Cleburne and the Pursuit of Equal Protection for Individuals With Mental Disorders

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The Equal Protection Clause of the Fourteenth Amendment to the Constitution has been the foundation for judicial rulings against discriminatory laws affecting racial minorities, women, and other groups. However, it has had only limited application in mental health law, even though individuals with mental disorders have been subjected to long-standing discrimination in many contexts. In the present day, we have become accustomed to living in an era of judicial conservatism and accept as the norm that courts do not recognize individuals with mental disorders as requiring constitutional protections against discrimination.

Conservative attitudes toward the rights of individuals with mental disorders have not always prevailed. In the 1970s and 1980s, mental health law was in flux, and the federal courts were active in expanding the rights of those with mental disabilities. With regard to equal protection under the Fourteenth Amendment, the critical turning point occurred a generation ago. This year marks the 30th anniversary of the U.S. Supreme Court's decision in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*[1] One commentator has described the *Cleburne* decision as the "largest constitutional 'moment' for disability law" (Ref. 2, p 529). In *Cleburne*, the Court ruled that intellectual disability did not constitute a quasi-suspect classification under the Fourteenth Amendment, a status that would have provided robust judicial protection against discriminatory laws.

Cleburne has been little discussed in recent years, but the ruling has had a substantial impact on the rights of those with mental disorders. In this editorial, I review the *Cleburne* ruling and its influence on the Court's subsequent decisions, which have affected not only individuals with intellectual disabilities, but also those with mental and physical disabilities.

Equal Protection Analysis

Section 1 of the Fourteenth Amendment to the United States Constitution provides that states shall not "deny to any person within its jurisdiction the equal protection of the laws."

Laws often treat groups of people differently (for example, age restrictions on driving or voting), so not all classifications are illegitimate. The courts have identified as "suspect classifications" those that are made against groups with immutable characteristics, political powerlessness, disenfranchisement, and a history of encountering discrimination. These are not criteria, *per se*, but are elements to be considered by the courts in determining whether a heightened level of judicial scrutiny (sometimes referred to as "strict scrutiny") should be applied to discriminatory laws affecting a particular group. The courts have recognized race, national origin, and religion as suspect classifications, reflecting the fact that they rarely, if ever, have any legitimate purpose. Courts carefully analyze laws based on suspect classifications. To survive this heightened judicial scrutiny, a law must be narrowly tailored to serve a compelling state interest that requires the questioned classification.

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The courts have also recognized "quasi-suspect classifications" (or "semi-suspect classifications"). Such classifications receive an intermediate level of judicial scrutiny. The courts have recognized gender and illegitimacy of birth to be quasi-suspect classifications. The designation of quasi-suspect reflects the judgment that such classifications sometimes have a legitimate purpose, but in other cases may reflect irrational misconceptions. Courts review laws regarding quasi-suspect classifications closely. To survive judicial review, laws affecting quasi-suspect classifications must be found to serve an important state interest, and that interest must be substantially served by the classification.

All other laws that involve groups must meet a rational-basis level of scrutiny (sometimes called "minimum scrutiny"). Classifications under the law must be rationally related to a legitimate state interest. Generally, the courts are deferential to legislative judgments and do not analyze the reasons underlying the distinctions made among groups of people.

City of Cleburne, Texas v. Cleburne Living Center, Inc.

Background

The case arose from the efforts of Cleburne Living Center, Inc. (CLC) to operate a group home for individuals with intellectual disabilities. City zoning regulations required a special-use permit for "hospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts" (Ref. 1, p 436). Following a public hearing, the city council denied the permit. CLC filed suit in federal district court arguing that the city zoning ordinance violated the equal protection rights of those with intellectual disabilities.

The district court concluded that "[i]f the potential residents of the . . . home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance" (Ref. 1, p 449). However, the district court upheld the City of Cleburne's ordinance. It held that those with intellectual disabilities did not constitute a suspect or quasi-suspect class and therefore did not apply strict scrutiny to its review. Under the lowest level of scrutiny, the court found that the ordinance was rationally related to the city's interests.

The Court of Appeals for the Fifth Circuit reversed this ruling, finding a history of "unfair and often grotesque mistreatment" of those with intellectual disabilities and that discrimination was "likely to reflect deep-seated prejudice" (Ref. 1, p 438). They also noted that those with intellectual disabilities lacked political power and that their condition was immutable. Because intellectual disability was relevant to many legislative actions, strict scrutiny was not appropriate. Intellectual disability was therefore found to be a quasi-suspect classification, and the Fifth Circuit applied an intermediate level of scrutiny. It found that the ordinance was invalid because it did not further any important governmental interest. The City of Cleburne appealed to the U.S. Supreme Court.

U.S. Supreme Court Ruling

The American Psychiatric Association and several other mental health organizations joined in an *amicus* brief written by the American Association on Mental Deficiency (now the American Association on Intellectual and Developmental Disabilities).[3] The brief supported recognition of intellectual disability as a quasi-suspect class and the application of an intermediate level of scrutiny. In review of the points of judicial analysis for a finding of suspect classification, the brief noted that individuals with intellectual disabilities had been deprived of fundamental rights because they were "erroneously believed to be a 'menace' to society and the principal source of immorality, prostitution, and crime" (Ref. 3, p 2). Moreover, these false stereotypes survived because "mentally retarded people were deliberately segregated from society" and "were disenfranchised from participating in the political system" (Ref. 3, p 2). The brief argued that classification of those with intellectual disabilities had "some legitimate uses in laws aimed at addressing the real needs and disabilities of retarded people" which should be upheld (Ref. 3, p 2). The brief rejected the lowest level of review, rational basis, as inadequate for the purposes of identifying invidiously discriminatory laws and called for an intermediate level of scrutiny.

In a decision that was viewed as a victory at the time by advocates for those who are disabled, the U.S. Supreme Court unanimously ruled that the restrictive city ordinance was unconstitutional. However, a six-justice majority of the Court declined to recognize persons with intellectual disabilities as a protected quasi-suspect class.[1] The latter finding would have wide-ranging consequences. The quirk-

iness of this decision can only be appreciated with detailed review.

Justice Byron White, writing for the Court, concluded that the court of appeals had erred in finding intellectual disability to be a quasi-suspect class, citing several reasons. First, those with intellectual disabilities "have a reduced ability to cope with and function in the everyday world" and that the members of the class range from "those whose disability is not immediately evident to those who must be constantly cared for" (Ref. 1, p 442). The Court viewed this variability as a significant barrier to a finding of suspect classification: "How this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary" (Ref. 1, p 442). Justice White reasoned that courts should be "very reluctant . . . to closely scrutinize legislative choices" regarding individuals within a group who have "distinguishing characteristics" relevant to state interests (Ref. 1, pp 441–2). Also, the government "may legitimately take into account" intellectual disability in a "wide range of decisions" (Ref. 1, p 446). The Court noted that "[h]eightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present" (Ref. 1, p 443).

Second, Justice White noted that there had been legislative action on the national and state level addressing the difficulties of persons with intellectual disabilities. This action, he wrote, "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary" (Ref. 1, p 443). He noted federal efforts, including § 504 of the Rehabilitation Act of 1973,[4] the Developmental Disabilities Assistance and Bill of Rights Act,[5] and the Education of the Handicapped Act.[6] Texas had enacted legislation including the Mentally Retarded Persons Act of 1977.[7] Justice White was concerned that according heightened scrutiny could have a chilling effect on these progressive efforts.

Third, "the legislative response . . . negates any claim that the mentally retarded are politically powerless" (Ref. 1, p 445).

Fourth, the Court was concerned about the slippery slope:

> . . . if 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 [Ref. 1, p 445–6].

Justice White listed "the aging, the disabled, the mentally ill, and the infirm."

The Court concluded:

> . . . [b]ecause mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate [Ref. 1, p 446].

Ordinarily, in the absence of a finding of suspect or quasi-suspect classification, the Court's analysis would have been finished. However, Justice White continued. Having rejected recognition of those with intellectual disabilities as a quasi-suspect class, the Court turned to a detailed analysis of the zoning ordinance, a level of analysis that would ordinarily have been reserved for examination of laws affecting suspect classifications. Finding that "the record does not reveal any basis for believing the . . . home would pose any special threat to the city's legitimate interests" the Court affirmed the lower court ruling that the ordinance was invalid as applied (Ref. 1, p 448). The Court examined the factors that the city council had relied on in denying the permit, factors that the district court had accepted as rational under its analysis. Noting the "negative attitude of the majority of property owners located within 200 feet" of the home, "the fears of elderly residents of the neighborhood," fear that students of the junior high school across the street from the home might harass its occupants, the home's location in a flood plain, and the size of the home (Ref. 1, p 448). Justice White analyzed and rejected each of the city council's reasons as being irrational. "The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded" (Ref. 1, p 450).

The Court declined to decide whether the ordinance requiring a special permit was invalid on its face.

Justice Thurgood Marshall wrote a separate opinion, joined by Justices William Brennan and Harry Blackmun, concurring with the Court's result, but not with its analysis. Justice Marshall first noted that the Court "disclaims that anything special, in the

form of heightened scrutiny, is taking place" (Ref. 1, p 456). "Cleburne's ordinance," Justice Marshall continued, "surely would be valid under the traditional rational-basis test" (Ref. 1, p 456). He noted that the Court's opinion subjected the ordinance "to precisely the sort of probing inquiry associated with heightened scrutiny" (Ref. 1, p 458). In an attempt to make sense of the majority opinion, Justice Marshall termed this "second-order" rational-basis review. He believed that the Court's reasoning was unclear and would create confusion. In addition, he argued that the "Court radically departs from our equal protection precedents" in ruling narrowly on how the city ordinance was applied in this case and failing to invalidate the ordinance on its face (Ref. 1, p 456).

Justice Marshall called for heightened scrutiny of the city ordinance. First, he argued, "the interest of the retarded in establishing a home is substantial" and implicated a fundamental liberty. In the wake of deinstitutionalization, "[f]or retarded adults, this right means living together in group homes" (Ref. 1, p 461). Second, he noted that persons with intellectual disabilities had been subjected to a long history of segregation and discrimination. He reviewed the abuses of eugenics, institutionalization, sterilization, exclusion from education, and disqualification from voting. "But most important," he wrote, "lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that have long plagued them" (Ref. 1, p 464). Justice Marshall concluded that "searching scrutiny" should be applied to housing ordinances affecting those with intellectual disabilities (Ref. 1, p 464).

Justice Marshall rejected the Court's conclusion that recent progressive legislation, such as § 504 of the Rehabilitation Act of 1973,[4] indicated that those with intellectual disabilities were not politically powerless and, therefore, did not deserve judicial protection based on recent progressive legislation. Noting the history of progressive legislation regarding race-based classifications, Justice Marshall observed that these developments did not indicate that such classifications were any less suspect as a result.

Justice Marshall also rejected the Court's view that variability within the class of individuals with intellectual disabilities precluded judicial application of heightened scrutiny: "that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist" (Ref. 1, p 468). Justice Marshall observed the fact that a characteristic "may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not." By way of example, he noted that "a sign that says 'men only' looks very different on a bathroom door than a courthouse door" (Ref. 1, pp 468–9).

Subsequent Developments

The *Cleburne* decision was a victory for persons with intellectual disabilities in their pursuit of community-based housing. Not long after, Congress passed the Fair Housing Amendments Act of 1988 (FHAA), barring discrimination in housing on the basis of disability.[8] However, the Court's denial of quasi-suspect status in *Cleburne* was a signal of the beginning of judicial conservatism regarding the rights of those with mental disabilities that would surface in later cases. Unless Justice Marshall's posited second-order rational-basis review proved to have life, those with mental disorders had little reason to anticipate significant judicial protection.

The Americans with Disabilities Act

Before the Court could speak again, an important intervening event arose from the legislative arena. In 1990, Congress enacted the Americans with Disabilities Act proclaiming that its purpose was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (Ref. 9, Section 2(b)(1)). In an apparent response to the Court's *Cleburne* decision, Congress sought to bolster judicial protection of the rights of persons with disabilities by establishing the foundation for a heightened level of equal protection for them.

In a series of findings detailed in the first section of the ADA, Congress appeared to address the U.S. Supreme Court's conclusions in *Cleburne*. The Court had found that legislation regarding persons with disabilities indicated that the group was not politically powerless. Congress found differently and cited an exhaustive list of forms of discrimination borne by individuals with disabilities, including "overprotective rules and policies." In language that drew from the Court's own opinions regarding suspect classifications, one finding read:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society [Ref. 9, Section 2(a)(7)].

Heller v. Doe

Soon after the enactment of the ADA, the U.S. Supreme Court was presented with another opportunity to consider how the Equal Protection Clause should apply to those with mental disabilities. In 1993, in *Heller v. Doe*, the U.S. Supreme Court found that Kentucky could provide different statutory schemes for involuntary civil commitment of those with intellectual disabilities and those with mental disorders.[10] The Kentucky statute specified that the applicable burden of proof for involuntary commitment for those with intellectual disabilities was clear and convincing evidence, while the standard for commitment for mental illness was beyond a reasonable doubt. The statute also provided that in commitment proceedings for those with intellectual disabilities, but not for those with mental disorders, guardians and immediate family members could participate as if a party to the proceedings, with all attendant rights, including the right to present evidence and appeal.

Justice Anthony Kennedy, writing for a five-to-four majority, rejected a claim that these provisions violate the constitutional right to equal protection of a class of persons with intellectual disabilities who had been committed. He applied a rational-basis review in his analysis. Justice Marshall had suggested that *Cleburne* had not applied a standard rational-basis review, but had created a second-order rational-basis standard. Justice Kennedy made clear that, in his view, it had not. He referred to the *Cleburne* decision once, to note "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill" (Ref. 10, p 321). The rational-basis review was to involve deference to the legislature's actions; in fact, he wrote, the state has "no obligation to produce evidence to sustain the rationality of a statutory classification" (Ref. 10, p 320). The statute, Justice Kennedy wrote, "is presumed constitutional" (Ref. 10, p 320). He made no mention of the ADA or its findings.

Justice David Souter, in a dissent joined by three other justices, opined that the Kentucky statute did not survive rational-basis scrutiny as had been applied in *Cleburne*. He observed that the Court in *Cleburne* reached its opinion after "enquiring into record support for the State's proffered justifications, and examining the distinction in treatment in light of the purposes put forward to support it" (Ref. 10, p 337). Justice Souter believed that the Court had not applied this *Cleburne* framework in *Heller v. Doe*. Justice Blackmun, who signed on to Justice Souter's dissent, also wrote separately to emphasize his view that heightened review should be applied to laws that discriminate against individuals with intellectual disabilities.

Justice Souter noted respondent Doe's arguments that the ADA "amounts to an exercise of Congress's power under § 5 of the Fourteenth Amendment to secure the guarantees of the Equal Protection Clause to the disabled" and that "all individuals with disabilities, including individuals with mental retardation should be treated as a suspect class" (Ref. 10, p 336).

The ruling in *Heller v. Doe* appeared to lay to rest the notion that the Court would provide more than minimal review to the equal protection claims of those with mental disorders. The ADA, including the embedded Congressional findings, had made no impact on the Court's analysis.

Board of Trustees of the University of Alabama v. Garrett

In *Board of Trustees of the University of Alabama v. Garrett*,[11] the U.S. Supreme Court would first address the interplay between the equal protection rights of persons with disabilities and the requirements of the ADA that Justice Souter had noted in his dissent in *Heller v. Doe*. A suit was brought by two state employees: one a nurse with breast cancer who lost her director position after undergoing surgery, radiation, and chemotherapy and the other a security officer with asthma and sleep apnea who was denied workplace accommodations. These individuals brought suit for monetary damages alleging that the state had failed to comply with Title I of the ADA. The Court ruled that the Eleventh Amendment barred the suits.

Under the Eleventh Amendment, private suits against a state could not be brought in federal court without the state's consent. Federal legislation could abrogate this immunity if Congress acted within its

constitutional authority. Congress could act to subject states to federal suit pursuant to the Fourteenth Amendment, which established citizens' rights to due process of law and to equal protection of the laws. However, with respect to the states, Congress could not exceed the scope of protection established by the courts.

Justice William Rehnquist, writing for a five-to-four majority, began his analysis by noting that the Court had ruled in *Cleburne* that mental retardation is not a quasi-suspect class and that "only the minimum 'rational-basis' review" is required (Ref. 11, p 357). He concluded that:

> The result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions are rational. They could quite hard headedly—and perhaps hard heartedly—hold to job-qualification requirements which do not make allowance for the disabled [Ref. 11, p 367].

The Court rejected the requirement for reasonable accommodations limited by "undue hardship" as specified in the ADA. It ruled that it would be "entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities" (Ref. 11, p 372). Justice Rehnquist continued that "the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer" (Ref. 11, p 372).

The *Garrett* decision had two important elements: first, the Court extended to all groups of persons with disabilities the finding from *Cleburne* that quasi-suspect classification did not apply to those with intellectual disabilities. Surprisingly, the Court made this highly consequential extension without a single line of discussion, analysis, or dissent. Second, with regard to state actions, the Court made clear that Congress could not wield its authority under the enforcement section of the Fourteenth Amendment to protect those with disabilities as a class beyond the limits defined by the Court in *Cleburne*. State actions that discriminate against persons with disabilities must be rationally related to a state interest, the lowest level of judicial scrutiny.

The Court's conservatism regarding the rights of persons with disabilities had deepened. Justice White, in *Cleburne*, had been concerned that a finding of quasi-suspect classification would open the door to other groups' claims for heightened protection. Justice Rehnquist, in *Garrett,* closed the door on all groups on the basis of disabilities. With respect to the ADA and other efforts by Congress to enforce the rights of those with disabilities under the Fourteenth Amendment, *Cleburne* would be limiting with regard to state actions.

Conclusion

Justice Marshall was certainly right in his dissenting opinion in *Cleburne* that persons with intellectual disabilities should have been accorded the protections of quasi-suspect classification in light of a long history of discrimination and segregation. However, the Court's opinions are not driven by the text and logic of previous decisions in a simple way. Its decisions generally reflect the views of the majority of society. The *Cleburne* case followed a period of massive deinstitutionalization of those with intellectual disabilities in the 1970s and 1980s. There was a period of resistance in some locales, but by the time the case reached the U.S. Supreme Court, most citizens supported the right of persons with intellectual disabilities to live in group homes in the community. The subsequent passage of the FHAA in 1988 is evidence of this conclusion. However, there was no general popular support for extending broader constitutional protections to this group. Justice White's majority opinion may be viewed as a pragmatic compromise that achieved the politically desirable result, but no more.

Currently, most protections for persons with disabilities are the result of legislation, not the consequence of judicial precedent. However, following *Garrett*, there are important limitations on the extent to which federal law can protect persons with disabilities against state actors. This is particularly injurious to those with intellectual and mental disabilities. In comparison to other groups of individuals with disabilities, those who have mental disorders are more likely to be affected by state laws, such as those that limit professional licensure, state benefits, and parental and other rights. As one example, a recent report of the National Council on Disability, citing *Cleburne*, found "no court to date has struck down on the basis of irrationality any child custody or child welfare law alleged to discriminate against parents with disabilities" (Ref. 12, p 301).

There seems to be little room for optimism that individuals with mental disorders will receive greater protection from the courts against discrimination, at least in the near future. Judicial change will come only when there is substantial change in the attitudes

of the public. Although some progress has been made to reduce stigma, the public continues to regard those with mental disorders as unstable and prone to violence; therefore, little can be expected in the way of political or social pressure. Advocacy groups appear to have accepted this reality. A recent review of disability constitutional law found that disability rights lawyers had no short- or long-term strategy to challenge *Cleburne*.[2] In an era of judicial conservatism regarding disability rights, advocates fear establishing bad precedents should they press their constitutional claims in court. Ironically, the fact that *Cleburne* and *Garrett* have been so perfunctorily and unconvincingly decided may prove to be a positive should the judicial topography shift favorably.

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