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Expanding the Quasi Suspect Class to Include Mentally Retarded Persons: Cleburne Living Center, Inc. v. City of Cleburne

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EXPANDING THE QUASI SUSPECT CLASS TO INCLUDE MENTALLY RETARDED PERSONS: CLEBURNE LIVING CENTER, INC. v. CITY OF CLEBURNE

I. INTRODUCTION

Cleburne Living Center, Inc. v. City of Cleburne[1] is a landmark decision because it is the first appellate court decision to unequivocally adopt the intermediate level of scrutiny when dealing with legislative discrimination against mentally retarded persons.[2]

Before 1973, there were very few cases dealing with the equal protection rights of the mentally retarded. However, the district courts are now faced with a number of cases dealing with this growing area of equal protection law. These district courts differ in their approaches. Decisions range from according the mentally retarded possible suspect class status[3] to relegating their claims to determination under the rational basis test.[4] This disparity stems from uncertainty among the lower courts as to what indicia a class must possess to be considered "suspect" or "quasi-suspect" for equal protection purposes.

The *Cleburne* court faced the issue with a well-reasoned and carefully structured opinion. The court explored the indicia of suspectness promulgated by the Supreme Court in various opinions, and held that the mentally retarded share sufficient indicia of a suspect class to be accorded quasi-suspect status; therefore, intermediate scrutiny is the proper level of scrutiny to employ when examining the constitutionality of a statute.[5] The largest part of the court's opinion dealt with the analysis of whether the discriminatory classification bore a substantial relationship to an important governmental objective — the required test under intermediate scrutiny. The court found that the City of Cleburne could not meet this test.[6]

II. FACTS

In July, 1980, Jan Hannah purchased a house in Cleburne, Texas in order to lease it to Cleburne Living Centers, Inc. (CLC)[7] for the establishment of a

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[1]Cleburne Living Center, Inc. v. City of Cleburne, No. CA 3-80-1576-F (N.D. Tex. April 16, 1982), *aff'd in part and rev'd in part,* 726 F.2d 191 (5th Cir. 1984).

[2]The most analogous Supreme Court decision dealt with the level of scrutiny applicable to equal protection claims of the mentally *ill,* but the Court did not reach the intermediate scrutiny argument since the classification was found not to pass even the rational basis test. Schweiker v. Wilson, 450 U.S. 221 (1981). The Cleburne court expressly reserved comment on classifications involving the mentally ill, stating, ". . . mental retardation, unlike mental illness, is an immutable disorder. The mentally retarded cannot be cured." 726 F.2d at 198 n.11.

[3]Fialkowski v. Shapp, 405 F.Supp. 946, 958-59 (E.D.Pa. 1975) (dicta).

[4]Anderson v. Banks, 520 F.Supp. 472, 506 (S.D.Ga. 1981).

[5]726 F.2d at 196.

[6]*Id.* at 200-02.

[7]Hannah is the Vice President and part-owner of CLC (now known as Community Living Concepts, Inc.), a

group home for thirteen mildly or moderately mentally retarded men and women.[8] The house is located in a district zoned R-3. This controversy surrounded two sections of the zoning ordinance governing R-3 districts.

Cleburne's zoning ordinance lists the permitted uses in an R-3 district, including:

1) Any use permitted in District R-2.
2) Apartment houses, or multiple dwellings.
3) Boarding and lodging houses.
4) Fraternity or sorority houses and dormitories.
5) Apartment hotels.
6) Hospitals, sanitariums, nursing homes or *homes* for convalescents or aged, *other than for the* insane or *feebleminded* or alcoholics or drug addicts [emphasis added].[9]

To establish the type of facility that CLC desires, the zoning ordinance requires that the group must obtain a special use permit from the Cleburne City Council or recommendation of the Planning and Zoning Commission. Renewal for each special use permit must be applied for annually.[10]

CLC duly applied for a special use permit, but the Planning and Zoning Commission recommended that the City Council deny the permit. Following a public hearing on October 14, 1980, the City Council of Cleburne refused to overrule the Commission's recommendation.[11] After exhausting administrative remedies, Hannah, CLC and Advocacy, Inc. sued the City of Cleburne, individual city employees, and council members for injunctive relief and damages.[12]

The plaintiffs relied upon three basic arguments to attack the ordinance:[13]

1) the ordinance violated their fourteenth amendment equal protection rights both on its face and as applied;[14]

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corporation organized to establish and operate supervised group homes for the mentally retarded. *Id.* at 193; Brief for Appellants at 7, Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984).

[8]There are four standard degrees of mental retardation:
(1) mild (IQ of approximately 50-70);
(2) moderate (IQ of approximately 35-50);
(3) severe (IQ of approximately 20-35); and
(4) profound (IQ below 20). 726 F.2d at 192 n.1.

[9]Cleburne, Texas, Zoning Ordinance §§ 8 and 16.

[10]726 F.2d at 194.

[11]*Id.*

[12]Advocacy, Inc. is a non-profit corporation formed to represent developmentally disabled persons. Plaintiffs were also joined by the Johnson County Association for Retarded Citizens (JCARC). *Id.* JCARC was found not to have standing by both the district court and the court of appeals. JCARC had not identified any members of its organization who desired to live in the proposed group home. Therefore, the courts held that the injury to JCARC's "'abstract social interests' is too intangible to justify standing." *Id.* at 203.

[13]The plaintiff also challenged the denial of the special use permit, but focused more on the overall constitutionality of the ordinance. Brief for Appellants at 7.

[14]726 F.2d at 194.

2) the ordinance violated their fourteenth amendment due process rights, as the distinctions drawn in the statute were arbitrary, capricious and unconstitutionally vague;[15] and
3) the ordinance violated the Revenue Sharing Act.[16]

The district court found for the defendants on all grounds.[17] The court of appeals affirmed the district court's finding that the ordinance did not violate the Revenue Sharing Act,[18] but it reversed the district court's ruling and found that there was an equal protection violation.[19]

The heart of the court of appeals' finding that the ordinance violated the plaintiff's equal protection rights is found in its determination of the proper standard of review for scrutinizing the ordinance.

III. Determining the Proper Standard of Review

In the past thirty years, numerous Supreme Court decisions dealing with Equal Protection claims have produced three basic levels of scrutiny for courts to apply in analyzing challenged statutes. These levels are generally called "rational basis," "intermediate scrutiny," and "strict scrutiny."[20] The level of scrutiny that courts are to apply depends upon either 1) the characteristics of the class against which the legislation discriminates, or 2) whether the legislation interferes with a fundamental right.[21]

Strict Scrutiny

The highest level of judicial scrutiny, the strict scrutiny test, is applied if the exercise of a fundamental right is hindered or if a classification is based on a "suspect" class. The Supreme Court has not formulated clear guidelines for determining whether a classification is suspect or not, but certain indicia have been cited repeatedly.

The first indicia of suspectness was included in the statement by Justice Stone in 1938 that "prejudice against discrete and insular minorities . . . may

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[15] *Id.* at 194-95 n.4.

[16] 31 U.S.C.A. § 6716 (1983) provides that federal funding to a local government will be discontinued if a program which uses the funding discriminates "against an otherwise qualified handicapped individual." 31 U.S.C.A. § 6716(b)(2) (1983).

[17] 726 F.2d at 194.

[18] The City of Cleburne was able to prove by clear and convincing evidence that "federal funds were not used to finance the zoning activities of the City Council." *Id.* at 195; *see* 31 U.S.C.A. § 6716(c)(1) (1983).

[19] 726 F.2d at 195. The court of appeals did not find it necessary to reach the due process claim, since it held that the ordinance was unconstitutional under the equal protection analysis. *Id.*

[20] *See generally* Mills v. Habluetzel, 456 U.S. 91 (1982) (intermediate scrutiny); U.S. R.R. Retirement Board v. Fritz, 449 U.S. 166 (1980) (rational basis); Craig v. Boren, 429 U.S. 190 (1976) (intermediate scrutiny); Loving v. Virginia, 388 U.S. 1 (1967) (strict scrutiny); McLaughlin v. Florida, 379 U.S. 184 (1964) (strict scrutiny); McGowan v. Maryland, 366 U.S. 420 (1961) (rational basis).

[21] The concept of "fundamental rights" is beyond the scope of this Note, but for further research *see generally* Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Williams v. Rhodes, 393 U.S. 23 (1968) (freedom of association).

call for a correspondingly more searching judicial inquiry."[22] In 1972, the Court suggested an additional indicia to be considered, i.e. whether a class is entitled to special judicial protection because the classification is based on an "immutable characteristic," one that its members cannot change.[23]

Only a year later, the Court summarized the 'traditional indicia' of suspectness as being: "[whether] the class is . . . 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 from the majoritarian political process."[24] In *Plyler v. Doe,* the Court added that if the classification is one "more likely than others to reflect deep-seated prejudice," strict scrutiny may be appropriate.[25]

Presently, the precise indicia of suspectness a class must possess to be accorded this highest level of judicial scrutiny is unclear. Thus far, the Court has limited the suspect class label to classifications based on race an alienage.[26] To be held constitutional, the legislative classification must be proved *necessary* to promote a *compelling* governmental interest.[27] If there is *any* less burdensome means to achieve the legislative objective, the classification is not necessary.[28] Statutes discriminating against suspect classes "tend to be irrelevant to any proper legislative goal."[29]

Rational Basis

The lowest level of scrutiny is the "rational basis" test. Under this level of scrutiny, courts will uphold the challenged legislative classification if the classification is merely *rationally* related to a *legitimate* governmental interest.[30] In the "two-tier" system (strict scrutiny and rational basis), if a classification did not interfere with a fundamental right or discriminate against a suspect class, the court would automatically apply the rational basis test. Under this test, the plaintiff must show that no reasonably foreseeable situation could occur to justify the challenged classification.[31]

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[22]United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[23]Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); *see* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[24]San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero, 411 U.S. at 685-86.

[25]Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

[26]*See generally* 338 U.S. 1; Yick Wo v. Hopkins, 118 U.S. 356 (1886); Graham v. Richardson, 403 U.S. 365 (1971).

[27]Eisenstadt v. Baird, 405 U.S. 438, 464 (1972); 403 U.S. at 372.

[28]411 U.S. at 16-17.

[29]457 U.S. at 216 n.14.

[30]411 U.S. at 16; 406 U.S. at 176. *See* Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications,* 68 Ky. L.J. 845 (1980).

[31]*See* 449 U.S. 166.

Intermediate Scrutiny

The intermediate scrutiny standard of review was developed in the 1970s due to the apparent judicial discontent with the rigidity of the former "two-tier" system of scrutiny (strict scrutiny and rational basis).[32] The groups presently classified as "quasi-suspect" under intermediate scrutiny attained that status when the Court felt that they qualified as quasi-suspect "when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases . . . ."[33]

The intermediate scrutiny test generally requires that the legislative classification be *substantially* related to an *important* or *permissible* governmental objective.[34] To date, the only classifications accorded quasi-suspect status by the Court are those based on gender and illegitimacy.[35]

The indicia of quasi-suspectness are even less clear than those required to determine whether a class is suspect. If one or more of the traditional indicia of suspectness is absent from the group being analyzed, courts often relegate the class to quasi-suspect status and apply an intermediate level of scrutiny to the statute or apply the rational basis test to the statute if the class' problem has not been sufficiently enduring.[36]

The lack of definitive guidelines as to which level of scrutiny should be applied has resulted in a great deal of confusion and disparate holdings in the lower courts. This disparity is especially evident when lower courts deal with the equal protection claims of the mentally retarded.

IV. PRIOR DISTRICT COURT DECISIONS

Uncertainty as to which level of judicial scrutiny is to be applied to discriminating statutes has caused the courts to reach a variety of conclusions in cases involving equal protection claims of the mentally retarded. Prior to *Cleburne,* there were no court of appeals' decisions on point. Thus, a brief overview of applicable district court cases is in order.

There are few reported district court cases that address this developing

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[32]*See* 457 U.S. at 231 (Marshall, J., concurring). *See generally* Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier, and the Role of the Court,* 14 U.S.F.L. Rev. 525 (1980); Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality,* 8 Hastings Const. L.Q. 777 (1981).

[33]457 U.S. at 218 n.16.

[34]*See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (discrimination against illegitimates); 429 U.S. 190,197 (1976) (gender discrimination).

[35]*See* cases cited *supra* note 34. *Cf.* 457 U.S. 202 (statute denied funds for education of children of illegal aliens). The Court invoked a hybrid level of scrutiny requiring the statute to rationally further some substantial state goal. This level of scrutiny appears to combine intermediate scrutiny with the rational basis test. *See* Note, *Constitutional Law: The Equal Protection Clause: The Effect of Plyler v. Doe on Intermediate Scrutiny,* 36 Okla. L. Rev. 321 (1983).

[36]457 U.S. at 218 n.16. *See* Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards,* 57 U. Det. J. Urb. L. 867 (1980).

area of the law. The most recently reported and persuasive case is *Association for Retarded Citizens of North Dakota v. Olson.*[37] This district court held that mentally retarded persons constitute a quasi-suspect class.[38] The court began with an analysis of whether the mentally retarded were a *suspect* class, relying on three criteria taken from *Rodriguez*[39] and *Murgia,*[40] specifically:

1) whether the class has suffered a "history of purposeful unequal treatment";[41]
2) "whether the class has been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,"[42] and
3) "whether the class is generally denied legal benefits on the basis of stereotyped characteristics not truly indicative of their abilities."[43]

The court found that much of the legislative discrimination suffered by the mentally retarded is rationally related to disabilities they possess, including reduced capacity for personal relationships and learning, and therefore denied suspect status to the class.[44] The court based its adoption of the intermediate level of scrutiny on the finding that the mentally retarded still suffer from some discrimination that is *not* related to actual disabilities.[45]

Another district court expressed the view that the minority status and political powerlessness of the mentally retarded supported the application of the middle-tier test for equal protection.[46] Although not necessary to its decision, the court wrote, "that the Supreme Court, if presented with the plaintiffs' equal protection claim, would apply the as yet hard to define middle test of equal protection . . . ."[47] In *Fialkowski v. Shapp,* the court decided the case on other grounds, but noted that the mentally retarded may be a *suspect* class. If not, legislation based on this classification would at least "appear to warrant greater judicial scrutiny than" rational basis.[48]

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[37]561 F.Supp. 473 (D.N.D. 1982), *aff'd on other grounds,* 713 F.2d 1384 (8th Cir. 1983) (mentally retarded persons are entitled to equal educational opportunities).

[38]561 F.Supp. at 490.

[39]411 U.S. 1.

[40]Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

[41]561 F.Supp. at 490 (quoting 411 U.S. at 28). An excellent resource book on the past and present treatment of the mentally retarded is S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE (1983).

[42]561 F.Supp. at 490 (quoting 411 U.S. at 28). Many states still deny mentally retarded persons the right to vote. *See* Note, *Mental Disability and the Right to Vote,* 88 Yale L.J. 1644 (1979).

[43]561 F.Supp. at 490 (quoting 427 U.S. at 313).

[44]561 F.Supp. at 490.

[45]*Id.*

[46]Frederick L. v. Thomas, 408 F.Supp. 832, 836 (E.D.Pa. 1976)(dicta), *aff'd on other grounds,* 557 F.2d 373 (3d Cir. 1977)(school failed to provide instruction specially suited to mentally retarded children).

[47]408 F.Supp. at 836.

[48]405 F.Supp. at 959 (school board denied certain educational opportunities to mentally retarded children).

Two district courts' decisions held that mentally retarded persons are not a *suspect* class but the courts did not consider the possibility that classifications discriminating against the mentally retarded could be tested under intermediate scrutiny.[49] In a third case, the court brushed aside the issue by stating that "[p]laintiffs have pointed to no opinion by a court of appeals holding that mentally retarded persons are a quasi-suspect class."[50]

The three latter opinions may be resolved differently today. The plaintiffs in the last case would now be able to point to the *Cleburne* case as a source of authority. One of the two district courts that did not consider intermediate scrutiny probably would do so today, since the case was decided very early in the judicial life of the intermediate standard of review.[51]

In *Cleburne,* however, the court of appeals unequivocally established that the mentally retarded were a quasi-suspect class. Thus, the intermediate level of scrutiny was the proper test to determine the constitutionality of the ordinance. To reach this decision, the court first had to analyze the requisite indicia of suspectness for quasi-suspect status.

V. CLEBURNE AND INTERMEDIATE SCRUTINY

The *Cleburne* court held that the class of mentally retarded persons possessed sufficient indicia of suspectness to warrant intermediate review.[52] The court found that the following indicia of suspectness are present when dealing with the mentally retarded as a class:

1) a possibility that legislation is based on deep-seated prejudice;[53]
2) a history of unfair mistreatment;
3) political powerlessness; and
4) immutability of the characteristic of being mentally retarded.[53a]

The court did not accord mentally retarded persons the status of a suspect class for two reasons. First, the court felt that strict scrutiny should be reserved

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[49]New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (state is not constitutionally required to provide the mentally retarded with a certain level of education); Developmental Disabilities Advocacy Center, Inc. v. Melton, 521 F.Supp. 365, 371 (D.N.H. 1981), *rev'd on other grounds,* 689 F.2d 281 (1st Cir. 1982)(mentally retarded residents of state facility have no constitutional right to visitation by unauthorized persons).

[50]520 F.Supp. 472, 512 (school policies requiring exit examinations did not deny mentally retarded persons equal protection).

[51]Two other cases briefly addressed the equal protection issue: Lora v. Board of Education of New York, 456 F.Supp. 1211 (E.D.N.Y. 1978), *rev'd on other grounds,* 623 F.2d 248 (2d Cir. 1980)(case involved mentally retarded Black and Hispanic students — decided under strict scrutiny due to claim of racial discrimination); New York State Ass'n for Retarded Children v. Carey, 466 F.Supp. 487 (E.D.N.Y. 1979), *aff'd,* 612 F.2d 644 (2d Cir. 1979) (this state action could not be sustained even under the rational basis analysis — court did not have to determine the level of scrutiny to be applied).

[52]726 F.2d at 197.

[53]*Id.* at 197 (*quoting* 457 U.S. at 216 n.14).

[53a]*Id.* at 197-98.

for the "traditional" classifications based on race and alienage.[54] Second, the court reasoned that "[t]hough mental retardation is irrelevant to many policies, it *is* a relevant distinction in some cases."[55] The court used the examples of placement in educational or employment programs where classification based on intelligence levels may be a proper legislative action.

The court also noted that intermediate scrutiny was "particularly appropriate" to apply in this case because the intended residents' access to housing was being impaired. Housing, while not a fundamental right, is "essential to individuals' full participation in society."[56] The availability of such a home "is an essential ingredient of normal living patterns for persons who are mentally retarded."[57] Based on these findings, the court applied the intermediate level of judicial review to the challenged ordinance and determined that the ordinance did not substantially further an important governmental interest.[58]

Constitutional Invalidity of the Ordinance

After determining that intermediate scrutiny was the proper level of judicial review, the court of appeals held the ordinance to be unconstitutional both on its face and as applied.[59]

Facial Invalidity

The court tested the four claimed legislative objectives under the *Craig v. Boren* requirement of a closer fit between the objectives and the ordinance's means of achieving them than is required under rational review.[60] The first objective of the City was to avoid undue concentrations of population.[61] The court rebutted this objective by pointing out that under the ordinance the same number of occupants would be allowed as long as they were not mentally retarded.[62] Therefore, the ordinance is irrelevant to the achievement of this objective.

Secondly, the City wanted to lessen congestion in the streets.[63] The court, however, found no showing that retarded persons drive more cars or receive more visitors than other people; therefore, the ordinance is irrelevant to the achievement of this objective.[64]

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[54] *Id.* at 198. No rationale was given for this holding.
[55] 726 F.2d at 198.
[56] *Id.* at 199 (*quoting* J.W. v. City of Tacoma, 720 F.2d 1126, 1129 (9th Cir. 1983)).
[57] 726 F.2d at 199 (*quoting* Cleburne Living Center v. City of Cleburne, No. CA 3-80-1576-F, slip op. at 9).
[58] 726 F.2d at 200.
[59] *Id.*
[60] 429 U.S. at 197, 200-04.
[61] 726 F.2d at 200.
[62] The court pointed out that the ordinance does not control the concentration of population, but "merely controls the learning skills of the population." *Id.*
[63] *Id.*
[64] *Id.* at 200-01.

The third objective was to ensure safety from fires and other dangers.[65] The court rejected this objective since there was no showing that mentally retarded persons light more fires than other people, or that in the event of an emergency, that they would require greater supervision than the occupants of nursing homes which are permitted in the R-3 zone.[66]

The final objective was to protect the health, safety, and welfare of the City's population. The City listed three particular areas of concern as being to protect the serenity of the existing neighborhoods, to protect neighbors from harm, and to protect the mental retardates themselves by providing an appropriate living environment.[67] The court rebutted this objective on the ground that there was no showing that mentally retarded persons are more disruptive or dangerous than other people or facilities allowed in the R-3 zone (including public schools and homes for delinquent children). In addition, the protection of mental retardates themselves can be achieved by requiring compliance with already existing state and federal regulations.[68]

In summary, the court found that the ordinance did not meet the intermediate scrutiny test, i.e. it did not "substantially further any important governmental interests."[69] While the court assumed that the claimed objectives were important, the court did not find the requisite "close fit" between the interests and the ordinance's means of achieving them. The court stated that absent "specific requirements to guide the judgment of the City Council . . . [t]here is too great a potential for blanket discrimination . . . ."[70] This lack of adequate guidelines and the resultant "unbridled discretion" in the City Council led the court to the conclusion that the ordinance was "facially invalid under the equal protection clause."[71]

Unconstitutional Application

On an alternative ground, the court found that even if the ordinance was not *facially* invalid, the Equal Protection Clause was violated by the decision of the City Council in the *application of the ordinance.*[72] Again using intermediate scrutiny, the court found no substantial furtherance of an important governmental interest that would justify the discriminatory

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[65] *Id.* at 200.

[66] *Id.* at 201.

[67] *Id.* at 200.

[68] *Id.* at 201.

[69] *Id.* at 200. *See* 429 U.S. 190.

[70] 726 F.2d at 201.

[71] *Id.*

[72] *Id. See* 118 U.S. 356 (ordinance valid on its face but unequally administered, and therefore violative of the Equal Protection Clause).

classification.[73] The Council's decision was influenced by the following factors:

1) the attitudes of the owners of property located within two hundred feet of the proposed home;
2) the junior high school located across the street from the proposed site;
3) the potential fears of elderly neighborhood residents;
4) floor space needs of the residents;
5) who is to be legally and financially responsible for any actions of the residents;
6) the home's location on a 500 year floor plain; and
7) in general, the presentation made before the City Council.[74]

The court found that the first three factors did not provide a legitimate basis for discrimination.[75] The court dispensed with factor 4) on the finding that the city did not show that the mentally retarded have any unusual space needs.[76] Factor 5) was considered irrelevant.[77] As to factor 6), the court felt that "the danger of a flood every five hundred years is not particularly great."[78] Factor 7) was dismissed as too ambiguous.[79]

In short, none of the factors influencing the Council's decision was found to justify the discriminatory treatment. Many of the proffered reasons do not serve even a legitimate governmental interest, let alone meet the requisite of substantially furthering an important governmental interest.

VI. Conclusion

Judicial discontent with the rigidity of the two-tier system, i.e. rational basis and strict scrutiny, has resulted in the development of a third level of scrutiny — intermediate scrutiny. To apply this intermediate level of scrutiny in examining a statute, the statute must discriminate against a class which can be labeled "quasi-suspect." Which and to what extent the indicia of suspectness must be present for a class to be quasi-suspect is a murky area at best. Prior to *Cleburne,* the major classifications considered quasi-suspect were based on gender or illegitimacy. However, *Cleburne* was the first appellate court decision to award the mentally retarded quasi-suspect status.

The lack of adequate guidelines to determine quasi-suspectness makes future holdings of the Supreme Court uncertain. As litigation increases, brought by some of the more than six million mentally retarded citizens in the

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[73]726 F.2d at 201.

[74]*Id.* at 202.

[75]*Id.*

[76]*Id.* In fact, the house exceeded the state's minimum space requirements. Brief for Appellants at 6.

[77]726 F.2d at 202.

[78]*Id.*

[79]*Id.*

United States,[80] the Court will no doubt recognize that the mentally retarded do possess many of the indicia of suspectness. But whether the Court will find sufficient indicia to award quasi-suspect status is yet to be determined.

The Court should recall its opinion in *Baxstrom v. Herold:* "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made."[81] Being mindful of this holding and the indicia of suspectness which the mentally retarded possess, the Court should firmly establish quasi-suspect status for the mentally retarded. Thus, all legislation which discriminates against this class must be examined with an intermediate level of scrutiny.

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[80]Brief for Appellants at 36.

[81]Baxstrom v. Herold, 383 U.S. 107, 111 (1966).