text.

use of strict scrutiny. An intermediate standard would accord to the judiciary the flexibility to invalidate those laws which are not based upon relevant distinctions.

The Supreme Court has not indicated the proper degree or number of suspect criteria required to trigger an intermediate standard of review. The Court should consider whether the mentally retarded through their surrogate representation will be able to use the legislative process to overcome the stereotypes connected with the label "mentally retarded." Since it is unlikely that the present legislative representation alone will give adequate protection, judicial protection should be afforded to the mentally retarded.

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