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CONSTITUTIONAL RULES AND INSTITUTIONAL ROLES: THE FATE OF THE EQUAL PROTECTION CLASS OF ONE AND WHAT IT MEANS FOR CONGRESSIONAL POWER TO ENFORCE CONSTITUTIONAL RIGHTS

William D. Araiza*

ABSTRACT

This Article examines the Supreme Court's recent "class-of-one" equal protection case, Engquist v. Oregon Department of Agriculture, where the Court held that the class-of-one equal protection theory did not apply in the government workplace. The Article concludes that Engquist reflects an implicit balancing of employees' equal protection rights against the government's legitimate interests in a flexible workplace and avoidance of litigation, with the Court imposing a categorical rule favoring the government's side of the balance. This Article critiques this categorical balancing. It argues that such a categorical rule is generally inappropriate where interests of constitutional stature exist on both sides of the balance.

However, it is the Engquist Court's method that carries with it the most troubling implications for equal protection and constitutional rights generally. Engquist disregards the sub-constitutional decision rules that lower courts developed to apply the constitutional principle the Court announced when it officially endorsed the class of one theory in 2000. Those rules were designed to honor both sides of the balance described above, and drew on trial courts' ability to impose appropriate pleading requirements, sift carefully through facts, and thus cull meritless claims at early stages of litigation while allowing potentially meritorious claims to progress.

The Court's disregard of the doctrinal rules developed by the lower courts hearkens back to its analogous disregard of congressional factfinding supporting legislation enforcing the Fourteenth Amendment. While the Court's relationship to the lower courts is quite different from its relationship to Congress, the lower courts nevertheless have unique talents useful to

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the project of applying constitutional principles. Engquist's exclusion of the lower courts from the task of applying Court-announced constitutional principles suggests that the Court will also greet with skepticism future congressional attempts to participate in that same project. Indeed, Engquist's method is quite consistent with the most restrictive versions of the modern Court's approach to congressional enforcement legislation.

Given that equality claims in the future will likely feature conduct that is subtler and more socially embedded than the more open and obvious unconstitutional conduct of the past, any unwillingness by the Court to accept Congress as a partner in uncovering and remedying equal protection violations constitutes an ominous portent for advocates of equality. Engquist, while certainly not a conclusive indicator of the Court's likely direction on this issue, gives cause for concern.

INTRODUCTION

COURTS are in the business of vindicating constitutional rights.¹ Yet they also must take care to minimize frivolous constitutional litigation, not only because of the costs such litigation imposes but also because avoidance of unnecessary litigation is to some degree a constitutional value in itself.² This tension plays itself out every day in the courts, where judges deploy implied causes of action, pleading rules, and substantive legal rules in order to achieve the appropriate balance between providing a remedy for every right and accounting for other legitimate interests that might be disrupted by litigation. The balance is never fully satisfactory. Every rule that makes it harder to prove a claim increases the likelihood that a plaintiff will be unable to prove a fundamentally meritorious claim. Conversely, every rule that makes a claim easier to prove increases the risk that unmeritorious claims will advance in the system, either to an inappropriate victory for the plaintiff or to an inappropriately generous settlement driven by the government-defendant's desire to end the lawsuit.

In the realm of statutory law, Congress has the ultimate power to set this balance by altering both procedural rules³ and the underlying sub-

1. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

2. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (noting "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties"); see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 20, 26-27 (1989) (Stevens, J., concurring) (describing the Court's Eleventh Amendment jurisprudence as partly motivated by a need to balance the vindication of federal rights" and "the constitutional immunity of the States").

3. See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802, 110 Stat. 1321-66 (codified as amended at 18 U.S.C. § 18 3626 (2006)) (modifying the availability of remedies in prison conditions litigation).

stantive liability rules.⁴ Congress also possesses significant power even with regard to constitutional rights through its power to enforce the Reconstruction Amendments.⁵ Under its enforcement power,⁶ Congress can both create remedies for constitutional violations and enact substantive laws that sweep more broadly than the constitutional rule, as long as those laws have some relationship to the underlying constitutional rule they seek to enforce.⁷

In the absence of congressional action, however, it is up to the federal courts to strike this balance. Of course, the courts' primary job is to vindicate constitutional rights. In theory, that fact might suggest that any judge-made rule limiting the vindication of rights would be suspect. But we know that is not the case. Procedural rules may keep meritorious claims out of court. Evidence rules may make it impossible for a plaintiff to prove the elements of her claim. And judge-created glosses on the underlying substantive rule—what Mitchell Berman calls “constitutional decision rules”⁸—may lead to the defeat of a plaintiff's case on the merits. Conversely, more generous rules of these types may make it easier for a plaintiff to prevail in court, even if her claim is in some theoretical sense not meritorious.⁹ How courts strike this balance is thus of utmost importance.

This Article examines a “small”¹⁰ constitutional law case, *Engquist v. Oregon Department of Agriculture*,¹¹ to examine how the Court struck this balance. *Engquist* deals with the rights of government employees to bring so-called “class of one” equal protection claims. *Engquist* presents

4. It goes without saying that Congress can alter the substantive liability rules that it originally enacted. Nevertheless, there may be a point at which congressional alteration of substantive rules trenches on core judicial power. See generally William D. Araiza, *The Trouble With Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055 (1999).

5. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

6. For convenience this Article will sometimes refer to this enforcement power as Congress' “Section 5 power,” given that most significant legislation enforcing the Reconstruction Amendments aims at enforcing the Fourteenth Amendment, whose enforcement provision is located in Section 5. Of course, Congress has enacted important legislation resting on its power to enforce the other Reconstruction Amendments. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the Voting Rights Act as appropriate congressional legislation enforcing the Fifteenth Amendment).

7. This test is known as the “congruence and proportionality” test, which requires that congressional enforcement legislation be “congruent and proportional” to the underlying constitutional violations sought to be remedied or deterred. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (setting forth this standard).

8. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (internal quotations omitted).

9. What is meant by “theoretical” is the common sense insight that courts and juries are not omniscient, and thus can never be perfect when they render verdicts or grant judgments. Because pleading rules and glosses on substantive rules can either make a claim more or less likely to succeed in front of a judge or jury, they may lead to “false positives” (decisions for the plaintiff when an omniscient decider applying the relevant law would not have found for her) or “false negatives” (decisions for the defendant when such a decider would not have found for him).

10. For an explanation of this term, see *infra* notes 21-22 and accompanying text.

11. 128 S. Ct. 2146, 2146 (2008).

an interesting vehicle for study, as it was the Court's first review of how lower courts were implementing an essentially new theory of equal protection. While the roots of the class-of-one theory extend deep into the history of equal protection,¹² the Court did not formally endorse it until 2000, in a case called *Village of Willowbrook v. Olech*.¹³ As explained below,¹⁴ this theory, while intuitively appealing as an application of a fundamental principle embodied by the Equal Protection Clause, opened up potentially broad vistas of government liability, and even broader vistas of litigation. Applying *Olech* therefore required lower courts to engage in the type of balancing identified above.¹⁵ They responded with a set of pleading and substantive rules designed to strike the appropriate balance. In turn, *Engquist* gave the Supreme Court the chance to review the lower courts' work.

This Article contends that the Court got that review wrong, not simply in the result it reached but, more egregiously, in its decisional method. When confronted with the lower courts' careful, if inevitably imperfect and somewhat *ad hoc*, attempts to balance the vindication of constitutional rights and the need to honor legitimate interests militating against class-of-one litigation, the Court, as Justice Stevens rightly said in dissent, simply took a meat-axe to the rights vindication part of the balance. The Article concedes that relatively few class-of-one claims are ultimately meritorious under equal protection doctrine, especially in the area of government employment, the subject-area addressed by *Engquist* and the area to which that opinion is ostensibly limited.¹⁶ But those rights do exist, even under the Court's own analysis. After *Engquist* those rights will not be vindicated.

The fact that the Court chose to value litigation minimization over rights vindication reflects the modern Court's preference for bright-line limits on rights vindication over more *ad hoc*, fact-intensive balancing approaches. Only two terms ago, the Court decided another case about the constitutional rights of government employees by eschewing the well-settled balancing test in that area in favor of a *per se* rule limiting the scope of the right in question.¹⁷ Even more importantly, the analysis in *Engquist* reflects the Court's unwillingness to accord any deference to lower courts' ability to perform this sort of balancing, even when the analysis required is of a type best performed by lower courts. So understood, the Court's analysis echoes caselaw over the last ten years where the Court has resisted congressional attempts to enforce constitutional rights when

12. See *infra* Part II.

13. 528 U.S. 562, 564 (2000).

14. See *infra* Part III.

15. See also *infra* note 310.

16. See *Engquist*, 128 S. Ct. at 2157. But see *infra* Part V.A (discussing other possible applications of the Court's analysis).

17. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) (holding that the traditional "Pickering balancing" of government employees' free speech rights and the government's interest in controlling speech in the workplace does not apply when the employee speaks as part of his job duties).

those attempts rely on more complex empirical analysis and more nuanced social judgments than that employed by the Court when it delineated the scope of the underlying right.¹⁸

This preference for clean, formalistic rules raises serious questions about the future vindication of constitutional rights in a world where constitutional violators have become more sophisticated than Bull Connor.¹⁹ This Article contends that the rigidity the Court showed toward equal protection litigation in *Engquist* parallels its similar rigidity toward congressional legislation aimed at protecting other equal protection rights. In both situations, the Supreme Court has rejected the efforts of other institutions to use their particular institutional competencies to create careful, fact-intensive, and nuanced approaches to the vindication of constitutional rights. Such nuanced approaches are necessary where, as in class-of-one cases, legitimate constitutional rights lie on both sides of the case. In such situations, the sifting mechanisms employed by lower courts offer the best hope of vindicating constitutional rights while also respecting competing legitimate interests. Such nuanced approaches are similarly necessary when, as in the case of congressional enforcement legislation, the problems sought to be remedied are subtle and not amenable to full unmasking through the litigation process.²⁰

As noted above, *Engquist* is a “small” case. Few class-of-one claims are truly meritorious, and even before *Engquist*, relatively few were succeeding in court.²¹ Even if *Engquist’s* logic eventually expands beyond the employment context,²² it will have minimal direct impact on individuals asserting equal protection claims. However, *Engquist’s* method portends a more general rigidity about the vindication of rights, and, in particular, an unwillingness to respect the contributions other government institutions can make to that effort. In a world where equal protection claims are not always as clear-cut as those of African-Americans seeking racial equality against Bull Connor’s water cannons, the *Engquist*

18. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 369, 374 (2001) (striking down as inappropriate enforcement legislation Title I of the Americans With Disabilities Act despite congressionally-compiled record of private sector and general social discrimination against disabled people); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (rejecting as irrelevant evidence of private sector age discrimination when considering whether Congress had compiled a record of state constitutional violations sufficient to render the Age Discrimination in Employment Act appropriate legislation enforcing the Equal Protection Clause).

19. The reference is to Bull Connor, the Commissioner of Public Safety in Birmingham, Alabama, who used attack dogs and water cannons on civil rights protesters in the 1960s. See also Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L. J. 177, 188-90 (2005) (coining the phrase “[t]he Bull Connor is Dead problem”).

20. Cf., e.g., *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring) (concluding that the lack of judicially-uncovered constitutional violations growing out of disability discrimination suggests the lack of a problem justifying broad remedial legislation pursuant to Congress’ power to enforce the Equal Protection Clause).

21. See *infra* note 271.

22. See *infra* note 239 (citing cases suggesting an expansion may already have begun); *infra* Part V.A (suggesting that *Engquist’s* logic may apply beyond the employment context).

Court's hostility to other institutions' particular strengths in uncovering and vindicating rights cannot be a good sign.

This Article builds on the work of others, most notably Mitchell Berman,²³ Henry Monaghan,²⁴ Lawrence Sager,²⁵ Richard Fallon,²⁶ and Michael McConnell.²⁷ These scholars have argued for recognition and exploration of a distinction between rules that reflect constitutional meaning and rules that help courts decide whether a particular principle of constitutional meaning was violated in a given case. This distinction becomes quite useful when examining the extent to which other institutions can vindicate constitutional rights by imposing legal obligations more stringent than those set by the Court itself. Much recent scholarship has considered when Congress can impose such obligations, in particular, under its power to enforce the Fourteenth Amendment.²⁸ This Article draws a connection between those discussions of congressional power, lower courts' deployment of sub-constitutional rules to decide constitutional claims, and the nature of some constitutional doctrine as simply judicially-workable rules that only approximate the underlying constitutional rule.²⁹

This Article uses *Engquist*, and the class-of-one doctrine more generally, as a case study of the translation of constitutional meaning into operative constitutional decision rules,³⁰ and of the appropriate allocation of authority to various government institutions to perform such translation. In particular, it examines how, before *Olech's* endorsement of the class-of-one theory of equal protection, lower court judges constructed a set of decision rules in response to their intuition that class-of-one claims, while usually meritless, nevertheless included a small core of claims that resonated with basic equal protection principles. It also examines how judges in cases after *Olech* altered those rules in response to *Olech's* terse and

23. See Berman, *supra* note 8, at 1.

24. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 1 (1975).

25. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978).

26. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 54 (1997).

27. See Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 153 (1997).

28. See William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 524 n.2 (2005) [hereinafter *The Section 5 Power*]; William D. Araiza, *The Section 5 Power After Tennessee v. Lane*, 32 PEPP. L. REV. 39, 43-44 (2004); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 2 (2007); David L. Schwan, "When You Come to a Fork in the Road, Take It!": *Tennessee v. Lane Takes a New Approach to Section Five Enforcement Powers*, 43 HOUS. L. REV. 235, 238-39 (2006); Winston Williams, Comment, *Check and Checkmate: Congress's Section 5 Power After Hibbs*, 71 TENN. L. REV. 315, 317-18 (2004).

29. See Araiza, *The Section 5 Power*, *supra* note 28, at 528-42 (discussing the concept of some constitutional doctrine's status as simply a judicially-workable decisional rule).

30. This term is taken from Berman, *supra* note 8.

cryptic endorsement of such claims. It then examines and critiques the Supreme Court's review of lower courts' work in this area.

This critique connects the Court's analysis in *Engquist* to its review of Congress' work product in the form of Section 5 enforcement legislation. The Court's modern Section 5 jurisprudence, while not completely consistent, largely reveals the same unwillingness to allow other institutions to engage in this translation work, even when the Court concedes the existence of underlying rights, and even when it confesses its own inability to fully apply underlying constitutional meaning. The Article concludes that *Engquist* reveals a continuation of the Court's disturbing tendency to disregard, or at least undervalue, the contributions other institutions can make to the full application of constitutional rules identified by the Court. This is troubling news in itself, but it is even more so given the likelihood that future constitutional (especially equal protection) claims will arise in contexts that resist straightforward judicial inquiry through the standard litigation process.

Part I of this Article provides an introduction to the concept of a class of one, for readers unfamiliar with this still obscure corner of equal protection law. With a basic knowledge provided, Part II examines the origins of the class-of-one, first in pre-*Olech* caselaw and then in the deeper roots of equal protection. The reverse character of this chronology is intentional. Class-based theories of equal protection so dominate our thinking about equal protection that it is appropriate to start with a demonstration that lower courts have in fact vindicated such claims. Only after establishing the real-world existence of such claims is it then appropriate to consider the consistency of the doctrine with the fundamental principles underlying the doctrine. Thus, Part II demonstrates both that modern courts even before *Olech* had accepted the gist of the class-of-one theory and that this theory resonates deeply with the principles underlying the Equal Protection Clause.

Part III then discusses *Olech*. It pays special attention to the Seventh Circuit opinion the Court reviewed as that opinion was written by Judge Posner, who both before and after *Olech* has been influential in the construction of the doctrine. Part III reveals the divergent approaches taken, on the one hand, by Judge Posner and Justice Breyer, and on the other, by the eight members of the Court that joined the exceptionally brief *per curiam* opinion. Judge Posner, in an approach endorsed by Justice Breyer in his concurring opinion, cited the *Olech* plaintiffs' allegation of government animus as a key factor in allowing their claim to go forward.³¹ They concluded that this allegation provided courts with a tool to limit the otherwise potentially-limitless vistas of federal constitutional litigation that would open when any individual treated differently than any other by the government could state an equal protection claim.³² By contrast, the rest

31. *Olech v. Village of Willowbrook*, 160 F.3d 386, 388-89 (7th Cir. 1998).

32. *Village of Willowbrook v. Olech*, 528 U.S. 563, 565-66 (2000) (Breyer, J., concurring).

of the Court treated the case as a simple application of the rule that irrational action by government, even if not premised on any broad trait-based classification, stated an equal protection claim.³³

Part III concludes by examining how lower courts dealt with the broad implications of the Court's conclusion in *Olech* that irrational differential treatment of any two persons violated equal protection. The main issue for the lower courts was not the potential for broad government liability, given the exceptional deference of the rational basis standard. Rather, the problem was in culling non-meritorious claims at early stages of the litigation to conserve judicial resources, protect the government's legitimate interest in avoiding clearly meritless litigation, and reduce the risk of inappropriate settlements should claims survive a motion to dismiss and move on to expensive and time-consuming discovery. Accordingly, Part III examines how lower courts developed a panoply of procedural and substantive rules designed to cull the vast majority of meritless claims from the few potentially meritorious ones.

Part IV considers *Engquist*. *Engquist* involved a government employee who claimed that she was fired because of her supervisor's irrational, non-performance-related dislike of her in violation of the Equal Protection Clause. A jury found for her on this claim, but the Ninth Circuit reversed, holding that class-of-one claims could not be brought against government employers. The Supreme Court, through Chief Justice Roberts, affirmed that holding. It concluded that government employment decisions are by their nature usually "subjective and individualized"³⁴ and thus "a poor fit"³⁵ for analysis under the class-of-one theory. Justice Stevens, joined by Justices Souter and Ginsburg, dissented.³⁶ He complained that even if the class-of-one doctrine needed pruning to prevent excessive litigation, the Court should not have announced a rigid *per se* rule against such claims in the workplace.³⁷

Part IV's analysis reveals the majority opinion's character as an application of, rather than a statement of, a constitutional rule. Much of what the Court says about class-of-one employment claims is accurate: the government decisions they challenge are often subjective and individualized in ways that make them poor fits for equal protection analysis. However, this analysis does not suggest that class-of-one discrimination in the workplace never violates equal protection. Rather, it suggests that courts may have a difficult time uncovering such discrimination. In our terminology, courts have a difficult time applying, in the workplace context, the rule that irrational government action violates the Constitution. Part IV concludes that had the Court—either in *Olech* or *Engquist*—imposed an animus requirement, it could have mitigated such epistemological problems

33. *Id.* at 565 (per curiam).

34. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2154 (2008).

35. *Id.* at 2155.

36. *Id.* at 2157.

37. *Id.* at 2158 (Stevens, J., dissenting).

without completely shutting the door on what the Court itself implicitly concedes might be meritorious claims.

Part V considers *Engquist's* implications, beginning with its application to other spheres of government activity. The Court took pains to limit its holding to the government workplace. However, its logic extends further, to any situation where the government decision can be characterized as "subjective and individualized." Some post-*Engquist* courts are already applying *Engquist's* analysis to other factual contexts, though the recentness of the decision means that more time is needed to observe how lower courts read the opinion.

Part V then examines the implications of *Engquist's* categorical approach to class-of-one workplace claims. It describes *Engquist* as a case where the Court balanced vindication of employees' rights against government's interests in workplace flexibility and litigation avoidance. These government interests are legitimate; however, the Court's categorical rule in its favor violates what ought to be a general rule in constitutional cases: avoiding what Justice Souter has called "winner-take-all" approaches when constitutional interests exist on both sides of the balance.³⁸

Part V concludes by considering the most troubling implication of the Court's method. It suggests that the Court's categorical approach in *Engquist* harkens back to its most rigid approach to congressional legislation enforcing the Reconstruction Amendments. That approach, reflected most notably in its 2001 decision in *Board of Trustees v. Garrett*,³⁹ was marked by the Court's refusal to credit congressional uncovering of more widespread constitutional violations justifying remedial legislation than that uncovered by courts themselves through the normal litigation process.⁴⁰ By refusing to recognize Congress' superior ability to uncover constitutional violations whose subtly, social embeddedness, or resistance to disclosure through judicially-recognized proof rendered them nearly invisible in the pages of case reports, the Court in cases such as *Garrett* showed its unwillingness to enlist Congress as a full partner in the vindication of Fourteenth Amendment rights.

Part V suggests that *Engquist* reveals, albeit at the level of a relatively trivial case, this same insistence on the Supreme Court's centrality and uniqueness in vindicating constitutional rights. Just as in cases such as *Garrett* where the Court refused to allow Congress to assist in applying constitutional rules announced by the Court itself, so too in *Engquist* the Court disregarded lower courts' construction of doctrinal rules aimed at applying the class-of-one rule announced in *Olech*. Those rules attempted to balance vindication of class-of-one rights with government's legitimate interests. The Court's disregard of those rules in favor of a categorical rule defeating those rights reflects the same unwillingness to

38. *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting).

39. 531 U.S. 356, 356 (2001).

40. See *infra* note 266.

share responsibility for the project of applying the constitutional law the Court itself announces.

The Court's insistence that other institutions not share in this project is an ominous portent for the vindication of equality rights in the future. If, as this Article suggests, equality claims in the future will challenge fewer obvious bad actors and more nuanced and socially-embedded conduct, the Supreme Court, indeed courts generally, will be unable to fully perceive the problem. *Engquist's* method suggests that the Court will be unwilling to credit congressional perceptions of the problem. If *Engquist* does indeed portend the Court's unwillingness to allow Congress to point the problems out, then advocates for equality may find themselves wishing for the return of government actors with the subtlety of Bull Connor.

I. AN INTRODUCTION TO THE CLASS OF ONE

Equal protection doctrine presents a paradox. On the one hand, the Court has consistently stated that equal protection rights are "personal."⁴¹ These statements flow, at least in part, from the Court's rejection of both a group-based theory of equal protection⁴² and, arguably following from such a theory, class-based remedies for past discrimination when the government body imposing the remedy has not been found formally guilty of unconstitutional discrimination.⁴³ This description has taken on real significance over the last twenty years as the Court has used it to buttress its skepticism of race-based government action regardless of its compensatory or remedial motive.⁴⁴

At the same time, standard equal protection law *does* in fact turn on groups, or at least on the classification traits (such as race and gender) that define group membership. Even though equal protection doctrine requires identification of a particular individual suffering discrimina-

41. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2765 (2007) (plurality opinion); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

42. Under a group-based theory a law's disparate impact on a protected (or "suspect") classification trait would trigger heightened scrutiny, without the need for discriminatory intent. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting reliance on pure disparate impact in large part because of the Court's conclusion that equal protection rights are personal). For one influential discussion of a group or class approach to equal protection, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

43. See *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2738, 2752 (plurality opinion) (rejecting the argument by school districts that their race-conscious student assignment policies were justified by their past discrimination that was either never conclusively adjudicated or already remedied); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-500 (1989) (rejecting the city's argument that its race-based contracting set-aside was constitutional because the lack of minority-owned contracting businesses suggested discrimination that warranted race-conscious remedial action).

44. *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2765; *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting); *Croson*, 488 U.S. at 493; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978).

tion,⁴⁵ that individual may nevertheless state an equal protection claim by claiming discrimination based on her possession of a certain group-held trait, such as her race or her gender. This class-based approach appears consistently in the history of the equal protection. Courts in the immediate post-Civil War period explicitly pronounced that either the sole or the predominant purpose of the Equal Protection Clause was to ensure equality for African Americans.⁴⁶ During the late nineteenth and early twentieth centuries, the Court often stated that equal protection guarded against inappropriate “[c]lass legislation” that burdened one group for reasons other than the public good.⁴⁷ In so doing, it picked up on a similar Jacksonian theme that animated legal discussions of equality before the Civil War.⁴⁸ In *United States v. Carolene Products*, the Court proposed a theory of equal protection that turned on the political and social status of the group being classified.⁴⁹ This theory still underlies much of the Court’s equal protection jurisprudence.⁵⁰

Whether, as one scholar has stated, these two conceptions of equal protection resemble “trains riding on parallel tracks that never meet,”⁵¹ or whether, instead, they co-exist only with significant tension, the fact remains that these two visions of equal protection both exist and exert strong holds on our constitutional imagination. The class-based approach

45. *Croson*, 488 U.S. at 498-99 (rejecting the argument that affirmative action set-aside for contractors was justified by the fact that discrimination against African Americans could be inferred by their very small participation in the contracting business); *Washington v. Davis*, 426 U.S. 229, 245 (1976) (rejecting a claim that the discriminatory effect a government action has on African Americans as a class states an equal protection claim).

46. *E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (“We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]. [The Clause] is so clearly a provision for that race . . . that a strong case would be necessary for its application to any other.”).

47. *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1884) (“Special burdens are often necessary for general benefits. . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. . . . Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [Fourteenth] amendment.”).

48. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND FALL OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 45-60 (1995); see also *supra* text accompanying notes 90-95.

49. 304 U.S. 144, 152 n.4 (1938) (noting that discrimination against “discrete and insular minorities” may require heightened judicial scrutiny).

50. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985) (analyzing whether the mentally retarded need heightened judicial scrutiny by employing the theory outlined in *Carolene Products*). For a more equivocal application of the *Carolene Products* theory, see *Croson*, 488 U.S. at 495-96 (calling into question the appropriateness of *Carolene Products* analysis of discrete and insular minorities, but then concluding that, to the extent the theory applied, finding that whites in Richmond constituted such a minority due to their minority status on the Richmond City Council). For an attempt to harmonize these seemingly discordant approaches to *Carolene Products*, see generally Araiza, *The Section 5 Power*, *supra* note 28, at 528-38, 580-83.

51. Robert C. Farrell, *Classes, Persons, Equal Protection and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 367 (2003).

resonates with our history, given that the Fourteenth Amendment was motivated by a struggle against a racial caste system. But the "personal rights" approach resonates as well. The rights secured in the Civil Rights Act of 1866—the precursor of the Fourteenth Amendment—are appropriately labeled "individual": the right to contract, to own property, and to have standing before the courts.⁵² Moreover, our intuition strongly suggests that some basic principle of equality is violated when, without justification, government burdens A but not B, even though both are similarly situated.⁵³ Indeed, Judge Posner has called this situation a "paradigmatic" violation of equal protection.⁵⁴

Thus, while class-based discrimination has historically played the predominant role in equal protection doctrine, unequal treatment that is not based on possession of a group trait percolated under the surface. In the modern era, a number of lower courts have been asked to consider whether alleged unequal treatment of similarly-situated persons violated equal protection even when the discrimination was not based on possession of a group trait. Even though the Supreme Court did not officially recognize such a theory until the 2000 case of *Village of Willowbrook v. Olech*,⁵⁵ lower courts before *Olech* embraced it and set about constructing doctrine to govern such claims.

II. THE CLASS-OF-ONE BEFORE *OLECH*

A. PRE-*OLECH* CASELAW

While *Olech* is often described as inaugurating the class-of-one theory of equal protection, in fact, *Olech* simply confirmed a theory that a number of lower courts had long accepted.⁵⁶ These cases are unusual in that

52. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

53. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949) ("The essence of . . . [the Equal Protection Clause] can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated."); *The Supreme Court, 1961 Term: Criminal Indictments for Refusal to Answer*, 76 HARV. L. REV. 100, 121 (1962) ("In principle, it would appear improper to limit the equal protection clause to class discrimination alone since it condemns discrimination against 'any person.'") (quoted in *United States v. Falk*, 479 F.2d 616, 619 n.4 (7th Cir. 1973)).

54. *Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) ("If . . . two [persons] are truly identical the different treatment of them *must* be discriminatory; treating likes as unlike is the paradigmatic case of the unequal protection of the laws.") (some emphases removed).

55. 528 U.S. 562, 562 (2000)

56. See *Rubinovitz v. Rogato*, 60 F.3d 906, 911-12 (1st Cir. 1995); *Vukadinovich v. Bd. of Sch. Trs.*, 978 F.2d 403, 414 & n.9 (7th Cir. 1992); *Yerardi's Moody St. Rest. v. Bd. of Selectmen*, 932 F.2d 89, 92 (1st Cir. 1991); *Yerardi's Moody St. Rest v. Bd. of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Jackson Court Condos., Inc. v. City of New Orleans*, 874 F.2d 1070, 1083 (5th Cir. 1989) (Williams, J., dissenting); *Chicago Cable Commc'ns v. Chi. Cable Comm'n*, 879 F.2d 1540, 1547 (7th Cir. 1989); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *LeClair v. Saunders*, 627 F.2d 606, 607 (2d Cir. 1980); *Moss v. Hornig*, 314 F.2d 89, 93 (2d Cir. 1963) (Lumbard, J.); *Burt v. City of New York*, 156 F.2d 791, 791-92 (2d Cir. 1946) (L. Hand, J.); *Louis v. Supreme Court of Nev.*, 490 F. Supp. 1174, 1183 (D.C. Nev. 1980). This is not to suggest that this acceptance was unanimous. See, e.g., Farrell,

they do not present the standard claims of discrimination on the basis of a widely-held trait; instead, as Judge Oakes said almost thirty years ago, they inhabit “a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply.”⁵⁷ In addition to being unusual, these cases also posed a problem: the (literal) inequality in government treatment at issue strongly suggested a violation of equal protection, but the ubiquity of government action treating one person differently from another meant that, under a class-of-one theory, nearly any government action could give rise to an equal protection claim. In order to honor judges’ instincts about the equal protection issues raised by these claims while also cabining the reach of such claims, lower courts before *Olech* groped for insights in the sparse caselaw and the unclear rules Judge Oakes described.⁵⁸

The lack of a straightforward doctrine led judges in these cases to rely on an assortment of insights about equal protection. For example, a number of these courts cited a 1944 Supreme Court case, *Snowden v. Hughes*,⁵⁹ for the proposition that the disparate treatment must be intentional,⁶⁰ and *Yick Wo v. Hopkins*⁶¹ for the proposition that selective enforcement of a neutral law, if performed for an illegitimate reason, violated equal protection.⁶² At the same time, these judges, mindful of the potential volume of litigation that might result if an individual could state an equal protection claim simply by alleging intentional and bad faith singling out, required plaintiffs to show that the bad faith was a major motivating factor behind the official action.⁶³ Finally, these cases

supra note 51, at 388-87; Timothy Zick, *Angry White Males: The Equal Protection Clause and “Classes of One,”* 89 Ky. L.J. 67, 83-88 (2001) (both identifying pre-*Olech* lower court decisions rejecting the class of one theory). This Article does not address these cases given the Court’s eventual endorsement of the theory. This Section’s discussion of pre-*Olech* caselaw is merely intended to examine the doctrinal construction engaged in by courts embracing the theory before *Olech*’s definitive endorsement.

57. *LeClair*, 627 F.2d at 608.

58. *Id.*

59. 321 U.S. 1, 1 (1944).

60. *Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.*, 933 F.2d 853, 859 (10th Cir. 1991); *Ciechon v. City of Chicago*, 686 F.2d 511, 522-23 (1982); *LeClair*, 627 F.2d at 609; *Shock v. Tester*, 405 F.2d 852, 856 (8th Cir. 1969); *Burt*, 156 F.2d at 791-92.

61. 118 U.S. 356, 373-74 (1886).

62. *LeClair*, 627 F.2d at 610; *Cook v. City of Price*, 566 F.2d 699, 701 (10th Cir. 1977); *Shock*, 405 F.2d at 855-56. This reading of *Yick Wo* has been questioned. Gabriel Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 ILL. L. REV. 1359 (arguing that *Yick Wo* cannot be understood as a case about race-based selective prosecution, but instead is better read as a case about property rights). The point here, however, is simply to note the doctrinal strands pre-*Olech* courts cited as they attempted to construct rules governing class-of-one claims in the period before the Supreme Court had provided definitive guidance.

63. See, e.g., *Le Clair*, 627 F.2d at 611 (“[T]he malice/bad faith standard should be scrupulously met.”); see also *Rubinovitz v. Rogato*, 60 F.3d 906, 912 (1st Cir. 1995) (suggesting that at least one judge on the panel believed that more than a single act of malice would be necessary for this type of claim to be allowed to proceed); *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) (Posner, J.) (“[A] tincture of ill will does not invalidate governmental action.”); *Yeradi’s Moody St. Rest. v. Bd. of Selectmen*, 932 F.2d 89, 94 (1st Cir. 1991) (finding that the government was entitled to a directed verdict

noted the deferential nature of the rational basis standard by which class-of-one claims would ultimately be judged.⁶⁴

Much of this doctrine states familiar equal protection law. However, its application to class-of-one cases presented challenges that required courts to make adjustments to the normal rules. In particular, the ubiquity of government decisions treating two individuals differently for reasons unrelated to membership in a class raised the specter of nearly limitless litigation. Moreover, the lack of a single trait differentiating the two persons made it more difficult to apply standard "fit" analysis that examined whether the government's use of that classifying tool was a close enough proxy for a sufficiently important government interest.⁶⁵

These challenges required courts to consider tools to limit the potential reach of the doctrine and adapt it to a context where a single trait could not be tested for the proper degree of fit. Thus, for example, courts considered carefully whether the two persons were in fact similarly situated.⁶⁶ Others required that the differential treatment be based on an impermissible reason which, in the class-of-one context, usually meant some subjective desire to harm the disfavored person, rather than simply requiring the usual lack of fit between the government's action and a legitimate interest.⁶⁷ After *Olech* explicitly endorsed the class-of-one theory, lower courts had to continue developing these and other requirements to control what might otherwise become a flood of litigation.⁶⁸

The lower courts' embrace of the class-of-one theory in spite of these challenges responded to their intuition that there is something fundamentally violative of any equality principle when A and B, who are similarly situated in all relevant respects, are treated differently without a good reason.⁶⁹ Such treatment suggests arbitrariness on the part of government, except perhaps where resource constraints or other neutral reasons require the government to choose between two equally deserving or equally culpable persons. In turn, arbitrariness may result from "pure" irrationality divorced from any malevolent intent, or from some malevo-

on the equal protection claim against it, given the weakness of the plaintiff's evidence on the bad faith issue).

64. *Armendariz v. Penman*, 75 F.3d 1311, 1326-27 (9th Cir. 1996); *Zeigler v. Jackson*, 638 F.2d 776, 781 (5th Cir. Unit B. Mar. 1981).

65. See William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *Ecol. L.Q.* 493, 503-04 (2007).

66. *Vukadinovich v. Bd. of Sch. Trs.*, 978 F.2d 403, 414 (7th Cir. 1992).

67. *LeClair*, 627 F.2d at 609-10.

68. See *infra* Part III.B.

69. See *Ind. State Teachers Ass'n v. Bd. of Sch. Commrs.*, 101 F.3d 1179, 1181 (7th Cir. 1996) ("It would be especially odd to refuse the protection of the clause in a case in which two *identical* entities were treated differently, on the ground that since they are identical they must belong to the same class, so there is no discrimination against a class. If the two are *truly* identical the different treatment of them *must* be discriminatory; treating likes as unlike is the paradigmatic case of the unequal protection of the laws."); see also ARISTOTLE, *NICOMACHEAN ETHICS* 118-19 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) (equality consists of treating likes alike).

lent intent (“animus”)—that is, an intent to pursue some aim other than the public good.⁷⁰

The difficult issue of animus reappeared in post-*Olech* caselaw and, indeed, in *Engquist* itself; this Article will return to the topic at appropriate points.⁷¹ For now, the important insight is that pre-*Olech* lower courts wrestling with basic equal protection principles without the benefit of directly-applicable precedent⁷² were creating doctrinal rules that both reflected underlying equality principles and were amenable to judicial application. They balanced judicial workability and legitimate government interests with courts’ basic intuitions about what equality requires.

But to say that our intuition suggests inequality when two similarly-situated persons are treated differently is not to show that the Equal Protection Clause is in fact implicated by such conduct. A general moral theory of equality may well deem such conduct problematic.⁷³ So might a theory of our own Equal Protection Clause that focuses on whether government is singling out powerless members of society.⁷⁴ What about the original understanding of the clause?

B. THE CLASS OF ONE AND THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION

Modern equal protection doctrine has strayed far from many understandings of the clause’s original meaning. Leaving aside the question

70. *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (Posner, J.) (“[W]e gloss ‘no rational basis’ in the unusual setting of ‘class of one’ equal protection cases to mean 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.”); *Ciechon v. City of Chicago*, 686 F.2d 511, 523 n.16 (7th Cir. 1982) (noting that the government disciplined one paramedic for misconduct that was also performed by the paramedic’s partner, who did not get disciplined, as a reaction to pressure from the media and the family of the patient); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1730-32 (1984) (suggesting that the ultimate constitutional requirement is that government act in pursuit of the public interest rather than purely private interests).

71. See *infra* Part III (discussing the role of animus in *Olech* and post-*Olech* caselaw); *infra* Part IV (discussing the role of animus in *Engquist*).

72. See *LeClaire*, 627 F.2d at 608.

73. See generally RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 199 (1978) (arguing that equality requires government to treat persons with equal “concern and respect”); DOUGLAS RAE ET AL., *EQUALITIES* (1981) (offering different moral theories of equality).

74. See *United States v. Carolene Prods.*, 302 U.S. 144, 152 n.4 (1938); *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (“The paradigmatic ‘class of one’ case . . . is one in which a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen.”); *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (“[C]lassifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause.”); *Jones v. City of Modesto*, 408 F. Supp. 2d 935, 957 (E.D. Cal. 2005); *Engelbrecht v. Clackamas County*, No. CV05-665-PK, 2006 WL 2927244, at *8 (D. Or. Oct. 11, 2006); *Am. Nat’l Bank & Trust Co. v. Town of Cicero*, No. 01 C 1395, 2003 WL 1712561, at *3 (N.D. Ill. Mar. 28, 2003); *Bayou Fleet, Inc. v. Alexander*, No. Civ. A. 97-2265, 1997 WL 625492, at *6 (E.D. La. Oct. 7, 1997) (all quoting *Esmail*).

whether the clause applies to classes of one, its expansion to cover classifications other than race raises the question of whether the clause was intended to combat anything other than racial discrimination, or even only discrimination against African Americans.⁷⁵ In addition, the modern doctrine's application to government action imposing any type of burden represents a significant expansion of what some scholars argue was its original intention to apply only to fundamental rights (however defined),⁷⁶ the rights guaranteed in the Civil Rights Act of 1866,⁷⁷ or, at most, rights otherwise protected by law.⁷⁸ Moreover, some scholars focus on the "protection" part of the "equal protection" formula to argue that the clause was originally intended only to apply to a subset of *types* of government action.⁷⁹ In short, the modern doctrine's application to *all* classifications and *any* government action creates a constitutional limitation far greater than the ones these scholars suggest reflect the original understanding of the clause.⁸⁰

The extraordinary diversity of theories of the original meaning of the Equal Protection Clause, and more generally, the interplay between the

75. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (questioning whether the Equal Protection Clause applied to anything other than discrimination against African-Americans).

76. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 117-120 (1986) (arguing that the Equal Protection Clause was intended to require equality with regard to all fundamental rights, including the rights enumerated in the Bill of Rights); JACOBUS TENBROEK, *EQUAL UNDER LAW* 223 (Collier Books rev. ed. 1965) (1951) (arguing that the Equal Protection Clause was designed to require states to protect individuals' natural rights, with the secondary requirement that such protection must be equal).

77. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 169-92 (2d ed. 1997).

78. See, e.g., Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 519, 520, 522, 527 (1985) (arguing that John Bingham and other key Republicans in the Thirty-Ninth Congress intended the Equal Protection Clause to apply to ensure equality only with regard to otherwise-existing legal rights, such as those constitutionally recognized in the Fourteenth Amendment's Privileges and Immunities Clause or in state law); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (concluding that the Equal Protection Clause was not originally intended to apply to school segregation, jury service, voting, or marriage). *Contra* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1132-34 (1995) (arguing that *Brown v. Bd. of Education* was correct as an originalist matter).

79. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433-51 (1992) (arguing that the Equal Protection Clause is fundamentally about the requirement that government provide equality in the protection for rights, rather than in the rights themselves); Kenyon Bunch, *If Racial Desegregation, Then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment*, 28 HARV. J.L. & PUB. POL'Y 781, 841 (2005) ("[A] general command that all state-created benefits and burdens are to be allocated 'equally' probably has no connection to the original meaning of the Fourteenth Amendment."); *id.* at 842 (It is "quite unlikely" that the current doctrine's applicability to all government actions "reflects the originally intended purpose of the Equal Protection Clause.").

80. E.g., Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 623 (2005) ("The contemporary consensus that gender-based discrimination represents a fundamental injustice displaced the original understanding of the Equal Protection Clause."); BERGER, *supra* note 77, at 198-220.

various components of Section 1 of the Fourteenth Amendment,⁸¹ make it impossible for this Article to retain its focus on modern doctrine while also analyzing comprehensively the plausibility of the class-of-one theory as an original matter. Even more fundamentally, it may be simply incoherent to carve out and analyze in isolation one question about the Fourteenth Amendment—whether it was meant to prohibit discrimination not based on membership in a class—without considering its full meaning. Still, some very summary comments may be appropriate.

First, the argument that the Fourteenth Amendment enshrined a regime of limited absolute equality—that is, not across-the-board equality but rather absolute equality but only with regard to a set of rights otherwise granted by law—militates against the entire classification-based reading of equal protection.⁸² In turn, a non-classification based vision of equality suggests that individuals may have equal protection claims when they are the victims of targeted government deprivations of those protected rights, regardless of whether the deprivation turned on their membership in a class. Second, the existence of a debate about whether the Privileges and Immunities Clause is the historically correct home for the Fourteenth Amendment's equality guarantee⁸³ does not negate the theoretical possibility of class-of-one claims, at least with regard to the rights that clause protects.⁸⁴ Both of these theories might call into question whether the Fourteenth Amendment prohibits discrimination with regard to *every* government action. However, the question here is whether the non-classification character of the class-of-one theory plausibly fits within the Amendment's original meaning, and not whether particular rights come under the Amendment's protection.

One problem with testing the class-of-one theory against various originalist theories of the Fourteenth Amendment is simply that class-of-one claims were not primary in anyone's thinking in 1866. This should not be surprising, given the imperative the drafters felt to realize full civil equality for the freed slaves and for African Americans more generally. They may have written Section 1 broadly enough to cover other classes or

81. See *infra* note 83.

82. Maltz, *supra* note 78, at 519, 522-29 (concluding that John Bingham did not view the Clause in terms of a rule against classification and discussing the views of other key congressional Republicans and reaching the same conclusion); TENBROEK, *supra* note 76, 237 ("The clause on equal protection of the laws had almost exclusively a substantive content. . . . Protection of men in their fundamental or natural rights was the basic idea of the clause; equality was a modifying condition. . . . This established its absolute and substantive character, though the use of the word 'equal' would seem to give the clause a comparative form. Equal denial of protection, that is, no protection at all, is accordingly a denial of equal protection. The requirement of equal protection of the laws cannot be met unless the protection of the laws is given; and to give the protection of the laws to men in their natural rights was the sole purpose in the creation of government.").

83. Harrison, *supra* note 79, at 1391-93 (arguing that the Privileges and Immunities Clause was intended to be the locus of a requirement that government laws regarding certain fundamental rights be equal, with the Equal Protection Clause playing a subsidiary role requiring only equal government protection of those rights from invasion by others).

84. *Id.* at 1388 (arguing that the Privileges and Immunities Clause was intended to protect equality with regard to positive law property and contract rights).

individuals without regard to class membership, but there is simply no reason to expect their statements—or the statements of their opponents—to speak in any detail to a question that even today occupies only the margin of equal protection doctrine.⁸⁵

For this reason, a more profitable approach to the historical question might be to move away from debates about the original meaning of the clause itself and toward more general antebellum constitutional thinking about equality. Such thinking is consistent with class-of-one equality claims. Antebellum constitutional theorists had focused significant attention on equality in the decades before the enactment of the Fourteenth Amendment.⁸⁶ This concern, in turn, finds echoes in Madison's theorizing about the abuse of sovereign power by self-interested factions who did not seek the general good.⁸⁷ Madison's concern translated into a variety of constitutional provisions that sought to limit government power to single out individuals or classes. These provisions included prohibitions on the granting of noble titles, impairing contractual obligations, and enacting bills of attainder,⁸⁸ in addition to the very creation of the federal government, which by its size and breadth was hoped to be more immune than state governments to factional hijacking.⁸⁹

By the early nineteenth century this concern for equally applicable laws had begun to manifest itself in court decisions, legislation, and state constitutional provisions opposing so-called "special" or "class" legislation. Whether cast explicitly in terms of equality guarantees in state constitutions, in aspirational statements such as those in the Declaration of Independence, or in terms of state constitutional "law of the land" or "due process" clauses, this concern with equality, non-favoritism, and review of legislation to ensure its "public purpose" became a defining feature of antebellum jurisprudence.⁹⁰

This constitutional focus paralleled the era's political focus on increasing democratization and the final breakdown of the Federalists' vision of

85. Zick, *supra* note 56, at 88 ("No one in the Thirty-Ninth Congress considered whether an individual could challenge government action motivated by alleged illegitimate animus under the Equal Protection Clause. The concerns of the time, which included the plight of the newly-freed slaves in the aftermath of a Civil War fought, in part, to render them free, were far weightier.").

86. Indeed, a concern that laws be general in application has been described as "the chief constitutional development of pre-Civil War America." Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Studies*, 88 MICH. L. REV. 1366, 1376 (1990) (citing F. HAYEK, *THE CONSTITUTION OF LIBERTY* 188 (1960)); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251-68 (1997).

87. GILLMAN, *supra* note 48, at 29-33.

88. Yudof, *supra* note 86, at 1374-75.

89. THE FEDERALIST NO. 10, at 81-84 (James Madison) (Clinton Rossiter ed., 1961).

90. GILLMAN, *supra* note 48, at 33-60 (noting the political and legal characters of the concern for equality); Yudof, *supra* note 86, at 1376 (discussing antebellum sources of the requirement of general and equal laws); *see also* Saunders, *supra* note 86, at 266 n.58 (giving examples of Tennessee cases citing that state constitution's "law of the land" clause as the source for the equality requirement).

government by an aristocracy of merit.⁹¹ Broader (white male) suffrage,⁹² resistance to the Bank of the United States and the special privileges and access to wealth it allegedly represented,⁹³ and more general resistance to the granting of special corporate charters⁹⁴ all reflected different aspects of this overall concern for equality. By the 1850s, abolitionists had co-opted this concept to paint slavery and slaveholders as a special interest that had taken over the federal government and was bending it to its own selfish goals.⁹⁵ As commentators have noted,⁹⁶ this particular strand of equality theory, in addition to others more explicitly targeted at the inequality represented by slavery, should be considered as part of the intellectual backdrop of the Fourteenth Amendment and of the Equal Protection Clause in particular.

This focus on singling out suggests at least the historical plausibility of reading the Equal Protection Clause as aiming at class-based legislation, but also at government action singling out individuals. Certainly the grant of certain special privileges, such as a special corporate charter, speaks not of broad, characteristic-based discrimination of the type normally associated with contemporary equal protection doctrine, but instead of the type of particularized singling-out that was distantly echoed in *Olech*. Concededly, special charters redounded to the *benefit*, rather than the detriment, of the singled-out individual. On the other hand, contemporary sources cite as examples of prohibited statutes those that impose a special rule in a particular litigation, situations where, by definition, both benefits and burdens would be imposed on particular individuals.⁹⁷

At any rate, it is only a relatively small conceptual step from a concern with the granting of special benefits to a particular individual to a concern

91. See generally SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2005).

92. *Id.* at 82-83, 196-202, 539-45.

93. *Id.* at 391-93.

94. On the objections to special corporate charters, see DAVID GOLD, *THE SHAPING OF NINETEENTH CENTURY LAW* 139 (1990); JAMIL ZAINALDIN, *LAW IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECONOMIC EXPANSION* 46, 47 (1983) (noting the rise of general incorporation laws by mid-century).

95. See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 87-102 (1970); Daniel Farber & John Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 *CONST. COMMENT.* 235, 238-39 (1984); Yudof, *supra* note 86, at 1379.

96. See generally Saunders, *supra* note 86, at 251-52; Yudof, *supra* note 86, at 1372-73; GILLMAN, *supra* note 48.

97. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 809 n.1 (8th ed. 1927) (citing cases striking down statutes extending statutes of limitations in particular cases while allowing them to remain in force generally, and statutes granting divorces not otherwise legally authorized). Indeed, before 1787 such legislative interference in litigation was one instance of the faction-based politics that led Madison and other framers to search for correctives in both governmental structure, see *THE FEDERALIST* NO. 10, at 81-84 (James Madison) (Clinton Rossiter ed., 1961) (explaining that governmental structure can mitigate factional politics), and grants of individual rights, see U.S. CONST. art. I, § 9, cl. 3 (prohibiting the federal government from enacting Bills of Attainder), and U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from enacting Bills of Attainder or law impairing the obligations of contracts).

with the imposition of special burdens on an individual. More broadly, if one looks at provisions such as the Contracts and Bill of Attainder Clauses as the precursors of the antebellum concern for special legislation,⁹⁸ then *Olech's* focus on particularized burdening of an individual appears more consistent with the general thrust of the thinking that resulted in the Equal Protection Clause. And certainly, the philosophy underlying the concern about special legislation—a philosophy that expressed concern about abuse of sovereign power for selfish, private ends rather than for the public good⁹⁹—is consistent with concern about both the bestowal of special benefits and the imposition of special burdens.

III. *OLECH* AND ITS AFTERMATH

Thus, by the time the Court considered *Olech*, the tools existed for the Court to uphold a class-of-one theory consistent with both lower court precedent¹⁰⁰ and standard interpretive tools.¹⁰¹ Indeed, the Court in *Olech* treated this case as a simple one. However, the sketchiness and seeming breadth of its analysis created problems that ultimately set the stage for *Engquist*.

A. *OLECH*¹⁰²

In *Village of Willowbrook v. Olech*, the Court affirmed the class-of-one theory when considering the constitutional implications of a classic neighborhood spat.¹⁰³ The problem started when the Olechs, residents of Willowbrook, Illinois, requested that the Village connect their home to the town water supply (the Olechs' well having broken beyond repair).¹⁰⁴ The Village agreed, but insisted on a thirty-three foot easement across their property (as well as across the properties of two other property owners to which the new municipal water pipe would also extend).¹⁰⁵ However, only fifteen feet of this easement was needed for installation

98. See *supra* note 97 and accompanying text.

99. See GOLD, *supra* note 94, at 99 (discussing "public purpose" requirement).

100. See *supra* notes 56-70 and accompanying text.

101. See *supra* notes 57-99 and accompanying text.

102. This Section is largely taken from Araiza, *supra* note 65, 495-98.

103. *Olech* generated a spate of scholarly commentary shortly after it was decided. See, e.g., Hortensia S. Carreira, *Protecting the "Class of One"*, 76 REAL PROP. PROB. & TR. J. 331, 331 (2001); David S. Cheval, *By the Way—The Equal Protection Clause Has Always Protected A "Class of One": An Examination of Village of Willowbrook v. Olech*, 104 W. VA. L. REV. 593, 593 (2002); Robert C. Farrell, *Classes, Persons, Equal Protection and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 367 (2003); Shaun M. Gehan, *With Malice Toward One: Malice and the Substantive Law in "Class of One" Equal Protection Claims in the Wake of Village of Willowbrook v. Olech*, 54 ME. L. REV. 329, 329 (2002); J. Michael McGuinness, *The Rising Tide of Equal Protection: Willowbrook and the New Non-Arbitrariness Standard*, 11 GEO. MASON U. CIV. RTS. L.J. 263, 263 (2001); Zick, *supra* note 56, at 69.

104. *Olech v. Vill. of Willowbrook*, No. 97 C 4935, 1998 WL 196455, at *1 (N.D. Ill. Apr. 13, 1998).

105. *Id.*

and maintenance of the water main.¹⁰⁶ Indeed, in prior analogous situations, the Village had only required fifteen feet.¹⁰⁷ According to the Village, the remaining eighteen feet demanded of the Olechs and their neighbors was needed to enable the Village to pave the street and install sidewalks.¹⁰⁸

The Olechs sued, alleging that the additional eighteen foot easement was requested because several years before, the residents had all sued the Village over an unrelated matter.¹⁰⁹ According to their complaint, those lawsuits generated “substantial ill will” on the part of the Village toward the residents, which in turn motivated the Village to demand the extra easement.¹¹⁰ They alleged that that ill will-based demand violated the Equal Protection Clause.¹¹¹

The district court granted the Village’s motion to dismiss the complaint.¹¹² It distinguished an earlier Seventh Circuit case, *Esmail v. Macrane*, where the appellate court found that allegations stated an equal protection claim.¹¹³ According to the district court, the official treatment in *Esmail* amounted to an “orchestrated campaign of official harassment” motivated by “sheer vindictiveness”; by contrast, it described the Village’s conduct as, at most, “unreasonabl[e]” and based on “ill will.”¹¹⁴

The Seventh Circuit, in an opinion by Judge Posner, reversed the district court and reinstated the suit.¹¹⁵ It failed to find a constitutionally significant difference between the “ill will” alleged in the Olechs’ complaint and the “orchestration” and “sheer malice” alleged in *Esmail*.¹¹⁶ Importantly, however, the court made clear that the Olechs’ complaint alleged more than simple “uneven law enforcement.”¹¹⁷ Judge Posner described such uneven law enforcement as “common” and “constitutionally innocent.”¹¹⁸ By contrast, he described the Olechs’ complaint as alleging that the unevenness (namely, the requirement of the extra eighteen foot easement) was caused by “a totally illegitimate animus toward the plaintiff by the defendant.”¹¹⁹ In this way, Judge Posner allowed the suit to go forward while avoiding the specter (that troubled both him and the district court) 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.”¹²⁰

106. *Id.* at *2 n.2.

107. *Id.*

108. *Id.* at *1.

109. *Id.* at *2.

110. *Id.*

111. *Id.*

112. *Id.* at *4.

113. 53 F.3d 176, 180 (7th Cir. 1995).

114. *Olech*, 1998 WL 196455, at *3 (internal quotations omitted).

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

116. *Id.* at 388 (internal quotations omitted).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

The Supreme Court, in a brief *per curiam* opinion, affirmed the Seventh Circuit.¹²¹ But it did so on a different, broader ground. The Court began by stating 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 that there is no rational basis for the difference in treatment.”¹²² Rather than citing as support any of the available appellate caselaw,¹²³ the Court cited two of its own cases both dealing with property taxes, *Sioux City Bridge Co. v. Dakota County*, and *Allegheny Pittsburgh Coal Co. v. Commission of Webster County*,¹²⁴ where the Court found actual or (in *Sioux City*) potential equal protection violations in differential methods of valuing property for property tax purposes.¹²⁵ Presumably, the Court’s choice of support reflected its desire to present *Olech* as an easy case reflecting well-settled law, rather than as an innovation requiring the Court to mine insights from lower court caselaw.¹²⁶ Indeed, the Court tied its recognition of class-of-one claims to the standard doctrinal formula that the Equal Protection Clause guarded against “intentional and arbitrary discrimination.”¹²⁷

The Court then applied this somewhat skeletal reasoning to the Olechs’ claim. It concluded that the complaint could be read as alleging that the Village “intentionally” treated the Olechs differently from other Village residents, that the demand for the extra eighteen foot easement was “irrational and wholly arbitrary,” and that the Village eventually relented and hooked up the Olechs to the city water system after receiving “a clearly adequate 15 foot easement.”¹²⁸ According to the Court, “[t]hese allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We 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.”¹²⁹

Justice Breyer concurred in the judgment.¹³⁰ He expressed the same concern as the Seventh Circuit, namely, that allowing such claims to go forward without requiring an allegation of ill will “would transform many ordinary violations of city or state law into violations of the Constitution.”¹³¹ He then attempted to mitigate the effect he feared the *per curiam* opinion would have. He noted that the Olechs had in fact alleged something more than mere irrationality—something he said the Seventh

121. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). The opinion takes up fewer than four pages in the United States Reports.

122. *Id.* at 564.

123. *See supra* Part II.A.

124. *Olech*, 528 U.S. at 564.

125. *See infra* Part IV.A.

126. Indeed, in addition to the opinion being short, *see supra* note 121, *Olech* is a *per curiam* opinion.

127. *Olech*, 528 U.S. at 564 (internal quotations omitted).

128. *Id.* at 565.

129. *Id.*

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

131. *Id.*

Circuit had called “vindictive action,” “illegitimate animus,” or “ill will.”¹³² For that reason, he concluded that allowing the *Olechs*’ claim to go forward did not implicate his concern about opening the federal courts to equal protection claims growing out of simple differential treatment.¹³³

The Supreme Court’s opinion in *Olech* constituted a statement of fundamental constitutional meaning. A short, vague, open-ended¹³⁴ opinion, *Olech* simply recognized class-of-one claims as cognizable under the Equal Protection Clause. It only affirmed the legal sufficiency of the plaintiffs’ pleadings, providing no practical rules about how such claims are to be proven¹³⁵ beyond restating a principle so basic that it transcends any particular constitutional provision—truly arbitrary government action violates the Constitution.¹³⁶ The Court’s final statement—that it did not base its decision on the plaintiffs’ subjective ill will theory¹³⁷—seemingly refines and makes more precise the Court’s statement of equal protection law. However, as lower courts realized after *Olech*, the close link between irrationality and animus meant that that last statement imposed almost no limits on lower courts faced with the task of crafting more precise decisional rules for class-of-one claims.¹³⁸ After *Olech*, the lower courts were left with the task of creating workable doctrine out of a fundamentally correct, but exceptionally vague, constitutional principle.

B. *OLECH* IN THE LOWER COURTS

After *Olech*, lower courts struggled with the potentially broad ranging implications of the Court’s affirmation of the idea that the Equal Protection Clause protected against more than class-based discrimination.¹³⁹ *Olech* officially opened the door for any person suffering adverse government treatment to point to others, allegedly similarly-situated, who did not suffer the same treatment and claim a violation of equal protection.¹⁴⁰ In dealing with these claims, courts had to consider difficult conceptual questions about what constitutes a denial of equal protection in class-of-one cases. They then had to apply those insights through deci-

132. *Id.* at 565-66 (quoting *Olech v. Vill. Of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998)).

133. *Id.*

134. *See Lunini v. Grayeb*, 395 F.3d 761, 771 (7th Cir. 2005) (describing *Olech*’s holding as an “open-ended pronouncement” that could not furnish government defendants of clear notice of a constitutional rule, and thus upholding defendant’s claim of qualified immunity).

135. Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, TRIAL, May 2000, at 89, 89 (“[T]he [*Olech*] Court offered virtually no analysis of what is necessary to allege a violation of the Equal Protection Clause except to say claims of ‘arbitrary’ actions are enough.”).

136. *See FALLON*, *supra* note 26, at 61 (“[T]he American constitutional tradition has long recognized a judicial authority, not necessarily linked to any specifically enumerated guarantee, to invalidate truly arbitrary legislation.”).

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

138. *Lunini*, 395 F.3d at 771; *Walsh v. Town of Lakeville*, 431 F. Supp. 2d 134, 144 (D. Mass. 2006).

139. *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004).

140. *Id.* at 1210-11.

sional rules that both reflected complex fact patterns and honored legitimate government interests disfavoring constitutional litigation every time the government treated one person differently from another.¹⁴¹

In considering these issues in contexts ranging from selective law enforcement to land use and employment, post-*Olech* courts constructed both pleading and substantive rules balancing the individual's and the government's interests in class-of-one claims.¹⁴² In the context of such claims courts interpreted the relaxed pleading requirements of the Federal Rules of Civil Procedure nevertheless to require plaintiffs to both establish the existence of truly similarly situated persons who were treated differently¹⁴³ and negate any possible rational basis for the government's action.¹⁴⁴ Such pleading requirements have real litigation effects; for example, courts have recognized that more precise pleading by a class-of-one plaintiff may cause the plaintiff to plead herself out of court by pleading the very facts that either establish her relevant difference from other persons or furnish a rational basis for the government's differ-

141. *Cf. id.* at 1213-14 ("Traditional equal protection law deals with groups unified by the characteristic alleged to be the root of the discrimination. In the classic case of racial discrimination, it is appropriate to assume, at least at the outset, that disadvantageous treatment is a function of systematic discrimination owing to the shared racial characteristic. . . . Looking only at one individual, however, there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible relevant factors.").

142. Selective enforcement of a law should be distinguished from selective prosecution, which refers to the situation where a government prosecutor is alleged to have singled out an individual for criminal prosecution. *United States v. Armstrong*, 517 U.S. 456, 465-70 (1996) (setting out standards for selective prosecution). At least some courts have blurred the two concepts, perhaps unsurprisingly given the prosecutorial nature of some government action outside the non-criminal context. *See, e.g., Levenstein v. Salafsky*, 164 F.3d 345, 352-53 (7th Cir. 1998) (applying class-of-one precedents to a case described as "selective prosecution" that dealt with a university disciplining an employee and forcing him to resign). *Contra Ciecchon v. City of Chicago*, 686 F.2d 511, 523 n.16 (7th Cir. 1982) (distinguishing between the two types of claims). *See generally* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 *GEO. MASON U. CIV. RTS. L.J.* 219 (2005) (distinguishing the two concepts).

143. *See, e.g., Jennings*, 383 F.3d at 1213-14; *Hayden v. Ala. Dep't of Pub. Safety*, 506 F. Supp. 2d 944, 957 (M.D. Ala. 2007) (insufficient for a class-of-one to simply plead that other "similarly situated" parties exist); *Dev. Group, L.L.C. v. Franklin Twp. Bd. of Supervisors*, No. Civ. A. 03-2936, 2003 WL 22358440, at *7 (E.D. Pa. Sept. 24, 2003) (rejecting as insufficient plaintiff's allegations that more favorably-treated parties were similar in two ways, and requiring that the complaint allege "much more detail" about the allegedly similarly-situated parties). *Contra Cathedral Church of the Intercessor v. Malverne*, 353 F. Supp. 2d 375, 383 (E.D.N.Y. 2005) ("[T]here is no requirement [in the Second Circuit] that the Plaintiffs identify in their complaint actual instances where others have been treated differently.") (internal quotations and brackets omitted); *Good v. Trish*, No. 1:06-CV-1736, 2007 WL 2702924, at *7 (M.D. Pa. Sept. 13, 2007) (finding that the class of one plaintiff met her "minimal burden by alleging that [the defendant] selectively enforced the sidewalk ordinance against her without offering any explanation for his decision").

144. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-60 (7th Cir. 1992) ("[T]o solve the 'perplexing situation . . . presented when the rational basis standard meets the standard applied to a dismissal under Fed. R. Civ. P. 12(b)(6) . . . a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.").

ential treatment.¹⁴⁵ These requirements do not ineluctably follow from the Court's opinion in *Olech*, but they most definitely follow from the need to strike the balance described above.¹⁴⁶

Courts also heightened the proof requirements for these elements of plaintiffs' claims. Consider, for example, the requirement that the plaintiff be similarly situated to others more favorably treated. In land-use cases, courts have described the required degree of similarity as "extremely high,"¹⁴⁷ "prima facie identical,"¹⁴⁸ and "more stringent . . . than that used in the [racial discrimination in] employment context."¹⁴⁹ For their part, courts considering employment class of one claims have borrowed from more conventional discrimination contexts when considering how similar the plaintiff must be to more favorably treated parties.¹⁵⁰ However, they have also recognized that the unique nature of class-of-

145. See, e.g., *Hayden v. Copping*, 533 F. Supp. 2d 1186 (M.D. Ala. 2008) ("A 'class of one' plaintiff might fail to state a claim by omitting key factual details in alleging that it is 'similarly situated' to another. . . . [A] 'class of one' plaintiff also might fail to state a claim if he 'sa[ys] too much,' for example, by attaching exhibits to the complaint which negate conclusory allegations of a similarly-situated comparator.") (quoting *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007) (internal quotations omitted)); *Axt v. City of Fort Wayne*, No. 1:06-CV-157-TS, 2006 WL 3093235, at *6-7 (N.D. Ind. Oct. 30, 2006) (concluding that the plaintiff's complaint itself alleged facts that, if true, presented a rational basis for the government's decision to single out the plaintiff); cf. *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 363 (2d Cir. 2002) (holding that the plaintiff's allegation that government discriminated against it because of its speech furnished a rational basis for the discrimination and thus defeated its equal protection class-of-one claim).

146. Such requirements help vindicate the government's interest in avoiding litigation; they also mitigate the risk that costly and time consuming fact-finding would lead the government to settle non-meritorious claims for their nuisance value. See *Gehan*, *supra* note 103, at 384 (noting this concern).

There exists at least some tension between the pleading requirements some courts have imposed on class-of-one plaintiffs and the Supreme Court's insistence that the FRCP's notice pleading system does not generally allow heightened pleading requirements in particular factual contexts or for particular types of legal claims. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-69 (1993). However, pleading requirements such as those imposed in *Wroblewski* may ultimately be consistent with the *Leatherman* rule to the extent that they apply the FRCP's relaxed pleading requirements to the exceptionally strict substantive requirement of the rational basis standard—i.e., that no conceivable rational basis supported the government action. Indeed, post-*Leatherman* lower court cases have adopted the *Wroblewski* approach. See, e.g., *Giarratano v. Johnson*, 521 F.3d 298, 303-04 (4th Cir. 2008); *Brown v. Zavaras*, 63 F.3d 967, 971-72 (10th Cir. 1995). Moreover, it is an open question whether the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), tightens pleading standards to the extent that the *Wroblewski* approach is now consistent with Supreme Court precedent, even if it wasn't before. See, e.g., *Giarratano*, 521 F.3d at 304 & n.3 (suggesting this possibility); *Iqbal v. Hasty*, 490 F.3d 143, 155-59 (2d Cir. 2007) (engaging in an extensive discussion of *Twombly*'s effect on pleading law). The Supreme Court has granted certiorari in *Iqbal*, 128 S. Ct. 2931 (2008), and may resolve this issue.

147. *Clubsides, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006).

148. *Purze v. Vill. Of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002).

149. *Neilson v. D'Angelis*, 409 F.3d 100, 106 (2d Cir. 2005), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008) (overturning a jury verdict in the plaintiff's favor).

150. *Eggleston v. Bieluch*, 203 F. App'x 257, 264 (11th Cir. 2006) (borrowing the standard from general equal protection circuit law).

one claims effectively imposes a higher burden on plaintiffs.¹⁵¹ For example, some courts, presaging the Supreme Court's concern in *Engquist*, considered whether the plaintiff demonstrated a deviation from a neutral applicable routine or standard;¹⁵² in one case where the plaintiff did not do so, a court required her "to provide compelling evidence of other similarly situated persons who were in fact treated differently."¹⁵³ This requirement eased the burden on the court to weigh the large variety of factors, often subjective, that go into many government decisions to single individuals out, but nevertheless allowed a judicial remedy in situations where dissimilar treatment was in fact harder to justify. Similarly, again constructing practical doctrine from constitutional principles, courts have noted the connection between class-of-one plaintiffs' heavy burden to show similar situatedness and the deferential nature of the rational basis standard: the less identical the plaintiff and the comparator, the easier it is for a court to imagine a rational basis for the differential treatment.¹⁵⁴

The practical, "applied" nature of this reasoning is evident. From the fundamental constitutional requirement that likes be treated alike comes the need to determine who is truly alike. Answering that question in the class-of-one context requires practical reasoning, as reflected in one court's analysis of the similar-situatedness requirement:

This requirement [that class-of-one plaintiffs demonstrate similarity in all material respects] comports with the intuition that the degree of similarity an equal protection plaintiff needs to show will vary in-

151. *Neilson*, 409 F.3d at 105-06; *Hayden v. Coppage*, 533 F. Supp. 2d 1186, 1192-93 (M.D. Ala. 2008) (noting that in cases where the challenged decision is "multi-dimensional" it will be harder for the plaintiff to demonstrate similar-situatedness).

152. *E.g.*, *Benjamin v. Brachman*, 246 F. App'x 905, 928 (6th Cir. 2007) (distinguishing *Olech* and a prior Sixth Circuit case on that ground).

153. *Jennings v. City of Stillwater*, 383 F.3d 1199, 1215 (10th Cir. 2004).

154. *See, e.g., Neilson*, 409 F.3d at 105 ("In . . . a 'class of one' case, the treatment of persons in similar circumstances is not offered to provide, along with other evidence, an evidentiary inference of the use of particular impermissible factors. In such a 'class of one' case, the existence of persons in similar circumstances who received more favorable treatment than the plaintiff is offered to provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose—whether personal or otherwise—is all but certain. . . . The similarity and equal protection inquiries are thus virtually one and the same in such a 'class of one' case") (citation and paragraph break omitted)); *Engelbrecht v. Clackamas County*, No. CV03-665-PK, 2006 WL 2927244, at *12 (D. Or. Oct. 11, 2006) (concluding that the same factors that rendered the plaintiff not similarly situated to more favorably treated persons also furnished a rational basis for the differential treatment); *Lerch v. Angell*, No. 06-C-454, 2007 WL 2751804, at *5 (E.D. Wis. Sept. 18, 2007) (using the same evidence to conclude both that the plaintiff was not similarly situated to persons who got more favorable treatment and that there was a rational reason for the differential treatment). *Contra Walker v. Exeter Region Coop. Sch. Dist.*, 284 F.3d 42, 44-45 (1st Cir. 2002) ("Decisions may sometimes use the similarly situated language to conflate the two inquiries—by pointing to a differentiating characteristic so self-evidently a basis for a reasonable classification as to show both dissimilarity and reasonableness at the same time. . . . This does not make it irrelevant to ask whether two groups are similarly situated. Our own cases do ask this question. . . . unless the distinctions are self-evidently a rational justification for the discrepant treatment . . . the justification question remains to be addressed.") (paragraph break omitted)).

versely with the size of the relevant class. If a plaintiff belongs to a large class, a systematic difference in treatment probably is not caused by individualized differences or statistical aberrations. But when the class consists of one person or entity, it is exceedingly difficult to demonstrate that any difference in treatment is not attributable to a quirk of the plaintiff or even to the fallibility of administrators whose inconsistency is as random as it is inevitable. Accordingly, courts have imposed exacting burdens on plaintiffs to demonstrate similarity in class-of-one cases.¹⁵⁵

Finally, a significant number of post-*Olech* courts continued to insist that class-of-one plaintiffs allege and prove animus.¹⁵⁶ At first glance, this is a striking phenomenon, given the Supreme Court's apparently clear direction that animus or ill will is not a necessary element of a class-of-one claim. This seeming conflict illustrates again the difference between constitutional principle and judicially-workable constitutional decision rules. Animus may not be a necessary part of the constitutional rule stated in *Olech*, but one can view the animus requirement in these post-*Olech* cases as playing an evidentiary role, forcing the plaintiff to provide affirmative evidence of the true, irrational, motivation for the government action that can otherwise be perceived only by the absence of any conceivable rational justification.¹⁵⁷ Given the difficulty, well-known to generations of law students, of dismissing every conceivable rational justification for a government action, the animus requirement culls meritless claims (thus serving the government's interest) while preserving claims featuring truly irrational government conduct.¹⁵⁸

155. *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1212-13 (10th Cir. 2006) (McConnell, J.).

156. *Jennings*, 383 F.3d at 1211 (citing cases); *Harlen Assocs. v. Incorporated Vill. of Mineola*, 273 F.3d 494, 500 (2d Cir. 2001) (collecting cases); *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1148-49 (10th Cir. 2001), *overruled on other grounds by Pignanelli v. Pueblo Sch. Dist. No 60*, 540 F.3d 1213 (10th Cir. 2008); *Jicarilla Apache Nation*, 440 F.3d at 1209-10 (recognizing the split among courts on the general question of whether class of one claims require an allegation of animus).

157. This logic assumes that animus-motivated action is necessarily arbitrary and irrational, and thus fails the test for constitutionality. This seems clear enough. If nothing else, the government has no legitimate business singling out a person simply because the government official dislikes him. See *infra* note 166; *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004), *overruled on other grounds by Action Apt. Ass'n v. Santa Monica Rent Control Bd.*, 508 F.3d 1020 (9th Cir. 2007) (“[T]here is no rational basis for state action that is malicious, irrational or plainly arbitrary.”) (internal quotations omitted)). Government action must always aim at some public good. The famous rational basis plus cases of the last thirty years—*Romer*, *Cleburne* and *Moreno*—all stand for this basic proposition. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[A] bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (internal quotations and emphasis deleted); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (same); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (same).

158. Of course, an animus requirement also has the effect of culling claims that may have merit but which are either “innocently irrational”—that is, completely arbitrary but only because of government's good faith, if serious mistake—or which are in fact animus-motivated, but where the plaintiff is unable to proffer adequate evidence of that fact. One answer to this problem is to suggest that at least the first class of these cases—challenging “innocent but irrational” government action—simply do not raise equal protection con-

Indeed, perhaps ironically, the animus requirement assists class-of-one plaintiffs. One might not immediately think this, since presumably the addition of an animus requirement would have the effect of making it harder for class-of-one plaintiffs to prevail as compared with the Supreme Court's statement that simple irrationality suffices to state a class-of-one claim. If, however, the rational basis standard really does allow the court to hypothesize any conceivable basis for the government action, then one might expect the number of successful class-of-one claims to be utterly miniscule. Direct proof of animus, however, might give a court more confidence about concluding that the government action was performed for an illegitimate reason. Such epistemic confidence might lead the court to pierce through the rational basis standard's extraordinary deference and rule for the plaintiff, even when the court could hypothesize a rational basis for the action.¹⁵⁹ In this way, the animus requirement imposed by the lower courts could be seen as a decision rule that implements the fundamental constitutional command of non-arbitrary government action.¹⁶⁰

Thus, by the time the Supreme Court decided *Engquist*, lower courts had crafted a set of sub-constitutional rules implementing *Olech's* constitutional insight that irrational differential treatment of similar parties violated equal protection. Those rules did not implement that norm perfectly: they undoubtedly allowed some non-meritorious claims to proceed or prevail while also quite probably cutting off or defeating some meritorious claims. But these rules nevertheless honored legitimate government interests in avoiding litigation on meritless claims while also preserving some part of the core set of claims that featured real constitutional violations. They were also capable of being implemented by courts.

IV. *ENGQUIST*

A. THE CLASS OF ONE IN *ENGQUIST*

In *Engquist v. Oregon Department of Agriculture* the Supreme Court

cerns but may instead violate the Due Process Clause's prohibition on irrationality. See Araiza, *supra* note 65, at 514-15 (suggesting this possibility); cf. Zick, *supra* note 56, at 125-29 (suggesting the Due Process Clause as a doctrinal home for all class-of-one cases). Another response, applicable to both of these situations, is simply to acknowledge that this evidentiary rule, like any, will have the effect of defeating fundamentally meritorious claims.

159. Quite arguably this is what happened in *Cleburne*. In that case, the Court, after noting direct evidence of the city's action at the behest of constituents' dislike of the group home for the mentally retarded, reviewed the city's more legitimate explanations more stringently than would normally be called for under the rational basis standard. *Cleburne*, 473 U.S. at 449-50. Cf. *id.* at 457-58 (Marshall, J., dissenting) (noting the unusual rigor of the Court's ostensible rational basis review).

160. This explanation seeks only to explain how post-*Olech* courts could impose an animus requirement in the face of *Olech's* statement that animus was not necessary to state an equal protection violation. It may still be the case that animus should in fact be a part of the core constitutional requirement. See *infra* Part IV.B (suggesting this possibility).

imposed significant limitations on class-of-one claims.¹⁶¹ At the very least, the Court firmly shut the door on class-of-one claims in the employment context.¹⁶² Its analysis, though, has the potential to extend further and severely limit the viability of class-of-one claims in other factual settings as well.

Engquist involved a claim by Anup Engquist, a food standard specialist for the Oregon Department of Agriculture.¹⁶³ After a number of clashes with her supervisor, Ms. Engquist was effectively laid off.¹⁶⁴ She subsequently sued, raising a variety of constitutional, federal statutory, and state law claims, including a class-of-one claim that her equal protection rights were violated for “arbitrary, vindictive, and malicious reasons.”¹⁶⁵ A jury found in her favor on the class-of-one claim, but a divided Ninth Circuit panel reversed the verdict, concluding that *Olech*’s class-of-one theory did not apply in public employment cases.¹⁶⁶ The majority reasoned that the class-of-one theory had no place in the government employment context, given the dissimilarity between that context and situations where government acted as a regulator. In concluding that the *Olech* Court likely did not intend the class-of-one theory to apply to government employment, the appellate majority also noted both the government’s interest in maintaining the flexibility inherent in remaining an at will employer and the fact that some government employees already enjoyed statutory employment protections.¹⁶⁷ In so doing, the Ninth Circuit became the only circuit to reject the applicability of the class-of-one theory in the employment context.¹⁶⁸

The Supreme Court, on a six to three vote, affirmed the appellate court’s reversal of the verdict.¹⁶⁹ The Court began by cataloguing the doctrinal areas where public employees enjoyed fewer or more constricted constitutional rights than non-employees subject to government

161. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2157 (2008).

162. *See, e.g., Wilson v. Libby*, 535 F.3d 697, 722 (D.C. Cir. 2008) (Rogers, J., concurring in part and dissenting in part); *Skrutski v. Marut*, 288 F. App’x 803, 809 (3d Cir. 2008); *Brady v. Dammer*, 573 F. Supp. 2d 712, 731 (N.D.N.Y. 2008) (all rejecting class-of-one employment claims on the basis of *Engquist*).

163. The facts are taken from the Ninth Circuit and Supreme Court opinions. *Engquist*, 128 S. Ct. at 2149; *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 990-91 (9th Cir. 2007).

164. Her collective bargaining agreement allowed her to apply for another position at her level or accept a demotion. She was found unqualified for the only position at her level and she refused to accept a demotion. *Engquist*, 128 S. Ct. at 2149.

165. *Engquist* also alleged discrimination based on race, sex and national origin, but the jury rejected those claims. *Id.*; *Engquist*, 478 F.3d at 992.

166. *See Engquist*, 478 F.3d at 996.

167. *Id.* at 994-96.

168. *Id.* at 1011 (Reinhardt, J., dissenting). Judge Reinhardt dissented. He noted that all other circuits to consider the issue had allowed class-of-one employment claims to go forward. He also noted that the rational basis test, a stringent requirement of similar-situatedness and an animus requirement would ensure government employment flexibility and guard against a flood of litigation. *Id.* at 1011-14 (Reinhardt, J., dissenting).

169. Chief Justice Roberts wrote the opinion, and he was joined by Justices Scalia, Kennedy, Thomas, Breyer and Alito. Justice Stevens wrote the dissent, which Justices Souter and Ginsburg joined. *Engquist*, 128 S. Ct. at 2148, 2157.

regulation.¹⁷⁰ It focused, in particular, on the free speech rights of employees, repeating the familiar *Pickering-Connick* balancing employed when employee speech rights conflict with government's interest in an orderly and efficient workplace. From these examples the Court drew two lessons:

First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, [the Court] consider[s] whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.¹⁷¹

These two principles established the framework for the Court's analysis in *Engquist*. In particular they provided the majority opinion's dual focus on the nature of the government's status in this case as employer rather than sovereign and the nature of the particular equal protection right at issue.

The Court began with the second of these principles—the status of class-of-one claims within the equal protection guarantee. After recognizing both the primary doctrinal thrust of the Equal Protection Clause as aiming at class-based distinctions and *Olech's* approval of class-of-one equal protection claims, the Court then sought to harmonize *Olech* with the doctrine's primary concern for class-based government action. In fact, the Court described *Olech's* recognition of the class-of-one theory “not so much [as] a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as . . . an application of that principle.”¹⁷² After noting the fact that *Olech* and the cases it relied on “involved the government's regulation of property”¹⁷³ (and thus implying a difference between the government's role there as regulator from its role in *Engquist* as employer), the Court then concluded as follows:

When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions. Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a rational basis for the difference in treatment.¹⁷⁴

Key here is the Court's attempt to narrow the conceptual space between class-of-one cases and the more traditional group classification-

170. *Id.* at 2151-52 (discussing the Fourth Amendment, Due Process and Free Speech rights of employees).

171. *Id.* at 2152.

172. *Id.* at 2153.

173. *Id.*

174. *Id.* (quotation marks and internal citations omitted).

based equal protection claims. The key is the determination whether parties are in fact similarly situated. In the very next paragraph, the Court interprets *Olech* so as to make it sound more like a traditional group classification case.¹⁷⁵ The paragraph deserves quotation in full:

What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter. Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected *Olech* to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.¹⁷⁶

The Court then contrasted other “forms” of government action, “which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.”¹⁷⁷ In these forms of government action, the “clear standard” the *Engquist* Court discerned in the *Olech* facts does not exist. According to the Court, rather than the clear standard at issue in *Olech*—normally, everyone in Willowbrook seeking to get hooked up to the Village’s water supply had to provide the Village with a fifteen-foot easement—in these other forms of government action decisions result from the consideration of individualized assessments. For example, a decision to grant a zoning variance might be based on a large variety of factors, such as the scope of the requested variance, the impact of the project on traffic, environmental quality and safety, and the number of non-conforming uses already existing.¹⁷⁸

The Court’s reliance on whether “a clear standard” existed “against which departures . . . could be readily assessed” reflects a concern with “fit” analysis in traditional equal protection doctrine.¹⁷⁹ The Court described *Olech* as a case featuring a presumptive rule (a “clear standard”) controlling the government’s action—a fifteen-foot easement was generally thought to be adequate for the government’s purposes. Thus, the Village’s insistence on a larger easement from the *Olechs* could appropriately trigger a judicial investigation of whether the deviation from the presumptive rule was rationally related to a legitimate government inter-

175. *Id.*

176. *Id.* at 2153-54 (internal citations omitted).

177. *Id.* at 2154.

178. See Araiza, *supra* note 65, at 506 n.74, 507 n.78, 508 n.81 (discussing cases). Indeed, the Court’s rationale suggests that these types of land use decisions may also be immune to class of one challenges. See, e.g., *Little v. City of Oakland*, No. C 99-00795 WHA, 2000 WL 1336608, at *5 (N.D. Cal. Sept. 12, 2000) (concluding that land use decisions cannot generate valid equal protection claims because of the uniqueness of each parcel).

179. *Engquist*, 128 S. Ct. at 2147.

est. So too, the Court described the cases *Olech* cited as involving a clear standard—for example, in *Allegheny Pittsburgh* the presumptive rule that tax assessments would be based on properties' market value.¹⁸⁰ Again, the government's deviation from that standard (its assessment of the plaintiff's competitors' properties based on purchase price) could appropriately trigger judicial scrutiny of the fit between the disparate treatment and a legitimate government interest.¹⁸¹

At this point in the opinion, one might expect the Court to conclude that the individualized nature of the decisional criteria in employment decisions makes traditional equal protection review impossible because the favored and disfavored parties can almost never be similarly situated. If the favored and disfavored groups differ not just on one basis (say, race or gender), but instead differ based on a whole collage of factors, all of which might be relevant to the government interest at stake, then no two parties will likely ever be similarly situated for equal protection purposes.¹⁸² Thus, a racial discrimination claim allows the court, at least theoretically, to abstract out race and determine if that characteristic is relevant, at a sufficient level of precision, to the achievement of the asserted government interest (which of course has to be sufficiently important).¹⁸³ By contrast, an employment or zoning decision based on a whole panoply of factors allows no such isolation and study of the relevance of a single decisional criterion; by definition, the decision turned on the entire combination of factors, which will almost never be perfectly replicated in any other employment (or land use) decision.¹⁸⁴

Thus, one possible result of this analysis is that equal protection claims challenging these forms of government decisions will almost always fail, based on a failure to demonstrate the plaintiff's relevant similarity to a more favorably treated person. As noted earlier, lower courts considering class-of-one claims insisted that plaintiffs allege and prove a high degree of similar-situatedness and rejected many claims based on plaintiffs'

180. See *id.* at 2154. The Court described *Sioux City Bridge* in the same way. See *id.*

181. See Araiza, *supra* note 65, at 503-09 (describing the "fit" problem in class-of-one cases).

182. Indeed, in a context such as zoning, parties that can show likeness in all objective relevant respects might still find their argument frustrated if the cumulative effects of granting several variances renders subsequent applications more harmful to the government's interest and thus different from the earlier applications with which they shared all relevant characteristics. See, e.g., *McDonald's Corp. v. City of Norton Shores*, 102 F. Supp. 2d 431, 438 (W.D. Mich. 2000) (upholding a denial of a permit for a drive through restaurant on a street with several such restaurants on the ground that the street's capacity could not handle one more such use).

183. See Araiza, *supra* note 65, at 505-06.

184. *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213-14 (10th Cir. 2004) (McConnell, J.) ("Traditional equal protection law deals with groups unified by the characteristic alleged to be the root of the discrimination. In the classic case of racial discrimination, it is appropriate to assume, at least at the outset, that disadvantageous treatment is a function of systematic discrimination owing to the shared racial characteristic. . . . Looking only at one individual, however, there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible relevant factors.").

failure to do so.¹⁸⁵

However, in *Engquist*, the Supreme Court embraced reasoning that led it to a more categorical rule against such claims. After describing these sorts of individualized decisions, the Court said that:

In such cases the rule that people should be treated alike, under like circumstances and conditions is not violated when one person is treated differently from others, *because treating like individuals differently is an accepted consequence of the discretion granted*. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.¹⁸⁶

The Court followed up this statement with the example of a police officer patrolling a road where many motorists exceed the speed limit.¹⁸⁷ It noted the common sense proposition that the officer's decision to ticket one speeder but not others does not run afoul of equal protection, assuming that the selection of the target is not based on some impermissible ground such as race.¹⁸⁸ "But," according to the Court:

[A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.¹⁸⁹

While the Court may be largely (though not fully) correct that equal protection claims do not fit easily into this type of fact pattern, its reasoning seems incorrect. Government decisions based on subjective, individualized considerations do not necessarily entail "treating like individuals differently."¹⁹⁰ Indeed, one perfectly plausible way of understanding such decisions is that they, by definition, rest on distinctions between the two persons that render them *relevantly different* for equal protection purposes. Consider a zoning variance decision that is based on factors unique to the particular property (*e.g.*, its topography or exact location). An owner basing an equal protection claim on the denial of his variance request while the owner of another property received a favorable answer would face the difficult task of establishing that the two properties were relevantly similar. The plaintiff would have to establish that both properties possessed the exact same relevant characteristics (*i.e.*, were "alike")—a significant hurdle when the decisional criteria (*e.g.*, topography or location) are so particularized.¹⁹¹ By contrast, judicial evaluation

185. See *supra* notes 143, 147-51.

186. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2154 (2008) (emphasis added and internal quotations omitted).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. See *supra* notes 147-53 and accompanying text.

of an instance of, say, gender discrimination requires the conceptually simple (if difficult in application) step of determining if the gender characteristic is a sufficiently precise marker for a sufficiently important government interest.¹⁹²

If this analysis is correct, then class-of-one employment claims should generally fail for failure to demonstrate the existence of similarly-situated persons.¹⁹³ However, unlike the Court's conclusion, this analysis would be not lead to a blanket rule exempting employment cases from class-of-one claims. Employment cases might exist where parties are in fact relevantly identical,¹⁹⁴ or, as in *Olech*, the government acts pursuant to a general rule, deviations from which would have to be explained (at least as far as the rational basis standard would demand).¹⁹⁵ Such cases, though rare, exist.¹⁹⁶

Indeed, the Court's opinion, read carefully, reveals that the Court hedges on the crucial question of whether equal protection class-of-one claims can exist in the workplace context. The Court begins its detailed analysis of Engquist's claim by stating that differential treatment resulting from "discretionary decisionmaking" based on "subjective, individualized assessments" does not violate "the rule that people should be treated alike, under like circumstances and conditions."¹⁹⁷ After analogizing to the traffic policeman's decision to ticket one speeder rather than another and concluding that such a decision does not violate equal protection because it is "subjective and individualized," the Court concludes that "[t]his principle applies most clearly in the employment context, for employment decisions are *quite often* subjective and individualized. . . ."¹⁹⁸ It concludes that "the class-of-one theory of equal protection . . . is simply a *poor fit* in the public employment context."¹⁹⁹ In sum, the Court identi-

192. Araiza, *supra* note 65, at 505-06.

193. Cf. Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage If They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 476-81 (2008) (calling for reform of employment discrimination law to assist employees who wish to bring discrimination claims but occupy unique job positions). This Article deals with statutory employment law, not equal protection law, although its concerns about such employees naturally apply in the equal protection context to the extent federal employment discrimination law tracks the equal protection requirement. See *id.* at 459 n.1.

194. See, e.g., *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982) (finding an equal protection violation when one paramedic was disciplined for a patient's death when her partner, who was equally responsible for the patient's care, was not); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. Unit B Mar. 1981) (finding an equal protection violation when one police officer was terminated based on prior convictions while other officers with convictions were retained, and where there was no rational basis for the differential treatment).

195. See, e.g., *Benjamin v. Brachman*, 246 F. App'x 905, 918-19 (6th Cir. 2007) (distinguishing an earlier employment case on the ground that the earlier case featured a general government policy that was deviated from, thus providing a ground for equal protection scrutiny).

196. See *supra* notes 194-95.

197. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2154 (2008) (internal quotations omitted).

198. *Id.* (emphasis added).

199. *Id.* at 2155 (emphasis added).

fies a principle—subjective and individualized decisions by definition cannot violate equal protection—and concludes that most—*not all*—employment decisions are of this sort. Even more explicitly, the Court complains that allowing such claims to go forward would require courts “to sort through them in a search for the proverbial needle in a haystack.”²⁰⁰ Taking the Court at its word, presumably such needles exist.

The *Engquist* Court, however, glosses over its own ambivalence. The Court, finding the employment context analogous to its traffic officer example, noted that “employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.”²⁰¹ It then quoted Engquist’s brief for the proposition that government employers can legitimately take into account employees’ “individual personalities and interpersonal relationships . . . in the workplace.”²⁰² Both statements are quite true, but the Court draws the wrong conclusion from them. They do not mean, as the Court concludes,²⁰³ that government employees are necessarily similarly situated. Indeed, they mean the opposite: each employee usually possesses a unique set of employment-relevant characteristics that usually renders her relevantly different from every other employee. It is precisely those differences that usually provide a rational basis for government to choose one employee over another for termination. It may well be that even the government supervisor cannot “articulate and quantify” those differences; hence the Court’s hedging statement that “treating *seemingly* similarly situated individuals differently in the employment context is par for the course.”²⁰⁴ But this presents an epistemological problem of identifying how employees are different. It does not mean that, in some abstract sense, government employees are necessarily similarly situated but that different treatment of similarly situated people in the employment context is somehow a perfectly legitimate state of affairs.²⁰⁵

On this understanding, *Olech* does indeed present a conceptually and epistemologically simpler equal protection claim than *Engquist*. In *Olech*, all other homeowners in town had to cede only a fifteen-foot easement, and the court’s job was simply to determine whether a rational basis might have existed for government to deviate from that baseline rule in the *Olechs*’ case.²⁰⁶ Implicit in *Engquist*’s description of *Olech* is that such a deviation from a baseline rule must have been conscious, rather

200. *Id.* at 2157.

201. *Id.* at 2154.

202. *Id.* (quoting Brief for Petitioner at 48, *Engquist v. Or. Dep’t of Agric.*, No. 07-474 (U.S. Feb. 20, 2008)).

203. *Id.* at 2154; *see also* text accompanying note 186.

204. *Engquist*, 128 S. Ct. at 2155 (emphasis added).

205. The Court’s use of the “par for the course” metaphor may suggest that it thinks such differential treatment is to be expected from supervisors or is close enough to the constitutional requirement to allow courts to disclaim judicial review of such decisions. *Engquist*, 128 S. Ct. at 2154. However, this would simply suggest the epistemological nature of the problem, responses to which the text goes on to analyze. *See infra* Part IV.B.

206. *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000).

than being based on "factors that are difficult to articulate and quantify."²⁰⁷ There must have been a (literally) discoverable reason that a judge can evaluate; alternatively, the very lack of a reason for such a startling deviation itself suggests irrationality. By contrast, in *Engquist* there was no baseline rule from which government deviated. Instead, the government made a decision based on factors that were unique to Ms. Engquist, and which therefore are harder to uncover.²⁰⁸ The government's consideration of those factors still may have reflected a fundamental lack of equal treatment: for example, if she and her co-workers were evaluated against different criteria or rated differently when, in fact, they deserved to be scored the same. But evidence of such unequal treatment would be hard to come by without turning federal courts into civil service appeals boards. By contrast, the Olechs had an easier evidentiary path to trod, as they could cite the fact that every other homeowner in the Village was burdened less than they were as a price of getting a water hookup.²⁰⁹ While the burden nevertheless remained on the Olechs to surmount the rational basis standard's presumption in favor of the Village, the Village's deviation from its normal practice gave both the Olechs and the Court a baseline against which to measure the evidence.

Ultimately, then, evidentiary ease is the main difference between the claims in *Olech* and *Engquist*.

B. ANIMUS AS A FACTOR IN CLASS-OF-ONE CASES

Of course, in the real world evidentiary ease is quite important. It might well be that extending equal protection's scope to include employment claims simply makes no sense if such claims are so easy to defeat that they either are pointless or lead only to nuisance avoidance settlements by government defendants. But a category of such claims could potentially survive a judge's or jury's fact finding. These claims also happen to be consistent with equal protection doctrine. These are claims—such as Ms. Engquist's—where the plaintiff alleges that the inequality was motivated by animus.²¹⁰ Such claims do give rise to equal protection concerns, both as a matter of the Court's own doctrine and at least some of the antebellum thought underlying the Equal Protection Clause.²¹¹

Animus toward the burdened party is an affirmative constitutional wrong that grafts an invalid motivation onto an otherwise valid government decision to impose a burden on one person but not another. In turn, the invalidity of that motivation justifies a court in finding an equal protection violation.²¹² Doctrinally, the presence of animus, either as an

207. *Engquist*, 128 S. Ct. at 2154.

208. *See id.* at 2151.

209. *See Olech*, 528 U.S. at 563.

210. *Engquist*, 128 S. Ct. at 2149.

211. *Id.* at 2150 (internal citations omitted).

212. Farrell, *supra* note 103, at 390 ("As [Joseph] Tussman and [Jacobus] 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

observable phenomenon or a logical deduction given the implausibility of other reasons for the decision, has underlain one set of the Supreme Court's "rational basis plus" decisions since *Department of Agriculture v. Moreno*.²¹³ In her concurrence in *Lawrence v. Texas*, Justice O'Connor explained these cases by linking animus with heightened rational basis scrutiny.²¹⁴ A decision alleged to be explicitly motivated by animus fits neatly within this line of cases.

Moreover, a plausible link exists between an animus-based decision in a class-of-one case and the intent requirement imposed in *Washington v. Davis*.²¹⁵ If the constitutional harm of discrimination lies in purposeful action—in traditional equal protection terminology, action taken "‘because of,’ not merely ‘in spite of’" a suspect ground of classification²¹⁶—then that harm must flow, at least in part, from the purposefulness of that action. Thus, for example, an intentional racial classification reflects the government's intentional use of a classification tool that the Court has concluded is rarely relevant to a purpose it might legitimately pursue. Such conduct raises the inference that the government is in fact pursuing an illegitimate goal²¹⁷ or at least failing to treat members of a class as fully equal citizens.²¹⁸ By contrast, unintentional mistreatment or classification by government simply does not call for the same judicial solici-

as impermissible, so that the constitutional standard requires a classification to be rationally related to a permissible purpose. It is not a large step from here to conclude that government action designed to achieve an impermissible purpose violates the Equal Protection Clause." (citing Tussman & tenBroek, *supra* note 53, at 344-346).

213. 413 U.S. 528, 529 (1973). See *Romer v. Evans*, 517 U.S. 620, 635-636 (1996) (concluding that the lack of a legitimate reason for the government's action suggests the presence of animus); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) (applying somewhat stricter review of the city's legitimate justifications after discrediting its first justification as governmental incorporation of constituents' dislike of the burdened group). By contrast, in *Zobel v. Williams*, 457 U.S. 55, 60-61 (1982), and *Hooper v. Bernallillo County Assessor*, 472 U.S. 612, 618 (1985), the Court used a less deferential version of rational basis review to strike down laws that burdened individuals based on the date of their arrival into the state. These cases and others, while decided on equal protection grounds, suggest federalism-based concerns underlying the dormant commerce principle and Article IV's Privileges and Immunities Clause. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 682-683 (3d ed. 2006) (discussing these cases and citing these concerns).

214. See *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring) (observing that the Court has applied more stringent scrutiny under the rational basis standard when the challenged actions have exhibited "a bare . . . desire to harm a politically unpopular group. . .").

215. 426 U.S. 229, 237-38 (1976).

216. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *supra* note 215 and accompanying text.

217. See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) ("The reasons for strict scrutiny [of racial classifications] are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose.").

218. See, e.g., *Craig v. Boren*, 429 U.S. 190, 202-03 n.14 (1976) (discounting government reliance on gender-discriminatory accident data since that data may reflect paternalistic attitudes toward female offenders); *Michael M. v. Sonoma County*, 450 U.S. 464, 494-96 (1981) (Brennan, J., dissenting) (noting the historical motivation of California's gender-specific statutory rape law as reflecting a sense that girls, as opposed to boys, were incapable of informed consent to sex).

tude.²¹⁹ So too with accidental or “innocently irrational” mistreatment of a single individual,²²⁰ even if the singling out of an individual is otherwise conceptually different from the classification decisions that are the staple of traditional equal protection claims. To complete the analogy, purposeful singling out of an individual—that is, singling out not as the inevitable result of a legitimate need to ticket or to fire somebody, but because the government actor *wanted* to single out this particular individual—should call forth equal protection scrutiny. The purpose analysis is more direct in the class-of-one context: the animus finding constitutes proof of the illegitimate purpose that is merely suggested in the normal situation featuring an intentional classification based on a suspect classifying tool. This directness makes sense in class-of-one cases, given the difficulty, noted earlier,²²¹ with lower courts performing the “fit” analysis that in standard classification cases yields the ultimate proof of illegitimate purpose.²²² However, in both class-of-one and standard classification cases the ultimate inquiry is the same: did the government pursue an illegitimate goal?²²³

219. This doctrine may well incompletely catch all actions that are worthy of careful judicial scrutiny. See, e.g., Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (arguing that government action that sends a culturally recognizable message of racial inferiority should be subjected to strict scrutiny despite the subjective motivations of the government actors). Even Professor Lawrence’s proposal, however, still speaks the language of motive, as Professor Lawrence himself notes. See *id.* (“This proposal . . . does not abandon the judicial search for unconstitutional motives. . .”).

220. See Araiza, *supra* note 65, at 515.

221. See *supra* text accompanying notes 65, 179.

222. In this sense, then, the concept of intent plays a role at two different parts of standard equal protection analysis. First, as noted earlier in this paragraph, under *Washington v. Davis* the government must have intentionally classified on the forbidden ground. *Washington v. Davis*, 426 U.S. 229, 237-38 (1976). This idea is captured in the familiar statement that the government must have acted “because of, not in spite of,” the effects of its actions on a given class. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Second, once discriminatory intent is shown, courts inquire into whether use of the given classification tool furthers an interest that is both appropriate for the government to seek and important enough to justify the use of the given tool, or, conversely, whether government is using that tool for an illegitimate or insufficiently important reason. This is the sense behind Justice O’Connor’s statement in *City of Richmond v. J.A. Croson Co.* that heightened scrutiny for all racial classifications is necessary “to ‘smoke out’ illegitimate uses of race.” 488 U.S. 469, 493 (1989).

223. Thus, just like in standard classification cases, *supra* note 222, in class-of-one cases the concept of intent also plays two roles. *Tuffendsam v. Dearborn County Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004) (describing the two levels of intentionality in a class-of-one equal protection case and equal protection doctrine more generally). *Olech* required that the singling out of the individual be “intentional.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) (requiring that government action be “intentional” before it can violate the Equal Protection Clause); see also *supra* note 63 (noting pre-*Olech* cases citing *Snowden*). As suggested in the accompanying text, the animus inquiry in turn performs, in a more direct way, the function normally performed by heightened scrutiny (i.e., the inquiry into the degree of fit) in standard equal protection analysis. As Justice O’Connor notes in *Croson*, that function is to allow a court to determine the classification’s ultimate purpose (and thus its constitutionality). See *supra* note 222.

This analogy also holds up as a matter of the theory underlying equal protection. According to at least one strand of antebellum equality theory, it should make no difference that such a decision is based on animus toward a single individual rather than toward a class sharing a single characteristic. As noted earlier,²²⁴ a major theme of antebellum thinking about equality was the concern that government not act merely at the insistence and for the benefit of a private interest, but rather that all government action be motivated by a public-regarding purpose. This theme continued after ratification of the Equal Protection Clause, especially when the Court focused its attention away from racial discrimination and toward use of the Clause to police regulation of business and commercial activity.²²⁵

The inability of judges to determine when a classification was in fact motivated by a public purpose and when it was private-regarding “factual” or “class” legislation partly explains the Court’s ultimate abandonment of this approach to equal protection (as well as its abandonment of real substantive due process limits on such regulation).²²⁶ But the underlying idea lived on in the Court’s statements that certain types of classifications are so unlikely to serve the public interest and so likely to be motivated by inappropriate purposes as to require strict judicial scrutiny.²²⁷ The Court’s *Carolene Products*-based method of determining when to accord heightened scrutiny—which turns on the Court’s estimate of when the political process may serve to make classification decisions sufficiently well-informed and responsive²²⁸—serves as another example of the Court attempting to create a judicially workable test for uncovering at least some percentage of inappropriate classifications.

Class-of-one claims where a particular individual alleges that she was the victim of animus on the part of the government decision-maker also appear to be within the judicial ken, turning as they do on adjudicative facts normally thought to be best found by courts. Indeed, lower courts both before and after *Olech*, as well as both Judge Posner²²⁹ and Justice Breyer²³⁰ in *Olech*, identified animus as a factor that helpfully cabined the otherwise broad litigation vistas opened up by the class-of-one theory.

In sum, class-of-one claims alleging animus as the basis for the adverse decision are consistent with both modern Supreme Court equal protection doctrine and the antebellum foundations of the Equal Protection Clause. They are also within courts’ competence to adjudicate, given the nature of their underlying allegations.

224. See *supra* text accompanying notes 86-99.

225. See generally Richard S. Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667 (1980).

226. See generally GILLMAN, *supra* note 48.

227. E.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (strict scrutiny of all racial classifications needed in order “to ‘smoke out’ illegitimate uses of race”).

228. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 157 (1980).

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

230. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (Breyer, J., concurring).

However, rather than altering *Olech* to require plaintiffs to prove animus (at least in cases lacking what the Court called a “clear standard” furnishing a baseline for equal protection analysis),²³¹ or at least approving of lower courts’ imposition of an animus requirement as a tool to cull meritless cases, *Engquist* instead excised the government workplace from the scope of the class-of-one doctrine.²³² The Court’s choice reveals a preference for a categorical rule rather than a rule that would have allowed significant culling of meritless cases while allowing at least some meritorious ones to move forward. Clearly, an animus requirement would not be as effective as the Court’s rule in dismissing cases. However, by focusing on a core concern of equal protection, it would have the benefit of culling more accurately—that is, preserving potentially meritorious claims while allowing courts to dismiss meritless ones.²³³

The Court’s approach in *Engquist* thus adopted the wrong approach to the balance the Court set out to strike between the government’s interest as an employer and the individual employee’s rights.²³⁴ The next Part considers the implications of this mistake. First, it considers the possibility that the Court’s analysis will affect cases beyond the workplace context, despite the Court’s insistence that it was only deciding a case about class-of-one claims in the workplace.²³⁵ Second, it considers the impact of the Court’s methodology of imposing bright-line limits on the vindication of constitutional rights.²³⁶ As the Article goes on to explain, this methodology ultimately hearkens to the Court’s more general rigidity when reviewing Congress’ attempts to vindicate constitutional rights.²³⁷ That rigidity carries potentially ominous implications for the more general vindication of equality rights in future years.

V. THE IMPLICATIONS OF *ENGQUIST*

Engquist speaks both to the class-of-one doctrine and to constitutional balancing more generally.²³⁸ Given that *Engquist* marked the first occasion where the Court had commented on the class-of-one doctrine since announcing it in *Olech*, its implications for the class-of-one doctrine must remain speculative, at least until lower courts have had more time to apply its logic to non-employment cases. However, *Engquist*’s general

231. See *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2153 (2008). Such a decision would not have required the Court to disturb *Olech*, but simply would have distinguished it as a case where the existence of such a standard obviated the need for an animus requirement.

232. *Engquist*, 128 S. Ct. at 2154.

233. Moreover, lower courts requiring animus as an element of the claim have imposed common sense subsidiary rules concerning the degree of animus necessary for a plaintiff to prevail. See *supra* note 63.

234. *Engquist*, 128 S. Ct. at 2152 (setting forth this balancing as the fundamental task the Court set out to perform); *supra* text accompanying notes 166-68.

235. See *infra* Part V.A.

236. See *infra* Part V.B.

237. See *infra* Part V.C.

238. *Engquist*, 128 S. Ct. at 2152.

method hearkens to the Court's approach to federal legislation aimed at enforcing the Equal Protection Clause. Thus, more general lessons can be drawn even now about the implications of the Court's method. This part of the Article considers *Engquist's* implications, from the most specific to the most general.

A. THE REACH OF ENGQUIST BEYOND EMPLOYMENT CASES

While *Engquist* focuses heavily on the unique features of the employment context, its description of *Olech's* proper scope suggests that its analysis may be felt in other subject areas.²³⁹ Certainly, many class-of-one cases can be described as challenging the type of "subjective, particularized" decision making the Court concluded was incompatible with equal protection analysis. Indeed, the Court suggested that land use cases, which account for a good number of class-of-one claims,²⁴⁰ usually fell within this category.²⁴¹

More generally, the very nature of a class-of-one claim is such that plaintiffs usually will attack a particularized application of law to them—for example, a decision to deny a permit or impose a sanction.²⁴² Such particularized applications of law to fact will usually occur in contexts where government has not established "a clear standard against which departures . . . could be readily assessed."²⁴³ Indeed, courts seeking to limit class-of-one claims can presumably run quite a distance with *Engquist's* description of *Olech* as a case where a deviation from a consistent government requirement "raised a concern of arbitrary classification"²⁴⁴ of the type normally associated with equal protection violations. It would not require a large analytical leap for a court to distinguish *Olech*, so described, from any fact pattern where government distributes benefits or burdens based on individuals' unique performances on a given set of cri-

239. Most of the few cases citing *Engquist* in the short period since its decision have been employment cases where the court in question has summarily rejected the class of one employment claim on the authority of *Engquist*. *E.g.*, *Giglio v. Derman*, 560 F. Supp. 2d 163, 173 (D. Conn. 2008); *Cranford v. McNesby*, No. 3:07CV203/MLR/MD, 2008 WL 2567653, at *6 (N.D. Fla. June 23, 2008); *see also supra* note 162. But scattered non-employment cases have cited *Engquist* for broader propositions. *See, e.g.*, *Adams v. Meloy*, 287 F. App'x 531, 534 (7th Cir. 2008) (rejecting a prisoner's class of one claim challenging a parole decision, citing *Engquist*, and stating that "[t]he parole board's inherent discretion necessitates that some prisoners will receive more favorable treatment than others."); *Siao-Pao v. Connolly*, 564 F. Supp. 2d 232, 245 (S.D.N.Y. 2008) (noting that parole decisions possess the same discretionary element as the employment decisions immunized from class of one challenges in *Engquist*); *Occhionero v. City of Fresno*, No. CV F 05-1184 LJP SMS, 2008 WL 2690431, at *9 (E.D. Ca. July 3, 2008) ("This Court heeds . . . the U.S. Supreme Court's observation in *Engquist* as to undermining discretion.") (enforcement of municipal code against waste recycler).

240. *Araiza, supra* note 65, at 509-12 (discussing land use class of one cases).

241. *See Engquist*, 128 S. Ct. at 2153 ("There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter.").

242. *See supra* note 178 (citing cases).

243. *Engquist*, 128 S. Ct. at 2153 (describing the facts of *Olech*).

244. *Id.*

teria. Distinguishing *Olech* in this way, and thereby limiting the class-of-one theory, could mean that a number of the lower court cases that allowed class-of-one claims to proceed to trial could come out the other way if decided today.²⁴⁵

B. MEAT-AXES, CATEGORICAL RULES, AND CONSTITUTIONAL BALANCING

Justice Stevens' dissent in *Engquist*, while recognizing the potentially troublesome reach of *Olech*, criticized what it describes as the majority's "meat-axe" approach to the problem.²⁴⁶ It suggested that class-of-one employment claims should remain available when the plaintiff can show the complete lack of a rational justification for the adverse employment decision.²⁴⁷ However, his analysis suffers from analytical and real world difficulties of its own. As the dissent conceded, any performance-related justification for the employment action would likely have doomed Ms. Engquist's claim, given the exceptional deference of the rational basis standard.²⁴⁸ Justice Stevens chided the majority for failing to take the more limited route of limiting class-of-one claims to cases "involving a complete absence of any conceivable rational basis for the adverse action."²⁴⁹ However, such cases are vanishingly rare unless courts are willing to toughen their review under the rational basis standard,²⁵⁰ or unless direct evidence of animus allows courts to find irrationality without conclusively discounting all conceivable rational bases for the action.²⁵¹

Ultimately, Justice Stevens' complaint may have more to do with the

245. See, e.g., *Esmail v. Macrane*, 53 F.3d 176, 178-80 (7th Cir. 1995) (finding an equal protection violation in light of official campaign to harass the plaintiff); *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. Unit B Mar. 1981) (finding an equal protection violation when one officer was terminated because of prior criminal convictions and when two other officers with convictions were not terminated).

246. *Engquist*, 128 S. Ct. at 2158 (Stevens, J., dissenting) ("Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection 'class of one' claims, the Court should use a scalpel rather than a meat-axe.").

247. *Id.* at 2159 (Stevens, J., dissenting).

248. *Id.* at 2157 n.2 (Stevens, J., dissenting).

249. *Id.* at 2160 (Stevens, J., dissenting).

250. Indeed, Justice Stevens may be the only justice on the Court willing to apply the rational basis standard in such a non-toothless way. In *Nordlinger v. Hahn*, for example, he alone dissented from the Court's decision upholding against an equal protection challenge Proposition 13, California's acquisition value-based property tax scheme. His analysis in that case was notably more searching than that of the majority. 505 U.S. 1, 28 (1992) (Stevens, J., dissenting); see also *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring) (applying more searching judicial review than the majority of a classification before upholding it against a Fifth Amendment equality challenge). His willingness to engage in more muscular equal protection review of classifications involving non-suspect classes is also suggested by his general discomfort with the entire structure of tiered equal protection review and his adherence, instead, to a more free-floating requirement that government classifications be reasonable and impartial. Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2339, 2358 (2006).

251. See *supra* text accompanying notes 159-60.

categorical nature of the Court's balancing.²⁵² *Engquist* entirely carved out class-of-one equal protection rights from the panoply of rights enjoyed by government employees. This result rests uneasily alongside constitutional rights adjudication in other areas involving government acting in a capacity other than a sovereign regulator. In those cases, the government's special status, for example, as employer, requires courts to define constitutional rights by balancing them against the government interests resulting from its particular role. In the employment context, such balancing is usually performed on a case-by-case basis.²⁵³ When the Court replaces such case-by-case balancing with categorical rules it usually does so in response to concerns about the government's ability to perceive accurately the elements of such balancing²⁵⁴ or because of a conclusion that the government has an overriding interest that easily outweighs relatively minor individual interests.²⁵⁵ *Garcetti v. Ceballos*, the most recent employees' rights case, is one of the few to deviate from this pattern by simply finding the usual balancing approach inapplicable.²⁵⁶

Engquist, like *Garcetti*, pretermits any such case-by-case balancing by concluding that equal protection class-of-one rights simply do not apply in the workplace context. However, unlike *Garcetti*, which purported to take the employee's speech completely out of the ambit of the relevant balancing test,²⁵⁷ *Engquist* reflects a more categorical result of the balancing it set out to perform.²⁵⁸ As noted earlier,²⁵⁹ the *Engquist* Court reveals its understanding that class-of-one equal protection violations may exist in the workplace. However, the government's countervailing

252. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (Stevens, J., dissenting) ("The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties, . . . is 'Sometimes,' not 'Never.'") (internal quotation omitted).

253. *E.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987) (Fourth Amendment rights); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (free speech rights); *Shahar v. Bowers*, 114 F.3d 1097, 1099-1100 (11th Cir. 1997) (First Amendment associational rights).

254. *See, e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (noting the difficulty of requiring the government to show individualized suspicion before subjecting customs workers to drug tests, given those employees' 'unique work environment'); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 628-31 (1989) (noting the difficulty railroad supervisors might have in spotting drug use before or after an accident); *see also, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 345-47 (2001) (noting the difficulty law enforcement officers would face making case-by-case determinations about whether an arrest supported by probable cause could ultimately be punished by jail time or whether a compelling safety need justified detention).

255. *See Von Raab*, 489 U.S. at 670-72 (noting the government's interest in preventing armed employees from being under the influence of drugs and the employees' diminished privacy interests given the details of the program); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657-61 (1995) (noting the compelling government interest in deterring student drug use justifying blanket drug testing policy for student athletes, and student-athletes' relatively diminished privacy interests).

256. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (concluding that the employee-speaker did not speak as a citizen when he made the speech that led to his discipline, and that therefore *Pickering* balancing did not apply).

257. *Id.*

258. *See Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2152 (2008).

259. *See supra* text accompanying notes 194-97.

interests in workplace flexibility and avoidance of meritless litigation trump vindication of these rarely violated rights that the Court suggests are peripheral to the Equal Protection Clause.²⁶⁰ Thus, *Engquist's* holding is not itself a constitutional rule—a rule, for example, that there is no such thing as a class-of-one violation in the workplace or, as in *Garcetti*, a rule that a citizen speaking pursuant to his job duties has no rights under the Free Speech Clause.²⁶¹ Rather, the implicit balancing *Engquist* performs makes that case closer to an application of a constitutional rule, a constitutional decision rule,²⁶² or a constitutional implementation.²⁶³

As a product of such balancing, *Engquist* can be criticized both for its categorical result and its rejection of finer-tuned balancing methodologies worked out by the lower courts. The result reflects yet another instance of the Court deciding on a categorical basis the outcome of a balancing test that includes constitutional interests on both sides.²⁶⁴ As a substantive matter, one might well criticize what Justice Souter has called this “winner-take-all” approach to constitutional balancing²⁶⁵ that performs the balance at a high level of generality rather than at the level of actual facts where the balance can be struck more precisely.

The Court's failure to balance more precisely leads to a methodological criticism as well. If it is accurate to describe *Engquist's* balancing as an application of a constitutional rule, rather than a statement of the rule itself, then one might ask if other branches ought to have more of a role in applying the rule that the Court had previously announced. For example, one might suggest that Congress should enjoy some latitude in applying constitutional rules laid down by the Court, at least to the extent

260. See, e.g., *Engquist*, 128 S. Ct. at 2152 (“Our equal protection jurisprudence has typically been concerned with governmental classifications that ‘affect some groups of citizens differently than others.’ (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring)); *id.* at 2151 (allowing class of one employment claims to go forward would require lower courts “to sort through [‘a multitude of . . . claims’] in a search for the proverbial needle in a haystack.”).

261. One might also find a parallel between *Atwater v. City of Lago Vista* and *Engquist*. The *Atwater* majority suggested strongly that the arrested motorist might have prevailed “[i]f [the Court] were to derive a rule exclusively to address the uncontested facts of [that] case,” concluding that the plaintiff’s “claim to live free of pointless indignity and confinement clearly outweigh[ed] anything the City [could] raise against it specific to her case.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47 (2001). However, the Court concluded that law enforcement’s legitimate need for clear rules to guide officers’ split-second decisions counseled against fact-specific balancing tests and in favor of more clear cut rules. See *id.* at 347. Thus, even though the motorist herself might have been the victim of an unreasonable search and seizure according to the result of a balance between the government’s and the individual’s interests, the government’s interest in a clear cut rule defeated her claim. Similarly, the *Engquist* Court concluded that the government’s interests in workplace flexibility and litigation avoidance outweighed government employees’ interests in vindicating their class of one rights. *Engquist*, 128 S. Ct. at 2156-57. When comparing these two cases, the key question is whether the government’s interests in *Engquist* rise to the level of law enforcement’s interests in *Atwater* in a rule that can be applied when an officer makes a split-second decision at a traffic stop.

262. See Berman, *supra* note 8.

263. See FALLON, *supra* note 26.

264. *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006).

265. *Id.* at 434 (Souter, J., dissenting).

those applications reflect Congress' particular institutional competence to uncover the extent to which government conduct threatens the interests the Court has identified as constitutionally relevant. In our case, perhaps the Court also owes respect to lower courts' applications of constitutional rules when it reviews the pleading and substantive rules lower courts have developed in their effort to balance states' legitimate interests and vindication of the class-of-one right the Court recognized in *Olech*.²⁶⁶

Obviously, determining the proper level of Supreme Court respect for another institution's work turns on both the nature of that work and the status of the other institution. For example, the Supreme Court, as a branch co-equal to Congress, should feel no obligation to subordinate its uniquely judicial judgments to any decision Congress may make. Similarly, as supervisor over the lower federal courts, the Court possesses final authority over those courts' work. Still, as this Article has argued, many constitutional decisions—among them *Engquist*—take the form of applications of constitutional rules rather than statements of constitutional rules themselves. The applied nature of those decisions in turn raises the possibility of appropriate roles for other institutions in making those decisions. The next Section concludes this Article by examining what *Engquist* suggests about such shared responsibility for constitutional application.

C. *ENGQUIST*, INSTITUTIONAL ROLES AND THE VINDICATION OF CONSTITUTIONAL RIGHTS

Engquist reflects the Court's suspicion of constitutional rights enforcement through sub-constitutional judge-made rules. Even more seriously, *Engquist's* suspicion of lower court enforcement of class-of-one rights harkens back to the Court's most rigid attitude toward congressional legislation enforcing the Fourteenth Amendment. Just as *Engquist* looked askance at the case-by-case rights vindication the plaintiff asked the Court to authorize, so too the Court's Section 5 jurisprudence has looked skeptically at congressional legislation enforcing peripheral or difficult to prove constitutional rights. To the extent this analogy holds, *Engquist* suggests a more general inhospitality in the Court's approach to other governmental institutions' attempts to vindicate rights. In particular, *Engquist* suggests that the Court has gone beyond the merely juricentric approach to rights vindication criticized by commentators analyzing the Supreme Court's Section 5 jurisprudence²⁶⁷ to an approach in which the Supreme Court arrogates for itself all authority to enforce constitutional rights, even when that requires excluding lower courts from a meaningful role. Thus, the case carries implications far beyond the relatively trivial issue it decided.

266. See *supra* Parts II.A, III.B.

267. See Araiza, *The Section 5 Power*, *supra* note 28, at 524 n.22 (citing scholars criticizing the Court's juricentric approach to the enforcement of constitutional rights).

To get a sense of the analogy, consider the post-*Olech* lower courts as stand-ins for Congress, leaving aside for the moment concerns about the comparability of those two institutions.²⁶⁸ Faced with a difficult to apply constitutional rule (*Olech* and the intuition it reflects),²⁶⁹ the lower courts imposed on plaintiffs a set of procedural and substantive hurdles aimed at limiting the intrusion on government employers' legitimate prerogatives while still allowing employees with the strongest claims to move forward. These requirements reflected the courts' (accurate) understanding that class-of-one claims are rarely meritorious. Crucially, however, these courts allowed plaintiffs to move forward if they satisfied these requirements.

These rules may allow some non-meritorious claims to survive motions to dismiss and for summary judgment.²⁷⁰ Thus, they may over-protect employees' equal protection rights, either by encouraging settlement or allowing a jury to decide the case, perhaps on grounds that have more to do with sympathy for the plaintiff than accurate application of the vague and malleable rational basis standard.²⁷¹ Just as congressional enforcement legislation may impose prophylactic rules that stretch liability beyond actual constitutional rules, so too this court-made doctrine may have the effect of broadening liability and limiting legitimate state prerogatives beyond the limits of the true underlying constitutional rule.

These rules stand in sharp contrast to the Court's approach in *Engquist*, where the Court cut off all class-of-one employment claims despite its own analysis suggesting that meritorious equal protection claims might

268. The question bracketed here is discussed later in this Part. See *infra* text accompanying notes 288-302.

269. See *Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) ("If . . . two [persons] are truly identical the different treatment of them *must* be discriminatory; treating likes as unlike is the paradigmatic case of the unequal protection of the laws." (some emphases removed)).

270. See, e.g., *HI-TECH Rockfall v. County of Maui*, No. CV 08-00081 DAE-LER, 2008 WL 2736036, at *7 (D. Haw. July 11, 2008) (expressing doubt about the ultimate merit of the plaintiff's class-of-one claim but allowing the plaintiff to file an amended complaint). It is unclear how many employment class-of-one cases ultimately prevail. In *Engquist* Justice Stevens counted approximately 150 employment class-of-one employment cases since *Olech*, *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2161 n.4 (2008) (Stevens, J., dissenting), and an appellate courts' examination of such cases in 2005 found none to have prevailed during this period, *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005). However, these searches may not have identified cases that did not generate a formal court opinion and that ended with an unappealed verdict for the plaintiff. Moreover, searches for "successful" class of one claims presumably did not count favorable to plaintiff settlements that were reached after the government defendant unsuccessfully moved either for dismissal or summary judgment. See *Farrell*, *supra* note 103, at 424 (noting the inadequacy of examining "traditional legal data bases" when determining the ultimate success rate of class-of-one claims generally, given that jury verdicts and settlements are generally not reported in an easily accessible form).

271. See *Joint Appendix* at *61, *63-64, *Engquist v. Or. Dep't of Agric.*, No. 07-474, 2008 WL 495386 (U.S. Feb. 20, 2008) (district court jury instructions on the class-of-one claim, stating that plaintiff must prove, *inter alia*, "that no rational basis exists for the difference in treatment" and "that Defendant took these actions for arbitrary, vindictive, or malicious reasons").

exist.²⁷² Inevitably, the casualties of this approach will include at least a small number of claims where truly similar persons are treated differently for no reason. Such claims may arise in employment contexts that feature “a clear standard against which departures . . . for a single plaintiff, could be readily assessed.”²⁷³ Alternatively, they may feature a singling-out for a clearly illegitimate reason.²⁷⁴ These are rare cases—in the Court’s own words, needles hidden in haystacks of meritless claims.²⁷⁵ Yet the Court’s response—to entirely disallow class-of-one claims in employment cases—would lead lower courts to dismiss these meritorious claims were they brought today.²⁷⁶

The Court’s approach reflects a deep suspicion of rights vindication that trenches on legitimate competing interests, such as litigation avoidance by states. Thus, instead of validating approaches that promise to vindicate meritorious claims at the cost of allowing some non-meritorious ones to go forward, the Court flips the default in the other direction, prohibiting all claims of a certain type, even when some of them might be meritorious. Again, one can discern an analogy to federal enforcement legislation. In cases such as *Board of Trustees v. Garrett*,²⁷⁷ the Court held that congressional enforcement legislation failed the congruence and proportionality test despite the existence of court-uncovered instances of unconstitutional discrimination in the subject area addressed by the stat-

272. See *supra* text accompanying notes 186-89.

273. *Engquist*, 128 S. Ct. at 2153. For example, in *Bower v. Village of Mount Sterling*, the Sixth Circuit reversed the dismissal of the plaintiff’s class-of-one claim based on the allegation that the government deviated from its routine hiring process on the basis of the decision-maker’s desire to punish the plaintiff’s parents for their political viewpoint. 44 F. App’x 670, 672 (6th Cir. 2002). The court in *Bower* noted that these allegations could also be construed to state a First Amendment claim, but concluded that they also stated an “independent” claim under *Olech*. See *id.* at 678. See also *Benjamin v. Brachman*, 246 F. App’x 905, 928 (6th Cir. 2007) (distinguishing *Bower* and *Olech* on the ground that the challenged employment decision was the result of “several committees and independent reviewers” and was the sort of discretionary decision that did not give rise to an equal protection claim under *Olech*).

274. See *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir. 1982) (finding no relevant difference between the fired paramedic and her colleague, with the disciplinary decision based solely on a need to respond to media and public pressure to find a scapegoat for a highly-publicized death).

275. *Engquist*, 128 S. Ct. at 2157.

276. Indeed, the Court’s decision in *Engquist* also presumably disallows congressional action in this area under the authority of Section 5. A federal enforcement statute reinstating some types of class-of-one employment claims would confront the problem that the Court in *Engquist* completely exempted the employment context from the ambit of class-of-one equal protection rights. Thus, under standard Section 5 analysis, a federal statute would fail the congruence and proportionality test in light of the Court’s ostensible conclusion (*but see supra* text accompanying notes 186-89) that class-of-one constitutional violations simply do not exist in the employment context. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (discussing the congruence and proportionality standard’s requirement that constitutional violations exist as a prerequisite to valid congressional enforcement legislation). A federal statute protecting state employees would be valid under the interstate commerce power, but retrospective relief such as a backpay award would be unavailable. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75-76 (1996).

277. 531 U.S. 356, 356 (2001).

ute.²⁷⁸ The Court's decision turned in large part on the paucity of judicially proven cases of unconstitutional conduct and the breadth of the statute's liability net. Similarly, in *Engquist* the Court sacrificed vindication of the rare or unusual constitutional violation because that vindication trenched too far into the prerogatives of state employers for too little payoff.²⁷⁹

If this analogy holds, then the Court's approach in *Engquist* hearkens back to its most rigid review of federal legislation enforcing the Equal Protection Clause. For that reason *Engquist* gives cause to be concerned far beyond the trivial²⁸⁰ implications of an admittedly small number of meritorious equal protection claims the Court's analysis defeats. Often, constitutional violations can be uncovered only through intensive fact-finding and common law style legal analysis,²⁸¹ keen awareness of social reality,²⁸² and careful, if necessarily *ad hoc*, balancing of individuals' rights with government's legitimate interests.²⁸³ This is probably truer today than ever before, given the decline of the most obvious forms of discrimination,²⁸⁴ the persistence of underlying prejudices, and our increasingly sophisticated knowledge of what does²⁸⁵ and perhaps what

278. See *id.* at 366 & n.4 (discussing the relevance of *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

279. Cf. *Kimel*, 528 U.S. at 88 (noting that Congress can enact stronger enforcement legislation when the constitutional problem is widespread or stubborn); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003) (same).

280. Of course the implications are not trivial to those who are the victims of these now-unvindicated claims. See *Ciechon v. City of Chicago*, 686 F.2d 511, 513 (7th Cir. 1982) (describing the plaintiff's otherwise unblemished record as a paramedic before her constitutionally arbitrary dismissal).

281. See *Benjamin v. Brachman*, 246 F. App'x 905, 928 (6th Cir. 2007) (distinguishing the class-of-one employment claim before the court from another such claim that the court previously allowed to go forward on the ground that the previous claim, like the one in *Olech*, featured a "clear and neutral applicable procedure" against which deviations could be measured).

282. *Garrett*, 531 U.S. at 377-78 (Breyer, J., dissenting) (arguing that Congress' accumulation of evidence of social attitudes toward the disabled, even if they are not examples of actual conduct by state actors, should be relevant to a determination of the scope of the problem Congress was trying to remedy in the Americans With Disabilities Act); Araiza, *The Section 5 Power*, *supra* note 28, at 555-59.

283. See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *infra* note 310 (explaining the type of "balancing" this Article envisages for class of one plaintiffs).

284. See Hasen, *supra* note 19, at 188-90; Devon Carbado, Catherine Fisk & Mitu Gulati, *After Inclusion 3* (Duke Law School Working Paper Series, 2008), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1117&context=duke/fs> ("While a claim that [conscious racial animus] has disappeared would be difficult to sustain, most would agree that conscious racial animus is not as prevalent a social practice as it once was and is not as salient.").

285. See, e.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1279 (2002); Carbado, Fisk & Gulati, *supra* note 278, at 3 (subtler types of racial discrimination); Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces And Legal Narratives That Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 687 (2007) (gender bias); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 703 (2008) (gender classification schemes as raising the possibility of bias against transgendered individuals).

should²⁸⁶ constitute discrimination. Unfortunately, the Supreme Court's review of congressional legislation tackling such subtle discrimination rigidly tests such legislation against a baseline set by the courts' own institutionally-limited capacity to evaluate these problems.²⁸⁷ To the extent *Engquist* reaffirms the current Court's willingness to sacrifice difficult-to-uncover constitutional rights in the service of providing clear rules favorable to state defendants, its ultimate importance stems more from its method than from its relatively trivial results.

But does this analogy hold? It might be objected that the significant institutional differences between Congress and the courts render inapt the comparison between the Court's response to congressional enforcement legislation and its response to the post-*Olech* rules developed by the lower courts. Congress, this argument goes, has authority to enforce the Fourteenth Amendment, even by prohibiting conduct that is itself constitutionally innocent.²⁸⁸ Even more fundamental is the difference in hierarchical status between Congress and the lower courts. On this argument, lower courts' inferior position in the Article III hierarchy makes their work less inherently worthy of Supreme Court deference than the analogous work product of a co-equal branch such as Congress. Thus, one might object that the Court's uncharitable treatment of lower courts' work in class-of-one cases suggests little about the reception it may give to congressional enforcement legislation.

Ultimately, neither of these objections diminishes the force of the analogy. First, even if Congress' Section 5 authority to enact explicitly pro-

286. See, e.g., Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (to be codified in scattered sections of 26, 29, and 42 U.S.C.) (discrimination based on genetic make-up); Spade, *supra* note 285, at 803 (bias against transgendered individuals); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (different levels of deception and hiding society requires of gays and lesbians); ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* (2008) (obesity).

287. See generally *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (faulting congressional enforcement legislation for tackling a problem that had not been the subject of a large number of successful lawsuits); *id.* at 375-76 (Kennedy, J., concurring) ("If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-85 (2000) (concluding that statutory restrictions on states' age discrimination fail the congruence and proportionality standard given the Court's precedent subjecting age discrimination claims only to rational basis review and its rejection of all such claims); Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003); Araiza, *The Section 5 Power*, *supra* note 28, at 555-59. Even the Court's decision in *Nevada Department of Human Resources v. Hibbs* upholding the constitutionality of the Family and Medical Leave Act as valid enforcement legislation targeting unconstitutional gender discrimination follows this template. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003). In that case the Court gave more deference to congressional enforcement rationales, but only because the Court itself had earlier determined that gender discrimination is especially problematic as an equal protection violation. *Hibbs*, 538 U.S. at 736.

288. See *Kimel*, 528 U.S. at 81.

phylactic rules distinguishes it from the lower courts,²⁸⁹ the fact remains that lower courts unquestionably have the authority to adopt rules that carry the same effect as prophylactic rules.²⁹⁰ If the Court disapproves of those judge-made rules (as it implicitly did in *Engquist*), it is not because those lower courts lacked the authority to make them, but rather because the Court disagreed with their content.

This brings us to the second, more troubling, objection. One might criticize the Court's refusal to credit congressional findings about age or disability discrimination²⁹¹ as inappropriate lack of deference to a co-equal branch of government²⁹² while remaining sanguine about the Court's exercise of supervisory power over the lower federal courts. After all, those courts are subordinate to the Supreme Court—literally, “inferior.”²⁹³ On this theory, the Court's rejection of lower courts' more *ad hoc* rules toward class-of-one cases, whether right or wrong, suggests little about its likely response to congressional legislation seeking to vindicate rights.

However, the institutional differences between the Supreme Court, the lower courts, and Congress suggest a unique role for the lower courts. In turn, when the Court dismisses that role it gives rise to reasonable concern about its respect for the judgments of other branches as well. Lower courts, even though they occupy an inferior position to the Supreme Court in the Article III hierarchy, are the forums for the fact-intensive sifting and weighing of legitimate values and interests when those values and interests collide—as they very often do. While the Supreme Court, as the final arbiter of “what the law *is*,”²⁹⁴ rightfully possesses ultimate power to define constitutional rights, lower courts—especially trial courts—nevertheless deserve a degree of respect, if perhaps not outright deference, when determining “what the law *means*” in a given factual context.²⁹⁵ Its failure to accord that respect, even within the context of a superior-subordinate relationship, suggests a hostility to sharing the re-

289. Certainly the Supreme Court has the authority to enact such rules, as made clear by the adoption of the exclusionary rule. See generally WAYNE LAFAVE, *SEARCH AND SEIZURE* ch. 1 (3d ed. 1996). Whether lower courts also have this authority is a question that does not need to be answered, since, as this part of the Article argues, courts have the authority to enact rules that have the effect of prophylactic rules.

290. See *supra* text accompanying notes 159-60.

291. See generally *Garrett*, 531 U.S. at 356 (striking down Title I of the Americans With Disabilities Act as inappropriate enforcement legislation despite congressionally-compiled record of private sector and general social discrimination against disabled people); *Kimel*, 528 U.S. at 90-91 (rejecting evidence of private sector age discrimination as irrelevant when considering whether Congress had compiled a record of state constitutional violations sufficient to render the Age Discrimination in Employment Act appropriate legislation enforcing the Equal Protection Clause).

292. Cf. *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 1624 (2007) (deferring to congressional findings about the medical necessity of certain types of abortions).

293. See U.S. CONST. art. III, § 1.

294. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

295. I have made an analogous argument in the context of congressional enforcement legislation, arguing that a distinction should be drawn between constitutional rules handed down by the Court, which congressional enforcement legislation must respect, and the application of those rules, where superior congressional competence may justify judicial deference to congressional determinations about the existence of unconstitutional conduct

sponsibility for application of constitutional rules similar to its hostility to a role for Congress.

Justice Souter's dissent in *Garcetti v. Ceballos* reflects some of these thoughts. In addition to being a case about constitutional rights in the government workplace, *Garcetti* is also similar to *Engquist* in that the majority abandoned the existing case-by-case balancing approach in favor of a categorical rule excluding the given right (in *Garcetti*, free speech) from the workplace. Justice Souter protested this categorical exclusion. For him, this approach violated what he called "the object of most constitutional adjudication . . . : when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake."²⁹⁶ Sometimes those adjustments entail a (re)statement of the values at stake. Thus, in *Garcetti*, Justice Souter suggested that in *Pickering* balancing only certain unusually important statements by government employees should, even potentially, outweigh the government's interest as an employer.²⁹⁷ Such a limitation, he suggested, would effectively limit litigation, if not by limiting lawsuits, then at least by culling the unmeritorious ones at the summary judgment stage.²⁹⁸ He also noted that no "debilitating flood of litigation" had occurred even the Ninth Circuit's approach reversed in *Garcetti*—an approach even more speech-protective than the one endorsed by Justice Souter.²⁹⁹

So far, the argument is a substantive one—namely, that fact intensive balancing tests are appropriate when, as Justice Souter puts it, "constitutionally significant interests clash."³⁰⁰ Such a conclusion, however, carries us to a follow up point about the appropriate roles for lower courts and the Supreme Court when the doctrinal rule calls for balancing. In *Garcetti*, Justice Souter expressed confidence in lower courts' ability to perform that balancing effectively. That confidence suggests that the Supreme Court should refrain not just from premitting the balancing, but also from second guessing these balancing decisions, at least in the absence of manifest mistake. Indeed, any balancing test inevitably accords an important role for the lower courts, given the impossibility and institutional inappropriateness of the Supreme Court reviewing every balancing

and the need for prophylactic rules to ferret out such conduct. See generally Araiza, *The Section 5 Power*, *supra* note 28.

296. *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting).

297. *Id.* at 434-35 (Souter, J., dissenting).

298. *Id.* at 435 (Souter, J., dissenting).

299. *Id.* (Souter, J., dissenting).

300. *Id.* at 427, 434 (Souter, J., dissenting). Such balancing tests may not be appropriate when the nature of the action at issue is such that government has an especially important interest in a clear-cut rule. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 345-54 (2001) (noting the difficulty law enforcement officers would face making case-by-case determinations about whether an arrest supported by probable cause could ultimately be punished by jail time or whether a compelling safety need justified detention, and thus refusing to adopt a Fourth Amendment rule requiring post hoc judicial balancing of the reasonableness of officers' decisions to arrest traffic law violators). It is worth noting that Justice Souter, the author of the *Garcetti* dissent discussed in the text, also wrote the majority opinion in *Atwater*. *Id.* at 323.

result.³⁰¹

By allowing lower courts to continue deciding cases based on balancing, rather than taking these decisions away via a categorical rule, Justice Souter's approach accords institutionally appropriate roles to both the Supreme Court and the lower courts. In his analysis, the Supreme Court retains the power "to say what the law is" by setting the terms of the balance—for example, in his *Garcetti* dissent by limiting the types of employee speech that are important enough to potentially outweigh the government's interest.³⁰² But his recognition of "constitutionally significant interests" on both sides of the balance means that balancing must take place, at least when the nature of the government action at issue does not present a strong case against balancing.³⁰³ Inevitably, such balancing must be performed by the lower courts.

So understood, *Engquist's* refusal to let lower courts continue performing case-by-case adjudication reveals at least some disregard for lower courts' institutional role, analogous to its skepticism of Congress' fact finding capacity in *Garrett*. This disregard is not a matter of appropriate superior court review of lower courts' work, but rather disregard for—or perhaps disinterest in—other institutions' particular competencies in the general project of safeguarding constitutional rights. It is important to recall here that both Congress and the lower courts in these situations are engaged in the application of constitutional rules, rather than the enunciation of actual constitutional meaning. In such situations, the Court's superior position to the lower courts and its unique law-stating function vis-à-vis Congress are far less relevant, since presumably constitutional application is an activity for which other institutions may have particular talents, depending on the situation.³⁰⁴ *Engquist's* refusal to accord a more meaningful role to the lower courts thus reflects a more general, and hence a more troubling, insistence on the Court's singular authority to apply, as well as state, constitutional rules.

Ultimately, of course, this argument takes the form of expressing concern about what *Engquist* means for what the Court *may* do in the future. The legal realist in all of us reminds us that if the Court wants to find a way to defer to congressional judgments on higher-stakes questions, then it will find a way to do so. Indeed, it is worth pointing out that Justice Breyer joined the majority in *Engquist*, even though he dissented in the Section 5 cases striking down congressional enforcement legislation, and

301. *C.f.* *Rankin v. McPherson*, 483 U.S. 378, 392-93 (1987) (Powell, J., concurring) (suggesting that the Supreme Court's decision to review the lower court's performance of the *Pickering* balancing test was striking given the relative simplicity of the case).

302. *Garcetti v. Cebalbs*, 547 U.S. 410, 433 (2006).

303. *See supra* text accompanying note 300.

304. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 377, 382-85 (Breyer, J., dissenting) (noting the subtle nature of disability discrimination and arguing that Congress should be accorded more leeway to determine when such discrimination runs the risk of crossing the line into unconstitutionally irrational or malicious conduct).

in fact wrote the dissent in *Garrett*, the opinion making the strongest case for deferring to Congress' particular institutional competencies.

This fact reminds us of the uniqueness of every case and cautions us about over-generalized predictions about how the Court will apply high level concepts such as deference, institutional roles, and constitutional rule-making versus constitutional application. Ultimately, all that an article such as this can do is point out the reasoning method used in a case, and suggest where that method would take the Court if it faithfully adhered to that method in subsequent cases. The predictive power of the analysis is of course buttressed to the extent the Court's approach is consistent with its approach in earlier cases.

In *Engquist*, the Court's method assumes the Court's centrality not just in announcing constitutional meaning, but in applying that meaning. It also involves disregard of mediating sub-constitutional rules that seek to balance competing constitutional interests on a case-by-case basis, in favor of a categorical rule in favor of one side of the balance. At that level of generality, the Court's method suggests hostility to rights vindication when the rights are analogous to those in *Engquist*—rare, narrow, peripheral, and hard to uncover.³⁰⁵ Moreover, its method surely cannot be favorable to the remediation of discrimination that society is only now beginning to identify and name as such.³⁰⁶ To the extent that the Court's disregard of the lower courts' approach to class-of-one equality rights suggests how the Court will view congressional approaches to analogous rights,³⁰⁷ the outlook cannot be favorable for those latter rights. This conclusion finds support in the fact that previous Section 5 cases reflect the same approach.³⁰⁸

VI. CONCLUSION

Engquist goes a long way toward undoing the careful, if necessarily imperfect, work of lower courts that was designed to vindicate intuitive equality concerns. It replaces that work with a *per se* rule that dooms the admittedly small class of cases that our intuition suggests should prevail. While the Court ostensibly limited its decision to employment cases, its logic does not allow such an easy cabining, as post-*Engquist* lower courts have already begun to intuit.³⁰⁹ The Court's logic reveals a preference

305. See *supra* note 285 and accompanying text.

306. See *supra* note 286 and accompanying text.

307. See *supra* notes 285-86 and accompanying text.

308. It is worth noting that *Hibbs* and *Lane*, the recent and more rights-favorable Section 5 decisions, relied on the votes of Justice O'Connor and (in *Hibbs*) Chief Justice Rehnquist, both of whom have left the Court and been replaced by justices who joined the majority in *Engquist*. See *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2148 (2008). *Tennessee v. Lane*, 541 U.S. 509, 512 (2004); *Nev. Dep't of Human Res. V. Hibbs*, 538 U.S. 721, 724 (2003). Justice Alito, Justice O'Connor's replacement, was of the opinion in 2000 that the congruence and proportionality standard required the invalidation of the Family and Medical Leave Act, a result later contradicted by the Supreme Court in *Hibbs*. *Chitister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000) (Alito, J.)

309. See *supra* note 239 and accompanying text.

for bright-line order over fact intensive messiness, balancing,³¹⁰ and mediating procedural rules,³¹¹ even when they are necessary in order to vindicate constitutional rights in contexts where government also has legitimate interests in flexibility and discretion.³¹² Ultimately, the disfavoring of this practical, if ad hoc, approach may be *Engquist's* most important legacy.

In *Engquist*, the Court essentially concludes that class-of-one claims normally do not fit within the government workplace context and that countervailing interests justify rejecting the few claims that may in fact be meritorious. This may well state a perfectly sensible rule of thumb, just like it may be a perfectly sensible rule of thumb that age or disability discrimination rarely rises to the level of an equal protection violation.³¹³ But lower courts can reach that result in a more nuanced way that more accurately strikes the balance that the Court strikes with its blunt, categorical rule. The kind of work disfavored in *Engquist* is exactly the sort of work that lower courts do all the time. To continue the analogy, the kind of legislative work disfavored in *Garrett* is the sort of work that Congress is far better suited to perform than courts. Respect for lower courts' superior ability to strike appropriate fact-intensive balances between constitutionally significant interests, just like respect for Congress' ability to uncover constitutional violations that may escape the limited fact finding format imposed by litigation, suggests that, when engaged in the project of vindicating constitutional rights, the Court should let other institutions do what they do best. Just as much as making bold statements of constitutional meaning, this respect for other institutions' comparative institutional advantages also constitutes part of the core command to an institution whose business is the vindication of constitutional rights.³¹⁴

310. Cf. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). It should be repeated that the type of "balancing" suggested here for class-of-one workplace claims does not involve the explicit weighing of the private interest and the governmental interest. To that extent it is unlike *Pickering* balancing. Rather, balancing in class-of-one cases involved lower courts imposing substantive and procedural hurdles on plaintiffs in recognition of the need to limit the scope of class-of-one claims, lest the government face the prospect of litigation anytime it disfavored any individual. See *supra* Part III.B (noting the types of rules imposed on class of one plaintiffs with this goal in mind).

311. See *supra* text accompanying notes 143-46 (discussing pleading rules courts imposed to allow dismissals of clearly non-meritorious class of one claims at the pleading stage).

312. Indeed, it should be noted that the often-cited case that can be viewed as the foundation for modern class-of-one analysis, *Ciechon v. City of Chicago*, was an employment case. See 686 F.2d 511 (7th Cir. 1982).

313. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (striking down, as inappropriate enforcement legislation, part of the Americans With Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90-91 (2000) (same result with regard to striking down part of the Age Discrimination in Employment Act).

314. See *supra* note 1.