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### Constitutional Law—Equal Protection—Zoning Ordinance Excluding Home for the Mentally Retarded Fails the Rational Basis Test

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CONSTITUTIONAL LAW — EQUAL PROTECTION — ZONING ORDINANCE EXCLUDING HOME FOR THE MENTALLY RETARDED FAILS THE RATIONAL BASIS TEST. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

In July 1980 Jan Hannah purchased a one-story, 2510 square foot frame house at 201 Featherston Street in Cleburne, Texas. She intended to lease the house to Cleburne Living Center, Inc. (CLC), a Texas corporation organized to establish group homes for the mentally retarded.<sup>1</sup> CLC planned to place thirteen moderately retarded adults and two live-in staff members in the house. This would be the first group home for the mentally retarded in Cleburne. The house was located in a residential area, zoned as an R-3 district.

Under the Cleburne zoning ordinance, an R-3 zone allowed apartments, hospitals, nursing homes, fraternity houses, and halfway houses for juvenile delinquents and paroled felons.<sup>2</sup> Homes for the “insane and feeble-minded” were not permitted unless a special use permit was obtained.<sup>3</sup> The City Council denied CLC’s application for a special use permit after considering the following factors: (1) The small size of the house in relation to the number of proposed residents; (2) the location of a junior high school across the street; (3) the fears of elderly neighbors; (4) the home’s location on a five hundred-year flood plain; (5) concern about the legal responsibility of CLC for any actions the retarded residents might take; and (6) the negative attitudes of the majority of property owners within two hundred feet of the house.<sup>4</sup>

After exhausting the administrative remedies, CLC and Jan Hannah sued for injunctive relief in federal district court,<sup>5</sup> arguing that the zoning ordinance violated the fourteenth amendment equal protec-

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1. CLC has been renamed Community Living Concepts, Inc. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3252 n.1 (1985).

2. CLEBURNE, TEX., ZONING ORDINANCE § 8 (1965).

3. CLEBURNE, TEX., ZONING ORDINANCE § 16 (1965). Section 16 provided that a special use permit may be issued by “the Governing Body, after public hearing, and after recommendation by the Planning Commission.” Special use permits had a one-year duration and each applicant was required to obtain the signatures of the property owners within two hundred feet of the proposed use.

4. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 194 (5th Cir. 1984). These factors were considered at a public hearing held by the Cleburne Planning and Zoning Commission on October 14, 1980.

5. *Cleburne Living Center v. City of Cleburne*, No. CA3-80-1576-F (N.D. Tex. April 16, 1982).

tion rights of the mentally retarded. The district court agreed that the City was discriminating against the retarded, but found that a "rational basis" existed for the City's action. The district court held that the City's denial of a special use permit was rationally related to legitimate concerns for public safety and preservation of the tranquility of the residential neighborhood.<sup>6</sup>

CLC appealed to the United States Court of Appeals for the Fifth Circuit.<sup>7</sup> The Fifth Circuit overruled the district court and held that the mentally retarded are a "quasi-suspect" class for purposes of equal protection review. Legislative classifications based on mental retardation would therefore have to be subjected to an intermediate or heightened level of judicial scrutiny. The Fifth Circuit held that the zoning ordinance was unconstitutional on its face and as applied because it failed to substantially further any important government interest.<sup>8</sup>

The City of Cleburne petitioned the United States Supreme Court for review of the Fifth Circuit's decision. After the Fifth Circuit denied a rehearing en banc, with six judges dissenting,<sup>9</sup> the Court granted certiorari on November 13, 1984.<sup>10</sup> On July 1, 1985, the Court affirmed in part and vacated in part the decision of the Fifth Circuit.<sup>11</sup> The Court held that the Fifth Circuit erred in conferring quasi-suspect status on the mentally retarded. The Court ruled that legislation that distinguishes between the mentally retarded and others need only be rationally related to a legitimate governmental purpose.<sup>12</sup> The Court held, however, that the zoning ordinance, as applied to CLC, was unconstitutional on the basis that the special use permit requirement was not rationally related to any legitimate interest of the City of Cleburne.<sup>13</sup>

Advocacy for the rights of the mentally retarded is a recent development in constitutional litigation. Prior to the latter half of the twentieth century, the rights of the mentally retarded were largely ignored.<sup>14</sup> In the middle ages, many viewed retardation as having a supernatural or even demonic origin.<sup>15</sup> Fear and hatred, spurred by ignorance of the

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6. *Id.*

7. *City of Cleburne*, 726 F.2d at 191.

8. *Id.* at 200.

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

10. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 427 (1984).

11. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

12. *Id.*

13. *Id.*

14. Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 43 U. CIN. L. REV. 679 (1974); Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976).

15. Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on*

causes of retardation, persisted into the colonial American period. The Puritans are believed to have burned or hanged the retarded as witches.<sup>16</sup> On occasion, colonists kidnapped the retarded in the night and left them on the outskirts of strange towns.<sup>17</sup> However, such practices were probably representative of the extreme. Ample evidence exists that mental retardation was generally tolerated if kept "out of sight and mind" in the confines of the family home.<sup>18</sup>

In the 1800's, a "poorhouse" system was developed to house and, purportedly, treat the retarded, destitute, sick, and insane. The real incentive was to protect society from its undesirables.<sup>19</sup> State governments began addressing the needs of the mentally retarded in the first half of the twentieth century. Large, poorly financed institutions were built in rural areas.<sup>20</sup> These facilities were supposedly built to treat the retarded, but rarely did they offer more than sustenance.<sup>21</sup> During this period, many in the medical community believed that the mentally retarded had a biological propensity for crime and disease. Accordingly, state legislatures quickly began passing laws restricting marriage<sup>22</sup> and promoting compulsory sterilization.<sup>23</sup> Mentally retarded children were denied educational opportunities.<sup>24</sup> Most states passed laws that denied

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*Community Homes for Retarded Persons*, 31 STAN. L. REV. 767, (1979); Mason & Menolascino, *supra* note 14, at 127; Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 35-36 (President's Committee on Mental Retardation, 1976).

16. Lippincott, *supra* note 15, at 769.

17. Burgdorf & Burgdorf, Jr., *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, 885 (1975).

18. Herr, *supra* note 14; S. VITELLO & R. SOSKIN, MENTAL RETARDATION: ITS SOCIAL AND LEGAL CONTEXT 24 (1985).

19. A. DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 25 (2d ed. 1949); Mason & Menolascino, *supra* note 14, at 132-38.

20. Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 306 (M. Kindred ed. 1976).

21. Mason & Menolascino, *supra* note 14, at 132-38; *see also* Mason & Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY ILL 93 (R. Kugel & W. Wolfensberger eds. 1969).

22. Burgdorf & Burgdorf, Jr., *supra* note 17, at 861 (in the late 1950's, 28 states had enacted statutes prohibiting marriage when one person was retarded); *see also* Chamberlain, *Current Legislation - Eugenics and Limitations of Marriage*, 9 A.B.A. J. 429 (1923).

23. *See* Buck v. Bell, 274 U.S. 200 (1927); *see also* O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20 (1956) (32 states have had statutes providing for the sterilization of retarded persons); Note, *Human Sterilization*, 35 IOWA L. REV. 251, 253 n.12 (1950) (20 states passed compulsory sterilization laws from 1926-1936).

24. *See* Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975); Pennsylvania Ass'n. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa 1971).

the retarded the right to vote.<sup>25</sup>

The 1950's and 1960's were a humanistic renaissance for the mentally retarded. The sociological theories of "normalization," "habilitation"<sup>26</sup> and "deinstitutionalization" became, and still are, predominant in the medical community.<sup>27</sup> A major goal of these contemporary theories has been to assimilate the retarded into the mainstream of society so they might have an opportunity to learn life skills, contribute to society, and otherwise enhance their lives.<sup>28</sup>

The federal government responded quickly to this new thinking. President John F. Kennedy's creation of a President's Committee on Mental Retardation in 1963 initiated more than a decade of legislative reform and judicial activism.<sup>29</sup> In the next fifteen years, Congress passed a series of laws that focused on deinstitutionalization and the promotion of community-based services.<sup>30</sup> In the 1970's, the courts' traditional hands-off policy toward state laws and administrative regulations affecting the retarded radically changed. The courts addressed such issues as the right to treatment and protection from harm in state institutions,<sup>31</sup> the right to treatment in the least restrictive environ-

25. Note, *Mental Disability and The Right to Vote*, 88 YALE L.J. 1644 (1979).

26. The term "habilitation" has been described as a process that "assists the resident to acquire and maintain those life skills which would enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency." *Wyatt v. Stickney*, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

27. Mason & Menolascino, *supra* note 14, at 136-48.

28. See generally Mason & Menolascino, *supra* note 14; Comment, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 WAYNE L. REV. 1349 (1982); Nirje, *The Normalization Principle and Its Human Management Implications*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 179 (President's Committee on Mental Retardation, 1969).

29. See generally Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process*, 31 STAN. L. REV. 679 (1979).

30. In 1963, Congress passed the Mental Retardation Facilities and Community Mental Health Centers Construction Act, Pub. L. No. 88-164, 77 Stat. 284 (codified as amended at 42 U.S.C. §§ 2661-2697(b) (1976)). The Act provided funds for the establishment of community facilities and mental health centers for the retarded. The Act was amended in 1970 to provide community-based care for persons with developmental disabilities, and was renamed the Developmental Disabilities Services and Facilities Construction Act. Pub. L. No. 91-517, 84 Stat. 1325 (1970). See also The Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (codified at 42 U.S.C. §§ 6000-6081 (1967 & Supp. III 1979)); sec. 504 of the Rehabilitation Act Amendments of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-796; (1976 & Supp. III 1979)) (conferring comprehensive substantive rights and access to facilities).

31. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (residents of state institutions have at minimum a constitutional right to "reasonable care and safety, reasonably non-restrictive confinement conditions, and such training as may be required by these interests."); see also *Welsch v. Likins*, 373 F. Supp. 486 (D. Minn. 1974), *further proceedings*, 550 F.2d 1122 (8th Cir. 1977);

ment,<sup>32</sup> and the right to public education.<sup>33</sup> The decisions reflected a shift of thinking from advocacy for improved treatment in institutions to placement in community group homes.<sup>34</sup>

Community resistance to the placement of retarded persons in residential neighborhoods has been, however, a major impediment to deinstitutionalization.<sup>35</sup> Zoning ordinances and private restrictive covenants<sup>36</sup> have been the primary devices used to bar group homes for the mentally retarded. Zoning ordinances can bar the placement of group homes in residential areas in three ways: (1) Explicit exclusion in the language of the ordinance; (2) exclusion by single-family classification; and (3) requirement of a special use or conditional use permit.<sup>37</sup>

Advocates of group homes for the mentally retarded have used a number of arguments to overcome zoning barriers. Assertions that a small group of retarded persons constitute a single-family unit have been successful in some jurisdictions.<sup>38</sup> Efforts to reform legislation have been quite successful. Twenty-two states have enacted statutes

Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973), *consent judgment approved sub nom.* New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

32. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1314-20 (E.D. Pa. 1977); *see* O'Connor v. Donaldson, 422 U.S. 563 (1975); Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974).

33. Mills v. Bd. of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972); *see* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

34. A community group home (also referred to as a community residence, family home and foster care facility) is a single-family dwelling in a residential area. A group home generally houses a small number of disabled residents with a live-in staff and 24-hour supervision. *See generally* Comment, *supra* note 28; Note, *Zoning the Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or the Fermentation [sic] of Wisdom*, 1979 ARIZ. ST. L.J. 385 (1979); Comment, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 OHIO N.U.L. REV. 64 (1980).

35. *See generally* Lippincott, *supra* note 16; Comment, *supra* note 28; Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1980).

36. *See generally* Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421 (1984).

37. Yohalem, *Exclusionary Zoning*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1676 (P. Friedman ed. 1979). *See also* R. WRIGHT & S. WRIGHT, LAND USE IN A NUTSHELL 133-95 (2d ed. 1985).

38. *See* Philadelphia Center for Dev. v. Zoning Hearing Bd., 492 A.2d 1191 (Pa. Commw. 1985); Freedom Township v. Portage City Bd. of Mental Retardation, 16 Ohio App. 3d 387, 476 N.E.2d 360 (1984); City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So. 2d 259 (La. App. 1981); Incorporated Village of Freeport v. Ass'n for the Help of Retarded Children, 406 N.Y.S.2d 221 (1977). *But cf.* City of Kenner v. Normal Life of Louisiana, 465 So. 2d 82 (La. App. 1985) (statutory inclusion of community group homes in single-family definition was not intended to override zoning ordinance definition of a single-family unit).

that supersede zoning ordinances that prohibit the placement of group homes in residential areas.<sup>39</sup> The argument that sovereign immunity exempts state-operated group homes from local zoning ordinances has also been raised with some success.<sup>40</sup>

Zoning ordinances restricting group homes have been frequently challenged on constitutional grounds.<sup>41</sup> Due process, the right to travel, and equal protection arguments have been raised.<sup>42</sup> The equal protection clause has been the driving force behind constitutional arguments made by advocates of the rights of the mentally retarded.<sup>43</sup> A major issue in the case law has been the level of judicial scrutiny the courts should apply to equal protection cases involving the mentally retarded.<sup>44</sup>

United States Supreme Court decisions in the past thirty years have produced three standards of scrutiny for courts to apply in analyzing equal protection claims. The standards of review are generally described as "rational basis," "intermediate or heightened scrutiny," and "strict scrutiny."<sup>45</sup> The level of scrutiny that the courts apply depends on either the characteristics of the class discriminated against, or on

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39. See Comment, *supra* note 28, at 1357 n.60 for a list of statutes.

40. See *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571 (Fla. Dist. Ct. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976). *But cf.* *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218 (1984), *appeal dismissed*, 105 S. Ct. 57 (1984) (zoning ordinance defining "family" as no more than four persons whether related or not, did not unconstitutionally discriminate against the mentally retarded). See generally Comment, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971).

41. See *Nectow v. Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (zoning is a constitutional exercise of the police power if reasonably related to the health, safety, morals or general welfare of the community). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (communities can exclude groups of unrelated citizens from a single-family residential neighborhood). *But cf.* *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (a zoning ordinance which defines "family" to include only a few categories of unrelated individuals is invalid).

42. See generally Commentary, *supra* note 34, at 80-82; *Yohalem*, *supra* note 37, at 1679-82.

43. See *Yohalem*, *supra* note 37, at 1680; *Burgdorf & Burgdorf, Jr.*, *supra* note 17, at 899.

44. See *Burgdorf & Burgdorf, Jr.*, *supra* note 17, at 900-02.

45. See generally *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (under rational basis review, legislation that is simply unwise or unartfully drawn will not be invalidated as unconstitutional); *Craig v. Boren*, 429 U.S. 190 (1976) (to withstand constitutional challenge, gender-based legislative distinctions must serve important governmental objectives and must be substantially related to the achievement of those objectives); *Loving v. Virginia*, 388 U.S. 1 (1967) (racial classifications must be subjected to the most rigid scrutiny, and if such a classification is ever to be upheld, it must be necessary to the accomplishment of some permissible state objective independent of the racial discrimination).

whether a fundamental constitutional right is involved.<sup>46</sup>

The rational basis test is the minimal and most widely applied standard of review. Legislation must only be rationally related to a legitimate government interest to pass constitutional muster. Legislation subjected to rational basis review carries a presumption of constitutionality in deference to legislative expertise.<sup>47</sup> Strict scrutiny, on the other hand, is properly applied only if a fundamental right is denied or if a "suspect class" is burdened. Legislation analyzed under the strict scrutiny standard must have a compelling purpose and be precisely tailored to achieve that purpose. Legislation subjected to this in-depth level of judicial scrutiny is burdened with a near presumption against constitutionality.<sup>48</sup>

The Supreme Court has not set forth precise guidelines for determining whether a classification is suspect. Rather, the Court has repeatedly identified several indicia of a suspect class: (1) "Immutable characteristic determined solely by accident of birth";<sup>49</sup> (2) whether the class is a "discrete and insular minority";<sup>50</sup> (3) whether the class has been subjected to a "history of purposefully unequal treatment";<sup>51</sup> and (4) whether the class has been relegated to a "position of political powerlessness."<sup>52</sup> Suspect classes have been identified based on race,<sup>53</sup> alienage,<sup>54</sup> and national origin.<sup>55</sup>

The intermediate or "heightened" level of scrutiny evolved in the 1970's in response to judicial recognition of the rigidity of a two-tiered system of review.<sup>56</sup> Intermediate scrutiny requires that a statutory classification be "reasonable, not arbitrary, and must rest upon some

46. Equal protection review in the context of fundamental rights is beyond the scope of this Note. See *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to vote). See also Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

47. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

48. See *Rodriguez*, 411 U.S. at 16; *Dunn*, 405 U.S. at 332 (1972); see also Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 917-18 (1980).

49. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972).

50. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

51. *Rodriguez*, 411 U.S. at 28; see *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

52. See *Rodriguez*, 411 U.S. at 28; *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

53. *Loving*, 388 U.S. at 1 (1967); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

54. See *Matthews v. Diaz*, 426 U.S. 67 (1976); *Graham*, 403 U.S. at 365 (1971).

55. *Hernandez v. Texas*, 347 U.S. 475 (1954); *Oyama v. California*, 332 U.S. 633 (1948).

56. See *Plyler*, 457 U.S. at 231; see generally Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777 (1981); Burgdorf & Burgdorf, Jr., *supra* note 17, at 902-08.



ground of difference having a fair and substantial relation to the object of the legislation . . . ."<sup>57</sup> To merit intermediate scrutiny, the classification burdened by the legislation must be a "quasi-suspect" class. A quasi-suspect class must possess one or more of the indicia of a suspect class.<sup>58</sup> Thus far, only classifications based on gender<sup>59</sup> and illegitimacy<sup>60</sup> have been deemed quasi-suspect by the Supreme Court.<sup>61</sup>

Prior to *City of Cleburne v. Cleburne Living Center*, the courts were uncertain and, consequently, inconsistent on the issue of whether the mentally retarded qualify as a suspect or quasi-suspect class. Few reported district court cases addressed the issue and *City of Cleburne* was a case of first impression in the federal courts of appeal.<sup>62</sup> The district court cases holding that the retarded are a suspect or quasi-suspect class applied a variety of rationales. Persuasive arguments were minority status,<sup>63</sup> political powerlessness,<sup>64</sup> a history of legislative neglect,<sup>65</sup> and the stigma of the label "retarded."<sup>66</sup>

One district court held that the mentally retarded are a quasi-suspect class because the retarded suffer from discrimination not related to actual disabilities.<sup>67</sup> Thus, a more searching review of legislation affecting them is necessary.<sup>68</sup> However, the court asserted that strict scrutiny is inappropriate because legislative discrimination is often legitimately based on the reduced ability of the retarded to function in everyday life.<sup>69</sup> Two district courts have held that the mentally re-

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57. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

58. *See Trimble v. Gordon*, 430 U.S. 762, 767 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1090 (1978).

59. *Reed*, 404 U.S. at 76; *Craig*, 429 U.S. at 197.

60. *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Trimble*, 430 U.S. at 762.

61. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 312-14 (1976) (age is not a suspect classification); *Rodriguez*, 411 U.S. at 28, 55 (wealth is not a suspect classification).

62. *City of Cleburne*, 726 F.2d at 191. *But cf.* *Fowler v. United States*, 633 F.2d 1258 (8th Cir. 1980). Rational basis review was applied to a legislative classification of the mentally retarded under the United States Government Civil Service regulations. (The case did not address the constitutional issue of what level of judicial scrutiny should be applied to the mentally retarded).

63. *Frederick v. Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976).

64. *Id.*

65. *Fialkowski v. Shapp*, 405 F. Supp. 946, 959 (E.D. Pa. 1975).

66. *Id.*

67. *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), *aff'd on other grounds*, 713 F.2d 1384 (8th Cir. 1983).

68. *Id.* at 490.

69. *Id.*; *see also Frontiero*, 411 U.S. at 686 (1973); *Doe v. Colautti*, 592 F.2d 704, 711 (3d Cir. 1979).

tarded are not a suspect class.<sup>70</sup> The courts gave no reasons for this determination except to state that prior decisions had not identified the retarded as a suspect class. The two courts did not address whether the retarded qualified as a quasi-suspect class. Two other district courts have held that the mentally retarded are not a quasi-suspect class.<sup>71</sup> In *Anderson v. Banks*<sup>72</sup> the district court summarily disposed of the equal protection issue by stating, “[p]laintiffs have pointed to no opinion by a court of appeals holding that mentally retarded persons are a quasi-suspect class.”<sup>73</sup>

In *City of Cleburne*<sup>74</sup> the District Court for the Northern District of Texas held that the mentally retarded are not a suspect or quasi-suspect class merely because they have a reduced ability to perform in and contribute to society.<sup>75</sup> The court relied heavily on a Third Circuit decision, which held that the mentally ill are not a suspect class merely because they have a “reduced ability for personal relations, for economic activity, and for political choice.”<sup>76</sup> The court also stressed the Third Circuit’s recognition of the reluctance of the Supreme Court to expand the suspect and quasi-suspect classes.<sup>77</sup> Applying the rational basis test, the district court in *City of Cleburne* held that the zoning ordinance was constitutional because it was rationally related to the City’s interests in protecting the prospective mentally retarded residents and maintaining the tranquility of the neighborhood.<sup>78</sup>

The United States Court of Appeals for the Fifth Circuit reversed, holding that the mentally retarded are a quasi-suspect class subject to the intermediate level of judicial scrutiny.<sup>79</sup> The Fifth Circuit analyzed in depth the legal and social issues of mental retardation and held that the retarded possess several of the indicia of a suspect class.<sup>80</sup> The Fifth Circuit emphasized that intermediate scrutiny is particularly appropri-

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70. *Developmental Disabilities Advocacy Center v. Melton*, 521 F. Supp. 365, 371 (D.N.H. 1981), *rev'd on other grounds*, 689 F.2d 281 (1st Cir. 1982); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973).

71. *Cleburne Living Center v. City of Cleburne*, No. CA3-80-1576-F (N.D. Tex. April 16, 1982); *Anderson v. Banks*, 520 F. Supp. 472, 512 (S.D. Ga. 1981).

72. 520 F. Supp. at 512.

73. *Id.*

74. *Cleburne Living Center v. City of Cleburne*, No. CA3-80-1576-F (N.D. Tex. April 16, 1982).

75. *Id.*

76. *Doe v. Colautti*, 592 F.2d 704, 711 (3d Cir. 1979).

77. *Cleburne Living Center*, No. CA3-80-1576-F (citing *Doe*, 592 F.2d at 711).

78. *Id.*

79. *Cleburne Living Center v. City of Cleburne*, 726 F.2d at 200.

80. *Id.* at 196-200. *See also supra* notes 49-52 and accompanying text.

ate in a case in which the retarded have been denied access to housing. Housing, though not a fundamental right, is "essential to individuals' full participation in society."<sup>81</sup> The Fifth Circuit applied intermediate scrutiny and invalidated the zoning ordinance on its face and as applied.<sup>82</sup>

The United States Supreme Court affirmed the Fifth Circuit's holding that the zoning ordinance was unconstitutional as applied to the proposed group home.<sup>83</sup> The Court, however, held that the mentally retarded are not a suspect or quasi-suspect class<sup>84</sup> and legislation affecting the retarded should only be afforded the minimal, rational basis review.<sup>85</sup>

Justice White delivered the opinion of the Court, joined by Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and O'Connor. First, the Court noted that the states' interest in dealing with and providing for the retarded is a legitimate interest.<sup>86</sup> Justice White stressed that the retarded "have a reduced ability to cope with and function in the everyday world."<sup>87</sup> For these reasons, the Court determined that legal treatment of the retarded is a task for the legislature, not the judiciary.<sup>88</sup> The Court reasoned that governmental entities must have a considerable amount of flexibility and freedom from judicial oversight in shaping and implementing legislation affecting the rights of the retarded. The Court set forth three arguments to further support this proposition: (1) Legislation has been addressing the needs of the retarded in a manner that "belies a continuing antipathy or prejudice";<sup>89</sup> (2) the federal government has outlawed discrimination of the retarded in federally funded programs;<sup>90</sup> and (3) if government entities are required to show a substantial relation to important governmental interests, they may "refrain from acting at all."<sup>91</sup>

The Court summarily rejected CLC's argument that the retarded

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81. *City of Cleburne*, 726 F.2d at 199 (quoting *J.W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983)).

82. 726 F.2d at 201-02.

83. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3251-52 (1985).

84. *Id.* at 3258.

85. *Id.* at 3251.

86. *Id.* at 3256.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; see sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982); Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B) (1982); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1)-(2) (1982).

91. *City of Cleburne*, 105 S. Ct. at 3257.

are politically powerless by stating that political power is not a criterion for heightened judicial scrutiny.<sup>92</sup> Finally, the Court reasoned that granting quasi-suspect status to the mentally retarded would in effect require that groups such as the aged and mentally ill be held quasi-suspect classes. Justice White wrote:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.<sup>93</sup>

After careful review of the city's justifications<sup>94</sup> for denying CLC the special use permit, the Court invalidated the zoning ordinance as applied to the proposed group home.<sup>95</sup> The Court concluded that the City lacked a rational basis for denying the special use permit. Rather, the City's action was based on "irrational prejudice."<sup>96</sup>

Justice Stevens, joined by Chief Justice Burger, wrote a concurring opinion that criticized the Court's recognition of three levels of judicial scrutiny in equal protection review.<sup>97</sup> Justice Stevens suggested that the three-tiered system is artificial because the Court really reviews each case on its own merits.<sup>98</sup> "[O]ur cases have not delineated three — or even one or two — such well defined standards. Rather our cases reflect a continuum of judgmental responses to differing classifications ranging from 'strict scrutiny' at one extreme to 'rational basis'

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92. *Id.*

93. *Id.* at 3257-58.

94. *See Cleburne*, 726 F.2d at 194.

95. *City of Cleburne*, 105 S. Ct. at 3260.

96. *Id.* One of the reasons that the action of the city could have been deemed unreasonable was that the R-3 zone allowed homes for juvenile delinquents and halfway houses for convicted felons as a matter of right. It is difficult to distinguish these uses from homes for the mentally retarded from a land use standpoint. Moreover, some cases have invalidated zoning provisions which attempt to make distinctions between very similar uses. *See, e.g., Chicago v. Sacks*, 1 Ill. 2d 342, 115 N.E.2d 762 (1953). *Cleburne's* R-3 provision requiring a special use permit for homes for the mentally retarded, while allowing housing for juvenile delinquents and halfway houses for criminals, arguably was invalid for that reason. Apparently, however, that argument was never advanced.

97. 105 S.Ct. at 3260-63 (Stevens, J., concurring).

98. *Id.* at 3260-61.

at the other."<sup>99</sup> Justice Stevens asserted that the court actually applies a single standard of review in every equal protection case.<sup>100</sup> Under this standard, the following questions must be asked: (1) What class has been harmed by the legislation and has it been subjected to a "tradition of disfavor" by our laws?;<sup>101</sup> (2) what is the public purpose that is being served by the law?;<sup>102</sup> and (3) what is the characteristic of the disadvantaged class that justifies disparate treatment?<sup>103</sup>

Justice Marshall, joined by Justices Brennan and Blackmun, wrote a separate opinion that concurred with the Court's holding but dissented on the way it was reached. Justice Marshall asserted that the Court erred in refusing to designate the mentally retarded as a quasi-suspect class.<sup>104</sup> He contended that the Court downplayed the "lengthy 'history of purposeful unequal treatment' of the retarded."<sup>105</sup> Instead, the Court pointed to recent legislative reform which it said "beli[es] a continuing antipathy or prejudice."<sup>106</sup> Justice Marshall noted that the court applied this same rationale to arrive at an opposite conclusion when it held gender classifications quasi-suspect.<sup>107</sup>

Justice Marshall asserted that the Court erred in concluding the retarded are not politically powerless.<sup>108</sup> He also maintained that the Court relied far too much on its theories in *Massachusetts Board of Retirement v. Murgia*.<sup>109</sup> The Court held in *Murgia* that age-based legislative distinctions were not subject to strict scrutiny.<sup>110</sup> Justice Marshall pointed out, however, that the Court in *Murgia* did not consider whether intermediate scrutiny was appropriate because that case was decided before "the Court explicitly acknowledged the existence of

99. *Id.*; see, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176-77 & n.10 (1980); *Craig*, 429 U.S. at 220-21; *Rodriguez*, 411 U.S. at 98.

100. *City of Cleburne*, 105 S. Ct. at 3261.

101. *Id.* n.6.

102. *Id.* at 3261-62.

103. *Id.* at 3262.

104. *Id.* at 3263-72 (Marshall, J., concurring in part and dissenting in part).

105. *Id.* at 3268 (quoting *Rodriguez*, 411 U.S. at 28).

106. 105 S. Ct. at 3268.

107. Justice Marshall wrote:

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

*Id.* at 3269 (quoting *Frontiero*, 411 U.S. at 687).

108. *City of Cleburne*, 105 S. Ct. at 3268.

109. *Id.* at 3269 n.19 (citing 427 U.S. 307 (1976)).

110. *Murgia*, 427 U.S. at 312-14.

heightened scrutiny."<sup>111</sup>

Finally, Justice Marshall pointed out that even though the Court determined minimal scrutiny was proper in *City of Cleburne*, it certainly did not apply the traditional rational basis test: "[T]he Court's heightened scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."<sup>112</sup> Justice Marshall asserted that the zoning ordinance would have withstood the traditional rational basis review.<sup>113</sup> He cautioned the Court that the "searching inquiry" into the constitutionality of the Cleburne zoning ordinance would lead lower courts to conduct exhaustive reviews of commercial and economic legislation.<sup>114</sup> Justice Marshall wrote, "[m]oreover, by failing to articulate the factors that justify today's 'second order' rational basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question . . . ."<sup>115</sup>

*City of Cleburne* began as a zoning case dealing with the validity of a special use permit requirement. It culminated in a holding by the Supreme Court that the mentally retarded are not a quasi-suspect class. *City of Cleburne* is the first Supreme Court case since 1976 to directly address the question of whether a segment of the population is suspect or quasi-suspect.<sup>116</sup> There are approximately 6.5 million mentally retarded persons living in the United States. Literally applied, *City of Cleburne* frees federal, state, and local governments from all but minimal constitutional restraints in dealing with mental retardation. Legislation that is only subjected to rational basis review almost always passes judicial inquiry.

*City of Cleburne*, however, may indicate that the Court will now undertake a more searching review under the rational basis test than it

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111. *City of Cleburne*, 105 S. Ct. at 3269 n.19 (citing *Craig v. Boren*, 429 U.S. 190 (1976)). Justice Powell, in his concurring opinion in *Craig v. Boren* asserted that:

[t]here are valid reasons for dissatisfaction with the 'two-tiered' approach that has been predominant in the Court's [equal protection] decisions in the past decade . . . candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification.

429 U.S. 190, 210-11 (1976); see L. TRIBE, *supra* note 58, at 1077-92.

112. *City of Cleburne*, 105 S. Ct. at 3264.

113. *Id.* at 3263.

114. *Id.*

115. *Id.* at 3265.

116. See *Murgia*, 427 U.S. at 307 (holding that the aged are not a suspect class).

has traditionally. Justice Marshall termed it "second order" rational basis review.<sup>117</sup> Herman Schwartz, an American University law professor who assisted CLC during the case, has coined it "rational basis with teeth."<sup>118</sup> Thus, a new category or sub-category of review may have been implicitly created.

Justice Stevens' concurring opinion raises the legitimate question of whether a three- or even two-tiered system of judicial review actually exists in equal protection cases. Considering the in-depth analysis of the Court in *City of Cleburne*, perhaps designating a class as suspect or quasi-suspect is of superficial consequence. Justice Stevens' opinion may be cited as a persuasive argument for eliminating the precise levels of judicial scrutiny in equal protection cases.

Although at first glance, *City of Cleburne* appears to be a grave blow to proponents of the constitutional rights of the mentally retarded, the Court did in fact apply some level of judicial scrutiny extending beyond the traditional rational relation test to reach the determination that the special use permit requirement was unconstitutional.

*Patricia J. Dolson*

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117. *City of Cleburne*, 105 S. Ct. at 3264.

118. Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112 (1985).