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CLASSES, PERSONS, EQUAL PROTECTION, AND *VILLAGE OF WILLOWBROOK V. OLECH*

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Abstract: In most contexts, the Equal Protection Clause serves as a limitation on government classifications, but it has also been used as a protector of individual rights. These competing versions of equal protection are contradictory, but courts have for the most part ignored this problem. In *Village of Willowbrook v. Olech*, the United States Supreme Court determined that an individual homeowner had stated a valid equal protection claim when she alleged that she alone, without regard to her membership in any class, had been treated differently from other similarly situated homeowners. The Court's decision in *Olech* has created a powerful precedent for other individual persons complaining of wrongful treatment by government officials. It also suggests a method of resolving the conflict between the two competing views of equal protection.

In most contexts, the basic role of the Equal Protection Clause is to act as a limit on government classifications. Tussman and tenBroek formally articulated this role in their influential article, The Equal Protection of the Laws.[1] The United States Supreme Court has provided substantial support for this view on numerous occasions. Some have gone so far as to suggest that this limitation on government classification is the only role of the Equal Protection Clause.[2] However, there has always been a less well-known, less influential version of the Equal Protection Clause that emphasizes, not classifications, but the protection of individual persons without regard to their membership in any particular class. This alternate view of equal protection occupies an uneasy relation with the more predominant class-based version. The two are apparently incompatible and might easily come into direct conflict, with one view emerging as the winner. But this has not happened. Rather, like trains riding on parallel tracks that never meet, the two apparently incompatible views of equal protection do not come into direct conflict, but simply ignore each other. Recently, in *Village of Willowbrook v. Olech*,[3] the

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1. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

2. The author of this Article was one of those who once made such an assertion. *See* Robert C. Farrell, *Equal Protection: Overinclusive Classifications and Individual Rights*, 41 ARK. L. REV. 1 (1988). That position I now recant with this Article.

3. 528 U.S. 562 (2000). For previous commentary on this case, see generally Hortensia S. Carreira, *Protecting the "Class of One,"* 36 REAL PROP. PROB. TR. J. 331 (2001); Erwin Chemerinsky, *Suing The Government for Arbitrary Actions*, 36 TRIAL 89 (May 2000); J. Michael

Court suggested, although inadvertently,[4] how the conflicting versions of equal protection might be reconciled. Although the Court's opinion in *Olech* is extremely brief and makes no mention of the problem, the case does provide a roadmap for assigning each of the views of equal protection to its proper sphere. The conceptual result is a greater level of clarity in the making of equal protection arguments. The practical result will probably be the proliferation in the federal district courts of cases where an individual person claims that governmental officials have treated him or her unequally.[5]

This Article will set forth the two variant views of equal protection and attempt to identify the appropriate context for each. Part I of this Article sets forth the traditional version of equal protection as a limit on government classification. Part II introduces the personal, individual-rights view of equal protection. Part III closely examines *Olech*, which reinvigorated the individual rights version under the rubric, "class of one." Part IV examines how *Olech* has changed litigation in the federal courts. Finally, Part V takes a second look at the class-based and individual-rights versions of equal protection in light of *Olech*.

I. EQUAL PROTECTION AS A LIMIT ON GOVERNMENT CLASSIFICATION

A. Tussman and tenBroek's View of Equal Protection

The notion of equality could not possibly require that all persons be treated the same. For example, a doctor who prescribed an aspirin to all his patients would not be treating them equally.[6] And thus, at least since

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McGuinness, *The Rising Tide of Equal Protection:* Willowbrook *and the New Non-Arbitrariness Standard*, 11 GEO. MASON U. CIV. RTS. L.J. 263 (2001); J. Michael McGuinness, *The Impact of* Village of Willowbrook v. Olech *on Disparate Treatment Claims*, 17 TOURO L. REV. 595 (2001); Paul D. Wilson, *What Hath* Olech *Wrought? The Equal Protection Clause in Recent Land-Use Damages Litigation*, 33 URB. LAW. 729 (2001); Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L. J. 69 (2000–2001).

4. The term "inadvertently" is used here because not only did the Court not explicitly claim to be reconciling a conflict between two different views of the Equal Protection Clause, it did not even advert to the fact that there was any such conflict. Nor did the Court cite, much less distinguish, any of the cases that spoke of equal protection as a limit on classifications rather than an individual right. The Supreme Court's opinion in *Olech* is discussed at greater length in Part III.B.

5. *See infra* Part IV.C.

6. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977) (discussing "the right *to treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. If I have two children,

Aristotle, it has been understood that equality requires, not that everyone be treated the same, but that those similarly situated be treated similarly.[7] Tussman and tenBroek applied this paradigm to the notion of equality as it applies to legislation. In opposition to the notion that equality requires all persons to be treated the same, Tussman and tenBroek explained that it is not possible to demand that all laws be of a general and universal character that make no distinction between persons.[8] "It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons."[9] Rather, "[f]rom the very necessities of society, legislation of a special character . . . must often be had."[10] "The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals."[11]

But once it is admitted that the legislature is free to enact laws with less than universal impact, thus treating different groups differently, then "[w]e . . . [have] arrive[d] at the point at which the demand for equality confronts the right to classify."[12] This is what Tussman and tenBroek identified as the basic paradox, that "[t]he equal protection of the laws is a 'pledge of the protection of equal laws.' But laws may classify. And 'the very idea of classification is that of inequality.'"[13] The way out of this bind turns out to be the doctrine of "reasonable classifications" where "the reasonableness of a classification is the degree of its success in treating similarly those similarly situated."[14]

Tussman and tenBroek explained this doctrine as follows. First, the process of classification involves the "designat[ion of] a . . . trait . . . the possession of which, by an individual, determines his membership in or inclusion within a class."[15] Thus, for example, the legislature could create a class by reference to a trait such as gender, age, or citizenship. Once a class is established, Tussman and tenBroek explained that it must be

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and one is dying of a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to see who should have the remaining dose of a drug") (emphasis in original).

7. ARISTOTLE, ETHICA NICOMACHEA V.3.1131a–1131b (W. Ross trans., 1925), *quoted in* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982).

8. Tussman & tenBroek, *supra* note 1, at 343 ("A state . . . is not compelled to 'run all its laws in the channels of general legislation.'" (citing Bachtel v. Wilson, 204 U.S. 36, 41 (1907))).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 343–44.

13. *Id.* at 344.

14. *Id.*

15. *Id.*

tested for reasonableness, that is, its success in treating similarly those similarly situated.[16] But how is the legislature to determine who is similarly situated? Clearly, this standard requires more than that every member of the class possess the classifying trait.[17] By such a circular standard, all classifications would be reasonable. Rather, according to Tussman and tenBroek, in order to test for similarity of situation, "we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law."[18]

In applying this test, Tussman and tenBroek explained that it is helpful to think of the class by reference to the trait that makes one a member of it, and to think of the purpose of the law by reference to the evil or mischief that the law seeks to eliminate.[19] With this terminology, then, the Tussman and tenBroek test requires us to compare the class that bears the trait with the class that is tainted by the mischief.[20] If a classification is perfect, the two classes completely coincide. In the real world, however, classifications are far more likely to be overinclusive, underinclusive, or both, but courts are quite deferential to legislative judgments and ordinarily will tolerate a great deal of imprecision. Of the differing kinds of imprecision, Tussman and tenBroek pointed out that the more objectionable is the overinclusive classification, the one that "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims."[21] The overinclusive classification "reach[es] out to the innocent bystander, the hapless victim of circumstance or association,"[22] and thus is the most inconsistent with "our traditional antipathy to assertions of mass guilt and guilt by association."[23]

It should be obvious that the Tussman and tenBroek view of equal protection as a limitation on classification provides no protection for individuals who are harmed by a classification, so long as the classification satisfies the requirement of reasonableness. For them, at

16. *Id.*
17. *Id.* at 345.
18. *Id.* at 346.
19. *Id.*
20. *Id.* at 346–47.
21. *Id.* at 351.
22. *Id.*
23. *Id.* at 352.

least as applied to legislation, the equal protection clause does not create individual, personal rights.

B. The View of Equal Protection as a Limitation on Classifications in the Courts

1. U.S. Supreme Court Precedent

The U.S. Supreme Court has repeatedly spoken of the Equal Protection Clause as a limit on government classifications. In *Nordlinger v. Hahn*,[24] for example, it explained that "[o]f course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."[25] This basic explanation led the Court to specify the traditional deferential rule for evaluating classifications is that, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."[26] The *Nordlinger* Court then concluded that the different treatment accorded to older and newer homeowners was rationally related to governmental interests in neighborhood stability and the protection of reliance interests.[27] It was of no concern to the Court, applying this version of the Equal Protection Clause, that the plaintiff in the case was paying property taxes five times higher than her neighbors were paying in similar homes.[28] So long as the classification was reasonable, individual harm or unfairness to a particular person was not part of the equal protection calculus.

The notion that the Equal Protection Clause's principal work is to limit government classifications is repeated frequently by the Court. Another example is *Romer v. Evans*[29] where the Court stated that:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or

24. 505 U.S. 1 (1992).
25. *Id.* at 10.
26. *Id.*
27. *Id.* at 12.
28. *Id.* at 7.
29. 517 U.S. 620 (1996).

> persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold a legislative classification so long as it bears a rational relation to some legitimate end.[30]

The Court in *Romer* then ruled that the classification at issue in that case, one that explicitly singled out gay persons for disadvantageous treatment, was not one that satisfied the reasonable classification requirement.[31] The problem was both that the provision at issue "singl[ed] out a certain *class* of citizens for disfavored legal status or general hardships"[32] and that it "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the *class* of persons affected."[33] The Court's opinion invalidating the provision made no reference to individual rights.

The Supreme Court's opinion in *Massachusetts Board of Retirement v. Murgia*[34] is a particularly clear expression of the view that equal protection is a limit on classification rather than a protector of individual rights. In that case, the Court reviewed a Massachusetts statute requiring all state police officers to retire at age fifty.[35] The purpose of the law was to ensure the fitness of officers in order to promote public safety "by assuring physical preparedness of its uniformed police."[36] Robert Murgia, the plaintiff in the case, was more than fifty years of age, but extremely fit.[37] He challenged the law as a denial of equal protection.[38] In effect, Murgia was arguing that he was similarly situated to those under fifty who were allowed to stay on their jobs and thus he should receive the same treatment.[39] According to Tussman and tenBroek's analysis, the

30. *Id.* at 631 (citations omitted).

31. *Id.* at 632.

32. *Id.* at 633 (emphasis added).

33. *Id.* at 634 (emphasis added).

34. 427 U.S. 307 (1976).

35. *Id.* at 308.

36. *Id.* at 314.

37. *Id.* at 311.

38. *Id.* at 309.

39. On the one hand, the mandatory retirement at age 50 was designed "to remove from police service those whose fitness for uniformed work presumptively has diminished with age." *Id.* at 315. On the other hand, Murgia had proved through individualized testing that "his excellent physical and mental condition rendered him capable of performing the duties of a uniformed officer." *Id.* at 311. Thus, it was Murgia's claim that in relation to fitness, he was in fact similar to the presumptively fit group of those under 50 rather than similar to the presumptively unfit group of those over 50.

issue is whether the class of state troopers over fifty was similarly situated with the class of state troopers under fifty in relation to the purpose of ensuring fitness to promote safety.[40] Once the Court determined that fitness tends to decline with age,[41] then the classes were not similarly situated because it is probably true that a greater percentage of those over fifty were unfit for the rigors of police work than the percentage of those under fifty who were unfit. Murgia was thus part of a class that was not similarly situated with the class of those under fifty in relation to the purpose of the law. Therefore, the Equal Protection Clause did not require that the members of Murgia's class be treated the same as those under fifty.

But what about Robert Murgia himself? Murgia had demonstrated through individual testing that he himself was extremely fit and quite capable of handling the rigors of police work.[42] Wouldn't that entitle him to the same treatment as other fit individuals? No, it would not. Under the view of equal protection as a limitation on government classification, all that was required was that the classification meet the required standard, without regard to the classification's effect on individual persons. Once it was determined that the age classification was reasonably correlated with fitness for police work, and thus that those who were members of the over fifty group were not similarly situated with those in the under fifty group, it did not matter what adverse affect the classification had on an individual member of the class. What was at work was a classification that made use of a generalization about age that was reasonably accurate. It did not matter that the generalization was not true as to a particular member of the class. Thus, the ordinary equal protection doctrine, at least as applied to legislative or administrative rules, appears to provide no protection for individuals from being harmed by classifications that embody generalizations that are not true as to the individual. In this context, it is very hard to make sense of the claim that equal protection is a personal, individual right.

Kimel v. Florida Board of Regents[43] provides further support for the view that equal protection serves only as a limitation on classifications.

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40. Tussman & tenBroek, *supra* note 1, at 346 (indicating that "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.").

41. *Id.* at 315.

42. *Id.* at 311 ("Appellee Murgia had passed . . . [a rigorous physical] examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.").

43. 528 U.S. 62 (2000).

In that case, the Supreme Court was concerned with the limits of Congressional power to enforce the Fourteenth Amendment through appropriate legislation.[44] The particular issue was whether Congress had the power under Section 5 of the Fourteenth Amendment to extend the prohibitions of the Age Discrimination in Employment Act of 1967 (ADEA)[45] to bind state governments. In the course of answering this question in the negative,[46] the Court used a test that required that there be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[47] In order to apply this test, the Court had to compare the kind of age discrimination that would be prohibited by the Equal Protection Clause with the kind of discrimination that was in fact prohibited by the statute.[48] In making this comparison, the Court made it clear that, unlike the ADEA, the Equal Protection Clause does not protect individuals. Specifically, the Court stated:

> Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be *an inaccurate proxy in any individual case* is irrelevant.[49]

The *Kimel* Court went on to explain that the constitutionality of age classifications was not to be determined "on a person by person basis."[50] On the other hand, the statutory language of the ADEA specifically made unlawful "discriminat[ion] against any individual . . . because of such individual's age."[51] This statutory language thus created "a presumption in favor of requiring . . . [an] individualized determination."[52] Once the Court had identified this clear distinction between the Equal Protection Clause (which allows for generalizations that may not be true in individual cases) and the ADEA (which protects each individual person

44. U.S. CONST. amend. XIV, § 5.

45. 29 U.S.C. § 621 et seq. (1994 & Supp. III).

46. *Kimel*, 528 U.S. at 67 ("We conclude that the ADEA does contain a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' authority under [Section] 5 of the Fourteenth Amendment.").

47. *Id.* at 81 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

48. *Id.* at 82–86 (comparing the conduct prohibited by the statute with the conduct prohibited by the Equal Protection Clause).

49. *Id.* at 84 (emphasis added).

50. *Id.* at 85–86.

51. 29 U.S.C. § 623(a)(1) (1994 & Supp. III).

52. *Kimel*, 528 U.S. at 87.

from discrimination), the Court determined that Congress did not have authority under Section 5 to adopt the ADEA because the conduct prohibited by the statute was much broader than, and thus not congruent and proportional to, the conduct prohibited by the Equal Protection Clause.[53] The Court's opinion in *Kimel* is thus very strong evidence that the Equal Protection Clause does not protect individual rights.

In fact, on at least one occasion, the Supreme Court has suggested that limiting classifications is the *only* role of the Equal Protection Clause. In *Oyler v. Boles*,[54] the Court reviewed a claim alleging selective enforcement of a habitual criminal statute. In rejecting that claim, the Court explained that "the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation."[55] What was missing from the allegations in the *Oyler* case was a claim that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[56] Without such an "arbitrary classification," the Court concluded, "grounds supporting a finding of a denial of equal protection were not alleged."[57] The Court's *Oyler* opinion is perhaps its strongest statement that equal protection does no more than limit government classifications.

2. *Lower Federal Court Precedent*

Some lower federal courts have been even more explicit in the view that equal protection is a limit on government classifications and nothing more. One of the strongest versions of this argument was made by the U.S. Court of Appeals for the Sixth Circuit in *Futernick v. Sumpter Township*.[58] In that case, the plaintiff alleged an equal protection violation when town officials selectively enforced state environmental regulations against him.[59] In rejecting that claim, the Sixth Circuit, citing *Oyler*, found that a claim of selective prosecution must be based on an

53. *Id.* at 86 ("The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.").

54. 368 U.S. 448 (1962).

55. *Id.* at 456.

56. *Id.*

57. *Id.*

58. 78 F.3d 1051 (6th Cir. 1996).

59. *Id.* at 1056 ("The heart of Futernick's case is the claim that state officials . . . violated his constitutional right to equal protection of the law by selectively enforcing Michigan state environmental regulations.").

unjustifiable standard on the grounds of "race, religion, or other arbitrary classification."[60] The court explained that an "arbitrary classification"[61] implied that "group distinctions could be a basis for liability"[62] but that not every act of arbitrariness directed at an individual would be constitutionally impermissible.[63] The court determined that Futernick's equal protection claim failed because he did "not claim to be a member of any group"[64] but had simply alleged town officials had acted in bad faith toward him individually.[65]At least with regard to equal protection claims of selective enforcement, the Sixth Circuit in *Futernick* read Supreme Court precedent as requiring "arbitrary classifications"[66] as a basis of liability. According to the Sixth Circuit, "choosing to enforce the law against a particular individual is [not] a 'classification.'"[67]

Futernick further explained that limiting equal protection claims to allegations of arbitrary classifications, that is, decisions aimed at a particular group, was essential in order to limit the work of the federal courts and to give proper deference to the judgment of local officials.[68] For example, the Sixth Circuit explained, a court could require that equal protection claims of bad faith toward an individual be accompanied by the requirement of also showing that "others who are similarly situated in 'all relevant aspects' have not been regulated."[69] The focus on "similarly situated"[70] persons would act as a screening device, in that not every act of bad faith directed at an individual would be an equal protection violation. Rather, equal protection would only prohibit those acts of bad faith where one individual had been singled out while other similarly situated individuals were left unregulated. Such a rule would protect individuals without requiring them to identify any class-based discrimination.

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60. *Id.* at 1057 (citing *Oyler*, 368 U.S. at 456).

61. *Id.*

62. *Id.*

63. *Id.* at 1057 n.8.

64. *Id.* at 1057.

65. *Id.*

66. *Id.*

67. *Id.* at 1058.

68. *Id.* ("Furthermore, we see compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right. The sheer number of possible cases is discouraging.") (emphasis in original).

69. *Id.* (citing Rubinowitz v. Rogato, 60 F.3d 906, 910 (1st Cir. 1995)).

70. *Id.*

But, according to the *Futernick* court, such a rule would also make it too easy for litigious plaintiffs to get past the motion to dismiss stage and advance to summary judgments because:

> Determining 'all relevant aspects' of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion. If we require defendants to wait until summary judgment, we burden local and state officials with the regular prospect of 'fishing expeditions' and meritless suits. In the meantime we federalize and constitutionalize what are essentially issues of local law and policy.[71]

The Sixth Circuit was concerned about the possibility of expanding equal protection to simple claims of arbitrariness or animosity not related to group identity.[72] The state needed to retain the discretion to determine against whom to enforce its laws, especially because the state has never been in a position to enforce all laws at all times against all infractions. It is both appropriate and necessary "for a state somehow to choose to prosecute or regulate only part of the group of people who may be violating the law, and to do so without subjecting the selection decision to micro-management by courts."[73] The requirement that allegations of arbitrariness or animosity by governmental officials must include a reference to group identity would exclude most of these claims.[74] Thus, according to *Futernick*, the Equal Protection Clause is only relevant when a plaintiff has alleged an arbitrary or invidious classification. A mere claim of arbitrary or invidious conduct toward an individual person will not suffice.

Powell v. Montgomery[75] is another recent case where a federal district court made an extremely strong statement supporting the class-based version of equal protection. In that case, the plaintiff had been fired from his job with the fire department for failing to obey an order to have himself weighed to determine his compliance with the department's

71. *Id.* at 1058–59 (internal citations omitted).

72. *Id.* at 1059.

73. *Id.* at 1060.

74. *Id.* at 1058–59 (indicating that, without a requirement that an equal protection claimant include an allegation of an intent to harm a protected group or punish the exercise of a fundamental right, "[t]he sheer number of possible cases is discouraging," and suggesting that the requirement of alleging an invidious classification is part of a view that "counsels against expanding a federal right to protection from non-group animosity on the part of local officials").

75. 56 F. Supp. 2d 1328 (M.D. Ala. 1999).

weight management regulations.[76] In response to his equal protection claim that the regulations had been applied unequally to him, the court insisted that his equal protection claim had to include an allegation of purposeful discrimination.[77] In explaining how one proved purposeful discrimination, a federal district court for the Middle District of Alabama cited the U.S. Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney*.[78] There the Court stated that discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[79] The federal district court in *Powell* interpreted this language to mean that the plaintiff's equal protection claim needed to include an allegation that the defendant's conduct had been "deliberately based on an *unjustifiable, group-based standard*."[80] Because the plaintiff in *Powell* had only alleged unequal treatment toward himself as an individual, his claim was rejected.[81]

Judge J. Skelly Wright, while he was Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, also shared the view of equal protection as being no more than a limit on government classification. In the course of an argument against the notion that equal protection violations required proof of purposeful discrimination, he included the following:

> The key here is that the [E]qual [P]rotection [C]lause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case invoking the [E]qual [P]rotection [C]lause, if it is to succeed, must allege something more than a tort, personal to the plaintiff.[82]

All of the cases cited in this section constitute strong support for the view that equal protection operates to limit government classifications, but does no more than that. However, as the next section will

76. *Id.* at 1331.

77. *Id.* at 1332.

78. 442 U.S. 256 (1979).

79. *Id.* at 279.

80. *Powell*, 56 F. Supp. 2d at 1333 (quoting E & T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987)) (emphasis in *Powell*).

81. *Id.*

82. J. Skelly Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R-C.L. L. REV. 1, 27 (1980).

demonstrate, there is an alternate view of equal protection that will necessarily call that wisdom into question.

II. EQUAL PROTECTION AS A PROTECTOR OF INDIVIDUAL RIGHTS

The alternate view of equal protection focuses, not on limiting governmental classifications, but on protecting individual rights. This view of equal protection has an obvious contextual basis; the Fourteenth Amendment itself provides that no state shall deny to any *person* the equal protection of the laws.[83] *Shelley v. Kramer*[84] was one of the earliest cases expressing this version of equal protection. In that case, the defendants had argued that the state courts were not treating black residents unequally in enforcing a racially restrictive covenant because the courts would be equally willing to enforce such a covenant against white persons.[85] The U.S. Supreme Court rejected this "equal discrimination" argument as amounting to no more than the "indiscriminate imposition of inequalities."[86] The Court explained that, even if courts were willing to penalize all races equally, that would not satisfy the mandate of the Equal Protection Clause because "[t]he rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[87] Thus, an individual black person who is unable to buy a home because of his race has been treated unequally, without regard to a court's willingness to prevent a white person from buying a home because of his race.

Although the Court in *Shelley* rejected the "equal application" defense on the basis of a personal rights view of equal protection, it is quite clear that there was no need to resort to that explanation in order to reach that result. In *Loving v. Virginia*,[88] the Court considered and rejected, without any reference to personal rights, a similar argument that had been made in defense of a statute that prohibited interracial marriage.[89] In *Loving*, the statute was defended on the ground that the state was willing to

83. U.S. CONST. amend. XIV.
84. 334 U.S. 1 (1948).
85. *Id.* at 21.
86. *Id.* at 22.
87. *Id.*
88. 388 U.S. 1 (1967).
89. *Id.* at 8.

prohibit interracial marriage equally by both black and white persons.[90] The Court rejected that argument on the grounds that the statutes contained "racial classifications," and "the fact of equal application does not immunize the statutes from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[91] Thus, the problem the Court identified in *Loving*, and which it ought to have identified in *Shelley*, was an indefensible classification, not an invasion of a personal right.

However, notwithstanding *Loving*, the view of equal protection as an individual right has had several more recent expressions in a series of affirmative action cases, where it has generally been used by those opposed to affirmative action, or at least by those opposed to a lesser standard of review for affirmative action. In *Regents of the University of California v. Bakke*,[92] Justice Powell argued that all racial classifications, whether invidious or benign, should be subjected to strict scrutiny.[93] In support of this conclusion, Justice Powell cited the personal nature of the equal protection guarantee.[94] He began by citing the above-quoted language in *Shelley* that the rights established by the equal protection clause are personal rights.[95] He then insisted that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[96] Justice Powell criticized the "artificial line of a 'two-class theory' of the Fourteenth Amendment,"[97] and insisted that "[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."[98] Justice Powell's concluding words on the subject were a strong endorsement of the individual rights position. He said, "[i]f it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions

90. *Id.*

91. *Id.* at 9.

92. 438 U.S. 265 (1978).

93. *Id.* at 291.

94. *Id* at 289–90.

95. *Id.* at 289 (quoting Shelley v. Kramer, 334 U.S. 22 (1948)).

96. *Id.*

97. *Id.* at 295. The "two-class theory" to which Powell here refers is the view that the Equal Protection Clause is directed solely at discrimination "based on differences between 'white' and Negro." *Id.* at 295 (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

98. *Id.* at 298.

impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently . . . . The Constitution guarantees that right to every person regardless of his background."[99]

Subsequently, in *Adarand Constructors Inc. v. Pena*,[100] the Supreme Court articulated an extremely strong version of the individual rights view of equal protection. In *Adarand*, the Court, for the first time in a majority opinion, held that strict scrutiny was the proper standard of review for all racial classifications, without regard to the level of government that was making the classification.[101] In so holding, the Court cited Justice Powell's *Bakke* opinion at some length as strong support for the individual rights view of equal protection.[102] Going beyond that, the Court in *Adarand* argued that its previous cases had established three general propositions with regard to racial classifications: skepticism, consistency, and congruence.[103] According to the Court, these three propositions:

> All derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.[104]

The Court explained further that "whenever the government treats any *person* unequally because of his or her race, that *person* has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[105] The majority criticized Justice Stevens' dissenting opinion, which had argued that it was appropriate to review benign racial classifications more generously than

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99. *Id.* at 299.

100. 515 U.S. 200 (1995).

101. *Id.* at 224 ("Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

102. *Id.* at 224–25.

103. *Id.* at 223–24.

104. *Id.* at 227 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)) (emphasis in original).

105. *Id.* at 229–30 (emphasis added).

invidious racial classifications,[106] as inconsistent "with the long line of cases understanding equal protection as a personal right."[107]

Outside of the affirmative action context, the Court has also used personal rights rhetoric to explain why gender classifications should be subjected to a heightened level of scrutiny. In *Frontiero v. Richardson*,[108] the plurality opinion explained that sex, "like race and national origin, is an immutable characteristic determined solely by accident of birth"[109] and thus to impose disabilities on the basis of sex "would seem to violate 'the basic concept of our system that *legal burdens should bear some relationship to individual responsibility.*'"[110] Further, because "the sex characteristic frequently bears no relation to ability to perform or contribute to society,"[111] classifications based on sex "often have the effect of invidiously relegating the entire class of females to inferior legal status *without regard to the actual capabilities of its individual members.*"[112] These statements seem to suggest that what is objectionable about gender classifications is that they fail to take into account individual differences within the sexes, that is, they involve broad generalizations that are not universally true, and thus, wrongfully ignore individual merit. Thus, equal protection would appear to protect individual rights.

However, the Supreme Court's assertions of the essentially personal nature of the right to equal protection are striking in their inconsistency with the host of Supreme Court cases identifying equal protection as a limit on governmental classifications[113] and in their willingness to ignore those cases. For example, consider Justice Powell's personal rights language in *Bakke* as it might apply to the facts of *Murgia*.[114] In *Murgia*, the issue was precisely the Court's unwillingness to look at Robert Murgia's personal situation, that is, his own proven qualifications for police work.[115] The Court apparently was uninterested in the argument that "it is the individual who is entitled to equal protection against

106. *See id.* at 243 (Stevens, J., dissenting).

107. *Id.* at 230.

108. 411 U. S. 677 (1973) (plurality opinion).

109. *Id.* at 686.

110. *Id.* (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)) (emphasis added).

111. *Id.*

112. *Id.* at 687 (emphasis added).

113. *See supra* Part I.B.

114. *See supra* notes 34–42 and accompanying text.

115. *See supra* note 42 and accompanying text.

classifications based on [age] because such distinctions impinge on personal rights."[116] Rather, what was important for the Court in *Murgia* was the reasonableness of the age classification which had the effect of terminating Murgia's employment. The Court apparently viewed Murgia as someone who was to be considered "only because of his membership in a particular group."[117] Or, if *Adarand* is to be used as precedent, why was it not true of Murgia that "whenever the government treats any person unequally because of his or her [age], that person has suffered an injury [under the Equal Protection Clause]"?[118] While it is true that race classifications are more suspicious than age classifications and thus should be more strictly scrutinized, the Court has given no reasonable explanation for treating equal protection as a personal right in the affirmative action cases, but not in most other areas of equal protection. In fact, it appears that the two views of equal protection are quite inconsistent and thus can survive together only so long as they continue to ignore each other. However, in *Olech*, the Supreme Court, apparently inadvertently and implicitly, identified a way in which the two versions of equal protection can be reconciled.

III. *VILLAGE OF WILLOWBROOK V. OLECH*

A. Village of Willowbrook v. Olech *in the Lower Courts*

1. The District Court Rejects Mrs. Olech's Individual Rights Claim

Village of Willowbrook v. Olech[119] did not begin as a case likely to lead to a significant precedent in the U.S. Supreme Court. Rather, it began rather trivially, when Grace Olech's well broke and could not be repaired.[120] Fortunately for Mrs. Olech, the public water supply was close at hand and the Village of Willowbrook was willing to connect her to it.[121] Unfortunately, the Village demanded from Mrs. Olech, as part of

116. This was the language Justice Powell used in his *Bakke* opinion, although with regard to race classifications rather than age classifications. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).

117. *Id.*

118. This was the language the Court used in *Adarand Constructors Inc. v. Payna*, 515 U.S. 200, 229–30 (1995), although, once again, with regard to race rather than age.

119. 1998 WL 196455 (N.D. Ill. Apr. 13, 1998).

120. *Id.* at *1.

121. *Id.*

the connection process, a 33-foot easement "while only requiring a 15-foot easement from other Village residents."[122] Mrs. Olech complained, but the Village initially would not reduce the size of the required easement.[123] This dispute between Mrs. Olech and the Village was the classic "garden variety" land use dispute that rarely gets to federal court and, if it does, is likely to be dismissed very quickly at the early stages. Mrs. Olech's case did get to federal district court, but was dismissed for failure to state a claim.[124]

According to Mrs. Olech's allegations before a district court in the Northern District of Illinois, the Village had initially demanded more of her than of others because village officials still harbored "substantial ill will" against her because she had successfully sued the Village in another matter six years earlier.[125] During the delay caused by this dispute, Mrs. Olech was without running water for three months and it was "this three-month delay that Olech claim[ed] deprived her of her rights under the Equal Protection Clause."[126] A federal district court for the Northern District of Illinois had no difficulty in disposing of Mrs. Olech's action. The court cited *Esmail v. Macrane*,[127] an earlier case from the Seventh Circuit that the *Olech* district court read as requiring an "orchestrated campaign[] of official harassment directed against [a plaintiff] out of sheer malice" in order for a plaintiff to prevail.[128] The court concluded that Mrs. Olech's complaint did not describe the "malignant animosity"[129] or the "orchestrated campaign of official harassment" required by *Esmail*.[130] Her assertions of vindictiveness and retaliation were mere "conclusory assertions" that did not include factual underpinnings sufficient to support them.[131]

122. *Id.* at *2.
123. *Id.*
124. *Id.* at *3–4.
125. *See id.* at *2.
126. *Id.*
127. 53 F.3d 176 (7th Cir. 1995).
128. *Olech*, 1998 WL 196455, at *3 (citing Esmail v. Macrane, 53 F.3d 176, 178 (7th Cir.1995).
129. *Id.*
130. *Id.*
131. *Id.*

2. *The Seventh Circuit Reverses on the Basis of Judge Posner's Vindictive Action Theory of Equal Protection*

Mrs. Olech appealed to the U.S. Court of Appeals for the Seventh Circuit and Chief Judge Posner wrote the opinion for that court.[132] It turns out that, at least from Mrs. Olech's perspective, Judge Posner was exactly the right person to consider her claim.

a. Earlier "Class of One" Claims in the Seventh Circuit

For several years before *Olech*, Judge Posner had been arguing in favor of a particular view of equal protection that was not shared by all the judges of the Seventh Circuit.[133] The particular issue was the nature of the "class of one" claim by an individual against the government. While it had been clear since *Ciechon v. City of Chicago*[134] that "class of one" equal protection claims were recognized in the Seventh Circuit, the conceptual underpinning of these claims was not at all clear. In *Ciechon*, the Seventh Circuit upheld the equal protection claim of a paramedic who had been discharged for the allegedly inadequate treatment of a patient, while the paramedic who had been working with her and had been equally responsible for the patient was not punished.[135] The court explained that "[e]qual protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way."[136] The effect of this rule was to "protect[] against intentional invidious discrimination by the state against persons similarly situated."[137]

The *Ciechon* decision appeared to require a successful claimant to prove, as Ciechon herself had done, that she had been treated differently from a similarly situated person. In addition, a claimant would have to prove that this different treatment was "intentional" as opposed to being the result of "error or mistake in the application of the law."[138] Beyond

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132. Olech v. Vill. of Willowbrook, 160 F.3d 386 (7th Cir. 1998).

133. This view of equal protection that differed from Judge Posner's is set forth *infra* notes 140–54 and accompanying text.

134. 686 F.2d 511 (7th Cir. 1982). *See also* Levenstein v. Salafsky, 164 F.3d 345, 353 (7th Cir. 1998) ("So called 'class of one' equal protection claims, cases 'in which the governmental body treated individuals differently who were identically situated in all respects rationally related to the government's mission' have been allowed in this circuit since at least *Ciechon*.") (citation omitted).

135. *Ciechon*, 686 F.2d at 516–17.

136. *Id.* at 522.

137. *Id.* at 522–23.

138. *See id.*

this, the *Ciechon* court made no mention of any requirement of vindictiveness or ill will, unless one could read such a requirement into a phrase the court did use, "intentional invidious discrimination."[139] But several post-*Ciechon* cases from the Seventh Circuit specifically held, not only that proof of animosity was not necessary to make out an equal protection violation, but also that it was not sufficient. For example, in *Falls v. Town of Dyer*,[140] Judge Easterbrook upheld the equal protection claim of a convenience store owner who had alleged that he was "the *only* person against whom the town enforce[d] [its] portable sign ordinance."[141] According to Judge Easterbrook, if the plaintiff could show a pattern of selectivity under which everyone else was allowed to use portable signs but the plaintiff was not, that would make out a valid claim.[142] On the other hand, according to Judge Easterbrook, even if the plaintiff could prove "that someone in local government had a vendetta against [plaintiff] but that the law is being enforced rationally against others,"[143] he would not survive a motion for summary judgment. Thus, for Judge Easterbrook, the essence of a "class of one" claim was the different treatment of a single individual compared with everyone else, without regard to the motivation behind that treatment.

A subsequent opinion by the Seventh Circuit made it even clearer that a vindictive motivation by a government official did not make out an equal protection claim. In *Wroblewski v. City of Washburn*,[144] the Seventh Circuit rejected the plaintiff's "class of one" claim arising out of allegations that the city had singled out the plaintiff arbitrarily and made his employment at a city marina virtually impossible.[145] According to the court, the plaintiff's allegation that he was singled out by the local officials out of animosity did not make out a valid equal protection claim.[146] For purposes of a motion to dismiss, even if the allegation that

139. *Id.*

140. 875 F.2d 146 (7th Cir. 1989).

141. *Id.* at 147 (emphasis in original).

142. *See id.* at 149.

143. *Id.*

144. 965 F.2d 452 (7th Cir. 1992).

145. *Id.* at 453.

146. *See id.* at 459 ("He simply alleges that he, and he alone, was singled out by the City Parents out of animosity and for no good reason. His equal protection claim would fail under the principle stated in *New Burnham Prairie Homes.*" (New Burnham Prairie Homes Inc. v. Vill. of Burnham, 910 F.2d 1474 7th Cir. (1990))). The court in *Wroblewski* had earlier cited *New Burnham* for the proposition that "an equal protection claim requires discrimination *because of membership in a*

the city acted out of animosity were assumed to be true, it would still be "insufficient to defeat the City policy's presumed rationality."[147] "[A]nimosity is not necessarily inconsistent with a rational basis."[148] It might be rational for the city to conclude that the animosity it felt toward the plaintiff, even if not the fault of the plaintiff, would be "likely to doom any future association to failure."[149] Thus, for the Seventh Circuit in *Wroblewski*, the essence of an equal protection claim had nothing to do with subjective ill will; rather, it required an allegation of different treatment of similarly situated persons.[150] Since the plaintiff in *Wroblewski* had failed to identify anyone similarly situated to himself who had been treated differently, he did not make out a successful equal protection claim.

Another Seventh Circuit panel also rejected a vindictive action equal protection claim. In *Herro v. City of Milwaukee*,[151] the plaintiff had alleged that the city had denied him a tavern license because of the city's animosity toward him.[152] The court found the claim wanting, at least in part because "claims of state action motivated by personal vendettas 'are hardly the type of allegations necessary to sustain an equal protection claim.'"[153] The Seventh Circuit in *Herro* cited with approval a case that had dismissed an equal protection claim when it had been based only "on allegations that [a] state official engaged in vendetta to destroy plaintiff."[154]

b. Judge Posner's Vindictive Action Theory

These four cases served as background for Judge Posner when he entered the arena in 1995 to write the opinion for the Seventh Circuit in *Esmail v. Macrane*.[155] Judge Posner upheld an equal protection claim by a liquor store owner whose license was not renewed because of a "deep-

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class." *Id.* at 965 F. 2d. at 458–59 (citing *New Burnham*, 910 F.2d at 1481–82) (emphasis in *Wroblewski* only).

147. *Id.* at 460.

148. *Id.*

149. *Id.*

150. *Id.* at 459.

151. 44 F.3d 550 (7th Cir. 1995).

152. *Id.* at 552.

153. *See id.* at 552–53 (citing Universal Sec. Ins. Co. v. Koefoed, 775 F. Supp. 240, 247 (N.D. Ill. 1991)).

154. *Id.*

155. 53 F.3d 176 (7th Cir. 1995).

seated animosity"[156] toward him by city officials. Judge Posner conceded that "[t]his is an unusual kind of equal protection case"[157] because it involved neither a charge of singling out members of a vulnerable group nor a challenge to a law alleged to make irrational distinctions.[158] Rather, the claim involved only a charge "that a powerful public official picked on a person out of sheer vindictiveness."[159] Although the case bore similarities to those of "selective prosecution,"[160] Judge Posner pointed out that selective enforcement of the law is not an equal protection problem unless "the decision to prosecute is made either in retaliation for the exercise of a constitutional right . . . or because of membership in a vulnerable group."[161] Esmail's claim did not meet any of these criteria, but Judge Posner found that he had made out a claim nonetheless.

According to Judge Posner, "equal protection does not just mean treating identically situated persons identically."[162] Judge Posner cited *Ciechon* to support the rule that conduct motivated by vindictiveness toward a particular individual violates the equal protection clause.[163] This was the correct view, according to Judge Posner, because "[i]f the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."[164] Although the unfair treatment was directed at an individual rather than a group, this fact was not determinative because "neither in terms nor in interpretation is the [equal protection] clause limited to protecting members of identifiable groups."[165] Thus, Esmail had satisfied his burden by alleging that "the action taken by the state . . . was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective."[166]

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156. *Id.* at 178.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 178–79 (explaining the two meanings of the term "selective prosecution" but concluding that the plaintiff's claim in *Esmail* was "not pleaded as a case of selective prosecution in any of the above senses").

161. *Id.* at 179.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 180.

166. *Id.*

c. *Reconciling Vindictive Action Claims with Comparative Right Claims*

However, even if one agrees with Judge Posner that vindictively-motivated conduct directed at an individual by a government official "ought to have a remedy in federal court,"[167] it is not immediately obvious why the source of this remedy ought to be the Equal Protection Clause. Although Judge Posner had conceded that "[t]his is an unusual kind of equal protection case,"[168] he understated how unusual it was, because there is ordinarily widespread agreement that equal protection arguments, whether they involve classifications or not, are inherently comparative.[169] A claimant insists that he or she has a right to a certain treatment because someone else, allegedly similarly situated, is getting that same treatment. Judge Posner's vindictive action claims involve no comparison, but rather simply a claim that the government has treated one person badly because of subjective ill will.[170]

However, there are two ways in which the vindictive action claim might be reconciled with the traditional notion of equal protection as a comparative right. The first is to argue that a vindictive action claim *assumes* an implied comparison with a class or person, that is, there is an implied comparison with the group or person whom the government has treated rationally, without any ill will.[171] By means of this implied comparison to this implied group, one could argue that a vindictive action claim is in fact a comparative claim. However, the rather large amount of implication that this defense requires makes it not particularly compelling.

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167. *Id.* at 179.

168. *Id.* at 178.

169. *See, e.g.*, Buckles v. Columbus Mun. Airport Auth., 2002 WL 193853, at *13 (S.D. Ohio Jan. 14, 2002) ("Nevertheless, even a class of one must show that he or she was treated differently than similarly situated individuals. An equal protection claim simply cannot exist absent an allegation that, *compared to others*, the plaintiff was treated less favorably.") (emphasis in original).

170. *E.g., Esmail*, 53 F.3d at 180 (indicating that, to establish a violation of the Equal Protection Clause, a claimant must prove that "the action taken by the state . . . was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective").

171. *See, e.g.*, Kiser v. Naperville Cmty. Unit, 227 F. Supp. 2d 954, 972 (N.D. Ill. 2002) ("[T]he District argues that [the plaintiff, a lawyer] cannot state an equal protection claim because he did not allege that other lawyers were employed by the District. The potential relevance of other lawyers is obvious from the complaint, so the District can reasonably foresee a subsequent allegation that such lawyers existed. For this reason, the omission of a specific allegation of fact concerning other lawyers in the complaint does not mandate dismissal.").

An alternative justification has some support from Tussman and tenBroek and the U.S. Supreme Court. As Tussman and tenBroek pointed out, one cannot tell who is similarly situated to whom without reference to the purpose of a law, and any useful consideration of purposes must close off certain purposes as impermissible, so that the constitutional standard requires a classification to be rationally related to a permissible purpose.[172] It is not a large step from here to conclude that government action designed to achieve an impermissible purpose violates the Equal Protection Clause. The Supreme Court has taken this very step in two cases where it analyzed a neutral rule that was improperly applied because of an inappropriate motivation.

In the first of these cases, *Yick Wo v. Hopkins*,[173] decided more than one hundred years before *Olech*, the Court found a violation of the Equal Protection Clause in the manner in which the San Francisco Board of Supervisors applied an ordinance, neutral on its face, that required a person operating a laundry to obtain the consent of the Board unless the laundry was located in a building made of brick or stone.[174] The Board had rejected the applications of all Chinese applicants but had consented to all others.[175] As the Court explained, the problem did not involve a general rule "for the regulation of the use of property for laundry purposes, to which all similarly situated may conform."[176] No one would have a constitutional problem with a general rule about wooden or brick buildings for laundries. But the problem in *Yick Wo* was not the rule itself, but rather its application. Although the law itself was impartial on its face, it was applied "with a mind so unequal and oppressive as to amount to a practical denial by the state of . . . equal protection."[177] The law was "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."[178]

Although the oppressive application of the laundry rule in *Yick Wo* was directed at a class of Chinese persons rather than one individual

172. *See supra* notes 15–18, 25–26 and accompanying text.
173. 118 U.S. 356 (1886).
174. *Id.* at 357.
175. *Id.* at 359.
176. *Id.* at 368.
177. *Id.* at 373.
178. *Id.* at 373–74.

person,[179] the case made clear that the Equal Protection Clause was broad enough to prohibit not only facially invalid classifications appearing in statutes, but also the oppressive application of impartial rules to individual persons. The determining factor was the presence of the evil eye, the unequal hand, or the oppressive mind.[180] These factors seem to cover much of the same territory as Judge Posner's "subjective ill will" theory.

Additionally, there is a much more recent precedential case on point. In 1985, in *City of Cleburne v. Cleburne Living Center, Inc.*,[181] the Court found an equal protection violation in the city's refusal to grant a special use permit for a group home for the mentally retarded.[182] The Court found it unnecessary to decide whether the regulation requiring a special use permit for "hospitals for the insane or feebleminded"[183] was facially invalid since the Court found it easier to conclude that the regulation was unconstitutional as applied.[184] The Court sifted through the city's purported justifications for denying the permit and found them all either impermissible or not credible.[185] It then concluded that the denial of the special use permit to this particular home was unconstitutional because it could be explained only by "an irrational prejudice against the mentally retarded, including those who would occupy the [group home]."[186] This "as applied" version of equal protection that looks to the motivation behind the administrative application of a local regulation also appears to

179. *Id.* at 359 (indicating that 150 natives of China had been arrested for operating a laundry without the required consent while 80 persons not subjects of China were allowed to operate their laundries without the required consent, and that these numbers demonstrate "a system of oppression of one kind of men and favoritism to all others").

180. *Id.* at 373–74 (referring to "a mind so unequal and oppressive" and "an evil eye and an unequal hand").

181. 473 U.S. 432 (1985).

182. *Id.* at 435.

183. *Id.* at 436.

184. *Id.* at 447 ("We inquire first whether requiring a special use permit for the Featherstone home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments."). Having determined that it was preferable to decide the constitutionality of the ordinance on an as applied basis, the Court then found it unconstitutional on that basis. *Id.* at 450.

185. *Id.* at 448–50.

186. *Id.* at 450.

be very similar to Judge Posner's "subjective ill will."[187] It is also quite clearly a precedent for the conclusion that the protection of the Equal Protection Clause extends to individuals harmed by administrative decisions, without the necessity of showing that the harm results from an improper classification. In any case, Judge Posner's view of the equal protection clause as prohibiting government action that is motivated by ill will, while not in the mainstream of equal protection arguments, does have some support from the U.S. Supreme Court.

It was with this background that Judge Posner wrote the opinion for the Seventh Circuit in *Olech*. For Judge Posner, his previous opinion in *Esmail* was dispositive. Judge Posner in *Esmail* had found a constitutional violation when there was proof of "a spiteful effort to 'get' [a person] for reasons wholly unrelated to any legitimate state objective."[188] Judge Posner found that Olech's complaint satisfied this standard in that it alleged that her previous lawsuit against the Village had generated "substantial ill will" and that, as a result, she had been treated differently from other property owners in the village in terms of the size of the easement demanded.[189] Judge Posner noted that the District Court had read too much into *Esmail*'s reference to an "orchestrated campaign of official harassment,"[190] since, according to Judge Posner, a showing of subjective ill will does not require evidence of a *"general"* orchestration.[191] Judge Posner concluded that he was troubled "by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case,"[192] but he was confident that the requirement of proving "totally illegitimate animus" toward the plaintiff would be a substantial check on the likely success of any such claim.[193]

187. *Cf.* Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995) (indicating that an Equal Protection Clause claimant must prove that "the action taken by the state . . . was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective").

188. Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998) (citing Esmail v. Macrane, 53 F. 3d 176, 180 (7th Cir. 1995)).

189. *Id.* at 387–88.

190. *Id.* at 388 (citing *Esmail*, 53 F.3d at 179).

191. *Id.* at 388.

192. *Id.*

193. *Id.*

B. *The U.S. Supreme Court Endorses Mrs. Olech's Individual Equal Protection Claim*

It may have been expected that the decision of the Seventh Circuit would end this "garden variety" land-use dispute, but the Village sought certiorari in the U.S. Supreme Court, and, surprisingly, the Court decided to hear the case.[194] Also surprising had to be the Supreme Court opinion that followed,[195] particularly its brevity and the casualness with which the Court treated the problem before it. The entire per curiam opinion consisted of five paragraphs.[196] The first three paragraphs summarized the facts and procedural history below, and then concluded with the Court's identification of the issue as "whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group."[197] The Court's entire substantive response to this question consisted of exactly two short paragraphs.

In the first of these paragraphs, the Court stated that "[o]ur cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment."[198] This statement of the "class of one" problem was obviously different from the manner in which Judge Posner had posed it below. Judge Posner had been concerned with the allegation that the Village had vindictively singled out Mrs. Olech in retaliation for a previous lawsuit.[199] Judge Posner's theory requires a plaintiff to produce evidence of the defendant officials' subjective motivation, but not necessarily evidence of similarly situated persons who were treated differently. The Supreme Court's explanation, on the other hand, requires a plaintiff to produce evidence that similarly situated persons were treated differently, but not any evidence of the defendant's subjective motivation for the conduct being challenged.[200] The Supreme Court

194. Vill. of Willowbrook v. Olech, 527 U.S. 1067 (1999) (mem.).

195. Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000).

196. *Id.* at 563–65.

197. *Id.* at 564.

198. *Id.*

199. Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998).

200. *See Olech*, 528 U.S. at 564 (recognizing an equal protection claim where a plaintiff alleges different treatment from others similarly situated); *id.* at 565 (indicating that the Court's decision was not based on the theory of "subjective ill will").

explicitly distanced itself from the "subjective ill will" theory that had been relied on by Judge Posner below.[201]

1. *The U.S. Supreme Court's Surprising Citations in Support of its Holding*

The U.S. Supreme Court cited two cases in support of its "class of one" holding: *Sioux City Bridge Co. v. Dakota County*,[202] a largely ignored case from 1923, and *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*,[203] a more recent case that the Court had previously attempted to limit to its facts. These two supporting cases were as far removed from the pantheon of influential equal protection cases as one could imagine.[204] However, both of these supporting cases involved successful attempts by individual plaintiffs who challenged excessive property tax appraisals on real property when other similar properties had been appraised at comparatively lower rates.

In *Sioux City Bridge*, the Court ruled that a bridge company had proven a violation of the Equal Protection Clause when it demonstrated that its property was assessed at one hundred percent of its valuation while other properties were assessed at fifty-five percent of their valuations.[205] The Court then explained that "the purpose of the [E]qual [P]rotection [C]lause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents."[206] The Court emphasized that it was

201. *Id.* at 565.

202. 260 U.S. 441 (1923).

203. 488 U.S. 336 (1989).

204. In the fifty years before *Olech*, the Supreme Court had cited *Sioux City Bridge* in the text of a majority opinion only one time. That single citation was in *Allegheny Pittsburgh Coal*, the case that the Court had later limited to its facts. In *Nordlinger v. Hahn*, 505 U.S. 1 (1992), the petitioners argued that the result in *Allegheny Pittsburgh Coal* required invalidation of a very similar property tax assessment scheme in their case. The *Nordlinger* Court rejected the argument, purporting to find "an obvious and critical factual difference," *id.* at 14, and concluding that *Allegheny Pittsburgh Coal* "was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Id.* at 16. *See also* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 404–05 (1999) (arguing that "[t]he effect of *Nordlinger* . . . is to limit *Allegheny Pittsburgh Coal* to its very narrow set of facts").

205. *Sioux City Bridge*, 260 U.S. at 445.

206. *Id.* (citing Sunday Lake Iron Co. v. Wakefield Tpk., 247 U.S. 350, 352 (1918)).

"intentional systematic undervaluation"[207] that would violate the Equal Protection Clause, not "mere errors of judgment."[208] The assessment in *Sioux City Bridge* was viewed, not as an example of arbitrary discrimination by the legislature in the enactment of a statute, but rather of intentional discrimination by a local board, the "duly constituted agents," in setting the tax value for one particular piece of property.[209]

Allegheny Pittsburgh Coal involved a coal company that complained about an acquisition value assessment scheme that had the effect of appraising its property, based on its recent purchase price, at a level that was thirty-five times the level applied to owners of comparable property who had purchased their property at earlier times.[210] In concluding a violation of the Equal Protection Clause, the Court once again emphasized "intentional systematic undervaluation" of comparable property and concluded that "[t]he equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."[211] Although no property owner had an independent right to have his or her individual property assessed at less than its fair market value, the Equal Protection Clause conferred on each property owner a comparative right to have his or property assessed at the same standard as other owners, even if that standard resulted in a valuation substantially below market value.[212]

Although *Sioux City Bridge* and *Allegheny Pittsburgh Coal*, broadly interpreted, provide some support for the Court's holding in *Olech,* they do not do so with much force. They were, of course, tax cases, not land use cases as *Olech* was. Although both cases involved a single, individual plaintiff, a "class of one" whose equal protection claim succeeded, neither of the decisions explicitly alluded to that fact. Nor had the Supreme Court, before *Olech*, ever cited them as "class of one" cases. And it certainly strains credulity to claim, as the Court did, that the

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207. *Id.*

208. *Id.* at 447.

209. *Id.* at 445.

210. Allegheny Pittsburgh Coal v. County Comm'n of Webster County, 488 U.S. 336, 341 (1989).

211. *Id.* at 345–46 (citing Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946)).

212. *Id.* at 346 (indicating that "the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated *by comparison* with the share of others similarly situated relative to their property holdings" and concluding that "*relative undervaluation*" of comparable property . . . over time therefore denies petitioners the equal protection of the law") (emphases added).

"class of one" equal protection claim had been "recognized" since these two cases had been decided.

But in any case, having determined that these two cases provided adequate support for its holding, the *Olech* Court found that Mrs. Olech's complaint stated a valid claim. Her complaint was sufficient because she had alleged "that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners,"[213] and that this demand was "irrational and wholly arbitrary."[214] In support of its conclusion that Mrs. Olech's complaint could "fairly be construed"[215] as making adequate allegations, the Court cited *Conley v. Gibson*,[216] a case that had adopted an extremely forgiving standard in evaluating plaintiffs' complaints.[217] The Court concluded its opinion by making clear that its decision was not based on the Seventh Circuit's "subjective ill theory" of equal protection, but had been decided on the "similarly situated" standard, "quite apart" from any reliance on the village's subjective motivation as a basis for its decision.[218]

Justice Breyer wrote a brief concurring opinion in *Olech* in which he expressed that, without a limiting principle, the majority's opinion could "transform many ordinary violations of city or state law into violations of the constitution."[219] Breyer argued that an appropriate limiting principle could be found, and that principle was precisely the "subjective ill will" theory adopted by the court of appeals, but rejected by the majority.[220] Breyer concurred only because the presence of that "added factor" (ill will) would "minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."[221]

213. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).

214. *Id.*

215. *Id.* at 565.

216. 355 U.S. 41 (1957).

217. *Olech*, 528 U.S. at 565 (citing *Conley*, 355 U.S. at 41, 45–46, which had approved the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief").

218. *Id.*

219. *Id.* (Breyer, J., concurring).

220. *Id.* at 565.

221. *Id.* at 566.

2. *Ignoring Precedential Cases and a Possible Explanation*

The *Olech* Court's choice of precedents to ignore is as revealing as its choice of precedents to cite. Once the Court had cited two cases in support of its substantive position,[222] it did not identify or distinguish any cases that might have suggested a different result. However, if the Court had been looking for a third property tax assessment case beyond the two it cited, it might have mentioned *Nordlinger v. Hahn*.[223] That case would have made it harder for the Court to explain its result in *Olech*. In *Nordlinger*, the individual plaintiff was badly mistreated in relation to her neighbors in her property tax assessment and paid property taxes almost five times as high as some of her neighbors.[224] Yet the Court upheld that different treatment because it was the result of a reasonable system of classification.[225] In *Nordlinger*, the Court demonstrated no concern for the individual person unfairly treated. Likewise, the Court in *Massachusetts Board of Retirement v. Murgia* showed no identifiable concern for the individual person adversely affected by governmental decisionmaking.[226] Surely Robert Murgia would take issue with the assertion that, under Supreme Court precedents, the Equal Protection Clause protects individuals from arbitrary treatment.

However, a close reading of the Court's citation to *Sioux City Bridge* suggests an explanation for the apparently inconsistent results. There, the Court explained that the Equal Protection Clause prohibits intentional and arbitrary discrimination "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[227] This statement explicitly identifies two different forms of state action subject to the Equal Protection Clause: legislation, on the one hand, and "execution," on the other.[228] It also implicitly suggests a different equal protection standard to be applied to each form of state action that is consistent with both views of equal protection. The different standards would result because of the essential difference between government legislating, on the one hand, and government acting on the other, through

222. Allegheny Pittsburgh Coal Co. v. Comm'n of Webster County, 488 U.S. 336 (1989); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923).

223. 505 U.S. 1 (1992).

224. *Id.* at 7.

225. *Id.* at 11–13.

226. *See supra* notes 34–42 and accompanying text.

227. *See supra* notes 205–09 and accompanying text.

228. *Id.*

individual decisions of government officials that assign government benefits or impose government burdens on individual persons.

Most of the cases in which the Court has spoken of equal protection as a limitation on classification have in fact involved *legislative* classification.[229] When legislatures enact statutes, they ordinarily make use of broad generalizations about large numbers of people.[230] They assume that people who have a certain trait, like age or gender, are similarly situated in relation to a particular purpose.[231] In short, legislatures when legislating usually *classify*.[232] But if it is generally accurate to assert that legislatures ordinarily classify, it follows that the Equal Protection Clause imposes limits on that process of classification.[233] However, in this context, it does no more than that. Individual persons who are harmed by legislative generalizations that are not true as applied to them have no remedy, unless the classification itself is unreasonable.[234] In these situations, equal protection is *not* an individual right.

It is quite a different story, on the other hand, when government officials make any of their millions of individual determinations daily. These include some of the most basic decisions involved in running a government, such as who gets hired for a government job, who gets fired from a government job, who gets a zoning waiver, who gets a government contract, who gets a subdivision approval, who gets a building permit, who gets a government grant, or who gets arrested. These governmental decisions are not legislative and do not amount to

229. *E.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (legislative age classification); Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) (legislative classification on milk packaging); United States R.R. Ret. Bd.v. Fritz, 449 U.S. 166 (1980) (legislative classification on retirement eligibility standards).

230. *E.g.*, *Murgia*, 427 U.S. 307 (reviewing statute that accepts generalization that fitness declines with age).

231. *E.g.*, *id.* (statute assumes that those over 50 are similarly situated in respect to fitness); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (statute assumes that military wives are financially dependent on their spouses but that military husbands are not financially dependent on their spouses).

232. *See supra* notes 8–23 and accompanying text. It is not unheard of for a legislature to enact a law directed at one particular person or entity, rather than at a class, but on the few occasions that legislatures do this, there are provisions of the Constitution other than the Equal Protection Clause that limit legislative action. *See* Consol. Edison Co. of N.Y. Inc. v. Pataki, 292 F.3d 338 (2d Cir. 2002) (holding New York statute explicitly prohibiting Consolidated Edison Co. from recovering from ratepayers costs associated with outage at Indian Point 2 Nuclear Facility violated Bill of Attainder Clause of the U.S. Constitution).

233. *See supra* Part I.

234. *See supra* notes 24–26 and accompanying text.

broad generalizations about large numbers of persons. These are individual decisions. And here, according to *Olech*, the Equal Protection Clause creates a personal right.[235]

In fact, upon careful observation, it must be admitted that one need not be engaged in the act of classifying at all in order to call the Equal Protection Clause into play. Because equality arguments are inherently comparative, there must be at least two persons. However, the basic mandate of equality that requires similarly situated persons to be treated similarly does not require classifications. If a parent has only two children and treats them differently, then that can amount to inequality without reference to classifications. If a local government treats two similarly situated neighbors differently in the size of its demand for an easement, that can constitute inequality. In neither of these cases need a plaintiff identify a class in order to make an equality claim. A plaintiff need only prove that he or she was treated differently from one similarly situated person. In such a case, equal protection is a personal right and there should be no necessity of referring to a "class of one" because there is no necessity of identifying a classification.

The Court's opinion in *Olech* clearly supports such a conclusion, but the Court did not make clear the conceptual underpinning of that conclusion. While the result in the case suggests that an individual plaintiff harmed by an unequal administrative decision has an equal protection claim without proving membership in a class, the Court's opinion suggests a slightly different explanation. The language chosen by the Court in *Olech* suggests that it is necessary to identify a class, but that the class can consist of only one member.[236] Although these two alternate formulations of the equal protection right recognized in *Olech* probably do not create practical differences, it is ironic that the *Olech* opinion, in the act of providing the strongest support for an individual rights view of equal protection, does so by using the traditional language of equal protection as a limit on classifications.[237] Although the Supreme Court in *Olech* purported to recognize an existing right and thus not change existing law, the opinion was far more transformative than the Court intimated. *Olech* in fact has had a dramatic effect on subsequent litigation in federal courts. The next section examines these effects.

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235. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

236. *Id.* at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one.'").

237. *Id.*

IV. THE AFTERMATH OF *OLECH*

After the U.S. Supreme Court's decision in *Olech*, it was clear that the Equal Protection Clause does protect individual rights, at least in an appropriately limited context.[238] But what was the exact nature of that right? According to the Court, an individual has a valid claim under the Equal Protection Clause when "she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment."[239] This is the "similarly situated" equal protection claim. In addition, according to the Seventh Circuit and several other courts of appeals, an individual also has a valid claim under the Equal Protection Clause when a government acts vindictively toward that person, with the motivation to "get" him.[240] This is the "vindictive action" equal protection claim. Although the Supreme Court did not affirm the "vindictive action" portion of the Seventh Circuit's *Olech* opinion, it did not overrule it either.[241] The following section examines how lower federal courts treated the Supreme Court's *Olech* decision and the "vindictive action" equal protection claim.

A. Did Olech *Change Existing Law?*

In *Olech*, the U.S. Supreme Court carefully explained that its decision validating the "class of one" equal protection claim was nothing new. According to the Court, "[o]ur cases *have recognized* successful equal protection claims brought by a 'class of one.'"[242] The Court purported to identify two cases that supported this assertion, one of them decided in 1923.[243] Surely then, the Court was of the view that it was simply restating existing law. Although ultimately that claim is defensible, it is not without its problems. First, the Court made no effort to distinguish those cases where it spoke of equal protection as a limitation on government classifications, with no mention of any protection of individual rights. Nor did the Court explain why in those cases the harm

238. Although the Equal Protection Clause does not protect individuals from adverse affects of reasonable legislative classifications, it does protect an individual from an arbitrary individual administrative decision by a government official. *See supra* Part III.B.

239. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

240. *See supra* Part III.A.2.

241. *Olech*, 528 U.S. at 565 ("[W]e therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of 'subjective ill will' relied on by that court.").

242. *Id.* at 564 (emphasis added).

243. *Id.* (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)).

to individuals was considered unimportant. Second, the Court did not explicitly state that its "class of one" holding was limited to the execution of law by government officials but did not extend to the enactment of laws by legislatures. However, if the holding of the case is appropriately limited, then *Olech* can be viewed as consistent with previous understandings of the Equal Protection Clause.

The issue of the consistency of *Olech* with pre-existing precedent arises explicitly in lower federal courts when defendants raise the defense of qualified immunity. This occurs when plaintiffs seek money damages from individual government defendants for violations of constitutional rights. In these cases, the Supreme Court has announced a rule that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[244] When a plaintiff seeks damages for a "class of one" claim that arose before February 23, 2000, the date of the Supreme Court opinion in *Olech*, it then becomes necessary to determine whether the "class of one" claim was "clearly established" before that date.

Of the few lower federal court cases that have explicitly considered this question, there is support for the conclusion that *Olech* did not change existing law. When the *Olech* litigation itself was remanded to a federal district court in the Northern District of Illinois, that court addressed the issue of qualified immunity for the defendants and whether or not the "class of one" equal protection claim was "clearly established" before 2000.[245] The lower court answered in the affirmative, citing both Seventh Circuit precedent and *Sioux City Bridge* and *Allegheny Pittsburgh Coal*.[246] In *McWaters v. Rick*,[247] a federal district court for the Eastern District of Virginia found that *Olech* "*confirmed* that government officials constitutionally may not apply a law arbitrarily to . . . a person who is similarly situated to others to whom the law has been applied."[248] Thus, the holding in *Olech* "was not based on novel legal theory . . . [but]

244. Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

245. Olech v. Vill. of Willowbrook, 2002 WL 31317415, at *23 (N.D. Ill. Oct. 10, 2002).

246. *Id.* at *23. This opinion of the district court amended an earlier opinion issued on May 24, 2002. *See id.* at *n.1.

247. 195 F. Supp. 2d 781 (E.D. Va. 2002).

248. *Id.* at 806 (emphasis added).

was confirming and clarifying, rather than revealing for the first time, that such a 'class of one' claim is constitutionally cognizable."[249]

But there is some dissent on this point. In *Taylor v. Russell*,[250] a federal district court for the Eastern District of Texas insisted that, "[p]rior to *Village of Willowbrook*, it was generally understood in this [Fifth] Circuit that an equal protection claim could only succeed if the disparate treatment at issue was premised upon a person's membership in a protected class or invocation of a constitutional right."[251] According to *Taylor*, it was not at all clear before *Olech* that a claim of personal vindictiveness "would be enough to support an equal protection claim without some other class-based discrimination."[252] Further, in *Anderson v. Anderson*,[253] a federal district court for the Northern District of Ohio found that "the *Olech* opinion invalidates the *Futernick* rule that cognizable equal protection claims must be based on class-based or group-based treatment."[254] The federal district courts in these cases found that *Olech* had forced change in the law of their circuits. At the very least, then, it must be said that, even if the Supreme Court's *Olech* opinion did not change the law of the Supreme Court itself, it certainly forced several lower federal courts to change their views of the Equal Protection Clause. Surprisingly, however, not every circuit appears to have received the message. As late as September 2002, more than two years after *Olech*, a panel in the Tenth Circuit stated in an unpublished opinion that, to establish an equal protection violation, "plaintiffs must show that they are members of a protected class and that the defendants purposefully discriminated against them because of their membership in that class."[255]

B. Limiting the Effect of Olech

Both Judge Posner and Justice Breyer expressed the fear that the Court's *Olech* decision, unless properly limited, could open the

249. *Id.*; *accord* Hyatt v. Town of Lake Lure, 225 F. Supp. 2d 647, 664 (W.D.N.C. 2002).

250. 181 F. Supp. 2d 668 (E.D. Tex. 2001).

251. *Id.* at 672.

252. *Id.*

253. 2000 WL 33126582 (N.D. Ohio Dec. 21, 2000).

254. *Id.* at *4 (citing Summers v. City of Raymond, 105 F. Supp. 2d 549, 551–52 (S.D. Miss. 2000)).

255. Brown v. Millard County, 47 F. Appx. 882, 890 (10th Cir. 2002) (citing Jones v. Union County, 296 F.3d 417, 426 (6th Cir. 2002)). Judge Hartz, in a concurring opinion, disagreed on this point. *Id.* at 890–91 (Hartz, J., concurring).

floodgates in federal courts to a host of insignificant yet time-consuming lawsuits.[256] In response to this concern, a number of federal courts have attempted to interpret *Olech* in a way that would limit its effect. One such strategy was to read *Olech* as requiring proof of vindictive motivation as well as different treatment of similarly situated persons.[257] A second strategy to limit *Olech* was to interpret the term "intentionally different treatment" very strictly.[258] A third strategy was to interpret the phrase "similarly situated" very narrowly.[259] The following section examines all three of these attempts to limit the effect of the Supreme Court's *Olech* opinion.

1. Limiting Olech *by Requiring Both Unequal Treatment and Subjective Ill Will*

The U.S. Supreme Court's opinion in *Olech* was short and apparently rather simple, but some of the federal courts of appeal treated it like a complex puzzle, to be mined for hidden meaning. Almost immediately after it was reported, both the Seventh and Second Circuits engaged in what they must have viewed as damage control, that is, an attempt to limit *Olech* so that it would not overrun the federal courts with garden variety disputes involving claims against local government.

In *Hilton v. City of Wheeling*,[260] the first appellate case to cite *Olech*, Judge Posner once again wrote for the Seventh Circuit. In his Seventh Circuit *Olech* opinion, Judge Posner had found the constitutional problem to be the subjective ill will that the town officials allegedly held toward Mrs. Olech. On the other hand, the Supreme Court decided the case on the ground that the town had intentionally treated Mrs. Olech different from similarly situated property owners without adequate justification.[261] It has been noted that these two explanations of the result

256. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (Breyer, J., concurring) ("The Solicitor General and the Village of Willowbrook have expressed concern lest we interpret the Equal Protection Clause in this case in a way that would transform many ordinary violations of city or state law into violations of the Constitution."); Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir.1998) ("Of course, we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case.").

257. *See infra* Part IV.B.1.

258. *See infra* Part IV.B.2.

259. *See infra* Part IV.B.3.

260. 209 F.3d 1005 (7th Cir. 2000).

261. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

in *Olech* are quite different,[262] and the Supreme Court seemed to have adopted only one.

But Judge Posner was not willing to concede this point. In *Hilton*, Judge Posner addressed a claim of unequal provision of police protection as an equal protection violation.[263] In rejecting that claim, Judge Posner explained that, while the police may have been inept or may have been deceived by the plaintiff's neighbors, it did not matter.[264] What mattered, said Judge Posner, "is the absence of evidence of an improper motive."[265] How could Judge Posner have read the *Olech* opinion to require evidence of improper motive? Judge Posner pointed to the language of the Supreme Court opinion indicating that the allegation of dissimilar treatment must include the claim that there is "no rational basis" for the difference in treatment and that the different treatment was "irrational *and wholly arbitrary*."[266] According to Judge Posner, this "no rational basis" language must necessarily include a gloss that "to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."[267] Judge Posner then cited his own Seventh Circuit *Olech* opinion, rather than the Supreme Court's opinion, to show that what was required was "proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant."[268]

Judge Posner's opinion in *Hilton* is surprising. First, it ignores the per curiam opinion of the Supreme Court, which explicitly stated that it did "not reach the alternative theory of 'subjective ill will' relied on by the [Seventh Circuit]."[269] Second, it exalts Justice Breyer's concurring opinion, which did require "ill will" as a component of a "class of one" claim, as well as Judge Posner's previous Seventh Circuit opinion, to the status of Supreme Court majority opinion. Judge Posner's reading of *Olech* is inconsistent with the per curiam opinion in that case. But whether grounded in precedent or not, Judge Posner's view, both because

262. *See supra* notes 198–201 and accompanying text.

263. *Hilton*, 209 F.3d at 1006–07.

264. *Id.* at 1008.

265. *Id.*

266. *Id.*

267. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).

268. *Id.* (citing Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir.1998)).

269. *Olech*, 528 U.S. at 565.

of his scholarly reputation and his position as Chief Judge of the Seventh Circuit and because *Hilton* was one of the first cases to interpret *Olech*, gave that position a great deal of credibility and influence. This created problems for subsequent courts interpreting *Olech*.

It certainly created difficulties for the Seventh Circuit. Shortly after *Hilton*, a different panel of Seventh Circuit judges adopted apparently contradictory interpretations of *Olech*. The court initially held that a "class of one" equal protection claim could be made *either* by showing different treatment of similarly situated persons *or* by showing a "spiteful effort to 'get' [a person]."[270] Later in the same opinion, the court also held that in order to make a "class of one" claim, a plaintiff must show different treatment of similarly situated persons *and* "totally illegitimate animus."[271] Two subsequent Seventh Circuit opinions approvingly cited *Hilton* as requiring proof of illegitimate animus in order to make out a claim under *Olech*.[272] These three cases suggest that the Seventh Circuit is free to come up with its own interpretations of Supreme Court precedents.

However, more recent opinions have retreated from the more extreme view expressed in *Hilton*. For example, in *Nevel v. Village of Schaumburg*,[273] the Seventh Circuit explicitly stated the two "class of one" tests disjunctively. In *Nevel*, the court concluded that, to succeed under *Olech*, the plaintiff must prove *either* intentionally different treatment of similarly situated persons *or* illegitimate animus toward the plaintiff.[274] A subsequent district court opinion from the Seventh Circuit reviewed the confusion on the meaning of *Olech* and concluded that *Nevel*:

> [S]tates the proper standards governing class of one equal protection claims. *Nevel* is more faithful to the Supreme Court's opinion in *Olech* . . . . The Seventh Circuit's subsequent attempts in *Hilton* and *Purze* to narrow the range of options available to class of one equal protection plaintiffs simply cannot be squared with *Olech*.[275]

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270. Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001).

271. *Id.*

272. Cruz v. Town of Cicero, 275 F.3d 579, 587 (7th Cir. 2001); Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002).

273. 297 F.3d 673 (7th Cir. 2002).

274. *Id.* at 681.

275. Northwestern Univ. v. City of Evanston, 2002 WL 31027981, at *4 (N.D. Ill. Sept. 11, 2002). *Accord* Panthera v. Vill. of Oaklawn, 2002 WL 31269486, at *9 (N.D. Ill. Oct. 10, 2002).

The Second Circuit has had its own problems in interpreting the meaning of the Supreme Court's *Olech* opinion. Even before *Olech*, the Second Circuit had already developed a two-part test in cases of selective treatment that anticipated the alternative interpretations of *Olech*. In *Leclair v. Saunders*,[276] the Second Circuit considered an allegation of an equal protection violation in the selective enforcement of a dairy farm regulation.[277] The court explained that liability would depend on proof that "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."[278] This two-part test seems to be virtually the same conjunctive test used by Judge Posner in his interpretation of *Olech*. But how much of Judge Posner's test has survived the Supreme Court's *Olech* opinion?

The Second Circuit has had a difficult time in determining exactly how much is left of the *LeClair* standard after *Olech*. In three separate attempts at explaining the effect of *Olech*, the Second Circuit did not resolve the issue of whether a plaintiff must prove both elements of the *LeClair* standard or only one of them.[279] In each of the cases, the court found that it did not need to decide that issue because in each case, the plaintiff was unable to prove either element.[280] However, the most recent cases from the district courts within the Second Circuit now seem to be of the view that in order to make a "class of one" claim, a plaintiff must prove *either* intentionally different treatment of similarly situated persons *or* subjective ill will.[281]

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276. 627 F.2d 606 (2d Cir. 1980).

277. *Id.* at 607–08.

278. *Id.* at 609–10.

279. Giordano v. City of New York, 274 F.3d 740 (2d Cir. 2001); Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494 (2d Cir. 2001); Gelb v. Bd. of Elections, 224 F.3d 149 (2d Cir. 2000).

280. *Giordano*, 274 F.2d at 751("[W]e decline to resolve this issue because its resolution would not affect the outcome of this appeal."); *Harlen*, 273 F.3d at 500 ("We need not decide which reading is the correct one in order to resolve this case, as Harlen's claim fails even if no showing of animus is required."); *Gelb*, 224 F.3d at 157 ("Although we do not foreclose the possibility of summary judgment in favor of the City Board, we note that summary judgment is generally inappropriate where questions of intent and state of mind are implicated."); *but see* Jackson v. Burke, 256 F.3d 93, 97 (2d Cir. 2001) (assuming that "proof of subjective ill will is not an essential element of a 'class of one' equal protection claim," but dismissing case because plaintiff had not shown any evidence that he was being treated from others similarly situated).

281. Payne v. Huntington Union Free Sch. Dist., 2002 WL 31039460, at *5 (E.D.N.Y. July 26, 2002) (indicating that to survive motion for summary judgment, plaintiff must prove that the

The most recent cases from the Seventh and Second Circuits thus seem to make clear that previous attempts to limit *Olech* by requiring subjective ill will does not work. The work of limiting *Olech*, if it is to succeed, must adopt a different strategy. The next section examines one such alternate method.

2. *Limiting* Olech *By Imposing a Strict Intent Standard*

The U.S. Supreme Court in *Olech* held that a "class of one" claim was made out when the plaintiff alleged "that she has been *intentionally* treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[282] An alternative method to limit *Olech* is to interpret the term "intentionally" in a very restrictive way. This was the strategy adopted by the Second Circuit in *Giordano v. City of New York*.[283]

In *Giordano*, a police officer was terminated from his position because of his use of the blood thinner, Coumadin.[284] The plaintiff's equal protection claim was that there was another New York City police officer, also using Coumadin and thus similarly situated, who had not been terminated.[285] The court rejected this claim on the grounds that, because there was no evidence that the police officials who had made the decision to terminate Giordano were also aware of this other officer, they could not have *intended* to treat Giordano differently from other officers.[286] This interpretation of the word "intentionally," is at first glance counterintuitive because it seems to reward ignorance by local officials. As long as an official makes sure he does not know the status of other similarly situated persons, he cannot be found to have intentionally

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motivation for the disparate treatment was ill will *or* for wholly arbitrary reasons lacking any rational basis); Padilla v. Harris, 2002 WL 750856, at *2 (D. Conn. Apr. 24, 2002) ("The Court cannot ignore the plain language of the Supreme Court in *Olech* that allegations that a plaintiff 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment' were sufficient to state a claim for denial of equal protection."); Barstow v. Shea, 196 F. Supp. 2d 141, 148 (D. Conn. 2002) ("To prevail on a 'class of one' equal protection claim, plaintiff must 'show, not only "irrational and wholly arbitrary" acts, but also intentional disparate treatment.'"); Tuchman v. Bechem Transp., Inc., 185 F. Supp. 2d 169, 173 (D. Conn. 2002) (granting defendant's motion to dismiss because plaintiffs had alleged neither dissimilar treatment nor animus).

282. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (emphasis added).

283. 274 F.3d. 740 (2d Cir. 2001).

284. *Id.* at 742.

285. *Id.*

286. *Id.* at 751–52.

violated a plaintiff's equal protection rights. A more obvious interpretation of the term "intentionally" would simply have meant that police officials intended to terminate Giordano because of his use of Coumadin, without regard to their conscious awareness of other officers in the same situation who were not being terminated. It is of little comfort to the officer laid off because of his use of Coumadin that, even though other officers in his situation received better treatment, police officials were not aware of those other officers.

However, there is ample support for the restrictive use of the term "intentionally" that was adopted by the court in *Giordano*. In 1944, long before *Olech*, the Supreme Court considered what was necessary to show a violation of the Equal Protection Clause in *Snowden v. Hughes*.[287] In *Snowden*, the plaintiff alleged that certain officials had violated state law in not certifying him for the Republican nomination to the state assembly and, in so doing, had violated his equal protection rights.[288] The Court rejected the claim, explaining that:

> [N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. [A]n erroneous or mistaken performance of [a] statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.[289]

The "something more" that would turn such an act into an equal protection violation, explained the Court, is "an element of intentional or purposeful discrimination."[290] For example, according to the Court, if state officials did not assess property uniformly for the purpose of imposing property taxes, "[i]t is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination."[291] Thus, in *Snowden*, the Court found that the plaintiff had not adequately alleged that the Canvassing Board purposefully discriminated against him in favor of another.[292] The Second Circuit's opinion in *Giordano* is consistent with this restrictive interpretation.

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287. 321 U.S. 1 (1944).
288. *Id.* at 5.
289. *Id.*
290. *Id.*
291. *Id.* at 9.
292. *Id.* at 10.

Other post-*Olech* courts have also interpreted the term "intentionally" in this same strict manner with the effect of limiting the reach of *Olech*. In *Payne v. Huntington Union Free School District*,[293] the court rejected the equal protection claim of a part-time teacher who had been terminated, because of the absence of evidence of intentionally different treatment.[294] The court explained that in order to meet this standard, the plaintiff would have to prove "that the Board *knew* it was treating her differently than it [was treating] other similarly situated individuals."[295] Thus, even if the plaintiff could identify individuals similar to herself whom the school board treated differently, that would not establish an equal protection claim in the absence of evidence that this different treatment was intentional. This was a standard too difficult for the plaintiff in *Payne* to satisfy.

In *Pariseau v. City of Brockton*,[296] the court rejected an equal protection claim arising out of a failure by police to dispatch a cruiser in response to a 911 call reporting a robbery.[297] The court found that the claim did not satisfy the intent standard set forth in *Olech*, since "[t]he arbitrariness of a law enforcement decision is not, without more, sufficient to state an equal protection claim."[298] The court, citing Justice Breyer's concurring opinion in *Olech*, explained that when differential treatment results from ineptness rather than design, there is no violation.[299] Thus, the court in *Pariseau* found that, "[e]ven if the decision not to dispatch a cruiser immediately lacked a rational basis, the equal protection claim cannot succeed unless Plaintiffs can make a threshold showing of the requisite discriminatory intent."[300] The plaintiffs in *Pariseau* were unable to show either a "purposeful scheme not to protect white complainants" or "a custom or policy . . . to provide less protection to victims of a particular kind of crime."[301]

Even in those cases where plaintiffs succeed in making "class of one" claims, they must overcome the hurdle of a strict "intent" standard. When the *Olech* case itself was remanded to the district court, that court

293. 2002 WL 31039460 (E.D.N.Y. July 26, 2002).
294. *Id.* at *8.
295. *Id.*
296. 135 F. Supp. 2d 257 (D. Mass. 2001).
297. *Id.* at 260.
298. *Id.* at 263.
299. *Id.* (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (Breyer, J., concurring)).
300. *Id.* at 264.
301. *Id.*

refused to grant the defendant's motion for summary judgment, at least in part because of the question of intent.[302] While it was clear that the Village had "intended" to demand the 33-foot easement from Mrs. Olech, it was not clear whether the Village "intended" to treat her differently from other similarly situated individuals.[303] The court found that there was a genuine issue of material fact as to whether the Village in fact knew of other similar landowners.[304] Only if they did know of that other treatment at the time they demanded something different from Mrs. Olech could it be proven that they "intended" to treat Mrs. Olech differently.[305]

In *McWaters v. Rick*, another post-*Olech* case, a federal district court in the Eastern District of Virginia imposed a strict intent standard. The plaintiff's equal protection claim was that a local board, of which she was a member, had investigated her travel expenses but not those of a similarly situated colleague, and also that the board had refused to reimburse her legal expenses incurred in the investigation while paying those of her colleague.[306] Although the court upheld her claim at the pleading stage, it did insist that she satisfy a demanding intent standard. The court explained, "to prove that a statute has been administered [in a discriminatory manner], more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state intended to discriminate."[307] The court then showed that the required intent means "more than intent as volition or awareness. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group [or person]."[308]

This demanding standard would require McWaters to prove, not only that the board had in fact treated her differently from another board member, but that the board had done so because it wanted to discriminate against her. Such a standard would have the effect of eliminating equal protection claims where the conduct, although arbitrary and not defensible, results from mere inattention or accident. In *McWaters*,

302. Olech v. Vill. of Willowbrook, 2002 WL 31317415, at *13 (N.D. Ill. Oct. 10, 2002).

303. *Id.*

304. *Id.*

305. *Id.*

306. McWaters v. Rick, 195 F. Supp. 2d 781, 787 (E.D. Va. 2002).

307. *Id.* at 792.

308. *Id.* at 781 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

however, the federal district court found that the plaintiff had in fact alleged such intentional discrimination and thus refused to dismiss her claim on the pleadings.[309]

It seems clear that the requirement that plaintiffs prove "intentional" discrimination as construed in the preceding cases is likely to limit the success of "class of one" claims and is thus also likely to limit the number of such claims.

3. *Limiting* Olech *By A Restrictive Interpretation of "Similarly Situated"*

Another technique to limit the effect of *Olech* is to apply a very restrictive interpretation of the term "similarly situated." As argued earlier, the oldest version of equality is the idea that similarly situated persons must be treated similarly.[310] But it has always been a vexing problem to determine what it means to be similarly situated. As Tussman and tenBroek demonstrated, the idea of "similarly situated" is incoherent in the abstract.[311] Since each human is like all other humans in an infinite variety of ways (and thus we are all similar) and, at the same time, each human is different from every other human in an infinite number of ways (and thus we are all different). Tussman and tenBroek found a way out of this incoherence by insisting that we relate the classification to the purpose on account of which it was made in order to determine who is similarly situated to whom.[312] But their analysis also suggests that the concept of who is similarly situated to whom is a manipulable device. On the one hand, the concept can be stretched by identifying a large number of persons who are similar to the plaintiff, thus making it easy for a plaintiff to insist on similar treatment. On the other hand, the concept can be shrunk by identifying only a small number of persons, or no persons, who are similar to the plaintiff, thus making it difficult for a plaintiff to claim a right to similar treatment. This latter strategy has been used by some courts to limit the effect of *Olech*.

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309. *Id.* at 793 (concluding that plaintiff McWaters had alleged an "arbitrary, irrational, and intentionally discriminatory act to investigate [her] alone" and that thus her complaint had alleged "a cognizable equal protection claim").

310. *See supra* note 7 and accompanying text.

311. Tussman & tenBroek, *supra* note 1, at 345 ("First, 'similarly situated' cannot mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test.").

312. *See supra* notes 17–18 and accompanying text.

The problem arises because the Supreme Court's opinion in *Olech*, with its reference to "intentionally treated differently from others similarly situated,"[313] appears to leave the impression that "similarly situated" is a self-defining term, without reference to any exterior criterion. This leaves the lower courts a great deal of discretion in deciding to whom the plaintiff ought to be compared and thus who is similar to him or her. Of course at the very least, it seems that a plaintiff needs to identify other similarly situated individuals who were treated differently.[314] Since equality claims necessarily involved a comparison, it is not enough to allege that you alone have been treated unfairly.[315] But the "similarly situated" requirement can be used to demand quite a bit more.

For example, in *Payne*, a federal district court for the Eastern District of New York considered the termination of a part-time teacher whose husband happened to be the superintendent of the school district.[316] Plaintiff's equal protection claim was that, while she had been fired because of her relationship to the superintendent, there were over one hundred other, similarly situated individuals, that is, employees of the school district who were related to other employees, who had not been fired.[317] In the alternative, the plaintiff could have accepted a narrower identification of the similarly situated class, that is, those "related individuals who are in supervisory-subordinate relationships."[318] The court rejected both comparison groups as not sufficiently similar. The court's interpretation of the term required that the comparison [of] individuals be "very similar indeed,"[319] and "similarly situated in all material respects."[320] Because no employee of the school district (other than plaintiff's husband who was the superintendent) had the power to supervise all other employees, the result was that there was no other employee similarly situated to the superintendent and thus no other

313. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

314. *See, e.g.*, Presnick v. Town of Orange, 152 F. Supp. 2d 215, 224–25 (D. Conn. 2001) (citing Nassau County v. County of Nassau, 106 F. Supp. 2d 433, 440 (E.D.N.Y. 2000) for the proposition that "'class of one' plaintiffs are not relieved from the burden of showing that other similarly situated people were treated differently").

315. *But see supra* Part III.2.B for Judge Posner's somewhat different "vindictive action" version of equal protection, which apparently does not require an explicit comparison.

316. Payne v. Huntington Free Sch. Dist., 2002 WL 31039460, *1 (E.D.N.Y. July 26, 2002)

317. *Id.* at *5.

318. *Id.*

319. *Id* at *6.

320. *Id.*

relative similarly situated to the plaintiff.[321] Thus the plaintiff could not make a valid equal protection claim.[322]

The federal district court in *Payne* might have treated the plaintiff's claim more generously by applying the "similarly situated" requirement in a more relaxed fashion. For example, the comparison class could have been viewed as all those employees who are directly supervised by a relative. There were such employees in the school system and not all of these relationships were prohibited.[323] But by insisting that any prospective members of the comparison class not differ in any way from the plaintiff, the court virtually foreordained the result that the plaintiff could not find any similarly situated persons and thus her equal protection claim would fail.

In *Campagna v. Commonwealth of Massachusetts Department of Environmental Protection*,[324] the plaintiff was a state employee who had been disciplined and who alleged unequal treatment in violation of the Equal Protection Clause.[325] A federal district court for the District of Massachusetts rejected the claim, finding that "the applicability of the 'class of one' theory to an employment-based equal protection claim seems dubious."[326] The court was concerned that:

> [A]ny public employee convinced that someone similarly situated is being treated more favorably could sue his or her employer under the Fourteenth Amendment for a violation of equal protection. Since practically every employee, public or private, is bound to be convinced at some point that he or she is getting the short end of the stick, it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of the "class of one" doctrine.[327]

But the court in *Compagna* found an easy way out of this dilemma by applying a very strict measure of what it meant to be "similarly situated."[328] The plaintiff was an environmental engineer.[329] He was

321. *Id.* at*7.
322. *Id.* at *12 (granting Defendants' motion for summary judgment).
323. *Id.* at *5.
324. 206 F. Supp. 2d 120 (D. Mass. 2002).
325. *Id.* at 121.
326. *Id.* at 126.
327. *Id.* at 127.
328. *Id.*
329. *Id.* at 121.

disciplined, *inter alia*, for failing to complete a required form.[330] His equal protection argument was that two other inspectors had also failed to file the required forms, but had not been disciplined.[331] The court rejected the claim on the ground that the two other inspectors were not similarly situated to the plaintiff. Specifically, they were different first, because "rightly or wrongly" the department considered that they did their work competently while the plaintiff did not, and second, because the plaintiff had performed his inspection as part of his private after-hours business, while the two others had performed their inspections as part of the work as state employees.[332] Thus, according to the court, these differences "warranted stricter treatment for [the] plaintiff."[333]

However, the plaintiff in *Compagna* would have identified the proper comparison differently. In the plaintiff's view, all those who are required to complete an inspection form should be treated the same.[334] On the other hand, from the perspective of the state defendant and for the federal district court, the requirement that a form be completed did not apply in the same way to all form-filers. Those whom the department considered to do competent work or who filled out forms as department employees were not held to the same standard as others.[335] Or to put it in other terms, all form filers are equal, but some are more equal than others. While the federal district court may well have been correct in concluding that the plaintiff in *Compagna* had no valid equal protection claim, the result in the case also suggests that a court can always find differences if it is so inclined.

A federal district court for the District of Massachusetts in *Lakeside Builders Inc. v. Planning Board of the Town of Franklin*[336] also applied a strict interpretation of "similarly situated" in rejecting the plaintiff's claim. In that case, the plaintiff, a builder, had requested a waiver of a subdivision requirement about the length of dead-end roads, but the request was denied.[337] Plaintiff's equal protection claim arose from the

330. *Id.* at 122–23.

331. *Id.* at 123.

332. *Id.* at 127.

333. *Id.*

334. *Id.* ("Plaintiff contends that he was similarly situated to [two other employees] who were not fined despite the fact that they also failed properly to complete the form in conjunction with their inspections of the Westfield property.").

335. *Id.*

336. 2002 WL 31655250 (D. Mass. Mar. 21, 2002).

337. *Id.* at *1.

fact that the planning board had approved waivers of that requirement in twenty-one subdivision developments,[338] and, according to plaintiff, these other situations were similar to its own and thus required the planning board to treat it similarly.[339] But the court found the plaintiff's complaint to be inadequate because it "[did] not propose any standard by which to judge whether one applicant for a waiver was 'similarly situated' to another. Rather, it simply asserts in conclusory fashion that the plaintiffs were treated differently from other similarly situated applicants."[340] The court was unwilling to conclude "that all applicants should be considered 'similarly situated' simply because they had all made requests for waivers of the dead-end street length regulation."[341]

It was not enough that all of the comparison group had applied for a waiver. The court indicated that it would "want to know a good deal more about the merits of individual applicants before deciding who was similarly situated to whom."[342] As the court noted, it would not make sense to assume that all applicants to a particular college were similarly situated, and would thus have to be treated similarly, simply because they had all applied to that particular college.[343] Likewise, the court found that in the case before it, the plaintiff had not alleged sufficient facts for the court to determine who, of all those requesting waivers, was similar to whom.[344] As the *Lakeside Builders* court explained, "Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples must be compared to apples."[345] Thus, once again a relatively strict interpretation of the term "similarly situated" lead to the dismissal of a plaintiff's "class of one" claim.

C. *How* Olech *Made It Easier For Plaintiffs in Federal Courts*

1. Creating a Powerful New Precedent

Notwithstanding the U.S. Supreme Court's assertion that *Olech* merely recognized existing law, and notwithstanding the efforts by some

338. *Id.*
339. *Id.* at *2.
340. *Id.* at *3.
341. *Id.*
342. *Id.* (comparing applicants for land use waivers with applicants to college).
343. *Id.*
344. *Id.*
345. *Id.* (citing Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989)).

federal courts to limit its effect, *Olech* is a powerful new precedent that has changed litigation in the federal courts. The Supreme Court's decision explicitly validated the individual equal protection claim that alleges intentionally different treatment of similarly situated persons.[346] In addition, while not endorsing the concept, the *Olech* opinion also called attention to the "vindictive action" version of that claim that had been widespread in the Seventh Circuit.[347] Since *Olech*, plaintiffs citing the case have made successful "class of one" arguments in a surprisingly high percentage of cases.[348]

Before *Olech,* this success would not have been expected. It has long been understood that rational basis equal protection claims, that is, those that do not involve heightened scrutiny because of a suspect class or fundamental right, have very little chance of success, because courts usually adopt an extremely deferential attitude.[349] During a recent twenty-five year period, the Supreme Court decided one hundred ten rational basis cases and the plaintiff prevailed in only ten of these, for a success rate of only nine percent.[350] One would imagine then, that "class of one" equal protection claims, which rarely involve suspect classes or fundamental rights, would rarely be successful. After *Olech*, that is no longer true. In the first eighty-six federal district court opinions after *Olech* that cite *Olech* and the term "class of one," plaintiffs prevailed in thirty,[351] for a success rate of thirty-five percent. This is an unexpectedly

346. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)

347. *See supra* notes 199–200 and accompanying text.

348. *See infra* note 351.

349. *See* Farrell, *supra* note 204, at 358–59.

350. *Id.* at 370.

351. These statistics were obtained from the following Westlaw search of federal district courts: [olech & "class of one" & date (aft 02/23/2000) & date (before 9/22/2002)]. That search produced 86 cases. Of that 86, plaintiffs prevailed in the following 30 cases: Northwestern Univ. v. City of Evanston, 2002 WL 31027981 (N.D. Ill. Sept. 11, 2002); Kiser v. Naperville Cmty. Unit, 2002 WL 2010185 (N.D. Ill. Aug. 29, 2002); Hyatt v. Town of Lake Lure, 2002 WL 2005464 (W.D.N.C. Aug. 26, 2002); Carr v. Vill. of Willow Springs, 2002 WL 1559665 (N.D. Ill. July 16, 2002); Britell v. United States, 204 F. Supp. 2d 182 (D. Mass. 2002); Olech v. Vill. of Willowbrook, 2002 WL 1058843 (N.D. Ill. May 24, 2002); Padilla v. Harris, 2002 WL 750856 (D. Conn. Apr. 24, 2002); McWaters v. Rick, 195 F. Supp. 2d 781 (E.D. Va. 2002); Tapalian v. Town of Seekonk, 188 F. Supp. 2d 136 (D. Mass. 2002); Stone v. Hope, 2002 WL 663468 (S.D. Ind. Mar. 7, 2002); Barstow v. Shea, 196 F. Supp. 2d 141 (D. Conn. 2002); Russo v. City of Hartford, 184 F. Supp. 2d 169 (D. Conn. 2002); Eisen v. Temple Univ., 2002 WL 32706 (E.D. Pa. Jan. 7, 2002); Am. Nat'l Bank & Trust Co. of Chic. v. Town of Cicero, 2001 WL 1631871 (N.D. Ill. Dec. 14, 2001); Oneto v. Town of Hamden, 169 F. Supp. 2d 72 (D. Conn. 2001); Tropical Air Flying Servs., Inc. v. Carmen Feliciano de Melecio, 158 F. Supp. 2d 177 (D.P.R. 2001); Caudell v. City of Toccoa, 153 F. Supp. 2d 1371 (N.D. Ga. 2001); Britell v. United States, 150 F. Supp. 2d 211 (D. Mass. 2001); McDonald

high percentage which suggests both that *Olech* is having a significant impact on the federal courts, and that Justice Breyer's and Judge Posner's concerns about the explosion of federal cases were well-justified.

A number of these successful claims appear to involve rather trivial matters that traditionally would not have made their way into federal court. For example, a state employee prevailed where the state required her to complete a medical incident report before leaving work because of illness.[352] An air ambulance service prevailed where local government selected its rival as a provider.[353] A builder prevailed where a town issued a stop work order on construction work already begun.[354] The owner of a mobile home park prevailed where he disagreed with the town's decision to install a particular kind of water and sewer meters at his park.[355] And a developer prevailed where a town refused to approve his subdivision plan.[356] Although other cases citing *Olech* were of a more substantial nature, the successes just cited are evidence of an equal protection jurisprudence that must be quite far removed from the intent of the framers.

This next section examines some of these successful "class of one" equal protection claims in the federal courts. Most of these successes have come at the pre-trial stages of a lawsuit, that is, at the time of a motion to dismiss or at the time of a motion for summary judgment. The cases examined will demonstrate how difficult it can be, after *Olech*, for a government defendant to get a suit dismissed at the early stages of a lawsuit.

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v. Vill. of Winnetka, 2001 WL 477148 (N.D. Ill. May 3, 2001); Northwestern Univ. v. City of Evanston, 2001 WL 219632 (N.D. Ill. Mar. 6, 2001); Zavatsky v. Anderson, 130 F. Supp. 2d 349 (D. Conn. 2001); Frevach Land Co. v. Multnomah County Dep't of Envtl. Servs., 2000 WL 1875839 (D. Or. Dec. 21, 2000); Byers v. Ill. State Police, 2000 WL 1741723 (N.D. Ill. Nov. 22, 2000); Anderson v. Vill. of Oswego, 109 F. Supp. 2d 930 (N.D.Ill. 2000); Baumgardner v. County of Cook, 108 F. Supp. 2d 1041 (N.D. Ill. 2000); Westfall v. City of Grand Forks, 2000 WL 33339627 (D.N.D. Aug 02, 2000); Econ. Opportunity Comm'n of Nassau County, Inc. v. County of Nassau, 106 F. Supp. 2d 433 (E.D.N.Y. 2000); Cruz v. Town of Cicero, 2000 WL 967980 (N.D. Ill. July 12, 2000); Michelfelder v. Bensalem Township Sch. Dist., 2000 WL 892866 (E.D. Pa. June 30, 2000); Singleton v. Chic. Sch. Reform Bd. of Trs., 2000 WL 777925 (N.D. Ill. June 13, 2000).

352. Barstow v. Shea, 196 F. Supp. 2d 141 (D. Conn. 2002).

353. Tropical Air Flying Servs., Inc. v. Carmen Feliciano de Melecio, 158 F. Supp. 2d 177 (D.P.R. 2001).

354. Frevach Land Co. v. Multnomah County Dep't of Envtl. Servs., 2000 WL 1875839 (D. Or. Dec. 21, 2000).

355. Stone v. Hope, Ind., 2002 WL 663468 (S.D. Ind. Mar. 7, 2002).

356. Tapalian v. Town of Seekonk, 188 F. Supp. 2d 136 (D. Mass. 2002).

2. Rejecting Defendants' Motions To Dismiss

Probably the most significant effect of the U.S. Supreme Court's *Olech* opinion is that it is now far more difficult for government defendants to have a case dismissed on the pleadings. Although it has never been possible for local government officials to prevent equal protection law suits from being filed against them, the damage from those suits to local government can be minimized if the suits can be dismissed at a very early stage, before discovery has taken place, before trial preparations have been made, and before the trial itself. Under traditional equal protection doctrine, rational basis claims are very commonly dismissed on the pleadings as a result of the extremely deferential standard that courts have traditionally applied in rational basis cases. The Supreme Court articulated a sweeping version of this deferential attitude in *Federal Communications Commission v. Beach Communications Inc.*,[357] where it stated that "[i]n areas of social and economic policy, a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[358] Under this standard, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,'"[359] and "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[360]

When courts apply the rationality standard deferentially, a complaint cannot be drafted that would survive a motion to dismiss. A plaintiff would have to "hypothesize all conceivable justifications for a statutory classification and then prove that no legislative body could 'rationally have believed' that the classification served [any of] the hypothesized purpose[s]."[361] But federal district courts seem to have read *Olech* as overturning much of this accepted wisdom, at least in the context of equal protection challenges to administrative decisions by local officials.

357. 508 U.S. 307 (1993).

358. *Id.* at 313.

359. *Id.* at 315.

360. *Id.*

361. Long Island Lighting v. Cuomo, 666 F. Supp. 370, 420 (N.D.N.Y. 1987) (citing W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 672 (1981)), *vacated in part*, 888 F.2d 230 (2d Cir. 1989). *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 38–40 (1992).

In contrast to the insurmountable burden for plaintiffs that previous courts suggested, some post-*Olech* cases suggest a far more relaxed pleading standard. In *Russo v. City of Hartford*,[362] the plaintiff challenged his suspension from the police force on equal protection grounds.[363] A federal district court for the District of Connecticut rejected the city's motion to dismiss because "Russo has alleged that similarly situated individuals were treated differently and that *the defendants have not expressed any legitimate basis for the differential treatment.*"[364] This statement suggests that the court assumes that the defendant has the burden of showing the legitimate basis for the different treatment. But that assumption is surely inconsistent with the strong presumption of validity accorded government action in rational basis cases and with the "any conceivable basis" language of *Beach Communications*.[365] The court in *Russo* was in fact quite aware of these presumptions, acknowledging that "defendants are under no obligation to provide a rational basis for the alleged violation; the court can dismiss the count on the pleadings if it can conceive of any rational basis for the classification."[366] Notwithstanding that acknowledgment, the court went on to say that it "refuses, however, to speculate as to conceivable rational bases for the defendants' actions."[367] As a result of the court's refusal to speculate, the case was not dismissed on the pleadings and thus the city of Hartford was forced to continue to litigate the case.[368]

Stone v. Hope, Indiana[369] is another post-*Olech* case where a federal district court in the Southern District of Indiana appeared to bend over backward to help the plaintiff survive a motion to dismiss. In that case, the plaintiff complained that the town had arbitrarily refused his request for individual water meters at his mobile home park while treating other trailer park owners differently.[370] Even though the plaintiff had not made his allegations with particularity, the court refused to dismiss the case.[371] "All reasonable inferences are to be drawn in favor of the Plaintiff.

362. 184 F. Supp. 2d 169 (D. Conn. 2002).
363. *Id.* at 190.
364. *Id.* at 195 (emphasis added).
365. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).
366. *Id.* at 195–96 (citing Connolly v. McCall, 254 F.3d 36, 42 (2d Cir. 2001)).
367. *Id.* at 196.
368. *Id.* at 197–98.
369. 2002 WL 663468 (S.D. Ind. Mar. 7, 2002).
370. *Id.* at *4.
371. *Id.*

Under this standard, the Plaintiff has provided Defendants with fair notice of his claims and the grounds upon which they are based."[372] This "fair notice" standard announced by the court in *Stone* is a very far distance from the "any conceivable basis" the Supreme Court used in *Beach Communications*. *Beach Communications* suggests that the burden is entirely on the plaintiff to identify and disprove all of the defendant's possible justifications.[373] The standard in *Stone* is almost exactly the opposite. It suggests that the plaintiff need only give notice in a general way of his equal protection claim and that will be sufficient to get him to the next stage of the litigation.

Although some courts have interpreted the "similarly situated" requirement quite strictly in order to eliminate claims,[374] that standard has sometimes been treated very generously in order to allow plaintiffs to survive a motion to dismiss. In *Kiser v. Naperville Community Unit*,[375] the plaintiff had been terminated from his position as executive administrator and attorney for a school district.[376] In moving to dismiss the claim, the school district argued that the plaintiff had not alleged that any other lawyers were employed by the district, and that, without such a group against which to compare the plaintiff, he had not stated an equal protection claim.[377] A federal district court in the Northern District of Illinois rejected that argument on the grounds that "[t]he potential relevance of other lawyers is obvious from the complaint" and thus that the plaintiff need not make the comparison explicitly.[378] Thus, on the basis of a rather vague complaint that had made no attempt to identify specific individuals who were similar but had been treated differently, the court found that a valid equal protection claim had been made.

In addition to the problems that government defendants have had in getting "similarly situated" "class of one" claims dismissed, courts have also made it more difficult for a governmental defendant to have "vindictive action" claims dismissed. In *Singleton v. Chicago School Reform Board*,[379] a federal district court for the Northern District of Illinois refused to dismiss, "[s]ince this Court cannot examine the

372. *Id.*

373. FCC v. Beach Communications, 508 U.S. 307, 314–15 (1993).

374. *See supra* notes Part IV. B.3.

375. 2002 WL 2010185 (N.D. Ill. Aug. 29, 2002).

376. *Id* at *2.

377. *Id.* at *14.

378. *Id.*

379. 2000 WL 777925 (N.D. Ill. June 13, 2000).

pleadings and magically determine the Defendants' state of mind at the time of their alleged unlawful actions, we must accept Plaintiff's allegations [of sheer vindictive purposes] to be true."[380] In *Northwestern University v. City of Evanston*,[381] a federal district court for the Northern District of Illinois explained that, at the motion to dismiss stage, the university did not need to prove its claims in order to avoid dismissal.[382] It was enough "simply [to] allege that it was treated differently and that the City's actions were irrational, arbitrary and even vindictive."[383] The *Evanston* court found this standard satisfied in the university's allegations that the city's decision to include some of the university's property in a historic district was "motivated by the . . . illegitimate desire to disregard the University's . . . right to be exempt from property taxes," and "by vindictiveness against the University for its refusal to accede to the City's demand for revenue payments in lieu of property taxes."[384] Finally, in *Hyatt v. Town of Lake Lure*,[385] a federal district court for the Western District of North Carolina, although conceding that claims "must be alleged with sufficient specificity to avoid being conclusory," insisted that "there is no heightened pleading requirement imposed on the plaintiff."[386] The *Hyatt* court found that the plaintiff had satisfied these standards with a nonspecific claim that "she ha[d] been treated differently from others similarly situated," and that "Defendants acted with 'personal malice' towards her and that the Defendants acted arbitrarily and capriciously."[387]

The relaxed standard adopted by the courts in these cases appears to turn on its head the previous presumption in rational basis cases that plaintiffs must counter all conceivable justifications for government action. Instead, these cases make it substantially easier for a plaintiff to survive a motion to dismiss and thus force the government defendant to continue to litigate the case, through discovery, summary judgment, and possibly trial.

380. *Id.* at *10.

381. 2001 WL 219632 (N.D. Ill. Mar. 6, 2001).

382. *Id.* at *3.

383. *Id.*

384. *Id.*

385. 2002 WL 2005464 (W.D.N.C. Aug. 26, 2002).

386. *Id.* at *11 (citing McWaters v. Rick, 195 F. Supp. 2d 781, 791 (E.D. Va. 2002)).

387. *Hyatt*, 2002 WL 2005464, at *11.

3. Rejecting Defendants' Motions for Summary Judgment

Traditionally, courts have also been very deferential to defendants at the summary judgment stage when deciding rational basis equal protection claims.[388] A motion for summary judgment is not to be granted unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[389] But where a court has determined that the actual motivation of a government actor is not relevant, then the parties' dispute over that motivation does not constitute a *material* fact.[390] Thus, government defendants have traditionally been able to have cases thrown out at the summary judgment stage.[391] But, after *Olech*, that traditional wisdom has been drawn into question in "class of one" cases, where the courts now appear to be far more deferential to plaintiffs.

In *Evanston*, the court, contrary to the traditional wisdom, considered evidence of actual motive as part of a motion for summary judgment.[392] In that case, the university complained that it had been singled out for inclusion in an historic preservation district in retaliation for its refusal to adjust its tax exempt status.[393] With regard to the claim of illegitimate animus and vindictive motivation as an equal protection violation, the court explained that "[a] vindictive action equal protection claim, unlike its traditional counterpart, requires scrutiny of the legislature's actual subjective motivation."[394] Because the city and the university disagreed about what had motivated the city's actions, the court found that there was a genuine issue of material fact and that it would not grant summary judgment.[395] Noticeably missing from the *Evanston* court's opinion was any suggestion that the court or the city might justify the city's action by reference to "any conceivable basis" that might be hypothesized.

In *Barstow v. Shea*,[396] the plaintiff, a state employee, alleged that she had been required to complete a medical incident report before leaving

388. *See* Farrell, *supra* note 361, at 41, n.233.

389. FED. R. CIV. P. 56(c).

390. *See* Farrell, *supra* note 361, at 41.

391. *Id.* at 41, n.233.

392. Northwestern Univ. v. City of Evanston, 2002 WL 31027981, at *6 (N.D. Ill. Sept. 11, 2002).

393. *Id.*

394. *Id.*

395. *Id.*

396. 196 F. Supp. 2d 141 (D. Conn. 2002).

work for illness while other employees had not been so required.[397] A federal district court for the District of Connecticut denied the defendant's motion for summary judgment because the plaintiff presented the depositions of two fellow employees who testified that they had left work due to illness but had not been required to complete the form.[398] Therefore, "the jury could conclude that plaintiff was treated differently from other similarly situated employees"[399] and "the jury could [also] discredit the reason given by the defendant for the differential treatment,"[400] and thus summary judgment was inappropriate.

In *Oneto v. Town of Hamden*,[401] the plaintiff was a police officer who had been passed over for promotion and then claimed a denial of equal protection.[402] The town moved for summary judgment on the grounds that the plaintiff had not introduced any evidence of similarly situated persons who were treated differently.[403] The town argued that since Oneto was promoted "only after resort to the courts, and well outside the ordinary course of civil service procedure," there was no one else similarly situated to him.[404] But a federal district court for the District of Connecticut did not identify the comparison class so narrowly. Instead, the court identified three other persons who were promoted outside the civil service rules (and were thus similarly situated) but had not been subjected to a special investigation like Oneto (and were thus treated differently).[405] Although the court conceded that Oneto's claim ultimately would be difficult to establish, "there [was] sufficient evidence in the record, when taken together and with all inferences drawn in Oneto's favor, from which a jury could conclude that [the town official's] actions were motivated by reasons unrelated to a legitimate investigative objective."[406] Thus summary judgment for the defendant was not appropriate.

397. *Id.* at 148.
398. *Id.*
399. *Id.* at 148.
400. *Id.* at 149.
401. 169 F. Supp. 2d 72 (D. Conn. 2001).
402. *Id.* at 73.
403. *Id.* at 81.
404. *Id.*
405. *Id.*
406. *Id.* at 82.

4. Final Judgments in Favor of Plaintiffs

Most successful "class of one" arguments have been won at the pre-trial stage, that is, plaintiffs have successfully opposed defendants' motions to dismiss or motions for summary judgment. There are very few reported cases of plaintiffs' ultimate victory on the merits of "class of one" claims. This shortage of reported victories could mean that "class of one" claims can now survive longer through the litigation, but ultimately are not successful. An alternate, and perhaps more probable, explanation is that both settlements of cases and final judgments, particularly when they are the result of jury verdicts, do not lead to reported opinions and thus are not readily retrievable through traditional legal data bases. Thus the shortage of reported final judgments where plaintiffs succeeded does not necessarily mean that they do not exist. In any case, there are two reported post-*Olech* cases of final victory in "class of one" claims.

The first of these cases, *Cruz v. Town of Cicero*,[407] was a "vindictive action" claim that involved a particularly egregious case of ill will and malice by a public official toward a private citizen.[408] *Cruz* was one more in that long line of Seventh Circuit "class of one" cases. The court affirmed a jury verdict of $402,000 for a violation of the Equal Protection Clause.[409] The plaintiffs were in the business of converting apartment buildings to condominiums.[410] The town refused to grant necessary certificates of compliance with the building and zoning rules.[411] The jury's verdict was based in part on testimony that the town President, Betty Loren-Maltese, had, through her friends in city government, seen to it that the plaintiffs would not get the certificates because they had been unwilling to make contributions to support her political career.[412] Thus, the certificates were denied in order to punish the plaintiffs.[413] On appeal, Seventh Circuit held that the evidence supported the verdict in that it demonstrated a "totally illegitimate

407. 275 F.3d 579 (7th Cir. 2001).

408. *Id.* at 589 ("[A] reasonable jury could have concluded (as this one did) that the trouble the Gonzalez parties had obtaining certificates of compliance . . . had nothing to do with [the merits]. Instead, these troubles stemmed from [the town president's] desire to punish Gonzalez for not repaying her 'help' with significant financial contribution of some kind.").

409. *Id* at 582–83.

410. *Id.* at 583.

411. *Id.* at 583–85.

412. *Id.* at 588–89.

413. *Id.* at 589.

animus," not related to the duties of government and not rationally related to a legitimate government interest.[414]

Caudell v. City of Toccoa[415] was a rare example when a legislature, rather than a local government official, singled out an individual for invidious treatment and thereby created a "class of one" claim. As indicated above, for the most part legislatures act by passing laws that make use of broad generalizations.[416] In these situations, the Equal Protection Clause serves only as a limit on classification.[417] However, in *Caudell*, the Georgia legislature approved an act directed at one person only.[418] The act provided that no one could serve on a city commission while also serving as a member of the board of any hospital authority.[419] The plaintiff was the only person in the entire state of Georgia affected by the act.[420] A federal district court for the Northern District of Georgia found that he had been "singled out for a special burden to which others have not been subjected,"[421] and that the state had "offered no legitimate state purpose whatsoever to justify this legislative classification,"[422] and thus it violated the Equal Protection Clause. The court granted final judgment for plaintiff declaring the act unconstitutional and enjoined city officials from taking any actions to enforce it.[423]

V. RE-EVALUATING THE INDIVIDUAL RIGHTS OR CLASS-BASED NATURE OF EQUAL PROTECTION AFTER *OLECH*

Although inadvertently and only implicitly, but nonetheless definitively, the U.S. Supreme Court in *Olech* has resolved the problem addressed in this article. That problem is that there are two views of the equal protection clause that are conceptually in conflict but in practice have ignored each other. With the benefit of the Supreme Court's opinion in *Olech*, we can identify an appropriate resolution of the conflict by reference to the following two rules.

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414. *Id.* at 589.
415. 153 F. Supp. 2d 1371 (N.D. Ga. 2001).
416. *See supra* Part I.A.
417. *See supra* Part I.B.
418. *Caudell*, 153 F. Supp. 2d at 1378.
419. *Id.* at 1375.
420. *Id.* at 1378.
421. *Id.*
422. *Id.*
423. *Id.* at 1381.

Rule 1.

When legislatures enact broad rules based on generalizations about persons, the Equal Protection Clause operates as a limitation on legislative classifications, but does no more. It does not protect individual rights, and thus, the individual person who is treated unfairly because a reasonable legislative generalization is not true as to him has no equal protection claim. Administrative rulemaking is subject to these same limits.

Rule 2.

When government officials make individual decisions to grant or withhold a benefit to a particular person, or to impose or eliminate a burden on a particular person, the Equal Protection Clause does protect individual rights. The Supreme Court in *Olech* requires a plaintiff in these situations to prove that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[424] The plaintiff in such a case need not identify a classification, but must simply show at least one other person who was similarly situated but received different treatment. In the courts of appeal, particularly the Seventh Circuit, there is an alternative way to make out an individual rights claim under the Equal Protection Clause. A plaintiff does so by proving that the a state official acted vindictively with an intention to "get" the plaintiff.

With these two rules as guides, it is now possible to see what is wrong with some of the earlier individual rights equal protection arguments. The individual rights argument has been made most frequently to demonstrate what is wrong with affirmative action. As that argument goes, affirmative action is based on group rights rather than individual rights and assumes that all persons of a particular race are effectively fungible, that is, they all share the same views and thus will all contribute in the same way to a "diverse" environment, or that they have all suffered from the same wrongs of racial discrimination and thus are all equally entitled to a race-based remedy. This, according to the critics, ignores the fact that each person of any race is an individual and therefore does not necessarily hold any particular view attributable to his race, nor will any particular individual necessarily have suffered discrimination based on his race. Further, race-based affirmative action classifications necessarily assume that white persons all hold the same viewpoints on race, and thus could not contribute to a diverse

424. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

environment, and also implicitly assume that all white persons somehow are responsible for past racial discrimination and should thus be willing to take a back seat today. It follows from this line of argument that race-based affirmative action is wrong because it confers benefits on all members of a racial minority group even though the individual members of that group do not individually deserve those benefits, and imposes burdens on all members of the white majority, even though there are many individual, innocent white persons who bear no responsibility for the status of minorities in today's society.

Whatever the ultimate resolution of the affirmative action issue under the Equal Protection Clause, it should not be resolved by resort to this individual rights reasoning. Since virtually all the forms of affirmative action have been subject to law suits have been broad rule-based programs rather than individual decisions directed at one particular person, they are thus subject only to the limit that the classifications they create satisfy the relevant equal protection standard. When the classification is based on race, the standard is strict scrutiny, so that the racial classification must be necessary to achieve a compelling interest in order to be upheld. But so long as the classification survives that test, the fact that some individuals seem to be treated unfairly does not give rise to a constitutional issue. The Court should be no more concerned for Allan Bakke than it was for Robert Murgia. Any decision that overturns an affirmative action program because it treats individuals as members of a group rather than as individual persons is simply not in accord with the.U.S. Supreme Court precedent. If the Supreme Court ultimately determines that affirmative action programs violate the Constitution, that determination should follow from the conclusion that a racial classification has been used improperly, not because the classification harmed an individual person.

However, the discussion of individual rights claims in affirmative action cases does strike a proper chord in a much more limited context. In determining what classifications should be given heightened scrutiny, the Court has traditionally looked at a number of factors, including whether or not the trait is immutable, whether or not the trait "frequently bears no relation to ability to perform or contribute to society,"[425] and whether the use of that trait is consistent with our commitment that "legal

425. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972). *See supra* notes 108–12 and accompanying text.

burdens should bear some relationship to individual responsibility."[426] Thus, in deciding what traits should receive heightened scrutiny on the ground that their use by government is suspicious because usually invidious, it might well be appropriate to consider the harm to individual persons that result from unthinking generalizations about persons that turn out, as they usually do, not to be universally true. But, once the Court has identified those traits that will receive heightened scrutiny, when it actually applies that scrutiny, the review should be only of the classification, not of the individual person unfairly harmed.

Olech teaches us that the equal protection clause does protect individual rights in a certain context, but the case clearly does not support any wholesale changes in the way courts review legislative classifications. *Olech* does support claims by individual persons who have been treated unequally by an executive branch official. That limited right itself will probably create substantial extra work for the federal courts. But *Olech* does not create any such individual right against legislative or administrative classification.

426. *Frontiero*, 411 U.S. at 686.