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The Equal Protection Class of One Claim: Olech, Enquist, and the Supreme Court's Misadventure

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THE EQUAL PROTECTION CLASS OF ONE CLAIM: *OLECH*, *ENGQUIST*, AND THE SUPREME COURT'S MISADVENTURE

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I. INTRODUCTION

Village of Willowbrook v. Olech[1] was a mistake. In that case decided in 2000, the United States Supreme Court purported to find support in its equal protection precedents for a claim by a "'class of one' where the plaintiff did not allege membership in a class or group."[2] In upholding the claim of a homeowner who alleged that the village had imposed an unequal burden on her when connecting her home to the public water supply,[3] the Court ignored a series of equal protection precedents to the contrary and employed two obscure, long-

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1. 28 U.S. 562 (2000).
2. *Id.* at 564 (citing Vill. of Willowbrook v. Olech, 527 U.S. 1067, 1067 (1999)).
3. *See id.* at 565.

ignored precedents to support its holding.[4] In addition to this problematic handling of precedent, *Olech* also generated a practical concern: the potential to turn "every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case."[5] The immediate response of the lower federal courts to the *Olech* decision can best be described as damage control. Federal judges sought to restrict the effect of *Olech* by reading into its holding a limitation that was hard to find in the text of the Supreme Court decision. Consistent with earlier equal protection precedents on the selective enforcement of criminal and civil laws, the lower federal courts attempted to limit the scope of the *Olech* class of one claim by requiring a showing of bad faith motivation on the part of the defendant.[6] Such attempts to limit the class of one claim in this way led to confusion and uncertainty.[7]

Eight years after *Olech*, in *Engquist v. Oregon Department of Agriculture*,[8] the Supreme Court revisited the class of one claim in a case by a government employee who alleged wrongful termination.[9] The *Engquist* Court conceded that there was a problem with an unrestrained interpretation of the *Olech* holding because, under such an extreme view, "any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim."[10] *The Engquist* Court, however, declined the opportunity to reconsider the conceptual underpinnings of the class of one claim or to follow the lead of the lower courts by requiring bad faith motivation.[11] Instead, the Court decided to limit *Olech* by creating a specific exception for government employment[12] and, more generally, by excepting those forms of government action "which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments."[13]

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4. *See id.* at 564–65 (citing Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)); discussion *infra* Parts II, III.A.

5. Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000).

6. *See, e.g.*, Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (rejecting a class of one claim because no "animus was presented in [the] case"); *see also infra* notes 113–120 and accompanying text (describing the bad faith showing required by federal courts).

7. *See* Bell v. Duperrault, 367 F.3d 703, 711–12 (7th Cir. 2004) (Posner, J., concurring) ("May the Court enlighten us; the fact that the post-*Olech* cases are all over the map suggests a need for the Court to step in and clarify its 'cryptic' per curiam decision." (internal citation omitted) (quoting Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 133 (2000–2001))).

8. 128 S. Ct. 2146 (2008).

9. *Id.* at 2149.

10. *Id.* at 2156.

11. *See id.* at 2153–57 (discussing the principles underlying class of one claims while failing to adopt a requirement of bad faith).

12. *Id.* at 2151–52.

13. *Id.* at 2154.

Perhaps the Supreme Court viewed the *Engquist* holding as a reasonable compromise that preserved the basic class of one claim but eliminated its most egregious application—the factual setting of public employment. In fact, however, because the *Engquist* Court was unwilling either to address the flawed concept underlying the class of one theory or to consider the adoption of a bad faith limitation, its purported solution to the class of one problem—the creation of a "discretionary decisionmaking" exception[14]—simply confused things further. The Court's *Engquist* opinion went too far and not far enough. By excepting all discretionary government action from the class of one claim, *Engquist* seems to eliminate any cause of action for a plaintiff harmed by the vindictive act of a government official when that act is part of an exercise of discretion.[15] By failing to impose a bad faith requirement on the class of one claim, *Engquist* seems to endorse a federal equal protection claim every time a rule is not enforced in an absolutely uniform way.[16]

This Article will examine the *Olech* and *Engquist* cases in light of earlier precedents. Some of these precedents treat the Equal Protection Clause as a limit on governmental classification. Other precedents involve selective prosecution and require proof of bad motive. Part II of this article, by way of background, will examine how the class of one claim fits into traditional arguments about equality, classifications, rules, and the exercise of discretion. Part III will examine the *Olech* and *Engquist* opinions. Part IV will examine how the lower federal courts have responded to the *Engquist* "discretionary decisionmaking"[17] exception.

II. THE CLASS OF ONE CLAIM IN CONTEXT: EQUALITY ARGUMENTS, CLASSIFICATIONS, RULES, AND DISCRETION

The term "class of one" is not self-defining, and the Supreme Court has not fully explained it. At the most obvious level, the term refers to an equal protection claim by a single person, the so-called "class of one."[18] This obvious explanation is not very helpful, however, since the class of one claim arises in several different settings and its meaning changes with the context.[19] To understand the novelty of the Court's class of one reasoning in *Olech* and *Engquist*, it is helpful to review the traditional template of equal protection arguments and to examine how well or how badly the class of one claim fits each setting.

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14. *See id.* at 2154.
15. *See infra* text accompanying notes 182–187.
16. *See infra* text accompanying notes 113–145.
17. *Engquist*, 128 S. Ct. at 2154.
18. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).
19. *Compare Engquist*, 128 S. Ct. at 2155 (declining to apply class of one jurisprudence to public employment), *with* United States v. Moore, 543 F.3d 891, 893 (7th Cir. 2008) (considering class of one claims in the context of prosecutorial discretion).

The command of equality is essentially comparative.[20] It requires a comparison of one entity with another entity. Thus, it makes sense to claim that "A equals B," but it is nonsense to assert that "A equals." Since Aristotle, the rule of equality has been understood to involve the comparative command that those similarly situated should be treated similarly.[21] Though equality arguments require at least two entities to compare, they do not require any more than two entities. Thus, it is not necessary to compare groups of people in order to make equality arguments. A standard example of a comparative equality argument that involves two, and only two, persons is the situation of a parent with two children. Suppose that the children are identical twins—eight-year-old boys—and that the parent requires one of the twins to go to bed at 8:00 p.m. while allowing the other to stay up until 11:00 p.m. The first twin likely would argue, on equality grounds, that since he was exactly the same as his twin in all relevant ways, that he should have the same bedtime. Absent some special circumstances, such as a medical problem that required extra sleep, the equality argument would be a powerful one.

The equality argument in the preceding paragraph involves the comparison of two persons, and it demonstrates that it is possible to make equality arguments that are limited to two persons without making any generalizations about classes of people. That possibility being conceded, the more common kind of equality argument, particularly in the legal sphere, is the one that compares two *classes* of persons.[22] To classify is to identify a trait that makes a person a member of a class (all those over fifty, for example) and then to ascribe a certain treatment (such as forced retirement) for those who, having the trait, are members of the class.[23] The typical equality challenge to this kind of classification compares one class of persons—those who have the trait—with a second class of persons—those without the trait—and argues that, because the two classes are similarly situated, the members of both classes should be treated similarly.

Whether one is comparing individuals or classes, the problem arises in determining who is similar to whom and therefore entitled to similar treatment.[24] This question of similarity is unanswerable in the abstract. On the one hand, all human beings are similar to all other human beings in having, for example, a

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20. *See, e.g.*, Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1205 (11th Cir. 2007) ("Adjudging equality necessarily requires comparison . . . ."); Buckles v. Columbus Mun. Airport Auth., No. CS-00-986, 2002 WL 193853, at *13 (S.D. Ohio Jan. 14, 2002) ("An equal protection claim simply cannot exist absent an allegation that, compared to others, the plaintiff was treated less favorably." (emphasis omitted)).

21. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–43 (1982) (citing ARISTOTLE, ETHICA NICOMACHEA bk. V §§ 1131a–1131b (W.D. Ross trans., Oxford 1925) (n.d.)).

22. *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) (analyzing an equal protection claim in terms of classifications).

23. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344–45 (1949) (providing the classic treatment of the process of classification and its place in making equal protection arguments).

24. *See id.* at 345.

common human genome as opposed to an ape or rat genome. They are therefore entitled to similar treatment. On the other hand, each human being is unique—an entity with his or her own genes and life experience—and thus different from everyone else and entitled to different treatment. The difficulty in solving this conundrum of determining who is similar to whom is substantial.[25] Peter Westen has called it an impossible task—one that makes the idea of equality an empty thing.[26]

The problem is addressed by conceding that one cannot determine who is similar to whom in the abstract without reference to an external criterion—the purpose for which the classification was made. Thus, for example, all people over the age of fifty share a trait that make them members of a class. Are they similarly situated to individuals in a class made up of people younger than fifty? If the purpose of the classification is to identify individuals who still have sufficient vigor to perform a physically demanding job like police work, then the two classes might be considered differently situated.[27] However, if the purpose of the classification is to determine who is eligible to vote, then the two classes appear to be similarly situated because physical vigor bears little relation to the ability to vote. The Supreme Court has developed standards of review to determine the degree of scrutiny that a court will apply when deciding whether a classification satisfies the demands of the Equal Protection Clause. The most basic is the rational basis standard, which requires that a classification be rationally related to a permissible governmental interest.[28] Where suspect classifications or fundamental rights are involved, the Court insists on a higher standard of review—either intermediate scrutiny[29] or strict scrutiny[30]—that requires a closer fit between classification and purpose.

Classifications are created by rules. The rules themselves come into existence through formal adoption in statutes or regulations or de facto from court decisions or consistent patterns of conduct over time. The proper application of the Equal Protection Clause to rules is sometimes confusing, particularly in the context of class of one claims. To identify the extremely

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25. *See* Westen, *supra* note 21, at 544 ("The trouble is that no two people are alike in every respect.").

26. *Id.*

27. The example here of the classification that requires police officers to retire at age fifty is based on the facts of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 308–12 (1976).

28. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) ("The appropriate standard of review is whether the difference in treatment . . . rationally furthers a legitimate state interest.").

29. *See, e.g.*, 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.").

30. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[Racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."); Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (internal citations omitted)).

limited context in which class of one claims may appropriately be made, it is important to distinguish three different contexts in which the Equal Protection Clause is applied to rules: (1) the situation where a rule that has been properly applied according to its terms is challenged as being unreasonable;[31] (2) the situation where a rule is conceded to be reasonable but has not been properly applied in an individual case;[32] and (3) the situation where a rule, conceded to be reasonable and properly applied, has been selectively enforced.[33] In addition to these contexts, the Equal Protection Clause may also be applied in a fourth context: the situation involving a purely discretionary action by a government agent where no rule applies at all.[34]

In the first and most common context of applying the Equal Protection Clause to a rule, a plaintiff who has been harmed by the proper application of a rule claims that the rule itself is unreasonable and therefore violates equal protection. Consider, for example, a rule that requires all police officers to retire at age fifty in order to promote public safety by assuring the physical fitness of the police force.[35] If the rule is properly applied to a particular police officer who has reached the age of fifty and forces the officer to retire, the officer might argue that the rule itself is unreasonable because the correlation between being age fifty and being unfit is too weak.[36] Such a claim would not go very far in the courts because the Equal Protection Clause generally requires very little correlation between classification and purpose.[37] It would not matter that the particular police officer affected was, in fact, very fit. Once a rule has satisfied the requirement of reasonableness in general, it does not matter that the generalization embodied in the rule is not true in a particular case.[38] Thus, in this context, where a plaintiff challenges the reasonableness of a rule that has been

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31. *See, e.g.*, *Murgia*, 427 U.S. at 308 (involving a challenge to mandatory retirement age for police officers).

32. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944) ("The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.").

33. *See, e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985) (involving an alleged arbitrary enforcement of local ordinances).

34. *See, e.g.*, Hilton v. City of Wheeling, 209 F.3d 1005, 1007–08 (7th Cir. 2000) (involving the police's discretion in "enforcing minor public nuisance laws").

35. *See Murgia*, 427 U.S. at 310–11.

36. *See id.* at 309–12.

37. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) ("Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

38. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) ("Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant.").

properly applied to him, the class of one claim, properly understood, will rarely succeed. In those rare cases where a plaintiff has succeeded in challenging the overall reasonableness of a rule, it has frequently been the case that the Court has found an improper motive at work.[39] The rational basis standard requires that a classification be rationally related to a permissible governmental purpose, but "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[40]

In the second context, a plaintiff does not complain that a given rule is unreasonable in general but complains because the rule has not been properly applied in his case. For example, if a state rule requires police officers to retire at age fifty but the State forces a particular officer to retire at age forty-nine, the State has not followed its own rule. Is this a violation of the Equal Protection Clause? It ought not to be. The failure by the State to apply a rule properly ought to be considered a violation of the rule, not a violation of the Equal Protection Clause. As Peter Westen has explained, it is a mistake to think that "equality imposes some substantive requirement of consistency apart from the substance of the rule itself."[41] Of course, rules should be applied consistently, impartially, and equally. However, "it is wrong to think that, once a rule is applied in accord with its own terms, equality has something additional to say about the scope of the rule—something that is not already inherent in the substantive terms of the rule itself."[42]

The Supreme Court addressed this issue in *Snowden v. Hughes*.[43] In that case, a candidate for public office had finished second in the Republican primary election and was thus entitled under state law to be made a candidate for the general election.[44] In violation of state law, local election officials failed to certify him for the general election.[45] The candidate brought suit and claimed that this failure was a violation of the Equal Protection Clause.[46] The Court rejected this claim, noting that there was "no contention that the statutes [were] in any respect inconsistent with the guarantees of the Fourteen Amendment."[47] It also observed the following:

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39. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (finding that the purpose of a statutory classification was out of animus toward hippies and that purpose was not legitimate).

40. *Id.* (emphasis omitted).

41. Westen, *supra* note 21, at 551.

42. *Id.* (citing Derek Browne, *Nonegalitarian Justice*, 56 AUSTRALASIAN J. PHIL. 48, 58–59 (1978)).

43. 321 U.S. 1 (1944).

44. *Id.* at 3.

45. *Id.* at 4.

46. *Id.*

47. *Id.* at 7.

> [N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. . . .
>
> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.[48]

Thus, in the ordinary case and absent improper motivation, the misapplication of a rule by state officials does not constitute a violation of the Equal Protection Clause.[49] Therefore, this factual setting is also not an appropriate context for a class of one claim.

In the third context, a plaintiff complains not that a given rule is unreasonable or that it has been misapplied in her case; rather, the plaintiff complains that the rule has been applied by state officials correctly *only* in her case.[50] This is the problem of underenforcement. For example, if a state rule requires police officers to retire at age fifty and the State requires a particular police officer to retire at age fifty but allows others to continue to work after that age, is that a violation of the Equal Protection Clause? In most cases, the underenforcement of state laws does not constitute a violation of equal protection. As Judge Posner has explained, "[t]he Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. Otherwise few speeders would have to pay traffic tickets. Selective, incomplete enforcement of the law is the norm in this country."[51] This means that random underenforcement of the law by government authorities does not violate equal protection and is therefore not a proper context for a class of one claim.[52]

On the other hand, there is another line of authority that holds that the selective enforcement of the law can, in certain circumstances, violate the Equal Protection Clause.[53] The Supreme Court has held that while a prosecutor has broad discretion to enforce criminal laws, prosecutorial discretion may not be "based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[54] More generally with regard to enforcement of noncriminal rules, such as zoning ordinances, it is not practically possible to hold a local

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48. *Id.* at 8.

49. *See id.* at 11–12.

50. *See, e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985) (finding that the procedure employed to effect a fireman's discharge did not violate the Fourteenth Amendment).

51. *Id.* (internal citations omitted).

52. *See infra* notes 113–120 and accompanying text (examining courts' treatment of underenforcement).

53. *See infra* notes 121–145 and accompanying text (discussing courts' treatment of selective enforcement).

54. Oyler v. Boles, 368 U.S. 448, 456 (1962).

government to a standard of strict Prussian uniformity.[55] Plaintiffs can prevail in such cases, however, if they can prove "both (1) that they were treated differently from other similarly situated individuals, and (2) that such differential treatment was based on '"impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."'"[56] It is in this single context of applying rules—selective enforcement based on bad faith—that the class of one claim both makes sense and has significant precedential support.

There is a fourth context in which the Equal Protection Clause is applied, involving not the direct application or enforcement of rules, but the exercise of discretion by government officials in making decisions not mandated by any rule. These discretionary judgments by government officials include decisions regarding government employment,[57] which contractor to select for a government contract,[58] whether to waive a zoning ordinance,[59] whether to approve a building subdivision,[60] and whether a student should be dismissed or expelled from an educational institution.[61] In these discretionary settings, it can be very difficult to make a compelling equality argument because, absent an objective standard against which each person can be measured, it is difficult to determine who is similarly situated to whom.[62] As with the enforcement of rules, the exercise of pure governmental discretion is not likely to lead to an equal protection violation absent evidence of improper motive.[63] This context seems as though it might be appropriate for a class of one equal protection claim, but the *Engquist* decision rules that out.[64]

Thus, the Equal Protection Clause has a complicated connection to rules and discretion. The preceding material can be summarized as follows: A plaintiff who has been harmed by the proper application of a rule may argue that the Equal Protection Clause has been violated because the rule is itself unreasonable. These arguments rarely succeed without evidence of improper motive. A

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55. *See Hameetman*, 776 F.2d at 641.

56. Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (quoting LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994)) (internal quotation marks omitted).

57. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2155 (2008).

58. *See* Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1273–74 (11th Cir. 2008).

59. *See Harlen Assocs.*, 273 F.3d at 499–503.

60. *See* MKA Realty Corp. v Town of Wallkill, 82 F. App'x 712, 713–14 (2d Cir. 2003).

61. *See* Bissessur v. Ind. Univ. Bd. of Trs., No. 1:07-CV-1290-SEB-WTL, 2008 WL 4274451, at *8 (S.D. Ind. Sept. 10, 2008).

62. *See* Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1203–04 (11th Cir. 2007) (noting that the similarly situated requirement will be difficult to establish when the government makes discretionary decisions based on multiple factors).

63. *See* Hilton v. City of Wheeling, 209 F.3d 1005, 1007–08 (7th Cir. 2000).

64. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2154 (2008) (explaining that in cases of "discretionary decisionmaking, . . . allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that . . . state officials are entrusted to exercise").

plaintiff harmed by the improper application of a rule may argue that the rule has been violated but, absent an improper motivation by state officials, the plaintiff will not be able to prove an equal protection violation. A plaintiff harmed by the proper, but underenforced, application of a rule ordinarily has no equal protection claim, unless the underenforcement was actually selective enforcement due to a bad faith intent to injure. A plaintiff harmed by the exercise of discretion by a government official will have a difficult time prevailing on an equal protection claim absent evidence of improper motivation. It is significant that, in all of these contexts, there is a strong correlation between evidence of improper motivation and the likelihood of success in making an equal protection claim.

III. THE SUPREME COURT ENDORSES THE CLASS OF ONE EQUAL PROTECTION CLAIM

This part examines the Supreme Court's two class of one equal protection cases: *Village of Willowbrook v. Olech*[65] and *Engquist v. Oregon Department of Agriculture*.[66]

A. Village of Willowbrook v. Olech[67]

Grace Olech brought a case in federal district court alleging that the Village of Willowbrook had violated the Equal Protection Clause by demanding a thirty-three-foot easement to connect her house to the public water supply while requiring only a fifteen-foot easement from other village residents.[68] According to the complaint, the Village demanded a larger easement from her because she had successfully sued the Village in an unrelated matter.[69] The district court

65. 528 U.S. 562 (2000).

66. 128 S. Ct. 2146 (2008).

67. The author previously commented extensively on this case in Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367 (2003). Others have also commented on this case. *See generally* William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493 (2007) (analyzing whether class of one claims can be based on irrational government action); Hortensia S. Carreira, *Protecting the "Class of One,"* 36 REAL PROP. PROB. & TR. J. 331 (2001) (discussing the history and impact of class of one equal protection claims); J. Michael McGuinness, *The Impact of* Village of Willowbrook v. Olech *on Disparate Treatment Claims*, 17 TOURO L. REV. 595 (2001) (discussing the impact of class of one claims); J. Michael McGuinness, *The Rising Tide of Equal Protection:* Willowbrook *and the New Non-Arbitrariness Standard*, 11 GEO. MASON U. CIV. RTS. L.J. 263 (2001) (examining contemporary equal protection law); Paul D. Wilson, *What Hath* Olech *Wrought? The Equal Protection Clause in Recent Land-Use Damages Litigation*, 33 URB. LAW. 729 (2001) (surveying the reaction of lower courts to *Olech* in land-use damages litigation); Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69 (2000–2001) (examining class of one jurisprudence); Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, TRIAL, May 2000, at 89 (examining *Village of Willowbrook v. Olech*).

68. *Olech*, 528 U.S. at 563.

69. *Id.*

dismissed Olech's complaint for failure to state a claim.[70] This was not surprising because Olech had not alleged any discrimination against a suspect or quasi-suspect class or any infringement of a fundamental right; in fact, the complaint had not alleged that Olech was a member of a class at all.[71] Olech appealed the district court decision to the Seventh Circuit, which reversed after determining that Olech had stated a cause of action.[72] Judge Posner, writing for the court, explained that the equal protection standard established by Seventh Circuit precedent is met where a plaintiff proves "'a spiteful effort to "get" [a person] for reasons wholly unrelated to any legitimate state objective.'"[73]

Given the insignificance of the claim at issue and the absence of any substantial precedent in the area, Olech seemed an unlikely candidate for Supreme Court review. The Court, however, granted certiorari and affirmed the decision of the Seventh Circuit, although on different grounds.[74] The per curiam opinion is very brief, consisting of only five paragraphs.[75] The Court identified the issue to be decided as "whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group."[76] The Court, answering in the affirmative, explained its decision as follows:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"[77]

The Court determined that Olech's complaint satisfied this standard because it could "fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners," and that the complaint alleged the treatment

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70. *Id.*
71. *See id.* at 564.
72. Olech v. Vill. of Willowbrook, 160 F.3d 386, 388–89 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000).
73. *Id.* at 387 (quoting Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995)).
74. *Olech*, 528 U.S. at 565.
75. *Id.* at 563–65.
76. *Id.* at 564 (citing Vill. of Willowbrook v. Olech, 527 U.S. 1067, 1067 (1999)).
77. *Id.* at 564 (internal citations omitted) (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

was "'irrational and wholly arbitrary.'"[78] The Court concluded that the allegations, "quite apart from the Village's subjective motivation, [were] sufficient to state a claim for relief under traditional equal protection analysis," even though the court did not reach "the alternative theory of 'subjective ill will' relied on by [the Seventh Circuit]."[79]

The Court's opinion in *Olech* is notable both for the precedents cited as well as for those ignored. Although the *Olech* opinion did not make clear whether the Village's actions had been discretionary or had involved the application of a rule, the Court subsequently described the *Olech* case as involving "a clear standard against which departures, even for a single plaintiff, could be readily assessed."[80] The Court appears to have been of the view that the Village violated its own de facto rule that only a fifteen-foot easement should have been required.[81] In concluding that the Village's violation of its own rule also constituted a violation of equal protection, the court ignored its holding in *Snowden v. Hughes*,[82] which provided that, absent improper motivation, the failure by state officials to follow a state law is only a violation of that law and not a violation of the Equal Protection Clause.[83] Although the Court insisted that cases had previously recognized successful class of one equal protection claims, the Court strained to cite even two cases to support the decision.[84] The first, *Sioux City Bridge Co. v. Dakota County*,[85] was an obscure case from 1923.[86] The second, *Allegheny Pittsburgh Coal Co. v. County Commission*,[87] though a more recent case, was one that the Court had previously attempted to limit to its facts.[88] Prior to *Olech*, the two cases were "'as far removed from the pantheon of influential equal protection cases as one could imagine.'"[89]

In *Sioux City Bridge*, the Court considered the equal protection claim of a company whose property was assessed for tax purposes at one hundred percent valuation in accordance with state law, while other properties in the county were assessed at a mere fifty-five percent valuation.[90] When the company appealed the order of the county board of equalization to the state trial court, the state court

78. *Id.* at 565.

79. *Id.*

80. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2153 (2008).

81. *See id.* at 2153–54 (noting that the board "consistently required" a fifteen-foot easement).

82. 321 U.S. 1 (1944); *see also supra* notes 43–49 and accompanying text (discussing holding in *Snowden*).

83. *Id.* at 8.

84. *See Olech*, 528 U.S. at 564.

85. 260 U.S. 441 (1923).

86. In the fifty years before *Olech*, the Supreme Court cited *Sioux City Bridge Co. v. Dakota County* in the text of a majority opinion only once. *See* Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 345 (1989).

87. 488 U.S. 336 (1989).

88. *See infra* notes 102–110 and accompanying text.

89. Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1202 (11th Cir. 2007) (quoting Farrell, *supra* note 67, at 394).

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

determined that the county had properly valued the bridge and dismissed the case without considering whether other property in the county had been systematically undervalued.[91] The state supreme court affirmed the lower court's ruling because the assessment was not "so manifestly wrong" that it required reversal.[92] These facts constitute a classic case of underenforcement of the law. The county had applied the law correctly, but it had consistently failed to enforce it against entities owning similar properties.[93] Absent evidence of improper motivation, such cases typically fail.[94] In *Sioux City Bridge*, however, the Supreme Court determined that "the right of [a] taxpayer whose property alone is taxed at 100 per cent[] of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."[95]

Sioux City Bridge appears to indicate that mere underenforcement of a law violates the Equal Protection Clause. However, the Court also noted that the case had been dismissed without any factual findings of intentional discrimination and remanded the case for a hearing on that issue, "inviting [the lower court's] attention to the well-established rule . . . that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity."[96] In *Snowden*, the Court explained what this "something more" would be:

> [W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.
>
> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.[97]

Consequently, *Sioux City Bridge* is not an appropriate precedent on which to predicate the *Olech* class of one claim. *Sioux City Bridge* is distinguishable because it involved a proper but selective enforcement of a standard rather than

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91. *Id.* at 443.
92. *Id.*
93. *Id.* at 446.
94. *See* Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985) ("Selective, incomplete enforcement of the law is the norm in this country.").
95. *Sioux City Bridge*, 260 U.S. at 446.
96. *Id.* at 447 (citing Sunday Lake Iron Co. v. Twp. of Wakefield, 247 U.S. 350, 353 (1918)).
97. Snowden v. Hughes, 321 U.S. 1, 8 (1944).

an improper application of a standard.[98] Thus, if the Village in *Olech* had a de facto rule requiring fifteen-foot easements but demanded a thirty-three foot easement, the Village would violate the easement rule, not the Equal Protection Clause. On the other hand, the problem in *Sioux City Bridge* was not that the plaintiff was adversely affected by the failure of the county to follow the full value assessment rule but by the fact that the county enforced the rule only in its case.[99] In addition, the *Olech* Court completely ignored the limitation imposed on the plaintiff's equal protection claim by the *Sioux City Bridge* and *Snowden* Courts[100]—the requirement that the differing treatment amount to intentional or purposeful discrimination.[101]

The *Olech* Court also cited *Allegheny Pittsburgh Coal Co. v. County Commission*. In that case, a coal company alleged that the county assessor followed a practice of valuing property on the basis of its most recent purchase price, even though the state constitution required that "'taxation . . . be equal and uniform throughout the State'" and that all property "'be taxed in proportion to its value.'"[102] Over time, this method created great disparities in assessments between longtime owners, whose assessments were low, and recent purchasers, whose assessments were very high.[103] In fact, the petitioner was paying property taxes at a rate thirty-five times that applied to owners of similar properties.[104] Accordingly, the Court determined that the scheme violated the Equal Protection Clause.[105] *Allegheny Pittsburgh* and *Sioux City Bridge* are similarly distinguishable from *Olech*—the alleged violation of the Equal Protection Clause was the proper application of a state statute in the face of systematic underenforcement against other property owners rather than a failure to apply a particular rule to the complaining party.

Even if *Allegheny Pittsburgh* does provide some support for the class of one claim, the Supreme Court later effectively limited the holding of *Allegheny Pittsburgh* to its facts. In *Nordlinger v. Hahn*,[106] the Court considered the validity of Proposition XIII, an amendment to the California Constitution that, by adopting an acquisition value assessment scheme during a time of substantial inflation in the housing market, created substantial disparities between the tax assessments of long-time homeowners and more recent purchasers.[107] The Court determined that the disparate treatment created a classification that rationally

98. *Sioux City Bridge*, 260 U.S. at 446.
99. *Id.* at 446–47.
100. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000).
101. *See Snowden*, 321 U.S. at 8; *Sioux City Bridge*, 260 U.S. at 446–47.
102. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 338 (1989) (quoting W. VA. CONST. art. X, §1).
103. *Id.*
104. *Id.* at 341.
105. *Id.* at 338.
106. 505 U.S. 1 (1992).
107. *Id.* at 6.

furthered legitimate state interests.[108] The petitioners predictably argued that invalidation of the California tax scheme would require the invalidation of *Allegheny Pittsburgh* because both cases involved acquisition value assessment schemes that produced disparities in property tax assessments.[109] The *Nordlinger* Court rejected the argument after finding "an obvious and critical factual difference" between the cases because "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme."[110] Given the similarity in the acquisition-value assessment schemes, the factual difference emphasized by the Court is anything but "obvious and critical." In fact, very little of *Allegheny Pittsburgh* appears to have survived *Nordlinger*, making *Allegheny Pittsburgh* a very slender thread on which to hang the class of one doctrine.

In addition to its problematic treatment of precedent, the *Olech* opinion also raises practical concerns because the decision contains a possible engine for the destruction of governmental decisionmaking. As Justice Breyer warned, the majority's interpretation of the Equal Protection Clause could "transform many ordinary violations of city or state law into violations of the Constitution."[111] Judge Posner had already expressed his own concerns regarding "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."[112] In the aftermath of *Olech*, the lower federal courts attempted to interpret *Olech* in a way that would limit its scope to avoid the problem of which Judge Posner warned.

In the first post-*Olech* class of one case decided in the federal courts, Judge Posner interpreted the Supreme Court's holding in *Olech* as not inconsistent with the Seventh Circuit's own, which required a plaintiff in a class of one case to prove that the alleged wrongful treatment was a "vindictive action" that included "improper motive" or "'illegitimate animus.'"[113] For Judge Posner, the improper motive element of the class of one claim survived the Supreme Court's *Olech* opinion.[114] On the surface, this reading of *Olech* is surprising because the Supreme Court specifically noted that it "did not reach the alternative theory of 'subjective ill will' relied on by [the Seventh Circuit]."[115] Following Judge Posner's lead, however, other circuit courts have preserved the improper motive

108. *Id.* at 12 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).
109. *Id.* at 14.
110. *Id.* at 14–16.
111. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (Breyer, J., concurring).
112. Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998).
113. Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (quoting *Olech*, 160 F.3d at 388).
114. *Id.*
115. *Olech*, 528 U.S. at 565.

element.[116] The survival of the "bad motive" element likely is due partially to Judge Posner's persuasive powers, partially to the practical problems that would result without such a limitation, and partially to the fact that the "bad motive" element of the class of one claim is consistent with a substantial body of pre-*Olech* equal protection doctrine. In fact, one could argue that the "bad motive" element of the class of one claim is more consistent with earlier selective enforcement precedents than *Olech*.

Selective enforcement equal protection arguments arise in an imperfect world where it is neither constitutionally required nor even possible that government enforce laws uniformly.[117] This means that there are countless violations of law, criminal and civil, that are neither identified nor punished. Perhaps the most obvious example is the police traffic officer who cannot possibly give tickets to all drivers on a busy highway who exceed the speed limit.[118] Does the inability to ticket *all* rule breakers prevent the police officer from ticketing *any* rule breaker? And what about the same problem in other factual contexts? Does the IRS have to bring enforcement proceedings against all taxpayers who have underpaid their taxes before it can bring a proceeding against any taxpayer? Does a city have to enforce building restrictions against all owners before it can bring an enforcement proceeding against any owner? The common sense answer to these questions has to be no. Otherwise the State could not enforce its rules at all.

The constitutional rules in this context follow common sense expectations: underenforcement of state laws, without more, does not constitute a violation of equal protection.[119] As Judge Posner explained, "[t]he Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. Otherwise few speeders would have to pay traffic tickets. Selective, incomplete enforcement of the law is the norm in this country."[120] To concede that underenforcement of the law is the norm, however, is not the same as to condone selective enforcement of

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116. *See, e.g.*, Bartell v. Aurora Pub. Sch., 263 F.3d 1143, 1149 (10th Cir. 2001) ("Under the equal protection theory urged by Bartell, he must prove that he was singled out for persecution due to some animosity on the part of APS."), *overruled on other grounds by* Pignanelli v. Pueblo Sch. Dist. No. 60, 540 F.3d 1213, 1222 (10th Cir. 2008); Williams v. Pryor, 240 F.3d 944, 951 (11th Cir. 2001) (citing *Olech*, 528 U.S. at 564–65) (maintaining malice in discussion of *Olech*); Shipp v. McMahon, 234 F.3d 907, 916–17 (5th Cir. 2000) (citing *Olech*, 528 U.S. at 564–65) ("To state a claim sufficient for relief, a single plaintiff must allege that an illegitimate animus or ill-will motivated her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment."), *overruled on other grounds by* McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2002). *See generally* Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499–500 (2d Cir. 2001) (recognizing confusion among the circuits regarding the necessity of showing animus to establish a class of one claim).

117. *See* Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985).

118. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2154 (2008); *Hameetman*, 776 F.2d at 641.

119. *See Hameetman*, 776 F.2d at 641.

120. *Id.* (internal citations omitted).

the law because of an impermissible, bad faith motive. There is a difference between pulling over every tenth speeding car and pulling over every speeding car whose driver is black, or every speeding car that has a "Pro Choice" bumper sticker, or every speeding car that is driven by someone who recently sued the town successfully. This kind of selective, bad faith enforcement of the law can be a violation of the Equal Protection Clause.

In *Oyler v. Boles*,[121] the Supreme Court rejected a selective enforcement claim brought by prisoners serving life sentences under a habitual criminal statute.[122] The prisoners argued that the application of the statute to them violated the Equal Protection Clause because it had been applied "to only a minority of those subject to its provisions."[123] The Court noted that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[124] A policy of selective enforcement would violate equal protection, however, if "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[125] In *Wayte v. United States*,[126] the Court cited this language from *Oyler* in rejecting the selective prosecution claim of individuals who had not registered with the Selective Service System.[127] The government's policy of passive enforcement was to "prosecute[] only those who report[ed] themselves as having violated the law, or who [were] reported by others."[128] The Court explained that prosecutors have "'broad discretion' as to whom to prosecute."[129] Although that broad discretion is not "'unfettered,'" there was no evidence in *Wayte* that the discretion had been exercised on the basis of forbidden categories "such as race, religion, or other arbitrary classification" as identified in *Oyler*.[130]

The Second Circuit has elaborated on the "other arbitrary classification" element of the Supreme Court's selective enforcement doctrine. In 1980, in *LeClair v. Saunders*,[131] the court considered an equal protection selective enforcement claim arising out of the state inspections of dairy farms.[132] A dairy farmer complained that a regulation regarding unprotected water supplies had

121. 368 U.S. 448 (1962).
122. *Id.* at 449.
123. *Id.*
124. *Id.* at 456.
125. *Id.*
126. 470 U.S. 598 (1985).
127. *Id.* at 608–10 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting *Oyler*, 368 U.S. at 456)).
128. *Id.* at 600.
129. *Id.* at 607 (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)).
130. *Id.* at 608–10 (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979); *Bordenkircher*, 434 U.S. at 364); *see also* United States v. Armstrong, 517 U.S. 456, 463–66 (1996) (citing *Oyler*, 368 U.S. at 456) (describing broad nature of and *Oyler*'s limits upon prosecutorial discretion).
131. 627 F.2d 606 (2d Cir. 1980).
132. *Id.* at 607–09.

been enforced more stringently against him than against similar dairy farmers.[133] The court held that the claim could succeed only upon "proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."[134] This statement of the test appears to put a gloss on the "other arbitrary classification" language by including an additional prohibited motivation for enforcing the law—"malicious or bad faith intent to injure a person."[135] When the plaintiff could not prove that the state inspector had attempted to injure him, either because of a prohibited classifications or out of bad faith, the selective enforcement claim did not succeed.[136] The Second Circuit has continued to adhere to the "bad faith" test.[137]

After the Supreme Court decided *Olech* in 2000, the Second Circuit struggled to determine how the *Olech* class of one equal protection claim relates to the Second Circuit's selective enforcement equal protection claim.[138] On the one hand, as a matter of logic, the selective enforcement claim should be the classic formulation of the class of one claim because it involves the State "going after" a particular person without justification. On the other hand, the *Olech* Court stated that it was not relying on the "'subjective ill will'" theory,[139] suggesting that, if selective enforcement cases are class of one cases, the requirement of bad faith has been eliminated. For the Second Circuit, this proved too much. Its response was either to treat selective enforcement claims as distinct from class of one claims or to indicate that whether "subjective ill will" was required after *Olech* was still an open question.

Shortly after *Olech*, in *Harlen Associates v. Incorporated Village of Mineola*,[140] the Second Circuit considered the equal protection claim of a developer who had been denied "a special use permit to operate a convenience store."[141] The plaintiff argued that "*Olech* modified the second part of the *LeClair* analysis by removing the requirement that malice or bad faith be shown

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133. *Id.* at 608.

134. *Id.* at 609–10.

135. *Compare Oyler*, 368 U.S. at 456 ("[S]election [must be] based upon an unjustifiable standard such as race, religion, or other arbitrary classification."), *with LeClair*, 627 F.2d at 609–10 ("[S]elective treatment [must be] based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.").

136. *LeClair*, 627 F.2d at 607.

137. *See, e.g.*, LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994) (citing *LeClair*, 627 F.2d at 609–10) (applying "bad faith" test to zoning regulations).

138. *See* Giordano v. City of N.Y., 274 F.3d 740, 751 (2d Cir. 2001) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000)) (declining to resolve the manner in which *Olech* affects the malice requirement); Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 500 (2d Cir. 2001) (observing that circuits read *Olech* differently without adopting a particular reading).

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

140. 273 F.3d 494 (2d Cir. 2001).

141. *Id.* at 497.

in order to state a valid 'class of one' equal protection claim."[142] The Second Circuit cited other circuits that had maintained the bad motive element even after the *Olech* decision but determined that it did not need to resolve the issue because the plaintiff had proved neither bad faith nor intentionally different treatment.[143]

These selective enforcement equal protection cases certainly appear to be an appropriate precedent for federal court decisions that have adopted the "bad motive" requirement to limit the reach of *Olech*.[144] Judge Posner, however, did strike a cautionary note about the use of improper motivation as a means of limiting *Olech*:

> [T]he cases on which I am relying may be fighting a doomed rearguard action. May the Court enlighten us; the fact that the post-*Olech* cases are all over the map suggests a need for the Court to step in and clarify its "cryptic" per curiam decision.
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> . . . .
>
> "Motive" tests are not very satisfactory and are therefore sparingly employed in the law. Motives are difficult to discern and often they are irrelevant to the social interests in a case . . . . Yet motive is sometimes given legal significance, most famously perhaps in the old spite-fence cases but also in assessing punitive damages and, of course, in criminal sentencing. I haven't been able to think of a better way of reining in the class-of-one cases, which have an ominous potential to burst the proper bounds of equal protection law, than to insist that an improper motive by a government official have been the sole cause of the inequality of treatment of which the plaintiff is complaining.[145]

Not all the lower federal courts, however, have followed Judge Posner's lead. For some, proof of bad faith motivation was an alternative, but not required, method of proving a class of one claim.[146] As an alternative method to limit the reach of *Olech*, the Ninth Circuit excluded from the class of one doctrine a particular factual setting—government employment.[147] This case led to the Supreme Court's second class of one case.

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142. *Id.* at 499–500.

143. *Id.* at 500.

144. *See supra* note 116.

145. Bell v. Duperrault, 367 F.3d 703, 711–13 (7th Cir. 2004) (Posner, J., concurring) (internal citations omitted).

146. *See, e.g.*, Nevel v. Vill. of Schaumburg, 297 F.3d 673, 681 (7th Cir. 2002) (recognizing two approaches to proving class of one equal protection claims).

147. *See* Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996 (9th Cir. 2007), *aff'd*, 128 S. Ct. 2146 (2008).

B. Engquist v. Oregon Department of Agriculture[148]

Anup Engquist worked for the Oregon Department of Agriculture and was laid off after her position was eliminated.[149] Engquist brought a class of one claim in federal district court and won a jury verdict of $175,000 in compensatory damages and $250,000 in punitive damages.[150] The jury found that the employees in her department "'intentionally treat[ed] [Engquist] differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons.'"[151] The United States Court of Appeals for the Ninth Circuit reversed, holding that the class of one theory was "inapplicable to decisions made by public employers with regard to their employees."[152] Because there was a dispute among the circuits on the issue,[153] the Supreme Court granted certiorari and affirmed the Ninth Circuit's decision, carving out a government employment exception to the *Olech* class of one claim.[154]

The Court began by noting the apparently contradictory views that the Equal Protection Clause "'protect[s] persons, not groups'"[155] and that its "core concern [is] as a shield against arbitrary classifications."[156] In what was a clear harbinger of the outcome of the case, the *Engquist* opinion strongly endorsed the second of these views over the first.[157] The Court noted that "[o]ur equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others.' Plaintiffs in such cases generally allege that they have been arbitrarily classified as members of an 'identifiable group.'"[158]

At this point, it would have been logical for the Court to conclude that the class of one claim created in *Olech* was inconsistent with this longstanding, class-based understanding of equal protection. The Court, however, was unwilling to adopt a wholesale rejection of its *Olech* opinion, and it did not even consider adopting the "bad motive" limitation, which had been commonly

148. 128 S. Ct. 2146 (2008).

149. *Id.* at 2149.

150. *Id.* at 2149–50.

151. *Id.*

152. *Engquist*, 478 F.3d at 996.

153. *Id.* at 1011 (Reinhardt, J., dissenting) ("The majority's holding relating to the class-of-one theory of equal protection creates inter-circuit conflict, is at odds with the precedent of the Supreme Court and of this circuit, and is not justified by the policy concerns raised by the majority. Every other circuit to have considered this question has applied the class-of-one theory to employment.").

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

155. *Id.* at 2150 (alteration in original) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

156. *Id.* at 2151.

157. *Id.*

158. *Id.* at 2152 (internal citations omitted).

employed in the lower federal courts.[159] Instead, the Court held that the class of one claim does not extend to government employment.[160]

The Court based the exception for government employment on two grounds.[161] The first involves the distinction between government as lawmaker, where it exercises "'the power to regulate or license,'" and the government as proprietor, where it "'manage[s] [its] internal operation.'"[162] In the second area, which includes government as employer, the government "'has far broader powers than does the government as sovereign.'"[163] The Court noted that while "government employees do not lose their constitutional rights when they accept their positions,"[164] the government maintains "significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large."[165] Because government employees interact with the government in this proprietary context, their class of one equal protection claims are correspondingly limited.[166]

This sovereign/proprietor distinction, however, is not the most important part of the *Engquist* opinion because an exception derived from it, being limited to factual contexts where government was acting as proprietor, would have a relatively small precedential effect.[167] In explaining its balancing of employee rights and government employer requirements, the Court enunciated a much broader principle that expanded the exception well beyond government employment—*Olech* class of one claims are ill-fitted, and therefore do not apply, to government acts that involve the exercise of discretion.[168] The Court explained the discretionary exception as follows:

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the

159. *See id.* at 2148–57.
160. *Id.* at 2157.
161. *See id.* at 2151.
162. *Id.* (second alteration in original) (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961)).
163. *Id.* (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion)).
164. *Id.* at 2152.
165. *Id.* at 2151.
166. *See id.*
167. Such contexts include government employment and government contracting.
168. *See id.* at 2154–55.

> arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.[169]

The Court then offered as an example of this kind of discretionary government action the case of a traffic officer stationed on a busy highway who could not possibly ticket everyone driving above the speed limit:

> [A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.
>
> This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. . . .
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> . . . .
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> . . . To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.[170]

The Court then concluded with a reference to the practical difficulties that would result if "any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim."[171]

Because the *Engquist* Court was unwilling to overrule *Olech* but reached a result that appeared inconsistent with it, the Court needed to distinguished *Olech* on its facts. The Court did so by claiming that *Olech* contained "a clear standard against which departures, even for a single plaintiff, could be readily assessed" and that "[t]here was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length."[172] The *Engquist* Court cited no source for its assertion that there was a "clear standard" in *Olech* other than the complaint, which "alleged that the board consistently required only a 15–foot

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169. *Id.* at 2154.
170. *Id.* at 2154–55.
171. *Id.* at 2156.
172. *Id.* at 2153.

easement, but subjected Olech to a 33–foot easement."[173] Thus, in the absence of a formal rule on the required dimensions of easements when public utilities are extended, the Court seems to have been suggesting that the Village had a de facto rule requiring a fifteen-foot easement to extend the water supply, but had insisted that Olech provide a thirty-three foot easement.[174] This explanation of how the facts in *Engquist* differ from those in *Olech* has the effect of limiting the scope of the class of one claim to a space that is almost entirely devoid of matter. The Court seems to divide up the universe of class of one claims into two types—those that, as in *Olech*, involve the application of a "clear standard" and those that, as in *Engquist*, involve the exercise of discretion. The *Engquist* Court had, in fact, excepted exercises of discretion from the class of one claim.[175] That left only the application of a "clear standard,"[176] which appears to be the functional equivalent of "application of a clear rule." When one uses the Equal Protection Clause to challenge a rule, however, there is a very limited scope for a class of one claim. If a plaintiff challenges the validity of a rule that has been properly applied to her, the rule need only meet a reasonableness test, even if its application is unfair to the individual plaintiff.[177] If a plaintiff challenges a rule that has been applied improperly to him, absent improper motivation, that is a violation of the rule, not of the Equal Protection Clause.[178] If a plaintiff challenges the proper but underenforced application of a rule to himself, that is not in the ordinary case a violation of equal protection.[179] Only in the situation where a rule is selectively enforced against a person based on bad faith or vindictive motivation is there precedent for an equal protection violation.[180] The *Engquist* Court, however, ignored the relevance of bad faith and thus lost the opportunity to place the class of one equal protection claim on the same footing as the traditional equal protection selective enforcement claim.[181] When one has gone through all the contexts in which a class of one claim will not work after *Engquist*, there does not seem to be anything left.

The *Engquist* Court's exception for discretionary government actions also went too far to the extent it appears to except almost all discretionary government decisions from constitutional scrutiny.[182] As the Court has made clear in its selective prosecution cases—where the government retains the broadest measure of discretion—discretion is not "'unfettered'" but rather

173. *Id.*
174. *Id.* at 2153–54.
175. *See id.* at 2155.
176. *Id.* at 2153.
177. *See supra* notes 36–40 and accompanying text.
178. *See supra* notes 41–51 and accompanying text.
179. *See Engquist*, 128 S. Ct. at 2154.
180. *See supra* notes 120–143 and accompanying text.
181. *See Engquist*, 128 S. Ct. at 2153–57.
182. *See id.* at 2154.

remains "'subject to constitutional constraints.'"[183] Specifically, the discretionary decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[184] As construed by the lower federal courts, the prohibition of "arbitrary classification" as a basis for exercising discretion includes the selective enforcement of the law based on a "'malicious or bad faith intent to injure a person.'"[185] The *Engquist* Court did concede in a passing comment that discretion exercised "on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns."[186] The Court, however, did not go beyond the broadly impermissible categories of race and sex and thus was unwilling to adopt a "bad faith" limitation on its class of one holding that extends more generally beyond those categories.[187]

There is another problem created by the *Engquist* exception for discretionary government actions—the exception is sufficiently broad and vague as to threaten to swallow the class of one rule. In the immediate aftermath of *Engquist*, a flood of cases in the lower federal courts applied the government discretion exception to a host of factual settings. The next part examines these cases.

IV. THE AFTERMATH OF *ENGQUIST*

It became clear immediately that the *Engquist* exception was not simply about government employment but about all discretionary decisionmaking by government. Thus, in the months following *Engquist*, the lower federal courts determined that *Engquist*'s exception for discretionary government action in employment was equally applicable to the criminal justice system,[188] government regulation,[189] land use regulation,[190] education,[191] and government contracting.[192] This section examines the extension of *Engquist* into these areas.

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183. Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)).

184. Oyler v. Boles, 368 U.S. 448, 456 (1962).

185. Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (quoting LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994)).

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

187. *See id.*

188. United States v. Moore, 543 F.3d 891, 901 (7th Cir. 2008).

189. Analytical Diagnostic Labs, Inc. v. Kusel, No. 07 Civ. 3908(BMC)(RER), 2008 WL 4222042, at *3–5 (E.D.N.Y. Sept. 15, 2008).

190. Nasca v. Town of Brookhaven, No. 05-CV-122 (JFB)(ETB), 2008 WL 4426906, at *11 n.4 (E.D.N.Y. Sept. 25, 2008).

191. Vassallo v. Lando, 591 F. Supp. 2d 172, 187 (E.D.N.Y. 2008).

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

A. Discretion in the Criminal Justice System

As an example of an appropriate exercise of governmental discretion that is not subject to class of one review, the *Engquist* Court mentioned a police officer who could not give a ticket to every speeding motorist and thus ticketed some but not others.[193] It was therefore not surprising that lower federal courts determined that *Engquist*'s discretionary exception was to be given a significant role in criminal justice cases, including cases of prosecutorial discretion,[194] parole board determinations,[195] and police officers' decisions to cite or arrest particular individuals.[196]

United States v. Moore[197] involved a class of one challenge to an exercise of prosecutorial discretion.[198] Appellant Moore had pleaded guilty to federal drug charges and then alleged a class of one equal protection claim on the ground that similarly situated defendants charged in state court had received lighter sentences.[199] The court noted, given that the state and federal defendants were charged by two different sovereigns in two different court systems, it would be difficult for Moore to prove that he and the state defendants were similarly situated.[200] More specifically, the court noted that Moore's argument was "nakedly aimed at the exercise of prosecutorial discretion."[201] The court quoted black letter Supreme Court doctrine: "'[I]n the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'"[202] The court then determined that because Moore's "no-rational-basis challenge to the exercise of prosecutorial discretion is doomed to failure, his class-of-one argument is foreclosed for this reason as well."[203] The court cited *Engquist* as supporting its decision because "class-of-one equal protection theory is a 'poor fit' where the challenged governmental action is the product of a broadly discretionary decision-making process."[204] The court explained that "the discretion conferred on prosecutors in choosing whom and how to prosecute is flatly inconsistent with a presumption of uniform treatment," and thus a class of

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

194. United States v. Moore, 543 F.3d 891, 901 (7th Cir. 2008).

195. Adams v. Meloy, 287 F. App'x 531, 534 (7th Cir. 2008); Siao-Pao v. Connolly, 564 F. Supp. 2d 232, 243–45 (S.D.N.Y. 2008).

196. Robertson v. City of Grand Rapids, No. 1:06-cv-451, 2008 WL 4822218, at *9–11 (W.D. Mich. Nov. 4, 2008).

197. 543 F.3d 891 (7th Cir. 2008).

198. *Id.* at 893.

199. *Id.*

200. *Id.* at 897.

201. *Id.* at 899.

202. *Id.* (quoting United States v. Armstrong, 517 U.S. 456, 464 (1996)).

203. *Id.* at 900.

204. *Id.* (quoting Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2155 (2008)).

one equal protection challenge is "just as much a 'poor fit' in the prosecutorial discretion context as in the public employment context."[205]

Three other post-*Engquist* cases involve discretionary actions by parole boards or police officers. In *Adams v. Meloy*,[206] a prisoner challenged the decision of the parole board to deny him parole.[207] He claimed that he had been singled out because he had killed a police officer.[208] The United States Court of Appeals for the Seventh Circuit rejected his class of one claim, citing *Engquist*.[209] The court noted that "[t]he parole board's inherent discretion necessitates that some prisoners will receive more favorable treatment than others."[210]

In *Siao-Pao v. Connolly*,[211] another prisoner challenged a denial of his parole as a class of one violation, comparing himself to a woman who received a similar sentence for the same conviction but was granted parole.[212] The court rejected his claim, citing *Engquist*.[213] The court explained:

> [T]he Parole Board is required to weigh criteria specific to a particular inmate, and need not enumerate or give equal weight to each factor. This process is discretionary, as was the decision in *Engquist*, where the Supreme Court rejected a class of one argument and accorded deference to the state's determination based on the subjective and individualized nature of the decision.[214]

Finally, in *Robertson v. City of Grand Rapids*,[215] the court again cited *Engquist* as holding that the class of one theory "was not appropriate for areas involving discretionary determinations."[216] *Robertson*, therefore, held that all of the plaintiff's class of one claims "relat[ing] to discretionary decisions by City police officers . . . are not viable in the wake of the Supreme Court's *Engquist* decision."[217]

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205. *Id.* at 901.
206. 287 F. App'x 531 (7th Cir. 2008).
207. *Id.* at 532.
208. *Id.* at 533.
209. *Id.* at 534 (citing *Engquist*, 128 S. Ct. at 2148–49).
210. *Id.*
211. 564 F. Supp. 2d 232 (S.D.N.Y. 2008).
212. *Id.* at 243.
213. *Id.* at 245 (citing *Engquist*, 128 S. Ct. at 2154).
214. *Id.*
215. No. 1:06-cv-451, 2008 WL 4822218 (W.D. Mich. Nov. 4, 2008).
216. *Id.* at *9 (quoting *Engquist*, 128 S. Ct. at 2153–54).
217. *Id.* at *10.

B. Discretion in Governmental Regulation

In the months following *Engquist*, a federal district court extended the discretionary exception to government regulation of health care facilities. In *Analytical Diagnostic Labs, Inc. v. Kusel*,[218] the New York State Department of Health refused to grant an operating permit to the plaintiff for the operation of its clinical testing laboratory.[219] The plaintiff brought suit and alleged that the defendants had violated the plaintiff's constitutional rights under a class of one theory because they had "intentionally and maliciously treated it differently from other laboratories with no rational basis."[220] The court rejected that argument, citing *Engquist*.[221] The *Kusel* court noted that, while the court in *Olech* had adopted a two-part test for a class of one claim—different treatment from a similarly situated entity and no rational basis for the different treatment[222]—*Engquist* had added a third requirement "that the differential treatment . . . resulted from non-discretionary state action."[223] In response to the defendant's motion for summary judgment, the court concluded that the plaintiff had established genuine issues of material fact with regard to the two original class of one requirements under *Olech* and that this ordinarily would preclude the granting of a motion for summary judgment.[224] The plaintiff, however, had failed to meet the third requirement—nondiscretionary state action—which was "fatal to its class of one claim."[225] The plaintiff had complained of the State's unwillingness to issue Certificates of Qualification and permits to operate the laboratory.[226] The court explained, "These are clearly discretionary state activities, as DOH [Department of Health] is entrusted with making licensing decisions after subjectively reviewing each individual laboratory's qualifications, the qualifications of its directors and potential directors, and any complaints and investigation results regarding the laboratory."[227] The court concluded that the plaintiff failed to allege a federal equal protection violation because the state officials "possess[ed] discretion to subjectively evaluate laboratories and make licensing decisions, and any differential treatment of [the plaintiff] stemmed from these discretionary activities."[228]

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218. No. 07 Civ. 3908 (BMC)(RER), 2008 WL 4222042 (E.D.N.Y. Sept. 15, 2008).
219. *See id.* at *3.
220. *Id.*
221. *See id.* at *3–4 (citing *Engquist*, 128 S. Ct. at 2154).
222. *Id.* at *3 (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006)).
223. *Id.* (citing *Engquist*, 128 S. Ct. at 2154).
224. *See id.* at *4.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at *5.

C. Discretion in Land Use Regulation

The discretion exception has also been extended to certain kinds of land use regulation. In *Nasca v. Town of Brookhaven*,[229] the plaintiff alleged that the town's failure to grant him a rental permit, which was necessary to rent most properties in the town, constituted a class of one violation.[230] The court granted the town's motion for summary judgment because the plaintiff had not proved that the properties not required to have permits were similarly situated to his properties and because he had not proved that there was no rational basis for the distinction.[231] As an alternative, the court noted:

> Although the *Engquist* decision was applied in the public employment context, the analysis by the Supreme Court suggests that "class of one" challenges can only be made to non-discretionary decisions. Therefore, to the extent plaintiff is challenging the discretionary decisions by the Town as to the enforcement of its permit laws and code provisions, *Engquist* suggests that "class of one" challenges cannot be asserted as to such decisions.[232]

In *Occhionero v. City of Fresno*,[233] the court considered a class of one challenge to the city's pattern of enforcing its housing and fire codes.[234] The court noted that it would heed "the warning of the Tenth Circuit Court of Appeals in *Jennings* and the U.S. Supreme Court's observation in *Engquist* as to undermining discretion."[235] The court determined that it was not "suited to judge the reasonableness of the City's actions regarding the property"[236] and granted the defendant's motion for summary judgment.[237]

Another line of constitutional cases that challenge land use decisions under the doctrine of substantive due process has confirmed that a large degree of discretion is the norm in land use cases.[238] In these cases, a plaintiff must first identify a property interest as the underlying basis of the claim.[239] In addition, federal courts have developed a standard mode of analysis for these cases that

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229. No. 05-CV-122 (JFB)(ETB), 2008 WL 4426906 (E.D.N.Y. Sept. 25, 2008).

230. *Id.* at *11.

231. *Id.* at *12.

232. *Id.* at *11 n.4.

233. No. CV F 05-1184 LJO SMS, 2008 WL 2690431 (E.D. Cal. July 3, 2008).

234. *Id.* at *3–5.

235. *Id.* at *9 (citing Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2154–55 (2008); Jennings v. City of Stillwater, 383 F.3d 1199, 1210–11 (10th Cir. 2004)).

236. *Id.*

237. *Id.* at *18.

238. *See, e.g.*, MKA Realty Corp. v. Town of Wallkill, 82 F. App'x 712, 713 (2d Cir. 2003) (housing development); Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 503 (2d Cir. 2001) (special use permits); Merry Charters, L.L.C. v. Town of Stonington, 342 F. Supp. 2d 69, 73–77 (D. Conn. 2004) (variance and special use permit).

239. *Harlen Assocs.*, 273 F.3d at 503 (citing Crowley v. Courville, 76 F.3d 47, 52 (1996)).

focuses on the level of discretion involved.[240] For example, in *Harlen Associates v. Incorporated Village of Mineola*,[241] the plaintiff brought a suit under the equal protection and due process clauses for the village's denial of a special use permit to operate a convenience store.[242] The court rejected both claims.[243] As to the substantive due process claim, the court held that, for the claimant to have a property right, he must have a "'legitimate claim of entitlement."'[244] The question of "'entitlement turns on whether the issuing authority lacks discretion to deny the permit, *i.e.*, is required to issue it upon ascertainment that certain objectively ascertainable criteria have been met."'[245] The court went on to conclude that the zoning law "vests considerable discretion in the Board with respect to granting special use permits."[246] The determination of whether to grant a permit is a multifaceted decision; the board is supposed to consider how hazardous the proposed use is "by reason of excessive traffic, assembly of persons or vehicles or proximity to travel routes or congregations of children, pedestrians, or others."[247] Courts have also noted other "rational and permissible bases for land use restrictions: noise, traffic, congestion, safety, aesthetics, valuation of adjoining land, and effect on city services."[248] It is clear that local authorities exercise substantial discretion in land use cases, making them inappropriate for class of one treatment after *Engquist*.

D. Discretionary Judgments in Educational Settings

In the months after *Engquist*, lower courts determined that the *Engquist* discretionary exception should extend to judgments made by educators in the running of their schools. In *Vassallo v. Lando*,[249] the principal of a high school had searched a student's belongings based on the principal's suspicion that the student had been involved in setting a fire at the school earlier in the day.[250] The student asserted a class of one claim in connection with the search.[251] The court rejected it, citing *Engquist*:

> As a threshold matter, this Court concludes that the Supreme Court's recent decision in [*Engquist*] would foreclose a "class of one" claim by plaintiff in connection with the discretionary decision by school

240. *See, e.g.*, *id.* at 503–04 (discussing discretion of zoning board).
241. 273 F.3d 494 (2d Cir. 2001).
242. *Id.* at 497.
243. *Id.*
244. *Id.* at 504 (quoting Zahra v. Town of Southold, 48 F.3d 674, 680 (2d Cir. 1995)).
245. *Id.* (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999)).
246. *Id.*
247. *Id.* (internal quotation marks omitted).
248. Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1387 (11th Cir. 1993).
249. 591 F. Supp. 2d 172 (E.D.N.Y. 2008).
250. *Id.* at 178.
251. *Id.*

> administrators in this case as to whether a student should be interviewed and searched for evidence of criminal activity. . . . [A]lthough *Engquist* dealt with discretionary decisions in the public employment context, its analysis and rationale clearly applies to discretionary determination by decision-makers in other contexts, such as the one in the instant case.[252]

The court explained further:

> Decisions that defendants make on a day-to-day basis to ensure the safety and welfare of the students under their care are necessarily discretionary ones; they must have the leeway to single out certain students for questioning when a disciplinary situation arises. Because [the defendants] acted within their discretionary powers as Principal and Superintendent when questioning and searching [the student], plaintiff's "class of one" equal protection claim must fail.[253]

Similarly, the court in *Bissessur v. Indiana University Board of Trustees*[254] granted a defendant's motion to dismiss a complaint in which the plaintiff made a class of one challenge to his dismissal from a school of optometry.[255] The court noted that the plaintiff had not adequately identified any similarly situated persons.[256] More generally, the court determined:

> The Supreme Court's rationale in *Engquist* effectively forecloses his claim. In light of Plaintiff's failure to overcome the heightened pleading requirements and the Supreme Court's recent limitation on the availability of class of one claims in the context of discretionary decision making, Count I of Plaintiff's Complaint must be dismissed for failure to state an equal protection violation.[257]

E. Discretion in Government Contracting

In *Douglas Asphalt Co. v. Qore, Inc.*,[258] a highway paving contractor alleged that it was wrongly singled out and treated differently from other paving contractors in a government bidding process.[259] The court, applying *Engquist*, rejected its class of one claim.[260] The court explained that it had "little trouble

252. *Id.* at 187 (citing Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146 (2008)).
253. *Id.* at 189.
254. No. 1:07-CV-1290-SEb-WTL, 2008 WL 4274451 (S.D. Ind. Sept. 10, 2008).
255. *Id.* at *1.
256. *Id.* at *8.
257. *Id.* at *9.
258. 541 F.3d 1269 (11th Cir. 2008).
259. *Id.* at 1271.
260. *Id.* (citing Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146 (2008)).

applying the reasoning in *Engquist*, directed at . . . the government-employee relationship, to the circumstances in this case involving a government-contractor relationship."[261] The court noted the similarities between government employment and government contracts, mentioning the Supreme Court's view that "'[t]he government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption.'"[262] Just as with government employment, "decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.'"[263] The court then held that *Engquist* was controlling and that the paving contractor had failed to assert a cognizable right to equal protection.[264]

V. REVISITING THE PRE-*ENGQUIST* CASES THAT EMPHASIZE DISCRETION

When the *Olech* court created the class of one cause of action in 2000, it gave no hint that there was any exception for government employment or discretionary government actions.[265] In those pre-*Engquist* days, several federal courts reached results consistent with *Engquist* by emphasizing the difficulty of identifying similarly situated entities for purposes of comparison when a government actor was exercising discretion. This part examines two of those cases to demonstrate how widely the *Engquist* exception might run.

In *Jicarilla Apache Nation v. Rio Arriba County*,[266] the United States Court of Appeals for the Tenth Circuit rejected a class of one claim arising from a challenge to a tax assessment of a property owned and used by the Jicarilla Apache Nation as an upscale elk hunting resort.[267] The case arose when the tax assessor for Rio Arriba County changed the property's classification "from agricultural to miscellaneous non-agricultural," increasing the tribe's property tax bill by more than $110,000 per year.[268] Because the assessor did not reclassify other allegedly similar properties, the tribe argued that it was a class of one that had been subjected to irrational and wholly arbitrary treatment.[269] The assessor justified the differing treatment on the ground that it had received from the Bureau of Indian Affairs a letter containing "unusually detailed information" about the ranch and that the information, which was not available for other ranches, provided a reason for the different treatment.[270] The court found that

261. *Id.* at 1274.
262. *Id.* (quoting Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996)).
263. *Id.* (quoting *Engquist*, 128 S. Ct. at 2154).
264. *Id.*
265. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000).
266. 440 F.3d 1202 (10th Cir. 2006).
267. *Id.* at 1204.
268. *Id.*
269. *Id.* (citing *Olech*, 528 U.S. at 564–65).
270. *Id.* at 1211.

"[t]he [d]efendants' stated reason . . . seem[ed] rational" because the assessor was "[u]sing information gained at little or no cost."[271]

More importantly, the court identified another defect in the tribe's *Olech* claim—"the lack of similarly situated comparators."[272] The court explained that the test of similarity was very strict, requiring "similarity in all material respects."[273] The court then explained the burden of proving similarity:

> This already substantial burden will be especially difficult to satisfy in the context of property tax assessment, *where state actors must make highly contextual judgments about the worth of property*. The difficulty of comparing properties means that there may be material distinctions between allegedly similarly situated parties, as well as a ready supply of rational and not wholly arbitrary reasons for differential treatment.[274]

This pre-*Engquist* court did not purport to base its decision on "discretion," but its focus on the "highly contextual judgments" about the worth of property amounts to exactly the same thing—the exercise of discretion where a number of variables are under consideration and the government decisionmaker must use appropriate judgment in terms of giving appropriate weight to each of the applicable variables.

In *Griffin Industries, Inc. v. Irvin*,[275] the United States Court of Appeals for the Eleventh Circuit considered a class of one claim by the owner of a chicken rendering plant who alleged that more stringent odor control restrictions had been imposed on the plant than on any other chicken rendering plant in the state.[276] The plaintiff's allegations focused solely on its competitor, American Proteins, as a similarly situated entity that had received more lenient treatment.[277] The court explained that the result in the case would turn on the "degree of similarity [that] is required for two entities to be considered 'similarly situated.'"[278] To answer this question, the court explained:

> In each case, however, the Court was able to analyze the "similarly situated" requirement succinctly and at a high order of abstraction. This was because the challenged governmental decisions were ultimately one-dimensional—they involved a single answer to a single question. In *Olech*, the only relevant factor was the size of the easement required in

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271. *Id.*

272. *Id.* at 1212.

273. *Id.* The court also noted a Seventh Circuit case requiring that plaintiffs make a case "that the compared properties are '*prima facie* identical in all relevant respects.'" *Id.* at 1213 (quoting Purze v. Village of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002)).

274. *Id.* (emphasis added).

275. 496 F.3d 1189 (11th Cir. 2007).

276. *Id.* at 1195.

277. *Id.* at 1202–03.

278. *Id.* at 1203.

> return for connection to the municipal water supply. In *Allegheny Pittsburgh Coal* and *Sioux City Bridge*, the only relevant factor was the market value of the property.
>
> Here, by contrast, the government's regulatory action was undeniably multi-dimensional, involving varied decisionmaking criteria applied in a series of *discretionary* decisions made over an extended period of time. In reviewing these decisions, we cannot use a simplistic, post-hoc caricature of the decisionmaking process. Governmental decisionmaking challenged under a "class of one" equal protection theory must be evaluated in light of the full variety of factors that an objectively reasonable governmental decisionmaker would have found relevant in making the challenged decision. Accordingly, when dissimilar governmental treatment is not the product of a one-dimensional decision—such as a standard easement or a tax assessed at a pre-set percentage of market value—the "similarly situated" requirement will be more difficult to establish.[279]

In analyzing the "similarly situated" prong of the *Olech* test, the court of appeals emphasized that in all but the rare, one-dimensional, single issue government decision, the class of one claim has no place.[280] In the actual world of governmental decisonmaking, where government officials must take into account and weigh numerous factors, criteria, and considerations, the decision will inevitably involve an exercise of discretion, and in such a situation, it will be exceedingly difficult for a court to second-guess a government actor's decision that two entities were different. This, of course, amounts to basically the same rule that the Supreme Court adopted in *Engquist*.

In *Griffin Industries*, the Eleventh Circuit noted the possible differences between Griffin and its competitor—the volume of rendering activity, the number of citizen complaints, pressure from local politicians, and the self-reporting by its competitor of water pollution problems.[281] Because the State's determination to regulate odors from Griffin's rendering plant was "the outcome of complex, multi-factored government decisonmaking processes,"[282] Griffin had not stated an adequate class of one claim.[283] At the time it was decided, *Griffin Industries* suggested that it would be very difficult for a plaintiff to bring a successful class of one claim challenging an environmental regulation or any complex government regulation. *Engquist* confirms that difficulty.

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279. *Id.* at 1203–04 (emphasis added).
280. *See id.*
281. *Id.* at 1206.
282. *Id.* at 1205.
283. *Id.* at 1210.

VI. CONCLUSION: IS THERE ANYTHING LEFT TO THE CLASS OF ONE CLAIM AFTER *ENGQUIST*?

The holding in *Village of Willowbrook v. Olech* was a mistake. The rationale of *Engquist v. Oregon Department of Agriculture* was a disappointment. *Olech* established an equal protection cause of action without adequate precedent and, in so doing, created the specter of local squabbles turning into constitutional cases in federal courts. *Engquist* conceded that there was a problem with the class of one claim but refused to address the conceptual problem head on or to listen to the wisdom of the lower federal courts that imposed a bad faith limitation on the class of one cause of action. Instead, the *Engquist* Court purported to endorse the *Olech* cause of action but then created a vague and very broad exception for discretionary governmental activity. This exception purports to leave the holding of *Olech* in place, but in practice, it swallows up most of the *Olech* holding and creates confusion for the lower federal courts.

When, in the future, the third class of one case reaches the Supreme Court, the Court should be more faithful to its equal protection precedents. This means recognizing that equal protection works best as a limit on government classifications, not as a protector of individual rights. It also means that the Court should endorse the one aspect of its class of one theory that makes sense and is supported by pre-*Olech* precedents—the selective enforcement claim that includes a bad motive element. All the rest should be jettisoned. Let the principle prevail over its misapplication.[284]

284. *See* Helvering v. Hallock, 309 U.S. 106, 122 (1940) ("The real problem is whether a principle shall prevail over its later misapplications.").