

2000

Angry White Males: The Equal Protection Clause and "Classes of One"

Timothy Zick

William & Mary Law School, tzick@wm.edu

Repository Citation

Zick, Timothy, "Angry White Males: The Equal Protection Clause and "Classes of One"" (2000). *Faculty Publications*. 274.
<https://scholarship.law.wm.edu/facpubs/274>

Angry White Males: The Equal Protection Clause and “Classes of One”

BY TIMOTHY ZICK*

“‘Equal protection’ emphasizes disparity in treatment by a State between *classes* of individuals whose situations are arguably indistinguishable.”¹

“[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.”²

I. INTRODUCTION

Section 1 of the Equal Protection Clause of the Fourteenth Amendment provides, in part, that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the

* Trial Attorney, Federal Programs Branch, Civil Division, United States Department of Justice. J.D. 1992, Georgetown University Law Center. The opinions expressed herein are solely those of the author and do not represent the position of the United States Department of Justice as to any matter. The author would like to thank Colin Owyang and Rupa Bhattacharyya for their assistance, and Madeleine Timin for reviewing earlier drafts of this Article.

¹ *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (emphasis added). In *Ross*, the Supreme Court refused to find that the Equal Protection Clause mandated an extension of the rule requiring states to appoint counsel for indigent defendants for appeals as of right to discretionary state court appeals or appeals to the federal courts. *Id.* at 617-18.

² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). In *Adarand*, the Supreme Court struck down an affirmative action scheme providing financial incentives to prime contractors who hired subcontractors from certain minority groups, finding that the scheme violated equal protection. *Id.* The Court noted that “all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.” *Id.* See also *infra* note 224 and accompanying text.

laws.”³ Once considered “the usual last resort of constitutional arguments,”⁴ the Equal Protection Clause has become “the Court’s chief instrument for invalidating state laws.”⁵ Unfortunately, however, as Professor Tribe has noted, “[t]he words of the equal protection clause do not, by themselves, tell us as much as we might wish.”⁶ Nor does adverting to the original intentions of the framers of the Equal Protection Clause provide much guidance, at least as to specific issues. The “original understanding” of the meaning of “equal protection” continues to be the subject of active scholarly debate, and any effort to glean answers to specific questions from the ambiguous ratification debates is bound to lead to frustration.⁷

As the Constitution and history offer little guidance as to the substantive meaning of “equal protection,” it has fallen to the Supreme Court to flesh out a doctrine.⁸ From the beginning, the Court has struggled to provide a coherent framework within which to analyze challenges to governmental action brought pursuant to the Equal Protection Clause. From its original requirement that legislative classifications merely be

³ U.S. CONST. amend. XIV

⁴ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

⁵ *Zablocki v. Redhail*, 434 U.S. 374, 395 (1978) (Stewart, J., concurring).

⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1514 (2d ed. 1988).

As Professor Tribe has stated: “To declare that no state shall ‘deny to any person within its jurisdiction the equal protection of the laws’ is more to proclaim a delphic edict than to state an intelligible rule of decision.” *Id.*

⁷ Compare Howard J. Graham, *Our “Declaratory” Fourteenth Amendment*, 7 STAN. L. REV. 3, 9-10, 17, 23, 37 (1954), and Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1054-85 (1956), and John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 1972 WASH. U. L.Q. 421, 442-43 (arguing that the Fourteenth Amendment was intended to eradicate all racial distinctions), with RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 18-19, 22-23, 163-65, 169, 173, 239 (1977), and MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE* 170 (1974), and Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 12-13, 16-17, 46-47, 56-58 (1955) (arguing that the Fourteenth Amendment was primarily intended to constitutionalize the 1866 Civil Rights Act and to prohibit racial discrimination with regard to particular fundamental rights only). For a summary of this and other scholarship, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 2-3, 63, 123 (1988).

⁸ See NELSON, *supra* note 7, at 148-96. Originally, it was anticipated that Congress, not federal judges, would be enforcing the Fourteenth Amendment. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2439 (1994).

"reasonable," the Court has groped gradually toward its current analytical framework under which three (and perhaps more) levels of scrutiny may apply, depending primarily upon the nature of the group or class allegedly discriminated against.⁹ The current multi-tiered approach aims principally to separate permissible legislative generalizations based upon group characteristics from illegitimate generalizations based upon stereotypes or other impermissible criteria.¹⁰

Notwithstanding the active debate concerning the original purpose of the Equal Protection Clause, it is widely accepted that the principal aim of the drafters and ratifiers of the Fourteenth Amendment was to eradicate official antebellum discrimination against blacks, particularly the so-called "Black Codes," pursuant to which blacks were treated as a lower or second-class caste.¹¹ Although not part of the framers' original design, the Supreme

⁹ The Court's original conception of "reasonableness" held that no regulatory provision was repugnant to equal protection so long as it "place[d] under the same restrictions, and subject[ed] to like penalties and burdens, all who [were] embraced by its prohibitions." *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888). For a discussion of the Supreme Court's current multi-tiered approach to equal protection, see 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* 4-66 (2d ed. 1992). Some commentators have argued that in addition to the three commonly used standards of review—rational basis, intermediate scrutiny, and strict scrutiny—the Supreme Court has on occasion applied a fourth standard, sometimes called "rational basis with teeth." See, e.g., Gale Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987). At least one Justice contends that there exists only one standard of review under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452-53 (1985) (Stevens, J., concurring) (arguing that the Court is actually applying a single rational basis standard in all of its equal protection cases).

¹⁰ See ROTUNDA & NOWAK, *supra* note 9, at 568 ("[T]he court has increasingly focused upon the concept of equal protection to guarantee that all individuals are accorded fair treatment in the exercise of fundamental rights or the elimination of distinctions based on impermissible criteria."); see Shannon Dean Sexton, Note, *A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 784 n.172 (2000) (highlighting illegitimate legislative generalizations based upon impermissible gender stereotypes or other impermissible criteria in the child custody context).

¹¹ See *Miller v. Johnson*, 515 U.S. 900, 934 (1995) (O'Connor, J., concurring) ("[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks."); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) ("[The Fourteenth Amendment's] aim was against

Court long ago expanded the right of equal protection to groups other than racial minorities.¹² Classifications based upon gender and alienage, for example, now receive some form of "heightened" scrutiny under the Fourteenth Amendment.¹³ Yet while the composition of the challenged class has shifted from time to time, the conceptualization of equal protection as a safeguard against disparate treatment of *classes* of individuals whose situations are allegedly indistinguishable has remained the core principle.¹⁴ Indeed, in the Court's recent Terms, interclass conflicts such as affirmative action, legislative districting, single-sex military education, and anti-gay legislation have dominated the equal protection docket.¹⁵

discrimination because of race or color."); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) ("The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause, and by it such laws are forbidden."). See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992), for an explanation of how Black Codes were used to prevent blacks from enjoying a wide variety of social and legal privileges available to whites.

¹² The Supreme Court has never felt particularly constrained to adhere strictly to the original understanding of the framers of the Equal Protection Clause. Indeed, by the 1960s, only Justice John Marshall Harlan continued to evince serious concern with the Fourteenth Amendment's original understanding. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 680-83 (1966) (Harlan, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 589-625 (1964) (Harlan, J., dissenting). As one scholar has noted, the Court in the 1970s "scarcely batted a collective eyelash at extending meaningful equal protection review to groups—women, aliens, and nonmarital children—plainly not among the contemplated beneficiaries of the Fourteenth Amendment." Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 254 (1991). In Professor Klarman's view, the Justices have generally shown "virtual contempt for the integrity of the historical record." *Id.* at 253.

¹³ See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (invalidating state statutes denying welfare benefits to resident aliens).

¹⁴ In fact, many racists during the ratification debates agreed with this core principle. However, these same individuals attempted to circumvent this principle behind the Equal Protection Clause by arguing that blacks "were something less than the full equals of whites." See NELSON, *supra* note 7, at 96-97.

¹⁵ See *United States v. Virginia*, 518 U.S. 515 (1996) (discussing single-sex military education); *Shaw v. Hunt*, 517 U.S. 899 (1996) (discussing racial

The text of the Equal Protection Clause speaks not of classes or groups, but of "persons."¹⁶ Does the clause protect persons qua persons, or only as members of identifiable classes or groups? Is the Equal Protection Clause concerned with allegations of individual mistreatment at all? While most courts and scholars have interpreted the clause as a protection against group mistreatment, in *Village of Willowbrook v. Olech*,¹⁷ a little-noticed per curiam opinion, the Supreme Court held that the Equal Protection Clause may be invoked to challenge *individual* claims of mistreatment at the hands of government officials.¹⁸ *Olech* involved a plaintiff who challenged the decision of local officials to require a thirty-three foot easement as a condition of connecting property to the municipal water system, while requiring only a fifteen foot easement from other property owners.¹⁹ The Court treated the question presented—whether a "class of one" singled out for allegedly arbitrary or capricious treatment may bring a claim under the Equal Protection Clause—as having been plainly decided by its prior precedents.²⁰

With the exception of Justice Breyer, who wrote a brief concurring opinion,²¹ the Court brushed aside concerns that had been expressed even by Chief Judge Posner, who authored the *Olech* opinion in the Seventh Circuit, that expanding the Equal Protection Clause to cover individual claims of mistreatment would flood the federal courts with local disputes between citizens and government officials.²²

Prior to *Olech*, a split among the federal courts of appeals and, indeed, a split *within* one of those circuits, had developed concerning the viability of "class of one" equal protection claims.²³ The United States Court of Appeals for the Seventh Circuit expressly held in a trilogy of cases, most recently in *Olech*, that an individual, regardless of race, gender, ethnicity, or any other distinguishing group characteristic, who alleged that a government official treated him adversely compared to others similarly situated, due solely to an

gerrymandering); *Romer v. Evans*, 517 U.S. 620 (1996) (discussing anti-discrimination protections for homosexuals); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (discussing affirmative action).

¹⁶ U.S. CONST. amend. XIV

¹⁷ *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam).

¹⁸ *Id.* at 1074-75.

¹⁹ *Id.* at 1074.

²⁰ *Id.* at 1074-75.

²¹ *Id.* at 1075.

²² *Id.* For a discussion of Chief Judge Posner's concerns, see *infra* note 73 and accompanying text.

²³ See *infra* Parts II.A-B.

"illegitimate animus," could bring a claim pursuant to the Fourteenth Amendment's Equal Protection Clause.²⁴ Just prior to *Olech*, however, the Seventh Circuit held exactly the opposite. In a series of opinions, the Seventh Circuit held that "[d]iscrimination based merely on *individual*, rather than group, reasons will not suffice" to state a claim under the Equal Protection Clause.²⁵ The Sixth Circuit had also held that so-called "classes of one" are not entitled to bring an equal protection claim.²⁶ Relying principally upon the Supreme Court's equal protection "selective prosecution" case law, which requires that a plaintiff claim either membership in a protected group or violation of an independent constitutional right to invoke the Equal Protection Clause, the Sixth Circuit had held that "classes of one" who allege illegitimate animus but who are not singled out because of membership in a protected group or because of retaliation for the exercise of a constitutionally protected right do not have a viable cause of action under the Equal Protection Clause.²⁷

²⁴ See *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998), *aff'd per curiam*, 120 S. Ct. 1073 (2000); *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179 (7th Cir. 1996); *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). The First and Second Circuits have also held that the Equal Protection Clause protects an individual from a state official who selectively enforces a law or regulation out of sheer malice. See *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996) (holding that claims under 42 U.S.C. § 1983 can be based upon group membership, the exercise of fundamental rights, or "malicious or bad faith intent to injure a person"); *Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995) (allowing selective enforcement claim based upon "bad faith or malicious intent to injure," but noting that successful claims should be "infrequent").

²⁵ *New Burnham Prairie Homes, Inc. v. Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990). See also *Herro v. City of Milwaukee*, 44 F.3d 550, 552-53 (7th Cir. 1995) (holding that personal vendettas against individuals are not actionable under the Equal Protection Clause); *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), *aff'd*, 510 U.S. 266 (1994) (holding that "'the state's act of singling out an individual for differential treatment' does not 'itself create the class'" necessary for application of the Equal Protection Clause (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992)); *Smith v. Town of Eaton*, 910 F.2d 1469, 1472 (7th Cir. 1990) (rejecting equal protection claim because plaintiff did not allege class-based discrimination); *Huebschen v. Dep't of Health & Soc. Servs.*, 716 F.2d 1167, 1171 (7th Cir. 1983) (holding that equal protection claim must be based on "intentional discrimination against [the plaintiff] because of his membership in a particular class, not merely [because] he was treated unfairly as an individual").

²⁶ *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996).

²⁷ *Id.* at 1057. In *Wayte v. United States*, 470 U.S. 598 (1985), the Supreme Court held that a plaintiff may state a claim for selective prosecution under the

In *Olech*, the Supreme Court put aside the Seventh Circuit's "vindictive action" theory and held that a plaintiff need not allege subjective "bad faith," "illegitimate animus," or intent to injure in order to challenge a local official's conduct under the Equal Protection Clause.²⁸ The Court held that under its precedents, all that is required to invoke the Equal Protection Clause is that a plaintiff allege arbitrary treatment, as measured against others similarly situated.²⁹ The Supreme Court's holding in *Olech* portends the following seemingly anomalous scenario: an individual white male, who claims only that a government official has pressed upon him a burden not equally shared by others, invoking a constitutional provision originally intended to lift blacks from the second-class caste they occupied after the Civil War. According to the Supreme Court, it is a settled principle that the Equal Protection Clause empowers an individual to fight city hall in federal court.³⁰ The Court reached this result, however, without even examining the text of the Equal Protection Clause, the history leading to its adoption, a century of jurisprudence that has in the main interpreted the clause to prohibit only disparate treatment based upon group or class factors, and conflicting language in its own precedents. Indeed, the Court, often criticized for its lengthy and fractured opinions, devoted little more than two pages to this important issue. The little-noticed per curiam opinion should serve to create significant confusion in the lower courts.

This Article contends that the holding in *Olech* was *not* dictated by the Supreme Court's prior precedents. Indeed, *Olech* is contrary to the manner in which the Court has historically interpreted the equal protection guarantee. The opinion, cryptic though it may be, will have a significant impact upon equal protection claims. For example, under *Olech* individual criminal prosecutions, employment decisions, and innumerable zoning and other local ordinances could give rise to an equal protection claim.

Part II reviews the circuit opinions that addressed the single-member class theory prior to *Olech*, with emphasis on the Seventh Circuit's recent

Equal Protection Clause where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, such as freedom of speech or religion, or because of membership in a vulnerable group. *Id.* at 608. *See also* Oyer v. Boles, 368 U.S. 448, 456 (1962) (holding that selective enforcement claims may be based upon arbitrary classifications).

²⁸ *See Olech*, 120 S. Ct. at 1075. Only Justice Breyer found the presence of allegations of bad faith significant. He stated in a concurring opinion that the "added factor" of ill will was "sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* (Breyer, J., concurring).

²⁹ *Id.* at 1074-75.

³⁰ *See id.*

case law, as that court has offered the most explicit justification for bringing the vindictive action cases within the Equal Protection Clause.³¹

Part III analyzes, in broad terms, the “original understanding” of the Fourteenth Amendment. Not surprisingly, the framers and ratifiers did not consider, much less settle, whether an individual could resort to the Equal Protection Clause in cases where government officials allegedly treated him arbitrarily. What the framers did establish, however, and what the Court had for a century prior to *Olech* seemed to accept, is that the principal goal of the equal protection guarantee was to prohibit legislation that, like the Black Codes, had the effect of creating a subordinate or subjugated caste of citizens unequal under the law. Thus, from the beginning, the Equal Protection Clause was concerned with the legitimacy of differential treatment afforded to similarly situated *groups* of persons.³²

Part IV examines the Supreme Court’s equal protection framework and the principal theoretical paradigms that the Court’s equal protection cases have spawned in the academic literature. Notwithstanding occasional statements concerning the “personal” nature of the rights guaranteed by the Equal Protection Clause, scholars have noted that the framers’ focus on illegitimate classifications and subjugation of members of certain groups is the dominant mediating principle underlying the Supreme Court’s equal protection jurisprudence.³³

Part V concludes that the original understanding of the equal protection guarantee, the Supreme Court’s subsequent delineation of the meaning of equality, and the theoretical underpinnings of the equal protection guarantee do not support extending the Equal Protection Clause to single-member classes who allege differential treatment based upon individual factors. While ultimately involving “personal” rights, in the sense that an individual always is harmed or benefitted by governmental action, “equal protection” is bound up intrinsically with the notion of group classification—a notion that does not permit the individual victim of every alleged instance of mistreatment to invoke its guarantee. The Court’s extension of equal protection in *Olech* removes any vestige of a mediating principle from the Equal Protection Clause, imperils the principles of separation of powers and federalism, and trivializes the Fourteenth Amendment by constitutionalizing and federalizing every local dispute between a citizen and a government official.³⁴

³¹ See *infra* notes 36-121 and accompanying text.

³² See *infra* notes 122-51 and accompanying text.

³³ See *infra* notes 152-216 and accompanying text.

³⁴ See *infra* notes 217-310 and accompanying text.

Finally, Part VI argues that the allegations in *Olech* and similar cases are more properly the subject of the Due Process Clause, in particular its substantive component, which has traditionally been viewed by the Supreme Court as the constitutional provision that protects individuals from arbitrary governmental action. Concerned that the Federal Constitution could be read to supplant state law, however, the Supreme Court has made clear in its substantive due process cases that, with regard to executive acts, only conduct that can be said to "shock the conscience" is subject to constitutional rebuke. Moreover, this Article argues that "class of one" claims threaten to superimpose the federal constitution on state administrative law. Thus, if these claims are to be allowed under *Olech*, they should be subject to the same exacting conscience-shocking standard as are substantive due process claims. Under that standard, only conduct that is arbitrary in the *constitutional* sense would be actionable under the Equal Protection Clause.³⁵

II. "VINDICTIVE ACTION" AND EQUAL PROTECTION

In its recent trilogy of "vindictive action" cases, the Seventh Circuit held that the Equal Protection Clause protects a person who alleges that a state actor withheld a benefit or enforced a law or regulation out of spite or illegitimate animus.³⁶ The First and Second Circuits have also embraced the notion that an individual has a right under the Equal Protection Clause to be free from "malicious" or "bad faith" governmental action.³⁷ The Sixth Circuit, fearing that such a ruling would cause disputes between local administrators and citizens to overwhelm the federal courts, has held that a "class of one" cannot invoke the Equal Protection Clause absent one of the circumstances identified by the Supreme Court as a basis for a Fourteenth Amendment "selective prosecution" claim—i.e.,

³⁵ See *infra* notes 311-51 and accompanying text.

³⁶ See *infra* Part II.A. While the "vindictive action" theory has been embraced by different panels of the Seventh Circuit, it is by no means clear that the theory is accepted by the entire circuit. *Esmail* and its progeny appear to be in conflict with other Seventh Circuit precedent. See *Herro v. City of Milwaukee*, 44 F.3d 550, 552 (7th Cir. 1995) ("A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual." (quoting *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990))).

³⁷ See *supra* note 24 and accompanying text.

a claim of membership in a protected group or violation of a constitutional right.³⁸

A. The Seventh Circuit Trilogy—The Individual Right to Equality

The Seventh Circuit's trilogy of "vindictive action" equal protection cases began with *Esmail v. Macrane*.³⁹ In *Esmail*, a liquor dealer alleged that the mayor of Naperville, Illinois saw to it that his application to renew a retail liquor license was denied. The dealer obtained a state court order granting the license renewal, then sued the mayor in federal court under the Equal Protection Clause, alleging that the mayor had forced him to spend \$75,000 in legal fees out of "deep-seated animosity" toward him.⁴⁰ The mayor's alleged "campaign of vengeance" was attributed primarily to the dealer's past success in getting a liquor license revocation changed to a brief suspension and the dealer's withdrawal of political support from the mayor.⁴¹ In his complaint, the dealer alleged that the city routinely renewed the liquor licenses of others guilty of similar, if not more serious, infractions of the law, and denied his application "for the sole and exclusive purpose of exacting retaliation and vengeance" against him.⁴²

The district court dismissed the equal protection cause of action for failure to state a claim.⁴³ The Seventh Circuit, in an opinion authored by Chief Judge Posner, reversed.⁴⁴ The court acknowledged that the case did not fit into the two common kinds of equal protection cases: those involving "charges of singling out members of a vulnerable group, racial or otherwise, for unequal treatment," and those involving "challenges to laws or policies alleged to make irrational distinctions."⁴⁵ Nor did the case, the court noted, fit the usual mode of selective prosecution cases "where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, or because of membership in a vulnerable group."⁴⁶ Rather, the distinctive feature of the plaintiff's claim was that the unequal

³⁸ See *infra* notes 94-117 and accompanying text.

³⁹ *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

⁴⁰ *Id.* at 178.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 177.

⁴⁴ *Id.* at 180.

⁴⁵ *Id.* at 178.

⁴⁶ *Id.* at 179.

treatment was alleged to have been the result solely of a vindictive campaign by the mayor.⁴⁷

The Seventh Circuit concluded that the Equal Protection Clause prohibits government actions taken for illegitimate or wholly irrational objectives, regardless of whether the victim of those actions is a member of a protected group. The court found ample room under the equal protection umbrella for "vindictive action" claims brought by individual plaintiffs.⁴⁸ The court stated that "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."⁴⁹ This principle, the court stated, was "implied"⁵⁰ by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*,⁵¹ in which the Court held that requiring a special use permit for a proposed group home for the mentally retarded violated the Equal Protection Clause because it appeared to rest solely upon an irrational prejudice against the mentally retarded.⁵² The Seventh Circuit acknowledged that the abuse charged by Esmail was "remote from the primary concern of the framers of the equal protection clause."⁵³ Nevertheless, the court observed that the clause "neither in terms nor in interpretation is . . . limited to protecting members of identifiable groups."⁵⁴ Indeed, the court concluded, "[a] class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause."⁵⁵

⁴⁷ *Id.* at 179-80.

⁴⁸ *Id.* at 180.

⁴⁹ *Id.* at 179.

⁵⁰ *Id.*

⁵¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

⁵² *Id.* at 450.

⁵³ *Esmail*, 53 F.3d at 180.

⁵⁴ *Id.*

⁵⁵ *Id.* The court acknowledged that prior Seventh Circuit precedents appeared to hold that a class must have more than one member for discrimination against the class to count as a denial of equal protection. *Id.* But the court noted that other circuit opinions had "point[ed] out sensibly that classifications should be scrutinized more carefully the smaller and more vulnerable the class is." *Id.* Indeed, *Esmail* was not the Seventh Circuit's first foray into the class of one debate. In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), the Seventh Circuit allowed a class of one equal protection claim to go forward. *Ciechon* involved two paramedics identically responsible for the death of a patient, yet only one was disciplined and the city could not provide a reason for the difference in treatment.

In the second case in the Seventh Circuit trilogy, *Indiana State Teachers Ass'n v. Indianapolis Board of School Commissioners*,⁵⁶ the court rebuffed a union's effort to invoke *Esmail*. The union complained that the Indianapolis school board, in the absence of any statutory collective bargaining scheme, had signed a succession of contracts with another union to be the exclusive bargaining representative of the school system's non-teacher employees and would not permit an election for a collective bargaining representative. The plaintiff union asserted that the school board was thus discriminating between two similarly situated entities in violation of the Equal Protection Clause of the Fourteenth Amendment. The school board argued that the union could not invoke the Equal Protection Clause because it did not allege discrimination against a class.⁵⁷ The Seventh Circuit, again speaking through Chief Judge Posner, reaffirmed that "[w]hile the principal target of the equal protection clause is discrimination against members of vulnerable groups," a protected class for purposes of the Equal Protection Clause may consist of a single member.⁵⁸ Chief Judge Posner wrote:

The equal protection clause does not speak of classes. A class, moreover, can consist of a single member . . . or of one member at present; and it can be defined by reference to the discrimination itself. To make "classification" an element of a denial of equal protection would therefore be vacuous. There is always a class.⁵⁹

The court went on to state that *Esmail* applies only when the government is treating unequally "persons who are prima facie identical in all relevant respects."⁶⁰ In the case of the unions, however, the court concluded that the government was "treating unequally two persons that [were] prima facie *unequal* in a rationally relevant respect."⁶¹ On the one hand, there was the union with which the government had been dealing contentedly for many years. On the other, there was the plaintiff union, which wished not only to break up the cozy existing relationship, but also to change the

Id. at 522-24.

⁵⁶ *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179 (7th Cir. 1996).

⁵⁷ *Id.* at 1180.

⁵⁸ *Id.* at 1181.

⁵⁹ *Id.* (citations omitted).

⁶⁰ *Id.*

⁶¹ *Id.* at 1182.

means by which a favored union would be chosen in the future.⁶² Under these circumstances, the court held that "the equal protection clause is inapplicable because the plaintiff is asking for a revision of policy rather than for a restoration of equality."⁶³ In sum, the court concluded that "[t]here is nothing irrational or vicious about preferring the known quantity to the unknown."⁶⁴

Notwithstanding its assurance that single member classes could invoke the Equal Protection Clause, the Seventh Circuit warned that not every slight suffered at the hands of local government officials was subject to review in federal court:

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.⁶⁵

The court was concerned that the plaintiff union was requesting that it adjudicate a difference of opinion as to the appropriate policy the school board should follow with regard to its process of labor relations and competitive bidding.⁶⁶ According to the court, review of the school board's decision for violation of equal protection was beyond the purview of federal courts, "which would be operating without any guidance other than what might be thought implicit in the idea of arbitrary governmental action."⁶⁷

In the third case, *Olech v. Village of Willowbrook*,⁶⁸ which ultimately made its way to the Supreme Court, a homeowner alleged that the village

⁶² *Id.* at 1181-82.

⁶³ *Id.* at 1182.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1181.

⁶⁶ *See id.* at 1181-82.

⁶⁷ *Id.* at 1181.

⁶⁸ *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998), *aff'd per curiam*, 120 S. Ct. 1073 (2000).

of Willowbrook delayed provision of water services for three months because she would not agree to a thirty-three foot easement to permit the village to widen the street, in lieu of the usual fifteen foot easement required for hookup to the water main. The homeowner alleged that the city's demand for a wider easement and the associated delay were in retaliation for her earlier, successful property damage suit against the city.⁶⁹ The district court dismissed the homeowner's equal protection claim because she did not allege an "orchestrated campaign of official harassment" motivated by "sheer malice."⁷⁰ But the Seventh Circuit, Chief Judge Posner again writing for the panel, said that:

[N]othing in the *Esmail* opinion, however, suggests a *general* requirement of "orchestration" in vindictive-action equal protection cases, let alone a legally significant distinction between "sheer malice" and "substantial ill will," if, as alleged here, the ill will is the sole cause of the action of which the plaintiff complains.⁷¹

It was enough, the court said, that the city failed for three months to perform its obligation to provide a water hookup "for no reason other than a baseless hatred."⁷²

Again, however, the Seventh Circuit voiced some reservations with regard to the possible consequences of its portentous holdings in *Esmail* and *Indiana State Teachers' Ass'n*. Chief Judge Posner wrote:

Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the 'vindictive action' class of equal protection cases 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. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action.⁷³

⁶⁹ *Id.* at 387-88.

⁷⁰ *Id.* at 388 (quoting *Esmail v Macrane*, 53 F.3d 176, 179 (7th Cir. 1995)).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The First and Second Circuits have also embraced single-member class "vindictive action" claims under the Equal Protection Clause. The First Circuit allows a plaintiff to establish an equal protection violation with evidence of "bad faith or malicious intent to injure."⁷⁴ While noting that vindictive action cases will be "infrequent"⁷⁵ and that the malice standard should be "scrupulously met,"⁷⁶ the First Circuit permits such equal protection claims to survive summary judgment, at least where there is evidence of a "malicious orchestrated campaign causing substantial harm."⁷⁷ Similarly, the Second Circuit has permitted "selective enforcement" of equal protection claims where a plaintiff can demonstrate that a government official maliciously singled him or her out with bad faith intent to injure.⁷⁸

B. The Opposing View—One is Not Enough

In 1995, the same year *Esmail* breathed life into "classes of one" alleging "vindictive action" under the Equal Protection Clause, a different panel of the Seventh Circuit strongly suggested that an individual claiming to be the victim of a personal vendetta does *not* state a claim under the clause. In *Herro v. City of Milwaukee*,⁷⁹ a disappointed applicant for a tavern license filed an action claiming that his equal protection rights had been violated. The plaintiff alleged that a city alderman acted to block his application out of sheer animosity or prejudice.⁸⁰ The *Herro* court acknowledged that some "older cases" from the circuit suggested that a

⁷⁴ *Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 912.

⁷⁸ *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996). Classes of one may be entitled to bring their equal protection claims in the First and Second Circuits, but to state that a "vindictive action" claim might ultimately prevail in either the First or Second Circuit is another matter entirely. *See, e.g., Rubinovitz*, 60 F.3d at 911 (affirming grant of summary judgment because evidence of malice was insufficient); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992) (affirming grant of summary judgment because evidence of malice was insufficient); *Yerardi's Moody St. Restaurant & Lounge, Inc. v. Bd. of Selectmen*, 878 F.2d 16, 20-21 (1st Cir. 1989) (holding that individual defendants were entitled to qualified immunity); *LeClair v. Saunders*, 627 F.2d 606, 611 (2d Cir. 1980) (reversing judgment for plaintiff at trial because evidence of malice was insufficient).

⁷⁹ *Herro v. City of Milwaukee*, 44 F.3d 550 (7th Cir. 1995).

⁸⁰ *Id.* at 551.

"class of only one" could state an equal protection claim,⁸¹ but stated that its "more recent cases place additional burdens on plaintiffs to identify the classification behind . . . a 'class of one.'"⁸² The court suggested that plaintiff's claim would have been stronger had he alleged "a classification consisting of all members of the Herro family applying for new tavern licenses."⁸³ In any event, the court held that defendants had offered rational reasons for the denial of the tavern license, which was all that the Equal Protection Clause required.⁸⁴

The "more recent" cases referred to by the *Herro* court explicitly held that a "class of one" could *not* bring an equal protection claim. In *Smith v. Town of Eaton*,⁸⁵ for example, the Seventh Circuit stated that a white police officer's claim that his dismissal violated the Equal Protection Clause "border[ed] on the frivolous."⁸⁶ Plaintiff claimed that while the town board had information regarding similar complaints lodged against two other officers, it did not suspend or dismiss them.⁸⁷ Quoting one of its earlier precedents, the court noted that "[a]n equal protection claim must be based on 'intentional discrimination against [the plaintiff] because of his membership in a particular class, not merely [because] he was treated unfairly as an individual.'"⁸⁸ As the plaintiff did not allege such class-based discrimination, the court held that his claim could not stand.⁸⁹

In *New Burnham Prairie Homes, Inc. v. Village of Burnham*,⁹⁰ landowners and a developer asserted that the Village of Burnham's denial of a building permit violated the Equal Protection Clause.⁹¹ The Seventh Circuit concluded that the plaintiffs' Equal Protection Clause claim lacked merit

⁸¹ *Id.* at 553. The court cited *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989), which held that a class of only one member can state a claim under the Equal Protection Clause if the plaintiff can show that a combination of legislative and executive action has singled him out for unique treatment. *Id.*

⁸² *Herro*, 44 F.3d at 553.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Smith v. Town of Eaton*, 910 F.2d 1469 (7th Cir. 1990).

⁸⁶ *Id.* at 1472.

⁸⁷ *Id.*

⁸⁸ *Id.* (citations omitted).

⁸⁹ *Id.* at 1473.

⁹⁰ *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990).

⁹¹ *Id.* at 1475-76.

because the "plaintiffs [did] not allege that they [were] singled out because they belong to any particular class."⁹² The court set forth the governing standard for equal protection claims: "In order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group. Discrimination based merely on *individual*, rather than group, reasons will not suffice."⁹³

In accord with this group of Seventh Circuit opinions is *Futernick v. Sumpter Township*,⁹⁴ in which the Sixth Circuit rejected what amounted to a "malicious enforcement" claim.⁹⁵ The plaintiff, who owned a trailer park, sued a Michigan official under 42 U.S.C. § 1983 for a violation of his right to equal protection, alleging that the official had selectively enforced state environmental regulations, delayed a sewer hookup "maliciously" and in "bad faith," and conspired with the township to charge an exorbitant sewer hookup fee.⁹⁶

The district court dismissed the plaintiff's equal protection claim.⁹⁷ The Sixth Circuit affirmed.⁹⁸ The court reviewed the law concerning the doctrine of selective enforcement, under which a plaintiff may have a viable equal protection claim if the decision to enforce the law is made either in retaliation for the exercise of a constitutional right or because of membership in a vulnerable group.⁹⁹ *Futernick*, the court noted, did not claim to be a member of any group; nor did he claim that he was being punished for exercising a constitutional right. The Sixth Circuit did not cite *Esmail*, but it expressly declined to accept plaintiff's "class of one" equal protection theory.¹⁰⁰ The Sixth Circuit relied principally on *Oyler v. Boles*,¹⁰¹ in which—according to the Sixth Circuit—the Supreme Court "mention[ed] only arbitrary *classifications* as a basis for selective enforcement liability."¹⁰² The Sixth Circuit went on to say that it "[did] not

⁹² *Id.* at 1481-82.

⁹³ *Id.* at 1481.

⁹⁴ *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996).

⁹⁵ *See id.* at 1060.

⁹⁶ *Id.* at 1052-54.

⁹⁷ *Id.* at 1052.

⁹⁸ *Id.* The Sixth Circuit affirmed as to all claims except the District Court's finding of Eleventh Amendment immunity for some defendants. *Id.*

⁹⁹ *Id.* at 1056 (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

¹⁰⁰ *Id.* at 1057-60.

¹⁰¹ *Oyler v. Boles*, 368 U.S. 448 (1962).

¹⁰² *Futernick*, 78 F.3d at 1058 (citations omitted).

believe that choosing to enforce the law against a particular individual is a 'classification' as that term is normally understood."¹⁰³

The Sixth Circuit's difficulty with the plaintiff's claim went beyond the nature of the odd-looking "class" plaintiff purported to represent. There were federalism and separation of powers concerns as well.¹⁰⁴ The *Futernick* court set forth several "compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right."¹⁰⁵ First, the court was discouraged by the "sheer number of possible cases" and the effect on the efficiency of state and local administrators.¹⁰⁶ As the court explained:

Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited.¹⁰⁷

The court acknowledged that some circuits, most notably the First and Second, had purported to solve this dilemma by limiting the availability of actions grounded upon a regulator's malice to those in which a plaintiff is able to prove that others who are similarly situated "in all relevant aspects" have not been regulated.¹⁰⁸ Although the Sixth Circuit acknowledged that this approach allows only cases of "*extraordinary* selectivity to state a claim," it nevertheless rejected the approach as a screening device because "[d]etermining 'all relevant aspects' of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion."¹⁰⁹ The court concluded that "[i]f we require defendants to wait until summary judgment, we burden local and state officials with

¹⁰³ *Id.* The court relied on Webster's dictionary to support its determination that classes of one are, in fact, not "classes" at all for purposes of the Equal Protection Clause. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 417 (1986) (defining "classify" as "to group or segregate in classes that have systematic relations usually founded on common properties or characters; sort").

¹⁰⁴ See *Futernick*, 78 F.3d at 1058.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995)).

¹⁰⁹ *Id.*

the regular prospect of ‘fishing expeditions’ and meritless suits. In the meantime we federalize and constitutionalize what are essentially issues of local law and policy.”¹¹⁰

Second, from a theoretical standpoint, the Sixth Circuit concluded that “[t]he nature of the right to equal protection also counsels against expanding a federal right to protection from non-group animosity on the part of local officials.”¹¹¹ The court pointed out that perfectly random enforcement of a law would not implicate the Equal Protection Clause.¹¹² Similarly, the court stated, “the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution.”¹¹³ The court explained:

From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the roll of a dice. There is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution’s protection begins only when the *incidence* of the burden of regulation becomes constitutionally suspicious.¹¹⁴

It was, then, the wholly arbitrary or “random” nature of personal animosity that, in the Sixth Circuit’s view, rendered the Equal Protection Clause inapposite.¹¹⁵

Although the Sixth Circuit hastened to add that it did not condone the abuse of local or state regulatory power, describing such abuse as “repugnant to the American tradition of the rule of law,” the court went on to state that local governments were in the best position to correct for any abuse through the “political processes that appointed [the] regulator in the first place.”¹¹⁶ Further, a plaintiff could seek redress in state courts and under state constitutions. “Absent a breakdown in the state’s normal political process that unfairly affects a protected group or the exercise of constitutional rights, we can and should trust states to police adequately their own processes.”¹¹⁷

¹¹⁰ *Id.* at 1058-59 (footnote omitted).

¹¹¹ *Id.* at 1059.

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

In *Olech*,¹¹⁸ however, the Supreme Court went even further than had the Seventh, First, and Second Circuits in their “class of one” precedents, consequently disregarding the Sixth Circuit’s concerns for allowing “fishing expeditions.”¹¹⁹ The Court did not reach the principles of “illegitimate animus” or “intent to injure” relied upon by those courts to limit the scope of the “class of one” theory. Rather, the Court held that individual mistreatment by local government officials could be challenged under the federal constitution regardless of the motivation behind the conduct.¹²⁰ Henceforth, a plaintiff who wishes to proceed in federal court under the Equal Protection Clause need only allege that a government official has acted arbitrarily or irrationally, and has treated the plaintiff less favorably than those similarly situated.¹²¹ The Supreme Court’s apparent resolution of the circuits’ divergence in views as to the purposes of the Equal Protection Clause (i.e., whether the clause was intended to protect not only groups but also “classes of one”) merits examination of the original purpose of the clause.

III. THE ORIGINAL UNDERSTANDING: STRIKING AT CASTES

As noted, the intended scope of the protections afforded by the Equal Protection Clause is a matter of ongoing scholarly debate. The debates of the Thirty-Ninth Congress, which ratified the Fourteenth Amendment, are far too ambiguous to settle many important questions such as whether the framers of the Equal Protection Clause intended to procure for blacks political or social equality on a broad scale or, more narrowly, to secure for them only those rights enumerated in the Civil Rights Act of 1866.¹²² They certainly do not tell us whether the architects of the clause intended to extend “equal protection” to a so-called “class of one.” No one in the Thirty-Ninth Congress considered whether an individual could challenge government action motivated by alleged illegitimate animus under the Equal Protection Clause. The concerns of the time, which included the plight of the newly-freed slaves in the aftermath of a Civil War fought, in part, to render them free, were far weightier.

Although answers to specific questions are rarely found in the original debates, considered in broader terms the intent of the framers is readily

¹¹⁸ *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam).

¹¹⁹ See *supra* notes 94-117 and accompanying text.

¹²⁰ *Olech*, 120 S. Ct. at 1074-75.

¹²¹ See *id.* at 1075.

¹²² See *supra* note 7 and accompanying text.

discernible. As Professor Sunstein has noted, "[t]he Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy. An important purpose of the Civil War Amendments was the attack on racial caste."¹²³ The Thirteenth Amendment, ratified in 1865, formally abolished slavery and represented Congress' first constitutional and legislative attack on the caste system.¹²⁴ Although the Thirteenth Amendment formally abolished slavery, Congress was confronted after the amendments ratification by activities in several intransigent southern states that sought to re-establish many of the badges of inferiority incident to slavery. In the winter of 1865-66, southern states enacted what were known as the "Black Codes," many of which prohibited blacks from owning land, voting, engaging in any activity other than domestic service, or leaving their jobs without suffering the forfeiture of earned pay.¹²⁵ To many in the Thirty-Ninth Congress, the Black Codes were symbolic of an unrepentant South seeking to return to a caste system under which blacks continued to occupy the inferior status imposed by the institution of slavery.¹²⁶

Prior to seeking a constitutional amendment to remedy the situation, Congress tried its hand at a legislative solution. On April 9, 1866, Congress overrode President Andrew Johnson's veto of the Civil Rights Act of 1866, which expressly provided the right to "citizens, of every race and color" to make and enforce contracts, be parties in court, to own and convey real and

¹²³ Sunstein, *supra* note 8, at 2435 (footnote omitted). Professor Sunstein traces the origins of the anticaste principle to the original framing of the Constitution. He points out that "the Constitution forbids titles of nobility and that an important part of the founding creed involved the rejection of monarchical heritage, largely on the ground that monarchy made caste distinctions among fundamentally equal human beings." *Id.* at 2434-35. See also THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that the legislature should not enact "unjust and partial laws" that operate "to the injury of the private rights of particular classes of citizens").

¹²⁴ The Thirteenth Amendment provides, in part: "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. For a discussion of the events leading to the passage of the Thirteenth Amendment, see G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1 (1974).

¹²⁵ See Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439, 453-61 (1994).

¹²⁶ See David F. Forte, *Spiritual Equality, The Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 604-09 (1998).

personal property, to enjoy the full benefit of all laws for the security of person or property enjoyed by white persons, and to be subject to like punishment and none other.¹²⁷ Many Republicans in Congress believed that the Civil Rights Act was beyond the constitutional power of Congress.¹²⁸ There was also widespread concern that the rights enumerated in the Civil Rights Act ought not be left to the discretion of future Congresses.¹²⁹

The Fourteenth Amendment, which had been under consideration for two months prior to Johnson's veto, was designed principally to protect the Civil Rights Act from constitutional attack.¹³⁰ Representative John Bingham of Ohio first set forth the "equal protection" language that would ultimately appear in section 1 of the Fourteenth Amendment in a proposed amendment that would have granted to Congress the power "to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property."¹³¹ Bingham himself was not particularly clear with regard to the intended purpose of the proposed amendment, but participants in the debate understood Bingham's language to prohibit only laws that singled out certain classes of persons for special benefits or burdens.¹³² Like many others, Senator William Pitt Fessenden of Maine, the conservative leader of the Republican majority in the Senate, understood the language to be aimed at the impermissible "class legislation" of the Black Codes.¹³³

¹²⁷ Civil Rights Act, ch. 31, § 1, 14 Stat. 27, 27 (1866) (current version at 42 U.S.C. §§ 1981-1982 (1991)).

¹²⁸ See Bickel, *supra* note 7, at 22.

¹²⁹ See BERGER, *supra* note 7, at 23.

¹³⁰ See *id.*, see also Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 14 (1977).

¹³¹ CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865). As it would finally appear after several revisions, the proposed amendment read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states and to all persons in the several States, equal protection in the rights of life, liberty, and property.

BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61 (1914) (citations omitted).

¹³² See Melissa L. Saunders, *Equal Protection, Class Legislation, and Color-blindness*, 96 MICH. L. REV. 245, 282-83 (1997).

¹³³ CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866). Similar sentiments had been expressed during the debate over the Civil Rights Act. Representative James Wilson, the Iowa Republican who sponsored the bill in the House, said it would mean only that "[o]ne class shall not be required to support alone the burdens

Representative Hotchkiss of New York, a moderate Republican who spoke against Bingham's proposal, stated that its equal protection language was designed to forbid a state to "discriminate between its citizens and give one class of citizens greater rights than it confers upon another."¹³⁴ While he found this a laudable goal, Hotchkiss refused to support the proposal because it left protection against unequal legislation to Congress's whim.¹³⁵ Better, he thought, to enact language that outlawed all such legislation by providing that "no State shall discriminate against any class of its citizens."¹³⁶

Hotchkiss's suggestion was not ignored. In fact, when the equal protection proposal reemerged from Committee, it had been changed from a grant of authority to Congress to its present form—a limitation, though an unspecified one, principally on state legislative authority.¹³⁷ The proponents of the revised equal protection language explained that it dealt a blow to existing special class legislation in the states. Senator Jacob Howard, a Michigan Republican, delivered the speech presenting the Fourteenth Amendment to the Senate.¹³⁸ The speech deserves special attention, as it represented the Joint Committee's official explanation of its proposal.¹³⁹ Senator Howard explained:

[The Equal Protection Clause] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one

which should rest on all classes alike." *Id.* at 1117. President Andrew Johnson, who vetoed the Civil Rights Act, nevertheless objected to the Black Codes on similar grounds. In his December 1865 State of the Union address, President Johnson declared that "there is no room for favored classes or monopolies." 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, 361-62 (1901).

¹³⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *See* U.S. CONST. amend. XIV

¹³⁸ *See* CONG. GLOBE, 39th Cong., 1st Sess. 2764-67 (1866).

¹³⁹ *See* JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 137 (1956).

measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?¹⁴⁰

Other members of the Thirty-Ninth Congress expressed similar sentiments in support of the equal protection proposal. Representative James Wilson of Iowa, for example, stated that in a true republican government there is "no class legislation, no class privileges," and no laws that legislate "against [one class] for the purpose of advantaging the interests of [another]."¹⁴¹ To the framers of the Fourteenth Amendment, the Black Codes epitomized such legislation; the Codes reduced the newly freed slaves to a condition of involuntary servitude that undermined the command of the Thirteenth Amendment.¹⁴²

Throughout the ratification process, Republicans consistently lauded the protection afforded by equal protection against impermissible class legislation.¹⁴³ Senator Timothy Howe of Wisconsin said that the Equal Protection Clause was designed to prevent the states from "deny[ing] to all classes of its citizens the protection of equal laws"¹⁴⁴ and to give the federal government "the power to protect classes against class legislation."¹⁴⁵ Representative Thomas Eliot of Massachusetts stated that the clause would "prohibit State legislation discriminating against classes of citizens."¹⁴⁶ Representative Thaddeus Stevens of Pennsylvania said that it would mean

¹⁴⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

¹⁴¹ *Id.* at 174.

¹⁴² See *id.* at 1621-22, where Representative Myers suggested that the Black Codes "impose by indirection a servitude which the Constitution now forbids." *Id.* Representative Thayer argued that the Black Codes were being used to "reduce this class of people to the condition of bondmen." *Id.* at 1151. Senator Wilson stated that Black Codes "practically make the freedman a peon or a serf." *Id.* at 340.

¹⁴³ See NELSON, *supra* note 7, at 115. Nelson observes that Republicans frequently stated that the "only effect" of the Equal Protection Clause would be to forbid the states from "discriminat[ing] arbitrarily between different classes of citizens" and to require them to "treat[] [their] citizens equally, distinguishing between them only when there was a basis in reason for doing so." *Id.*

¹⁴⁴ CONG. GLOBE, 39th Cong., 1st Sess. app. 219 (1866).

¹⁴⁵ CONG. GLOBE, 40th Cong., 2d Sess. 883 (1868).

¹⁴⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

only that "the same laws must and shall apply to every mortal, American, Irishman, African, German or Turk."¹⁴⁷

Thus the framers and ratifiers of the Fourteenth Amendment were concerned with class legislation that imposed special burdens on one class of citizens that were not to be shared by others, or granted special benefits to one class not granted to another, primarily because such special legislation "embodied discrimination and in this way helped to create caste."¹⁴⁸ As one commentator has observed: "The idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the [F]ourteenth [A]mendment was enacted."¹⁴⁹ As Justice Harlan, dissenting in *Plessy v. Ferguson*,¹⁵⁰ eloquently and succinctly stated the principle: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."¹⁵¹

IV EQUAL PROTECTION THEORY

The Supreme Court's theory of wrongful discrimination under the Equal Protection Clause has come a long way since Justice Harlan's dissent in *Plessy*. The anti-caste principle articulated by Justice Harlan was embraced by Congress, and eventually by the Court, as it stepped in to

¹⁴⁷ Thaddeus Stevens, *The Pending Canvass!*, Speech Delivered at Bedford, Pa. (Sept. 4, 1866), in *THADDEUS STEVENS PAPERS* 11 (Beverly Wilson Palmer ed., 1993).

¹⁴⁸ Sunstein, *supra* note 8, at 2436. One commentator has argued that the framers of the Fourteenth Amendment understood the Equal Protection Clause to nationalize a prohibition against "partial" or "special" laws, which singled out groups of persons for special benefits or burdens and had been developed in the state courts in the first half of the nineteenth century. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997). Professor Saunders argues that while the framers of the Equal Protection Clause did intend to abolish all "caste" legislation, as Professor Sunstein and others have argued, they used the term "class" legislation in a broader sense—"to refer to any law that singled out a certain class for special benefits or burdens, whether or not it had a subordinating effect on a particular class." *Id.* at 290 n.198.

¹⁴⁹ Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1376 (1990).

¹⁵⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁵¹ *Id.* at 559 (Harlan, J., dissenting).

adjudicate and implement the Fourteenth Amendment.¹⁵² The Supreme Court, however, found itself ill-equipped to enforce the anti-caste principle, a task better left to Congress through the legislative function. To be sure, the Court continues to be sensitive to the stigmatization of protected groups by legislative act. That concern, against stigmatization, was at the heart of the Fourteenth Amendment from the beginning, and some equal protection theories focus exclusively on the plight of historically subjugated groups or classes. Modern equal protection jurisprudence, however, has become more generally concerned with whether like classes are treated alike by the government.

"Classes of one" who claim that local administrators have engaged in arbitrary or irrational decisionmaking do not raise core issues of caste or stigmatization. That is not to say, however, that nothing can be learned from theories based on caste or stigma, or, for that matter, from the framers' original intentions. This portion of the Article briefly explores some of the principal theories of equal protection. Although the focus of equal protection theories has varied, the unifying principle—borrowed from the framers themselves—has remained that governmental actions that intentionally disadvantage certain groups, or certain individuals *as members of a group*, are forbidden under the Equal Protection Clause.

A. Theories of Stigma and Caste

There are four principal theories of equal protection, three of which will be discussed in Parts IV.A and IV.B. Only one of the four theories—the so-called "anti-differentiation principle"—bears directly on the "class of one" scenario. This theory is discussed in somewhat greater detail in Part IV.C.

1. The Anti-Discrimination Principle—Stigma

The "stigma" theory¹⁵³ of equal protection can be traced to the Supreme Court's opinion in *Brown v. Board of Education* and, before that decision, to Justice Harlan's dissent in *Plessy*. It was perhaps best articulated by Paul

¹⁵² Perhaps the Court's best known anti-caste decisions are *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which invalidated segregation in education, and *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down state miscegenation laws.

¹⁵³ See *Brown*, 347 U.S. at 494 (noting the detrimental impact of segregation).

Brest,¹⁵⁴ who used the phrase "anti-discrimination principle" to describe "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected."¹⁵⁵ The theory focuses on the unfair stigma caused by race-based decisions that disadvantage members of minority groups. Brest focuses on the harm caused by race-based classifications: "Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior."¹⁵⁶ This theory helps to explain why rules that employ "suspect" predicates, such as racial predicates, are uniquely subject to judicial invalidation under the Equal Protection Clause.

As Justice Black explained in *Korematsu v. United States*,¹⁵⁷ the case in which the government attempted to justify the internment of Japanese-Americans: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."¹⁵⁸ Although concerned primarily with racial stigmatization, the anti-discrimination principle is broad enough to protect other group traits as well, including sex and illegitimacy.¹⁵⁹

While concerned with the harmful effects of discrimination based upon membership in racial or ethnic groups, the anti-discrimination principle is an individualistic theory, concerned with the harm visited upon individual members of the singled-out group.¹⁶⁰ The group itself, under this theory, has no intrinsic moral value or right to compensation for harm visited upon its members. As Brest explained in his seminal article:

For administrative purposes, some remedies for racial discrimination are triggered by disproportionate racial impact or treat persons according to membership in racial groups; but group membership is always a proxy for the individual's right not to be discriminated against. Similarly, remedies for race-specific harms recognize the sociological consequences of group

¹⁵⁴ Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV 1 (1976).

¹⁵⁵ *Id.* at 1.

¹⁵⁶ *Id.* at 8.

¹⁵⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁵⁸ *Id.* at 216.

¹⁵⁹ See Brest, *supra* note 154, at 5.

¹⁶⁰ *Id.* at 48.

identification and affiliation only to assure justice for individual members.¹⁶¹

In sum, the anti-discrimination principle rejects "[t]he notion that the treatment of individuals as a group for malign purposes requires their treatment as a group for benign compensatory purposes."¹⁶²

2. *The Group-Disadvantaging Principle—Caste*

Owen Fiss advanced what he called the "group-disadvantaging" theory of equal protection in his well-known article "Groups and the Equal Protection Clause."¹⁶³ Fiss's concern is with practices that aggravate the subordinate position of a "specially disadvantaged group," paradigmatically blacks.¹⁶⁴ In contrast to the anti-discrimination principle, Fiss's theory is explicitly group-oriented. Fiss explains that one of the reasons blacks fall within the parameter of the Equal Protection Clause is because they are a "social group"¹⁶⁵—a social entity with a "distinct existence apart from its members"¹⁶⁶—that "has been in a position of perpetual subordination," and whose "political power is severely circumscribed."¹⁶⁷ Fiss further explains that the Equal Protection Clause is not concerned with the effect of laws on particular individuals. What is critical under the group-disadvantaging theory is that a law or practice aggravates or perpetuates the subordinate position of a specially disadvantaged group. Fiss writes: "[T]he Equal Protection Clause should be viewed as a prohibition against group-disadvantaging practices, not unfair treatment . . . [A] claim of individual unfairness [should be] put to one

¹⁶¹ *Id.*

¹⁶² *Id.* at 51.

¹⁶³ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147 (1976).

¹⁶⁴ See *id.* at 147. For a more modern explication of the group-disadvantaging principle, see Sunstein, *supra* note 8, at 2410. Simply put, Professor Sunstein's "anticaste principle" holds that "no group may be made into second-class citizens." *Id.* at 2429. See also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

¹⁶⁵ Fiss, *supra* note 163, at 154.

¹⁶⁶ *Id.* at 148. This, along with what Fiss calls "interdependence"—his notion that "[t]he identity and well-being of the members of the group and the identity and well-being of the group are linked"—are in his view the necessary and sufficient conditions for the existence of a social group. *Id.*

¹⁶⁷ *Id.* at 154-55.

side.¹⁶⁸ Moreover, the theory applies only to "natural classes" or groups.¹⁶⁹ Fiss explains that "the Equal Protection Clause . . . [does not extend to] what might be considered artificial classes, those created by a classification or criterion embodied in a state practice or statute."¹⁷⁰

While Fiss's theory, like other group-oriented theories, assumes that it is permissible to have unequal distribution of welfare among individuals, it holds that it is unjust for one racial or ethnic group to be substantially worse off than others. Thus, unlike the anti-discrimination principle, the group-disadvantaging principle is essentially indifferent to the history that led to the unequal distribution. Fiss proposes a purely redistributive principle that requires relief for any group that constitutes a "perpetual underclass."¹⁷¹ Members of the group may partake of the remedy regardless of whether they were in fact harmed by the state action; they are essentially taking as representatives of their groups. Fiss's redistributive strategy would, in his view, "give expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time."¹⁷²

B. Process Theories

The oft-quoted footnote four in *United States v. Carolene Products*¹⁷³ is the cornerstone of the "process theory" of equal protection.¹⁷⁴ As John Hart Ely explains:

In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the process is undeserving of trust, when . . . though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced

¹⁶⁸ *Id.* at 160.

¹⁶⁹ *Id.* at 148.

¹⁷⁰ *Id.* at 156.

¹⁷¹ *Id.* at 150.

¹⁷² *Id.* at 151.

¹⁷³ *United States v. Carolene Prods.*, 304 U.S. 144 (1938).

¹⁷⁴ *See id.* at 152-53 n.4 ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.¹⁷⁵

A process theory is concerned with the political role played by prejudices and stereotypes about the moral inferiority of the targeted group. The concern is that these prejudices either prevent certain groups from participating in the political processes or result in morally objectionable legislative and executive actions or rules based on fundamentally false premises.

Under the process theory, the courts serve as a means of correcting special kinds of malfunctions in the political process, such as discriminatory treatment of so-called "suspect" classes. Ely maintains that a suspect class is a "discrete and insular"¹⁷⁶ minority that is "barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable."¹⁷⁷ The process theory holds that only those groups unable to protect themselves through the political process are entitled to heightened judicial scrutiny of laws disadvantaging them. They are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁷⁸ Ely does not consider women "discrete and insular," therefore, as they have extensive, close contact with men and constitute a majority of the voting population.¹⁷⁹

C. *The Anti-Differentiation Principle*

The concern with stigma, caste and process has given way in equal protection jurisprudence to a broader conception of "treating likes alike." Twentieth century equal protection jurisprudence has been dominated by this "anti-differentiation principle," which asks whether people who are similarly situated have been treated similarly. The "class of one" cases implicate this theory of equal protection, as individuals complain that they have been treated differently from all others who are "similarly situated."

¹⁷⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980).

¹⁷⁶ *Carolene Prods.*, 304 U.S. at 153 n.4.

¹⁷⁷ ELY, *supra* note 175, at 152.

¹⁷⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁷⁹ ELY, *supra* note 175, at 164. Ely's theory has been criticized for being too narrow in this regard. See, e.g., Olga Popov, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095, 1097-98 (1991).

This portion of the Article discusses the anti-differentiation principle thoroughly, as it is the most relevant of the four primary theories of equal protection.

In explicating the anti-differentiation principle, the Supreme Court has generally required that discriminatory state legislation must be based upon "reasonable classifications." The Court has struggled, however, to precisely define the parameters of permissible government discrimination. In its modern equal protection jurisprudence, the Court has focused primarily upon (1) the "rationality" of the government's distinction, and (2) the "purpose" of that distinction.

1. *Minimum Rationality*

Since 1949, when Joseph Tussman and Jacobus tenBroek published their leading article on "The Equal Protection of the Laws,"¹⁸⁰ the core concept in equal protection theory has been the idea that equal protection requires the equal treatment of "similarly situated" persons.¹⁸¹ As Tussman and tenBroek explain:

The essence of [the Equal Protection Clause] can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.¹⁸²

The Supreme Court regularly articulates this "likes must be treated as likes," or anti-differentiation, theory of equality in its equal protection jurisprudence,¹⁸³ and other scholars have carried it forward and refined the theory within constitutional scholarship.¹⁸⁴

¹⁸⁰ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

¹⁸¹ *Id.* at 344.

¹⁸² *Id.* (footnote omitted).

¹⁸³ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike.") (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

¹⁸⁴ See, e.g., Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 448, 456-60 (1989).

It is a truism that all laws classify.¹⁸⁵ Equal protection, according to the anti-differentiation principle, requires that such classifications have a certain relation to the purpose of a particular law. The rule is usually stated as requiring that a classification be rationally related to legitimate government purposes.¹⁸⁶ As Tussman and tenBroek characterize it, the Equal Protection Clause embodies a principle of "reasonable classification."¹⁸⁷

The Supreme Court's earliest standard for legislative and administrative classifications, as applied to government regulation of socioeconomic matters, required simply that there be like treatment of those engaged in the regulated activities.¹⁸⁸ This narrow view of the anti-differentiation principle was found to be unworkable, as entities within the class who were treated differently were by their nature not "the same."¹⁸⁹

The anti-differentiation principle, as developed in the Supreme Court's equal protection jurisprudence, requires that legislative enactments and executive acts¹⁹⁰ meet the basic requirement of minimum rationality. Equal protection requires "some rationality in the nature of the class singled

¹⁸⁵ See *Toll v. Moreno*, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting) ("All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment."); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) ("Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law."); see also Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Every time an agency of government formulates a rule—in particular, every time a legislature enacts a law—it classifies.").

¹⁸⁶ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.").

¹⁸⁷ Tussman & tenBroek, *supra* note 180, at 344.

¹⁸⁸ See *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888) (holding that no regulatory provision was repugnant to equal protection so long as it "place[d] under the same restrictions, and subject[ed] to like penalties and burdens, all who [were] embraced by its prohibitions.").

¹⁸⁹ See *TRIBE*, *supra* note 6, at 1440.

¹⁹⁰ It has long been established that the Equal Protection Clause extends to all state action that denies equal protection, including actions of the legislative, executive, and judicial branches. See *Virginia v. Rives*, 100 U.S. 313, 318 (1880).

out,"¹⁹¹ with rationality tested by the classification's ability to serve the purposes intended by the legislative or administrative rule. In other words, "[t]he courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."¹⁹²

The government may determine that it is in the public interest to treat the mentally ill differently from the mentally retarded,¹⁹³ widowed spouses who marry before age sixty differently than those who marry after sixty,¹⁹⁴ and plastic milk containers differently than paperboard containers.¹⁹⁵ The Equal Protection Clause requires that the government justify its choice of which classes are subjected to regulation. The minimum rationality standard is extraordinarily deferential to the legislature's determination of "fit" between the classes chosen and the governmental purpose. The Supreme Court has generally upheld state classifications when applying rational basis review to equal protection challenges.¹⁹⁶ Indeed, under rational basis review the Court has been willing to uphold classifications so long as they are supported by any conceivable basis, whether that basis has been articulated by the legislature or not.¹⁹⁷

2. *Illicit Purpose*

Although the *fit* between legislative means and ends has been the dominant approach and has resulted, on rare occasions, in laws being stricken for lack of a rational basis, the Supreme Court has also invalidated legislative classifications based upon the illegitimate *purpose* behind the classification. This review of governmental purpose has gained currency

¹⁹¹ *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966).

¹⁹² *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

¹⁹³ *Heller v. Doe*, 509 U.S. 312, 321-28 (1993).

¹⁹⁴ *Bowen v. Owens*, 476 U.S. 340, 348-50 (1986).

¹⁹⁵ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-70 (1981).

¹⁹⁶ See *TRIBE*, *supra* note 6, at 1443 (stating that the rationality requirement is "largely equivalent to a strong presumption of constitutionality").

¹⁹⁷ See *id.*, see also *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 646 (2000) ("The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision."). The Supreme Court has been reluctant to strike down state laws under rational basis review. 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 (1999) (noting that during the past twenty-five years, the Supreme Court has invalidated laws under the rationality test on only ten occasions, while rejecting such claims in one hundred cases).

in approximately the past three decades.¹⁹⁸ Indeed, in some instances it appears to have sharper teeth than the traditional means/ends review.¹⁹⁹

The Supreme Court has invalidated classifications because of illegitimate purposes in two categories of cases. The first category consists of classifications that favor in-state interests to those of "outsiders." In *Zobel v. Williams*,²⁰⁰ for example, the Supreme Court struck down as irrational an Alaska statute that distributed income from the state's natural resources based upon the year in which residency was established.²⁰¹ The Court has held that such categorizations, which favor politically powerful "permanent classes" of residents over out-of-state interests, are motivated by a bare desire to injure unrepresented outsiders. A motivation to benefit in-state interests or, conversely, to harm outsiders, is not a constitutionally rational basis for classifying groups.²⁰² Professor Sunstein has labeled ill motives of this sort "naked preferences."²⁰³

The second category of enactments invalidated by the Court for lack of a legitimate purpose are those in which a politically powerless or marginalized group has been singled out for unfair treatment.²⁰⁴ These "naked preferences" look very much like classifications based upon race and gender, which courts have subjected to more exacting scrutiny, although the Court has refrained from invoking its "suspect" or "quasi-suspect" classification jurisprudence to strike them down. The earliest case was *United States Department of Agriculture v. Moreno*,²⁰⁵ in which the

¹⁹⁸ See D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 83-84 (stating that inquiry into legitimacy of legislative purpose did not begin until the 1970s). For a discussion of the difficulty of ascertaining legislative purpose, see generally William N. Eskridge, Jr. & Phillip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 702-03 (1987).

¹⁹⁹ See Daniel A. Crane, *Faith, Reason, and Bare Animosity*, 21 CAMPBELL L. REV. 125, 139-46 (1999) (discussing "Bare Animosity Review").

²⁰⁰ *Zobel v. Williams*, 457 U.S. 55 (1982).

²⁰¹ *Id.* at 63.

²⁰² See generally *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (invalidating New Mexico law that granted tax exemption to Vietnam Veterans only if they had resided in state prior to specified date); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (striking down Alabama tax on out-of-state insurance companies that was higher than tax levied against in-state entities).

²⁰³ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

²⁰⁴ See Crane, *supra* note 199, at 139-46.

²⁰⁵ *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

Supreme Court struck down an amendment to the federal Food Stamp Act of 1964 that was intended to prevent "hippies" and "hippie communes" from participating in the food stamp program. Justice Brennan, writing for the majority, stated: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."²⁰⁶

The Supreme Court revisited its "naked animosity" approach in *Plyler v. Doe*,²⁰⁷ a case involving a Texas statute that prohibited children of illegal immigrants from attending public schools. The Court determined that the State's purported justifications for the statute were mere subterfuge, and that the purpose of the classification was to punish the children of illegal immigrants for their parents' status. It characterized the Texas law as an effort to impose "a lifetime hardship on a discrete class of children not accountable for their disabling status."²⁰⁸ The Court refused to recognize such naked animosity as a legitimate governmental purpose, and insisted that the State "do more than justify its classification with a concise expression of an intention to discriminate" against the children of illegal immigrants.²⁰⁹

The Supreme Court has granted similar protection under the Equal Protection Clause to the mentally retarded. In *City of Cleburne v. Cleburne Living Center*,²¹⁰ the Court determined that in refusing to grant a special use permit for the operation of a group home for the mentally retarded, the city was motivated by "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding."²¹¹ Under the Equal Protection Clause, the State must steer clear of its "private biases" and act solely in the public interest.²¹²

Most recently, in *Romer v. Evans*,²¹³ the Supreme Court invalidated a Colorado constitutional amendment passed by referendum which would have prohibited the State of Colorado or any of its political subdivisions from

adopt[ing] or enforc[ing] any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices

²⁰⁶ *Id.* at 534.

²⁰⁷ *Plyler v. Doe*, 457 U.S. 202 (1982).

²⁰⁸ *Id.* at 223.

²⁰⁹ *Id.* at 227 (citation omitted).

²¹⁰ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

²¹¹ *Id.* at 448.

²¹² *Id.* (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

²¹³ *Romer v. Evans*, 517 U.S. 620 (1996).

or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.²¹⁴

In his majority opinion striking down the Colorado constitutional amendment, Justice Kennedy stated: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."²¹⁵ Justice Kennedy invoked the spirit of the Equal Protection Clause, as well as the text of the Fourteenth Amendment, in striking down the Colorado amendment. The Court determined that the Colorado amendment violated the naked animosity principle because it "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."²¹⁶ In other words, the Colorado amendment was born of a naked desire to harm gays, lesbians, and bisexuals.

In these "bare animosity" cases, the Supreme Court invalidated laws not because the legislature did not formulate a tight "fit" between its means and ends, but rather because the ends themselves were forbidden by the Equal Protection Clause. In a nation of equal laws, a naked desire to harm a particular group of people is a constitutionally illegitimate purpose. Simply put, the State cannot single out a group of people for adverse treatment solely because it does not like them, at least, the Court has indicated, when the group singled out is politically unpopular and lacks the political wherewithal to defend itself from vindictive lawmakers.

V. "CLASSES OF ONE" AND THE EQUAL PROTECTION CLAUSE

Far from being pre-determined by prior precedent, *Olech* appears to be at odds with a century of equal protection jurisprudence. A "class of one" is no class at all, at least not as that term has been defined by the Supreme Court. The Court's jurisprudence reflects the history of the Equal Protection Clause, which is bound up with notions of group treatment, and has never been considered a tool for adjudicating claims of individual mistreatment.²¹⁷ Thus, contrary to *Olech*, there is no doctrinal basis for

²¹⁴ COLO. CONST. art. II, § 30b, *invalidated by Romer v. Evans*, 517 U.S. 620 (1996).

²¹⁵ *Romer*, 517 U.S. at 633.

²¹⁶ *Id.* at 634.

²¹⁷ See *supra* notes 152-216 and accompanying text.

treating an individual white male as protected under the Equal Protection Clause.

A "class of one" consisting solely of a disappointed white male plainly does not implicate the anti-caste concern that animated the framers of the Equal Protection Clause. Nor does such a "class" raise concerns for defending the politically powerless against negative stereotyping or differentiation by the government on some illegitimate basis, such as sexual orientation or mental capacity, as in more recent Supreme Court jurisprudence.²¹⁸

The only possible theoretical underpinning for invoking the clause on behalf of such a "class" is the anti-differentiation principle, which requires at a minimum that the government state a rational reason for its line-drawing or differentiating principle—its "classification." As explained below, however, while the anti-differentiation theory holds out some surface appeal in support of the "class of one" cases, upon closer examination this theory also fails to provide an adequate foundation for applying the Equal Protection Clause to individuals who are disappointed by the decisions of their local officials.

A. *The Rights of "Persons" or Groups?*

In the process of opening federal courthouse doors to individual claims under the Equal Protection Clause, the *Olech* Court failed to consider even basic principles. To determine whether individual claims of mistreatment are covered under the Equal Protection Clause, it is necessary in the first instance to examine who or what is the object of the protection afforded under the Equal Protection Clause. Does the Equal Protection Clause protect individual persons, groups of individuals, or both?

Perhaps the most common understanding of the purpose of the clause is that it protects blacks and other minority classes from racial or ethnic stereotyping or, worse, outright racism. As Chief Judge Posner pointed out in *Indiana State Teachers Ass'n*, however, the Equal Protection Clause "does not speak of classes," and, in Judge Posner's view, "[a] class, moreover, can consist of a single member."²¹⁹ As demonstrated in Part II, the drafters of the Equal Protection Clause were burdened with far more serious concerns at the time the clause was drafted than whether an

²¹⁸ See *supra* notes 163-216 and accompanying text.

²¹⁹ *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

individual could bring a viable action under its language. They simply never considered the issue.

Despite its statement in *Olech* that its cases "have recognized" such claims, the Supreme Court has never been presented with the issue of whether individual claims of mistreatment are properly the subject of the Equal Protection Clause.²²⁰ The Court has, however, made the same seemingly axiomatic textual observation made by Chief Judge Posner in *Esmail*—that the clause speaks in terms of "persons"—in *City of Richmond v. J.A. Croson Co.*,²²¹ and, more recently, in *Adarand Constructors, Inc. v. Peña*.²²²

In *Croson*, the Court invalidated a plan adopted by the Richmond City Council that required prime contractors to whom the city awarded construction contracts to subcontract at least thirty percent of the dollar amount of the contract to one or more "Minority Business Enterprises." In settling upon strict scrutiny as the appropriate standard by which to judge classifications drawn in favor of minorities, the Court rejected the argument that classifications that seek to benefit minorities should be subjected to lesser scrutiny than those that seek to disadvantage them. To emphasize its commitment to color-blindness, the Court reiterated that "the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."²²³ In *Adarand*, the Court invalidated federal highway

²²⁰ The Court cited only two cases that it claimed had "recognized" class of one claims under the Equal Protection Clause. One of the cases the Court relied upon, *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989), involved not an individual claim of mistreatment but claims on behalf of a group of property owners, who alleged that a tax assessor had assessed their property differently from the property of those similarly situated based upon an improper characteristic shared only by petitioners' properties. That is not a "class of one" scenario, but is rather the sort of systematic line-drawing with which the Equal Protection Clause has always been concerned. The other case, *Sioux City Bridge Co. v. Dalinta County, Neb.*, 560 U.S. 441, 446 (1923), is a remnant of the Court's earliest efforts to articulate a rationality standard. See *supra* notes 188-89 and accompanying text. *Sioux City* was another dispute over tax assessments, in which the Court treated all taxpayers as belonging to a single "class," and found the possibility of differential treatment of one class member—Sioux City—implicated principles of equal protection. *Sioux City*, 560 U.S. at 446.

²²¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²²² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

²²³ *Croson*, 488 U.S. at 493 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

contract set-asides for minority business enterprises. In the course of rejecting the idea of "benign" federal racial classifications, the Court declared it a "basic principle" that the Equal Protection Clause "protects persons, not groups," and went on to identify the right to equal protection as a "personal right."²²⁴ If the object of the clause is to protect "persons" and is in fact concerned only with "personal rights," perhaps the Equal Protection Clause provides an individual, regardless of race, gender or other group characteristic, a federal constitutional remedy for unfair treatment at the hands of local officials.

As noted, in *Olech* the Supreme Court did not so much as mention the text of the Equal Protection Clause. Nor, despite the fact that its statements in *Adarand* and *Croson* appear on their face to support the principle that class or group characteristics are irrelevant under the Equal Protection Clause, did the *Olech* Court rely upon those statements. Careful observation of the context in which the Supreme Court articulated this individualistic approach to equal protection demonstrates why the Court did not even cite *Adarand* and *Croson*. Those cases do not stand for the proposition that the object of equal protection is the individual, wholly separate and apart from any group to which he or she belongs. Indeed, when considered in context, the Court's comments go in the opposite direction.

It is critical to recognize that in *Croson* and *Adarand* the Supreme Court was addressing the issue of affirmative action, an issue that presents "the tension between the Fourteenth Amendment's guarantee of equal treatment of all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by minority groups in our society."²²⁵ The principal issue before the Court in *Croson*, and later in *Adarand*, was whether affirmative action policies were to be subjected to the same "strict scrutiny" as other race-based classifications. In explaining its answer in the affirmative, the Court said in *Croson* and *Adarand* that equal protection rights are personal *insofar as* the government may not use race as the sole criterion in public decision-making, whether distributing benefits or burdens, absent some very compelling reason (i.e., remedying the effects of past or current discrimination²²⁶). After comment-

²²⁴ *Adarand*, 515 U.S. at 227

²²⁵ *Croson*, 488 U.S. at 476-77

²²⁶ As the Supreme Court held in *Croson*, however, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* at 499. If the government is to use race at all, it must have evidence that the scope of the remedy it proposes is limited in some reasonable sense to the injury it wishes to redress. *See id.*

ing that the Equal Protection Clause “protects persons, not groups,” the Court explained:

It follows from that principle that all governmental action based on race—a *group* classification long recognized as “in most circumstances irrelevant and therefore prohibited,” should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding “benign” state and federal racial classifications to different standards does not square with them.²²⁷

In other words, the government is generally prohibited from using race or other class-based characteristics *as a proxy*. In the affirmative action context, a white person has a “personal right” not to be punished because of his skin color for past discrimination that is unidentified, unproven, and, therefore, unconnected to him. Thus, under *Croson* and *Adarand*, it is the individual’s differential treatment *based on his race* that implicates the Equal Protection Clause.

The import of the Supreme Court’s individualistic approach to equal protection in affirmative action cases is that even corrective justice must be color-blind. Non-victims should not benefit, and non-sinners should not pay. Equal protection rights are “personal” only insofar as the purpose of the clause is to make the individual, and not the group, whole. However, what the clause reaches, and sometimes forbids, in the first instance is *group-disadvantaging* governmental action. In other words, the clause is remedially personal insofar as remedies are fashioned to fit individual cases, to reward victims and to punish wrongdoers, but underpinning this individualistic approach is the notion that the government generally may not disadvantage members of a class or group solely because they share some common characteristic. To borrow Professor Brest’s succinct explanation, the Supreme Court rejects the “notion that the treatment of individuals as a group for malign purposes requires their treatment as a group for benign compensatory purposes.”²²⁸

B. *There is Not Always a “Class”*

The language of the Equal Protection Clause settles nothing with regard to “class of one” cases. While it is the individual “person” who is

²²⁷ *Adarand*, 515 U.S. at 227 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

²²⁸ See Brest, *supra* note 154, at 51.

benefitted or harmed by government action in any particular case, the Equal Protection Clause has always been concerned with group or class distinctions.²²⁹ Whatever other conclusions one might draw from the ratification debates, it is beyond dispute that the framers of the Fourteenth Amendment's Equal Protection Clause were principally concerned with eradicating the caste discrimination visited upon blacks in the post-Civil War era.²³⁰ It is also beyond debate that, whatever the intentions of the framers with regard to the scope of the Equal Protection Clause, the Supreme Court long ago expanded the list of "suspect" or "quasi-suspect" classifications to include those based upon gender and illegitimacy.²³¹ All other classifications are subjected to so-called "rational basis" review, which means either that the Court will analyze the degree of "fit" between government means and ends,²³² or, in a small but growing subset of cases, will invalidate a law that the Court deems to have an illegitimate purpose, i.e., an intent to disadvantage a politically powerless group.²³³

In sum, judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment is inextricably bound up with notions of group characteristics. It is the state's proxy, or broad generalization, that is subjected to scrutiny under the clause.

In this respect, the Equal Protection Clause is quite different from other provisions of the Bill of Rights. It is clear, for example, that the protection against unreasonable searches and seizures afforded to "persons" under the Fourth Amendment²³⁴ does not depend on group membership or status. The same is true of the rights against double jeopardy and self-incrimination

²²⁹ See *supra* notes 152-228 and accompanying text.

²³⁰ See *supra* notes 122-51 and accompanying text.

²³¹ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* §§ 9.4, 9.6 (1997).

²³² See *id.* at 541-45 (describing the "reasonable relationship" requirement of the rational basis test).

²³³ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating, under the rational basis test, a zoning ordinance that prevented the operation of a home for the mentally retarded).

²³⁴ The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

afforded the "person" under the Fifth Amendment.²³⁵ The Equal Protection Clause is different, however, because it addresses the unique wrong of discrimination.

Professor Sunstein explained this point in his recent book.²³⁶ With regard to the individualistic text of the Equal Protection Clause ("any person"), he states:

To be sure, "any person" may complain that a classification is constitutionally unacceptable. But on what grounds can "any person" seek special judicial assistance? Under the equal protection clause, all claims of constitutional discrimination are necessarily based on complaints about treatment that singles out a characteristic *shared by a group*. . . The issue is whether the government's use of that particular shared characteristic is disfavored from the constitutional point of view. There is no serious question about whether the characteristics of which "any person" may complain are shared characteristics; of course they are. In this sense, claims of unconstitutional discrimination are always claims about the government's impermissible use of some group-based characteristic, even if those claims are made by "any person."²³⁷

In sum, the essence of the Equal Protection Clause is the prohibition of group-based discrimination.

Nearly all of the Supreme Court's equal protection jurisprudence addresses legislative classifications. The legislature draws classifications based, hopefully, on some reasoned distinction aimed at serving a lawful purpose. By contrast, not all administrative decisions construct a we/they line capable of meaningful judicial review. This is particularly true in the "class of one" cases. In these cases the charge is that a government official has *singled out* an individual who does not belong to any group, vulnerable or otherwise, for unfair treatment. There has, quite simply, been no effort

²³⁵ The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself.

U.S. CONST. amend. V

²³⁶ CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

²³⁷ *Id.* at 125-26.

whatsoever to draw a line based upon some purportedly relevant distinguishing characteristic. Consequently, there is no "classification" as that term has been interpreted and applied in equal protection jurisprudence and scholarship.

Despite the absence of any effort to classify for the purpose of enforcement of the law, *Esmail* and the other cases in which courts confronted individual claims of vindictive action prior to *Olech* determined that the absence of competing groups did not take the Equal Protection Clause out of play.²³⁸ The First and Second Circuits did not state explicitly why the absence of an identifiable group characteristic did not foreclose review under the Equal Protection Clause. At least in its most recent "class of one" precedents, the Seventh Circuit ventured a two-pronged answer to this doctrinal dilemma. Its textual answer was discussed in the preceding section. The court's second point was that "[a] class, moreover, can consist of a single member."²³⁹ Indeed, according to Chief Judge Posner: "There is always a class."²⁴⁰ In *Esmail*, the Seventh Circuit held that the plaintiff's suit was not "barred by the 'class of one' rule, because there is no such rule."²⁴¹ In *Olech*, the Supreme Court accepted this principle as well settled.

There are several problems with the notion that "there is always a class" for purposes of the Equal Protection Clause, or, stated differently, that the alleged discrimination *creates* the class. The first is a matter of simple definition. Classes and castes are *group* separators. Individuals are sorted into one class or another based upon some characteristic, like skin color or gender, that they share with other members of the same group.²⁴²

²³⁸ See, e.g., *Esmail v. Macrane*, 53 F.2d 176, 179 (7th Cir. 1995) (explaining that an individual ought to have a remedy under the Equal Protection Clause).

²³⁹ *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

²⁴⁰ *Id.*

²⁴¹ *Esmail*, 53 F.3d at 180.

²⁴² See *supra* note 103 and accompanying text; see also BLACK'S LAW DICTIONARY 248-49 (6th ed. 1990) (defining "class" as "[a] group of persons, things, qualities, or activities, having common characteristics or attributes," and "classification" as an "[a]rrangement into groups or categories on the basis of established criteria"). Similar class concepts animate the definition of "discriminate." See *supra* note 102 and accompanying text. It may be argued that my approach to "classes" requires courts to draw difficult lines from time to time. Are two people enough to institute a "class," or three? In most cases in which there has been discrimination based on group or shared characteristics, the classification will be clear. The point is that equal protection provides a "personal" right to be free from invidious group or class discrimination based on shared characteristics

Consistent with this definition of class, all of the equal protection theories—anti-subjugation, group-disadvantaging, process, and anti-differentiation—have as their focus the treatment of one group vis-a-vis another.²⁴³ The Supreme Court's equal protection jurisprudence mediates these group controversies generally by reviewing the legislature's classifications under the "rational basis" review for proper fit, and occasionally for improper purpose, and uses "strict scrutiny" only to invalidate those classifications based upon a "suspect" characteristic.²⁴⁴

Prior to *Olech*, the Supreme Court had not squarely addressed whether an individual can constitute a "class" for purposes of the Equal Protection Clause. With few exceptions, the Supreme Court's equal protection cases have involved either legislative line-drawing that places different groups on opposite sides of a chosen line, or executive action, such as criminal prosecution, that targets a particular class or group.²⁴⁵ The Seventh Circuit "class of one" cases nowhere mentioned any of the numerous Supreme Court precedents that describe the Equal Protection Clause as a benchmark for judging the validity of governmental groupings of individuals. In *Indiana State Teachers Ass'n*, the Seventh Circuit relied on *Nixon v. Administrator of General Services*,²⁴⁶ a case involving a legislative enactment concerning the treatment to be afforded to former President Nixon's presidential materials, including certain tape recordings that were in danger of being destroyed. The Supreme Court held that President Nixon was a "legitimate class of one"²⁴⁷ such that Congress's enactment singling out his papers did not constitute an unconstitutional "bill of attainder."²⁴⁸ The *Nixon* case is readily distinguishable on the ground that it did not

that are arbitrary or irrelevant.

²⁴³ See, e.g., Tussman & tenBroek, *supra* note 180, at 344-53.

²⁴⁴ See CHEMERINSKY, *supra* note 231, at 529-31. See also *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645-47 (2000) (holding that age classifications do not involve a historically subjugated minority, and are thus appropriately subject only to rational basis review).

²⁴⁵ See *infra* notes 283-309 and accompanying text.

²⁴⁶ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

²⁴⁷ *Id.* at 472.

²⁴⁸ U.S. CONST. art. I, § 9, cl. 3. This clause provides: "No Bill of Attainder or ex post facto Law shall be passed." *Id.* A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon*, 433 U.S. at 468 (emphasis added). President Nixon initially challenged the act as violative of both the Equal Protection Clause and the prohibition on bills of attainder. However, he abandoned the equal protection argument before the Supreme Court. *Id.* at 471 n.33.

involve a claim of unfair treatment under the Equal Protection Clause, but rather an allegation of an unconstitutional "Bill of Attainder," which singles out an individual or group for special punishment. Given that the Court was not even discussing the Equal Protection Clause and classifications challenged pursuant to that clause, *Nixon* is thin support indeed for the statement that "there is always a class" under the Equal Protection Clause.

The other cases cited by the Seventh Circuit demonstrate the group-focus of the clause. The court cited *City of New Orleans v. Dukes*,²⁴⁹ which involved not a "class of one," but a municipal ordinance that prohibited all vendors from selling foodstuffs in Louisiana's French Quarter unless they had continuously operated their business in that location for eight or more years.²⁵⁰ The city, thus, drew a line separating the group of long-standing vendors from those who had operated their businesses for less than the purportedly relevant time period. Thus, *Dukes* set up a classic Equal Protection Clause inquiry regarding the legislative "fit" between means and ends.

In search of some support for its theory of equal protection, the Seventh Circuit stated in *Esmail* that *City of Cleburne v. Cleburne Living Center, Inc.*²⁵¹ "implied" that an individual ought to have a remedy under the Equal Protection Clause where he is subjected to vindictive governmental action.²⁵² The Court's concern in *City of Cleburne*, however, was not with unfair treatment visited upon an individual, but rather with a legislative classification that singled out mentally retarded persons *as a group* and placed them, based upon unwarranted stereotypes, under restrictions not borne by members of the majority group.²⁵³

Far from "implying" support for "class of one" equal protection cases, prior to *Olech* the Supreme Court had strongly suggested that it would reject the Seventh Circuit's conclusion that a "class" for purposes of the Equal Protection Clause can be "defined by reference to the discrimination itself."²⁵⁴ In *Personnel Administrator of Massachusetts v.*

²⁴⁹ *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam).

²⁵⁰ *Id.* at 298.

²⁵¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

²⁵² *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995).

²⁵³ *See Cleburne*, 473 U.S. at 450 (explaining that the ordinance shows "an irrational prejudice against the mentally retarded" while noting that fraternity and sorority members are not subject to the same treatment).

²⁵⁴ *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

Feeney,²⁵⁵ the Court held that in order to state a claim under the Equal Protection Clause, a plaintiff must do more than demonstrate the disparate impact of a law; she must also demonstrate that the government official acted with the intent to discriminate.²⁵⁶ Further, the "intent" required is of a particular nature when the Equal Protection Clause is invoked: the decision-maker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon *an identifiable group*."²⁵⁷ *Feeney* came very close indeed to stating a "class of one" rule in equal protection cases. The brief per curiam opinion issued in *Olech* does not even mention *Feeney*.

Under the Supreme Court's anti-differentiation principle, as explained in *Feeney*, an equal protection claim must be based on intentional discrimination against the plaintiff because of membership in a particular class, not merely on allegations of unfair treatment of the individual. The Sixth Circuit's *Futernick* decision is not the only Circuit opinion that rejected an equal protection claim based on allegations that an individual was treated unfairly.²⁵⁸ As noted, prior to *Esmail*, several of the Seventh Circuit's *own* precedents rejected the notion that a "class" can consist of a single person.²⁵⁹ Some of those opinions cited *Feeney* for the proposition that allegations by an individual that the person was treated unfairly or vindictively do not suffice under the Equal Protection Clause. As the panel explained in *New Burnham Prairie Homes v. Village of Burnham*:²⁶⁰ "Discrimination based merely on *individual*, rather than group, reasons will not suffice."²⁶¹

The Supreme Court has said precisely the same thing in its "selective enforcement" or "selective prosecution" cases, which, again, are nowhere mentioned in *Olech*. "Selective enforcement" is typically a defense raised to a criminal prosecution, the argument being that the prosecutor has singled out the individual for differential treatment—prosecution—while cases against others similarly situated to the defendant have not been

²⁵⁵ *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (upholding Massachusetts law considering veterans for state civil service positions ahead of non-veterans because purpose of the law was not to exclude women).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 279 (emphasis added).

²⁵⁸ See *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996).

²⁵⁹ See *supra* note 25 and accompanying cases.

²⁶⁰ *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990).

²⁶¹ *Id.* at 1481.

pursued.²⁶² In *Oyler v. Boles*,²⁶³ the Supreme Court rejected plaintiff's claim that he was selectively prosecuted under a repeat offender statute. The Court stated:

[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard *such as race, religion, or other arbitrary classification*. Therefore grounds supporting a finding of a denial of equal protection were not alleged.²⁶⁴

Thus, in order to prove a claim of selective enforcement, a defendant must demonstrate that the prosecutor decided to pursue him because of his membership in an identifiable group, his holding of particular religious beliefs, or some other arbitrary "classification" based on an illegitimate characteristic.

In *Wayte v. United States*,²⁶⁵ the Court elaborated further on the confines of the selective enforcement defense. In *Wayte*, petitioner was indicted for failure to register with the Selective Service System.²⁶⁶ He moved to dismiss the indictment, claiming that the Selective Service's policy of investigating and referring for prosecution only those who were "vocal" opponents of the registration program violated the Fifth Amendment guarantee of equal protection.²⁶⁷ In response, "the district court dismissed the indictment on the ground that the Government had failed to rebut petitioner's prima facie case of selective prosecution."²⁶⁸ The Ninth Circuit Court of Appeals reversed.²⁶⁹ The Supreme Court affirmed, holding that in order to prevail on a selective prosecution claim the defendant must

²⁶² For a discussion of the defense of selective prosecution, see Karl S. Coplan, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144 (1984).

²⁶³ *Oyler v. Boles*, 368 U.S. 448 (1962).

²⁶⁴ *Id.* at 456 (emphasis added) (citations omitted).

²⁶⁵ *Wayte v. United States*, 470 U.S. 598 (1985).

²⁶⁶ *Id.* at 603.

²⁶⁷ *Id.* at 604. Although the Fifth Amendment does not contain an Equal Protection Clause, it does contain an equal protection component. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (explaining that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive").

²⁶⁸ *Wayte*, 470 U.S. at 604-05 (footnote omitted).

²⁶⁹ *Id.* at 606.

demonstrate that the prosecution was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification . . . including the exercise of protected statutory and constitutional rights."²⁷⁰ Thus, in addition to demonstrating an impermissible classification, defendant may also prevail on a selective prosecution claim if he can show that his prosecution violates "protected statutory or constitutional rights," such as the exercise of First Amendment free speech rights.

The *Wayte* Court found it "appropriate to judge selective prosecution claims according to ordinary equal protection standards."²⁷¹ The Court cited *Feeney* for the proposition that defendants must demonstrate that the government official was motivated by an intent to discriminate based upon an illegitimate group characteristic.²⁷² As the Supreme Court held more than one hundred years ago in *Yick Wo v. Hopkins*,²⁷³ a defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular *class of persons* . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law.²⁷⁴ What was true when *Yick Wo* was decided is no less true today: ordinary equal protection standards forbid illegitimate classifications, but they do not speak to individual claims of unfair treatment. At least, that was the understanding prior to *Olech*.

Finally, as further demonstration that a class cannot be defined merely by the discrimination itself, the Supreme Court has grafted a class-based animus requirement onto certain federal civil rights laws. The surviving version of the federal Civil Rights Act of 1871, for example, prohibits conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws."²⁷⁵ The Supreme Court has held that an actionable conspiracy under this provision must evidence "some racial, or perhaps otherwise *class-based*, invidiously discriminatory animus behind the conspirators' action."²⁷⁶ As the Court explained in *Bray v. Alexandria Women's Health Clinic*,²⁷⁷ it was only by

²⁷⁰ *Id.* at 608 (citations and internal quotations omitted).

²⁷¹ *Id.*

²⁷² *Id.* at 608-09.

²⁷³ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²⁷⁴ *Id.* at 373 (emphasis added).

²⁷⁵ 42 U.S.C. § 1985(3) (2000).

²⁷⁶ *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added) (holding that "§ 1985(3) does not require state action but reaches private conspiracies . . . that are aimed at invidiously discriminatory deprivations of the equal enjoyment of rights secured to all by law").

²⁷⁷ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1992).

limiting the civil rights statute to race or other *class-based* animus that the Court could avoid "interpreting [the Act] as a general federal tort law."²⁷⁸ While the scope of the "other" class-based category remains unsettled, it is clear that actions under the statute alleging a violation of equal protection must be based upon invidious class animus and cannot consist solely of individual complaints of unfair treatment.²⁷⁹

Contrary to *Olech*, the notion of classes created with reference to defining group characteristics has been a critical concept in equal protection jurisprudence from the beginning. The framers and ratifiers of the Fourteenth Amendment sought to protect the class of newly freed slaves from the Black Codes.²⁸⁰ The Supreme Court's jurisprudence reaffirmed the framers' bedrock, and expanded the scope of the Equal Protection Clause to cover any classification of citizens utilized by the government to serve its ends. Under the Equal Protection Clause, the Court referees group conflicts—between men and women, rich and poor, and long-standing residents and newly established businesses—and adjusts the level of scrutiny it applies based upon the group characteristic the government relies upon in making the classification. Until *Olech*, it was fairly clear that the Equal Protection Clause could not be invoked to adjudicate individual claims of unfair treatment. As the Court stated in *Plyler v. Doe*:²⁸¹ "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."²⁸² Thus, while all laws classify, it is not accurate to state that there is *always* a class for purposes of the Equal Protection Clause. There are no castes of one.

C. Separation of Powers and the Limits of Judicial Review

There are three fundamental objections to permitting the federal courts to referee individual claims of mistreatment under standard equal

²⁷⁸ *Id.* at 268 (quoting *Griffin*, 403 U.S. at 102). In *Bray*, the Supreme Court held that § 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics. *Id.*

²⁷⁹ Justice Souter, for example, contends in his opinion in *Bray* that the other "class-based" category of § 1985(3) is not limited to race or like classes, but extends as well to other legislative classifications subject to "rational basis" review under the Court's equal protection jurisprudence. *See id.* at 295-96 (Souter, J., concurring in part and dissenting in part).

²⁸⁰ *See* discussion *supra* Part III.

²⁸¹ *Plyler v. Doe*, 457 U.S. 202 (1982).

²⁸² *Id.* at 213.

protection doctrine. First, "class of one" cases, or at least those shorn of any requirement that plaintiff demonstrate a campaign of retaliation or other intent to injure, provide no mediating principle for the decision-maker to employ. Second, as the Sixth Circuit stated in *Futernick*, "[t]he sheer number of possible cases is discouraging."²⁸³ Third, if there is to be a referee in cases of unfair or arbitrary treatment at the hands of state and local administrators, that task ought to fall to the state courts, who should judge the dispute under principles of state law.

The Equal Protection Clause by itself provides no workable test for determining whether there has been a violation of one's equal protection rights. It has become the responsibility of the courts and commentators to fashion some rule of decision to be applied when the clause is invoked. We rely on what Professor Fiss long ago called "mediating principles"—mediating because they "'stand between' the courts and the Constitution" and "give meaning and content to an ideal embodied in the text."²⁸⁴ However, as demonstrated, none of the mediating principles of the Equal Protection Clause—caste, stigma, process, or anti-differentiation—apply in the "class of one" cases.²⁸⁵

Despite its obvious weaknesses, the "bad faith" or "malice" approach adopted by the First, Second, and Seventh Circuits at least imposed some limits on the multitude of executive actions that could be challenged in federal court under the Equal Protection Clause. Indeed, Justice Breyer's concurrence in *Olech* noted that it was only the "added factor" of ill will that prevented the "class of one" cases from turning the courts into zoning boards of appeal.²⁸⁶ In *Olech*, however, the Supreme Court put subjective ill will to the side, opining that only arbitrary differential treatment need be alleged to state a claim.²⁸⁷

Olech leaves the courts with no mediating principle whatsoever. The Seventh Circuit had defended its "vindictive action" theory on the ground that the "loser" in a zoning contest could not "automatically appeal to the federal courts on the ground that the decision was arbitrary."²⁸⁸ That result,

²⁸³ *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir. 1996).

²⁸⁴ Fiss, *supra* note 163, at 107.

²⁸⁵ See discussion *supra* Part IV.

²⁸⁶ *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam). It is doubtful, however, that even the "added factor" of animus would serve as a significant or effective deterrent to lawsuits. If all it takes for a person who has been denied a benefit to state a claim is an allegation that a public official "had it in for" him, we should expect such lawsuits to be more common.

²⁸⁷ See *id.* at 1074.

²⁸⁸ *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

Chief Judge Posner stated, "would constitutionalize the Administrative Procedure Act and make its provisions binding on state and local government and enforceable in the federal courts."²⁸⁹

However, that is precisely the effect of *Olech*. There is now no executive or administrative action that is beyond the reach of the Equal Protection Clause. After *Olech*, any individual who is disappointed with a local zoning decision or, indeed, the provision of any municipal service or benefit, may appeal to the federal courts for redress. The courts must then decide the equal protection claim "without any guidance other than what might be thought implicit in the idea of arbitrary governmental action."²⁹⁰

In addition to providing no mediating principle of its own, *Olech* calls into question the mediating principles the courts have relied upon to limit equal protection claims. Employment discrimination and selective prosecution are just two examples. Under *Feeney*, a government employee who claims to have been wrongfully dismissed may invoke the Equal Protection Clause.²⁹¹ *Olech* calls into question employment decisions

²⁸⁹ *Id.*

²⁹⁰ *Id.* Remarkably, even after *Olech*, the Seventh Circuit continues to require that a "class of one" allege an improper motive in order to state a claim under the Equal Protection Clause. See *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000). In *Hilton*, the Seventh Circuit stated:

[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.

Id. at 1008. Without such a requirement, Chief Judge Posner argued, "the federal courts would be drawn deep into the local enforcement of petty state and local laws." *Id.* See also *Albiero v. City of Kankakee*, 91 F. Supp. 2d 1208, 1213 (N.D. Ill. 2000) (holding that to prevail on an equal protection claim, plaintiff must prove defendants "singled him out" for differential treatment in a spiteful effort to "get" him); *Singleton v. Chicago Sch. Reform Bd.*, No. 00C395, 2000 WL 777925, at *10 (N.D. Ill. June 13, 2000) (holding that a class of one plaintiff must allege defendant's actions "were motivated by vindictiveness and spite"); *Kevin v. Thompson*, No. 99 C 7882, 2000 WL 549440, at *6 (N.D. Ill. May 1, 2000) (dismissing class of one complaint where there was no allegation that decision was "vindictive, motivated by any illegitimate animus or caused by subjective ill will").

²⁹¹ See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1978) (explaining that "[a]lthough public employment is not a constitutional right any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause").

allegedly based upon gender, race, or some other group characteristic.²⁹² *Feeney* requires that plaintiffs in such cases prove intentional discrimination based upon some group characteristic. However, after *Olech*, all that is required is an allegation that plaintiff was dismissed while others allegedly "similarly situated" were not. In other words, plaintiffs need not allege, or prove, invidious discrimination based on shared characteristics, but only that they were dismissed, i.e., "discriminated" against, for no rational reason.

Likewise, the Supreme Court's selective prosecution precedents, which invoke standard equal protection doctrine, require an allegation of mistreatment based upon an illegitimate classification, such as religion, race, or punishment for exercise of a constitutional right.²⁹³ If, as *Olech* suggests, standard equal protection doctrine extends to every allegedly arbitrary decision made by a government official, an individual may challenge the decision to prosecute without reference to any improper classification. Under *Olech*, there would appear to be no limits to the reach of the Equal Protection Clause.²⁹⁴ In Professor Fiss's words, "class of one" cases offer nothing to "'stand between' the courts and the Constitution" and "to give meaning and content to an ideal embodied in the text."²⁹⁵

To be sure, an individual who challenges government action as arbitrary under the deferential "rational basis" test will be unlikely to

²⁹² See, e.g., *Trautvetter v. Quick*, 916 F.2d 1140, 1151 (7th Cir. 1990) (holding that plaintiff that alleged she was dismissed because of her gender in violation of the Equal Protection Clause "must show intent to discriminate *because of* her status as a female and not because of characteristics of her gender which are personal to her").

²⁹³ See *supra* note 29 and accompanying text.

²⁹⁴ The Fifth Circuit has examined a selective prosecution claim post-*Olech*. In *Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000), the court held that "to successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right." *Id.* at 277 (footnote omitted). The Fifth Circuit further opined that the Supreme Court's opinion in *Olech* did not alter the requirement that "class of one" selective prosecution plaintiffs "must assert membership in a larger protected class." *Id.* at 277 n.17 That interpretation, however, is contrary to the plain holding of the *Olech* opinion, which, like the Seventh Circuit's "vindictive action" precedents, recognizes an individual's right to equal protection regardless of any group membership or identification. See *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam).

²⁹⁵ Fiss, *supra* note 163, at 107

succeed. At least that is true where the decision maker can proffer some legitimate reason for the action taken.²⁹⁶ However, the fact that a defense may be available in most cases does not excuse the expansion of a constitutional provision to cover every conceivable case. The Supreme Court has stated that the Constitution and its amendments were intended to apply to "the large concerns of the governors and the governed."²⁹⁷ That intent has been carried out in equal protection jurisprudence by focusing on classifications that have effects beyond the confines of disputes over individual benefits. Subjecting a plaintiff to an eighteen foot easement differential or failing to timely connect a homeowner's sewage line or pick up his trash, though actions that are undoubtedly of concern to the individuals involved, are hardly the type of "large concerns" that should embroil the federal courts in constitutional questions. Such disputes will transform the federal courts into overseers of the day-to-day conduct of local government officials. Further, the Supreme Court has been highly sensitive to the prospect of subjecting government officials to intrusive and time-consuming lawsuits. In *Crawford-El v. Britton*,²⁹⁸ for example, the Supreme Court stated that "there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions."²⁹⁹

In *Esmail*, Chief Judge Posner argued that claims of mistreatment by state and local officials called for a federal remedy. In closing his opinion, he noted that: "[a] class of one is likely to be the most vulnerable of all."³⁰⁰ Consider a person, regardless of color, who has the weight of the government brought upon him for no reason other than sheer hatred. As Chief Judge Posner further commented in *Esmail*: "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."³⁰¹

Olech does not rest upon orchestrated campaigns of vengeance, malignant animosity, or even the naked abuse of government power.³⁰²

²⁹⁶ See, e.g., *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (stating that "[t]he rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification").

²⁹⁷ *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

²⁹⁸ *Crawford-El v. Britton*, 523 U.S. 574 (1998).

²⁹⁹ *Id.* at 590.

³⁰⁰ *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).

³⁰¹ *Id.* at 179.

³⁰² See *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam).

Rather, the decision extends to even the most routine of government decisions such as the denial of some benefit to which plaintiff believes she is entitled. It sets up the federal courts not just as zoning boards of appeals, but rather as arbiters of every wrong allegedly committed by a local administrator. Every appeal in the zoning context, for example, necessarily involves some allegation that the board exceeded, abused, or distorted its legal authority. The breadth of the equal protection doctrine the Supreme Court accepted as settled in *Olech* is disconcerting.³⁰³

A weak or ambiguous mediating principle will invite lawsuits. The Sixth Circuit is not the only court concerned about the "sheer number of possible cases"³⁰⁴ likely to be spawned by the "class of one" precedents. The Seventh Circuit voiced its own concerns in *Olech*, stating that "[o]f course [they were] troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case."³⁰⁵ It is not hyperbole to suggest that this will be precisely the effect of *Olech*. A plaintiff need only artfully plead in the complaint that an official acted arbitrarily or irrationally in order to cause that official to appear and defend against the allegations.

Perhaps even more troubling than the burdens posed by the "class of one" cases is the federalization of these local disputes between citizens and

³⁰³ It was entirely unnecessary in *Olech* to create a broad new remedy in federal court for every local wrong. Esmail and other classes of one already have federal constitutional remedies at their disposal. First, under the *Wayte* decision, if Esmail had alleged that the government official sought to "get" him because of his exercise of First Amendment rights (a claim Esmail did not, but could have, made), he would have stated a valid selective enforcement claim. See *Esmail*, 53 F.3d at 178. Thus, at least where the plaintiff is exercising a constitutional right at the time of the vindictive action, he may invoke the selective enforcement precedents. Further, the Due Process Clause is the provision that polices fairness between the state and the *individual* dealing with the state, regardless of how other individuals in the same situation may be treated. See *supra* Part VI. The approach developed in those cases limits actionable executive action to egregious or outrageous behavior, and I argue that "class of one" equal protection claims, if they are to be permitted, ought to be similarly limited.

³⁰⁴ *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir. 1996).

³⁰⁵ *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd per curiam*, 120 S. Ct. 1073 (2000). See also *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (warning that without a mediating principle, "the federal courts would be drawn deep into the local enforcement of petty state and local laws").

their government officials. On this point the words of the Seventh Circuit in *Indiana State Teachers Ass'n* bear repeating:

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. The review of such a decision not claimed to violate some other source of constitutional obligation such as the free speech clause of the First Amendment is not the proper business of the federal judiciary, which would be operating without any guidance other than what might be thought implicit in the idea of arbitrary governmental action.³⁰⁶

It would be difficult to better articulate the primary objections to making the "class of one" cases the province of the federal judiciary

The federal courts are not the proper fora in which to litigate purely local disputes. That is particularly so when the principal question posed is whether the regulator has acted arbitrarily. There are state laws and procedures upon which to base such a claim. Arbitrary government action is prohibited and subject to injunction under the common law, and most states have administrative procedure acts of their own.³⁰⁷ Thus, there is no compelling reason for the federal judiciary to insert itself into the day-to-day conduct of local government officials. As the *Futernick* court explained:

Those affected by the unfair regulator have recourse to the state political processes that appointed that regulator in the first place. State courts or the state constitution may provide protection. . . . Absent a breakdown in the state's normal political process that unfairly affects a protected group or

³⁰⁶ *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

³⁰⁷ *See, e.g., Arnold v. Engelbrecht*, 518 N.E.2d 237, 239 (Ill. 1987) (holding that discretionary acts of public official which are arbitrary and capricious are subject to injunctive relief).

the exercise of constitutional rights, we can and should trust states to police adequately their own processes.³⁰⁸

In *Esmail*, the Seventh Circuit asserted, without citation to any authority or example, that "[a]lthough the courts of Illinois seem to have been perfectly ready, willing, and able to protect Esmail against Mayor Macrane, powerful state or local officials are not infrequently able to overawe state or local courts."³⁰⁹ To accept that assertion as constitutional doctrine is to make every matter of state politics the domain of the federal judiciary. This underestimates and denigrates the state and local judiciaries, who ought not be pushed aside in order that federal constitutional doctrine may be unnecessarily expanded.

It is ironic that the Supreme Court, which of late has emphasized principles of federalism and has limited access to federal courts, would invite countless claims alleging that the federal constitution has been violated by local and state government officials.³¹⁰ In light of its interpretation of the Due Process Clause, as discussed in the final Part of this Article, it is surprising that the Court did so.

VI. EXPOUNDING A CONSTITUTION—SUBSTANTIVE DUE PROCESS

Under the Equal Protection Clause, individual claims of mistreatment should be put to one side; yet, if they are to be permitted under *Olech*, the courts will need a mediating principle to apply, lest the federal constitution swallow whole state processes for adjudicating allegations of executive and administrative misconduct. A constitutional standard already exists to test individual claims of arbitrary executive action. That standard has its origins in the area of substantive due process, and it permits relief from allegedly arbitrary government action only in the rarest of circumstances. In that

³⁰⁸ *Futernick*, 78 F.3d at 1059.

³⁰⁹ *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).

³¹⁰ See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999) (rejecting implied waiver as a basis for abrogating states' sovereign immunity and holding that any waiver of sovereign immunity by a state must be express); *Alden v. Maine*, 527 U.S. 706, 748 (1999) (holding that "our federalism" requires that Congress treat states in a manner indicative of their status as residuary sovereigns); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (stating that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states").

respect, it stands in stark contrast to the "class of one" approach under *Olech*.

A. *Substantive Due Process—The Conscience-Shocking Standard*

For more than a century, the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment,³¹¹ not the Equal Protection Clause, as the constitutional guarantee "intended to secure the *individual* from the arbitrary exercise of the powers of government."³¹² Recently, the Court explained in *County of Sacramento v. Lewis*³¹³ that "[w]e have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'"³¹⁴

Indeed, the core concept of due process is protection of the individual against arbitrary action. This is true whether the challenge is to the denial of fundamental procedural fairness or, as the *Lewis* Court stated, "in the exercise of power without any reasonable justification in the service of a legitimate governmental objective."³¹⁵ It is with the latter circumstance that the so-called "substantive due process" doctrine is concerned. In *Lewis*, the Supreme Court held that a police officer's actions during a high-speed chase did not violate the substantive component of the Due Process Clause because the officer's conduct did not "shock the conscience."³¹⁶ In an attempt to give content to the "shocks the conscience" standard, the Court stated that "conduct intended to injure in some way unjustifiable by any

³¹¹ The Due Process Clause provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law." U.S. CONST. amend. XIV

³¹² *Hurtado v. California*, 110 U.S. 516, 527 (1884) (emphasis added). In *Ross v. Moffitt*, 417 U.S. 600 (1974), then Justice Rehnquist distinguished the Equal Protection and Due Process Clauses by explaining that "'Due process' emphasizes fairness between the State and the *individual* dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between *classes of individuals* whose situations are arguably indistinguishable." *Id.* at 609 (emphasis added).

³¹³ *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

³¹⁴ *Id.* at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). See also *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

³¹⁵ *Lewis*, 523 U.S. at 846.

³¹⁶ *Id.* at 833.

government interest is the sort of official action most likely to rise to the conscience-shocking level."³¹⁷

Due process in its substantive sense limits what the government may do both in its legislative and executive capacities. However, in *Lewis* the Supreme Court held that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."³¹⁸ In cases involving challenges to legislation, courts must inquire whether the claimed due process interest is a fundamental right "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty."³¹⁹ It is only executive actions that are subject to the "shocks the conscience" standard.³²⁰

The Supreme Court's substantive due process cases involving executive action emphasize that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"³²¹ The Supreme Court has explained that only by so limiting the range of potential liability can the Court recognize that—as noted by Chief Justice Marshall early in the development of judicial review—"it is a *constitution* we are expounding."³²² In *Lewis*, the Court briefly explained its basis for cabinining executive liability under the federal constitution: "[E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law."³²³

B. A "Font" of Administrative Law

The "class of one" cases³²⁴ implicate precisely the same concerns. Individual claims of executive or administrative misconduct under the Equal Protection Clause threaten to "demote" the constitution to a "font"

³¹⁷ *Id.* at 849 (citation omitted). The "shocks the conscience" standard originated in *Rochin v. California*, 342 U.S. 165 (1952), where the Court held that the forced pumping of a suspect's stomach "shocked the conscience." *Id.* at 172-73. See also *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that such conduct "shocked the conscience" and was so "brutal" and "offensive" that it did not comport with "traditional ideas of fair play and decency").

³¹⁸ *Lewis*, 523 U.S. at 846.

³¹⁹ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

³²⁰ *Lewis*, 523 U.S. at 846.

³²¹ *Id.* (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

³²² *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

³²³ *Lewis*, 523 U.S. at 847-48 n.8.

³²⁴ See discussion *supra* Part IV

not of tort, but of administrative law. There is no principled reason to allow such claims to be brought readily in federal court under the Equal Protection Clause, while limiting the same actions brought under the Due Process Clause to conduct that "shocks the conscience" or is "egregious."³²⁵ Allowing claims of irrational or arbitrary executive and administrative action to be brought in federal court by classes of one under traditional equal protection doctrine will supplant state administrative law and, as the Seventh Circuit itself pointed out in the "vindictive action" cases, constitutionalize the federal Administrative Procedure Act.³²⁶

Individual challenges to the decisions of state and local executive officials are plainly the province of the Due Process Clause. However, if the Court is to interpret the Equal Protection Clause as reaching these claims, it ought to at least subject them to the same "shocks the conscience" standard as it does claims of executive misconduct under the due process guarantee. Like the Due Process Clause, equal protection "does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."³²⁷ Only by treating "class of one" claims in the same manner as those invoking the substantive due process guarantee can the courts limit these cases to the most egregious and

³²⁵ To be sure, the Supreme Court has been wary of expanding liability based upon the "textual conundrum of substantive due process." John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 502 (1997). Thus far, the Court has applied the standard only in cases involving physical injury to the plaintiff. But it is not necessarily so limited. See Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313 (1991) (arguing that conduct short of physical abuse may satisfy the "shocks the conscience" standard). See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining that "we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended'") (quoting *Collins*, 503 U.S. at 125). But expanding the constitutional proportions of executive and administrative liability under the Equal Protection Clause merely because it is a more favored clause is not a principled distinction. Such an expansion creates the same difficulty the Court has assiduously tried to avoid in its due process cases, and the Equal Protection Clause is also characterized by "scarce and open-ended" criteria. State law ought not be supplanted by federal constitutional doctrine, whether the state law at issue sounds in tort or administrative law.

³²⁶ See *Indiana State Teachers Ass'n v. Indianapolis Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

³²⁷ *Lewis*, 523 U.S. at 848.

arbitrary conduct, thereby preserving the proper constitutional proportions.³²⁸

As the Second Circuit stated in a case involving a substantive due process challenge to a zoning decision similar to that in *Olech*:

Substantive due process is an outer limit on the legitimacy of governmental action. It does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason *correctable in a state court lawsuit seeking review of administrative action*. Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.³²⁹

What the substantive due process guarantee reaches, and what the Equal Protection Clause ought to be limited to in class of one cases, are government officials who abuse their power, or "employ[] it as an instrument of oppression."³³⁰ That standard rightly "points clearly away from liability, or clearly toward it, only at the ends of the [administrative] law's spectrum of

³²⁸ From a textual standpoint, there is no reason the courts could not borrow the "shocks the conscience" standard in equal protection cases challenging arbitrary executive action. The text of the Due Process Clause nowhere requires that conduct "shock the conscience" to be actionable. Nor does the Equal Protection Clause on its face distinguish among "rational," "important," and "compelling" government interests. These are court-fashioned standards used to limit the reach of broadly worded constitutional provisions. It should make no difference of *constitutional* proportions whether a plaintiff challenging executive action couches his claim in terms of equal protection or due process, or whether these claims create a "font" of tort or administrative law.

³²⁹ *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (emphasis added). See also *G.M. Eng'rs & Assoc. v. W. Bloomfield Township*, 922 F.2d 328, 332 (6th Cir. 1990) (holding that local zoning actions violate substantive due process only if they "shock the conscience"); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) (holding that "substantive due process claims should be limited to 'truly irrational' governmental actions [such as] attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet").

³³⁰ *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). In *Rabinovitz v. Rogato*, 60 F.3d 906 (1st Cir. 1995), the court cautioned that "routine" claims that a zoning official acted maliciously "are likely to have rough sailing." *Id.* at 912. However, the court allowed the case to proceed because, based on the evidence, "a reasonable jury might well be able to conclude that there was an orchestrated conspiracy involving a number of officials, selective enforcement, malice, and substantial harm." *Id.*

culpability”³³¹ In that sense, the First, Second, and Seventh Circuits’ focus on “vindictiveness”—a concerted effort to “get” an individual or an intent to injure him—correctly, if somewhat imperfectly, limits the constitutional proportions of these equal protection claims.³³² There must, however, be substantially more than a single act of malice underlying some routine administrative action.

C. *The “Bare Animus” Cases*

Efforts to “get” an individual through “orchestrated campaign[s] of vengeance”³³³ are the sort of “conduct intended to injure in some way unjustifiable by any government interest” that is the target of the conscience-shocking standard.³³⁴ It is in such cases that federal remedies are most appropriate, as the machinery of state or local government has plainly malfunctioned. All other cases, including routine zoning challenges, or allegations of a single act of ill will or animus, ought to be left to the state courts. Although the Court did not fully explain the legislative/executive distinction in *Lewis*, it seems clear that there is a mediating principle at work. Legislation represents the institutional judgment of the members of an elected branch of government, while executive action tends mainly to consist of conduct undertaken by a single actor. Thus, it is reasonable to impose a different standard on challenges to executive action than applied to legislative challenges. What the Court is concerned with under the Due Process Clause is the *systematic* breakdown of the governmental function, not random carelessness or mistakes.³³⁵ Thus,

³³¹ *Lewis*, 523 U.S. at 848. It is important to remember, when delineating the bounds of their liability, that local and state administrators are called on to make many routine divisions each day. As Chief Judge Posner noted in *Olech*, there may be “tens or even hundreds of thousands” of disputed divisions each year.” *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998).

³³² Unfortunately, the Seventh Circuit failed to limit its “no vindictive action” precedents to instances in which there has been a systematic malfunction in the administration of local laws, such as an “orchestrated campaign of official harassment.” *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).

³³³ *Id.* at 178.

³³⁴ *Lewis*, 523 U.S. at 849.

³³⁵ See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993) (arguing that due process law aims to “ensure that governmental lawbreaking does not reach intolerable levels” and that “this . . . ambition is more clearly implicated in challenges to rules and legislation than in individual tort actions”).

it is not the isolated act of denying an individual a permit, even if that denial is based on ill will, that deserves constitutional rebuke, but rather the concerted effort or pattern of seeking vengeance or retaliation against the individual.³³⁶ Carrying this distinction over to the "class of one" equal protection cases, it may be appropriate to apply traditional notions of equal protection to *legislation* that singles out an individual or entity for special treatment, as this would constitute, by definition, a *systematic* deprivation of equal protection. However, traditional notions of equal protection would not apply to run-of-the-mill executive actions, but only to those, like an orchestrated campaign to punish an individual, that "shock the conscience."

Among the difficulties with incorporating the conscience-shocking standard into equal protection challenges to executive action is the Supreme Court's reluctance to sanction an investigation of individual motives under traditional equal protection doctrine. In *Olech*, the Supreme Court did not rule out an assessment of motive, but rather declined to consider whether the Seventh Circuit's "illegitimate animus" theory was viable under the Equal Protection Clause.³³⁷ However, Justice Breyer indicated in his concurrence that the "added factor" of subjective ill will was necessary to confine the Court's holding to only a limited number of cases.³³⁸ Without it, Justice Breyer recognized that courts may well be presented with the question "whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause."³³⁹

It is true that the Supreme Court has been reluctant to examine the subjective intent of government officials, particularly legislators, when the Equal Protection Clause is invoked.³⁴⁰ This reluctance is based at least in

³³⁶ See J. Michael McGuinness & Lisa A. McGuinness Parlagreco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV. 1129, 1152 (1990) ("While a single incident may certainly suffice to shock the conscience, perhaps the test is more appropriately applied to a course of governmental conduct"). See also Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 690 (1997) (stating that "what is special about constitutional law, and distinguishes it from tort, is its concern with institutional power, and therefore with systemic injustice").

³³⁷ See *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam).

³³⁸ *Id.* (Breyer, J., concurring).

³³⁹ *Id.*

³⁴⁰ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a

part on the difficulty inherent in assessing the motivations of a multi-member legislative body. But as we have seen, the Court sometimes invalidates government actions under the Equal Protection Clause because they are motivated by bare, irrational animus.³⁴¹ These "naked preference" cases support application of the conscience-shocking standard to "class of one" claims premised upon the Equal Protection Clause, because in such cases there is no legitimate purpose for the acts committed. Moreover, in cases involving orchestrated campaigns of official harassment or retaliation, a detailed inquiry into officials' motivations may not be necessary. More often than not, a campaign of vengeance involving a series of malicious acts will speak for itself.

Democratic outputs should not be frequently set aside solely on the ground that they were the result of illicit motives.³⁴² Indeed, although the Equal Protection Clause is frequently invoked to invalidate state laws, the Court has invalidated only a mere handful of laws based upon illegitimate purpose. Similarly, it may be assumed that executive conduct that singles out a person for harsh or retaliatory treatment that is conscience-shocking or egregious will be an exceptional occurrence. To invalidate decisions in such isolated circumstances does not interject the courts into the administrative process other than under the most unique and extraordinary circumstances, as a judicial check on government run amok. "Class of one" cases limited by the "shocks the conscience" standard do not threaten to embroil federal courts in local disputes of all manner and circumstance. For example, the doctrine would not reach the run-of-the-mill zoning decision. Yet, a campaign of retaliation, like a legislative classification that purports to deny to some group benefits afforded to all others by law, "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the [person] affected."³⁴³

The "naked preference" cases and "vindictive action" cases share another similarity. Both types of cases implicate the process theory of equal protection. Chief Judge Posner posited the frightening prospect of an

wrongful purpose or motive has caused the power to be exerted.") (citing *McCray v. United States*, 195 U.S. 27, 56 (1904)).

³⁴¹ See *supra* Part IV.C.2.

³⁴² The Supreme Court has cautioned against "broad ranging" discovery to determine the subjective good faith of government officials. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). But it has stopped short of prohibiting such inquiries, relying instead upon the availability of early dispositive motions to weed out non-meritorious claims. See *Crawford-El v. Britton*, 523 U.S. 574 (1998).

³⁴³ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (emphasis added).

individual who faces alone the vindictive force of the government.³⁴⁴ Process theory plainly applies in the case of groups like homosexuals and the mentally retarded. We may presume that their legislative allies are few or none; hence the need to scrutinize far more carefully the government's stated purpose in enacting legislation that disfavors these groups. The same can be said of individuals who complain of vindictive or retaliatory action by local administrators engaged in an orchestrated conspiracy. Although not part of a vulnerable group that has historically been victimized, these isolated individuals are indeed "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."³⁴⁵ They are, in Ely's words, disadvantaged "out of simple hostility."³⁴⁶ What we should be concerned with in the "vindictive action" cases is a malfunction of the political process in a special form—not simply the bare animosity or naked hatred of a single administrator in an isolated instance, but rather a concerted effort by government officials of vengeance or retaliation. This is a structural problem, not merely a random mistake in democratic output. While it may be that the subjugated individual can ultimately rally others to his cause, a political remedy—removal of the rogue administrator—will be entirely ineffectual, as the harm from the retaliation will have been done.

The Court has exercised very sparingly its power to invalidate laws on the ground that they are animated by an illegitimate purpose. It has done so to protect the politically powerless from legislative ill will. While concededly outside the original scope of footnote four of *Carolene Products*,³⁴⁷ which concerned historically subjugated and readily identifiable minorities, individuals who face alone a campaign of vengeance are certainly politically powerless in the strictest sense. If the Equal Protection Clause means anything, it is that a legislature cannot enact laws that marginalize or subjugate a vulnerable class of citizens merely because a majority of the lawmakers do not like them. Neither should rogue executive officials be permitted to harass or retaliate against an individual out of bare animus.

Not every random act that disappoints an individual ought to involve the federal courts in constitutional interpretation. But egregious cases of governmental oppression are another matter entirely, no matter what the

³⁴⁴ See discussion *supra* Part II.

³⁴⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

³⁴⁶ ELY, *supra* note 175, at 103.

³⁴⁷ See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); see also *supra* note 174 and accompanying text.

race or gender of the victim. Such conduct does not "comport with traditional ideas of fair play and decency,"³⁴⁸ is "arbitrary" in the constitutional sense, and is thus properly the subject of the equal protection guarantee.

The cryptic discussion of equal protection in *Olech* likely will continue to spawn confusion in the lower courts. In addition to providing some mediating principle by which to screen equal protection claims, the focus on egregious, orchestrated retaliation would bring doctrinal parity to "class of one" cases by re-affirming that only the most outrageous official misconduct is of constitutional significance. By limiting the "class of one" theory, the Supreme Court would reaffirm prior precedents like *Feeney*³⁴⁹ and *Wayte*,³⁵⁰ which plainly require something more than a bare allegation of arbitrary conduct. An individual who claims to have been discharged from employment in violation of the Equal Protection Clause still must prove that dismissal was due to an intent to discriminate against the individual because of membership in some group. In addition, claims of selective prosecution will continue to be limited primarily to challenges against traditional group-based discrimination or retaliation for exercise of a constitutional right.³⁵¹ Allegations of arbitrary denial of governmental benefits will, in the main, be the province of state and local adjudicative bodies, which will generally be far closer to the disputes and, thus, better able to resolve them.

VII. CONCLUSION

As the Seventh Circuit conceded in *Esmail*,³⁵² in rather understated fashion, protecting angry white males from allegedly unfair government treatment "is remote from the primary concern of the framers of the equal protection clause."³⁵³ That observation does not, of course, prohibit an

³⁴⁸ *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

³⁴⁹ *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1978).

³⁵⁰ *Wayte v. United States*, 470 U.S. 598 (1985).

³⁵¹ Claims of selective prosecution based on *Olech* would stand little chance of success in any event. *Wayte* is grounded upon the broad discretion afforded the government in determining whom to prosecute. *See id.* at 607 ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.").

³⁵² *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

³⁵³ *Id.* at 180 (citing *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879), and *Palmer v. Thompson*, 403 U.S. 217, 220 (1971)).

extension of equal protection doctrine, as the Supreme Court's jurisprudence attests. Prior to *Olech*, however, the Court was quite careful to limit the reach of the Equal Protection Clause to prohibit only those governmental actions based upon impermissible group-identifying characteristics.

Olech brushes aside a century of equal protection jurisprudence, but provides no useful mediating principle for federal courts to apply. As the Court has emphasized, however, "executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims."³⁵⁴ *Olech* fails to preserve that proportionality. By usurping state law, the Court's interpretation of the Equal Protection Clause demotes not only the federal constitution, but also the state and local judiciary.

Olech signals to all disappointed individuals that they have a constitutional claim against their government officials. The door to the federal courthouse ought not be opened so wide. Except in the most egregious cases, individual claims of mistreatment ought to be set to one side under the Equal Protection Clause. The Supreme Court has already fashioned a mediating principle to limit the scope of the so-called "class of one" claims. Under the Court's substantive due process jurisprudence, only those executive acts that "shock the conscience" are constitutionally significant and thus call for a federal remedy. All other cases are the province of state law. Unless *Olech* is so limited, federal courts will be expounding not a *constitution*, but a "font" of administrative law.

³⁵⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48 n.8 (1998).