
January 2018

Richard Posner: A Class of One

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Recommended Citation

Robert C Farrell, *Richard Posner: A Class of One*, 71 SMU L. REV. 1041 (2018)
<https://scholar.smu.edu/smulr/vol71/iss4/3>

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RICHARD POSNER: A CLASS OF ONE

Robert C. Farrell*

ABSTRACT

Judge Richard Posner, best known for his contributions to the field of law and economics, has also made an outsized contribution to another area of the law—the equal protection class-of-one claim. By some combination of happenstance and design, Posner was able to shape the class-of-one doctrine even where his views were inconsistent with Supreme Court precedent. The Supreme Court’s initial exposition of the doctrine had identified an equal protection violation when there was intentionally different treatment of similarly situated persons without a rational basis for the difference in treatment. Posner insisted that this language included within it a requirement that a defendant have acted with animus toward the plaintiff, that is, a spiteful effort to “get” a person for reasons wholly unrelated to any legitimate state objective. Was the essence of the class-of-one claim irrationality, as advocated by the Supreme Court, or animus, as advocated by Posner? Surprisingly, Judge Posner saw his version of the class-of-one claim become somewhat commonplace. Posner, a single judge on a United States Court of Appeals, fought the United States Supreme Court, and, in some large measure, held it to a draw.

TABLE OF CONTENTS

I. INTRODUCTION	1042
II. THE SUPREME COURT’S CLASS OF ONE CASES ...	1043
A. <i>VILLAGE OF WILLOWBROOK V. OLECH</i>	1043
B. <i>ENGQUIST V. OREGON DEPARTMENT OF</i> <i>AGRICULTURE</i>	1049
III. JUDGE POSNER’S CLASS OF ONE OPINIONS	1051
A. <i>ESMAIL V. MACRANE</i>	1051
B. <i>INDIANA STATE TEACHERS ASSOCIATION V. BOARD</i> <i>OF SCHOOL COMMISSIONERS</i>	1053
C. <i>OLECH V. VILLAGE OF WILLOWBROOK</i>	1053
D. <i>HILTON V. CITY OF WHEELING</i>	1054
E. <i>BELL V. DUPERRAULT</i>	1056
F. <i>INDIANA LAND CO. V. CITY OF GREENWOOD</i>	1058
G. <i>TUFFENDSAM V. DEARBORN COUNTY BOARD OF</i> <i>HEALTH</i>	1059

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H. <i>CROWLEY v. MCKINNEY</i>	1060
I. <i>LAUTH v. MCCOLLUM</i>	1061
J. <i>DEL MARCELLE v. BROWN COUNTY CORP.</i>	1062
K. <i>SCHERR v. CITY OF CHICAGO</i>	1065
IV. THE INFLUENCE OF JUDGE POSNER'S CLASS OF ONE VIEWS	1065
A. WITHIN THE SEVENTH CIRCUIT	1066
B. IN OTHER CIRCUITS	1067
V. WHO WAS RIGHT?	1069
VI. CONCLUSION	1075

I. INTRODUCTION

JUDGE Richard Posner, recently retired from the bench,¹ is well-known for his contributions to the field of law and economics, where he is widely considered a leader in the field.² He has been identified as “the most influential American legal scholar during his almost half-century in the academy” and “the most cited legal scholar ‘of all time.’”³ He is a judicial “superstar,” whose opinions are cited widely outside his circuit, and has principal cases in law school casebooks.⁴ It is perhaps less well known that Posner has also made an outsized contribution to an area of the law with which he is not so typically associated—the equal protection class of one claim. This article examines Judge Posner’s class of one opinions and their influence. By some combination of happenstance and design, Posner was in a position to write the opinion in a court of appeals case⁵ that went on to become the Supreme Court’s first class of one case,⁶ and then in a position to write the opinion in the first federal court of appeals case to interpret and apply that Supreme Court case.⁷ Surprisingly, he was able to adopt a framework of analysis for class of one claims that was, at least, a questionable interpretation of Supreme Court precedent, and, possibly, a direct contradiction of that precedent. Even more surprisingly, Judge Posner saw his version of the class of one claim become somewhat commonplace. Posner, a single judge on the United States Court of Appeals, fought the U.S. Supreme Court, and, in some large measure, held it to a draw.

This article begins with a summary and critique of the Supreme Court’s

1. Adam Lipton, *An Exit Interview With Richard Posner, Judicial Provocateur*, N.Y. TIMES, Sept. 11, 2017, at A18.

2. See, e.g., Lincoln Caplan, *Rhetoric and Law*, HARV. MAG., Jan.-Feb. 2016, at 49, 52 (“Posner did more than anyone else to promote the approach called ‘law and economics.’”).

3. *Id.* at 50.

4. Margaret V. Sachs, *Superstar Judges as Entrepreneurs: The Untold Story of Fraud on the Market*, 48 U.C. DAVIS L. REV. 1207, 1211 (2015).

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

6. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

7. *Hilton v. City of Wheeling*, 209 F. 3d 1005 (7th Cir. 2000).

two class of one cases, *Village of Willowbrook v. Olech*,⁸ and *Engquist v. Oregon Department of Agriculture*.⁹ It will then examine each of Judge Posner's class of one opinions, wherein he set forth his own version of the class of one claim. Next it will evaluate the influence of Posner's views on other federal courts. Finally, it will evaluate the persuasiveness of Posner's version of the class of one claim.

II. THE SUPREME COURT'S CLASS OF ONE CASES

A. *VILLAGE OF WILLOWBROOK V. OLECH*

*Village of Willowbrook v. Olech*¹⁰ began as a minor dispute between Grace Olech and the Village of Willowbrook over the width of an easement that the Village required from her as a condition of connecting her home to the public water supply. According to Olech, the village demanded a thirty-three-foot easement from her, but only a fifteen-foot easement from other Village residents.¹¹ Olech filed suit in federal district court, claiming a violation of the Equal Protection Clause, but her case was dismissed for failure to state a claim.¹² On appeal, the Seventh Circuit, in an opinion written by Judge Posner, reversed the district court, since Olech had met the standard established by Seventh Circuit precedent, that a plaintiff must allege "a spiteful effort to 'get' [a person] for reasons wholly unrelated to any legitimate state objective."¹³

The Supreme Court agreed to review the case and affirmed the decision of the Seventh Circuit, but on completely different grounds. In a brief per curiam opinion, the Court announced its class of one standard:

Our 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.¹⁴

The Court concluded that this standard had been met by the allegations in Olech's complaint: that the Village had demanded a larger easement from her than from other similarly-situated village residents and that this treatment was "irrational and wholly arbitrary."¹⁵ Significantly, the Court noted that the allegations in the complaint, "quite apart from the Village's subjective motivation," were sufficient to state a claim and that the Court did not need to reach "the alternative theory of 'subjective ill will' relied on by [the Seventh Circuit]."¹⁶ Justice Breyer, concurring, noted

8. *Vill. of Willowbrook*, 528 U.S. at 562. I have written about this case previously: Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367 (2003). Some of the material in this section is based on that article.

9. See generally *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008).

10. *Vill. of Willowbrook*, 528 U.S. at 562.

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

12. *Id.* at 388.

13. *Id.* at 387 (quoting *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995)).

14. *Vill. of Willowbrook*, 528 U.S. at 564.

15. *Id.* at 565.

16. *Id.*

that the majority opinion had the potential to turn “run-of-the-mill zoning cases into cases of constitutional right.”¹⁷ Breyer, however, citing Posner’s opinion below, suggested that the presence of vindictive action, illegitimate animus, or ill will was sufficient to minimize that concern.¹⁸ The majority ignored Breyer’s warning.

A comparison of the Supreme Court’s *Olech* majority opinion and Judge Posner’s opinion in the Seventh Circuit below reveals the basic outline of the dispute between them. For the Supreme Court, the problem with the Village’s conduct was *irrationality*, that is, the Village treated similarly-situated residents differently, without a good reason. For Posner, the problem was *animus*, that is, the Village treated an individual person badly because of a bare desire to harm that person. These two competing versions of the class of one claim are the crux of this paper.

The Court’s *Olech* opinion, focusing on irrationality, was curious in three ways. First, it was conceptually unconnected with a host of existing Supreme Court precedents. Second, the rule it adopted would create extraordinary practical problems for local government. Third, the Court deliberately ignored the important limiting principle that could have resolved the problems its opinion created—that the class of one claim should be limited to cases that involved vindictive action on the part of a government official.

As to the conceptual problem and the lack of supporting precedent, the Court insisted that “Our cases *have recognized* successful equal protection claims brought by a ‘class of one.’”¹⁹ In making this assertion, the Court purported to put the *Olech* case within the mainstream of equal protection jurisprudence. This claim required an extraordinary reworking of existing Supreme Court precedents, first, straining to identify supporting cases, and then, willfully ignoring a substantial amount of contradictory precedent. As for supporting precedents, the Court cited only two cases, neither of which had used the term “class of one.” The first was an obscure 1923 case that had been rarely cited by the Court,²⁰ and the second being a more recent case that the Court had effectively limited to its facts.²¹ These were the cases that were claimed to provide precedential

17. *Id.* at 566 (Breyer, J., concurring).

18. *Id.*

19. *Id.* at 564 (majority opinion) (emphasis added).

20. *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). In the fifty years immediately preceding *Olech*, the Supreme Court had cited *Sioux City Bridge* in the text of a majority opinion only one time. *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster Cty.*, 488 U.S. 336, 345 (1989) (citing *Sioux City Bridge Co.*, 260 U.S. at 445–46).

21. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345. In *Nordlinger v. Hahn*, 505 U.S. 1, 14–16 (1992), the petitioners argued that the result in *Allegheny Pittsburgh Coal* required invalidation of a very similar property tax assessment scheme in their case. The *Nordlinger* Court rejected the argument, purporting to find “an obvious and critical factual difference,” and concluded that *Allegheny Pittsburgh Coal* “was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme.” *Id.* at 14, 16. The Court’s description of *Allegheny Pittsburgh Coal* effectively limited the case to its “rare” set of facts.

support for the *Olech* opinion.²²

Additionally, the *Olech* Court had to ignore a substantial set of precedents that would have undermined its claim that an equal protection class of one claim had been “recognized” by its previous cases. In almost all of its equal protection decisions, the Court has viewed the Equal Protection Clause as a limit on government classification, that is, a limit on the ability of government to identify a trait that puts people into a class, and then treat that class differently from everyone else.²³ Thus equal protection cases almost always involve a claim that one *group* has been treated differently from a second *group*, and that there is no justification for the difference in treatment.²⁴ The Court has in fact adopted a widely used test to review this kind of governmental action—“[u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.”²⁵

This focus on equal protection as a limitation on governmental classification leaves little room for a focus on individuals who are harmed by an appropriate classification. For example, in *Kimel v. Florida Board of Regents*,²⁶ decided the same year as *Olech*, the Court was concerned with the limits of Congressional power to enforce the Fourteenth Amendment through appropriate legislation as a source of support for the Age Discrimination in Employment Act. In finding that Congress had exceeded its powers, the Court stated:

22. These two cases were “as far removed from the pantheon of influential equal protection cases as one could imagine.” *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007) (quoting Farrell, *supra* note 8, at 394).

23. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam) (“In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State’s classification rationally furthers the purpose identified by the State”); *Nordlinger*, 505 U.S. at 6, 10 (“Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”); *Vance v. Bradley*, 440 U.S. 93, 110–11 (“But this case, as equal protection cases recurrently do, involves a legislative classification contained in a statute. . . . In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker.”); see also *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008) (“Our equal protection jurisprudence has typically been concerned with governmental classifications that affect some groups of citizens differently than others. ‘Equal protection’ . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. [T]he basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. Plaintiffs in such cases generally allege that they have been arbitrarily classified as members of an ‘identifiable group.’”) (citations omitted).

24. *Engquist*, 553 U.S. at 601 (“Our equal protection jurisprudence has typically been concerned with governmental classifications that ‘affect some groups of citizens differently than others.’ “‘Equal protection’ . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable”) (citations omitted).

25. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

26. 528 U.S. 62, 80–90 (2000)

Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant.²⁷

Thus, the constitutionality of age classifications was not to be determined "on a person by person basis."²⁸ Additional Supreme Court precedents confirm this class-based focus of the Equal Protection Clause and its lack of concern for harm to an individual.²⁹

It is clear then that, as long as classification meets the test of reasonableness, any harm the classification does to an individual person is an acceptable byproduct. If it is reasonable to require the class of police officers who reach the age of fifty to retire, on the assumption that physical fitness tends to decline with age, it is not an equal protection concern that an individual police officer, who is over fifty but extremely fit, is forced to retire.³⁰ If a gender classification is substantially related to the adoption of different rules for proving maternity and paternity in relation to acquiring citizenship, it is not an equal protection concern that an individual child, who in fact can prove who his father is, is denied citizenship.³¹ If racial classification is narrowly tailored to achieve diversity in a university setting, it is not an equal protection concern that an individual applicant, who might have been accepted at a university absent an affirmative action program, is denied admission.³² If the Court had taken into account its entire body of equal protection precedents, then the idea underlying *Olech*—that a primary concern of the Equal Protection Clause is the protection of individual persons—is untenable. Yet, the Court's brief opinion in *Olech* ignored all these precedents.

27. *Id.* at 84.

28. *Id.* at 85–86.

29. *See, e.g.,* Weinberger v. Salfi, 422 U.S. 749, 785 (1975) ("There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce."); Parham v. Hughes, 441 U.S. 347, 358 (1979) (plurality opinion) ("This argument misconceives the basic principle of the Equal Protection Clause. The function of that provision of the Constitution is to measure the validity of classifications created by state laws. Since we have concluded that the classification created by the Georgia statute is a rational means for dealing with the problem of proving paternity, it is constitutionally irrelevant that the appellant may be able to prove paternity in another manner.") (citation omitted).

30. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 315 (1976) (upholding age-based discrimination under rational basis review).

31. *See* Nguyen v. INS, 533 U.S. 53, 70–71 (2001) (upholding gender classification under intermediate scrutiny).

32. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (upholding race-based affirmative action program using strict scrutiny). After noting that "[t]o be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups,'" the Court determined that "[w]e are satisfied that the Law School's admissions program does not." *Id.* at 341 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

The second problem with the Court's *Olech* opinion is that it creates extraordinary practical problems for local government—"the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case."³³ These concerns were genuine. The Supreme Court's characterization of the problem as one of irrationality—intentionally different treatment from others similarly situated without a rational basis for the difference in treatment—was without any limiting principle. It therefore appeared to give every individual aggrieved by any government decision his or her day in federal court with a constitutional claim.³⁴ These situations subject to constitutional review would include: (1) decisions made by local authorities in the criminal justice system—to arrest or not arrest, to prosecute or not prosecute, to provide or not provide certain prison conditions;³⁵ (2) land use decisions—to approve or not approve a zoning variance, to approve or not approve an application for a building permit, to enforce or not enforce a building code provision;³⁶ (3) employment decisions—to hire or not hire, to promote or not promote, to raise an employee's salary or not raise it, to impose discipline or not impose it, to terminate an employee or not terminate;³⁷ (4) government contracts—to enter or not enter into a contract with a particular party for trash removal, towing, office supplies, or any other product or service needed by a local government;³⁸ (5) regulation of business—to issue or not issue a license, to renew or not renew a license;³⁹ (6) education—to suspend or not suspend a student, to expel or not expel a student, to impose or not impose disciplinary action on a student;⁴⁰ and (7) government benefits—to grant or not grant housing subsidies, to grant or not grant monetary

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

34. This is not to say that these plaintiffs would all have a *winning* constitutional claim, but they could easily frame one in a complaint that would require the government to defend the case. Had the lower courts not adopted limiting principles to the Supreme Court's *Olech* opinion, many of these claims might have been successful.

35. *E.g.*, *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016) (finding that prisoner's complaint of his treatment by prison authorities stated a class of one equal protection claim).

36. *E.g.*, *Contasti v. City of Solana Beach*, 644 F. App'x 743, 745 (9th Cir. 2016) (finding that plaintiff had stated a viable class of one claim in the land use context regarding the city's treatment of her application for a development permit).

37. *See, e.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 596–98 (2008) (noting, but then reversing, a successful class of one claim by a government employee who had won a jury verdict of \$175,000 in compensatory damages and \$250,000 in punitive damages).

38. *E.g.*, *Renato Pistolessi, Alltow, Inc. v. Calabrese*, 666 F. App'x 55, 58 (2d Cir. 2016) (summary order) (considering but rejecting towing company's class of one claim in that it had been passed over in favor of other towing companies).

39. *E.g.*, *Esmail v. Macrane*, 53 F.3d 176, 178–80 (7th Cir. 1995) (finding that plaintiff stated a class of one claim when city refused to renew his liquor license for spiteful reasons).

40. *E.g.*, *Crowley v. McKinney*, 400 F.3d 965, 972 (7th Cir. 2005) (plaintiff had stated class of one claim in alleging that the school had denied him access to school records and school premises out of vindictiveness).

benefits.⁴¹ By opening the door to all of these claims, the *Olech* Court created a situation where many instances of everyday governing at the local level could now be considered constitutional violations.

The third problem with the Supreme Court's *Olech* opinion was that the Court ignored the important limiting principle suggested by Judge Posner. For Posner, class of one cases made sense only where the challenged governmental act was based on vindictiveness or ill will.⁴² Had this "ill will" limitation attached to the class of one claim, the tens or hundreds of thousands of cases where government treated people differently without a rational reason, without more, would no longer state a viable class of one claim. There was ample support for this animus limitation within existing Supreme Court precedents, if the Court had been willing to look for it.

One clear precedent on point was *Snowden v. Hughes*,⁴³ a Supreme Court case in which the plaintiff alleged that certain officials had violated state law in not certifying him for nomination to the state assembly and, in so doing, had violated his equal protection rights. The Court rejected the claim, explaining that "an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws."⁴⁴ And what is the something more that the Court was looking for? The Court explained: "[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination.*"⁴⁵ This was precisely the kind of limitation that the Court might have applied in *Olech*, but failed to do so.

There are additional Supreme Court precedents in the area of selective prosecution or selective enforcement that also support the "purposeful discrimination" limitation in the closely related class of one claims. Selective prosecution and selective enforcement claims predate the Court's class of one precedents, but they make basically the same claim—that the plaintiff has been singled out by government prosecutors or enforcement agents while others, in similar circumstances, have been allowed to go free. These claims are very hard to win because they call into question the basic discretionary power that has been assigned to the executive branch to enforce the law.⁴⁶ In the few cases where plaintiffs prevailed, the Court

41. *E.g.*, *Garanin v. New York City Hous. Pres. & Dev.*, 673 F. App'x 122, 124 (2d Cir. 2016) (summary order) (considering but rejecting plaintiff's class of one claim where his application for middle income housing had been denied).

42. *See infra* text accompanying notes 68–81, 87–96.

43. 321 U.S. 1, 2–5 (1944), *reh'g denied*, 321 U.S. 804 (1944).

44. *Id.* at 8.

45. *Id.* (emphasis added).

46. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("A selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive. The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws.") (citations omitted).

has focused on improper purpose.

In *United States v. Armstrong*,⁴⁷ the plaintiff complained of his selective prosecution on the basis of race. The Court rejected that claim, stating that “[t]he requirements for a selective-prosecution claim draw on ‘ordinary equal protection standards,’” and that “[t]he claimant must demonstrate that the federal prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’”⁴⁸ Furthermore, in *Wayte v. United States*,⁴⁹ the Supreme Court considered the question of whether a “passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others”⁵⁰ violated the Equal Protection Clause. The Court answered no, since “[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under [the Court’s] prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and *that it was motivated by a discriminatory purpose.*”⁵¹ Surely there was ample support in Supreme Court precedents for the *Olech* Court to have required animus as an essential element of the class of one claim.

With regard to more general equal protection doctrine outside of the class of one area, there is also a substantial set of precedents that government action violates equal protection if it is based on an improper motive. The *Olech* Court ignored these precedents as well. They will be examined carefully in Part IV of this article.

B. *ENGQUIST V. OREGON DEPARTMENT OF AGRICULTURE*⁵²

In the years following *Olech*, the lower federal courts were stuck with a Supreme Court opinion that was, on the one hand, binding on them, but was on the other hand, unworkable.⁵³ *Olech* simply opened up too many avenues to bring a constitutional claim in federal courts. The lower courts responded by interpreting *Olech* to limit its reach as much as possible. They accomplished this by: (1) imposing the improper motivation test;⁵⁴

47. 517 U.S. 456 (1996).

48. *Id.* at 465 (citations omitted).

49. 470 U.S. 598 (1985).

50. *Id.* at 600.

51. *Id.* at 608 (emphasis added) (citations omitted).

52. 553 U.S. 591 (2008). I have written about this case previously: Robert C. Farrell, *The Equal Protection Class of One Claim: Olech, Engquist, and the Supreme Court’s Misadventure*, 61 S.C. L. REV. 107 (2009). Some of the material in this section is based on that article.

53. *See, e.g.*, *Jennings v. Stillwater*, 383 F.3d 1199, 1210–11 (10th Cir. 2004) (“In the wake of *Olech*, the lower courts have struggled to define the contours of class of one cases. All have recognized that, unless carefully circumscribed, the concept of a class of one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors.”).

54. *See, e.g.*, text accompanying notes 68–81, 87–96.

(2) imposing a strict intent standard;⁵⁵ (3) imposing a restrictive interpretation of similarly situated;⁵⁶ or (4) requiring a plaintiff to negate all conceivable justifications for a government's action.⁵⁷ Eight years later, the Supreme Court decided its second class of one claim, *Engquist v. Oregon Department of Agriculture*.

In *Engquist*, a state employee had won her class of one claim in the district court, which found that the denial of a promotion and her subsequent termination were without rational basis, and that these actions had been taken solely for vindictive or malicious reasons.⁵⁸ The Court of Appeals for the Ninth Circuit reversed, on the ground that the class of one claim did not apply to employment decisions by governments.⁵⁹ The Supreme Court affirmed the Ninth Circuit. The Court's narrow holding was that government employment was excepted from the class of one doctrine.⁶⁰ But the more significant portion of the opinion involved its explanation of that decision—that employment decisions commonly involve the exercise of discretion and that, where state action involves discretionary decision-making “based on a vast array of subjective, individualized assessments,” the rule that like should be treated alike cannot be reasonably applied since “treating like individuals differently is an accepted consequence of the discretion granted.”⁶¹

The Court's *Engquist* opinion is an implicit acknowledgment that the *Olech* opinion is flawed. *Olech* had opened a vast new array of constitutional claims that needed to be limited, and the *Engquist* Court did impose a limit on those claims. Unfortunately, the Court chose an inappropriate and ineffective limit. The Court chose to except one particular factual setting—government employment—from the class of one doctrine, but did not address the more basic problems with the doctrine. And lower courts did not view the precedential effect of *Engquist* as limited to government employment decisions. Rather, lower federal courts treated *Engquist* as covering a host of other non-employment discretion-

55. *E.g.*, *Giordano v. City of New York*, 274 F.3d 740, 751 (2d Cir. 2001) (finding that government defendants could not have intended to treat plaintiff differently from a similarly situated person if they don't know about the other person).

56. *E.g.*, *Clubsides, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (“We have held that class of one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves. . . . Accordingly, to succeed on a class of one claim, a plaintiff must establish that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.”) (citations omitted).

57. *E.g.*, *Scherr v. City of Chicago*, 757 F.3d 593, 598 (7th Cir. 2014) (insisting “that a class-of-one plaintiff ‘must, to prevail, negate any reasonably conceivable state of facts that could provide a rational basis for the classification.’”).

58. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 596 (2008).

59. *Id.*

60. *Id.* at 607 (“In concluding that the class of one theory of equal protection has no application in the public employment context—and that is all we decide—we are guided, as in the past, by the ‘common-sense realization that government offices could not function if every employment decision became a constitutional matter.’”).

61. *Id.* at 603.

ary decisions, including government action that involved criminal justice,⁶² land use planning,⁶³ education,⁶⁴ and government contracting.⁶⁵ The Second and Seventh Circuits, however, did eventually impose some limit on this extension of *Engquist*, indicating that the *Engquist* precedent did not extend to *all* kinds of discretionary decisions.⁶⁶

Most importantly, for purposes of this article, the Court never even considered correcting the class of one problem by imposing the ill will standard that Justice Posner had suggested. This was surprising, considering that the trial court in *Engquist* found that the plaintiff had been terminated for vindictive or malicious reasons.⁶⁷ The Court had just rejected the plaintiff's claim against her government employer because the decision to terminate her was embedded in a thick mess of discretionary matters. But the plaintiff had proven that the government had exercised its discretion in bad faith to inflict harm on her intentionally. Shouldn't that animus have outweighed any discretionary exception? The Court did not even treat this question as worthy of consideration.

III. JUDGE POSNER'S CLASS OF ONE OPINIONS

The battle lines were drawn. Was the core of the class of one claim *irrationality*, as held by the Supreme Court, or was it *animus*, as held by Judge Posner? Judge Posner, as a sitting judge on the Seventh Circuit, was in a unique position to shape the class of one claim, both before it reached the Supreme Court, and then afterward. Posner wrote eleven class of one opinions, either for the majority or concurring. This section will examine each of those opinions, in chronological order.

A. *ESMAIL V. MACRANE*

In *Esmail v. Macrane*,⁶⁸ Posner wrote his first class of one opinion, an opinion that predated the Supreme Court's first entry into the subject by five years. In *Esmail*, the plaintiff operated a retail liquor store and was required to renew its license annually.⁶⁹ The mayor, who was also the liquor control commissioner, denied his application for renewal.⁷⁰ Esmail alleged that the reason for the denial was that city officials had a "deep-seated animosity" toward him that was part of the mayor's "campaign of

62. *E.g.*, *United States v. Moore*, 543 F.3d 891, 893 (7th Cir. 2008).

63. *E.g.*, *Nasca v. Town of Brookhaven*, No. 05-CV-122 (JFB)(ETB), 2008 WL 4426906, at *1, *10-14 (E.D.N.Y. Sept. 25, 2008), *aff'd*, 355 F. App'x 475 (2d Cir. 2009).

64. *E.g.*, *Vassallo v. Lando*, 591 F. Supp. 2d 172, 186 (E.D.N.Y. 2008).

65. *E.g.*, *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008).

66. *See Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009) (finding that *Engquist* does not support the argument that malicious police conduct, even though discretionary, is off-limits from class of one claims); *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 142 (2d Cir. 2010) ("We join the Seventh Circuit in holding that *Engquist* does not bar all class of one claims involving discretionary state action.")

67. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 596 (2008).

68. 53 F.3d 176 (7th Cir. 1995).

69. *Id.* at 177.

70. *Id.*

vengeance” against him.⁷¹ The trial judge dismissed the case for failure to state a claim.⁷² On appeal, Judge Posner wrote the opinion that reversed the district court.

Posner conceded that Esmail’s complaint was “an unusual kind of equal protection case,” in that it involved neither the unequal treatment of a vulnerable group nor a challenge to “laws or policies alleged to make irrational distinctions.”⁷³ But “neither in terms nor in interpretation is the [Equal Protection Clause] limited to protecting identifiable groups.”⁷⁴ Esmail’s claim was about an administrative decision by local government officials that adversely affected him alone. Posner determined that he had stated a claim.⁷⁵

Posner distinguished Esmail’s claim from the common situations where government officials fail to enforce laws fully, either as a result of random selection or by concentrating on the most newsworthy lawbreakers.⁷⁶ The result in such cases is that “people who are equally guilty of crimes or other violations receive unequal treatment, with some being punished and others getting off scot-free.”⁷⁷ But such an outcome would be the inevitable result of the inability of any government to enforce all its laws to the fullest extent. Esmail, however, was not complaining about a random or purposive enforcement of a law. He was complaining about “an orchestrated campaign of official harassment directed at him out of sheer malice,”⁷⁸ and for that, Posner said, he “ought to have a remedy in federal court.”⁷⁹ Posner provided support for his conclusion by citing *City of Cleburne v. Cleburne Living Center*,⁸⁰ a case in which the Supreme Court had invalidated application of an ordinance that purposely disadvantaged the intellectually disabled. That challenged action had been determined to be unconstitutional because the government action was designed to achieve an illegitimate end.⁸¹

Esmail, the first of Posner’s class of one opinions, is significant for establishing Posner’s baseline understanding of class of one claims: that the different treatment of similarly situated persons is inevitable in the day to day operation of government and, therefore, unexceptional as a constitutional issue. What mattered were actions taken with an improper, vindictive motivation.

71. *Id.* at 178.

72. *Id.* at 177.

73. *Id.* at 178.

74. *Id.* at 180.

75. *Id.*

76. *Id.* at 178.

77. *Id.*

78. *Id.* at 179.

79. *Id.*

80. 473 U.S. 432 (1985).

81. *Id.* at 450 (“The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”).

B. *INDIANA STATE TEACHERS ASSOCIATION V.
BOARD OF SCHOOL COMMISSIONERS*

In *Indiana State Teachers Association v. Board of School Commissioners*,⁸² there was a dispute between a labor union and the Indianapolis School Board, which had chosen a different union to represent non-teacher employees.⁸³ This was not a case where the government was treating one *person* differently from another similarly situated *person*, but rather it was a case where the government was treating one *organization* (a union) differently from a second *organization* (a second union). Posner, however, was willing to treat the class of one precedents as possibly relevant, but then determined that the plaintiff could not prevail—its claim would prove too much:

The concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts. To decide is to choose, and ordinarily to choose *between*—to choose one suppliant, applicant, petitioner, protester, contractor, or employee over another. Can the loser in the contest automatically appeal to the federal courts on the ground that the decision was arbitrary and an arbitrary decision treats likes as unlike and therefore denies the equal protection of the laws? That would constitutionalize the Administrative Procedure Act *and* make its provisions binding on state and local government and enforceable in the federal courts.⁸⁴

Consistent with his earlier opinion in *Esmail*, Posner explained that even where government is treating similarly situated persons differently, the equal protection clause is brought into play only “as a protection against allowing the government to single out a hapless individual, firm, or other entity for unfavorable treatment.”⁸⁵ There was none of that improper motivation on the part of the school board. It was not irrational for the school to prefer the union that it had been working with for a long time over a completely unfamiliar union.⁸⁶ The class of one claim failed.

Here again, Posner made clear that it was not arbitrary (and thus irrational) conduct that was the basis of a class of one claim, but only government action based on an impermissible motive.

C. *OLECH V. VILLAGE OF WILLOWBROOK*

Olech v. Village of Willowbrook,⁸⁷ which was to become the Supreme Court’s first class of one case, started in the Seventh Circuit, and Posner wrote the opinion for the majority in the case. The trial judge had dismissed the case,⁸⁸ and Posner reversed on the ground that the trial judge

82. 101 F.3d 1179 (7th Cir. 1996).

83. *Id.* at 1180.

84. *Id.* at 1181.

85. *Id.* at 1181–82.

86. *Id.* at 1182.

87. 160 F.3d 386 (7th Cir. 1998).

88. *Id.* at 388.

had construed his earlier *Esmail* opinion too strictly, requiring an “orchestrated campaign of official harassment.”⁸⁹ Posner made clear there was no necessity of orchestration as long as “ill will is the sole cause of the action of which the plaintiff complains.”⁹⁰ Posner conceded that in *Esmail* the plaintiff may have been denied a liquor license while others similarly situated received a license, but “[s]tanding by itself, this difference in treatment would not have been a denial of equal protection, but merely an example of uneven law enforcement, than which nothing is more common nor, in the usual case, constitutionally innocent.”⁹¹

What was important in *Olech* was not uneven enforcement of the law, but a refusal to provide governmental service because of a “baseless hatred”⁹² toward Olech. Olech had alleged in her complaint that the reason the Village had treated her worse than her neighbors was that she had previously won a lawsuit against the Village, and that successful suit generated substantial ill will toward her from Village officials.⁹³ For Posner, this allegation was sufficient to state a class of one claim.

And what about “the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case[]”?⁹⁴ That might certainly be a problem, but Posner suggested that that concern was adequately addressed by the “vindictive action” element of his class of one formula, which “requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.”⁹⁵ This requirement would be a substantial limitation on the number of successful class of one claims. And even if there is some evidence of animus, the government action would not be condemned “[i]f the defendant would have taken the complained-of action anyway.”⁹⁶

The Supreme Court granted certiorari and ultimately affirmed the Seventh Circuit’s *Olech* decision, but on an entirely different ground, quite apart from the “subjective motivation” or “subjective ill will” theories relied upon by Judge Posner. That opinion was discussed in Section I.A.

D. *HILTON V. CITY OF WHEELING*

*Hilton v. City of Wheeling*⁹⁷ was the first Court of Appeals case to interpret and apply the Supreme Court’s *Olech* opinion, being published less than two months after the Supreme Court opinion.⁹⁸ It was probably

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 387.

94. *Id.* at 388.

95. *Id.*

96. *Id.*

97. 209 F.3d 1005 (7th Cir. 2000).

98. The Supreme Court’s *Olech* opinion was published on February 23, 2000. *See generally* Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam). The Seventh Cir-

Posner's most important class of one opinion, since he was the first out of the gate, and thus in a position to frame his class of one analysis as consistent with the Supreme Court precedent. As a matter of court hierarchy, Posner should have been obligated to follow the Supreme Court. His *Hilton* opinion, however largely ignored the Supreme Court's *Olech* opinion and restated his own views as he had previously expressed in *Esmail*, *Indiana State Teachers*, and *Olech*.

Hilton had been involved in a longtime feud with his neighbors and he complained of unequal police protection, claiming that the police had responded to his neighbors' complaints about him but not to his complaints about his neighbors.⁹⁹ As Posner viewed the facts, Hilton had made no attempt to discover *why* he had been treated differently from his neighbors:

For reasons that Hilton has not attempted to discover, the police exercised the broad discretion that custom gives them in enforcing minor public nuisance laws, in favor of the neighbors. For all we know, they did so simply because the neighbors were always in the right and Hilton always in the wrong. But maybe not; maybe the Wheeling police are inept, or have been deceived by the neighbors. It doesn't matter; *what matters is the absence of evidence of an improper motive*.¹⁰⁰

But what about the Supreme Court's opinion which had stated that its decision was *not* based on improper motive? Posner insisted that "[t]he role of motive is left unclear by the Supreme Court's decision"¹⁰¹—for if motive were actually irrelevant, then "federal courts would be drawn deep into the local enforcement of petty state and local laws."¹⁰² For Posner, this could not be, and there had to be a way out of the dilemma. For Posner, there was:

[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.¹⁰³

Posner then cited his own Seventh Circuit *Olech* opinion to demonstrate that "totally illegitimate animus" is a required element of a class of one claim.¹⁰⁴ By citing his own opinion, Posner implied that it had survived the Supreme Court's opinion that had almost certainly suggested other-

cuit's *Hilton* opinion was published on April 20, 2000. See generally *Hilton*, 209 F.3d at 1005.

99. *Id.* at 1006.

100. *Id.* at 1007–08 (emphasis added).

101. *Id.* at 1008.

102. *Id.*

103. *Id.*

104. *Id.*

wise. Since the plaintiff in *Hilton* had presented no evidence of animus, he lost.

Posner's *Hilton* opinion certainly could be described as brave. While he purported to be giving effect to the Supreme Court opinion, his own opinion was surely at odds with it. To be sure, Posner's opinion presented a far more realistic understanding of how local governments work, and it was the far more sensible recognition of the breathtaking vistas of liability that the Supreme Court's opinion would open up. But it also raised a new question: Does the Seventh Circuit have to follow the Supreme Court?

E. *BELL V. DUPERRAULT*

Four years after *Hilton*, the Seventh Circuit decided *Bell v. Duperrault*.¹⁰⁵ *Bell* was a case in which a landowner wanted to build a pier into the water but was denied a building permit since he was unwilling to go through an administrative hearing.¹⁰⁶ *Bell* claimed that other similarly situated landowners had been granted permits without a hearing, and that this different treatment constituted a denial of equal protection.¹⁰⁷ Judge Flaum, writing the majority opinion for the three-judge panel, rejected that claim. Flaum initially focused on the absence of similarly situated homeowners as precluding *Bell*'s claim, but he later also considered and rejected *Bell*'s claim that the permit denial was the result of discriminatory animus toward him.¹⁰⁸ Flaum's opinion thus implied that one could prevail on a class of one claim either by showing different treatment of similarly situated persons or by showing animus.

Judge Posner wrote a separate concurring opinion. He indicated that he was writing "in an effort to clarify the standard (on which the majority opinion is prudently noncommittal) applicable to 'class of one' equal protection cases."¹⁰⁹ Posner noted that in the Supreme Court's *Olech* opinion, Justice Breyer's concurrence had approved the Seventh Circuit's formulation of the class of one claim (requiring animus), but that Breyer's colleagues had not responded.¹¹⁰ Posner then stated: "Their silence requires interpretation."¹¹¹

First, Posner argued that his *Hilton* opinion was consistent with the Supreme Court's language in *Olech*—"irrational and wholly arbitrary." He suggested that the Supreme Court in *Olech* spoke only to what a plaintiff need *allege* ("irrational and wholly arbitrary" treatment), but did not make clear what a plaintiff must *prove*.¹¹² Since the phrase "irrational

105. 367 F.3d 703 (7th Cir. 2004).

106. *Id.* at 705.

107. *Id.* at 706.

108. *Id.* at 707–09.

109. *Id.* at 709 (Posner, J., concurring).

110. *Id.* at 710.

111. *Id.*

112. *See id.* at 711 (citation omitted).

and wholly arbitrary” treatment was not self-defining,¹¹³ Posner was of the view that *Olech* left open the door for interpretation, and that his own resolution of that issue in *Hilton* opinion was not foreclosed. But Posner was forced into an admission of sorts. Having noted that the *Olech* majority had found the allegations that the defendant was acting in an irrational and wholly arbitrary manner were sufficient “quite apart from the [defendant’s] subjective motivation,”¹¹⁴ Posner conceded:

And so the cases on which I am relying may be fighting a doomed rearguard action. May the Court enlighten us; the fact that the post-*Olech* cases are all over the map suggests a need for the Court to step in and clarify its ‘cryptic’ per curiam decision.¹¹⁵

Of course, the Supreme Court has never further enlightened us about the meaning of its cryptic opinion, and Posner’s rearguard action was not in fact doomed.

The heart of Posner’s critique of the *Olech* rule is that different treatment of similarly situated persons is inevitable at the lowest operational level of government, and thus should not give rise to a constitutional claim unless invidiously motivated. When the police pull over one car traveling at sixty-five miles per hour but not another, when one asylum officer turns down an applicant while a second asylum officer grants the application in a similar case, when the IRS audits one taxpayer’s return but does not audit another similarly-situated taxpayer—why should these cases, multiplied by tens or hundreds of thousands, create an equal protection violation, absent improper motivation?

Posner explained the reason that motive is an important limit on the *Olech* standard:

[R]equiring proof of a bad motive brings the class of one cases into harmony with the standard equal protection cases and the purpose behind the equal protection clause. That purpose is to protect the vulnerable These [cited cases] are all cases in which the unequal treatment complained of is either vicious or exploitative (or frequently both), and the fundamental insight of the class of one cases is that vicious or exploitative discrimination can sometimes be found even when the victim does not belong to a group that is a familiar target of such treatment. Indeed, a lone victim picked out for social or economic oppression or extinction can be especially vulnerable.¹¹⁶

Posner noted that standards relying on motive are problematic, since “[m]otive’ tests are not very satisfactory and are therefore sparingly employed in the law. Motives are difficult to discern and often they are irrelevant to the social interests in a case.”¹¹⁷ But having conceded that point, Posner insisted:

113. *Id.*

114. *Id.* (alteration in original) (emphasis omitted).

115. *Id.* at 711–12 (citation omitted).

116. *Id.* at 712 (citations omitted).

117. *Id.* at 713.

I haven't been able to think of a better way of reining in the class of one cases, which have an ominous potential to burst the proper bounds of equal protection law, than to insist that an improper motive by a government official have been the sole cause of the inequality of treatment of which the plaintiff is complaining.¹¹⁸

Judge Posner's concurrence in *Bell* is perhaps his most full-throated defense of the vindictive-motive limitation on class of one claims. It purported to explain how the motive limitation is a plausible interpretation of the Supreme Court's "irrational and wholly arbitrary" standard, and it sought to show the connection between bad motives and the most basic purpose underlying the equal protection clause.

F. *INDIANA LAND CO. v. CITY OF GREENWOOD*

In *Indiana Land Co. v. City of Greenwood*,¹¹⁹ a real estate developer applied for approval of an annexation of certain property and a rezoning of it. The proposal initially was rejected by the City's Plan Commission, but then received majority approval by the City Council of Greenwood.¹²⁰ The proposal failed, however, because it did not satisfy a local rule that such a vote, overturning the recommendation of the Plan Commission, required approval of two-thirds of those voting.¹²¹ The City subsequently amended its two-thirds rule and required only a majority to overrule its Plan Commission, but did not apply this amended rule retroactively to the developer's application.¹²² He filed suit claiming, *inter alia*, that the failure to apply the new majority vote rule to his application was a violation of equal protection.¹²³

Judge Posner, writing for the majority, found no violation of equal protection. Citing his own opinion in *Hilton*, he noted that *Hilton* required a plaintiff to 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."¹²⁴ Posner found that the plaintiff did not satisfy this standard, as the mere failure to apply the new majority standard to plaintiff's case was insufficient to show "ill will or exploitative or otherwise illegitimate motives."¹²⁵ Just to cover his bases, Posner noted that other panels within the Seventh Circuit had adopted a different *Olech* standard—a "showing that the defendant had intentionally treated the plaintiff differently from others similarly situated and had had no rational basis for doing so."¹²⁶ Conceding that there was a tension between this standard and the standard that he had

118. *Id.*

119. 378 F.3d 705 (7th Cir. 2004).

120. *Id.* at 707.

121. *Id.* at 707–08.

122. *Id.* at 708.

123. *Id.* at 707.

124. *Id.* at 712 (quoting *Hilton v. City of Wheeling*, 209 F.3d. 1005, 1008 (7th Cir. 2000)).

125. *Id.*

126. *Id.* at 713.

set forth in *Hilton*, Posner determined that there was no need to resolve the conflict since the city's action satisfied the other standard as well: it was rational not to apply rules retroactively.¹²⁷

Posner's opinion in *Indiana Land* broke no new ground, but it evidenced his continued commitment to the vindictive motivation class of one standard, as well as his awareness that not all of his Seventh Circuit colleagues agreed with him.

G. *TUFFENDSAM V. DEARBORN COUNTY BOARD OF HEALTH*

For Posner, 2004 was a busy class of one year, in that *Tuffendsam v. Dearborn County Board of Health*¹²⁸ was his third class of one opinion of the year. In that case, the plaintiff alleged that the county health board was enforcing its sewage discharge rules more zealously against her than against her neighbors.¹²⁹ Posner once again began his analysis by citing *Olech's* "irrational and wholly arbitrary" language and warned of the "[b]reathtaking vistas of liability" that would be opened up by an unconstrained interpretation of that language.¹³⁰ Thus, he explained, his opinion in *Hilton* limited those vistas by requiring a deliberate act by the defendant seeking to deprive the plaintiff of equal protection "for reasons of a personal nature unrelated to the defendant's position."¹³¹ Since there was no evidence of such ill will presented, that would resolve the case against the plaintiff.¹³²

But, once again, as in *Indiana Land*, Posner seemed to feel it necessary to give some mention to the alternative Seventh Circuit interpretation of *Olech*, one that required a simple showing that "the defendant had intentionally treated the plaintiff differently from others similarly situated and had had no rational basis for doing so."¹³³ This time, Posner tried a different tack, suggesting that "[the] divergent strands in the case law [could], however, be woven together."¹³⁴ The attempted reconciliation of the two views was based on the ambiguity of the word "intentionally." That word, Posner indicated, could at one extreme mean "mere knowledge of likely consequences" or at the other extreme, "a desire for those consequences."¹³⁵ Posner said that, in the class of one context, "intentionally" different treatment should have the second meaning.¹³⁶ Thus, in *Tuffendsam*, the health board "intentionally" treated the plaintiff differently in that it had to know that its pattern of septic tank enforcement was une-

127. *Id.*

128. 385 F.3d 1124 (7th Cir. 2004).

129. *Id.* at 1127.

130. *Id.* (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam)).

131. *Id.* (quoting *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000)) (subsequent citations omitted).

132. *Id.*

133. *Id.* (citing *Ind. Land Co. v. City of Greenwood*, 378 F.3d 705, 713 (7th Cir. 2004)).

134. *Id.*

135. *Id.*

136. *Id.*

ven.¹³⁷ “But [the board] did not ‘intentionally’ treat the plaintiff worse in the sense of wanting her to be worse off than those others.”¹³⁸ By this linguistic legerdemain, Posner appeared to harmonize his *Hilton* opinion with the Supreme Court’s *Olech* opinion—“intentionally different treatment” was interpreted to mean “purposefully worse treatment.” This attempt to weave the two strands together was not entirely persuasive. In *Olech*, the Supreme Court had stated both that: (1) a class of one plaintiff had to prove “intentionally” different treatment, and that (2) such an allegation, “quite apart from the Village’s subjective motivation” were sufficient. This suggests that “intentionally” is not equivalent to wanting someone to be worse off than others. So this attempt at reconciliation of opposing views does not really work. Rather, it seems to show that Posner was still unwilling to admit that he was hemmed in by the Supreme Court’s *Olech* opinion.

H. *CROWLEY V. MCKINNEY*

In *Crowley v. McKinney*,¹³⁹ the plaintiff was the father of a student attending public school. He alleged that the school principal was denying him access to school records and school premises because of the principal’s animosity toward him, arising from the father’s criticism of the school and its management.¹⁴⁰ Importantly, Posner described this alleged animosity as “*the pivot on which Crowley’s [class of one] equal protection claim turn[ed].*”¹⁴¹ As in previous cases, Posner noted that the Seventh Circuit had recognized two standards for proving class of one violations—the “personal animosity” standard from *Hilton*, and the “intentionally different treatment of those similarly situated standard” from other Seventh Circuit precedents.¹⁴² Posner cited his opinion in *Tuffendsam* to show that the ambiguous concept of intentionality could be used to weave the two divergent strands together.¹⁴³

With this blurring of the strands, Posner concluded that the plaintiff had alleged an equal protection violation under either test.¹⁴⁴ Or, more accurately, alleged a prima facie violation, for “animus is not a sufficient condition for a class of one claim to succeed.”¹⁴⁵ Thus, if the defendant “would have acted the same way toward [the plaintiff] had he not disliked him . . . then the concurrence of an improper motive would not condemn the act.”¹⁴⁶ Therefore, the plaintiff’s case ought not to have been dismissed on the pleadings, for his claim was adequately pleaded.

137. *Id.*

138. *Id.* See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam).

139. 400 F.3d 965 (7th Cir. 2005).

140. *Id.* at 972.

141. *Id.* (emphasis added).

142. *Id.*

143. *Id.* (citing *Tuffendsam v. Dearborn Cty. Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004)).

144. *Id.*

145. *Id.*

146. *Id.*

I. *LAUTH V. MCCOLLUM*

In *Lauth v. McCollum*,¹⁴⁷ the plaintiff was a police officer who had been suspended for failure to follow standard operating procedures and statutory requirements during the investigation of a missing child.¹⁴⁸ The plaintiff claimed that his suspension was the result of animosity toward him by the police chief and the Village Board of Police Commissioners because he had been instrumental in getting the Village police force unionized.¹⁴⁹ This case predated the Supreme Court's *Engquist* decision by three years, so Posner could not dismiss the case on the ground that it involved government employment. Still, Posner was not sympathetic, and noted that "[t]here [wa]s clearly something wrong with a suit of this character coming into federal court dressed as a constitutional case."¹⁵⁰ Posner explained the problem as follows:

These are cases in which the plaintiff does not claim to be a member of a class that the defendant discriminates against, but argues only that he is being treated arbitrarily worse than someone or ones identically situated to him. If that is the law and any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened. Complete equality in enforcement is impossible to achieve; nor can personal motives be purged from all official action, especially in the frequently tense setting of labor relations.¹⁵¹

In contrast to these endless vistas of liability based on a mere showing of arbitrariness, Posner suggested that the "paradigmatic" class of one claim was one in which "a public official, with no conceivable basis for his action other than spite or some other improper motive . . . comes down hard on a hapless private citizen."¹⁵²

Posner noted that courts were "still struggling to circumscribe this amorphous cause of action."¹⁵³ He then went on to identify a second way to reconcile the Seventh Circuit's two lines of cases. While he had previously focused on the ambiguous meaning of the word "intentionally,"¹⁵⁴ in *Lauth* he focused on the deferential version of the equal protection rational basis standard, which required a plaintiff to "negative any reasonably conceivable state of facts that could provide a rational basis for the classification."¹⁵⁵ This is a standard that, if literally applied, is impossible to meet. The Supreme Court has quite clearly not applied it consist-

147. 424 F.3d 631 (7th Cir. 2005).

148. *Id.* at 631.

149. *Id.* at 631–32.

150. *Id.* at 632.

151. *Id.* at 633.

152. *Id.*

153. *Id.* at 634.

154. *See supra* text accompanying notes 133–138.

155. *Lauth*, 424 F.3d at 634.

ently in rational basis cases.¹⁵⁶ But for Posner, this standard would demonstrate that the irrationality and animus tests are not irreconcilable: “Animus thus comes into play only when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it.”¹⁵⁷ It should be noted that this requirement that a plaintiff negate all conceivable justifications for the defendant’s conduct does not appear in Posner’s early class of one cases. In *Olech*, for example, Posner explained that “the ‘vindictive action’ class of equal protection cases [simply] requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.”¹⁵⁸ Posner’s newer version of the test would make it far harder for class of one plaintiffs to prevail, even where they suffered precisely because of the illegitimate animus of the defendant, since those plaintiffs might not be able to negate all conceivable justifications for the defendant’s conduct.

The plaintiff in *Lauth* had alleged animus on the part of the police chief as the reason for his suspension, but he had clearly not negated any conceivable state of facts that would explain his treatment. Thus, Posner affirmed the trial court’s grant of summary judgment for the defendant. Posner made no mention of the fact that his newest standard, requiring the plaintiff to negate any conceivable state of facts before animus comes into play, was a more demanding standard than the one he had announced in *Hilton*. If it was taken literally, plaintiffs would never meet this impossible burden and the animus-based class of one claim would be doomed. But Posner did not consistently adhere to this more demanding standard, as can be seen in the next case.

J. *DEL MARCELLE v. BROWN COUNTY CORP.*

*Del Marcelle v. Brown County Corp.*¹⁵⁹ was supposed to be a high stakes summit at which all the judges of the Seventh Circuit, sitting en banc, would finally resolve the intra-circuit conflict on the essential elements of the class of one claim. The summit failed. The en banc opinion, in fact, turned out to be a muddle, with no majority opinion and three competing versions of the class of one claim. In failing to resolve the conflicts, the court instead shone a bright light on the disagreements between judges in the Seventh Circuit and the inability of those judges to bridge the gap that separated them.

The *Del Marcelle* case had been brought in the district court by a plaintiff who alleged that the police had failed to respond to his complaint

156. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 415 (1999).

157. *Lauth*, 424 F.3d at 634.

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

159. 680 F.3d 887 (7th Cir. 2012) (en banc).

about gangs that were harassing him and his wife.¹⁶⁰ The district court dismissed the complaint.¹⁶¹ An appeal was initially taken to a three-judge panel, which prepared a draft opinion and circulated it to the full court.¹⁶² The full court decided to hear the case en banc, “hop[ing] that the judges might be able to agree on an improved standard” for class of one cases.¹⁶³ The judges were not able to agree. The en banc court produced three opinions, none commanding a majority of judges. Posner wrote the lead opinion, affirming the district court’s dismissal, but was joined by only three judges.¹⁶⁴ Judge Easterbrook concurred in the judgment, but not in Posner’s opinion, thus providing a fifth vote for affirmance.¹⁶⁵ Five judges dissented and would have reversed the district court.¹⁶⁶ Since reversal requires a majority, the five to five vote left the district court opinion in place.¹⁶⁷

Posner’s opinion is a lengthy exposition of the class of one problem. Looking back at the Supreme Court’s *Olech* opinion, he noted that, although the Court used the term “irrational and wholly arbitrary” to describe the prohibited conduct, it left those “key words . . . undefined.”¹⁶⁸ Posner also focused on Justice Breyer’s concurring opinion, which would have required “subjective ill will” as an element of a class of one claim as a means of cabining the unlimited vistas of liability, had “[t]he majority [not] ignored his concurrence.”¹⁶⁹ Posner thought this was a mistake— “[w]e have difficulty understanding why.”¹⁷⁰ Had the Court made ill will a factor in class of one claims, then it would have “launched modern class of one claim equal protection litigation on calmer waters.”¹⁷¹

Posner then candidly admitted that lower-court judges could not accept the Supreme Court’s *Olech* opinion at face value.¹⁷² For Posner, the problem had always been that when local government officials are making thousands of decisions on a daily basis, the effect of these decisions is that some persons are benefited and some are harmed. In this situation, it is inevitable that similarly-situated persons will be treated differently. For Posner, “[t]he challenge is to find amidst the welter of trivial ‘irrationalities’ in discretionary actions by frontline public employees acts of discrimination of a character to warrant classification as denials of equal

160. *Id.* at 888 (Posner, J.).

161. *Id.*

162. *Id.* at 888–89.

163. *Id.* at 889.

164. *Id.* at 888.

165. *Id.* at 900 (Easterbrook, J., concurring).

166. *Id.* at 905 (Wood, J., dissenting).

167. *Id.* at 889 (Posner, J.) (noting that the result of an appellate court’s tie vote is affirmance).

168. *Id.* at 890 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam)).

169. *Id.* at 891 (citing *Vill. of Willowbrook*, 528 U.S. at 566 (Breyer, J., concurring)).

170. *Id.*

171. *Id.*

172. *Id.* (“[L]ike Justice Breyer, lower-court judges did not believe that class of one litigation could be kept from exploding without some limiting principles, but they (we) couldn’t and still can’t agree on what those principles should be.”).

protection.”¹⁷³ The fact that some government decisions are random does not make them irrational. “Randomization can be a proper and indeed indispensable tool of government, given limited governmental resources.”¹⁷⁴ In these situations, “[m]ore is needed” in order to make out a constitutional claim.¹⁷⁵ And for Posner, “the more should relate to the public officer’s motivations, subjective though they are.”¹⁷⁶ “The plaintiff must plead and prove *both* the absence of a rational basis for the defendant’s action *and* some improper personal motive (which need not be hostility, but could be, for example, corruption) for the differential treatment.”¹⁷⁷

Thus, Posner’s opinion makes quite clear that, because of the open-ended government liability under the Supreme Court’s *Olech* standard, a limiting principle is required. That limiting principle is the presence of improper motivation. Only three of ten judges on the Seventh Circuit joined Posner. Judge Easterbrook, writing for himself, insisted that, in class of one suits, “motive or intent . . . has no role at all.”¹⁷⁸

Judge Wood, joined by four judges, was of the view that the plaintiff in a class of one claim would have to prove the following elements: “(1) plaintiff was the victim of intentional discrimination, (2) at the hands of a state actor, (3) the state actor lacked a rational basis for so singling out the plaintiff, and (4) the plaintiff has been injured by the intentionally discriminatory treatment.”¹⁷⁹ Judge Wood’s description of the elements of a class of one claim makes no mention of improper motivation. She did, however, make a concession in that direction as follows. Although proof of illegitimate motive is not a primary element of the class of one claim, it could be relevant as “illustrative of the kind of facts on which a plaintiff might rely in a complaint to show that the lack of a rational basis is not merely possible, but plausible.”¹⁸⁰

In the end, the Seventh Circuit’s *Del Marcelle* opinion, which was supposed to introduce clarity into the class of one standard, instead left the matter as confused as ever. The case was not an outright victory for Posner in that only three other judges agreed with his opinion that animus is the essence of the class of one claim. But the case was still something of a validation for Posner, in that nine out of ten circuit judges were of the view that evidence of illegitimate motive was at least relevant in proving a class of one claim. This is a surprising result in relation to the Supreme Court’s *Olech* opinion, which had made clear that subjective ill will was not a required element of the class of one claim. Posner had changed the conversation and pushed it into the direction he favored.

173. *Id.* at 894.

174. *Id.* at 895.

175. *Id.* at 899.

176. *Id.*

177. *Id.*

178. *Id.* at 900 (Easterbrook, J., concurring).

179. *Id.* at 913 (Wood, J., dissenting).

180. *Id.*

K. *SCHERR V. CITY OF CHICAGO*

In *Scherr v. City of Chicago*,¹⁸¹ the plaintiff complained of improper police conduct that had adversely affected her. The trial judge rejected her class of one claim. Although the plaintiff did not pursue it on appeal, Posner was still willing to comment on the claim.¹⁸² He began, citing *Del Marcelle*, by noting that “[t]he limits of the [class of one] doctrine are unclear.”¹⁸³ He then went on to cite his own *Hilton* opinion from 2000, in which he had insisted that a necessary element of the class of one claim was that the defendant sought to deprive the plaintiff of equal protection “for reasons of a personal nature unrelated to the duties of the defendant’s position.”¹⁸⁴ Under that standard, Posner suggested that the plaintiff may have stated a valid claim based on the defendant’s animus toward the plaintiff.¹⁸⁵ But Posner then went on to cite his later opinion in *Lauth v. McCollum*, a case in which animus played a lesser role.¹⁸⁶ Posner stated that animus “comes into play only when, *no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff*, the action would be inexplicable unless animus had motivated it,”¹⁸⁷ and that a class of one plaintiff must, to prevail, “negative any reasonably conceivable state of facts that could provide a *rational basis* for the classification.”¹⁸⁸ In *Scherr*, there was a rational basis for the defendant’s action—probable cause for issue of a search warrant—and thus the plaintiff’s class of one claim failed.¹⁸⁹

Scherr is a good example of a case where the defendant has in fact acted with animus, but would have acted, absent animus, in the same way and had rational basis for that action. In such a case, animus alone is insufficient to state a class of one claim. It also seems to be the case in both *Scherr* and *Lauth* that Posner is willing to give more weight to irrationality as a relevant factor in class of one claims, although animus is still for him a primary focus.

IV. THE INFLUENCE OF JUDGE POSNER’S CLASS OF ONE VIEWS

To what extent have Judge Posner’s strongly articulated views on the class of one claim influenced other courts, both within and without the Seventh Circuit? It must initially be conceded that one cannot *prove* Posner’s influence on other courts, except in those cases where there is a direct citation to a Posner class of one opinion. The eleven Posner opin-

181. 757 F.3d 593 (7th Cir. 2014).

182. *Id.* at 598 (dictum).

183. *Id.*

184. *Id.* (quoting *Hilton v. City of Wheeler*, 209 F.3d 1005, 1008 (7th Cir. 2000)).

185. *Id.* (dictum).

186. *Id.*

187. *Id.* (emphasis in original).

188. *Id.* (quoting *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005)).

189. *Id.* (plaintiff’s class of one claim was abandoned on appeal).

ions discussed in this article have been cited by 1,219 other courts,¹⁹⁰ and that number itself suggests a substantial influence. But where other courts have adopted an animus requirement for class of one claims, without citing Posner, it is likely that the judges writing those opinions were influenced by Posner, who was both the earliest and strongest advocate of animus as an essential element of the class of one claim. This section suggests that Posner's class of one viewpoint, voiced early and strongly, almost certainly influenced the debate, and that the proper measure of that influence is the extent that other courts subsequently adopted the view he argued for.

A. WITHIN THE SEVENTH CIRCUIT

In addition to the nine class of one cases in which Posner wrote the majority opinion, four other Seventh Circuit cases decided after *Hilton* adopted Posner's view of class of one claims as requiring evidence of ill will, hostility, vindictiveness, or animus.¹⁹¹ To be sure, not all of the Seventh Circuit panels insisted on showing animus. In *Nevel v. Village of Schaumburg*,¹⁹² for example, a panel of the Seventh Circuit suggested that a plaintiff had two options to prove a class of one claim.¹⁹³ One of those options, following Posner, was to prove illegitimate animus.¹⁹⁴ The other option tracked the language of the Supreme Court's *Olech* opinion much more closely: the plaintiffs could prevail if they could show that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."¹⁹⁵ One could view the *Nevel* standard as giving equal weight to the Supreme Court and to Judge Posner. While the earlier cases had exalted Posner over the Supreme Court, the *Nevel* panel treated him merely as an equal to the Supreme Court.

Other Seventh Circuit panels followed *Nevel*, finding that a class of one claim could be stated *either* by alleging improper animus *or* by alleging

190. A Westlaw search on Feb. 28, 2018, showed the following number of case citations to Posner's class of one opinions. See *Scherr v. City of Chicago*, 757 F.3d 593 (7th Cir. 2014) (13 citations); *Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (141 citations); *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005) (155 citations); *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005) (51 citations); *Tuffendsam v. Dearborn Cty. Bd. of Health*, 385 F.3d 1124 (7th Cir. 2004) (36 citations); *Indiana Land Co. v. City of Greenwood*, 378 F.3d 705 (7th Cir. 2004) (52 citations); *Bell v. Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004) (129 citations); *Hilton v. City of Wheeler*, 209 F.3d 1005 (7th Cir. 2000) (197 citations); *Olech v. Vill. of Willowbrook*, 160 F.3d 386 (7th Cir. 1998) (89 citations); *Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs*, 101 F.3d 1179 (7th Cir. 1996) (48 citations); *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995) (308 citations). This adds to a total of 1,219 citations.

191. See *Fenje v. Feld*, 398 F.3d 620, 628 (7th Cir. 2005); *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 283 (7th Cir. 2003); *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002); *Cruz v. Town of Cicero*, 275 F.3d 579, 587 (7th Cir. 2001).

192. 297 F.3d 673 (7th Cir. 2002).

193. *Id.* at 681 (citing *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001)).

194. *Id.* (citing *Albiero*, 246 F.3d at 932).

195. *Id.* (quoting *Albiero*, 246 F.3d at 932).

intentionally different treatment of similarly situated persons without any rational basis for doing so.¹⁹⁶ Although these cases do not adopt Posner's view that animus is an *essential* element of the class of one claim, they show his influence in that proving animus is one of the ways a class of one claim can succeed. And Posner's influence can also be seen in the Circuit's en banc decision in *Del Marcelle*.¹⁹⁷ Although Posner's understanding that improper motivation is an essential element of the class of one claim was supported by only three other judges, five additional judges affirmed that evidence of improper motivation was relevant to proving a class of one claim.¹⁹⁸ And all this after the Supreme Court in *Olech* had stated that animus is not a necessary element of the class of one claim.

B. IN OTHER CIRCUITS

In other circuits, there is considerable support for Judge Posner's version of the class of one claim. Panels from the First, Fifth, Ninth, Tenth, and Eleventh Circuits have all issued opinions stating that something in the nature of ill will or vindictiveness is an essential element of a class of one claim. In *SBT Holdings, LLC v. Town of Westminster*,¹⁹⁹ a panel of the First Circuit stated that "[T]o establish its claim . . . [a plaintiff must] allege facts indicating that, 'compared with others similarly situated, [it] was selectively treated . . . based on impermissible considerations such as . . . malicious or bad faith intent to injure a person.'"²⁰⁰ In *Shipp v. McMahon*,²⁰¹ a panel of the Fifth Circuit cited *Hilton* favorably and noted that that court had found that "an improper motive is critical and opined that its absence will defeat an Equal Protection challenge to unequal police protection."²⁰² In *Lazy Y Ranch Ltd. v. Behrens*,²⁰³ a panel of the Ninth Circuit, explaining the nature of the class of one claim, stated that in such a case, the plaintiff "does not allege that the defendants discriminate against a group with whom she shares characteristics, but rather that the defendants simply harbor *animus* against her in particular and therefore treated her arbitrarily."²⁰⁴ In *Mimics Inc. v. Village of Angel Fire*,²⁰⁵ a panel of the Tenth Circuit stated that to succeed as a class of one claim,

196. See *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1002 (7th Cir. 2006); *Lunini v. Grayeb*, 395 F.3d 761, 768 (7th Cir. 2005); *Levenstein v. Salafsky*, 414 F.3d 767, 775–76 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004); *Albiero*, 246 F.3d at 932.

197. See *supra* text accompanying notes 157–177.

198. See *supra* text accompanying notes 157–177.

199. 547 F.3d 28 (1st Cir. 2008).

200. *Id.* at 34 (second and third alterations in original) (emphasis omitted) (quoting *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001)).

201. 234 F.3d 907 (5th Cir. 2000), *overruled on other grounds by* *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002).

202. *Shipp*, 234 F.3d at 916 (citing *Hilton v. City of Wheeler*, 209 F.3d 1005, 1008 (7th Cir. 2000)).

203. 546 F.3d 580 (9th Cir. 2008).

204. *Id.* at 592 (emphasis added and omitted).

205. 394 F.3d 836 (10th Cir. 2005).

the plaintiffs “must prove that they were ‘singled out for persecution due to some animosity,’ meaning that the actions of [the defendant] were a ‘spiteful effort to “get” [the plaintiffs] for reasons wholly unrelated to any legitimate state activity.’”²⁰⁶ In *Williams v. Pryor*,²⁰⁷ a panel of the Eleventh Circuit described the holding of the Supreme Court’s *Olech* opinion as follows: “[the] plaintiff stated [a] constitutional Equal Protection Clause cause of action by alleging that village acted irrationally, wholly arbitrarily, and *out of malice* toward [the] plaintiff.”²⁰⁸ There is some authority to the contrary in these circuits.²⁰⁹

In two circuits (Second and Sixth), there is authority that, although animus is not an essential element of a class of one claim, it is one of the methods of proving such a case. In the Second Circuit, while there is some confusion and inconsistent authority, there is at least some support for the view that proof of animus is one of the methods that can be used. In *DeMuria v. Hawkes*,²¹⁰ a panel of the Second Circuit, interpreting *Olech*, stated that “the allegation of an impermissible motive and of animus is sufficient to establish an equal protection issue.”²¹¹ The *DeMuria* court then cited *Harlen Associates Inc. v. Village of Mineola*,²¹² an earlier Second Circuit precedent, as “holding that a plaintiff must show either lack of rational basis or animus under *Olech*.”²¹³ A panel of the Sixth Circuit, in *Warren v. City of Athens*,²¹⁴ stated that “A ‘class of one’ plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by ‘negativ[ing] every conceivable basis which might support’ the government action or by demonstrating that the challenged government action was motivated by animus or ill-will.”²¹⁵

On the other hand, other circuits have rejected Posner’s focus on animus, either by specifically rejecting animus as a requirement— “[a]lthough [the plaintiff] must show that the [defendant’s] decision was

206. *Id.* at 849 (quoting *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1149 (10th Cir. 2001)).

207. 240 F.3d 944 (11th Cir. 2001).

208. *Id.* at 951 (emphasis added) (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam)).

209. *See, e.g.*, *Gerhart v. Lake County*, 637 F.3d 1013, 1022 (9th Cir. 2011); *Cordi-Allen v. Conlon*, 494 F.3d 245, 250 n.3 (1st Cir. 2007); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 n.3 (5th Cir. 2007); *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1210 (10th Cir. 2006); *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007).

210. 328 F.3d 704 (2d Cir. 2003).

211. *Id.* at 707.

212. 273 F.3d 494 (2d Cir. 2001).

213. *Id.* at 500. *But see* *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 140 (2d Cir. 2010) (“We have held that to succeed on a class of one claim, a plaintiff must establish that: (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.”) (citation omitted).

214. 411 F.3d 697 (6th Cir. 2005).

215. *Id.* at 711 (alterations in original) (quoting *Klimik v. Kent Cty. Sheriff’s Dep’t*, 91 F. App’x 396, 400 (6th Cir. 2004)).

intentional, he need not show that the Commissioners were motivated by subjective ill will;²¹⁶ or by simply repeating the *Olech* formula—where plaintiff must allege that “she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,”²¹⁷ and thus by implication omitting any animus requirement.

In sum, while there is disagreement within the circuits as to the meaning of *Olech*, Judge Posner’s view that animus is either required or relevant has support in eight circuits. In view of the fact that the Supreme Court in *Olech* ignored animus, this is a significant influence.

V. WHO WAS RIGHT?

In addition to the question of who had more influence—the Supreme Court or Judge Posner—there is a second, related question—who was right? Should the class of one claim be based on *irrationality* or *animus*? If that question were to be answered, first, on the basis of equal protection precedents, or second, on the basis of pragmatism rather than judicial hierarchy, then the answer would be clear: Judge Posner is right and the United States Supreme Court is wrong.

As a matter of precedent, a focus on animus is consistent both with the purpose behind the Equal Protection Clause and many of the Court’s precedents interpreting it. In one of its first cases interpreting the recently adopted Equal Protection Clause, the Supreme Court made clear that the “one pervading purpose” of that clause was the protection of newly freed slaves from oppression by those who had formerly exercised control over them.²¹⁸ Judge Posner’s updated version of that assertion is that the purpose behind the Equal Protection Clause is “to protect the vulnerable.”²¹⁹ When animus is a required element of the class of one claim, then courts are able to focus on “vicious or exploitative” treatment of an individual—“[i]ndeed a lone victim picked out for social or economic oppression or extinction can be especially vulnerable.”²²⁰

The general standard for rational basis review is that a classification needs to be rationally related to a permissible purpose.²²¹ In theory, this standard can be violated either by a showing of irrationality—the classification is not rationally related to a permissible purpose²²²—or by a showing of animus—the classification is designed to achieve an impermissible

216. *Gerhart v. Lake County*, 637 F.3d 1013, 1022 (9th Cir. 2011).

217. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)).

218. *See Strauder v. West Virginia*, 100 U.S. 303, 307 (1879).

219. *Bell v. Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004).

220. *Id.*

221. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

222. *E.g., Williams v. Vermont*, 472 U.S. 14, 24 (1985) (regarding the purpose of having those who use the roads pay for them, “[t]he distinction between [resident and nonresident] bears no relation to the statutory purpose.”).

purpose, such as desire to harm a particular group.²²³ While the Supreme Court very occasionally invalidates classifications on the grounds of irrationality, in recent years most successful rational basis claims that succeed do so because the Court finds animus.

Probably the four most famous of these heightened rationality cases are *United States Department of Agriculture v. Moreno*,²²⁴ *City of Cleburne v. Cleburne Living Center*,²²⁵ *Romer v. Evan*,²²⁶ and *United States v. Windsor*.²²⁷ In all of these cases, the Court invalidated government action because it was based on improper animus. In *Moreno*, a food stamp case, the Court held that a mere desire to harm a politically unpopular group was not a permissible government interest.²²⁸ In *Cleburne*, the Court invalidated a local land use decision because it was motivated by an “irrational prejudice against the mentally retarded.”²²⁹ In *Romer*, the Court invalidated a state constitutional provision because it was “inexplicable by anything but animus toward the class it affects”²³⁰ and because it raised “the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”²³¹ In *Windsor*, the Court invalidated the federal Defense of Marriage Act because “[t]he avowed purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and so a stigma upon all who enter[ed] into same-sex marriages.”²³² Thus, a focus on improper motivation has long been one of the tools in the equal protection toolbox, and would have been an appropriate limiting principle for the Supreme Court to have used in the class of one area.

In the spring of 2018, the Supreme Court decided two First Amendment cases²³³ that demonstrated both the strength of the animus argument as well as its limitations. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,²³⁴ the Court upheld the First Amendment claim of a baker who was unwilling to bake a wedding cake for a same-sex couple, because of his religious opposition to same-sex marriage. The Court could have treated the case as the starting point of a discussion that balanced the baker’s freedom of religion claim against the weight of the state’s interest in prohibiting discrimination on the basis of sexual orientation. Instead, the Court decided the case on the much narrower ground of ani-

223. *E.g.*, *Moreno*, 413 U.S. at 534 (“[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

224. 413 U.S. 528 (1973).

225. 473 U.S. 432 (1985).

226. 517 U.S. 620 (1996).

227. 570 U.S. 744 (2013).

228. *Moreno*, 413 U.S. at 534.

229. *Cleburne*, 473 U.S. at 450.

230. *Romer*, 517 U.S. at 632.

231. *Id.* at 634.

232. *Windsor*, 570 U.S. at 770.

233. *See generally* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

234. 138 S. Ct. 1719 (2018).

mus or hostility to religion.²³⁵

It turned out to be important to the Court that, when the Colorado Civil Rights Commission was considering the discrimination claim against the baker, one of the commissioners stated that there were “hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use—to use their religion to hurt others.”²³⁶ The Court said of this statement that “[t]o describe a man’s faith as ‘one of the most despicable pieces of rhetoric that a man can use’ is to disparage his religion,”²³⁷ and this conduct “violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or a religious viewpoint.”²³⁸

The *Cakeshop* opinion appeared to be a full-throated validation of the importance of animus in constitutional adjudication, suggesting that evidence of animus or hostility outweighs all other considerations. The Court, for example, gave no weight to the fact that the Commission had a very plausible and defensible reason for its decision—giving effect to the Colorado’s state anti-discrimination law. Nor did the Court seem to consider that the Commissioner’s claim had a factual underpinning, that is, religion has in fact been used to justify discrimination, even in arguments made in cases that reached the Supreme Court.²³⁹ Had the *Cakeshop* opinion been the Court’s final pronouncement on the subject, then one could say that evidence of animus is likely to carry the day in a constitutional argument.

Just three weeks later, however, in *Trump v. Hawaii*,²⁴⁰ the Court was faced with a case in which there was substantial evidence of animus, but the Court chose to treat that evidence as irrelevant. The case involved, *inter alia*, a First Amendment challenge to President Trump’s proclamation that imposed entry restrictions on immigrants from certain predominantly Muslim countries.²⁴¹ The plaintiffs alleged that the primary purpose of the proclamation was religious animus, and that the national security concerns used to justify it were mere pretext.²⁴² Justice Sotomayor, in her dissenting opinion, noted that there was substantial evidence that anti-Muslim animus was in fact the basis for the proclama-

235. *Id.* at 1731–32.

236. *Id.* at 1729.

237. *Id.*

238. *Id.* at 1731.

239. *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”) (statement of trial judge); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”) (justifying the exclusion of women from the practice of law).

240. 138 S. Ct. 2392 (2018).

241. *Id.* at 2403.

242. *Id.* at 2417.

tion.²⁴³ The majority, however, adopting a rational basis standard in this First Amendment case,²⁴⁴ stated that it would uphold the policy if it was “plausibly related to the Government’s stated objective to protect the country and improve vetting processes.”²⁴⁵ Applying this standard very generously, the Court stated that “because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”²⁴⁶ The Court effectively stated that, when there is a plausible justification for government action, it will not look behind that action for evidence of animus. But, of course, that was not the standard the Court adopted in its *Cakeshop* opinion.

Even after *Trump v. Hawaii*, there is still substantial support in Supreme Court precedent for the relevance of animus in constitutional adjudication, but it must be admitted that those precedents are not followed consistently. And there is also increasing focus on animus in the scholarly literature of rational-basis review, outside of the class of one context. Susannah W. Pollvogt, in *Unconstitutional Animus*,²⁴⁷ identifies “animus” as constituting the most coherent explanation of what is not a permissible purpose under the Equal Protection Clause. She says:

[A]nimus, including hostility toward a particular social group, is never a valid basis for legislation or other state action²⁴⁸ So while the Court has discerned the presence of unconstitutional animus on only a few occasions, when animus is found, it functions as a doctrinal silver bullet²⁴⁹ . . . [D]emonstrating that a law is based on unconstitutional animus is virtually the only way a plaintiff is successful under deferential rational basis review.²⁵⁰

Dale Carpenter, in *Windsor Products: Equal Protection from Animus*,²⁵¹ argues that “the concept of animus has emerged from equal protection doctrine as an “independent constitutional force.”²⁵² He states:

[C]onsider the simple idea that it is wrong for one person to treat another person malevolently. This sentiment so suffuses our moral

243. *Id.* at 2438–39 (Sotomayor, J., dissenting) (“Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that ‘Islam hates us,’ warned that ‘[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country,’ promised to enact a ‘total and complete shutdown of Muslims entering the United States,’ . . . and instructed one of his advisers to find a ‘lega[l]’ way to enact a Muslim ban. The President continued to make similar statements well after his inauguration, as detailed above.”) (footnote omitted) (citations omitted).

244. *Id.* at 2420 (majority opinion).

245. *Id.*

246. *Id.* at 2421.

247. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012).

248. *Id.* at 888.

249. *Id.* at 889.

250. *Id.* at 892.

251. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 *SUP. CT. REV.* 183 (2014).

252. *Id.*

and legal tradition that hardly anyone would deny it. “Of course it is our moral heritage that one should not hate any human being or class of human beings,” wrote Justice Antonin Scalia in his dissent in *Romer v Evans*. Animus doctrine constitutionalizes this basic precept. It asserts that just as *individuals* have a moral and sometimes legal duty not to act maliciously toward others, the *group* of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people.²⁵³

Andrew Koppelman, in *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”*²⁵⁴ explains that the constitutional problem with DOMA was that “a group [was] deliberately singled out for broad harm for the sake of an insignificant benefit. Singled out: this is not a matter of unintended impact.”²⁵⁵ “DOMA’s purpose was to convey a message of disdain for gay couples, with extreme indifference to the human costs.”²⁵⁶ The “singling out” that Koppelman describes is exactly what Posner is focusing on when he identifies animus as the essential element in the class of one claim.

William Araiza has recently published a book-length treatment on the subject, *Animus, A Short Introduction to Bias in the Law*,²⁵⁷ in which he asserts that “[a]nimus matters more than ever today.”²⁵⁸ Araiza has also focused on animus specifically in the class of one context. In *Irrationality and Animus in Class-of-One Equal Protection Cases*,²⁵⁹ argues that “direct evidence of animus [is] a necessary and appropriate part of the plaintiff’s [class of one] case.”²⁶⁰ Reviewing the *Moreno, Cleburne, Romer* line of cases, Araiza notes that “animus . . . constitutes one of the core prohibitions of the Equal Protection Clause.”²⁶¹ Although animus and irrationality are generally considered to be alternative methods for proving equal protection violations, the irrationality standard tends to not work at all in the class of one context, since there are typically “a nearly limitless number of hypothetical justifications for the challenged decision and a large number of potentially relevant factual bases.”²⁶² As a result, “it becomes nearly impossible for a court not to be able to find a hypo-

253. *Id.* at 185, 185 n.6 (footnotes omitted) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 157 (Harvard, 1980) (“To disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively.”)).

254. Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”* 64 *CASE W. RES. L. REV.* 1045 (2014).

255. *Id.* at 1068.

256. *Id.* at 1069.

257. WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017).

258. *Id.* at 3.

259. William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 4 *ECOLOGY L.Q.* 493 (2007).

260. *Id.* at 501.

261. *Id.* at 502.

262. *Id.* at 507.

thetical justification supported by at least some rationally findable facts.”²⁶³ In this situation, then, direct proof of animus is the only workable alternative.²⁶⁴

Darien Shanske adopts the opposing view in *Engquist and the Erosion of the Equal Protection Clause: An Attempt to Stop the Creep of Irrational Dicta*.²⁶⁵ In that article he rejects animus as an essential element of class of one claims: “Neither at the level of theory nor practice must malice be demonstrated in a class of one case.”²⁶⁶ Shanske argues that pure irrationality, without evidence of animus, should be sufficient to state a class of one claim, and that public officials face a “‘reason-giving’ requirement,”²⁶⁷ that is, they must be able to give a reason that serves as an adequate explanation for their actions. But even after rejecting the necessity of animus, Shanske then suggests that the standard he would adopt to prove irrationality is the one proposed by Judge Reinhardt of the Ninth Circuit:

The plaintiff can show that no rational basis exists in a class of one case by showing that an “asserted rational basis was merely a pretext for different treatment.” Such pretext may be shown by demonstrating “either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive.” As to the second prong, reasons that are “malicious, irrational or plainly arbitrary” cannot provide a rational basis. Thus, malice can in some circumstances serve as a basis for showing both disparate treatment and lack of rational basis.²⁶⁸

Thus, for Shanske, animus is not essential, but it is clearly relevant and will often be the measure of proof that demonstrates the irrationality that he demands as the proper test. And, if Araiza is correct, evidence of animus will be necessary in most cases since, without it, prohibited irrationality directed at a particular individual will be impossible to be prove.

Moving on to pragmatism, the Supreme Court’s *Olech* decision has very much the feel of a head-in-the-clouds decision, one that is oblivious to the everyday realities of government workers. Does it make sense to announce a constitutional rule that immediately turns tens of thousands of actions by individual government workers into unconstitutional acts? This is the problem that Posner identifies: it is inevitable that local government officials, when enforcing rules or making other decisions, will not be able to treat all similarly-situated persons similarly.

The fact that the local police cannot pull over every driver who is speeding should not mean that they cannot pull over any driver at all. The

263. *Id.*

264. *Id.* at 508.

265. Darien Shanske, *Engquist and the Erosion of the Equal Protection Clause: An Attempt to Stop the Creep of Irrational Dicta*, 61 HASTINGS L.J. 969 (2010).

266. *Id.* at 987.

267. *Id.* at 990.

268. *Id.* at 991 (quoting *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 1013–14 (9th Cir. 2007) (Reinhardt, J., dissenting)).

fact that the prosecutor's office cannot investigate and bring charges in every case of wrongdoing brought to their attention should not mean that it cannot prosecute anyone. The fact that there are five virtually indistinguishable towing companies applying for the one towing contract should not mean that the towing contract cannot be entered into at all. In all of these cases, and many more like them, it is inevitable that similarly situated persons will be treated differently. They ought not to have a constitutional claim. Government cannot operate if they all do. "The Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all."²⁶⁹ A requirement of animus by government officials to establish a class of one claim reduces the "[b]reathtaking vistas of liability"²⁷⁰ to a manageable size.

VI. CONCLUSION

The United States court system is hierarchical. The district courts must follow the courts of appeal and the courts of appeal must follow the Supreme Court. It is said that the United States Supreme Court has the final word on the meaning of our Constitution—the Court is correct because it is final.²⁷¹ But that explanation of the relationship between lower courts and the Supreme Court is perhaps an oversimplification. When Justice Breyer was asked about the meaning of a recent Court decision in which he had authored one of the opinions, he replied, "It depends on what the lower courts make of it."²⁷²

When Judge Posner was writing his *Hilton* opinion, less than two months after the Supreme Court had published *Olech* and before any other federal circuit court had cited it, he had a choice to make. Either follow a Supreme Court opinion that appeared to be ill-considered and problematic, or construe that opinion in a way that he considered to be more sensible and more consistent with underlying constitutional precedent. Posner, of course, chose the latter option. He wrote an opinion that purported to follow the Supreme Court but, in substance affirmed his own Seventh Circuit *Olech* opinion. Judge Posner's stature within the judicial community was sufficiently prominent and his powers of persuasion sufficiently compelling that his views commanded substantial support. He could not overrule the Supreme Court, but he succeeded in neutralizing it to a substantial degree. Posner said that he feared that his advocacy of animus as the core of the class of one claim was a doomed rearguard action. No more doomed than the action of King Leonidas and the three hundred Spartans at Thermopylae.

269. *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985) (opinion by Posner, J.).

270. *Tuffendsam v. Dearborn Cty. Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004).

271. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

272. Linda Greenhouse, *The Supreme Court and the Law of Motion*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/7/20/opinion/the-supreme-court-and-the-law-of-motion.html>.

