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Nicole Richter

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# Notes

## A STANDARD FOR "CLASS OF ONE" CLAIMS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT: PROTECTING VICTIMS OF NON-CLASS BASED DISCRIMINATION FROM VINDICTIVE STATE ACTION

*The 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.<sup>1</sup>*

### I. INTRODUCTION

Grace and Thaddeus Olech ("Olechs") occupied a single family home in the Village of Willowbrook.<sup>2</sup> Until the spring of 1995, the Olechs received their water from a private well on the property.<sup>3</sup> When the well broke down beyond repair, they immediately requested to be hooked up to the Willowbrook municipal water system.<sup>4</sup> The Village of Willowbrook agreed to provide the Olechs with water; however, it required them to grant a thirty-three foot easement for the construction and maintenance of a roadway.<sup>5</sup> The Olechs protested, believing that this policy was unfair because the Village only required a fifteen foot

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<sup>1</sup> Vill. of Willowbrook v. Olech, 528 U.S. 1073 (2000), 120 S. Ct. 1073, 1074-75 (2000) (per curiam) (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

<sup>2</sup> Olech v. Vill. of Willowbrook, No. 97 C 4935, 1998 WL 196455, at \*1 (N.D. Ill. April 13, 1998); Brief of Respondent at 3, Vill. of Willowbrook v. Olech, 120 S. Ct. 1073 (2000) (per curiam) (No. 98-1288).

<sup>3</sup> Respondent's Brief at 3, Olech (No. 98-1288).

<sup>4</sup> Olech, 1998 WL 196455, at \*1. The Village of Willowbrook was required by law to provide water to the Olechs on the condition that they paid for the costs of the project. Respondent's Brief at 4, Olech (No. 98-1288). On July 11, 1995, the Olechs paid the Village \$7,012.67 for their share of the costs. *Id.*

<sup>5</sup> Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam).

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easement from other property owners for the construction of a water main.<sup>6</sup>

Meanwhile, the Olechs were forced to hook up an overground rubber hose to their neighbor's well to obtain water for their house.<sup>7</sup> In the fall of 1995, the Village finally relented, and agreed to provide the Olechs with water services in exchange for a fifteen foot easement.<sup>8</sup> In a letter to the Olechs, the Village attorney conceded that a fifteen foot easement would be sufficient.<sup>9</sup> By this time, it was too late to begin construction of a water main.<sup>10</sup> Their overground hose had frozen and the Olechs, who were both in their seventies, spent the winter without running water.<sup>11</sup>

The lack of running water caused the Olechs to suffer great inconvenience and mental and physical distress.<sup>12</sup> Grace Olech filed a claim in federal court against the Village and two Village officials,<sup>13</sup> alleging that she had been singled out for vindictive treatment because of a prior lawsuit they had won against the Village six years earlier.<sup>14</sup> She claimed that the prior lawsuit had generated substantial ill will toward

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<sup>6</sup> *Id.* It is interesting to note that the Village of Willowbrook had already developed a plan to require all home owners on the Olech's street who were not already hooked up to the Village's water system to do so within two years. Respondent's Brief at 4, *Olech* (No. 98-1288). The plan did not contain a provision requiring land owners to grant an easement to the Village. *Id.*

<sup>7</sup> *Olech v. Vill. of Willowbrook*, No. 97 C 4935, 1998 WL 196455, at \*1 (N.D. Ill. April 13, 1998). The Olechs viewed this as a "temporary" way of obtaining water, and asked Village officials to be hooked up to municipal water supplies "right away" because they knew that their overground hose would freeze in winter. *Id.*

<sup>8</sup> *Olech*, 160 F.3d at 387.

<sup>9</sup> *Id.* at 387-88. The Village attorney sent a letter to the Olechs on November 10, 1995, informing them that, "[a] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village." Brief of Respondent at 6, *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam) (No. 98-1288). After receiving the letter, the Olechs granted the fifteen foot easement. *Id.* at 7.

<sup>10</sup> *Olech*, 1998 WL 196455, at \*2; Respondent's Brief at 7-8, *Olech* (No. 98-1288).

<sup>11</sup> *Id.*

<sup>12</sup> Respondent's Brief at 8, *Olech* (No. 98-1288).

<sup>13</sup> *Id.* at 1. Grace Olech sued the President of Willowbrook and the Director of Public Services of Willowbrook in their individual capacities. *Id.*

<sup>14</sup> *Olech v. Vill. of Willowbrook*, 160 F.3d at 386, 387-88 (7th Cir. 1998). Thaddeus Olech has since passed away, and his wife, Grace Olech, has continued to pursue legal recourse for the Village's actions. *Id.* See generally *Zimmer v. Vill. of Willowbrook*, 610 N.E.2d 709 (Ill. App. Ct. 1993). In *Zimmer*, the Olechs, along with their neighbors, sued the Village for damages as the result of storm water flooding their properties. *Id.* at 711. While they were ultimately successful against the Village, the lawsuit generated substantial ill will toward the Olechs on behalf of the Village. *Olech*, 160 F.3d at 388.

them on the part of Willowbrook and its officers.<sup>15</sup> She alleged that the ill will motivated the Village to single them out for disparate treatment in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>16</sup>

Grace Olech's case represents a situation that many individuals find themselves in as the result of irrational or vindictive treatment by state or local government officials.<sup>17</sup> Individuals, such as the Olechs, are singled out for differential treatment, causing physical and mental anguish.<sup>18</sup> One avenue of relief is a claim under the Equal Protection Clause, which declares that a state government shall not "deny to any person within its jurisdiction the equal protection of the laws."<sup>19</sup> While this language has been interpreted to mean that all persons similarly situated should be treated alike,<sup>20</sup> it does not offer much guidance for courts seeking to apply its principles.<sup>21</sup> Despite the lack of clear standards, the Equal Protection Clause has traditionally been interpreted to protect members of vulnerable groups and the exercise of fundamental rights from arbitrary government conduct.<sup>22</sup>

Recently, in *Village of Willowbrook v. Olech*,<sup>23</sup> the United States Supreme Court affirmed that the Equal Protection Clause protects individuals, as well as vulnerable groups and fundamental rights from

<sup>15</sup> *Olech*, 160 F.3d at 388.

<sup>16</sup> *Id.*

<sup>17</sup> J. Michael McGuinness, *Equal Protection for Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 CAMPBELL L. REV. 333, 356 (1996). Professor McGuinness contends that the vast majority of Americans have not been given some "special status or privilege" through suspect class or fundamental rights protection. *Id.* See also *infra* notes 66-77 and accompanying text for an explanation of suspect class and fundamental rights.

<sup>18</sup> See, e.g., Brief of Respondent at 6, *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073 (per curiam) (No. 98-1288) (alleging that the Olechs suffered mental and physical distress because they spent the winter without running water); *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995) (contending that the mayor conducted a "campaign of vengeance" against him by denying a license and causing the police to harass him); *Rubinovitz v. Rogato*, 60 F.3d 906, 912 (1st Cir. 1995) (finding that local officials may have engaged in a conspiracy to cause substantial harm to the plaintiffs for malicious reasons).

<sup>19</sup> U.S. CONST. amend. XIV, § 1.

<sup>20</sup> See *infra* note 60 and accompanying text.

<sup>21</sup> McGuinness, *supra* note 17, at 334-35 ("The constitutional text offers virtually no guidance into the meaning of equal protection."); see also Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982).

<sup>22</sup> See *infra* Part II.A for the traditional types of protection that the Supreme Court has recognized under the Equal Protection Clause of the Fourteenth Amendment.

<sup>23</sup> 120 S. Ct. 1073, 1074-75 (2000) (per curiam). See also *supra* note 1 and accompanying text.

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vindictive state action.<sup>24</sup> This approach to Equal Protection jurisprudence is referred to as a "class of one" claim.<sup>25</sup> Under this theory, individuals like the Olechs, who have been victimized by state or local officials, but who do not have a claim under a traditionally recognized Equal Protection category, can file a claim in federal court under 42 U.S.C. § 1983.<sup>26</sup> These claims arise when a state or local government official inequitably administers a state statute or local ordinance.<sup>27</sup> They often occur in the context of land use,<sup>28</sup> zoning,<sup>29</sup> licensing,<sup>30</sup> and the provision of governmental services.<sup>31</sup>

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<sup>24</sup> *Olech*, 120 S. Ct. at 1074-75.

<sup>25</sup> See, e.g., *Id.* at 1074 (using the term "class of one" to describe the plaintiff's claim); *Bula v. City of Antigo*, No. 99-1765, 1999 WL 1136835, at \*1 (7th Cir. Nov. 16, 1999) (referring to the plaintiff's claim as a "class of one" claim); *Staples v. City of Milwaukee*, 142 F.3d 383, 387 (7th Cir. 1998) (recognizing the plaintiff's claim as a "class of one" Equal Protection case); *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (using the term "class of one" to refer to individual claims under the Equal Protection Clause); *Wroblewski v. City of Washburn*, 965 F.2d 452, 458 (7th Cir. 1992) (referring to the plaintiff's Equal Protection allegation as a "class of one" claim).

<sup>26</sup> See *infra* notes 239-42 and accompanying text.

<sup>27</sup> See, e.g., *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam) (alleging that Village officials required the plaintiff alone to grant a nonstandard easement as a condition for municipal water services); *Esmail*, 53 F.3d at 178 (contending that the mayor singled the plaintiff out for the denial of a liquor license); *Rubinovitz v. Rogato*, 60 F.3d 906, 908-09 (1st Cir. 1995) (alleging selective enforcement of city building code regulations); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980) (claiming selective treatment in the enforcement of a state regulation requiring dairy farms to have clean water supplies).

<sup>28</sup> *Rubinovitz*, 60 F.3d at 908-09 (alleging vindictive enforcement of zoning variance and building code violations); *Epstein v. Township of Whitehall*, 693 F. Supp. 309, 312 (E.D. Pa. 1988) (claiming local officials maliciously impeded the development of their land).

<sup>29</sup> *LaTrieste Rest. and Cabaret, Inc. v. Vill. of Port Chester*, 40 F.3d 587, 588-89 (2d Cir. 1994) (contending malicious enforcement of zoning regulations); *Masi Mgmt. v. Town of Ogden*, 691 N.Y.S.2d 706, 717-18 (1999) (maintaining selective enforcement of zoning codes); *Thomas v. City of West Haven*, 734 A.2d 535, 538-39 (Conn. 1999) (alleging irrational denial of application for zoning change).

<sup>30</sup> *Esmail*, 53 F.3d at 180 (7th Cir. 1995) (holding that a vindictive denial of a liquor license validly stated a claim deserving Equal Protection analysis); *Zahra v. Town of Southold*, 48 F.3d 674, 676-79 (2d Cir. 1995) (alleging malicious revocation of building permit was an Equal Protection violation); *LeClair*, 627 F.2d at 608 (contending a farm license suspension was a malicious state action in violation of the Equal Protection Clause).

<sup>31</sup> *Olech*, 160 F.3d at 387 (alleging vindictive denial of municipal water services was an Equal Protection violation); *Front Royal and Warren County Indust. Park Corp. v. Town of Front Royal Va.*, 135 F.3d 275, 277-79 (4th Cir. 1998) (claiming that municipality's failure to provide sewer services implicated the Equal Protection Clause); *Browning-Ferris Indust. of S. Atlantic, Inc. v. Wake County*, 905 F. Supp. 312, 314-16 (E.D.N.C. 1995) (maintaining that the city's failure to provide a sewer line violated Equal Protection).

However, this approach is a relatively new form of Equal Protection; thus, it remains unclear how lower courts should analyze these claims.<sup>32</sup> While several appellate courts have recognized an Equal Protection claim for individuals based on malicious or vindictive state action,<sup>33</sup> they have articulated conflicting standards for addressing and analyzing these claims.<sup>34</sup> Furthermore, appellate courts have evaluated "class of one" cases in the context of Rule 56 motions for summary judgment and Rule 12(b)(6) motions to dismiss, but few have addressed a "class of one" claim in a trial situation.<sup>35</sup> As such, these decisions

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<sup>32</sup> See *infra* Part III for the conflicting approaches to Equal Protection claims for vindictive state action.

<sup>33</sup> See *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam) (finding an Equal Protection violation where the village singled out a homeowner with vindictive treatment); *Staples v. City of Milwaukee*, 142 F.3d 383, 387 (7th Cir. 1998) (recognizing non-suspect individual claims for arbitrary state action under the Equal Protection Clause of the Fourteenth Amendment); *Indiana State Teachers Ass'n v. Board of Sch. Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996) ("The equal protection clause does not speak of classes. A class, moreover, can consist of a single member."); *Batra v. Board of Regents*, 79 F.3d 717, 721-22 (8th Cir. 1996) (acknowledging that arbitrary or irrational state action that singles out an individual for different treatment can violate the Equal Protection Clause); *Esmail*, 53 F.3d at 179-80 (holding an individual can bring a claim against a state official for vindictive action under the Equal Protection Clause of the Fourteenth Amendment); *Rubinovitz*, 60 F.3d at 911 (reaffirming that bad faith or malicious intent to injure an individual violates Equal Protection); *Yerardi's Moody St. Rest. & Lounge, Inc. v. Board of Selectmen*, 932 F.2d 89, 94 (1st Cir. 1991) (recognizing that malicious or bad faith intent to injure an individual can violate Equal Protection); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981) (holding that differential treatment without a rational justification is arbitrary and violates Equal Protection); *LeClair*, 627 F.2d at 609-10 (stating that a state or local government official can violate the Equal Protection clause when they single out an individual with the malicious or bad faith intent to injure); *Torres v. Frias*, 68 F. Supp.2d 935, 943 (N.D. Ill. 1999) (acknowledging that state action based upon an illegitimate animus toward the plaintiff violates Equal Protection); *Lockhart v. Cedar Rapids Cmty. Sch. Dist.*, 963 F. Supp. 805, 816 (N.D. Iowa 1997) (finding that the Equal Protection Clause protects citizens from irrational or arbitrary state action); *Masi*, 691 N.Y.S.2d at 720-21 (recognizing individual or non-class based Equal Protection claims motivated by malicious or bad faith intent to injure); *Thomas*, 734 A.2d at 551 (holding that landowners established a prima facie case of selective treatment in violation of Equal Protection); *Penterman v. Wis. Elec. Power Co.*, 565 N.W.2d 521, 534 (Wis. 1997) (acknowledging that irrational and arbitrary state action can violate the Equal Protection Clause).

<sup>34</sup> See *infra* Part III.

<sup>35</sup> See, e.g., *Baumgardner v. County of Cook*, No. 99-C5788, 2000 WL 1100438, at \*13-16 (N.D. Ill. Aug. 3, 2000) (evaluating a "class of one" claim in the context of a Rule 12(b)(6) motion to dismiss). In *Baumgardner*, the Court addressed the difference between a Rule 12(b)(6) motion to dismiss and the rational basis standard. *Id.* at \*15. It contrasted the Rule 12(b)(6) standard, which requires the plaintiff to prevail if relief could be granted under any set of facts, with the rational basis standard under which the government wins if any set of facts can reasonably be construed to justify the classification. *Id.* (citing *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992)). The Court found that

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provide a useful starting point for a "class of one" analysis, but they do not provide a trial standard.

When it decided *Olech*, the Supreme Court failed to articulate a clear standard. It provided the foundation for analyzing "class of one" claims; however, it declined to decide the issue of whether a claim of malicious or arbitrary treatment rises to the level of a constitutional violation.<sup>36</sup> This Note addresses the difficulty of analyzing Equal Protection "class of one" claims and calls for a much needed clarification of the legal standards in "class of one" litigation. There are several difficulties inherent in fashioning a standard for "class of one" claims.<sup>37</sup> First, "class of one" claims are brought under 42 U.S.C. § 1983 ("Section

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the rational basis standard will not prevent the plaintiff from prevailing on a Rule 12(b)(6) motion. *Id.* A Rule 12(b)(6) motion is a procedural device that allows the plaintiff to conduct discovery and move to trial, while the rational basis standard is the "substantive burden" that the plaintiff will have to meet at trial. *Id.* The Court concluded that to decide a Rule 12(b)(6) motion when evaluating an equal protection claim that is subject to rational basis scrutiny, courts should determine if the plaintiff has alleged facts that are "sufficient to overcome the presumption of rationality that applies to government classifications." *Id.* (citing *Wroblewski*, 965 F.2d at 460). See also *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam) (affirming the appellate court's denial of a 12(b)(6) motion to dismiss for failure to state a cognizable "class of one" claim); *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000) (affirming the district court's granting of summary judgment in a "class of one" claim); *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir. 2000) (reviewing a summary judgment motion in a "class of one" claim); *Esmail v. Macrane*, 53 F.3d 176, 177 (7th Cir. 1995) (evaluating a motion to dismiss for failure to state a "class of one" claim); *Rubinovitz v. Rogato*, 60 F.3d 906, 909 (1st Cir. 1995) (analyzing the district court's granting of summary judgment in a "class of one" claim). See *infra* note 249 for the summary judgment standard.

<sup>36</sup> *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam) ("[W]e . . . do not reach the alternative theory of ill will relied on by the [Seventh Circuit]."). See also Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, 36 TRIAL 89, 90 (2000) (finding that the Court did not reach the issue of whether improper motive is enough to bring an Equal Protection claim); *Hilton*, 209 F.3d at 1008 (7th Cir. 2000) (noting that the Supreme Court left the role of motive unclear when it decided *Olech*). But see Joseph Z. Flemming, *Mt. Healthy, Causation and Affirmative Defenses*, 51 MERCER L. REV. 637, 650 n.61 (2000) (stating that the Supreme Court applied a strict test of motivation when it decided *Olech*).

<sup>37</sup> Chemerinsky, *supra* note 36, at 90. Chemerinsky stated:

There are understandable reasons why the Court wanted to shy away from the question of whether improper subjective motivation is sufficient for a claim. It is easy for plaintiffs to allege such motivation with the hope of gaining needed evidence during discovery and persuading a jury at trial. The Court also may have been concerned that issues of motivation focus on the government's actual purpose, while rational basis review looks solely to whether there is a conceivable permissible purpose for the government's action.

*Id.*

1983").<sup>38</sup> When a government official is sued under Section 1983, a court may grant qualified immunity to officials under an objective test.<sup>39</sup> The integration of a subjective inquiry into an official's motivations with an objective standard presents many challenges.<sup>40</sup> Furthermore, it is difficult to reconcile an inquiry into the subjective motivations of a government official with the deferential rational basis standard that controls "class of one" claims.<sup>41</sup> This Note resolves these difficulties and proposes that "class of one" claims should be analyzed under a heightened rational basis standard.

Section II of this Note discusses the history and development of the Equal Protection Clause, with an explanation of how Equal Protection claims are analyzed.<sup>42</sup> This Section also discusses early "class of one" cases and traces their extension to administrative actions and selective enforcement.<sup>43</sup> Section III of this Note describes how courts currently analyze Equal Protection "class of one" claims for vindictive state action.<sup>44</sup> This Section focuses on the different approaches that the appellate courts presently use to analyze "class of one" claims, focusing with particularity on the First, Second and Seventh Circuits.<sup>45</sup> Then, Section IV looks at the Supreme Court's recent decision in *Village of Willowbrook v. Olech*.<sup>46</sup> It analyzes the test for qualified immunity and proposes a standard for integrating the qualified immunity issues with a substantive claim.<sup>47</sup> Additionally, Section IV shows that "class of one" claims can be analyzed under a heightened form of rational basis review.<sup>48</sup> Section IV also discusses Substantive Due Process and shows how it can serve as an additional claim for "class of one" plaintiffs who are victimized by vindictive government action.<sup>49</sup> Finally, Section V presents a Model Judicial Reasoning for courts to apply when they

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<sup>38</sup> See, e.g., *Hilton*, 209 F.3d at 1006 (utilizing 42 U.S.C. § 1983 to allege a "class of one" claim); *Esmail*, 53 F.3d at 177 (alleging a "class of one" claim under 42 U.S.C. § 1983); *Rubinovitz*, 60 F.3d at 910 (filing an Equal Protection claim for the "malicious or bad faith" enforcement of the law under 42 U.S.C. § 1983); *LeClair*, 627 F.2d at 607 (utilizing 42 U.S.C. § 1983 as the vehicle for a claim of selective enforcement).

<sup>39</sup> See *infra* notes 243-86 and accompanying text.

<sup>40</sup> See *infra* notes 276-77 and accompanying text.

<sup>41</sup> See Chemerinsky, *supra* note 36, at 90.

<sup>42</sup> See *infra* notes 52-88 and accompanying text.

<sup>43</sup> See *infra* notes 89-127 and accompanying text.

<sup>44</sup> See *infra* notes 128-86 and accompanying text.

<sup>45</sup> See *infra* notes 133-86 and accompanying text.

<sup>46</sup> See *infra* notes 187-238 and accompanying text.

<sup>47</sup> See *infra* notes 239-86 and accompanying text.

<sup>48</sup> See *infra* notes 287-348 and accompanying text.

<sup>49</sup> See *infra* notes 349-63 and accompanying text.



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evaluate "class of one" claims at trial.<sup>50</sup> Accordingly, Section V uses Ms. Olech's claim that was presented in the Introduction as an example of how the Model Judicial Reasoning would be implemented.<sup>51</sup>

II. THE HISTORY AND DEVELOPMENT OF EQUAL PROTECTION CLAIMS

A. *Equal Protection Clause of the Fourteenth Amendment*

The Fourteenth Amendment was enacted after the Civil War to protect the newly emancipated slaves from unequal treatment.<sup>52</sup> However, the Fourteenth Amendment was not used for almost a century after its enactment because the Supreme Court rarely found that a state or local action violated the Equal Protection Clause.<sup>53</sup> The turning point for Equal Protection jurisprudence came in 1954, when the Supreme Court decided *Brown v. Board of Education*.<sup>54</sup>

After *Brown*, the Supreme Court indicated an increased willingness to hear claims of invidious discrimination under the Equal Protection Clause.<sup>55</sup> The Court has, in its modern case law, expanded the scope of Equal Protection beyond race to include classifications such as

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<sup>50</sup> See *infra* notes 364-403 and accompanying text.

<sup>51</sup> See *infra* notes 364-403 and accompanying text.

<sup>52</sup> *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880) ("One great purpose of [the Fourteenth Amendment] was to raise [African-Americans] from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States."); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880). In *Strauder*, the Court observed that the "true spirit and meaning" of the Civil War Amendments was securing to a race recently emancipated enjoyment of all civil rights that under the law are enjoyed by whites. *Id.* at 306.

The Court reaffirmed the core meaning of the Equal Protection Clause in the Twentieth Century. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmental discrimination based on race."); *Palmer v. Thompson*, 403 U.S. 217, 220 (1971) ("There can be no doubt that a major purpose of [the Fourteenth Amendment] was to safeguard [African-Americans] against discriminatory state laws - state laws that fail to give [African-Americans] protection equal to that afforded white people."); *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) ("[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified distinctions based on race."). See also Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997), for an in-depth analysis of the history of the Fourteenth Amendment.

<sup>53</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 526 (1997).

<sup>54</sup> 347 U.S. 483, 495 (1954) (holding that separate educational facilities for white and African-American school children violated the Equal Protection Clause). See also CHERMERINSKY, *supra* note 53, at 526.

<sup>55</sup> CHERMERINSKY, *supra* note 53, at 526. See also McGuinness, *supra* note 17, at 334 ("[I]n recent years, the equal protection guarantee has become among the most important constitutional sources for the protection of individual rights.").

gender and illegitimacy and fundamental rights such as the right to vote and access to the courts.<sup>56</sup> In its most recent expansion of Equal Protection jurisprudence, the Court affirmed that the Equal Protection Clause protects individuals as well as members of suspect classes.<sup>57</sup>

Currently, the main source of claims against a state or local government official for invidious discrimination is the Equal Protection Clause of the Fourteenth Amendment.<sup>58</sup> Under the Equal Protection Clause, no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>59</sup> This provision requires that persons similarly situated should be treated alike.<sup>60</sup> Specifically, the Equal Protection Clause protects against discriminatory action taken by states and their subdivisions.<sup>61</sup> While the Fourteenth Amendment does not apply to the Federal Government, the Due Process Clause of the Fifth

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<sup>56</sup> See *infra* notes 70-71, 78-79 and accompanying text.

<sup>57</sup> See generally *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam).

<sup>58</sup> See, e.g., *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) (presenting a claim of vindictive state action against an individual under the Equal Protection Clause of the Fourteenth Amendment), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam); *Rubinovitz*, 60 F.3d at 909-10 (finding that a claim of malicious or bad faith intent to harm an individual is actionable under the Equal Protection Clause of the Fourteenth Amendment). See also *infra* Part IV.D. for a discussion of how an individual can also bring a claim for vindictive or malicious treatment under the Substantive Due Process Clause of the Fourteenth Amendment.

<sup>59</sup> U.S. CONST. amend. XIV, § 1.

<sup>60</sup> *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Fourteenth Amendment does not demand that all persons should be dealt with identically, however, exact or perfect equality is not required. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996). In *Romer*, the Supreme Court stated, "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Id.*

While the Supreme Court has never attempted to define Equal Protection, scholars have offered two models; one model looks at equal treatment, while the other model looks at equal results. CHEMERINSKY, *supra* note 53, at 527 n.8. Under the equal treatment model, the focus is on whether the government is treating people equally without discrimination. *Id.* If so, Equal Protection is satisfied, even if the outcome is unequal. *Id.* In contrast, the equal results model focuses on the outcome of the government's action. *Id.* Under this approach, Equal Protection can be violated if a facially neutral law has a discriminatory impact. *Id.*

<sup>61</sup> *United States v. Raines*, 362 U.S. 17, 25 (1960) (declaring as a "fundamental proposition" that state officials of every rank are bound by the Fourteenth Amendment).

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Amendment is interpreted to provide the same protection against discriminatory classifications by the Federal Government.<sup>62</sup>

The Supreme Court presently analyzes Equal Protection claims under three levels of scrutiny to determine if the state action violated the Equal Protection Clause: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.<sup>63</sup> While traditional Equal Protection claims focus on legislative classifications,<sup>64</sup> the three tiered system of analysis also applies to administrative decisions, such as "class of one" claims.<sup>65</sup> The highest level of scrutiny is given to classifications that burden a suspect class<sup>66</sup> or a fundamental right.<sup>67</sup> Suspect classes include race,<sup>68</sup> alienage

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<sup>62</sup> *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). See also Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977) (discussing the Fifth Amendment's Equal Protection requirement).

<sup>63</sup> Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky. L.J. 591, 595-96 (1999-2000). Professor Saphire found that the basic framework for equal protection analysis has been well settled for the past twenty-five years. *Id.* He found that the Court uses three levels of scrutiny and that each "level . . . entails a prescribed test with increasingly demanding requirements that must be satisfied if the challenged classification is to withstand constitutional challenge." *Id.* at 596. The levels of scrutiny demonstrate the leeway that policymakers have in "achieving societal goals." Sean C. Doyle, Note, *HIV-Positive, Equal Protection Negative*, 81 GEO. L.J. 375, 383 (1992). However, policymakers will not be granted a "presumption of benevolence" when ignorance, bias, prejudice, or malice has influenced their decision. *Id.*

The three tiered approach to Equal Protection analysis has been criticized by some Supreme Court Justices. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985). In a concurring opinion, Justice Stevens suggested that the Court's analysis of equal protection classifications might be better characterized as a "continuum of judicial responses to differing classifications." *Id.* at 451 (Stevens, J., concurring). See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (criticizing the Court's "rigidified approach" to equal protection analysis); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 478 (1997) (arguing a sliding scale approach toward Equal Protection review is superior to the "single test" approach).

<sup>64</sup> See *Cleburne*, 473 U.S. at 453 (Stevens, J., concurring) ("In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws?"); *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 (1987) ("The first and most common type [of Equal Protection] is a claim that a statute discriminates on its face.").

<sup>65</sup> See *infra* notes 92-98 and accompanying text.

<sup>66</sup> CHEMERINSKY, *supra* note 53, at 550.

<sup>67</sup> *Id.* at 638.

<sup>68</sup> In *Cleburne*, the Court noted that race receives the highest level of scrutiny because the classifications are "so seldom relevant" to a legitimate state interest, and because racial discrimination is unlikely to be rectified by legislative means. *City of Cleburne*, 473 U.S. at 440.

Racial classifications have been challenged in a number of contexts. Facial challenges have been made to laws that confer a disadvantage upon a group of people because of their

or national origin.<sup>69</sup> Fundamental rights include the right to vote,<sup>70</sup> the right to access to courts,<sup>71</sup> the right to interstate travel,<sup>72</sup> and the right to

race. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (declaring unconstitutional a law that limited jury service to white males over the age of twenty-one); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (invalidating a law that prevented a mother from gaining custody of her child when she married an African-American because it violated the Equal Protection Clause). Challenges have also been made to laws that burden both whites and racial minorities. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding unconstitutional a state statute that forbade whites to marry racial minorities); *Anderson v. Martin*, 375 U.S. 399, 401-02 (1964) (finding a requirement that race be listed on a political candidate's ballot implicated Equal Protection). Finally, laws that required separation of the races have been struck down for violating Equal Protection. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that separate educational facilities for white and African-American school children violated the Equal Protection Clause); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877, 877 (1955) (affirming that a law requiring segregation in public beaches and bathhouses was unconstitutional).

Challenges have also been made to laws that are neutral on their face, but discriminatory in their application. See *Washington v. Davis*, 426 U.S. 229, 246 (1976) (finding a test for a position in the Washington D.C. Police Department that failed more African-Americans than whites was constitutional absent discriminatory intent). This type of challenge will be analyzed under strict scrutiny only if there is proof of a discriminatory purpose. *Id.* at 239. Proof of discriminatory impact by itself will not trigger strict scrutiny and the claim will be analyzed under the rational basis standard. *Id.* The requirement of discriminatory intent means that a plaintiff has the initial burden of showing that the government intended to discriminate. *Personnel Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 281 (1979). That the government knew that there might be a discriminatory effect is not enough. *Id.* at 279. In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), the Supreme Court stated that a plaintiff can prove discriminatory intent by showing that the law is so clearly discriminatory that there is no other explanation, by showing statistical discrimination, or by showing a discriminatory purpose through the legislative history of the laws. *Id.* at 264-68. See also *infra* notes 383-88 and accompanying text.

<sup>69</sup> See *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606 (1976) (invalidating a statute that permitted only U.S. citizens to practice engineering under strict scrutiny); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (declaring a flat ban that prevented aliens from holding civil service jobs unconstitutional); *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (reaffirming that strict scrutiny is the standard for alienage classifications); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (stating that classifications based on alienage are inherently suspect).

<sup>70</sup> See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (1969) (holding that "exact[ing] judicial scrutiny" should be used to evaluate statutes that determine who can vote); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (affirming that the right to vote is a fundamental right); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (stating that "the right of suffrage is a fundamental matter in a free and democratic society . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

<sup>71</sup> *Lewis v. Casey*, 518 U.S. 343, 348-55 (1996) (alleging a violation of the right of access to courts); *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (holding that states must provide indigent criminal defendants with a trial transcript).

<sup>72</sup> *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (finding a program that favored established state residents over new state residents violated the Equal Protection Clause); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (stating that the right to travel or migrate interstate

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privacy.<sup>73</sup> These classifications are subject to "strict scrutiny."<sup>74</sup> Under strict scrutiny, the classification will be upheld only if the government can show that it is necessary to promote a compelling government interest<sup>75</sup> and that the goal cannot be met through less discriminatory means.<sup>76</sup> Strict scrutiny is a difficult standard for the government to meet; thus, it is almost always fatal to a challenged law.<sup>77</sup>

Classifications that involve gender<sup>78</sup> and illegitimacy<sup>79</sup> receive a slightly lower level of scrutiny,<sup>80</sup> commonly referred to as "intermediate

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is constitutionally protected); *United States v. Guest*, 383 U.S. 745, 757 (1966) (stating that the right to travel is a "fundamental right"). While the right to intrastate travel is analyzed under strict scrutiny, the Supreme Court has stated that the right to foreign travel is not a fundamental right; therefore, it should only be analyzed under rational basis. See *Haig v. Agee*, 453 U.S. 280, 306 (1981).

<sup>73</sup> Privacy rights include the right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), the right to control the upbringing of one's own children, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), the right to refuse medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990), the right to be free from government interference in choosing to have an abortion under limited circumstances, *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992), and the right to use contraceptives, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>74</sup> CHEMERINSKY, *supra* note 53, at 550. These categories are subject to the highest level of scrutiny because they involve group traits that are irrelevant to a state interest and often involve injury to politically powerless groups. Doyle, *supra* note 63, at 381-82.

<sup>75</sup> *City of Cleburne*, 473 U.S. at 440; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

<sup>76</sup> *Wygant*, 476 U.S. at 280 ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly tailored to accomplish that purpose.").

<sup>77</sup> CHEMERINSKY, *supra* note 53, at 529 (citing Gerald Gunther, *The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

<sup>78</sup> *United States v. Virginia*, 518 U.S. 515, 531 (1996) (stating that parties who seek to defend a gender-based classification must show an "exceedingly persuasive justification"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (analyzing a gender-based classification under intermediate scrutiny); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (stating that an intermediate level of scrutiny should be used for gender-based classifications); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding classifications based on gender are subject to intermediate scrutiny). Intermediate scrutiny is used to evaluate laws that discriminate against men as well as laws that discriminate against women. For example, in *Mississippi University for Women v. Hogan*, the Court declared that a state nursing school that was available only to women was unconstitutional under intermediate scrutiny. *Hogan*, 458 U.S. at 724.

<sup>79</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that intermediate scrutiny is used for classifications based on illegitimacy); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (stating that an intermediate level of review is used for illegitimacy); *Lalli v. Lalli*, 439 U.S. 259, 265-66 (1978) (analyzing an illegitimacy claim under intermediate scrutiny).

<sup>80</sup> *Id.* Courts apply intermediate scrutiny when a "classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties." *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

scrutiny."<sup>81</sup> To survive intermediate scrutiny, the government must show that the classification is substantially related to a sufficiently important government interest.<sup>82</sup> If the government cannot meet this burden, the classification will not pass constitutional evaluation.<sup>83</sup>

All other classifications, most notably those that involve social and economic classifications, receive the lowest level of scrutiny.<sup>84</sup> This is referred to as "rational basis" review and, under this standard, the party attacking the legislation bears the burden of proof.<sup>85</sup> A rational basis classification is presumed to be valid as long as it is rationally related to a legitimate state interest.<sup>86</sup> The courts are deferential to the

<sup>81</sup> CHEMERINSKY, *supra* note 53, at 529.

<sup>82</sup> *Craig*, 429 U.S. at 197-98 (finding that gender classifications must serve "important governmental objectives" and must be "substantially related to achievement of those objectives"); *Mills*, 456 U.S. at 99 (finding that classifications that involve illegitimate children will not pass equal protection scrutiny unless they are substantially related to a legitimate state interest).

<sup>83</sup> *Craig*, 429 U.S. at 204 (invalidating an Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of 21 and to females under the age of 18 because the relationship between gender and traffic safety was "too tenuous" to be substantially related to the statutory objective); *Mills*, 456 U.S. at 100-01 (finding that a Texas statute which only allowed illegitimate children one year to establish paternity violated Equal Protection because it was not substantially related to a legitimate state interest).

<sup>84</sup> See *City of Cleburne*, 473 U.S. at 440 (finding that the states are given wide latitude in regulating social or economic matters); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1980) (stating that local social and economic legislation is analyzed under the rational basis standard). Rational basis review is also applied to classifications such as age, *Vance v. Bradley*, 440 U.S. 93, 97 (1979), *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976), disability, *Cleburne*, 473 U.S. at 446, wealth, *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970), and sexual orientation, *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986), *Romer v. Evans*, 517 U.S. 620, 631-32 (1996).

<sup>85</sup> CHEMERINSKY, *supra* note 53, at 530. See also Saphire, *supra* note 63, at 597. Saphire found that the rational basis standard has been the most stable of the three standards. *Id.* It is the oldest and most basic standard that all classifications must satisfy. *Id.*

<sup>86</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996). In *Romer*, the Court described the rational basis standard:

[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and marks the limits of our own authority.

*Id.*

Under the rational basis test, a legitimate state interest can consist of interests traditionally within the "police powers" of a state, such as safety, public health, or public morals. See *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (finding that the Sunday sale of exempted commodities was necessary for the "health of the populace"); *Ry. Express Agency v. New York*, 336 U.S. 106, 109-11 (1949) (stating that a New York City traffic

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government under this standard of review,<sup>87</sup> and it will uphold a classification so long as there is a conceivable basis for it.<sup>88</sup>

### B. The Development of Equal Protection "Class of One" Claims

The "class of one" concept was recognized by the Supreme Court in its rudimentary form in the Nineteenth Century.<sup>89</sup> Early cases addressed arbitrary treatment in the context of administrative action.<sup>90</sup> They served as the impetus for later selective enforcement claims under Equal Protection.<sup>91</sup> The following Section traces the development of "class of one" jurisprudence from its origins in administrative action claims to the concept of selective enforcement.

#### 1. The Emergence of "Class of One" Claims in Administrative Actions

While many Equal Protection claims are based upon legislative classifications, "class of one" claims usually arise when a state or local

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regulation forbidding any one to operate an advertising vehicle was enacted for public safety reasons, thus it did not violate Equal Protection). Even though it is rare, the Supreme Court has stated that there are impermissible state objectives. For example, a state cannot enact legislation where it desires to harm a politically unpopular group. See *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer*, 517 U.S. at 634-35. This principal will be developed in Part IV.C. of this Note to show how "class of one" claims can be analyzed under the rational basis standard.

<sup>87</sup> Saphire, *supra* note 63, at 598 (stating that rational basis review entails a great degree of judicial deference). See also Richard H. Fallon, Jr., *The Supreme Court, 1996 Term-Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (finding that rational basis review is a "virtual rubber stamp"); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (stating that rational basis review is the "paradigm of judicial restraint").

<sup>88</sup> *Beach Communications, Inc.*, 508 U.S. at 313. In *Beach*, the Court went so far as to say, "those attacking the rationality of the legislative classification have the burden to 'negate every conceivable basis which might support it.'" *Id.* at 315. See also *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911) (finding a challenged classification will fail only if it is completely arbitrary).

<sup>89</sup> See *Missouri v. Lewis*, 101 U.S. 22, 31 (1879) (finding that the Equal Protection Clause of the Fourteenth Amendment "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances"); *Atchison, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 104 (1899) ("[T]he equal protection guaranteed by the Constitution forbids the legislature to select a person . . . and impose upon him . . . burdens and liabilities which are not cast upon others similarly situated."). See also *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916). In *McFarland*, the Court used "class of one" language when it found that a statute "bristl[ed] with severities that touch[ed] the plaintiff alone," and stated that a legislature could not enact a statute directed toward a particular individual or corporation unless there was a rational basis for doing so. *Id.* The Court held that the statute was invalid because it was a "purely arbitrary" exercise of legislative power. *Id.*

<sup>90</sup> See *infra* notes 92-127 and accompanying text.

<sup>91</sup> See *infra* Part II.B.2.

official applies a facially neutral law in a discriminatory manner.<sup>92</sup> However, the Equal Protection Clause requires the fair application of laws as well as impartial legislation.<sup>93</sup> This principle was established in 1886 by *Yick Wo v. Hopkins*.<sup>94</sup> In *Yick Wo*, the Supreme Court evaluated a San Francisco ordinance that required laundry operators to obtain permission to operate from the Board of Supervisors unless the laundry was located in a brick or stone building.<sup>95</sup> The statute was facially valid, but was enforced primarily against the Chinese as a means to shut down their laundry facilities.<sup>96</sup> The Court was concerned that the Board was

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<sup>92</sup> McGuinness, *supra* note 17, at 334-35. In his article Professor McGuinness states that while much of the focus in Equal Protection litigation is on legislative classifications, the more common context in which an individual needs protection is where the government acts arbitrarily through administrative action. *Id.* See also Saphire, *supra* note 63, at 600 n. 34 ("Equal protection analysis is not confined to formal legislation."); and *supra* note 25 for a list of cases where the courts have heard claims for the discriminatory application of laws to individuals under the Equal Protection Clause.

<sup>93</sup> There are three broad categories of Equal Protection claims. *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n.5 (11th Cir. 1989). The most common claim is when a statute is discriminatory on its face. *Id.* When this occurs, the court will analyze the claim under the appropriate level of scrutiny to determine if the statute violates the Equal Protection Clause. *Id.* The second type of claim occurs when the neutral application of a facially neutral law has a disparate impact. *Id.* To succeed with this type of challenge, a plaintiff must show discriminatory intent. See also *supra* note 68 for an explanation of how these types of Equal Protection challenges apply to race-based classifications for an understanding of these concepts in practice. The third type of claim is when a facially neutral statute is administered in a discriminatory way. *E & T Realty*, 830 F.2d at 1112 n.5. It is this category that most "class of one" claims fall into. The appellate courts have heard many cases involving Equal Protection claims against state or local governments for their administrative actions. See, e.g., *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 289-290 (4th Cir. 1998) (evaluating Equal Protection claim based on town's refusal to provide sewer service); *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819, 823 (11th Cir. 1998) (challenging city's denial of special use permit); *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 936-37 (5th Cir. 1988) (alleging a local utility board's refusal to provide water violated the Equal Protection Clause); *Carolan v. City of Kansas City*, 813 F.2d 178, 181-82 (8th Cir. 1987) (contending enforcement of building code implicated Equal Protection).

<sup>94</sup> 118 U.S. 356 (1886). See J. Michael McGuinness, *Decisions of the Past Decade Have Expanded Equal Protection Beyond Suspect Classes*, 72 FEB. N.Y. ST. B.J. 36 (2000) (finding that *Yick Wo* is the cornerstone for Equal Protection).

<sup>95</sup> *Yick Wo*, 118 U.S. at 357. The ordinance stated, in pertinent part:

Section 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

*Id.* (citing Order No. 1,569 (May 26, 1880)).

<sup>96</sup> *Yick Wo*, 118 U.S. at 372-74. The petitioners in *Yick Wo*, Chinese laundry owners, were imprisoned for violating the ordinance. *Id.* at 359. They appealed to the Supreme Court,



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abusing its powers in the administration of the law.<sup>97</sup> Accordingly, it declared that unequal and unjust discrimination in the administration of the laws violated the Equal Protection Clause.<sup>98</sup>

The Court subsequently addressed a "class of one" claim involving administrative action when it decided *Snowden v. Hughes*<sup>99</sup> in 1944.<sup>100</sup> In *Snowden*, the petitioner brought an Equal Protection claim against the Illinois State Election Board ("the Election Board"), alleging that it had willfully and maliciously refused to list him as a candidate for representative in the General Assembly.<sup>101</sup> Initially, the Court analyzed the Equal Protection claim by stating that the petitioner's right to be a candidate for office was created by a facially neutral state statute.<sup>102</sup> The Court found that the administration of a facially neutral statute would not violate the Equal Protection Clause unless the plaintiff could show an "element of intentional or purposeful" discrimination in the application of the statute.<sup>103</sup> Similarly, the Court stated that a statute could

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contending that their Equal Protection rights were violated by the application of the ordinance. *Id.* at 369.

<sup>97</sup> *Id.* at 369-70. Regarding the discriminatory application of the law, the Court commented: For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

*Id.* at 370.

<sup>98</sup> *Id.* at 374. The Court found that the denial of permits to Chinese immigrants was based solely on the ill will of the board, and declared that the imprisonment of the petitioners was illegal. *Id.*

<sup>99</sup> 321 U.S. 1 (1944).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 3-6. The petitioner was running for the office of representative in the Illinois General Assembly as a Republican candidate. *Id.* at 3. According to proportional representation in the petitioner's district, two candidates for representative in the General Assembly were to be nominated on the Republican ticket for that district. *Id.* The results of the primary election showed that the petitioner had received the second highest number of votes. *Id.* According to Illinois Statute, the candidate who received the highest number of votes was to be declared nominated. *Id.* The petitioner contended that because he was the candidate with the second highest number of votes, he should have received the nomination for the second representative from his district. *Id.* at 4. The Election Board only listed one nominee for the office of representative in the General Assembly, and the petitioner claimed that they "willfully, maliciously, and arbitrarily" left him off of the nomination ballot in violation of the Fourteenth Amendment. *Id.*

<sup>102</sup> *Id.* at 7.

<sup>103</sup> *Id.* at 8. The Court declared:

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

discriminate on its face, if a plaintiff could show that one class or individual was preferred over another in its application.<sup>104</sup> Finally, the Court stressed that discriminatory intent is not to be presumed, but must be shown by clear and convincing evidence.<sup>105</sup> However, after analyzing the claim, the Court found that the petitioner's allegations of willful and malicious application were insufficient to show purposeful discrimination, and held that the petitioner's Equal Protection rights were not violated.<sup>106</sup>

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shown to be present in it an element of intentional or purposeful discrimination.

*Id.*

<sup>104</sup> *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). See *supra* note 93 for the ways in which a statute can violate the Equal Protection Clause. "Class of one" claims usually involve statutes or regulations that are neutral on their face, but violate Equal Protection in their application to the plaintiff. See, e.g., *Rubinovitz*, 60 F.3d at 909 (alleging improper enforcement of lawful zoning regulations); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980) (condemning the selective enforcement of a lawful state regulation). If a legislative action specifically singles an individual or a particular group out for punishment, it is a bill of attainder. See Micheal P. Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 HASTINGS CONST. L.Q. 767, 790 (1978) ("[T]he . . . definition of a bill of attainder has four distinct components: it is (1) a legislative act (2) imposing punishment (3) upon a designated person or class of persons (4) without the benefit of a judicial trial."). A bill of attainder is similar to a "class of one" claim because the United States Constitution forbids a legislature from singling out an individual or group for vindictive treatment. U.S. CONST. art. 1, § 9, cl. 3 (stating "[n]o Bill of Attainder or ex post facto Law shall be passed").

<sup>105</sup> *Snowden*, 321 U.S. at 8. The Court supported its standard by analogizing to two different types of Equal Protection claims. *Id.* at 8-9. First, the Court discussed intentional discrimination in the context of racial classifications. *Id.* The Court stated that an Equal Protection violation by the exclusion of African-Americans from a jury can be proven by extrinsic evidence of "purposeful discriminatory administration" of a statute that is fair on its face, but that a mere showing that African-Americans were not included on the jury is not enough. *Id.*

Second, the Court discussed property valuation for tax rates. *Id.* at 9. The Court stated that tax assessors violate the Equal Protection Clause when they do not assess similar property under a uniform standard of valuation. *Id.* To violate the Equal Protection Clause, over or under valuation of property must be due to purposeful discrimination, which can be evidenced by systematic under-valuation of some property, while similar property can be systematically overvalued. *Id.* Tax cases decided since *Snowden* have continued to hold that property assessment that discriminatorily values similar property at different values violates Equal Protection. See, e.g., *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) ("The Equal Protection Clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."); *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) ("The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.").

<sup>106</sup> *Snowden*, 321 U.S. at 10.

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The Second Circuit relied upon the holding in *Snowden* in 1946, when it decided *Burt v. City of New York*.<sup>107</sup> In *Burt*, the plaintiff, an architect, appealed from the dismissal of a complaint alleging that the New York Building Department ("the Department") singled him out for unlawful oppression when they denied his building permits.<sup>108</sup> The Second Circuit found that the Department deliberately abused its statutory powers because it selected the plaintiff for oppressive treatment.<sup>109</sup> The court made this finding because the Board approved the applications of other architects similarly situated.<sup>110</sup> The court further stated that a deliberate abuse of power by a state official would not be enough to bring a "class of one" claim; the plaintiff must show evidence of "purposeful discrimination."<sup>111</sup> Overall, the court found that there was sufficient evidence of purposeful discrimination, and remanded the case for further proceedings.<sup>112</sup>

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<sup>107</sup> 156 F.2d 791 (2d Cir. 1946).

<sup>108</sup> *Id.* The plaintiff was a registered architect who practiced in the State of New York. *Id.* As part of his employment, he was required to make applications to the Building Department to gain approval for his work. *Id.* He brought a "class of one" claim against the Department alleging that they abused their powers when they failed to approve his applications and imposed upon him other unlawful conditions. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The court found that the plaintiff had been "singled out" for unlawful oppression when the Board denied his applications and imposed unlawful conditions upon him, while it approved the applications of other architects similarly situated. *Id.*

<sup>111</sup> *Id.* at 791-92. The court relied on the holding in *Snowden* when it required a showing of purposeful discrimination stating, "the decision definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good . . . ." *Id.* at 792.

<sup>112</sup> *Burt v. City of New York*, 156 F.2d 791, 793 (2d Cir. 1946).

2. "Class of One" Claims in the Context of Selective Enforcement<sup>113</sup>

After *Snowden*, the Supreme Court did not specifically address "class of one" claims under the Equal Protection Clause until *Village of Willowbrook v. Olech*.<sup>114</sup> However, it subsequently addressed individual Equal Protection claims in the context of selective enforcement.<sup>115</sup> Under the Equal Protection Clause, an individual can bring a claim for the selective enforcement of an otherwise valid law or regulation when the enforcement amounts to "purposeful discrimination."<sup>116</sup> The Supreme Court articulated the standard for selective enforcement in *Wayte v. United States*.<sup>117</sup> In *Wayte*, the Court evaluated the government's passive enforcement policy of prosecuting individuals who failed to register with the Selective Service, but only if they reported themselves to authorities or if others reported them.<sup>118</sup> The petitioner claimed that his indictment under this policy was unlawful selective prosecution.<sup>119</sup>

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<sup>113</sup> It is important to note that many courts interchange the term selective enforcement with the term selective prosecution. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607-610 (1985) (interchanging the terms prosecution and enforcement); *Oyler v. Boles*, 368 U.S. 448, 456-57 (1962) (using the terms selective prosecution and selective enforcement synonymously); *Leclair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980) (stating that "appellees charge boils down to one of selective enforcement or prosecution by a state official pursuant to a lawful state regulation"). The words are also used synonymously in *Black's Law Dictionary*. BLACK'S LAW DICTIONARY 1363 (7th ed. 1999). However, the word prosecution, has a distinct meaning from the word enforcement. *Id.* at 1237. Prosecution can be used to mean the commencement and carrying out of a legal action, or it can mean to institute and pursue criminal action. *Id.* Enforce means to give force or effect to a law, or to compel obedience to. *Id.* at 549. Therefore, use of these two words can create confusion; and it is necessary to clarify that when the term selective prosecution is used in this Note to describe a particular court's reasoning, the focus of this Note is on selective enforcement. For an overview of basic selective enforcement cases, see J. Michael McGuinness, *Jack-Booted Government Thugs Beware: Litigating Equal Protection & Selective Enforcement Claims*, PLI/LIT. 387, 396-97 (1997). For further explanation of selective prosecution, see Richard Bloom, *Twenty-Eighth Annual Review of Criminal Procedure: II. Preliminary Proceedings: Prosecutorial Discretion*, 87 GEO. L.J. 1267 (1999).

<sup>114</sup> 120 S. Ct. 1073 (2000) (per curiam).

<sup>115</sup> Claims for selective enforcement usually arise in the context of a criminal prosecution or regulatory enforcement action. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir. 1996). In a selective prosecution or enforcement claim, the burden is on the plaintiff to show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent. *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991).

<sup>116</sup> *Futernick*, 78 F.3d at 1056. See *infra* notes 124-25 and accompanying text for an explanation of what comprises a forbidden standard.

<sup>117</sup> 470 U.S. 598 (1985).

<sup>118</sup> *Id.* at 600-01. Under the Military Selective Service Act, the President issued a proclamation ordering male citizens to register with the Selective Service System. *Id.* The petitioner refused to do so, stating in a letter to both the President and the Selective Service System:

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When deciding *Wayte*, the Court addressed the two types of selective prosecution or enforcement.<sup>120</sup> The first type occurs when the government fails to prosecute all known offenders.<sup>121</sup> The Court stated that this type of claim was not actionable under the Equal Protection Clause.<sup>122</sup> The Court found that the government has broad discretion when deciding whom to prosecute, and that the exercise of selectivity in law enforcement does not rise to the level of a constitutional violation.<sup>123</sup>

Next, the Court defined the second form of selective enforcement, which occurs when the state prosecutes an individual based upon membership in a vulnerable group or other "arbitrary classification."<sup>124</sup> Under the second form, Equal Protection violations

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I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me.

*Id.* at 601 n.2. Selective Services gave the petitioner several chances to comply with the proclamation, but he refused, after which Selective Services indicted him for knowingly and willfully failing to register for the draft. *Id.* at 602-03.

<sup>119</sup> *Id.* at 604. The petitioner moved to dismiss his indictment on the grounds that he and other indicted opponents of the policy were impermissibly targeted for prosecution because they were "vocal" opponents of the program. *Id.*

<sup>120</sup> *Id.* at 607-10. See also *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Futernick v. Sumpter Township*, 78 F.3d at 1051, 1056-58 (6th Cir. 1996); *Esmail v. Macrane*, 53 F.3d 176, 178-79 (7th Cir. 1995); and *Dubuc v. Green Oak Township*, 958 F. Supp. 1231, 1236 (E.D. Mich. 1997) for an explanation of selective enforcement.

<sup>121</sup> *Wayte*, 470 U.S. at 607-08. This can occur as a result of ineptitude, lack of adequate resources, *Esmail*, 53 F.3d at 178-79, when the government wants to run a test case, *Mackay Telegraph & Cable Co. v. City of Little Rock*, 250 U.S. 94, 100 (1919), or when the government wants to deter individuals from certain actions, *Cook v. City of Price*, 566 F.2d 699, 701 (5th Cir. 1977).

<sup>122</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985). The Court declared, "[s]o 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 rests entirely in his discretion." *Id.* See also *Oyler*, 368 U.S. at 456 ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.").

<sup>123</sup> *Wayte*, 470 U.S. at 607-08. In *Wayte*, the Court stated:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

*Id.* at 607. See also *United States v. Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986) (giving broad discretion to the prosecutor).

<sup>124</sup> *Wayte*, 470 U.S. at 608. See also *Oyler*, 368 U.S. at 456.

also occur when the state uses enforcement as a means to punish individuals for the exercise of a constitutionally protected right, such as the right to free speech or the free exercise of religion.<sup>125</sup> Accordingly, the Court found that the plaintiff must show that the enforcement had a discriminatory effect and was motivated by a discriminatory purpose.<sup>126</sup> It concluded that the petitioner did not meet the burden of proof, and held that government's passive enforcement policy did not violate the Equal Protection Clause.<sup>127</sup> After *Wayte*, the appellate courts formed their own standards for "class of one" claims.

### III. CURRENT EQUAL PROTECTION THEORIES FOR VINDICTIVE GOVERNMENT TREATMENT

While the Supreme Court recently recognized "class of one" claims under the Equal Protection Clause,<sup>128</sup> it did not articulate a clear standard.<sup>129</sup> However, "class of one" claims have been analyzed in the appellate courts for several decades.<sup>130</sup> These cases provide a useful starting point for determining the elements. The main proponents of "class of one" jurisprudence have been the First, Second, and Seventh Circuits.<sup>131</sup> While their theories are similar, they are theoretically distinct. The following Section discusses these approaches and shows why they are different.<sup>132</sup>

<sup>125</sup> *Wayte*, 470 U.S. at 608. See also *United States v. Rendondo-Lemos*, 955 F.2d 1296, 1298 (9th Cir. 1992) (stating that a claim of gender-based selective prosecution violates Equal Protection); *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989) (finding that the initiation of a prosecution against persons exercising their constitutional rights creates an inference of discrimination); *Hernandez v. Commissioner*, 819 F.2d 1212, 1225 (1st Cir. 1987) (holding that the government cannot prosecute based on faith).

<sup>126</sup> *Wayte*, 470 U.S. at 608-09. In articulating this standard, the Court relied on *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979), *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976). See *infra* notes 384-89 and accompanying text for the significance of *Arlington Heights*.

<sup>127</sup> *Wayte*, 470 U.S. at 610, 614 (1985).

<sup>128</sup> See *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693, 733 (2000) (finding the Court recently recognized "class of one" Equal Protection claims in *Olech*); *Equal Protection: Supreme Court Permits Claim by Class of One*, 29 MAY REAL EST. L. REP. 3 (2000) (stating that the Court in *Olech* held that a plaintiff does not have to allege membership in a class or group to bring an Equal Protection claim).

<sup>129</sup> See *supra* notes 36-37 and accompanying text.

<sup>130</sup> See *infra* notes 133-86 and accompanying text.

<sup>131</sup> See *infra* notes 133-86 and accompanying text.

<sup>132</sup> See *infra* notes 162-65 and accompanying text. See also *supra* note 33 for other circuits that have recognized "class of one" claims. Prior to the Supreme Court's decision in *Village of Willowbrook v. Olech*, the Sixth Circuit did not recognize "class of one" claims. See, e.g., Bass

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A. *The First and Second Circuit's Selective Enforcement or "Malicious Intent to Injure" Standard*

The Second Circuit expanded upon selective enforcement when it created an Equal Protection claim to protect an individual singled out for malicious or bad faith law enforcement.<sup>133</sup> The court announced its Equal Protection standard in the landmark case of *LeClair v. Saunders*.<sup>134</sup> In *LeClair*, the appellees, a husband and wife, owned a dairy farm in Vermont.<sup>135</sup> They brought an Equal Protection claim under 42 U.S.C. § 1983, alleging the selective enforcement of a dairy farm regulation that required the farms to have sanitary water supplies.<sup>136</sup> The appellees

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v. Robinson, 167 F.3d 1041, 1050 (6th Cir. 1999) (finding invidious discrimination must be based on membership in a protected class to violate the Equal Protection Clause); *Futernick v. Sumpter Township*, 78 F.3d 1051, 1057-59 (6th Cir. 1996) (stating that the Equal Protection Clause of the Fourteenth Amendment does not protect individuals who are not members of a suspect class or exercising a fundamental right); *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (holding that an individual must be a member of a class or group singled out for discriminatory treatment to allege an Equal Protection violation); *Dubuc v. Green Oak Township*, 958 F. Supp. 1231, 1238 (E.D. Mich. 1997) (reasoning that the Equal Protection Clause is not implicated unless the discriminatory practice is directed toward a suspect classification).

In *Futernick*, the Sixth Circuit stated that an individual could not bring an Equal Protection claim for selective enforcement based upon "malice or personal animosity" unless he or she was a member of a suspect class or was prevented from exercising a constitutional right. *Futernick*, 78 F.3d at 1057. The court reasoned that the presence of personal animosity should not turn a valid enforcement action into a constitutional violation. *Id.* at 1059. The *Futernick* court stated that victims of arbitrary government action have recourse in the state courts, and allowing claims of selective prosecution under the Equal Protection Clause would bring what are essentially issues of local law and policy into the federal courts. *Id.*

The Sixth Circuit's approach in *Futernick* was sharply criticized by some commentators. See, e.g., McGuinness, *supra* note 17, at 349-50. When addressing the Sixth Circuit's decision in *Futernick*, McGuinness stated "[i]t seems difficult to believe that the court seriously suggested that the appointing authority for the governmental official would provide relief for a victimized citizen. The court in *Futernick* does not apparently recognize the inner workings of local politics and patronage throughout America." *Id.*

<sup>133</sup> See, e.g., *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980). See also John R. Williams, *Representing Plaintiffs in Civil Rights Litigation Under Section 1983*, 596 PLI/LIT 117, 204 (1998) (stating that selective enforcement can be a basis for Section 1983 litigation under Equal Protection).

<sup>134</sup> 627 F.2d 606 (2d Cir. 1980). This form of Equal Protection is derived from *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946). See *supra* notes 107-12 for the facts and holding of *Burt*. See also McGuinness, *supra*, note 94, at 37 ("Judge Hand's conclusion and analysis in [*Burt*] provided fertile ground for the Second Circuit's expanded recognition of Equal Protection in *LeClair*.").

<sup>135</sup> *LeClair*, 627 F.2d at 607. The appellees owned a 235-acre, 50-cow dairy farm. *Id.*

<sup>136</sup> *Id.* The Massachusetts regulation required all dairy farms shipping milk into the state to undergo an annual inspection for sanitary conditions. *Id.* The regulation required all water supplies to be, "easily accessible, adequate, and of a safe sanitary quality." *Id.* The

argued that they were selected for unequal treatment because, out of ten or eleven farms with unclean water supplies, they were the only farm to be suspended.<sup>137</sup> After a two day jury trial, the district court ordered \$39,375 to be paid in damages.<sup>138</sup> The defendant appealed the original verdict and the damage award to the Second Circuit.<sup>139</sup>

The Second Circuit prefaced its analysis by acknowledging that the plaintiff's claim was "lodged in a murky corner of equal protection law" in which there were "no clearly delineated rules to apply."<sup>140</sup> It recognized that the plaintiffs alleged selective enforcement or prosecution was based on the discriminatory administration of a statute.<sup>141</sup> However, the court reasoned that the claim did not fit into the traditional categories of selective enforcement because the plaintiffs had not alleged that they were singled out for their membership in a suspect class or for the exercise of a fundamental right.<sup>142</sup>

To solve this problem, the court borrowed concepts from qualified immunity and from selective prosecution to create a new "malicious intent to injure" standard.<sup>143</sup> Relying on *Wood v. Strickland*,<sup>144</sup>

appellees, the LeClairs, owned a farm with an inadequate water source, using a visibly open and dirty pond as the water supply for their milk room. *Id.* After the inspector warned the appellees about the inadequacy of the water supply, he suspended the LeClair's farm. *Id.* at 608. This forced the LeClair's to stop shipping their milk to Massachusetts, which put their farm out of business. *Id.*

<sup>137</sup> *Id.* The LeClairs contended that they were singled out for selective treatment because ten or eleven farms in the area had unclean water supplies. *Id.* Of those farms, only two were suspended, the LeClairs and another farm, and the other farm was quickly reinstated. *Id.*

<sup>138</sup> *LeClair*, 627 F.2d at 607. After the trial, the jury returned a verdict for the LeClairs' and awarded \$44,152 in damages. *Id.* The district court ordered a new trial on the damages, where they were lowered to \$39,375. *Id.*

<sup>139</sup> *Id.* The LeClair's cross-appealed the district court's order for a new trial on the damages and the denial of costs and attorney fees. *Id.* The Second Circuit examined the record to determine if there was sufficient evidence to survive a motion for a directed verdict. *Id.* at 610.

<sup>140</sup> *Id.* at 608. The court distinguished the LeClair's claim from traditional Equal Protection claims that involve a statute that is unconstitutional on its face. *Id.* The Second Circuit stated that if the allegations involved a facial attack on the statute, the appellees would "almost certainly" have lost because a state has the police power to regulate public health. *Id.* Instead, the court found that the claim was one of "selective enforcement or prosecution pursuant to a lawful state regulation." *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 610. See *supra* Part II.B.2 for an explanation of the traditional categories of selective enforcement.

<sup>143</sup> *LeClair*, 627 F.2d at 606, 608-10. The court stated that, "the doctrine of immunity and the law of equal protection intersect in determining whether appellant is liable for damages in this § 1983 action." *Id.* at 608.



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the court stated that government officials are entitled to qualified immunity from lawsuits under Section 1983 for "reasonable mistakes."<sup>145</sup> At the same time, the *Wood* standard did not allow courts to grant qualified immunity for actions based on "whim or caprice."<sup>146</sup>

The Second Circuit further relied on the standard for selective enforcement articulated in *Moss v. Hornig*.<sup>147</sup> In *Moss*, the court held that to prove the unequal administration of a facially neutral statute, the

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<sup>144</sup> 420 U.S. 308 (1975).

<sup>145</sup> *LeClair*, 627 F.2d at 608. The Supreme Court recognizes two types of immunity for government officials under Section 1983: absolute and qualified. Jeffery J. McKenna, *Prosecutorial Immunity: Imbler, Burns, and Now Buckley v. Fitzsimmons-The Supreme Court's Attempt to Provide Guidance in a Difficult Area*, 1994 BYU L. REV. 663, 666 (1994). The procedural difference between the two types of immunity is important. *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976). Absolute immunity defeats a suit at the outset, while qualified immunity is an affirmative defense that bars action only when the official can show that his or her actions did not violate clearly established constitutional rights of which a reasonable person would have known. *Id.* See also *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Generally, government officials are protected by qualified immunity. *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991) ("This Court has refused to extend absolute immunity beyond a very limited class of officials."). See *infra* notes 243-50 and accompanying text for further explanation of absolute and qualified immunity.

<sup>146</sup> *LeClair*, 627 F.2d at 609. The Court in *Wood* stated:

[A]n official is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [one whose rights are] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .

*Wood*, 420 U.S. at 322. In *Wood*, the Court held that an official is not protected by qualified immunity if he or she knew or reasonably should have known that their actions were undertaken with malicious intent. *Id.* Thus, under *Wood*, the test for qualified immunity consisted of two parts. *Id.* The objective prong of the test stated that an official's defense of qualified immunity could be overcome by a showing that the plaintiff's constitutional rights had been violated, and the subjective prong stated that a public official could lose his or her immunity upon a showing of malice. *Id.*

From the test in *Wood*, the Second Circuit inferred that a government official with qualified immunity can be held liable for acting with malicious intent to injure a person in a "nonconstitutional" sense. *LeClair*, 627 F.2d at 609. However, the Supreme Court has since abandoned the subjective prong of the test for qualified immunity. *Harlow*, 457 U.S. at 818. In *Harlow*, the Court established a purely objective standard for granting qualified immunity in which an official was liable only if he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Id.* See also *infra* notes 254-66 and accompanying text.

<sup>147</sup> 314 F.2d 89 (2d Cir. 1963). In *Moss*, the plaintiff brought an action against a state official under Section 1983 for selectively enforcing Sunday closing laws only against his business. *Id.*

plaintiff must show "intentional or purposeful discrimination."<sup>148</sup> The Second Circuit superimposed the two standards to create a "malicious or bad faith intent to injure" claim through selective treatment.<sup>149</sup> The Second Circuit required the plaintiff to prove 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.<sup>150</sup> After analyzing the plaintiff's claim under this test, the court reversed the district court and held that the plaintiffs failed to show that the allegedly selective treatment was based upon malice or a bad-faith intent to injure.<sup>151</sup>

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<sup>148</sup> *Id.* at 92. The Second Circuit relied on *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), to clarify the "intentional or purposeful discrimination" standard. *Id.* In *Berrios*, the court stated that to prove selective prosecution, the defendant must show:

- (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
- (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e. based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

*Id.*

<sup>149</sup> *LeClair*, 627 F.2d at 609-10.

<sup>150</sup> *Id.* The Second Circuit explained that in applying the test, the malice or bad faith standard must be "scrupulously met." *Id.* at 611.

<sup>151</sup> *Id.* at 610-11. The court found that the appellees did not allege that they were suspended because of their race, nationality, religion, or exercise of a constitutional right. *Id.* at 610. Therefore, the court reasoned that the appellees would have to show malicious or bad faith intent to injure through selective treatment of their farm. *Id.* The Second Circuit examined six pieces of evidence that the LeClairs presented at trial on the issue of malice:

- (1) that the other 10 or 11 farms were treated differently from the LeClairs'; (2) that Saunders, [the inspector], wanted appellees to connect the well without knowing it was adequate; (3) that Saunders knew about the well in 1970 or 1971, but only suddenly in 1975 decided to push them to connect it; (4) that Saunders intentionally appeared at the end of 1975 so as to make it impossible for them to meet the deadline for approval; (5) that Saunders was in a spiteful mood at the time of the December 1975 inspection because he had had a run-in earlier in the day with another farmer; and (6) that the March 1976 special reinspection was unusually meticulous and detailed.

*Id.* The Court concluded that these elements did not provide enough evidence that the inspector maliciously intended to harm the LeClairs. *Id.* at 610-11. It reversed the findings below. *Id.* at 611.

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The First Circuit refined the Second Circuit's "bad-faith or malicious intent to injure" test when it decided *Rubinovitz v. Rogato*<sup>152</sup> in 1995. The plaintiffs in *Rubinovitz* appealed to the First Circuit after their Section 1983 claim for the selective enforcement of building code provisions was dismissed on summary judgment.<sup>153</sup> The First Circuit began its analysis with the first element of the *LeClair* test. It stated that Equal Protection plaintiffs must show that persons who are similarly situated "in all relevant aspects" were treated differently to prove that they had been singled out for unlawful enforcement.<sup>154</sup>

After concluding that the plaintiffs satisfied the first element, the court analyzed the second *LeClair* element for evidence of "bad faith or malicious intent to injure."<sup>155</sup> In doing so, it expressed the concern that something more than a single act of malice underlying a routine administrative action should be necessary to make out an Equal Protection claim for selective enforcement.<sup>156</sup> To address this concern, the First Circuit looked for a "malicious[ly] orchestrated campaign causing substantial harm."<sup>157</sup> After examining the facts, the court held that the case could not be resolved on summary judgment because a

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<sup>152</sup> 60 F.3d 906, 911-12 (1st Cir. 1995). For other cases using the "malicious or bad faith intent to injure" standard, see *Zahra v. Town of Southold*, 48 F.3d 674, 683-85 (2d Cir. 1995), *LaTrieste Rest. and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994), *Yerardi's Moody St. Rest. and Lounge, Inc. v. Board of Selectmen of the Town of Randolph*, 932 F.2d 89, 92 (1st Cir. 1991), and *Heille v. City of St. Paul*, 512 F. Supp. 810, 815 (D. Minn. 1981).

<sup>153</sup> *Rubinovitz*, 60 F.3d at 908-09. The Rubinovitzes were the owners of a garage-style apartment. *Id.* They brought a claim against the defendants, city officials in Lynn, Massachusetts, after the city revoked a previously granted zoning variance, and imposed several building code violations. *Id.* These events occurred after the Rubinovitzes evicted a tenant for violating her lease. *Id.* at 908. The tenant was friends with the city purchasing director, who pressured other city agencies to bring action against the Rubinovitzes. *Id.* at 908-09.

<sup>154</sup> *Id.* at 910. The court stated, "[p]laintiffs claiming an equal protection violation must first 'identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were singled . . . out for unlawful oppression.'" *Id.* at 910 (quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989)). The court found that there was no basis in the record by which it could determine if the Rubinovitzes were singled out for "unlawful oppression," but stated that they had a possible claim for selective enforcement. *Rubinovitz*, 60 F.3d at 910.

<sup>155</sup> *Rubinovitz*, 60 F.3d at 911.

<sup>156</sup> *Id.* at 912.

<sup>157</sup> *Rubinovitz*, 60 F.3d at 912. While the court looked for an orchestrated campaign, it did not decide whether it was necessary to plead this element in every claim. *Id.* However, the court found that it would be difficult for plaintiffs to bring claims under the "malicious intent" standard. *Id.* (stating that "[p]laintiffs are likely to have rough sailing").

reasonable jury might be able to conclude that there was an orchestrated conspiracy to harm the plaintiffs.<sup>158</sup>

### B. The Seventh Circuit's "Vindictive Action" Theory

While the Seventh Circuit disagreed with the theoretical approach of the First and Second Circuits, it built upon their basic principals to create an Equal Protection claim for the vindictive enforcement of state or local laws. It recognized this type of Equal Protection violation in *Esmail v. Macrane*.<sup>159</sup> The plaintiff in *Esmail* brought a claim under Section 1983, alleging that the town mayor violated his Equal Protection rights when he denied him a liquor license and granted licenses to others similarly situated.<sup>160</sup> The plaintiff claimed that the mayor singled him out for discriminatory treatment based on "sheer vindictiveness."<sup>161</sup>

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<sup>158</sup> *Id.* ("[W]e think that although the case might be a difficult one for the plaintiffs, a reasonable jury might well be able to conclude that there was an orchestrated conspiracy involving a number of officials, selective enforcement, malice, and substantial harm.").

<sup>159</sup> 53 F.3d 176, 177 (7th Cir. 1995). For the precursor to *Esmail*, see *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982). See also Williams, *supra* note 133, at 209. Williams notes that the Seventh Circuit has a "history of creativity in this area." *Id.* He speculated that this could be attributed to the nature of political life in Illinois. *Id.* It is interesting to note that the Seventh Circuit has not always recognized "class of one" claims, suggesting in some of its earlier cases that an Equal Protection class must have more than one member. See, e.g., *Herro v. City of Milwaukee*, 44 F.3d 550, 553 (7th Cir. 1995) (finding that an equal protection claim must include an allegation of class-based discrimination); *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) ("A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual."); *Smith v. Town of Eaton*, 910 F.2d 1469, 1473 (7th Cir. 1990) (stating that "an equal protection claim must be based on 'intentional discrimination against [the plaintiff] because of his membership in a particular class, not merely [because] he was treated unfairly as an individual'" (citations omitted)).

<sup>160</sup> *Esmail*, 53 F.3d at 177. The plaintiff Esmail owned a liquor store in the City of Naperville for several years when the city notified him that his annual liquor license would not be renewed. *Id.* The city denied Esmail's license on the grounds that he served liquor to a minor, that one of his managers had failed to register according to a municipal code, and that he failed to disclose on the renewal that his license had previously been revoked. *Id.* The mayor, who is also the liquor control commissioner in Naperville, found Esmail guilty on almost all of the charges and denied his application for a liquor license. *Id.* After he exhausted his administrative remedies, Esmail filed a claim in state court. *Id.* The state court subsequently ordered that Esmail be granted a liquor license and found that he was only guilty of having an unregistered manager on the premises for an hour and a half, a *de minimis* violation. *Id.*

<sup>161</sup> *Id.* at 178. Esmail claimed that the mayor and other city officials harbored a "deep seated" animosity toward him, in part because he initiated an advertising campaign against the sale of liquor to minors which accused the city of ineffectual law enforcement, and in part because he withdrew his political and financial support from the mayor. *Id.*

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The Seventh Circuit began its analysis in *Esmail* by discussing the traditional categories of selective prosecution.<sup>162</sup> However, the court did not acknowledge the First and Second Circuit's "malice or bad-faith" addition to the traditional categories.<sup>163</sup> Instead, the court found that the plaintiff in *Esmail* had not plead a claim of selective prosecution.<sup>164</sup> It reasoned that his claim was different because it was not a claim of unequal treatment.<sup>165</sup> Rather, the plaintiff alleged "an orchestrated campaign of official harassment directed against him out of sheer malice."<sup>166</sup> By creating a new Equal Protection claim, the court deviated from the First and Second Circuit's approach.<sup>167</sup> Under the Seventh Circuit's claim, a wronged individual can bring a claim in federal court when he or she has been singled out for "vindictive" treatment by a government official.<sup>168</sup> The Seventh Circuit reasoned that, "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."<sup>169</sup>

Overall, the court admitted that the type of claim brought by the plaintiff did not fit into the Equal Protection tradition of claims based upon group classifications.<sup>170</sup> However, it justified its new classification by stating that the Equal Protection Clause of the Fourteenth Amendment is not limited to protecting members of identifiable

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*Esmail* claimed that the mayor denied his liquor license for these reasons, granting new liquor licenses to others who had engaged in similar conduct. *Id.* at 177. For example, the mayor granted a license to an individual who had a conviction for a felony drug charge, and whose manager had served a four-year sentence in federal prison on drug charges. *Id.*  
<sup>162</sup> *Id.* at 178-79. See *supra* Part II.B.2 for an explanation of selective prosecution or enforcement.

<sup>163</sup> But cf. McGuinness, *supra* note 94, at 36 (finding that *Esmail* drew on Second Circuit cases).

<sup>164</sup> *Esmail*, 53 F.3d at 179. The court found that the case was not plead as a claim of selective prosecution, but was framed as an "orchestrated campaign of official harassment directed against him out of sheer malice." *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* See also *Penterman v. Wis. Elec. Power Co.*, 565 N.W.2d 521, 534 (Wis. 1997) (acknowledging a "third type of equal protection claim recognized by the Seventh Circuit in *Esmail*").

<sup>168</sup> *Esmail*, 53 F.3d at 179. While announcing that this principle was "sound," the Seventh Circuit admitted that it could be "subject to abuse by persons whose real complaint is selective prosecution in the sense that it is not cognizable in suits to enforce the equal protection clause." *Id.*

<sup>169</sup> *Esmail*, 53 F.3d at 179. The Seventh Circuit relied upon *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) for this proposition. *Id.* See *infra* notes 300-09 and accompanying text for the facts and holding of *Cleburne*.

<sup>170</sup> *Esmail*, 53 F.3d at 180.

groups.<sup>171</sup> The court reasoned that a "class of one" is likely to be the most vulnerable classification, and therefore in need of the most protection.<sup>172</sup> When addressing the standard, the Seventh Circuit stated that the plaintiff had the burden of proving that the state's action was a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective."<sup>173</sup> It reasoned that this standard was sound because it was more demanding than the probable cause standard for the tort of malicious prosecution.<sup>174</sup> The court concluded that the plaintiff stated a claim, and that the case should not have been dismissed by the district court.<sup>175</sup>

The Seventh Circuit revisited the issue when it decided *Olech v. Village of Willowbrook*<sup>176</sup> in 1998.<sup>177</sup> The plaintiff in *Olech* brought a claim against the Village of Willowbrook after the Village refused to honor her

<sup>171</sup> *Id.* at 180. The court stated that the suit was not barred by the "class of one rule" because there is "no such rule." *Id.*

<sup>172</sup> *Id.* at 180. The Seventh Circuit declared that, "a class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause." *Id.* See also *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992) ("Indeed, one might suppose that the smaller the class, the less able it would be to protect itself in the political arena, and therefore the greater the danger that it might be singled out for oppression."). The Seventh Circuit found that while the plaintiff was able to obtain relief in the state courts, the claim has a place in the federal courts because in many instances powerful state and local officials are able to use their power to "overawe" state or local courts. *Esnail*, 53 F.3d at 180.

<sup>173</sup> *Esnail*, 53 F.3d at 180. Judge Posner reasoned that the proposed standard was more demanding than having to show probable cause, which is the meaning of malice in a tort action for malicious prosecution. *Id.* For example, to prevail on a claim of malicious prosecution in Illinois, the plaintiff must show that: (1) "the defendant brought the underlying suit maliciously and without probable cause; and (2) the former action was terminated in his or her favor; and (3) some 'special injury' or special damage beyond the usual expense, time or annoyance in defending a lawsuit." *Cult Awareness Network v. Church of Scientology Int'l*, 685 N.E.2d 1347, 1350 (Ill. 1997).

<sup>174</sup> *Esnail*, 53 F.3d at 180.

<sup>175</sup> *Id.*

<sup>176</sup> 160 F.3d 386 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam). For additional explanation of the Seventh Circuit's approach to vindictive Equal Protection claims see *Indiana State Teachers Ass'n v. Board of Sch. Comm'rs of the City of Indianapolis*, 101 F.3d 1179 (7th Cir. 1996).

<sup>177</sup> *Olech*, 160 F.3d at 388. See also *Payton v. Rush Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 632 n. 7 (7th Cir. 1999) (noting that "class of one" claims "provide a last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives . . .") (citations omitted); *Pleva v. Norquist*, 195 F.3d 905, 917 (7th Cir. 1999) (analyzing a "class of one" claim under the *Esnail* standard); *Levenstein v. Salafsky*, 164 F.3d 345, 353 (7th Cir. 1998) (explaining the theory behind "class of one" claims). See also *infra* note 202 and accompanying text for further "class of one" claims decided by the Seventh Circuit.

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request to provide municipal water services.<sup>178</sup> The Village would not provide the house with sewer services unless she gave the Village a thirty-three foot easement, rather than the standard fifteen-foot easement.<sup>179</sup> The plaintiff refused to grant the nonstandard easement, and as a result, went without water for three months.<sup>180</sup> The Village finally relented and hooked the plaintiff up to its water, requiring only a fifteen-foot easement.<sup>181</sup> The plaintiff claimed that the Village violated her Equal Protection rights because it singled her out for a larger easement based upon "substantial ill will" generated by an earlier lawsuit that the plaintiff had brought against the Village.<sup>182</sup>

The district court dismissed the case because the complaint did not allege an "orchestrated campaign of official harassment" motivated by "sheer malice."<sup>183</sup> The Seventh Circuit found that it was not necessary for a "class of one" plaintiff to allege an orchestrated campaign of harassment.<sup>184</sup> Rather, the plaintiff must allege that the government official acted out of an illegitimate desire to "get" him or her based upon

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<sup>178</sup> *Olech*, 160 F.3d at 387. See *supra* notes 2-16 and accompanying text.

<sup>179</sup> *Id.* When the plaintiff's private well broke, she asked the Village to hook-up her house up to its municipal water system. *Id.* The Village agreed to do so, but only if the plaintiff would grant it a thirty-three foot easement to widen the road in front of the plaintiff's house. *Id.* This requirement deviated from the Village's normal requirement of a fifteen-foot easement for water hook-up. *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387-88 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam). See *supra* note 9 for the text of the Village's letter to *Olech*.

<sup>182</sup> *Olech*, 160 F.3d at 387. In the prior lawsuit, the plaintiff sued the Village for flood damages caused by the Village's negligent installment and enlargement of culverts near her property. *Id.* The plaintiff's suit was successful, and she obtained damages from the Village. *Id.* See also *Zimmer v. Vill. of Willowbrook*, 610 N.E.2d 709 (Ill. App. Ct. 1993).

<sup>183</sup> *Olech*, 160 F.3d at 388. See also *Olech v. Vill. of Willowbrook*, No. 97 C 4935, 1998 WL 196455, at \*1 (N.D. Ill. April 13, 1998).

<sup>184</sup> *Olech*, 160 F.3d at 388. The Seventh Circuit found that a requirement of "orchestration" is not necessary in vindictive action Equal Protection claims and further stated that the short duration of the deprivation is not important. *Id.* (citing *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995)).

prior lawful actions.<sup>185</sup> The Seventh Circuit found that the case could not be disposed of based on the pleadings, and reversed the district court.<sup>186</sup>

#### IV. THE SUPREME COURT'S DECISION IN *VILLAGE OF WILLOWBROOK V. OLECH* AND ITS AFTERMATH

The United States Supreme Court granted certiorari in *Olech* to decide whether the Equal Protection Clause creates a cause of action for "class of one" plaintiffs, or plaintiffs who have not alleged membership in a protected class or group.<sup>187</sup> In a per curiam opinion, *Village of Willowbrook v. Olech*,<sup>188</sup> the Court held that the Equal Protection Clause protects "class of one" plaintiffs from unequal treatment.<sup>189</sup> The Court wrote a brief analysis, finding that prior cases had successfully recognized "class of one" claims where the plaintiff alleged that he was intentionally treated differently from others who were similarly situated and that there was no rational basis for the treatment.<sup>190</sup> The Court

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<sup>185</sup> *Olech*, 160 F.3d at 388. In "vindictive action" claims, the plaintiff has to allege that the official action was not the result of prosecutorial discretion, which is not actionable under the Equal Protection Clause, but the result of an illegitimate desire to "get" him. *Id.* The Seventh Circuit was concerned that the creation of a federal claim for municipal "squabbles" might flood the federal courts with litigation. *Id.* The court found, however, that the plaintiff's required showing of differential treatment based upon a "totally illegitimate animus" was sufficient to prevent such an onslaught, stating that a mere "tincture of ill will" is not sufficient to invalidate a government action. *Id.*

<sup>186</sup> *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388-89 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam). The court stated that it might be possible to dispose of the case short of trial, but it could not be dismissed based solely on the pleadings. *Id.* at 388.

<sup>187</sup> *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (per curiam). In a footnote to the case, the Court acknowledged that the plaintiff's allegations could be interpreted to present a class of five. *Id.* The Olech's neighbors were also singled out for a thirty-three foot easement instead of the standard fifteen-foot easement because of alleged ill will from a prior law suit. *Id.* The Court stated that this factor was irrelevant because the number of individuals in a class does not matter for Equal Protection analysis. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1074-75.

<sup>190</sup> *Id.* The Court only relied upon two prior cases to support its holding, *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) and *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989). *Id.* In *Sioux City*, the Supreme Court decided whether the defendants violated the plaintiff's Equal Protection rights when they singled out the plaintiff for a higher tax rate. *Sioux City*, 260 U.S. at 441-42. The Court found that the Equal Protection Clause protects individuals from "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)). Based upon this finding, the *Sioux City* Court remanded the case to determine if the defendant had intentionally discriminated against the plaintiff in his/her tax assessment. *Sioux City*, 260 U.S. at 447.



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reasoned that Ms. Olech's claim satisfied these requirements when she alleged that the Village intentionally demanded a thirty-three-foot easement while other property owners were only required to provide a fifteen-foot easement.<sup>191</sup> The Court further reasoned that allegations of "irrational and wholly arbitrary" state action were sufficient to state a claim for relief under traditional Equal Protection standards.<sup>192</sup>

Justice Breyer wrote a concurring opinion to address the concern that plaintiffs would flood the federal courts with state and local claims.<sup>193</sup> He found that a rule which required an intentional difference in treatment and a lack of a rational basis might allow inconsequential claims into federal court.<sup>194</sup> He reasoned that the allegation of an extra element, "vindictive action," would minimize the chances of turning a "run of the mill" zoning claim into a constitutional claim.<sup>195</sup> Accordingly, he concurred with the majority in recognizing a "class of one" claim.<sup>196</sup>

However, the Court, by its own admission, failed to address the Seventh Circuit's theory of "subjective ill will."<sup>197</sup> While it found that allegations of irrational and arbitrary state action were sufficient to state

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In *Allegheny*, landowners challenged the valuation of their property for tax purposes, alleging that the systematic under valuation of neighboring property violated the Equal Protection Clause. *Allegheny*, 488 U.S. at 342. The Court found that the petitioner's property was assessed at roughly eight to thirty-five times more than similar property in the community. *Id.* at 344. The Court held that there was no rational basis for the distinction, stating "[t]he equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Id.* at 345. (citation omitted).

<sup>191</sup> *Olech*, 120 S. Ct. at 1075.

<sup>192</sup> *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam). The Court affirmed the Seventh Circuit's denial of a 12(b)(6) motion to dismiss, finding that Ms. Olech had presented a sufficient claim. *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* Justice Breyer used the example of zoning violations to illustrate his point. *Id.* He found that zoning decisions almost always treat one land owner differently from others and that a rule that only looks for an intentional difference in treatment and the lack of a rational basis would not prevent insubstantial claims from proceeding to federal court. *Id.* However, he reasoned that Ms. Olech's claim was different because it included an allegation of "ill will" or "illegitimate animus." *Id.*

<sup>195</sup> *Id.* He found that Ms. Olech's claim resembled *Esnail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), because she alleged that the Village's action was motivated by "ill will." *Id.* See *supra* notes 159-75 and accompanying text for the facts and holding of *Esnail*.

<sup>196</sup> *Olech*, 120 S. Ct. at 1075.

<sup>197</sup> *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam) ("We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of 'subjective ill will' relied on by that court.").

a claim, the Court did not determine if allegations regarding motive, such as ill will or vindictive action, were a necessary part of the plaintiff's prima facie case.<sup>198</sup> Furthermore, the Court did not mention the First and Second Circuit's "malicious or bad faith intent to injure" standard in its opinion. By glossing over these theories, the Court failed to clarify its reasoning or provide a workable standard for "class of one" claims.<sup>199</sup>

Indeed, since *Olech*, the Seventh Circuit has reaffirmed its standard for vindictive state action. In *Hilton v. City of Wheeling*,<sup>200</sup> the court drew upon its decision in *Olech* when it confirmed that "vindictive action" cases require proof of a "totally illegitimate animus" toward the plaintiff from the defendant.<sup>201</sup> Subsequent cases in the Seventh Circuit have continued to cite to *Hilton*, *Esmail*, and *Olech* and use the "illegitimate animus" standard of proof.<sup>202</sup> Likewise, the district courts

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<sup>198</sup> *Olech*, 120 S. Ct. at 1075.

<sup>199</sup> See *supra* note 36 and accompanying text.

<sup>200</sup> 209 F.3d 1005 (7th Cir. 2000). In *Hilton*, the plaintiff complained that unequal police protection violated the Equal Protection Clause. *Id.* at 1007. He alleged that the police cited or arrested him for disorderly conduct, battery, and violating noise ordinances fifteen times, while complaints by him against his neighbors went unanswered. *Id.* at 1006.

<sup>201</sup> *Id.* at 1008. The Seventh Circuit reaffirmed that "vindictive action" cases require "proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant." *Id.* at 1008 (citing *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam)). The Court found that the plaintiff had not pled a "class of one" claim because he failed to allege that the police action was motivated by an illegitimate animus. *Hilton*, 209 F.3d at 1008.

<sup>202</sup> See, e.g., *Fojtik v. Vill. of Spring Grove*, No. 98C-50360, 2000 WL 776888, at \*2-3 (N.D. Ill. May 26, 2000) (evaluating a "class of one" claim under the "vindictive action" standard); *Kevin v. Thompson*, No. 99C-7882, 2000 WL 549440, at \*5-6 (N.D. Ill. May 1, 2000) (finding that a "class of one" plaintiff must allege vindictiveness or an illegitimate animus to survive a motion to dismiss); *Singleton v. Chicago Sch. Reform Bd. of Trs.*, No. 00C-395, 2000 WL 777925, at \*9-10 (N.D. Ill. June 13, 2000) (clarifying that to withstand a motion to dismiss, a "class of one" plaintiff must allege treatment that is: "(1) based upon sheer vindictiveness or spite; and (2) wholly unrelated to any legitimate state objective"); *Alberio v. City of Kankakee*, 91 F.Supp.2d 1208, 1213 (C.D. Ill. 2000) (stating that "vindictive action" cases require proof that the state action was motivated by an illegitimate animus toward the plaintiff).

Other jurisdictions have also decided "class of one" claims since the Supreme Court decided *Olech*. See *Bryan v. City of Madison*, 213 F.3d 267, 276-77 (5th Cir. 2000) (affirming the dismissal of a "class of one" claim for lack of evidence of improper motive); *Alsenas v. City of Brecksville*, No. 99-4063, 2000 WL 875717, at \*2 (6th Cir. June 19, 2000) (upholding the dismissal of a "class of one" claim because the plaintiff failed to allege that there was no rational basis for the decision); *Shipley v. Internal Revenue Serv.*, No. Civ. A. 99-2331-KHV, 2000 WL 575019, at \*8 (D. Kan. March 30, 2000) (dismissing a "class of one" claim for failure to allege differential treatment); *Michelfelder v. Bensalem Township Sch. Dist.*, No. Civ. A.

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in the First and Second circuits have also remained true to their standard.<sup>203</sup> They have continued to cite to the *LeClair* "malicious or bad faith intent to injure standard" when evaluating "class of one" claims.<sup>204</sup>

The Supreme Court's lack of guidance in *Olech* leaves many unanswered questions. It is not clear what the plaintiff's burden of proof should be in presenting this type of case. Further, courts have been left with little guidance on how to evaluate legitimate "class of one claims."<sup>205</sup> These issues are further complicated by the theoretical framework that surrounds Equal Protection litigation. An Equal Protection "class of one" claim is brought under 42 U.S.C. § 1983.<sup>206</sup> As a defense, a government official can receive qualified immunity from suit unless he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known.<sup>207</sup> This objective standard appears to conflict with a subjective inquiry into an official's intent or motivation.<sup>208</sup> However, it is difficult to determine if an individual has been singled out for discriminatory treatment without examining subjective intent or motivations.

Furthermore, "class of one" claims are restricted by judicial review. Under Equal Protection analysis, "class of one" claims do not trigger heightened scrutiny; therefore, they receive rational basis review.<sup>209</sup> When evaluating claims under the rational basis standard, courts must accord great deference to the government's reasons for taking an action.<sup>210</sup> They are reluctant to consider the subjective motivations of officials when determining if there is a legitimate government purpose for the challenged classification.<sup>211</sup> This makes it difficult to determine if the action was motivated by malice or ill will.

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99-4621, 2000 WL 892866, at \*3 (E.D. Pa. June 30, 2000) (recognizing that a "class of one" can bring an Equal Protection claim).

<sup>203</sup> *Katz v. Stannard Beach Ass'n*, 95 F. Supp. 90, 95 (D. Conn. 2000) (analyzing a "class of one" claim under the *LeClair* malice or bad faith intent to injure standard); *Roth v. City of Syracuse*, 96 F. Supp. 2d 171, 178-79 (N.D.N.Y. 2000) (citing the "malice or bad faith intent to injure" standard); *Economic Opportunity Comm'n of Nassau County, Inc. v. CEDC, Inc.*, 106 F. Supp. 2d 433, 439-41 (E.D.N.Y. 2000) (utilizing the *LeClair* standard to analyze a "class of one" claim).

<sup>204</sup> *Economic Opportunity Comm'n of Nassau County, Inc.*, 106 F. Supp. 2d at 439-41.

<sup>205</sup> See *supra* note 36 and accompanying text.

<sup>206</sup> See *supra* note 38 and accompanying text.

<sup>207</sup> See *infra* note 265 and accompanying text.

<sup>208</sup> See *infra* notes 267-69 and accompanying text.

<sup>209</sup> See *infra* note 288 and accompanying text.

<sup>210</sup> See *infra* notes 289-90 and accompanying text.

<sup>211</sup> See *infra* note 290 and accompanying text.

The following Section addresses these problems. First, it compares and contrasts the First and Second Circuit's "malicious intent to injure" standard with the Seventh Circuit's "vindictive action" standard.<sup>212</sup> Next, this Section reconciles the objective test for qualified immunity with the subjective aspects of "class of one" claims.<sup>213</sup> Then, this Section addresses the conflict inherent in analyzing a constitutional motive claim under rational basis review.<sup>214</sup> It proposes that "class of one" claims should be analyzed under a higher form of rational basis review that would allow the court to examine motive.<sup>215</sup> Finally, this Section briefly compares and contrasts Equal Protection and Substantive Due Process because these claims can overlap for "class of one" plaintiffs.<sup>216</sup>

*A. The First and Second Circuits' "Malice or Bad Faith Intent to Injure" Theory Compared and Contrasted with the Seventh Circuit's "Vindictive Action" Theory*

As stated earlier, the Supreme Court recognized Equal Protection claims for non-class based discrimination in *Olech*; however, the standard for "class of one" remains unclear.<sup>217</sup> Thus, it is useful to turn to the circuit courts for guidance. The main proponents of "class of one" litigation are the First, the Second, and the Seventh Circuits.<sup>218</sup> However, the First and Second Circuits recognize "class of one" claims under the theory of selective enforcement,<sup>219</sup> while the Seventh Circuit analyzes them as a slightly different type of Equal Protection claim.<sup>220</sup> Under these conflicting approaches, it is difficult for courts to analyze "class of one" claims in a uniform manner. Therefore, the standards must be carefully analyzed to determine which approach is best to use for "class of one" claims.

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<sup>212</sup> See *infra* notes 217-38 and accompanying text.

<sup>213</sup> See *infra* notes 239-86 and accompanying text.

<sup>214</sup> See *infra* notes 287-347 and accompanying text.

<sup>215</sup> See *infra* notes 310-48 and accompanying text.

<sup>216</sup> See *infra* notes 349-63 and accompanying text.

<sup>217</sup> Compare *LeClair*, 627 F.2d at 608 (finding that an Equal Protection claim for malicious government action that is not based on membership in a protected class can be decided as a case of selective enforcement), with *Esmail*, 53 F.3d at 178-179 (stating that a claim for vindictive state action is not selective prosecution unless the plaintiff is a member of a suspect class or exercising a fundamental right).

<sup>218</sup> See *supra* Part III.

<sup>219</sup> See *supra* Part III.A.

<sup>220</sup> See *supra* Part III.B.

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While the Seventh Circuit's theoretical approach in *Esmail* is similar to the First and Second Circuits,<sup>221</sup> this Note adopts the Seventh Circuit's "vindictive action" theory for several reasons.<sup>222</sup> First, the First and Second Circuits borrow their "malice or bad faith intent to injure" standard from qualified immunity and selective enforcement.<sup>223</sup> This combination of theories is difficult to reconcile. Selective enforcement is an amorphous concept that is difficult to allege and prove.<sup>224</sup>

Second, upon close inspection, it becomes apparent that the theoretical basis for First and Second Circuit's approach is not as sound as the Seventh Circuit's.<sup>225</sup> The Supreme Court modified the standard for qualified immunity after *LeClair* was decided.<sup>226</sup> In *Harlow v. Fitzgerald*,<sup>227</sup> decided two years after *LeClair*, the Supreme Court altered the test for qualified immunity, eliminating the subjective inquiry into the official's motivations of malice, and adopting an objective standard.<sup>228</sup> However, the *LeClair* court borrowed the "malice or bad faith intent to injure" standard from the subjective test for qualified

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<sup>221</sup> See *supra* Part III. The circuits analyze these claims under different theories, but they use the same language to describe the state or local conduct. See *supra* Part III. For example, the Second Circuit used the terms malice and bad faith to describe the conduct, and the Seventh Circuit used the words vindictive and malice to refer to the official's conduct. See *supra* Part III. The circuits also came to the same conclusion at the end of their analyses, that individuals can bring an Equal Protection claim against a state or local official when they are intentionally singled out for vindictive or malicious treatment. See *supra* Part III.

<sup>222</sup> See *infra* notes 223-31 and accompanying text.

<sup>223</sup> See *supra* notes 143-49 and accompanying text. The first case from the Second Circuit to use this standard was *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980). See also *supra* notes 134-51 and accompanying text for the facts and the holding of *LeClair*.

<sup>224</sup> See *supra* note 140 and accompanying text. See also *Albright v. Oliver*, 510 U.S. 266, 270-72 (1994). In *Albright*, the Court noted that "the extent to which a claim of malicious prosecution is actionable under § 1983 is one 'on which there is an embarrassing diversity of judicial opinion.'" *Id.* at 270 n.4 (citations omitted). Furthermore, the scholarly materials on the subject are sparse, leaving many aspects of selective enforcement uncovered.

<sup>225</sup> See *infra* notes 226-31 and accompanying text.

<sup>226</sup> See *infra* notes 258-66 and accompanying text.

<sup>227</sup> 457 U.S. 800 (1982).

<sup>228</sup> *Id.* at 817-18. The *Harlow* Court abandoned the subjective inquiry for qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818. Under the new test for qualified immunity, a government official would lose his or her immunity only if he or she violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* See *infra* notes 249-66 and accompanying text for further explanation of qualified immunity. See also Laura Owen, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 969-90 (1989). In her article, Professor Owen conducted an extensive analysis of *Harlow*. *Id.*

immunity.<sup>229</sup> Because the subjective prong has been abandoned, the standard is no longer based upon current law.<sup>230</sup> Nonetheless, cases from the First and Second Circuits continue to use the *LeClair* standard.<sup>231</sup> While the *LeClair* "malicious intent to injure" standard may survive the change in qualified immunity analysis, it is weakened by the Court's decision in *Harlow*. A better approach is to use a straightforward Equal Protection analysis for "class of one" claims.

The Seventh Circuit provides a better theory because it utilizes a direct approach.<sup>232</sup> In *Esmail*, the court created a "new" Equal Protection claim.<sup>233</sup> Under the Seventh Circuit's approach, "class of one" plaintiffs can bring a claim in federal court when they have been singled out for "vindictive" treatment.<sup>234</sup> This standard allows for easier interpretation and application. Furthermore, in dicta, the Supreme Court indicated

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<sup>229</sup> See *LeClair*, 627 F.2d at 609-610. As previously stated, under the *LeClair* standard, the plaintiff is required to show that "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based upon impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure." *Id.*

<sup>230</sup> See *infra* notes 254-66 and accompanying text.

<sup>231</sup> See, e.g., *Zahra v. Town of Southold*, 48 F.3d 674, 683-85 (2d Cir. 1995) (utilizing the *LeClair* standard to analyze a selective enforcement claim); *Rubinowitz*, 60 F.3d at 910 (citing to the *LeClair* standard); *LaTrieste Rest. and Cabaret, Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (deciding a selective enforcement claim under the *LeClair* standard); *Yerardi's Moody St. Rest. & Lounge, Inc.*, 932 F.2d at 92-94 (analyzing a selective enforcement claim under the *LeClair* standard).

<sup>232</sup> See, e.g., *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam) (analyzing a "class of one" claim under the "vindictive action" approach); *Esmail*, 53 F.3d at 179-80 (finding that "class of one" claims should be evaluated for the presence of an illicit motive).

<sup>233</sup> *Esmail*, 53 F.3d at 178-80. While the Seventh Circuit rejected the First and Second Circuit's approach based on selective enforcement, it is difficult to determine why. See *Esmail*, 53 F.3d at 179 ("This case is not . . . a case of selective prosecution."). The approaches appear to be substantively similar in all important aspects. See *supra* Part III.B. This Note can only speculate that the Seventh Circuit may have been dissatisfied with the selective enforcement/qualified immunity approach because of a different theoretical approach to Equal Protection. In *Esmail*, the court stated:

[E]qual protection does not just mean treating identically situated persons identically. . . . If the liquor dealers enumerated in *Esmail*'s complaint committed worse infractions that he was charged with but were let off with lighter or no sanctions, this was unequal treatment. It would not in itself establish a claim under the equal protection clause, because nonactionable selective prosecution produces exactly such inequalities. The distinctive feature here . . . is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.

*Esmail*, 53 F.3d at 179.

<sup>234</sup> See *supra* Part III.B.

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that it would be willing to accept the Seventh Circuit's theory when it decided *Village of Willowbrook v. Olech*.<sup>235</sup>

However, there are uncertainties with the Seventh Circuit's approach as well. The Seventh Circuit does not use a traditional level of Equal Protection scrutiny when analyzing "class of one" claims.<sup>236</sup> The Seventh Circuit's "vindictive action" standard requires plaintiffs to prove the subjective motivations of the government official, but it does not state how this would work under the rational basis standard.<sup>237</sup> This is problematic because in *Olech*, the Court indicated that it would analyze "class of one" claims under rational basis.<sup>238</sup> Furthermore, the Seventh Circuit's approach does not explain how its approach would be executed when a state or local official moves for summary judgment based upon qualified immunity. Thus, the following subsection integrates Equal Protection "class of one" claims with qualified immunity.

*B. Qualified Immunity*

Section 1983 provides plaintiffs with a federal cause of action against state actors for civil rights violations.<sup>239</sup> Congress enacted

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<sup>235</sup> *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1075 (2000) (per curiam). The Court found that allegations of irrational and wholly arbitrary action are enough to state a claim under the Equal Protection Clause. *Id.* While it did not address the Seventh Circuit's theory of "subjective ill will," it did not overrule it either. *Id.*

<sup>236</sup> See *supra* Part III.B. A plaintiff in the Seventh Circuit is only required to show that the action taken by the government official was a "spiteful effort to get him" for reasons wholly unrelated to a legitimate state objective. *Olech*, 120 S. Ct. at 1075. Under rational basis review, the court must inquire whether the administrative classification is rationally related to a legitimate government purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992).

<sup>237</sup> See *supra* Part III.B. See also *Wilson*, *supra* note , at 939-40. *Wilson* finds that the Seventh Circuit did not identify a specific level of Equal Protection scrutiny when it decided *Olech*. *Id.* at 939. He speculates that the court may be saying that actions taken out of sheer spite do not have a valid government purpose by definition. *Id.* at 940.

<sup>238</sup> See *supra* note 190 and accompanying text.

<sup>239</sup> Section 1983 provides, in pertinent part:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States . . . to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (1994).

While Section 1983 is not itself a source of substantive rights, it provides a means of vindicating federal rights established by the Constitution or a federal statute. Jennifer L.

Section 1983 to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"<sup>240</sup> To bring a successful claim, a plaintiff must allege that: (1) a federally protected right was violated; and (2) the person violating the right did so under the color of state law.<sup>241</sup> Plaintiffs who succeed under Section 1983 can seek civil damages and injunctive relief against state officials and municipalities who violate their constitutional rights.<sup>242</sup>

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Mercer & William C. Elwell, *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 88 GEO. L.J. 1753, 1755-56 (2000). See also *Albright v. Oliver*, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' The first step in any such claim is to identify the specific constitutional right allegedly infringed.") (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)); *Baumgardner v. County of Cook*, 108 F. Supp. 2d 1041, 1042-43 (N.D. Ill. 2000) ("42 U.S.C. § 1983 does not confer substantive rights; it provides a remedy, that is, a private cause of action, for violations of constitutional rights and rights created by federal statute."). For example, a plaintiff in a "class of one" claim derives his substantive right from the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and enforces that right through a claim under Section 1983. See *supra* note 38 and accompanying text.

A claim can also be brought against a federal official under Section 1983. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971). Furthermore, state courts have concurrent jurisdiction to hear Section 1983 claims. See *Howlett v. Rose*, 496 U.S. 356, 367-69 (1990). However, a Section 1983 action that is filed in state court is usually governed by federal law. *Felder v. Casey*, 487 U.S. 131, 151-53 (1988). See also Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057 (1989).

<sup>240</sup> *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). The Supreme Court stated a two-part test for determining whether a private individual has acted under color of state law in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). First, the deprivation must be caused by the plaintiff's exercise of a right or privilege created "by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible." *Id.* Second, the defendant "must be a person who may fairly be said to be a state actor." *Id.* The *Lugar* Court found that the second requirement can be satisfied with a showing that the defendant is a state official, that he acted together with or obtained significant aid from state officials, or that the defendant's conduct is "otherwise chargeable to the State." *Id.*

<sup>241</sup> *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). See also William H. ReMine, *Civil Suits for Civil Rights: A Primer on § 1983*, 26 COLO. LAW. 5, 5 (1997); Michael C. Fayz, *Civil Rights*, DET. C. L. REV. 343, 345 (1995).

<sup>242</sup> Theodore & Stewart, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 644-45 (1987). Under 42 U.S.C. § 1983, plaintiffs can receive nominal damages, presumed damages, actual damages, punitive damages, and injunctive relief. ReMine, *supra* note 241, at 11. A plaintiff cannot receive punitive damages against a municipality or a local government agency, but can recover them from an official who is sued in her personal capacity. *Id.* at 12. The plaintiff may also be able to recover attorney fees if she prevails. *Id.* Under Section 1983, plaintiffs are not required to exhaust state remedies before filing a claim in federal court. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *McNeese v. Board of Educ.*, 373 U.S. 668, 671 (1963).



However, aspects of a plaintiff's claim may be thwarted by the doctrine of immunity.<sup>243</sup> Under 42 U.S.C. § 1983, a court can grant state and local officials absolute or qualified immunity.<sup>244</sup> Absolute immunity, which bars all legal proceedings, is most commonly granted to legislators,<sup>245</sup> judges,<sup>246</sup> and prosecutors.<sup>247</sup> However, most government officials only receive qualified immunity.<sup>248</sup> Qualified immunity is an affirmative defense that an official who performs discretionary functions can raise in a summary judgment motion.<sup>249</sup> If it is granted, it will protect the defendant from liability for civil damages.<sup>250</sup>

<sup>243</sup> See *infra* notes 244-50 and accompanying text.

<sup>244</sup> See Fayz, *supra* note 241, at 404. Fayz found:

[i]mmunity analysis starts with a determination as to whether a defendant has absolute immunity. If a defendant has absolute immunity, then not much time need be spent looking to the nature of the wrong alleged by the plaintiff. . . . [However], it is not surprising that the concept of absolute immunity is a relatively limited one and that the Supreme Court developed the separate concept of qualified immunity to apply in most cases involving alleged wrongdoing on the part of public officials.

*Id.* While 42 U.S.C. does not provide immunity from liability on its face, the Supreme Court applied the common law immunity defenses to Section 1983 actions in a series of cases. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 125-33 (1999). See also *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

<sup>245</sup> *Teeney v. Brandhove*, 341 U.S. 367, 379 (1951). Absolute immunity depends on the function that the individual is performing, not the position that he or she holds. Remine, *supra* note 241 at 10. Therefore, legislators have absolute immunity when they are acting "in a field where legislators traditionally have power to act." *Id.* Protected legislative acts have been defined as "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Hutchinson v. Proxmire*, 443 U.S. 111, 126 (1979) (citations omitted).

<sup>246</sup> *Stump v. Sparkman*, 435 U.S. 349, 359 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

<sup>247</sup> *Imbler v. Patchman*, 424 U.S. 409, 427-28 (1976). A prosecutor will enjoy absolute immunity for initiating and trying a criminal case, but may not have immunity for administrative or investigative functions. *Id.* at 430. Absolute immunity has also been granted to police officers who serve as witnesses under 42 U.S.C. § 1983. *Brisco v. LaHue*, 460 U.S. 325, 329-34 (1983).

<sup>248</sup> Fayz, *supra* note 241, at 404.

<sup>249</sup> *Id.* at 423 ("[Q]ualified immunity is frequently advanced in a motion for summary judgment."); Ivan E. Bodensteiner, *Recent Developments in Civil Rights*, 24 IND. L. REV. 675, 677 (1991) ("[T]he Court has made every effort to reduce the qualified immunity issue to an objective, legal determination that can be resolved at an early stage in litigation through a motion for summary judgment."). See also *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In *Gomez*, the Court found that the burden of pleading the qualified immunity defense rests with the defendant. *Id.* A motion for summary judgment is brought under Rule 56 of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 56(c). To prevail on a motion for

Most, if not all, "class of one" claims allege Equal Protection violations by officials who have performed discretionary functions.<sup>251</sup> As such, they are candidates for qualified immunity.<sup>252</sup> While the central focus of this Note is to create a trial standard for "class of one" claims, the issue of qualified immunity will create many questions for lower courts as subsequent claims are litigated.<sup>253</sup> Therefore, this Section will address the qualified immunity standard before proceeding to the trial analysis.

### 1. Qualified Immunity After *Harlow v. Fitzgerald* <sup>254</sup>

Prior to 1982, the test for determining if a government official deserved qualified immunity consisted of two parts.<sup>255</sup> A plaintiff could overcome the qualified immunity defense under the objective prong of the test showing that the constitutional right asserted was clearly established and that the defendant knew or reasonably should have

summary judgment, the moving party must show that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

<sup>250</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). While qualified immunity may protect government officials from liability for damages, it may not preclude other claims against state or local entities. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 513 (1999). For example, in *Village of Willowbrook v. Olech*, the plaintiff filed a claim against two officials in their individual capacity and the Village of Willowbrook. Brief for Respondent at 8, *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam) (No. 98-1288). Even if the court grants qualified immunity to the officials, the plaintiff may still be able to proceed with a claim against the municipality. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). However, municipalities are subject to suit only in situations where municipal officials have acted pursuant to official policy or custom. *Id.*

<sup>251</sup> See e.g., *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998), *aff'd*, 120 S. Ct. 1073 (2000) (per curiam) (alleging that the two "high" village officials violated the plaintiff's Equal Protection rights); *Esnail*, 53 F.3d at 178 (claiming that the mayor violated the plaintiff's Equal Protection rights in violation of Section 1983); *LeClair*, 627 F.3d at 607 (filing a Section 1983 action against a dairy farm inspector).

<sup>252</sup> See *supra* note 249 and accompanying text.

<sup>253</sup> While several cases decided after *Village of Willowbrook v. Olech*, have touched upon qualified immunity, none have addressed the issue at length. See, e.g., *Bryan*, 213 F.3d at 272-74 (declining to discuss the issue of qualified immunity because the officials had already received absolute immunity); *Baumgardner*, 2000 WL 1100438, at \*2 (discussing qualified immunity for officials who violate statutory rights); *Anderson v. City of New York*, No. CV99-418JBW, 2000 WL 1010984, at \*2 (S.D.N.Y. July 19, 2000) (analyzing qualified immunity as it pertains to the right not to be arrested without probable cause).

<sup>254</sup> 457 U.S. 800 (1982).

<sup>255</sup> See *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).

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known that he was violating that right.<sup>256</sup> Second, under the subjective prong, a public official could lose his or her immunity if the plaintiff could show that the action was motivated by malice or bad faith.<sup>257</sup>

The Supreme Court modified the standard for qualified immunity in *Harlow v. Fitzgerald*.<sup>258</sup> In *Harlow*, the plaintiff sued senior White House aides.<sup>259</sup> He contended that they had engaged in a conspiracy to retaliate against him for his whistleblowing testimony to Congress about problems in the Defense Department.<sup>260</sup> After nearly eight years of protracted discovery, White House aides filed a motion for summary judgment based on their immunity.<sup>261</sup>

To support this claim, the aides argued that the two part test for qualified immunity did not provide adequate protection from meritless lawsuits.<sup>262</sup> They contended that the malice or bad faith inquiry often precluded summary judgment because an inquiry into a defendant's state of mind created an issue of triable fact.<sup>263</sup> Moved by this concern, the Court eliminated the subjective inquiry into an official's state of mind.<sup>264</sup> The revised test for qualified immunity became a legal inquiry

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.* Relying on *Scheuer v. Rhodes*, 416 U.S. 232 (1974), Justice Powell stated that the subjective element could be satisfied by determining "whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith." *Wood*, 420 U.S. at 330 (Powell, J., concurring in part and dissenting in part). The Second Circuit based the *LeClair* malice or bad faith intent to injure standard on the subjective prong. See *supra* Part III.A. The following Section will provide a more comprehensive review of the Court's decision in *Harlow* and show why the Second Circuit based its standard on invalid law. See *infra* Part IV.B.2.

<sup>258</sup> 457 U.S. 800 (1982). In a companion case, the Court granted President Nixon absolute immunity from action that he may have taken. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

<sup>259</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982).

<sup>260</sup> *Id.* at 804-05.

<sup>261</sup> *Id.* at 805. The aides argued that they were entitled to absolute immunity, or in the alternative, that they had committed no wrongdoing and were entitled to qualified immunity. *Id.* at 808, 813.

<sup>262</sup> Owen, *supra* note 228, at 973-74 (citing Brief for Petitioner at 61, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (No. 80-945)).

<sup>263</sup> *Id.* at 974 (citing Brief for Petitioner at 63 n.17, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (No. 80-945)).

<sup>264</sup> *Harlow*, 457 U.S. at 816-18. The Court gave several policy reasons in support of qualified immunity. *Id.* at 814. It found that the "social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* See also James C. Wrenn, Jr., Comment, *Passing the Buck: The Supreme Court's Failure to Clarify Qualified Immunity Doctrine to Protect Public Officials from Frivolous Lawsuits*, Crawford-El v. Britton, 118 S. Ct. 1584 (1998), 22 HARV. J.L.

of whether a government official "performing discretionary functions" had violated "clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>265</sup> The modified standard made it easier for courts to dismiss unsupported claims at the summary judgment stage, and it continues to be the test for qualified immunity today.<sup>266</sup>

## 2. Reconciling the Objective *Harlow* Inquiry with Subjective Intent

The prohibition against subjective inquiries established by *Harlow* is problematic when a constitutional claim requires proof of unlawful motive or intent.<sup>267</sup> This is especially true for "class of one" claims where an essential component of the claim is the defendant's unlawful intent to single the plaintiff out for vindictive or malicious treatment.<sup>268</sup> However, it is possible to distinguish the defendant's subjective knowledge of the law from the defendant's subjective intent as an element of a constitutional claim.<sup>269</sup>

& PUB. POL'Y 1031, 1045 (1999) ("Litigating officials' motives imposes great social costs on society. . . . Lawsuits not only require officials to engage in discovery, cross-examination, and other bothersome events, but these motive-based lawsuits also carry a stigma.").

<sup>265</sup> *Harlow*, 457 U.S. at 818 (citations omitted).

<sup>266</sup> The Supreme Court clarified the analytical structure under which a claim of qualified immunity should be addressed in *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). In *Siegert*, the Court articulated a two-part test for courts to apply when deciding to grant qualified immunity. *Id.* at 232-33. A court must first decide if the plaintiff has alleged a clearly established constitutional right. *Id.* If the official has not violated a statutory or constitutional right, he or she is entitled to qualified immunity. *Id.* But, if the court finds that there has been a constitutional or a statutory violation, it must perform the second part of the analysis and determine whether the right was "clearly established" at the time of the violation. *Id.* This is the test that the courts currently use to determine if a state official performing discretionary functions is entitled to qualified immunity. See, e.g., *Conn v. Gabbert*, 526 U.S. 286, 290 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.") (citing *Siegert v. Gilley*, 500 U.S. 226, 232-233 (1991)).

<sup>267</sup> Clay J. Pierce, Note, *The Misapplication of Qualified Immunity: Unfair Procedural Burdens for Constitutional Damage Claims Requiring Proof of the Defendant's Intent*, 62 *FORDHAM L. REV.* 1769, 1771 (1994). Pierce found that lower courts struggled to reconcile *Harlow*'s prohibition against subjective inquiries into the defendant's motivations where such motivations are part of the plaintiff's claim. *Id.* at 1779 n.92. He speculated that this occurred in part because the Court's decision in *Harlow* did not distinguish between inquiries related to qualified immunity and inquiries related to the plaintiff's substantive claim. *Id.* Prior to *Crawford-El*, the appellate courts used varied procedural mechanisms to evaluate these types of claims. *Id.* at 1778.

<sup>268</sup> See *infra* Part V.

<sup>269</sup> See Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective*

The Supreme Court addressed the objective/subjective dilemma for the first time in *Crawford-El v. Britton*.<sup>270</sup> In *Crawford-El*, the Court explained that while subjective intent is irrelevant to the issue of qualified immunity, it could remain as a necessary element of the plaintiff's affirmative case.<sup>271</sup> The Court remained faithful to the holding in *Harlow* when it found that the defense of qualified immunity cannot be rebutted by evidence showing that the defendant's conduct was malicious or improperly motivated.<sup>272</sup> It stated that evidence regarding the defendant's subjective motivations is "simply irrelevant" to the defense of qualified immunity.<sup>273</sup>

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*Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 891 (1998). The authors stated:

A distinct issue from a defendant's subjective knowledge of the law is that of the defendant's subjective intent. Furthermore, there is a difference between a defendant's subjective motive for taking certain actions (i.e., whether a defendant acted with malice), and a defendant's subjective intent as an essential element of the plaintiff's alleged constitutional violation. While *Harlow* proscribes inquiry into the former, *Crawford-El v. Britton* has now definitively established that *Harlow* does not prohibit inquiry into the latter.

*Id.* See also *Grant v. City of Pittsburgh*, 98 F.3d 116, 124 (3d Cir. 1996) ("The subjective inquiry that *Harlow* proscribes, however, is distinct from the question whether a public official, in taking official action that but for an improper motive would not be legally proscribed, in fact harbored the improper motive.").

<sup>270</sup> 523 U.S. 574 (1998). In *Crawford-El*, a prison inmate filed a law suit under 42 U.S.C. § 1983 against a correctional officer alleging that she misdelivered his personal possessions after he was transferred to a different prison in retaliation for communicating with the press in violation of his First Amendment rights. *Id.* at 578-79. The correctional officer moved for dismissal of the complaint based in part on qualified immunity. *Id.* at 580. After several legal proceedings, the Court of Appeals for the District of Columbia decided the case en banc. *Id.* at 581. When evaluating his claim, the D.C. Circuit imposed a higher pleading standard on the plaintiff, requiring him to show evidence of improper motive by clear and convincing evidence. *Id.* at 584-85. The Court granted certiorari in *Crawford-El*, despite the "relative unimportance of the facts," to determine the correct relationship between the objective standard for qualified immunity under *Harlow* and the plaintiff's burden of proof when an element of his or her claim depends on proof of subjective intent. *Id.* at 584.

<sup>271</sup> *Id.* at 589.

<sup>272</sup> *Id.* at 588.

<sup>273</sup> *Id.* See also *Eskow & Cole*, *supra* note 269, at 893. They stated:

In other words, *Crawford-El* drew a fine line between the role of subjective intent with respect to the affirmative defense of qualified immunity—where it is irrelevant—and the role of subjective intent with respect to the elements of a constitutional violation—where it remains a vital element of certain civil rights suits.

*Id.*

The Court continued by stating that allegations of intent are permissible as "essential elements" of constitutional claims.<sup>274</sup> Thus, in *Crawford-El*, the Court held that lower courts might make an inquiry into subjective intent as long as the inquiry is focused on the underlying elements of the claim and not the qualified immunity analysis.<sup>275</sup> However, the Court did not provide further guidance on the execution of this inquiry, leaving the lower courts to develop the standard.<sup>276</sup>

Currently, there is no clearly defined standard for how a qualified immunity analysis should proceed when intent or motive is an element of the claim.<sup>277</sup> Some commentators have suggested that the defendant's motivations are analytically distinct from the defendant's

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<sup>274</sup> *Crawford-El*, 523 U.S. at 588-89. In a well supported opinion, the Court stated that the policy reasons behind the objective standard in *Harlow* would not be undermined by inquiring about an official's subjective intent as an element of a claim. *Id.* at 594. The Court found that there are significant differences between "bare allegations of malice" that provided the basis for rebutting qualified immunity under the *Wood* standard and allegations of intent that are elements of constitutional claims. *Id.* at 592. First, the Court stated that the inquiry under *Wood* was an open ended inquiry into the official's motive that was unrelated to the deprivation of a constitutional right, while the inquiry after *Harlow* was more specific. *Id.* Second, the Court found that the objective qualified immunity standard eliminated motive-based claims where the official did not violate clearly established law. *Id.* Third, the Court found that the substantive elements of the constitutional claim might serve as a limit to frivolous claims if there is doubt as to the illegality of the defendant's conduct or if the plaintiff cannot establish causation. *Id.* at 593. The Court reasoned that trial courts might use their discretion to protect defendants under the Federal Rules of Civil Procedure. *Id.* at 597-98. The Court suggested that trial courts could do so by ordering a reply to the defendant's answer under Rule 7(a) or grant the defendant's motion for a more definite statement under Rule 12(e). *Id.* at 598. Finally, the Court concluded that summary judgment will serve as an "ultimate screen" for precluding insubstantial claims before they get to trial. *Id.* at 600.

<sup>275</sup> *Crawford-El*, 523 U.S. at 588. The Court concluded that plaintiffs were not required to satisfy the heightened pleading standard imposed by the D.C. Court of Appeals. *Id.* at 589. However, the Court did not determine whether the defendant was entitled to qualified immunity, leaving that determination for the lower courts. Eskow & Cole, *supra* note 269, at 901.

<sup>276</sup> *Crawford-El*, 523 U.S. at 602. In a dissenting opinion, Justice Rehnquist found it both "puzzling and unfortunate" that the Court did not address a means of harmonizing the objective and subjective components in practice. *Id.* To reconcile this issue, he proposed a test to determine qualified immunity. See *infra* note 278. See also Wrenn, *supra* note 264, at 1031 ("In *Crawford-El* v. Britton, the Supreme Court missed a great opportunity to clarify the common law doctrine of qualified immunity."); Eskow & Cole, *supra* note 269, at 900. Eskow and Cole explain that while the Court's decision in *Crawford-El* "goes to great lengths" to explain how lower courts can weed out insubstantial claims under the Federal Rules of Civil Procedure, it did not provide guidance as to how evidence of subjective intent would be reconciled with *Harlow*'s objective standard. *Id.*

<sup>277</sup> Wrenn, *supra* note 264, at 1044 (finding that "varied formulations" [of the qualified immunity analysis] have been proposed by the courts).

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knowledge of the law.<sup>278</sup> Under this approach, subjective inquiries into the defendant's knowledge of the law are not allowed.<sup>279</sup> However, subjective inquiries regarding the elements of the claim, such as vindictive motivations, can still occur.<sup>280</sup> Accordingly, in a "class of one" claim, the court would ask whether a reasonable official in the defendant's position would have known that she was violating the plaintiff's Equal Protection rights when she singled her out for differential treatment.<sup>281</sup> The court would answer this question affirmatively because *Village of Willowbrook v. Olech*<sup>282</sup> establishes that it

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<sup>278</sup> See Pierce, *supra* note 267, at 1781. Pierce found that many courts have rejected the argument that *Harlow* prevents inquiries into the defendant's motivations. *Id.* They found that the issue of motive is analytically distinct from the defendant's knowledge of the law. *Id.* Under this type of analysis, a defendant's challenge to the plaintiff's allegations of motive merely creates an issue of fact to be resolved at trial. *Id.* The defendant cannot prevent the claim from moving forward by offering a "permissible excuse" for her conduct. *Id.* Pierce supports this form of analysis because "[i]f *Harlow* prohibits inquiry into the defendant's motives where such motives form the basis of the plaintiff's claim, it effectively eliminates any civil rights action where the plaintiff must prove motive." *Id.* at 1782. See also Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 45 (1st Cir. 1988); Musso v. Hourigan, 836 F.2d 736, 743 (2d Cir. 1988); Kenyatta v. Moore, 744 F.2d 1179, 1185 (5th Cir. 1984).

In contrast to Pierce, Justice Rehnquist answered this question in a dissenting opinion to *Crawford-El*, by concluding that a government official is entitled to immunity from suit under § 1983 if he or she can offer a legitimate reason for the decision and the plaintiff is unable to establish by objective evidence that the official's reason is actually pretext. *Crawford-El*, 523 U.S. at 602. Eskow and Cole built upon this formulation of the qualified immunity analysis to create a three part test. They would ask:

(1) did the plaintiff come forth with evidence to raise a genuine issue of triable fact as to the existence of unconstitutional intent; (2) if so, even assuming the defendant may have acted, in part, out of an unconstitutional motive, did the defendant nonetheless offer an objectively reasonable explanation for his conduct; and (3) did the plaintiff then provide objective evidence that the defendant's proffered rationale is itself unreasonable or otherwise is mere pretext?

Eskow & Cole, *supra* note 269, at 914. Eskow and Cole recognize that while this approach may seem "inherently paradoxical," courts must "embrace rather than resist" this conflict if they ever hope to strike a balance between vindicating civil rights abuses and protecting government officials from insubstantial claims. *Id.* at 919.

<sup>279</sup> Pierce, *supra* note 267, at 1791. Pierce argued that the *Harlow* Court only intended to preclude inquiries into the defendant's knowledge of the law. *Id.*

<sup>280</sup> *Id.* at 1782-83. See also Bodensteiner, *supra* note 249, at 681. Professor Bodensteiner found that a motion for summary judgment that includes a qualified immunity defense can be defeated by a showing that there is a genuine issue as to any material fact in dispute. *Id.* If this occurs, the Court should determine whether the law was clearly established for the qualified immunity analysis, but the jury should resolve issues of fact and determine whether the defendant acted reasonably according to established law. *Id.*

<sup>281</sup> See *supra* note 265 and accompanying text for the language that the Court used in *Harlow*.

<sup>282</sup> 120 S. Ct. 1073 (2000) (per curiam).

violates the Equal Protection Clause to intentionally single-out an individual for disparate treatment.<sup>283</sup> Then, the court would analyze the substantive elements of the claim to determine if there was a genuine issue of material fact in dispute.<sup>284</sup> If there is a dispute over the factual issue of motive, the court would deny summary judgment and allow the case to proceed.<sup>285</sup>

While this approach to qualified immunity does not provide the definitive answer for officials who have allegedly violated an individual's Equal Protection rights, it shows a possible solution. There are several approaches to this problem,<sup>286</sup> and this Note chooses one approach as a means of demonstrating how the objective test for qualified immunity can be harmonized with subjective intent when it is an element of a claim. Once the objective/subjective conflict is resolved, another problematic area for "class of one" litigation is the rational basis test.

### C. Rational Basis Review

In *Village of Willowbrook v. Olech*,<sup>287</sup> the Court indicated that it would use the rational basis standard to evaluate "class of one" claims.<sup>288</sup> However, rational basis is the most deferential form of Equal Protection analysis.<sup>289</sup> When courts evaluate government actions under this standard, they are reluctant to consider the motivations behind the decision.<sup>290</sup> At first glance, this conflicts with the current approach in the

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<sup>283</sup> *Id.* at 1074-75.

<sup>284</sup> See *supra* note 249 for the summary judgment standard.

<sup>285</sup> See Bodensteiner, *supra* note 249, at 681.

<sup>286</sup> See *supra* note 278.

<sup>287</sup> 120 S. Ct. 1073 (2000) (per curiam).

<sup>288</sup> *Id.* at 1074. ("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.").

<sup>289</sup> See Saphire, *supra* note 63, at 605 ("[I]t is difficult to overstate but, for the purposes of this Article important to emphasize, the degree of judicial deference entailed in . . . rational basis review."). See also *supra* note 87.

<sup>290</sup> See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (finding that, in general, courts refrain from evaluating legislative motives absent a showing of arbitrariness or irrationality); *Lee v. South Carolina Dept. of Natural Resources*, 530 S.E.2d 112, 115 n.4 (S.C. 2000) (stating that "the actual motivations of the enacting governmental body are entirely irrelevant" when determining the purpose and validity of the law under Equal Protection analysis); Leon Friedman, *Purpose, Intent and Motive in Constitutional Litigation*, 596 PLI/LIT. 713, 715 (1998) (finding that "[i]nquiries into congressional motives or purposes are a hazardous matter").



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appellate courts, under which the plaintiff is required to allege that the decision was motivated by a vindictive desire to cause harm.<sup>291</sup> With the exception of Justice Breyer's concurring opinion, the Supreme Court did not resolve this issue in *Olech*, leaving it for future cases.<sup>292</sup>

But, upon closer examination, it becomes apparent that the Court has decided other motive driven cases under the rational basis standard.<sup>293</sup> In particular, the Court actively scrutinized the motivations behind the government action in *City of Cleburne v. Cleburne Living Center*<sup>294</sup> and *Romer v. Evans*.<sup>295</sup> However, subsequent decisions, while not specifically overruling these cases, have weakened the proposition that rational basis review can be used to examine the government's motives.<sup>296</sup> Therefore, the following Section will begin with the Court's findings in *Cleburne*, and show how motive based claims can still be brought under the rational basis standard.<sup>297</sup> Then, in support of this proposition, this Section will discuss *Romer v. Evans*<sup>298</sup> and show that its analysis can be used to evaluate "class of one" claims.<sup>299</sup>

### 1. *City of Cleburne v. Cleburne Living Center*<sup>300</sup>

In *Cleburne*, the Supreme Court analyzed whether the City of Cleburne violated the Equal Protection Clause when it denied a special use permit to a group home for the mentally retarded under a local zoning ordinance.<sup>301</sup> The Court decided the claim under the rational

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<sup>291</sup> See *supra* Part III.

<sup>292</sup> Vill. of Willowbrook v. Olech, 120 S. Ct. 1073, 1075 (2000). See also *supra* notes 193-96 and accompanying text for Justice Breyer's concurring opinion.

<sup>293</sup> See generally *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

<sup>294</sup> 473 U.S. 432 (1985). See also *Saphire*, *supra* note 63, at 616-17. *Saphire* found that *Cleburne* stands as a prohibition against classifications that are based on prejudice alone and has been used by lower courts to strike down such classifications. *Id.*

<sup>295</sup> 517 U.S. 620 (1996). See *infra* notes 338-41 and accompanying text for the facts and the holding of *Romer*.

<sup>296</sup> See *infra* notes 320-30 and accompanying text.

<sup>297</sup> See *infra* notes 300-36 and accompanying text.

<sup>298</sup> 517 U.S. 620 (1996).

<sup>299</sup> See *infra* notes 337-47 and accompanying text.

<sup>300</sup> 473 U.S. 432 (1985).

<sup>301</sup> *Id.* at 447-55. In *Cleburne*, the Cleburne Living Center, Inc. ("Center") petitioned the City for a special use permit to operate a group home for the mentally retarded. *Id.* at 436. The Center was required to apply for a special permit under the City's zoning regulation which required a special use permit for the construction of "hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions." *Id.* However, the proposed location of the Center was zoned to include other dwellings, such as

review and second order review.<sup>311</sup> "First order" rational basis is the traditional form in which the Court is deferential to the government's purpose.<sup>312</sup> Accordingly, the Court upholds a classification as long as there was a "plausible reason" for the classification.<sup>313</sup> "Second order" rational basis emerged as the heightened form of rational basis that the Court used in *Cleburne*.<sup>314</sup> Under this form, the Court takes an "active" role in evaluating the government's proffered reasons.<sup>315</sup> While some legal commentators welcomed the Court's active role in evaluating the government's basis for its actions,<sup>316</sup> others protested that the Court's analysis went too far.<sup>317</sup> They argued that it went beyond the confines of rational basis review and represented a dangerous invasion upon the

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<sup>311</sup> Madrid, *supra* note 302, at 171. Madrid found that, while rational basis review is supposed to be a uniform standard, the Court has applied rational basis review in two distinct ways. *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* A classic example of this form of review is *Williamson v. Lee Optical*, 348 U.S. 483 (1955). *Id.* at 171. See also *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). The Court took a very deferential approach to rational basis review in *Fritz*, finding that it is "constitutionally irrelevant" whether the basis for the legislation was the actual reason for the legislation. *Id.* As long as there is a plausible reason for the legislature's action, the Court's inquiry is at an end. *Id.*

<sup>314</sup> Madrid, *supra* note 302, at 171-72. See also *City of Cleburne*, 473 U.S. at 458 (Marshall, J., dissenting). In a dissenting opinion, Justice Marshall wrote that the Court's form of rational basis in *Cleburne* was closer to heightened scrutiny. *Id.* at 458. He called this form "second order" rational basis review. *Id.* Marshall found that under second order rational basis review, the Court approached classifications skeptically and suspended its judgment until all of the facts and evidence were considered. *Id.* at 471-72.

<sup>315</sup> See *supra* note 314. The Ninth Circuit interpreted *Cleburne* as creating a new level of rational basis called "active" rational basis review. Madrid, *supra* note 302, at 175. Most notably, the Ninth Circuit used active rational basis review to evaluate military policy toward homosexuals. See *High Tech Gays v. Defense Indus. Sec. Clearance*, 895 F.2d 563, 574-77 (9th Cir. 1990); *Pruitt v. Cheney*, 963 F.2d 1160, 1164-66 (9th Cir. 1991). Under this form of review, the court required the government to present evidence to support its classification. See *Pruitt*, 963 F.2d at 1166. However, it is questionable whether the Ninth Circuit's active form of review survives later Supreme Court decisions that return to a more deferential standard. Madrid, *supra* note 302 at 204-05; *Saphire*, *supra* note 63, at 628.

<sup>316</sup> See *supra* note 315. See also *Burstyn v. Miami Beach*, 663 F. Supp. 528, 533 n.1 (S.D. Fla. 1987) (finding that, after *Cleburne*, the Court established a trend that allowed courts to go beyond asserted justifications for a classification and to carefully focus on the relationship between the legislative ends and means); *Coburn v. Agustin*, 627 F. Supp. 983, 989 (D. Kan. 1985) (finding that *Cleburne* "convincingly demonstrate[s]" the existence of an exacting rational basis test).

<sup>317</sup> See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 298-99 (1998) (noting the "disturbing activism" in some of the Supreme Court's Equal Protection decisions); *Cleburne*, 473 U.S. at 478 (Marshall, J., dissenting). Justice Marshall found that the Court's form of rational basis was "freewheeling, and potentially dangerous." *Id.*

government's decision-making ability.<sup>318</sup> Perhaps in response to these concerns, the Court clarified its rational basis standard in subsequent cases.<sup>319</sup>

One of the most important Equal Protection decisions after *Cleburne* was *Heller v. Doe*.<sup>320</sup> In *Heller*, the Court evaluated a Kentucky statute that governed the involuntary committal of the mentally disabled to state institutions.<sup>321</sup> To some commentators, *Heller* represented the Court's retreat from the second order rational basis review.<sup>322</sup> The Court cited to *Cleburne* only once to reaffirm that classifications involving the mentally retarded are scrutinized under rational basis review.<sup>323</sup> In all other aspects, the Court exercised judicial restraint when determining if there was a rational basis for the statute, using many first order

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<sup>318</sup> *Id.* See *supra* note 317. Many government decisions rely on classifications. Saphire, *supra* note 63, at 600. Under a demanding level of scrutiny, no law would be immune from a potential challenge. *Id.* Therefore, the courts have tried to create standards for reviewing Equal Protection classifications that balance judicial and legislative interests. *Id.* at 601.

<sup>319</sup> Saphire, *supra* note 63, at 622. Saphire stated that the Supreme Court clarified rational basis review in the early 1990s. *Id.*

<sup>320</sup> 509 U.S. 312 (1993). See Saphire, *supra* note 63, at 622. (finding that *Heller v. Doe* is probably the most important of the cases that the Supreme Court used to clarify the rational basis standard). See also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993); *Nordlinger v. Han*, 505 U.S. 1, 11 (1992).

<sup>321</sup> *Heller*, 509 U.S. at 315. In Kentucky the civil commitment of the mentally retarded and the mentally ill were determined by two separate statutes. *Id.* at 314. At issue in the case was the procedural differences in the statutes. *Id.* First, the burden of proof at a final commitment hearing for the mentally retarded was clear and convincing evidence, while the burden of proof for the mentally ill was beyond a reasonable doubt. *Id.* at 315. Second, at commitment proceedings for the mentally retarded, guardians and immediate family members were able to participate as if they were parties to the proceeding. *Id.* However, commitment proceedings for the mentally ill did not include this procedure. *Id.* A class of mentally retarded persons who were involuntarily committed to Kentucky institutions challenged these differences, alleging that they violated the Equal Protection Clause of the Fourteenth Amendment because they were irrational. *Id.*

<sup>322</sup> Saphire, *supra* note 63, at 635. See also Madrid, *supra* note 302, at 192. Madrid found that the Court did not to follow the *Cleburne* form of rational basis review. *Id.* He speculated that there were two reasons why the Court did not use second order rational basis review. *Id.* First, he reasoned that the facts of *Heller* did not present the Court with a case of blatant discrimination as *Cleburne* had. *Id.* While the classifications in both cases rested on stereotypical attitudes toward the mentally retarded, the language in *Cleburne* was stereotypical on its face. *Id.* at 192-93. Second, Madrid reasoned that the enactment of the Americans with Disabilities Act of 1990 provided greater statutory protection for the mentally retarded. *Id.* at 193. In part, this may eliminate the need to classify the mentally retarded as a suspect or quasi-suspect classification. *Id.*

<sup>323</sup> *Heller*, 509 U.S. at 321.

basis standard, finding that the mentally retarded were not a suspect classification.<sup>302</sup> Its approach represented a departure from traditional rational basis review.<sup>303</sup> The Court engaged in an active, rather than a passive, analysis of the City's basis for treating the group home differently from other homes in the immediate area.<sup>304</sup> Instead of according the City the traditional deference that government actors receive, the Court conducted a "searching inquiry" into the City's reasons for denying the permit.<sup>305</sup> This was unusual because, under

apartment houses, fraternity or sorority houses, hospitals, nursing homes, and private clubs. *Id.* at 436 n.3. After holding a hearing, the city council refused to grant the permit. *Id.* at 437. The Cleburne Living Center filed a law suit against the City and its officials alleging that the zoning ordinance violated the Equal Protection Clause on its face and as it was applied to the Center and its potential residents. *Id.*

<sup>302</sup> *Cleburne*, 473 U.S. at 442. When the case was appealed to the Fifth Circuit, it determined that mental retardation was a quasi-suspect classification that deserved intermediate scrutiny. *Id.* at 437-38. The Supreme Court overruled the Fifth Circuit and listed four reasons to support its finding that the mentally retarded should not be a quasi-suspect class. *Id.* at 442-46. First, the Court stated that the state's interest in providing for the mentally retarded was best left to the judgment of the legislature and health care providers because they are better qualified to make substantive decisions about the mentally retarded. *Id.* at 442-43. Second, the Court found that the mentally retarded were adequately protected from discrimination by federal and state legislation. *Id.* at 443-45. Third, the Court argued that the mentally retarded are not politically powerless as a group because they have attracted the attention of legislators. *Id.* at 445. Fourth, the Court stated that if the mentally retarded were a quasi-suspect class, it would open the door for other groups with similar characteristics, such as the aged, the disabled, the mentally ill and the infirm. *Id.* at 445-45. See also Alfonso Madrid, Comment, *Rational Basis Review Goes Back to the Dentist's Chair: Can The Toothless Test of Heller v. Doe Keep Gays in the Military?*, 4 TEMP. POL. & CIV. RTS. L. REV. 167, 174 (1994). Madrid found that the Court may have been in a quandary when it decided *Cleburne*. *Id.* It may have approved of the Fifth Circuit's decision; however, it did not want to "open the door" to another suspect classification. *Id.* He speculates that this may be the reason why the Court gave rational basis review more "bite." *Id.*

<sup>303</sup> *Doyle*, *supra* note 63, at 403. *Doyle* found that the Court deviated from traditional rational basis review in two ways. *Id.* First, instead of searching its "collective imagination" to find a rational relationship to a state interest, it carefully examined the City's reasons for treating the mentally retarded differently than other group housing communities. *Id.* Second, the Court required a "high degree of correlation" between the classification and the purpose of the ordinance. *Id.*

<sup>304</sup> *City of Cleburne*, 473 U.S. at 458 (Marshall, J., dissenting). Justice Marshall, who was joined by Justices Brennan and Blackmun, found that the Court engaged in a "probing inquiry" when it evaluated the statute. *Id.* See also *Doyle*, *supra* note 63, at 403. *Doyle* found that the Court "dissect[ed] the record" when it analyzed the ordinance. *Id.*

<sup>305</sup> *Cleburne*, 473 U.S. at 460 (Marshall, J., dissenting). Justice Marshall felt that the Court's approach was unfortunate because the Court did not provide guidance for determining when a more searching inquiry should be conducted. *Id.* He wrote that without further guidance, lower courts would be left in the dark and the Court would remain unaccountable for its decisions. *Id.* at 459-60. See also *infra* note 302 for the Court's analysis

traditional rational basis review, the state is not obligated to produce evidence to defend its classification.<sup>306</sup>

Most relevant to the issue of unconstitutional motivation in *Cleburne* was the Court's finding that negative attitudes of surrounding property owners toward a home for the mentally retarded would not provide the City with a rational reason for denying the permit.<sup>307</sup> The Court stated that negative attitudes, unsubstantiated by other factors, would not furnish a permissible basis for treating the mentally retarded differently.<sup>308</sup> The Court struck down the ordinance, finding that there was no rational basis, in part, because it was based on "irrational prejudice" against the mentally retarded.<sup>309</sup>

## 2. Rational Basis Review after *Cleburne*

After *Cleburne*, the Court's role in rational basis review was unclear.<sup>310</sup> Two forms of rational basis review emerged: first order

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of the City's proposed interests. In particular, note how the Court examines each reason carefully to determine if it is a legitimate interest.

<sup>306</sup> *Saphire*, *supra* note 63, at 613. *Saphire* noted that the Court's inquiry was "odd" because a state does not have an obligation to justify its classification under traditional rational basis review. *Id.*

<sup>307</sup> *Cleburne*, 473 U.S. at 448. The Court also evaluated three other state interests offered by the City. *Id.* at 448-50. First, the City was concerned that students at a nearby high school would harass the occupants of the group home. *Id.* at 448. The Court found that such "vague, undifferentiated fears" would not serve as a legitimate interest. *Id.* at 449. Second, the City objected to the location of the group home because it was located on a five hundred year old flood plane. *Id.* The Court stated that this concern could not justify treating the mentally retarded differently since other dwellings could be located at the same site, such as nursing homes or hospitals. *Id.* Third, the City was concerned with the size and the number of occupants in the proposed Center. *Id.* The Court found that this interest was unsupported because there was no evidence showing that mentally retarded were different from other groups who possibly could occupy the site, such as nursing home residents or fraternity brothers. *Id.* at 449-50.

<sup>308</sup> *Cleburne*, 473 U.S. at 448. When evaluating the negative attitudes of nearby property owners, the Court found, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* (citation omitted).

<sup>309</sup> *Id.* at 450. The Court also invalidated the ordinance for the reasons stated at *supra* note 307.

<sup>310</sup> *Heller v. Doe*, 509 U.S. 312, 337 (1993) (Souter, J., dissenting) ("While the Court cites *Cleburne* once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day *Cleburne*'s status is left uncertain."); *Saphire*, *supra* note 63, at 619 (finding that *Cleburne* created, at the minimum, a moderate degree of doctrinal confusion and instability in the lower courts).

concepts.<sup>324</sup> For example, it backed away from *Cleburne* when it found that non-suspect classifications are accorded a "strong presumption of validity."<sup>325</sup> Instead of actively evaluating the government's interests, the Court found that any "reasonably conceivable" interest could provide a rational basis for the government's action.<sup>326</sup> The Court also retreated from *Cleburne* when it re-established that the state is not required to provide a rational basis for its actions.<sup>327</sup> It stated that a classification could be constitutional even if was supported by a "rational speculation unsupported by evidence or empirical data."<sup>328</sup> Overall, the Court found that the statute was constitutional because there were "plausible rationales" for the classifications.<sup>329</sup>

After *Heller*, it was arguable whether the Court returned to first order rational basis review.<sup>330</sup> *Heller* restated many of the deferential rational basis principles that signaled the return to a conservative approach.<sup>331</sup> However, *Cleburne* is distinguishable from *Heller*.<sup>332</sup> *Cleburne* evaluated discrimination directed toward a particular classification, the mentally retarded, while *Heller* evaluated differential

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<sup>324</sup> See *infra* notes 325-29 and accompanying text. See also Saphire, *supra* note 63, at 623-24 (finding that the tone of *Heller* suggested a deferential approach toward rational basis review).

<sup>325</sup> *Heller*, 509 U.S. at 319.

<sup>326</sup> *Id.* at 320 ("A classification 'must be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.'") (citations omitted).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)).

<sup>329</sup> *Heller*, 509 U.S. at 333. The Court concluded that it was rational to create a higher standard of proof for the commitment of the mentally ill because mental illness is more difficult to diagnose. *Id.* at 321-24. The Court also reasoned that the disparity in the standards was justified because the methods of treatment for the mentally retarded are less invasive than methods used to treat the mentally ill. *Id.* at 324. The mentally ill are subjected to intrusive medical and physical treatments that the mentally retarded do not receive. *Id.* Overall, the Court was highly deferential in its analysis, concluding:

In sum, there are plausible rationales for each of the statutory distinctions challenged by respondents in this case. It could be that 'the assumptions underlying these rationales are erroneous, but the very fact that they are arguable is sufficient, on rational basis review, to immunize the legislative choice from constitutional challenge.'

*Id.* (citations omitted).

<sup>330</sup> Saphire, *supra* note 63, at 599. Saphire focused his article on the "death of *Cleburne*." *Id.* He found that the form of rational basis employed in *Cleburne* was "short-lived" and that expecting to win a case under the current rational basis standard "is like expecting to win the lottery." *Id.* at 639.

<sup>331</sup> See *supra* notes 325-29 and accompanying text.

<sup>332</sup> See *supra* note 322.

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treatment within a classification.<sup>333</sup> This may account, in part, for the differences in the Court's approach. Furthermore, *Heller* did not specifically overrule *Cleburne*.<sup>334</sup> Thus, active rational basis review can still be used to analyze classifications based purely on prejudice or vindictive motivations.<sup>335</sup> Recently, the Court used an active rational basis analysis to strike down a prejudicial classification in *Romer v. Evans*.<sup>336</sup>

3. The Reaffirmation of Second Order Rational Basis in *Romer v. Evans*<sup>337</sup>

In *Romer*, the Supreme Court held that an amendment to the Colorado Constitution, which prohibited government action to protect homosexuals from discrimination, violated the Equal Protection Clause.<sup>338</sup> The Court evaluated the amendment under the rational basis standard, finding that "discrimination of an unusual character especially suggest[s] careful consideration to determine whether [it is] obnoxious to the constitutional provision."<sup>339</sup> The Court found that the amendment

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<sup>333</sup> See *supra* notes 301-09, 321-29 and accompanying text.

<sup>334</sup> *Heller*, 509 U.S. at 337 (Souter, J., dissenting) (stating that the Court did not purport to overrule *Cleburne* when it decided *Heller v. Doe*). See also Saphire, *supra* note 63, at 628. Professor Saphire found that while the general prospects for Equal Protection claims under the rational basis standard look bleak, there may be limited circumstances in which the *Cleburne* form of rational basis review will be successful. *Id.* at 628-33.

<sup>335</sup> Saphire, *supra* note 63, at 616-17, 628-31. Saphire stated that, even after *Heller*, *Cleburne* can still be understood as a prohibition against classifications that are motivated by prejudice alone. *Id.* at 616. He also reasoned that some classifications may still be found irrational after *Heller* because the Court acknowledged that, even under the rational basis standard, the government's interests must be grounded in reality. *Id.* at 631. See also *Heller*, 509 U.S. at 321 ("[E]ven the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation.").

<sup>336</sup> 517 U.S. 620 (1996).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 635-36. In *Romer*, the citizens of Colorado adopted an amendment to the state constitution, known as "Amendment 2," in a state wide referendum. *Id.* at 623. Amendment 2 was enacted in response to ordinances that had been passed in several municipalities prohibiting discrimination against homosexuals in areas such as housing, employment, education, public accommodations, and health and welfare services. *Id.* at 623-24. Amendment 2 repealed these ordinances and prohibited all legislative, executive, or judicial action designed to protect homosexuals. *Id.* at 624. Members of the homosexual community, as well as the municipalities whose ordinances had been overturned, filed a suit to have Amendment 2 declared invalid, alleging that it subjected them to immediate and substantial discrimination. *Id.* at 625.

<sup>339</sup> *Romer*, 517 U.S. at 633. The state's principal argument was that Amendment 2 merely put gays and lesbians in the same position that all other citizens occupy. *Id.* at 626. The Court found that this interest was invalid because it imposed a broad disability upon a single named group. *Id.* at 632. The Court also reasoned that Amendment 2 was based

created a disadvantage for homosexuals which gave rise to an "inevitable inference" that the statute was motivated by animosity.<sup>340</sup> The Court concluded that a desire to harm a politically unpopular group cannot constitute a legitimate government interest and declared that the amendment was unconstitutional because it did not have a rational relationship to a legitimate government interest.<sup>341</sup>

The Court's approach in *Romer* is very similar to *Cleburne*, lending support to the proposition that second order rational basis review survives *Heller*.<sup>342</sup> The *Romer* Court carefully scrutinized the rationality of Colorado's amendment, looking beyond any conceivable rational basis to evaluate the motivations behind the amendment.<sup>343</sup> While *Heller* established that the state is not required to provide evidence to support the rationality of its classification,<sup>344</sup> heightened scrutiny of the government's interest is still permissible where animosity or prejudice form the basis for a classification.<sup>345</sup>

Thus, *Romer* supports the application of a heightened form of rational basis review to "class of one" claims. Like the plaintiffs claim in *Romer*, the core allegation of a "class of one" claim is vindictive or irrational treatment.<sup>346</sup> While "class of one" plaintiffs are the victims of non-class based discrimination, the Court in *Village of Willowbrook v. Olech*,<sup>347</sup> indicated that the principles that apply to classifications can also

upon animosity toward homosexuals, which can never be the basis for government action. *Id.* at 634-35.

<sup>340</sup> *Id.* at 634.

<sup>341</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.") (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>342</sup> This argument is even more compelling under the theory that the levels of Equal Protection scrutiny are not discrete categories, but rather a continuum. See *supra* note 63. If Equal Protection review is viewed as a continuum of increasing scrutiny, it is possible to have different levels of analysis within a particular form of review, such as rational basis.

<sup>343</sup> See *supra* notes 338-41 and accompanying text.

<sup>344</sup> *Heller*, 509 U.S. at 320. See also *Madrid*, *supra* note 302, at 204-05 (finding that, after *Heller*, it is clear that there is no burden on the government to justify the rationality of its decision).

<sup>345</sup> *Doyle*, *supra* note 63, at 404-08. *Doyle* argued that a more exacting level of rational basis scrutiny should be employed where the rights of a disfavored group are involved. *Id.* at 408. He found that this would give the courts the flexibility to "probe the motivations behind suspicious discriminatory action." *Id.*

<sup>346</sup> See *supra* Part III.

<sup>347</sup> 120 S. Ct. 1073 (2000) (per curiam).



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be used to evaluate "class of one" claims.<sup>348</sup> Therefore, the *Romer* form of rational basis review that scrutinizes the government's motivations can be used to evaluate "class of one" claims. The Model Judicial Reasoning will further explain how the approach from *Romer* can be used to analyze "class of one" claims. However, before proceeding to the Model Judicial Reasoning, this Note will discuss the relationship between Equal Protection and Substantive Due Process with regard to "class of one" claims.

### D. Substantive Due Process

Individuals who experience vindictive state action may have an additional claim under the Substantive Due Process Clause of the Fourteenth Amendment.<sup>349</sup> Like the Equal Protection Clause, the Substantive Due Process Clause protects fundamental rights.<sup>350</sup>

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<sup>348</sup> *Id.* at 1074. See also *Baumgardner*, 2000 WL 1100438, at \*13-15 (finding that although *Cleburne* and *Romer* involved classifications, the reasoning in those cases is applicable to "class of one" claims).

<sup>349</sup> U.S. CONST. amend. XIV, § 1. The Due Process Clause states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." *Id.* The Due Process Clause of the Fourteenth Amendment is the source of three different types of constitutional protection. CHEMERINSKY, *supra* note 53, at 419-20. The first type of Due Process protection incorporates specific provisions named in the Bill of Rights. Rosalie Berger Levinson, *Protection against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991). The Supreme Court incorporates these provisions through the concept of liberty. *Id.* This means that the states, as well as the federal government, must obey the commands of the Bill of Rights. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

The second type of Due Process recognized by the Supreme Court, and the type addressed in this Note, is Substantive Due Process. CHEMERINSKY, *supra* note 53 at 420. This form of Due Process prohibits the government from engaging in arbitrary actions regardless of the fairness of the procedures used to implement them. See *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982); *Moore v. East Cleveland*, 431 U.S. 494, 498-99 (1977).

The third type of Due Process is a guarantee of fair procedures, and is referred to as Procedural Due Process. CHEMERINSKY, *supra* note 53 at 419. Under Procedural Due Process, a state may not execute, imprison, or fine a defendant without a fair trial, nor may the state deprive a person of their property without adequate procedural safeguards. See *Groppi v. Leslie*, 404 U.S. 496, 499-501 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

<sup>350</sup> CHEMERINSKY, *supra* note 53, at 639. Professor Chemerinsky has noted that most of the fundamental rights have been protected under both the Due Process and the Equal Protection Clauses. *Id.* For example, the Supreme Court has held that the right to contraceptives is protected under Equal Protection and Substantive Due Process. Compare *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (upholding the right to use contraception under the Equal Protection Clause), with *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (finding that the right to use contraception is a protected liberty interest under Due Process). Professor Chemerinsky found that there is not much to distinguish as to whether the Court uses Equal Protection or Substantive Due Process to protect a

Fundamental rights under Substantive Due Process include marriage,<sup>351</sup> procreation,<sup>352</sup> and familial privacy.<sup>353</sup> In addition to fundamental rights, the Substantive Due Process Clause also protects individuals from arbitrary government conduct.<sup>354</sup> Thus, many "class of one" plaintiffs may be able to allege a Substantive Due Process violation in addition to an Equal Protection claim. While Equal Protection and Substantive Due Process are defined differently, in certain situations there is an overlap between the theories.<sup>355</sup> First, however, it is important to highlight why they are different.

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fundamental right, because under either provision strict scrutiny is generally used. CHEMERINSKY, *supra* note 53, at 639.

<sup>351</sup> See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

<sup>352</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992); *Carey*, 431 U.S. at 688-89; *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold*, 381 U.S. at 485; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>353</sup> See, e.g., *Moore*, 431 U.S. at 499; *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>354</sup> See *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (emphasizing that "the touchstone of due process is protection of the individual against arbitrary action of the government"). In *Lewis*, the Court analyzed the plaintiff's claim under the "shocks the conscience" standard. *Id.* at 846. Under this test, behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" will violate Due Process. *Id.* at 848 n.8. The Court found that this inquiry is circumstance based, dependant on the totality of the facts. *Id.* at 850. See also Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 576-77 (1990). In his article, Phillips outlined the various tests used to evaluate substantive due process claims. *Id.* He found that courts use rational basis review for social and economic regulations, prison regulations, and in public employment cases. *Id.* at 576. Courts use the arbitrary or capricious standard in public employment cases and land use cases. *Id.* The shocks the conscience standard is used for miscellaneous claims, while factor-based balancing tests are used primarily in excessive force cases. *Id.* Courts are also deferential to professional standards test to evaluate the treatment of patients in mental institutions, and a reckless or deliberate indifference standard to evaluate special relationship cases. *Id.* at 576-77.

<sup>355</sup> See CHEMERINSKY, *supra* note 53, at 639; Paul D. Wilson, *Nasty Motives: A Consideration of Recent Federal Damages Claims in Land-Use Cases*, 31 URB. LAW 937, 938 (1999) (stating that landowners often use Due Process and Equal Protection claims to challenge municipal action); Christopher R. Bryant, Comment, *Zoning Out Due Process Rights: W.J.F. Realty Corp. v. Town of Southhampton*, 73 ST. JOHN'S L. REV. 565 (1999) (explaining that failure to apply zoning regulations, building, and housing codes in a rational manner may result in liability under both the Due Process and Equal Protection Clauses). See also *Gutzwiller v. Ferik*, 860 F.2d 1317, 1329 (6th Cir. 1988) ("[I]nvidious discrimination prohibited by the equal protection clause . . . also constitutes an arbitrary and capricious deprivation of the individual's liberty interest."); *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988) ("[T]he due process and equal protection theories in this case are practically identical, both being grounded on the allegation of arbitrary law enforcement activity.").

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The Equal Protection Clause is violated when the government intentionally treats persons who are similarly situated differently,<sup>356</sup> while the Due Process Clause is violated when the government treats someone irrationally, even if it treats everyone similarly.<sup>357</sup> Substantive Due Process claims are also distinguishable from Equal Protection claims because some courts require a Substantive Due Process plaintiff to show that the government arbitrarily deprived them of a liberty or a property interest.<sup>358</sup> These two claims can overlap, however, when a government official takes vindictive action against an individual, treating him differently from others who are similarly situated.<sup>359</sup> There are several cases in which plaintiffs have alleged Equal Protection and Substantive Due Process violations.<sup>360</sup>

However, Equal Protection and Substantive Due Process are distinct claims with different elements.<sup>361</sup> While there is some overlap

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<sup>356</sup> See *supra* note 60 and accompanying text.

<sup>357</sup> CHEMERINSKY, *supra* note 53, at 639. See also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (noting that plaintiffs raised only Substantive Due Process claims because similarly situated persons were treated the same in their allegations).

<sup>358</sup> Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 626 (1992) ("Substantive due process only applies if the challenged government action affected an interest protected by the due process clauses, namely, life, liberty, or property."). See also *Front Royal and Warren County Indust. Park Corp. v. Town of Front Royal, Virginia*, 135 F.3d 275, 288 (4th Cir. 1998); *Mackenzie v. City of Rockledge*, 920 F.2d 1554, 1558 (11th Cir. 1991); *DiMartini v. Ferrin*, 906 F.2d 465, 467 (9th Cir. 1990); *Nolin v. Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990); *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990); *Colon v. Schneider*, 899 F.2d 660, 666-67 (7th Cir. 1990). But cf. J. Michael McGuinness & Lisa A. McGuinness *Parlagreco, The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV. 1129, 1133 (1990) ("Substantive due process rights are not dependant upon property rights under state law as in the case of procedural due process rights.").

<sup>359</sup> CHEMERINSKY, *supra* note 53, at 639.

<sup>360</sup> See *Brennan v. Stewart*, 834 F.2d 1248, 1258 (5th Cir. 1988) (stating that both Due Process and Equal Protection claims are properly alleged); *Scott v. Greenville County*, 716 F.2d 1409, 1414 (4th Cir. 1983) (finding that there was standing to plead Equal Protection and Substantive Due Process claims for the denial of a building permit); *Sternaman v. County of McHenry*, 454 F. Supp. 240, 250 (N.D. Ill. 1978) (stating that Equal Protection and Due Process were denied by the arbitrary refusal to renew the permit of a disfavored non-minority).

<sup>361</sup> *Bryant*, *supra* note 355, at 565. Bryant explains that while a plaintiff may have a claim under both Equal Protection and Due Process, it will be easier for a plaintiff in the Second Circuit to prevail under an Equal Protection claim. *Id.* See also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978); *Browning-Ferris Indus. of South Atl., Inc. v. Wake County*, 905 F. Supp. 312, 324 (holding that county's denial of sewer line violated plaintiff's right to Substantive Due Process, but not plaintiff's Equal Protection rights).

between the two theories, they are not identical.<sup>362</sup> A plaintiff may be able to show that he was treated differently from others similarly situated, but he may not have a protected liberty or property right that would allow him to bring a Substantive Due Process claim.<sup>363</sup> With the similarities between Equal Protection and Substantive Due Process in mind, this Note now turns to a standard for "class of one" claims.

#### V. A MODEL JUDICIAL REASONING FOR EQUAL PROTECTION "CLASS OF ONE" CLAIMS

This Section proposes a Model Judicial Reasoning for federal and state courts to apply when they evaluate "class of one" claims.<sup>364</sup> A uniform approach to "class of one" jurisprudence will eliminate the confusion that currently exists among the appellate courts.<sup>365</sup> While the Seventh Circuit provides a viable approach, it does not use the rational basis standard.<sup>366</sup> Therefore, the Model Judicial Reasoning combines aspects of the Seventh Circuit's "vindictive action" approach with the traditional elements of rational basis review.

Furthermore, the proposed Reasoning strikes a balance between the competing concerns of individual rights and government discretion.<sup>367</sup> The *Romer* rational basis standard provides this balance. It

<sup>362</sup> See *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988) (finding that "the concepts of equal protection and substantive due process are defined differently [even though they are] very similar concepts"); *Kevin v. Thompson*, No. 99C 7882, 2000 WL 549440, at \*6 (N.D. Ill. May 1, 2000) (finding that a plaintiff must allege more than irrational and arbitrary action to show improper motive in a "class of one" claim).

<sup>363</sup> See e.g., *Thigpen v. Bibb County*, 216 F.3d 1314, 1320 (11th Cir. 2000) ("[O]nly the due process clause alludes to property and liberty. In contrast, the applicability of the equal protection clause is not limited to only those instances in which property and liberty interests are implicated."); *John Corp. v. City of Houston*, 214 F.3d 573, 577 n.2 (5th Cir. 2000) ("Unlike the Due Process Clause, the Equal Protection Clause does not require that the governmental action work a deprivation of a constitutionally protected property or liberty interest.").

<sup>364</sup> This Note proposes a standard for both state and federal courts because state courts have concurrent jurisdiction to hear claims under 42 U.S.C. § 1983. See *supra* note 239.

<sup>365</sup> See *supra* Part III for the ways in which the Appellate Courts currently analyze "class of one" claims for vindictive state action.

<sup>366</sup> See *supra* note 237 and accompanying text.

<sup>367</sup> For a discussion of the balance between individual rights and the discretionary interests of government officials see *Crawford-El v. Britton*, 523 U.S. 574, 590-91 (1998), *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982), and *Butz v. Economou*, 438 U.S. 478, 506 (1978). In *Harlow*, the Supreme Court recognized that in situations where government officials abuse their power, an action for damages may be the only realistic alternative that some individuals have. *Harlow*, 457 U.S. at 813-14. However, the Court stated that individual interests had to be balanced against the costs that government officials must bear as the

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realizes the need to protect the plaintiff's civil rights by allowing the fact finder to examine the motives behind the state or local action.<sup>368</sup> At the same time, it remains deferential toward the government's need to make decisions without the fear of protracted litigation by asking if there is a *legitimate* rational basis for the decision. While it is arguable that discriminatory behavior toward individuals is not as historically documented or severe as discrimination toward groups, such as the mentally retarded or homosexuals, it is important to remember that individuals, standing alone against a vast government bureaucracy, are significantly outmatched.<sup>369</sup>

Finally, the presence of a "vindictive action" element will ensure that insubstantial claims do not turn into constitutional violations.<sup>370</sup> If plaintiffs fail to allege spite or ill will, their claim may be dismissed under a Rule 12(b)(6) motion to dismiss for failure to state a claim or under a Rule 56 motion for summary judgment.<sup>371</sup> Officials are also protected from liability in their individual capacity under qualified immunity.<sup>372</sup> This presents another substantial hurdle for plaintiffs to overcome. These elements, combined with the great amount of deference accorded to government actions, even under second order rational basis review, will give a plaintiff's attorney much to consider before filing a "class of one" claim.<sup>373</sup>

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result of litigation. *Id.* at 814. See *supra* notes 227-28 and accompanying text for the facts and the holding of *Harlow*.

See also Saphire, *supra* note 63, at 601. Professor Saphire also found that a conflict exists between judicial and legislative functions when a court examines legislation. *Id.* The response has been to apply three levels of scrutiny to Equal Protection claims and to use the appropriate level for each claim. *Id.* This approach can also apply to executive and administrative decisions, creating a balance of power between the executive and judicial branches on a broad level and between judges and state actors on a more specific level. See *supra* notes 92-98.

<sup>368</sup> A federal cause of action will provide additional protection for "class of one" claimants. Powerful government officials are often allied with local state court judges, making it difficult for individuals to overcome this balance in political power. McGuinness, *supra* note 17, at 336. Access to the federal courts will provide an unbiased forum for their claim. *Id.*

<sup>369</sup> See *supra* note 172.

<sup>370</sup> See *supra* notes 193-96 and accompanying text.

<sup>371</sup> See *supra* note 35 and 249 for Rule 12(b)(6) and Rule 56 standards.

<sup>372</sup> See *supra* notes 243-50 and accompanying text.

<sup>373</sup> See Wilson, *supra* note 355, at 940. Wilson stated that under the Seventh Circuit's "vindictive action" requirement, "most landowners, if they have competent legal advice, [will not] race off to court seeking damages on the first occasion that they cross swords with municipal officials." *Id.*

The following Section provides an analytical framework for analyzing "class of one" claims brought under 42 U.S.C. § 1983. This Note will use the facts of Ms. Olech's lawsuit against the Village of Willowbrook to illustrate how the analysis proceeds. The Model Judicial Reasoning provides the steps for analyzing a claim once it has proceeded to trial; thus, it assumes that the court has already performed the qualified immunity analysis and the claim has survived a motion for summary judgment.<sup>374</sup>

*Step One. To establish a prima facie "class of one" claim, the plaintiff must show that:*

- (A) She was intentionally singled out from others who were similarly situated; and*
- (B) She was singled out solely because of the official's vindictive motivations or ill will towards her.*

#### *Commentary*

Under the rational basis standard, the plaintiff has the burden of establishing disparate treatment.<sup>375</sup> For "class of one" plaintiffs, this burden consists of two parts. Under Part A, the plaintiff must prove that the official intentionally singled her out from others who are similarly situated. The first part of the plaintiff's burden complies with the Supreme Court's holding in *Village of Willowbrook v. Olech*.<sup>376</sup> In *Olech*, the Court found that a "class of one" plaintiff must allege that she was intentionally treated differently from others who are similarly situated.<sup>377</sup> Intent is an essential element of Part A. It is a core element

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<sup>374</sup> See *supra* notes 277-85 and accompanying text for an explanation of how a court could conduct the qualified immunity analysis.

<sup>375</sup> See *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (per curiam) (finding that a "class of one" plaintiff must allege that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"); *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000) (finding that a plaintiff alleging an Equal Protection violation has the burden of showing that "(1) he is otherwise similarly situated to members of the unprotected class; (2) he was treated differently from members of the unprotected class; and (3) the defendant acted with discriminatory intent"); *Edwards v. Johnson*, 209 F.3d 772, 780 (5th Cir. 2000) (stating that to bring an Equal Protection claim, a plaintiff must prove the existence of "purposeful discrimination").

<sup>376</sup> 120 S. Ct. 1073 (2000) (per curiam).

<sup>377</sup> *Id.* at 1074. See also *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998) ("[A]t the heart of any equal protection claim must be an allegation of being treated differently than those similarly situated.").

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of all equal protection claims<sup>378</sup> and, generally, government officials are protected from lawsuits based upon negligent action.<sup>379</sup>

Furthermore, it is necessary for the plaintiff to show that she was singled out from others similarly situated. This is another essential element for Equal Protection cases; without it, the plaintiff will not have a valid claim.<sup>380</sup> To determine if the plaintiff is similarly situated with other relevant persons, the court should look at the "relevant aspects" of those who are in a comparable situation to determine if they are "roughly equivalent."<sup>381</sup>

In addition to intent, the *Olech* Court found that the plaintiff must establish that there was no rational basis for the treatment.<sup>382</sup> Part B of the plaintiff's burden of proof satisfies this requirement. It incorporates the Seventh Circuit's "vindictive action" theory with the rational basis standard. If the plaintiff can show that the decision to single her out was based purely on the desire to vindictively single her out, it follows that there is no rational basis for the decision.<sup>383</sup> In *Village*

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<sup>378</sup> See *Village of Arlington Heights*, 429 U.S. at 265 (finding that it is "well established" that a plaintiff is required to show intent or purpose for an Equal Protection violation). See also *supra* note 375. The requirement of intentional or purposeful discrimination is reflected in early "class of one" claims and has continued to be an element of the plaintiff's prima facie case in recent decisions. See *supra* Parts II.B. and III.

<sup>379</sup> See *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (finding that plaintiffs cannot bring a constitutional claim for negligent government action); *Lemoine v. New Horizons Ranch and Ctr., Inc.*, 174 F.3d 629, 635 (5th Cir. 1999) (finding that a violation of federal law does not create a cognizable Section 1983 claim if defendant merely acted negligently).

<sup>380</sup> See *supra* notes 60 and 375 and accompanying text. However, a plaintiff who is unable to prove this element may still have a claim for vindictive treatment under Substantive Due Process. See *supra* Part IV.D.

<sup>381</sup> *Economic Opportunity Comm'n v. CEDC*, 106 F.Supp.2d 433, 439 (E.D.N.Y. 2000). The Court noted, that "the test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." *Id.* This standard is similar to the test that the Second Circuit used in *Rubinovitz v. Rogato*, 60 F.3d 906, 909-10 (1st Cir. 1995). In *Rubinovitz*, the court found that an Equal Protection plaintiff must allege that they were singled out from others who were similarly situated "in all relevant aspects." *Id.* See also *supra* note 154 and accompanying text.

<sup>382</sup> *Vill. of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (*per curiam*).

<sup>383</sup> Under the Seventh Circuit's approach, a single act can provide the basis for an Equal Protection claim. See *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) (finding that an "orchestrated campaign" was not essential to the plaintiff's claim), *aff'd*, 120 S. Ct. 1073 (2000) (*per curiam*). This contrasts with the First Circuit's approach in *Rubinovitz v. Rogato*, 60 F.3d 906, 912 (1st Cir. 1995), where the court looked for an "orchestrated campaign causing substantial harm." *Id.* This Note takes the position that a single act will be sufficient for a "class of one" claim and it speculates that the First Circuit may have also taken this position if *Olech* was available for their analysis.

of *Arlington Heights*,<sup>384</sup> the Supreme Court identified several factors that can be used to determine intent or the motivations behind government action.<sup>385</sup> These factors include, but are not limited to:

- (1) the historical background of the decision;<sup>386</sup>
- (2) the specific sequence of events leading up to the challenged decision;<sup>387</sup>
- (3) departures from the normal procedural sequence;<sup>388</sup> and
- (4) the legislative or administrative history of the action.<sup>389</sup>

Under Part A of this Section, Ms. Olech will have to show that Village Officials intentionally singled her out from others who are similarly situated for discriminatory treatment and that this treatment was motivated by ill will. The fact finder could begin this analysis by determining if Ms. Olech was singled out from others who are in a position that is "roughly equivalent" to Ms. Olech's. To support this allegation, Ms. Olech could demonstrate that other occupants of single family homes in the Village of Willowbrook were not required to provide a thirty-three foot easement for water services. If the fact finder concludes that Ms. Olech was singled out from others similarly situated, it would proceed to the Part B of the analysis, and determine if Ms. Olech

<sup>384</sup> 429 U.S. 252 (1977).

<sup>385</sup> *Id.* at 265-69. In *Arlington Heights*, the Court found that a plaintiff is not required to prove that the challenged action was based solely on discriminatory intent. *Id.* at 265. This differs from the Seventh Circuit's requirement for "class of one" plaintiffs, who must show that the alleged discrimination action was taken purely for vindictive reasons. See *supra* notes 176-186 and accompanying text. However, *Arlington Heights* was a case that involved racial discrimination, which receives strict scrutiny. *Id.* at 264-65. See also *supra* note 68 and accompanying text. "Class of one" claims only receive rational basis scrutiny, and this may account for the difference in the plaintiff's burden of establishing causation.

<sup>386</sup> *Arlington Heights*, 429 U.S. at 267. See also *Yeshiva Chofetz Chiam Radin, Inc. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 354 (S.D.N.Y. 2000). The *Yeshiva* court interpreted *Arlington Heights* to include six factors for determining discriminatory purpose:

[T]he historical background of the decision, the specific sequence of events leading up to it, departures from the normal procedural sequence, substantive departures from factors usually considered important by the decisionmaker, the legislative or administrative history (including contemporary statements of decisionmakers), and in extraordinary circumstances, testimony concerning the purpose of official action (subject to the possible limitations of legislative immunity).

*Id.* This Note chooses to limit the factors to those that are the most relevant to "class of one" claims for simplicity.

<sup>387</sup> *Village of Arlington Heights*, 429 U.S. at 267.

<sup>388</sup> *Id.*

<sup>389</sup> *Village of Arlington Heights*, 429 U.S. 252 at 268.



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successfully alleged that she was intentionally singled out for vindictive treatment. At this point, the intent and the motive elements would merge together because there is a significant overlap between the two concepts.<sup>390</sup> An action that is motivated by ill will is also intentional. Therefore, it is more efficient to try these elements together.

To support her "class of one" claim, Ms. Olech could rely on the *Arlington Heights* factors to show an illicit motive. Under the historical background factor, she could present evidence regarding her prior lawsuit against the Village.<sup>391</sup> Ms. Olech would emphasize that the lawsuit was bitterly contested and generated substantial ill will towards her.<sup>392</sup> This evidence would show a possible motivation for singling her out for vindictive treatment. It could also establish that the Village's decision was not the result of negligence. Similarly, this evidence could be used to prove the second factor, the specific sequence of events leading up to the challenged decision. Ms. Olech could show that the lawsuit occurred prior to the Village's decision to single her out for a thirty-three foot easement, proving that the subsequent decision was motivated by the ill will from the law suit.

Furthermore, Ms. Olech could present evidence that the Village departed from its normal procedural sequence to satisfy the third factor. She would show that the Village's normal standard was to ask for a fifteen foot easement, while it required her to provide a thirty-three foot easement.<sup>393</sup> Finally, Ms. Olech could show that the administrative history regarding the Village's decision proves unlawful intent or malice. As evidence, Ms. Olech could introduce the letter from the Village attorney conceding that a fifteen foot easement would be sufficient.<sup>394</sup> If the judge or the jury is satisfied that Ms. Olech successfully met her burden of proof, Step Two would be implemented.<sup>395</sup>

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<sup>390</sup> While there is a significant overlap between motive and intent for the purposes of this analysis, this Note does not mean to imply that the concepts are the same. Black's Law Dictionary defines motive as "[s]omething, esp[ecially] a willful desire that leads one to act," while it finds that "intent is the state of mind accompanying an act." BLACK'S LAW DICTIONARY 1034, 813 (7th ed. 1999). It distinguishes motive from intent, stating "[w]hereas motive is the inducement to do some act, intent is the mental resolution or determination to do it." *Id.* at 813.

<sup>391</sup> See *supra* note 14 and accompanying text.

<sup>392</sup> See *supra* note 15 and accompanying text.

<sup>393</sup> See *supra* notes 5-6 and accompanying text.

<sup>394</sup> See *supra* note 9 and accompanying text.

<sup>395</sup> At this point in the trial, either party may move for a judgement as a matter of law under Rule 50. See FED. R. CIV. P. 50. It states, in pertinent part:

*Step Two. After the plaintiff has satisfied her burden of proof, the court shall inquire whether there is a rational relationship between the disparate treatment and the official's purpose for such treatment. To do so, the fact finder shall:*

*(A) Identify the government interest; and*

*(B) Examine whether the interest is rationally related to a legitimate purpose.<sup>396</sup>*

### *Commentary*

Under this standard, the fact finder must first identify a government interest.<sup>397</sup> This interest does not have to be the actual interest behind the official's decision, but it must be a plausible interest.<sup>398</sup> However, the inquiry would not end here. Under Step B, the court or the jury would utilize the approach from *Cleburne* to determine if the interest was legitimate or if it was merely a pretext for vindictive or

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(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

*Id.* When a court decides a motion for judgment as a matter of law, it must review all of the evidence in the record. *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000). The court is required to draw all reasonable inferences in favor of the nonmoving party, and it is not allowed to make credibility determinations or weigh the evidence. *Id.* If the motion is unsuccessful, the court should proceed to Step Two of the Model Judicial Reasoning.

<sup>396</sup> Madrid, *supra* note 302, at 198-99. Madrid stated that the first step in rational basis review is identifying a legitimate government interest. *Id.* at 198. The second step is determining if that interest is rationally related to a legitimate interest. *Id.* at 199.

<sup>397</sup> After *Heller v. Doe*, the government no longer has the burden of presenting legitimate interests to the fact finder. See *supra* note 344 and accompanying text. However, Professor Saphire found that while the government is not required to defend its actions, it is not precluded from doing so. See Saphire, *supra* note 63, at 612 n.95. He stated that defense attorneys may find it advantageous to offer a purpose for the action because rational basis review is so deferential that it will almost always be possible to find a plausible purpose. *Id.*

<sup>398</sup> See *supra* note 329.

irrational motivation.<sup>399</sup> This inquiry would involve weighing the *Arlington Heights* factors against the stated interest. The court or jury would have to determine if the evidence established proof of an illegitimate motive, or if the government's interest was the true motivation for the disputed action. This step is crucial to the plaintiff's case. Without it, it would be futile for many "class of one" plaintiffs to file a law suit because it is very easy to manufacture a "legitimate" interest.<sup>400</sup>

If the fact finder concludes that the government's decision was motivated by an illegitimate desire to harm the plaintiff, it would conclude that there was no rational basis for the action. The court should find in favor of the plaintiff and award appropriate damages.<sup>401</sup> But, if the fact finder remains unconvinced by the plaintiff's evidence of improper motive, it should conclude that the interest was legitimate and that there was a rational basis for treating the plaintiff differently.

In Ms. Olech's case, the court or the jury would begin by identifying a plausible reason for the Village's actions. For example, one plausible reason is that the Village singled-out Ms. Olech for a thirty-three foot easement to widen the road for public use.<sup>402</sup> Under the rational basis standard, this could qualify as a valid social interest.<sup>403</sup> This interest would be weighed against the evidence that Ms. Olech presented in Step One. The fact finder would have to determine if the ill will generated by Ms. Olech's prior law suit and the Village's deviation from its policy of requiring a fifteen foot easement can provide the basis for finding an illegitimate motive. In Ms. Olech's situation, it appears likely that the Village singled her out for discriminatory treatment based on ill will. However, the ultimate determination has yet to be made.<sup>404</sup>

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<sup>399</sup> This approach is based upon *Romer v. Evans*, 517 U.S. 620 (1996). See *supra* notes 337-341 and accompanying text for the facts and analysis of *Romer*.

<sup>400</sup> See *supra* note 396.

<sup>401</sup> See *supra* note 242 for the types of damages that are recoverable under 42 U.S.C. § 1983.

<sup>402</sup> See *supra* note 5 and accompanying text.

<sup>403</sup> The states are given wide latitude to regulate social and economic matters under the rational basis standard. See *supra* note 84 and accompanying text.

<sup>404</sup> In *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000) (per curiam), the Court upheld the Seventh Circuit's finding that Ms. Olech had presented a claim sufficient to survive a 12(b)(6) motion to dismiss. *Id.* at 1075. The case is currently pending.

## VI. CONCLUSION

Currently, there is no clear standard for analyzing "class of one" claims. The Supreme Court's decision in *Village of Willowbrook v. Olech* leaves many unanswered questions. This Note proposes that "class of one" claims should be analyzed under a heightened form of rational basis review. This approach is consistent with the Court's decision in *Romer v. Evans*. It combines elements of the Seventh Circuit's "vindictive action" approach with the traditional elements of the rational basis standard. An analysis of the motivations behind the disputed action will simultaneously provide plaintiffs with a viable claim and protect the government's interest in policy making. Plaintiffs will still have a difficult case to prove. However, a heightened rational basis standard will make it possible for them to have their day in court.

Nicole Richter

