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With Malice Toward One: Malice and the Substantive Law in "Class of One" Equal Protection Claims in the Wake of Village of Willowbrook v. Olech

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WITH MALICE TOWARD ONE: MALICE AND THE SUBSTANTIVE LAW IN “CLASS OF ONE” EQUAL PROTECTION CLAIMS IN THE WAKE OF VILLAGE OF WILLOWBROOK V. OLECH

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The role of motive is left unclear by the Supreme Court's decision. We described the class of equal protection cases illustrated by Olech as "vindictive action" cases and said that they 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."[1]

I. INTRODUCTION

It may be time to relearn the fundamentals of the Equal Protection Clause of the Fourteenth Amendment. According to the Supreme Court, in a brief and unassuming per curiam opinion in Village of Willowbrook v. Olech, violations of equal protection do not of necessity rely on class-based discriminations. Federal, state, and local governments can violate the equal protection rights of an individual qua individual; a so-called "class of one."[4] The ramifications of this decision are just now becoming clear, and it has already led to some surprising results in areas of statutory law thought to be well settled.[5]

The only question the Supreme Court undertook to answer was "whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group."[6] The answer was affirmative: "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."[7] This proposition is at once both entirely unobjectionable and striking. The Equal Protection Clause, of course, rests on the notion that those who are alike are entitled to be treated alike by the state, unless there is a rational, permissible public reason for treating persons or groups of people differently.[8] On the other hand, the notion was certainly prevalent that the Equal Protection Clause, drafted to insure that the class of former slaves obtained equal enjoyment of the law,[9] required some allegation of class-based discrimination.[10]

4. Id. at 564. See infra note 57 for a discussion of the interesting history of the derivation of this term in equal protection jurisprudence.
5. See, e.g., Byers v. Illinois State Police, 2000 U.S. Dist. LEXIS 17159 (N.D. Ill. Nov. 22, 2000) (allowing a claim for retaliation based on filing charges with the EEOC under Title VII to proceed as a "class of one" equal protection claim without exhausting administrative remedies). This case is taken up infra, see Part III.E.
7. Id. (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989)).
8. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").
10. Thus as eminent a jurist as Judge Skelly Wright was secure in asserting "the equal protection clause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case invoking the equal protection clause, if it is to succeed, must allege something more than a tort, personal to the plaintiff." Skelly Wright, Judicial Review and the Equal Protection Clause, 15 HARV. C.R.-C.L. L. REV. 1, 27 (1980).
In part, this conundrum is answered by the fact that the case law upon which the Olech decision rested came from equal protection jurisprudence dealing with taxation of property. The case cited by the Olech Court for its holding is Sioux City Bridge Co. v. Dakota County,11 which involved a claim that the plaintiff's property was taxed at its full value, while all other similar property was taxed at fifty-five percent of its value.12 The Sioux City Court stated that:

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. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.13

In fact, all of the so-called “class of one” decisions by the Supreme Court prior to Olech were limited to the realm of taxation.14 The narrow scope of these decisions presented a perfectly adequate ground for distinguishing the earlier precedent, albeit one not utilized.

As a result, it appears that an individual may state a claim for violation of equal protection by pleading: (1) the claimant is similarly situated, in all relevant respects, to others, (2) has been treated differently, and (3) the difference in treatment has no rational basis. The only additional gloss the Court adds to this guiding principle—gleaned from Sioux City—is “that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person . . . against intentional and arbitrary discrimination.”15

There is one further interesting twist to the decision, the significance of which becomes clear only with brief explication of the facts at issue in Olech. Ms. Olech sued the Village for a three-month delay in providing her access to the municipal water supply after her well dried up.16 The Village initially demanded a thirty-three-foot easement as a condition of the water main connection (as a dedication for a public roadway, sidewalks, and utilities), but finally relented, requesting only a fifteen-foot easement “consistent with Village policy regarding all other property in the Village.”17 The crux of the suit was that Willowbrook’s “demand was actually motivated by ill will resulting from [Olech’s] previous filing of an unrelated, successful lawsuit against the Village; and that the Village acted either with the intent to deprive Olech of her rights or in reckless disregard of her rights.”18

11. 260 U.S. 441 (1923).
12. Id. at 443-44.
14. See Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989) (holding that a decision to value newly sold property at its sale price, while not reassessing other properties, violates equal protection). One of the differences distinguishing the tax cases is that often, as in the Sioux City and Allegheny Pittsburgh Coal cases, the state constitution itself mandates “uniformity of taxing burdens.” Sioux City Bridge Co. v. Dakota County, 260 U.S. at 442; see also Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. at 338.
16. Id. at 563.
The claim was a constitutional tort brought under 42 U.S.C. § 1983\(^1\) charging a deprivation of Ms. Olech’s right to equal protection under the color of law.

The significance of the charge of “ill will” is that the Seventh Circuit had long recognized the validity of suits alleging violations of equal protection under § 1983 when “a powerful public official pick[s] on a person out of sheer vindictiveness.”\(^2\) The Court, however, refused to decide whether the “alternative theory of ‘subjective ill will,’” on which the Seventh Circuit relied, was any part of the “class of one” cause of action.\(^2\) Justice Breyer, writing the only signed opinion, was not so reticent in his concurrence. To him, the entire essence of the “class of one” equal protection claim (as compared with a “common instance of a faulty zoning decision” which offends no right) is precisely the allegation of “an extra factor . . . a factor that the Court of Appeals called ‘vindictive action,’ ‘illegitimate animus,’ or ‘ill will.’”\(^3\) Thus, in addition to the pleading standards listed above, the question fairly met in this Comment is whether malice of some stripe is any part of the pleading standards or of the substantive law in what will be hereinafter called an “Olech claim.”\(^4\)

This decision, though short in length, has the potential to fuel what some consider an already raging conflagration of litigation under § 1983\(^5\) by both expanding the pool of potential plaintiffs and by seeming to ease the pleading requirements. Such cases can pose a real threat to municipal and local governments that may be forced to defend a large number of seemingly insubstantial claims,\(^6\) while

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   Every 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 or other person within the jurisdiction thereof to the deprivation of any 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, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Id.


5. Id. at 565-66.

6. An “Olech claim” is defined as a § 1983 claim resting solely on a constitutional violation of one’s right to equal protection under the Fourteenth Amendment because a law, action, or decision of a state actor “intentionally discriminated” against that individual, similarly situated to others, for reasons unrelated to a legitimate state interest. This, of course, describes the paradigmatic case. Many of the cases discussed infra actually involve other constitutional or state or federal statutory claims. In those cases, the Olech claim is the equal protection violation premised on these grounds.

7. See Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (“Monroe [v. Pape, 365 U.S. 167 (1961)] changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law.”).

8. As will be discussed infra at Part IV, a suit is only insubstantial if it fails to state a claim under the substantive law. Even “objectively” silly suits can be “substantial” if they are recognized by the controlling law. The issue, therefore, is how should the law be adjusted so that “silly” means “insubstantial.”
public officials, police officers, and members of a wide range of boards and commissions face an increased threat of personal liability. Conversely, Olech may also be viewed as a landmark rule empowering citizens with a check on overweening and officious local "Napoleons" who would use their power to punish enemies or elicit pecuniary gain. Olech, therefore, is clearly destined to be an important case and as such, the many questions it has left open—principally with respect to its substantive requirements as to pleading standards and dispositive motions—need to be examined.

This Comment addresses the way courts in various circuits have dealt with the pleading requirements and dispositive motions in both their pre- and post-Olech decisions, both at the 12(b)(6) and summary judgment stages. Given the prevalence of § 1983 cases generally and the fact that a myriad of courts will ultimately shape the substantive law governing "class of one" equal protection claims, uniformity in this area of law will help guide judges deciding motions to dismiss, motions for summary judgment, governmental claims for qualified immunity, and when such cases should actually go to trial. The Supreme Court has elucidated somewhat contradictory mandates with respect to these questions, particularly in the balance between the rights of individuals actually harmed by abuses of official power and the need for a diligent and committed force of public officials who may be deterred either from service or from assiduous prosecution of the public's interest by the threat of invasive and costly suits and the potential of large damage awards.

In essence, the question is: How can courts weed out the "insubstantial" claims from meritorious ones in a relatively consistent way, without erring too far in one direction or another? But to answer this question it must first be determined what the substantive law actually is (because whether or not a claim is "substantial" depends on the whether it pleads or proves the elements of the cause of action), so it must also be asked: Does, or should, an Olech claim include the element of malice or ill will or some other type of illegitimate animus on the part of the public official?

In Part II, this Comment looks in detail at the Olech decision and its antecedents in the circuit courts, with particular emphasis on the Seventh Circuit (from which Olech emerged), which has developed the most extensive jurisprudence on "class of one" equal protection, and the Second Circuit. This Part examines the genesis of the term "class of one" and argues that it has made its way into equal protection law through possible misinterpretations of case law dealing with impermissible bills of attainder. Pre-Olech motions to dismiss, motions for summary judgment, and issues surrounding assertions of qualified immunity are also examined. Particular attention is paid to the issue of "malice" or "ill will" as an actual element of the cause of action.

26. See, e.g., Shipp v. McMahon, 234 F.3d 907 (5th Cir. 2000) (suggesting equal protection claim lies against police officer and mother of abusive husband if she vindictively denied plaintiff equal police protection from son); Forseth v. Vill. of Sussex, 199 F.3d 363 (7th Cir. 2000) (holding "malicious" conditioning of plat approval on conveyance of land to village administrator states an equal protection claim).
27. FED. R. CIV. P. 12(b)(6).
28. FED. R. CIV. P. 56.
29. See Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (holding that public officials should not be subjected to wide-ranging discovery or the threat of a trial unless their actions violate "clearly established law" at the time of the transgression).
Part III looks at the judicial responses to the *Olech* decision. Specifically, it surveys all significant cases decided on the authority of *Olech* with an eye towards determining which circuits read the element of malice into the cause of action, and how cases are decided at both the motion to dismiss and summary judgment stages. This Part will also examine, in the context of public officials’ claims of qualified immunity, how courts have treated pleading and discovery issues in cases where “subjective motivation” is considered a necessary element. It is generally hypothesized that courts will employ all the tools granted by case law and the Federal Rules of Civil Procedure to weed out apparently “meritless” claims while opening the door to plaintiffs faced with particularly egregious situations by adjusting the substantive law.

Part IV looks at the policies of public official liability and case law dealing with heightened pleading standards, primarily as enunciated by the Supreme Court. This Part highlights the frequent tension seen in decisions in cases arising under § 1983 with respect to qualified immunity and liabilities of public officials generally. This clash revolves around the competing desire to ease the pressure on exploding federal court dockets with the manifest injustice of denying aggrieved litigants with meritorious claims their “day in court.” Frequently, the problematic cases have, like *Harlow v. Fitzgerald*, involved subjective elements of malice or ill will. The Court has attempted to draw a line between cases in which the subjective motivation is offered as evidence of why the public official’s ostensibly reasonable action violates the rights of the plaintiff (and thus public officials are likely to be found qualifiedly immune, while plaintiffs are denied discovery) and of which malice is an “element” of the cause itself (and so, while plaintiffs get a chance at discovery into the subjective intent, the Court admonishes trial courts to use the rules of procedure to tailor the pre-trial process narrowly in order to do justice). It ends with a discussion on just how *Olech* throws these issues into stark relief, making it all but certain that the Court will end up addressing the very questions it left open in the case at hand. The suggestion is made that Justice Breyer’s concurrence in *Olech*, requiring an additional subjective element such as malice, be adopted—as many courts have done—as a necessary element of pleading and proof. Procedural and substantive methodologies for handling § 1983 suits generally, and *Olech* suits in particular, from Supreme Court and case law from the circuits is reviewed, and the discussion ends with application of principles to the *Olech* case itself.

Finally, Part V, the Conclusion, modestly offers suggestions drawn from recent cases on ways to adjust the substantive law response to a general understanding of what constitutes an “insubstantial” suit, while preserving access for those whose claims are objectively reasonable. Suggestions are made for district judges to use procedural tools, such as requests for more definite statements from plaintiffs who make their *Olech* claims solely in barebones, conclusory fashion; Rule 12(c) rulings on the pleadings; and, where warranted, liberal use of highly deferential rational basis review when it appears that federal courts are being used solely as “zoning boards of review” or as courts of first resort in matters of solely local interest and of purely state law. It sums up by anticipating a near term review of this case law.

II. THE OLECH DECISION AND ITS PREDECESSORS

The prototypical Olech case asserts that some adverse action (or inaction) by a local official, board, or legislative body was motivated by malice, ill will, or vindictiveness. As § 1983 claims require that a state actor, under color of law, deprive a person of either a statutory or constitutional right, these Plaintiffs assert that some adverse action treats them differently than others similarly situated and because of the improper motive, this difference in treatment lacks a rational basis. As a result, they claim that their right to equal protection under the law has been violated. Prior to Olech, circuit courts had divided on the issue of whether an individual could assert an Equal Protection Clause violation if they were not a member of a particular group or class. This split of authority is taken up below, as well as judicial interpretations of the pre-Olech law in handling dispositive motions and pleas of qualified immunity, followed by a discussion of the Olech decisions in district courts, the Seventh Circuit and the Supreme Court.

A. Cases Holding for "Class of One" Actions

The following circuits have lines of cases establishing a cause of action akin to the equal protection claim recognized by the Supreme Court in Olech. Note the divergent sources of law from which these lines of cases emerged. These include bill of attainder jurisprudence, selective prosecution cases, the Supreme Court’s holding in Snowden v. Hughes, and general principles of the Equal Protection Clause itself.

I. The Seventh Circuit

The Seventh Circuit, led particularly by Chief Judge Richard Posner, has taken a strong stance that when “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.” The Seventh Circuit, in deciding Olech, cited to one of its earlier decisions in the case of Esmail v. Macrane for the proposition that the equal protection clause “can... be invoked... by a person who can prove that ‘action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to “get” him for reasons wholly unrelated to any legitimate state objective.’” Both the Olech and Esmail opinions were authored by Judge Posner.

Esmail involved a liquor store owner who alleged that he was a victim of an “orchestrated campaign of official harassment directed against him out of sheer malice” by the mayor who also served as liquor control commissioner. The claim alleged differential treatment in the denial of his license renewal by the mayor.

32. See supra note 19.
33. Falls v. Town of Dyer, 875 F.2d 146 (7th Cir. 1984).
34. LeClair v. Saunders, 627 F.2d 606 (2d Cir. 1980).
35. 321 U.S. 1 (1944).
36. Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982).
37. Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995).
38. 53 F.3d 176 (7th Cir. 1995).
40. Esmail v. Macrane, 53 F.3d at 179.
who had apparently granted renewals to other owners who allegedly committed more serious violations. The district court dismissed the claim under Rule 12(b)(6), for apparently failing to adequately show differential treatment for the "same or similar" conduct. The Seventh Circuit reversed, holding that a person states a claim under the Equal Protection Clause when they allege "that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." The Esmail decision, though explicitly rejected by a few circuits, was widely followed.

Judge Posner referred to the action as a "an unusual kind of equal protection case," and distinguished it from the more "common kinds." In the Esmail formulation, these include discrimination based on racial or other invidious classifications, "challenges to laws or policies alleged to make irrational distinctions," and "selective prosecution" cases. This case was held to be different, particularly from selective prosecution claims that fail because the state is simply conserving resources by, for example, focusing only on some law-breakers. The difference, according to the Esmail court, "is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor." "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." While recognizing "that the abuse charged in this case is remote from the primary concern of the framers of the

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41. Id. at 177-78. The allegations of animus in this case revolved around the umbrage the mayor was supposed to have taken at an advertising campaign of Esmail's directed against the sale of liquor to minors (the ads "accused the city of ineffectual enforcement of the law"); the withdrawal of political and financial support of the mayor; and "Esmail's success in getting [a] 1985 revocation order [of his permit] (issued by Mayor Macrane's predecessor) changed to a brief suspension." Id. The "'campaign of vengeance,'" in addition to the attempted denial of the license, was alleged to include unwarranted police sobriety stops, "intrusive surveillance," and "in causing false criminal charges to be lodged against him." Id.

42. FED. R. CIV. P. 12(b)(6).
43. Esmail v. Macrane, 53 F.3d at 179 (internal quotations omitted).
44. Id. at 180.
45. See infra Part II.B..
46. See, e.g., Smith v. E. New Mexico Medical Ctr., No. 94-2213 & 94-2241, 1995 WL 749712 (10th Cir. Dec. 19, 1995); Rubinovitz v. Rogato, 60 F.3d 906, 912 (1st Cir. 1995); Batra v. Bd. of Regents of Univ. of Nebraska, 79 F.3d 717, 722 (8th Cir. 1996).
47. Esmail v. Macrane, 53 F.3d at 178.
48. Id. (citing Lindsey v. Normet, 405 U.S. 56 (1972)).
49. Id. Here two types of claims were distinguished: (1) Where the state simply fails to prosecute all known lawbreakers either due to "ineptitude or (more commonly) because of lack of adequate resources." Id. This does not offend equal protection. (2) "[W]here the decision to prosecute is made either in retaliation for the exercise of a constitutional right . . . or because of membership in a vulnerable group." Id. at 179 (citing Wayte v. United States, 470 U.S. 598, 608 (1985). This type of selective prosecution is actionable. Id.
50. See Wayte v. United States, 470 U.S. at 607-09 (holding that equal protection rights were not violated by a government policy of prosecuting Selective Service nonregistrants who openly criticized the draft policy); see also Oyler v. Boles, 368 U.S. 448, 456 (1962) (holding that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" if not based on impermissible standards).
51. Esmail v. Macrane, 53 F.3d at 179.
52. Id.
53. Id. at 180.
equal protection clause," Judge Posner concluded that "neither in term nor in interpretation is the clause limited to protecting members of identifiable groups."

The court distinguished earlier Seventh Circuit cases that suggested classes were indeed necessary to a successful suit under the Equal Protection Clause. The Author argues below that Judge Posner's dismissal of such powerful holdings as dicta is somewhat less than convincing, nevertheless he goes on to note that:

Other [Seventh Circuit] opinions ... point out sensibly that classifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause. Esmail's suit thus is not barred by the "class of one" rule, because there is no such rule.

The case was thus remanded, with a final admonition from Judge Posner that the plaintiff faces the task of proving the Mayor's action "was a spiteful effort to 'get' him," which is "more demanding than merely having to prove that a prosecution lacked probable cause, the meaning of 'malice' in the tort of malicious prosecution."
Perhaps the progenitor of the "class of one" cause of action in the Seventh Circuit—cited in *Esmail*—is *Ciechon v. City of Chicago*. *Ciechon* concerned two paramedics involved in an emergency call in which the patient (who refused to go to the hospital on an initial visit) later died. The family of the deceased complained to the local press and the Mayor's office regarding the paramedics' handling of the case. Of the four members of the ambulance crew, including another paramedic equally responsible for the care of the victim, only Ciechon was subject to investigation and, ultimately, dismissal. This difference in treatment was held to violate Ciechon's rights to due process and equal protection.

The Seventh Circuit found that the "two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, were treated absolutely differently. . . . Since the discrimination was intentional, the equal protection clause was violated." The court found no rational basis for the decision in the multitude of exhibits and affidavits—nothing "that would absolve [the other paramedic] while condemning Ciechon." The *Ciechon* court, however, did not rest any part of its equal protection decision on a finding of bad intent, ill-will, or malice, despite the obvious inference, found by the court with reference to the due process claim, that Ciechon was "sacrifice[d]" to avert bad publicity and a civil lawsuit by the victim's family.

Fearful of "opening the floodgates to review [of] all municipal personnel decisions," the circuit court attempted to limit the holding to the facts: "It is only because these defendants purposely and invidiously chose one of two similarly situated employees for undeserved punishment and misused otherwise legitimate disciplinary procedures that our intervention is justified." The hope of containing this cause of action to these narrow facts, however, was not met. Lawyers, doing what lawyers do, took the holding of *Ciechon* and expanded its use in a growing number of superficially similar equal protection cases, and it has been cited numerous times as perhaps the original "class of one" case in the Seventh Circuit.

2. The Second Circuit

Perhaps the "grandfather" of "class of one" cases is the decision of Circuit Court Judge Learned Hand in *Burt v. City of New York*, decided in the wake of

1995) (noting that "Falls was the only member of his class"); Indiana Teachers Ass'n v. Bd. of Sch. Comm'rs, 101 F.3d 1179, 1181 (7th Cir. 1996) (citing *Falls* to establish that the Equal Protection Clause protects classes of one). It appears, therefore, that the term "class of one" has made its way into equal protection jurisprudence via the Bill of Attainder Clause. *U.S. Const.* art. 1 § 10.

58. 686 F.2d 511 (7th Cir. 1982).
59. *Id.* at 513-15.
60. *Id.* at 515.
61. *Id.* at 515-16.
62. *Id.* at 516-17.
63. *Id.* at 522 (citing United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973) (en banc)).
64. *Id.* at 524.
65. *Id.* at 520.
66. *Id.* at 517.
67. *See, e.g.*, Levenstein v. Salafsky, 164 F.3d at 353 ("So-called 'class of one' equal protection claims . . . have been allowed in this circuit since at least *Ciechon.*").
68. 156 F.2d 791 (2d Cir. 1946).
the Supreme Court decision in *Snowden v. Hughes*. Burt, a *pro se* litigant and registered architect, charged the city, the Commissioner of Buildings, and other agencies and officials with "deliberately misinterpret[ing] and abus[ing] their statutory power in order to deny his applications [necessary for his trade] or impose upon him unlawful conditions" while approving those of other, similarly situated architects. Burt asserted "that he [was] the victim of a 'purposeful discrimination'" and that the "defendants' treatment of [Burt] was actuated by personal hostility." Based on *Snowden*, the Second Circuit held that Burt stated a claim under the predecessor to § 1983.

According to Judge Hand, *Snowden* "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 against demurrer." While this language has a distinctly modern cast, in light of the *Olech* decision, it is not clear that the *Snowden* Court meant anything other than racial discrimination in the dicta relied on by Judge Hand. Nevertheless, the *Burt* court treated the appellation "purposeful discrimination" as an automatic entrée to the next stage of litigation:

"The only protection at present is in the difficulty of proving such cases which is great; but, so far as we can see, any public officer of a state, or of the United States, will have to defend any action brought in a district court . . . in which the plaintiff, however irresponsible, is willing to make the necessary allegations."

Given the liberality of the pleading standards announced by the *Burt* court and the very clear parallel that case has to *Esmail*, it seems odd that a well-established jurisprudence in "class of one" cases did not emerge in the intervening years in the Second Circuit. Yet thirty-four years later, in *LeClair v. Saunders*, the Second Circuit essentially remade the same case law without ever citing to *Burt*. In *LeClair*, the plaintiff was a Vermont farmer who was denied the right to ship milk into Massachusetts for failing to procure a sanitary, protected water supply for his farm. LeClair sued Saunders, a Massachusetts state inspector, under § 1983 for violating his right to equal protection by selecting his farm for sanction—while others were not—because of a "malicious or bad faith intent to injure the LeClairs."
The plaintiff won a damage award at trial, but the appeals court reversed, finding insufficient evidence to support the allegations of malice. The court started its analysis by noting that the "case is lodged in a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply." The cause of action, as interpreted by the court, "boils down to one of selective enforcement ... by a state official pursuant to a lawful state regulation," and was thus closely analogous to the complaint raised in Burt. In order to decide the case, the court pointed out the balance that needs to be struck between protecting a state official who needs to "call them as he sees them" with preventing abuses by powerful agents from acting with "whim or caprice." As a result, "[t]he doctrine of immunity and the law of equal protection intersect in determining" liability in this § 1983 case because the defendant’s liability depends on whether Saunders knew his actions violated the plaintiff’s constitutional rights or were motivated by malicious intent to injure.

For determining the scope of the immunity doctrine, the court quoted at length from Wood v. Strickland, a Supreme Court case involving conduct of school officials toward a student. In Wood, the Court said an official’s immunity is lost if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." The LeClair court gleaned from Wood a two part test: "[D]id the official, with subjective or objective knowledge, violate a person’s constitutional rights, or did the official act with malicious intent to injure the person in some ‘nonconstitutional’ sense?" Having found no constitutional rights at issue in the case, the court proceeded to survey case law to determine whether Saunders’s actions met the definition of "malicious intent" or whether they were done with reasonable “good faith” and therefore provided qualified immunity.

The real difference between Burt and LeClair is the difference between the pleading requirements necessary to defeat a motion to dismiss and the necessary quantum of factual matters needed to be at issue in order to overcome a summary judgment motion (or proven to prevail at a trial on the merits). Judge Hand allowed Burt to pass through the 12(b)(6) window because he made the necessary allegation of "intentional and purposeful discrimination." But, as the LeClair court noted,

81 Id. at 607.
82. Id. at 611.
83. Id. at 608.
84. Id.
85. Id. at 608-09.
86. Id.
88. LeClair v. Saunders, 627 F.2d at 608.
89. Id. at 609 (quoting Wood v. Strickland, 420 U.S. at 322).
90. Id. at 609 (quoting Wood v. Strickland, 420 U.S. at 322).
91. LeClair v. Saunders, 627 F.2d at 610.
92. Burt v. City of New York, 156 F.2d at 792 (citing Snowden v. Hughes, 321 U.S. 1, 8 (1943)) (internal quotations omitted).
the bare bones of the phrase "intentional and purposeful discrimination" are an insufficient guide to judge liability in this context. Under appellees' suggested interpretation, if Saunders intended to suspend the LeClairs, which he clearly did, and his purpose was to prevent them from shipping milk to Massachusetts, which it clearly was, then he would be guilty of discrimination. This result would be so overinclusive as to be unworkable, let alone unfair.  

In the end, the *LeClair* court put together a definition of "discrimination" that would be actionable in the current context by drawing from Supreme Court jurisprudence involving qualified immunity and case law involving "criminal defense of selective prosecution," stating that:

[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.  

The court went on to find insufficient malice to support the verdict in the case, and reversed.

Thus the nexus between *Burt* and *LeClair* meets squarely in the division between the majority opinion in *Olech* and Justice Breyer's concurrence. In essence, both cases involved charges of inequitable application of valid laws, but each was presented to the appeals court at different stages of litigation: *Burt* on a motion to dismiss, *LeClair* on appeal of a jury verdict. At the pleading stage, the *Burt* court said that it was necessary to allege "intentional discrimination" to defeat the motion while intimating that no specific facts need be pleaded to support it. *LeClair*, by contrast, presented a situation analogous to the plaintiff at the summary judgment stage: What specific facts constituting the "intentional discrimination" must be supported by evidence and controverted to get to trial? The answer is that evidence, either direct or, more likely, circumstantial, tending to show malice or bad faith intent to injure was *some part of* the motivation behind the public official's action must be adduced to either get to trial or, after trial, to prevail. In the end, it is clear that the Second Circuit stands in agreement with Justice Breyer, and the *Olech* majority leaves the district courts in the same position as trial court in *LeClair*, i.e., needing to decide what constitutes "intentional and arbitrary discrimination" when deciding if a public official's actions lack a "rational basis."  

**B. Cases Holding for the Need of Classes**

Of all the circuits, the Sixth and Seventh Circuit Courts of Appeals have made the clearest statements that some allegation of class-based discrimination is necessary to support a claim under the Equal Protection Clause. There is obviously a certain amount of irony in the fact that, both prior to and after the *Esmail* decision, Seventh Circuit courts have held that

you must be singled out because of your membership in the class, and not just be the random victim of governmental incompetence.... [W]e hold that: "the state's act of singling out an individual for differential treatment” does not "itself create

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94. *Id.* at 609-10.
95. *Id.* at 611.
96. *Vill. of Willowbrook v. Olech*, 528 U.S. at 564.
the class.” That would make every selective prosecution, and indeed every arbitrary act of government, a violation of the Constitution.\(^97\)

The Sixth Circuit has likewise held that “the choice of whom to prosecute or cite for a violation of an otherwise valid law or regulation is constitutionally troublesome only when it is blemished by the intent to harm a protected group,”\(^98\) explicitly rejecting the Second Circuit’s holding in \textit{LeClair}.\(^99\) \textit{Futernick v. Sumpter Township} involved a mobile home park owner who claimed the state selectively enforced regulations regarding effluent discharge from his trailer parks, “maliciously” and in “bad faith,” thereby violating his right to equal protection.\(^100\) The district court dismissed the complaint for failure to state a claim, and the Sixth Circuit affirmed.\(^101\)

As with \textit{Esmail}, \textit{LeClair}, and \textit{Burt}, the \textit{Futernick} court was grappling with the elements necessary to show a constitutional violation when a civil plaintiff charges “selective enforcement” of a facially valid law. The law in the Sixth Circuit was that “[s]elective enforcement can . . . lead to § 1983 liability if the plaintiff pleads ‘purposeful discrimination’ intended to accomplish some forbidden aim.”\(^102\) The question became whether “malice” and “bad faith” meet the definition of a “forbidden aim” in constitutional terms, as the First and Second Circuits have held, absent intent to deprive a person of fundamental rights or an impermissible, group based, discriminatory intent.\(^103\) Based on its reading of Supreme Court decisions and for reasons having mostly to do with policy and judicial economy, the \textit{Futernick} court held that “the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution.”\(^104\)

In light of the questions examined in this Comment, it is worthwhile to review the reasons offered by the Sixth Circuit in rejecting the “class of one” equal protection cause of action. The \textit{Futernick} court began by noting that “[t]o our knowledge, . . . neither [the First nor Second Circuits] . . . has ever affirmed a victory for

97. Albright v. Oliver, 975 F.2d 343, 348 (7th Cir. 1992) (Posner, J.) (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 459 (7th Cir. 1992)). \textit{See also} Herro v. City of Milwaukee, 44 F.3d 550, 552 (7th Cir. 1995) (citing New Burnham Prairie Homes v. Vill. of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990)) (an Equal Protection Clause action must show intentional discrimination because of class membership, not unfair treatment as an individual); Pleva v. Norquist, 36 F. Supp. 2d 839, 850 (E.D. Wis. 1999) (same).

98. \textit{Futernick} v. Sumpter Township, 78 F.3d 1051, 1060 (6th Cir. 1996).


100. \textit{Id.} at 1057. “The complaint allege[d] ‘purposeful discrimination aimed specifically’ at \textit{Futernick},” but made no mention of “impermissible intent.” \textit{Id.} at 1057 n.9. The allegations of bad faith and malice were added in briefs to the circuit court and oral argument in the court below. \textit{Id.} Note that what had been sufficient in \textit{Burt} to state a claim was held insufficient by the Sixth Circuit.

101. \textit{Id.} at 1052.

102. \textit{Id.} at 1056 (citing \textit{Birth Control Ctrs., Inc. v. Reizen}, 743 F.2d 352, 359-60 (6th Cir. 1983); \textit{Wright v. Metrohealth Med. Ctr.}, 58 F.3d 1130, 1137 n.7 (6th Cir. 1995)).

103. \textit{See id.} at 1056-59. The court cited, among other cases, \textit{Rubinovitz v. Rogato}, 60 F.3d 906 (1st Cir. 1995), and \textit{LeClair v. Saunders}, 627 F.2d 606 (2nd Cir. 1980), for the proposition that those circuits “will allow § 1983 relief against a state official who selectively enforces a law or regulation out of malice.” \textit{Futernick} v. Sumpter Township, 78 F.3d at 1057-58.

the plaintiff on such a theory."\textsuperscript{105} Countervailing the limited utility of allowing a cause of action upon which, the court's research showed, no one had ever prevailed, were compelling reasons that the sundry motivations of local regulators should not be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right. The sheer number of possible cases is discouraging. Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited.\textsuperscript{106} Once allowed, these "moderately artful complaint[s]" would permit a plaintiff to survive a motion to dismiss and engage in potentially "mammoth discovery" in an effort to ferret out impermissible motives.\textsuperscript{107} "If we require defendants to wait until summary judgment, we burden local and state officials with the regular prospect of 'fishing expeditions' and meritless suits. In the meantime we federalize and constitutionalize what are essentially issues of local law and policy."\textsuperscript{108}

The Futernick court addressed some of the means employed by other circuits to "limit[] the availability of § 1983" relief in malice-based torts by "requiring that the plaintiff prove that others who are similarly situated in 'all relevant aspects' have not been regulated."\textsuperscript{109} The court was skeptical, however, that such a "screening device" would be effective, noting that "[d]etermining 'all relevant aspects' of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion."\textsuperscript{110} The Sixth Circuit also made note of the other major "screening device"—a finding that malice was insufficiently pleaded or proved, as in LeClair—in its summary of "class of one" cases which have failed.\textsuperscript{111}

On the whole, the Futernick court felt that these considerations of law and policy and "[t]he nature of the right to equal protection . . . counsels against expanding a federal right to protection from non-group animosity on the part of local officials."\textsuperscript{112} While "not sanction[ing] the abuse of state or local regulatory power," the court found that state-supplied legal remedies, the political process, and, "in extreme cases, . . . federal due process claims, reviewable by the Supreme Court of the United States by writ of certiorari," provide adequate protection for plaintiffs in Futernick's, or, for that matter, Olech's, position.\textsuperscript{113}

Although the Futernick court does not reference the case, nor do any of the courts that have struggled for a rationale as to why the 14th Amendment requires class-based discrimination, it seems to find its strongest support in the famous

\textsuperscript{105} Id. at 1057.
\textsuperscript{106} Id. at 1058.
\textsuperscript{107} Id. at 1058 n.12.
\textsuperscript{108} Id. at 1058-59 (footnote omitted).
\textsuperscript{109} Id. at 1058 (quoting Rubinovitz v. Rogato, 60 F.3d at 910 (citing Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989))).
\textsuperscript{110} Id.
\textsuperscript{111} See id. at 1057-58.
\textsuperscript{112} Id. at 1059.
\textsuperscript{113} Id.
footnote 4 in Justice Stone's Carolene Products decision. The Futernick court is clearly struggling to articulate two powerful motivators behind the development of equal protection jurisprudence and § 1983 law: (1) The Supreme Court's particular view of "judicial federalism" at a given historical point, and (2) how broadly the substantive right protected by the 14th Amendment is understood. The Carolene Products footnote helps those courts who feel that classes are necessary to an equal protection claim because it tells us what matters are of such grave constitutional concern as to justify federal intrusion into areas clearly within the province of the state.

C. Pre-Olech Treatment of Dispositive Motions in "Class of One" Cases

Courts' treatment of motions to dismiss and for summary judgment of Olech claims offers insight not merely into the substantive law (e.g., whether or not the "class of one" equal protection is recognized in the particular circuit), but appear also to reflect somewhat subjective views about the merits, or lack thereof, of the particular facts surrounding a case. What follows is a review of various pre-Olech decisions from various circuits on such dispositive motions.

1. Motions to Dismiss Under Federal Rule 12(b)(6)

a. Cases Denying Motions to Dismiss

The district court in Quartararo v. Catterson denied the defendant's 12(b)(6) motion on a finding that the pleading standards enunciated in LeClair had been met when the plaintiff, a convicted murderer, alleged that actions of the defendants "were motivated by a bad-faith intent to injure him, and had the effect of accordng him different treatment than other" similarly situated prisoners. The complaint alleged specific facts personally implicating the defendants in undertakings leading to the disparate treatment, but the Quartararo court was less clear on how the plaintiff had met the burden of pleading "impermissible, malicious intention to injure." It appears that the plaintiff's theory was that the defendant's actions were motivated by a desire to "avoid media embarrassment" occasioned by news reports of his participation in a work-release program and improper "public and political pressure" resulting in his denial of parole. However, the decision to

115. Compare Vanderhurst v. Colorado Mountain Coll. Dist., 16 F. Supp. 2d 1297, 1302 (D. Colo. 1998) (holding an equal protection claim stated when "intentional or purposeful discrimination" alleged even absent a claim of class membership) with Homeowner/Contractor Consultants, Inc. v. Ascension Parish Planning and Zoning Comm'n, 32 F. Supp. 2d 384, 394 (M.D. La. 1999) (dismissing plaintiff's equal protection claim because the Fifth Circuit "has not embraced the holding in Esmail").
117. LeClair v. Saunders, 627 F.2d at 609-10 (that is "that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on . . . malicious or bad faith intent to injure a person").
118. Quartararo v. Catterson, 917 F. Supp. at 946.
119. Id. at 946-47.
120. Id. at 927.
121. Id. at 929.
deny the 12(b)(6) motion rested on the defendants’ “deliberate indifference to this bad-faith undertaking,”122 which in the context of the decision makes it clear that it is their acts and not their motivations upon which potential liability was predicated.123

In Vanderhurst v. Colorado Mountain College District,124 the district court adopted the rule of Esmail, following its acceptance by the Tenth Circuit in an unreported decision in Smith v. Eastern New Mexico Medical Center,125 using it to deny the defendants’ motion to dismiss Vanderhurst’s equal protection claim.126 “The Smith court expanded the basis for an equal protection claim to include claims by an individual if there are allegations of behavior amounting to intentional or purposeful discrimination . . . .”127 On this authority, the Vanderhurst court went on to hold that the following allegation stated a claim under the Equal Protection Clause:

[T]hat defendants:

- intentionally and vindictively carried out a campaign to divest Vanderhurst, as a member of an individual class, of his employment and thereby humiliating him in a manner wholly unrelated to a legitimate state objective. This campaign was carried out in retaliation for Vanderhurst’s exercise of his constitutional rights, and carried out as unequal governmental treatment because . . . CMC administrators and CMC Board members harbored malignant animosity toward Vanderhurst.128

This is an example of “magic words” pleading, similar to the holding in Burt.129

In Levenstein v. Salafsky,130 the Seventh Circuit reviewed the denial of a 12(b)(6) motion when the defendants asserted the defense of qualified immunity, the court found that the equal protection claim was adequately alleged for the purposes of defeating the immunity defense.131 The case involved a tenured state university administrator and professor who alleged that sexual harassment charges were trumped up against him after he began to investigate financial improprieties in the university system.132 Levenstein had a strong case that his rights to procedural due process had been violated.133 His equal protection claim, while striking the court as “more tenuous,” was held to be adequately alleged “at this early stage.”134

The court cited Esmail for the proposition that an equal protection claim is “actionable ‘where the power of government is brought to bear on a harmless indi-

122. Id. at 946.
123. See id. at 932-33.
126. Vanderhurst v. Colorado Mountain Coll. Dist., 16 F. Supp. 2d at 1302. The defendants had moved to dismiss this claim, and requested summary judgment on six of the eight counts. Id. at 1298.
127. Id. at 1301 (citing Smith v. E. New Mexico Med. Ctr., 1955 WL 749712 at *8).
128. Id. at 1302 (quoting Second Amended Complaint, ¶ 161) (alterations and emphasis in original).
129. See supra text accompanying notes 68-76, 96.
130. 164 F.3d 345 (7th Cir. 1998). See also infra text accompanying notes 232-39.
131. Id. at 352.
132. Id. at 348-50.
133. See id. at 351-53.
134. Id. at 352.
vidual merely because a powerful state or local official harbors a malignant ani-
mosity toward him." 135 It noted that there is a need to allege that one has been
treated differently than others who are "identical in relevant ways." 136 The
Levenstein court then determined the pleading element of malice was met by the
allegation that the defendants had a "motive to retaliate against him personally
because of his belief that certain financial transactions needed to be reviewed and
that his superiors might be covering up financial irregularities." 137 The complaint
did not, however, allege that others were treated differently, but rather that the
university reneged on its determination that an investigation was unwarranted and
"vindicatively went ahead and investigated Levenstein anyway." 138

The Levenstein court appears to view discovery as an adequate substitute for
pleading differential treatment from others similarly situated with any particular-


This places the Levenstein decision on the outer limits of the "class of one" juris-
prudence. It may well be that the court's decision in this respect was a bit
underanalyzed given the strength of the procedural due process claims, and the
tangential nature of the equal protection claim. In cases with less persuasive facts,
courts have dismissed claims for failure to allege, with some level of specificity,
adequate comparators.

b. Motion to Dismiss Granted

Standing in stark contrast to the Levenstein decision is the holding in Wroblewski v. City of Washburn, 140 an earlier Seventh Circuit opinion. This pre-Esmail decision suggested that classes were necessary to state an equal protection claim, but the district court's dismissal of the complaint was upheld on the grounds that (1) the plaintiff failed "to identify any individual or group situated similarly to himself" and (2) that the "City's alleged action pass[ed] muster under the rational basis standard." 141

Wroblewski, a former Mayor of Washburn, took over operations and a twenty-
year lease on a publicly owned marina. 142 The operation ran into financial diffi-
culties and was unable to make lease payments to the City. 143 Wroblewski alleged
that certain city officials "developed animosities toward" him, refusing to renegoti-
tate the lease with his company or deal with any successor that would employ

135. Id. (quoting Esmail v. Macrane, 53 F.3d at 179).
136. Id. (citing Indiana State Teachers Ass'n v. Bd. of Sch. Comm'rs, 101 F.3d 1179, 1181
(7th Cir. 1996)).
137. Id. at 352-53.
138. Id. at 352.
139. Id.
140. 965 F.2d 452 (7th Cir. 1992).
141. Id. at 459.
142. Id. at 454.
143. Id.
Eventually the City evicted him and leased "the marina facility to a different corporation on terms far more favorable than those ever offered to" Wroblewski. Finally, the City allegedly engaged in "a pattern of 'baseless' litigation against Wroblewski" and made inaccurate statements about the dismissal of these suits that "brought [him] into public disrepute and ridicule." The court held that Wroblewski's "complaint reveals the respect in which he is different from other parties: he has had extensive prior dealings with the marina, and the company with which he was associated owes the City money." In almost diametrical opposition to the latitude with which the Levenstein court treated the pleading standards, the Wroblewski court narrowly focused on the lack of comparators to deny the plaintiff a chance at discovery. And in doing so, the Wroblewski court seems to have ignored the charges relating to the "baseless suits" and harm to reputation.

The court did not, however, ignore the issue of malice entirely. In making its second finding regarding the rational basis standard, the Seventh Circuit engaged in an interesting discussion on the interplay between the substantive standard of review on which a case is ultimately to be decided, that is, the rational basis standard, and the broad Rule 12(b)(6) mandate to have a plaintiff's claim viewed in the most favorable light. The court stated that under Rule 12(b)(6) it must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting "facts" in light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.

With respect to the allegation of ill will, the Wroblewski court held that "[t]his allegation does make dismissal under Rule 12(b)(6) a closer question. Even this allegation, however, assumed true as it must be, is insufficient to defeat the City policy's presumed rationality." After noting that the government has "considerable discretion to decide with whom it will deal in maintaining its property," the court went on to state that "in this context animosity is not necessarily inconsistent with a rational basis. . . . [The City] could, however, decide that it cannot get along productively with someone, at least when that someone has done work on the city's property before."

The Wroblewski decision is unusual in its application of the rational basis standard at the 12(b)(6) "window." In Olech, neither the Seventh Circuit's nor the Supreme Court's decision to deny the Village of Willowbrook's motion to dismiss addressed the propriety of engaging in such an exercise even though the trial court apparently found that the Village had a rational basis for making the larger than

144. Id.
145. Id.
146. Id. at 454-55.
147. Id. at 459.
148. Id. at 459-60.
149. Id. at 460.
150. Id.
151. Id.
The use of the rational basis standard to dismiss apparently insubstantial suits, however, may be more frequently employed if, as some courts suspect, the Olech decision leads to a vast increase in "class of one" suits. If so, then Supreme Court review of this tool may be warranted.

The Eighth Circuit rejected a pre-Olech complaint for failure to "allege and prove unlawful, purposeful discrimination" even as it recognized the validity of the "class of one" equal protection cause of action. The plaintiffs in Batra "allege[d] that University officials violated . . . the Bylaws by withholding vital tenure information that must be 'published and disseminated to the faculties,' with the result that plaintiffs were treated differently than other similarly situated members of the tenure-track faculty." But the Eighth Circuit noted that "if that type of 'withholding,' without more, were enough to trigger a 'rational basis' analysis of why the information was withheld, virtually every negligent governmental action could be converted into an equal protection violation." Relying on the Supreme Court's decision in Snowden v. Hughes, the Batra court required plaintiffs claiming violations of § 1983 on equal protection grounds to allege and prove something more than different treatment by government officials. . . .

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Applying this standard, the court held that the complaint neither alleged "who did the withholding, nor why the information was withheld," nor did it make a case that the University irrationally classified "tenure-track faculty into different groups in considering tenure applicants," and thus the claim was properly dismissed.

In Indiana State Teachers Ass'n v. Board of School Commissioners (ISTA) the Seventh Circuit, in an opinion by Chief Judge Posner, affirmed a 12(b)(6) dis-
missal of an *Olech* claim for failure to sufficiently allege that the plaintiff and comparator were "identically situated in all relevant respects." The Indiana State Teachers Association challenged a decision by the school board not to hold a representational election—electing to maintain its existing relationship with the current union—claiming it violated the union's right to equal protection because by doing so the Board "discriminates between two similarly situated entities." The Seventh Circuit made short work of the notion that the two organizations were similarly situated, holding that "in the present case the government is treating unequally two persons that are prima facie unequal in a rationally relevant respect—the union with which the government had been dealing contentedly for many years and the union that wishes . . . to break up the cozy existing relationship." The *ISTA* court distinguished between a situation in which the "plaintiff is asking for a revision of policy rather than for a restoration of equality." The concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts. To decide is to choose, and ordinarily to choose *between*—to choose one suppliant, applicant, petitioner, protester, contractor, or employee over another. Can the loser in the contest automatically appeal to the federal courts on the ground that the decision was arbitrary and an arbitrary decision treats likes as unlike and therefore denies the equal protection of the laws? That would constitutionalize the Administrative Procedure Act and make its provisions binding on state and local government and enforceable in the federal courts. This seems a sensible policy, and it appears that the holding of *ISTA* is correct as a matter of law—"[t]here is nothing irrational or vicious about preferring the known quantity to the unknown." The challenge, however, arises in cases in which the pleadings do not make it immediately apparent, as the Sixth Circuit noted in *Puternick*, whether the plaintiff and comparator or comparators are "identically situated in all relevant respects" without allowing the plaintiffs to engage in "broad-ranging discovery." This may often be the case because the issue of similarity, like that of subjective motivation, is intensely factual.

It is possible, one supposes, that Judge Posner could have decided *Olech* on exactly the same grounds as *ISTA* without raising so much as an eyebrow. After all, *Olech* was identically situated to every resident on Tennessee Avenue and, further, the requested easement of thirty-three feet was to accommodate roadway, sidewalk, and public utility construction while the fifteen-foot easement was the Village's uniform requirement for water main hook-ups alone.

161. *Id.* at 1182.
162. *Id.* at 1180.
163. *Id.* at 1182.
164. *Id.*
165. *Id.* at 1181.
166. *Id.* at 1182. *See also* Arrington v. Dickerson, 915 F. Supp. 1503, 1509 (M.D. Ala. 1995) (refusing to reach question of "discriminatory intent" when the complaint does not contain "even a hint of an allegation" that plaintiff was similarly situated to others).
168. Indiana State Teachers Ass'n v. Bd. of Sch. Comm'rs, 101 F.3d at 1181 (emphasis added).
169. Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982). The quotation from *Harlow* foreshadows the discussion, *infra* at notes, regarding the quite similar concern the Supreme Court shares with the Sixth Circuit in this regard.
2. Pre-Olech Treatment of Motions for Summary Judgment

Dispositions of motions for summary judgment under Federal Rule of Civil Procedure 56(c) can be decided in a greater variety of ways than motions to dismiss for failure to state a claim. A judge can grant judgment for either party, or deny a party’s motion and require the case to proceed to trial. Thus the discussion of various court’s treatment of Rule 56(c) motions will be discussed first by cases decided for the plaintiff and then by those going in favor of the defendants.

a. Plaintiffs Prevail at Summary Judgment

It is rare that a plaintiff prevails on a motion for summary judgment in a “class of one” vindictive action suit. Ciechon, however, is one such case, and it is one that presents the opposite extreme from ISTA because the comparator and the plaintiff were so identically situated as to preclude any factual questions for trial. In Zeigler v. Jackson, the Fifth Circuit held that a plaintiff police officer candidate, discharged for having two previous convictions determined to be “misdemeanor[s] involving either force, violence or moral turpitude,” was entitled to judgment as a matter of law under the equal protection clause when the police department failed to discharge other police candidates with equally or more serious prior convictions. The Zeigler court reversed the lower court’s grant of judgment for the defendants, finding that if “distinctions between similarly situated individuals are to withstand an equal protection analysis, such distinctions must be reasonable, not arbitrary, and must rest on grounds having a fair and substantial relation to the object of the legislation.”

Zeigler’s previous crimes, two misdemeanors, were “presenting a firearm” and “criminal provocation,” while the three other candidates had convictions for forgery (defined by Alabama law as a crime of moral turpitude), third degree assault, or assault and battery (both of which require a finding of force or violence) but were allowed to continue at the police academy. The Zeigler court held that

175. Zeigler v. Jackson, 638 F.2d at 779 (citing Stanton v. Stanton, 421 U.S. 7, 14 (1975)).
176. Id. at 779. Among the other “good facts” favoring the plaintiff:
The district attorney of Jefferson County, the mayor and chief of police of Adamsville all wrote letters to the Commission on Zeigler’s behalf, urging the Commission to allow Zeigler to become a police officer. Moreover, Judge Gwin, the one who convicted Zeigler, offered to testify at Zeigler’s rehearing on his behalf concerning the charges against him.
the police department offered no “rational justification” for the different treat-
ment.177 “Since the other officers equally subject to the character requirement
were not denied employment because of their convictions, the Commission’s ter-
mination of Zeigler violated his right to equal protection of the law.”178 When
faced with egregious facts and patently bad behavior by state actors, it appears that
courts will find a basis upon which to provide relief.

In *Rubinovitz v. Rogato*,179 the First Circuit reversed a trial court’s ruling grant-
ing summary judgment for the defendants, holding that there existed triable issues
of fact suggestive of “a malicious orchestrated campaign” by city officials.180 The
Rubinovitzes rented an apartment in an out-building on their lot to a friend of
Rogato, the city’s purchasing agent.181 Later, a code inspector informed the
Rubinovitzes that they needed a certificate of occupancy and a second egress from
the apartment, which required a zoning variance.182 Shortly after applying for the
variance, they evicted the tenant for harboring an unauthorized cat, which, to sim-
plify matters, led Rogato to allegedly interfere in the Board of Appeals proceed-
ings in regard to the variance183 and to contact the health department “every hour
on the hour” urging that the Rubinovitzes be cited.184 The city’s gas and plumbing
inspectors also advised them of violations and ordered disconnection of the
apartment’s utilities, and the gas inspector allegedly told a contractor the couple
hired that they were “‘bad people’ and call[ed] Mrs. Rubinovitz ‘a bitch.’”185

The Rubinovitzes brought suit against various public officials under § 1983
alleging violations for rights to equal protection, free speech, and property rights.186
The district court granted the defendant’s motion for summary judgment on all
counts.187 The trial judge treated the Rubinovitzes’ equal protection claim as one
premised on exercise of fundamental rights: “[T]hat they were denied equal pro-
tection under the law by being singled out . . . for exercising their property rights .
. . and for exercising their rights to free speech.”188 From this holding, and from
the trial judge’s comment that “Rogato’s motivation appeared to be malice toward
the Rubinovitzes because of their eviction proceedings . . . rather than retaliation
for their exercise of their free speech rights,”189 it appears that the plaintiffs did

177. Id. at 778 n.6. Further, the police officer whose testimony convicted him on the two misde-
meanors was later fired for excessive brutality, and Judge Gwin intimated that arrest might have
been racially motivated. Id. at 778 n.7.
178. Id.
179. 60 F.3d 906 (1st Cir. 1995).
180. Id. at 912.
181. Id. at 908.
182. Id.
183. Id. In fact, the Board initially granted the variance by a vote of 4-1, but subsequently,
and allegedly at the insistence of Rogato, moved to reconsider and, on a revote, denied it by 3-
2. Id. at 908-09.
184. Id. at 908.
185. Id. at 909.
186. Id. The free speech claim related to an allegation that some of these adverse actions
were taken in response to a letter the Rubinovitzes wrote to the Director of Public Health com-
plaining of Rogato’s vendetta. Id.
187. Id. Defendant’s motion to dismiss after discovery was treated as a Rule 56(c) motion
and the judge ruled for defendants after holding a hearing. Id.
188. Id.
189. Id. Indeed, the appeals court states that the Rubinovitzes “charge[d] defendants with
improper selective enforcement of local regulations.” Id.
not advance an Olech claim recognized in the circuit under Yerardi's Moody Street Restaurant and Lounge, Inc. v. Board of Selectmen.\textsuperscript{190}

The First Circuit reversed the district court, holding that "there is enough indication of a malicious orchestrated campaign causing substantial harm—though only barely enough evidence—that the case cannot be resolved on summary judgment."\textsuperscript{191} The Rubonivitz court found persuasive evidence as to Rogato's hostility towards the Rubinovitzes, her various interventions with fellow city officials, and concerted action by the officials to treat them differently.\textsuperscript{192} The balance of the evidence the plaintiffs came forward with, that is circumstantial evidence of inspections, service disconnection orders, and the interference with the hired contractor ("using language . . . redolent of malice"), was enough when coupled with evidence that others similarly situated were not so treated to get the Rubinovitzes to trial.\textsuperscript{193} On these facts, the court concluded, "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."\textsuperscript{194}

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\textbf{b. Defendants Prevail at Summary Judgment}
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In a case with much less compelling facts than either Ciechon or Rubinovitz, the Second Circuit upheld a grant of summary judgment for the defendants in Lisa's Party City, Inc. v. Town of Henrietta.\textsuperscript{195} At issue was the company's § 1983 claim that the town's failure to grant it a variance from a "sign ordinance"—requiring shopping plaza signs to "be coordinated so as to create aesthetic uniformity within the plaza"—when other stores had received one, violated the company's equal protection rights.\textsuperscript{196} Party City adduced some evidence that others, similarly situated, had violated the ordinance without adverse action by the Town, but the court did not reach this issue.\textsuperscript{197} Instead, the Second Circuit found that "Party City has failed to show a material issue of fact as to the key issue in an equal protection claim alleging selective enforcement—impermissible motive."\textsuperscript{198}

The evidence was to the effect that "one town official, who was not a member of the zoning board that denied the variance, was annoyed by Party City's owners."\textsuperscript{199} "On these facts," the court held, "the appellant's assertion that the Town enforced the ordinance against it with an impermissible motivation is sheer 'conjecture and speculation' that is insufficient to withstand" a summary judgment motion.\textsuperscript{200}

\begin{footnotesize}
\begin{itemize}
  \item 190. 878 F.2d 16 (1st Cir. 1989). The First Circuit refers to these causes of action as "bad-faith or malicious-intent-to-injure cases." Rubonivitz v. Rogato, 60 F.3d at 911.
  \item 191. Rubonivitz v. Rogato, 60 F.3d at 912.
  \item 192. Id.
  \item 193. Id. The Rubonivitz court was less than clear on the issue of the importance of what is arguably the most persuasive evidence, i.e., the reconsideration of the vote on the variance. In announcing its decision, the court stated that it was "[p]utting aside the Board's reconsideration vote." id., thus obscuring its importance.
  \item 194. Id.
  \item 195. 185 F.3d 12 (2d Cir. 1999).
  \item 196. Id. at 13 (quoting HENRIETTA TOWN CODE, § 97-8-B(2)). The plaintiff also alleged the ordinance required Party City to "alter its trademark in violation of the Lanham Act, 15 U.S.C. § 1121(b)." Id. at 14.
  \item 197. Id. at 17.
  \item 198. Id.
  \item 199. Id.
  \item 200. Id. (quoting Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)).
\end{itemize}
\end{footnotesize}
The Wheeler v. Miller\textsuperscript{201} court, while expressing doubts as to the viability of a "class of one" equal protection suit, assumed its availability in affirming judgment for the defendants.\textsuperscript{202} As in the Party City case, the plaintiff's case was less than compelling: Wheeler, a doctoral candidate dismissed from the psychology program, received a total of four "C's" in a program which allows for student dismissal after getting just two "C" level grades.\textsuperscript{203} He also twice failed his comprehensive exams, administered by two different panels, in what six academics all agreed was the worst performance they had ever witnessed.\textsuperscript{204} Plaintiff alleged that he was treated dissimilarly than other students because of that taint of "unproven and unprovable accusation[s] of cheating" and a uniquely rigorous remediation program to which he was subjected.\textsuperscript{205}

The Fifth Circuit employed rational-basis analysis and held that courts deciding equal protection issues, like those of substantive due process, must recognize the "deference afforded decisions in an academic setting."\textsuperscript{206} In holding that no rational factfinder could hold for the plaintiff, the Wheeler court noted that "Wheeler could point to no individual with a similarly poor academic performance who was awarded a doctorate."\textsuperscript{207} In fact, the plaintiff admitted that "no other student has ever failed comprehensive oral examinations."\textsuperscript{208} The court concluded by holding that given our deferential review of academic decisions we cannot say that closer scrutiny of Wheeler or special expectations were unwarranted in light of his overall academic performance. In Ewing the Court warned that "we are not in a position to say that" other students were "similarly situated" with the plaintiff, in light of "[t]he insusceptibility of promotion decisions such as this one to rigorous judicial review."\textsuperscript{209}

3. Treatment of Qualified Immunity Claims

Perhaps it seems incongruous to independently address the narrow issue of qualified immunity as a stand-alone topic. However, in nearly every Olech suit brought—at least those surviving a 12(b)(6) motion—the public official or agency is likely to raise the affirmative defense of qualified immunity in order to escape potential liability. Secondly, the doctrine of qualified immunity was developed in the context of constitutional tort suits for damages brought against public officials,\textsuperscript{210} and thus has great relevance in the development of "class of one" jurisdiction. Finally, as the law of qualified immunity has developed, such as in the classic case of Harlow v. Fitzgerald,\textsuperscript{211} the Supreme Court has paid careful atten-

\textsuperscript{201} 168 F.3d 241 (5th Cir. 1999).
\textsuperscript{202} Id. at 252. Note that this case was decided under the due process and equal protection clauses of the Texas state constitution, but under Texas law these clauses are decided in conformity with federal due process and equal protection case law. See id. at 247, 252.
\textsuperscript{203} Id. at 245-46.
\textsuperscript{204} Id. at 246.
\textsuperscript{205} Id. at 244 n.3.
\textsuperscript{206} Id. at 252 (citing Levi v. Univ. of Tex., 840 F.2d 277, 280-81 (5th Cir. 1988)).
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Wheeler v. Miller, 168 F.3d at 252 (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. at 228 n.14).
\textsuperscript{210} See generally 15 AM. JUR. 2D Civil Rights §§ 111-21 (2000).
\textsuperscript{211} 457 U.S. 800 (1982).
tion to the issue of malice as an element of such suits and established the policy that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." These issues are very much of moment to the development of case law in Olech suits as addressed in this Comment.

Qualified immunity is an affirmative defense that may be pleaded in conjunction with a motion to dismiss under Federal Rules of Civil Procedure 12(b), though the better practice, it is said, is to plead it at summary judgment. Once the defense is raised, the plaintiff bears the burden of showing, first, that he or she "asserted a violation of a constitutional right" and, second, that the right allegedly violated was "clearly established" under authority binding on the court making the ruling.

To meet this burden the plaintiff is held to a "heightened standard of pleading" requiring her or him to reply with "specific, non-conclusory allegations of fact sufficient to allow the court to determine that those facts, if proved, demonstrate that the official actions taken were not objectively reasonable in the light of clearly established law." The right a plaintiff seeks to vindicate must be established in a "particularized" sense, that is, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Qualified immunity is a "threshold" issue that must be decided before discovery is allowed.

Generally speaking, courts analyzing the availability of a qualified immunity defense take one of two approaches. The first could be called a "strict" or "fact-based" approach which looks at the facts of the case and the actions in which the official engaged to determine if the law "clearly established" so that he or she would know those particular actions violated the plaintiff's rights. The other approach is more lenient, a "law-based" approach. In cases such as this, courts deciding immunity questions in Olech cases simply ask the question: Is the law regarding official liability in "class of one" equal protection cases clearly established? If this is the question asked, then the answer is typically going to be


214. See 15 Am. Jur. 2d Civil Rights §§ 120, 121; see also Levenstein v. Salafsky, 164 F.3d at 346-47.


217. Id. § 121.


The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow.


220. See Levenstein v. Salafsky, 164 F.3d at 353 (holding the "relevant constitutional standards were well established" because the Seventh Circuit has long recognized "class of one' equal protection claims.").
"yes" and immunity is denied.\textsuperscript{221} In light of the Supreme Court's admonition in \textit{Anderson v. Creighton}\textsuperscript{222} it would appear that the latter course is unjustified.

\textbf{a. Immunity Recognized}

In \textit{Norton v. Village of Corrales},\textsuperscript{223} the Tenth Circuit held public officials had qualified immunity in a suit over a zoning decision which a developer charged was motivated by certain officials dislike of him, and their desire to "put him 'out of business.'"\textsuperscript{224} The plaintiffs did not allege that "they were treated differently from similarly situated persons or corporations,"\textsuperscript{225} and the trial court dismissed the suit for failure to state a claim.\textsuperscript{226} The circuit court, however, after noting that it was clearly not a class-based suit requiring heightened scrutiny, asked "whether the Equal Protection Clause protects . . . where the plaintiff alleges he is an individual victim of purposeful discrimination."\textsuperscript{227}

Instead of simply affirming the dismissal on the 12(b)(6) motion, the Tenth Circuit analyzed the issue in terms of qualified immunity, noting that "plaintiffs did not point to any case law establishing that defendants’ asserted actions in denying approval of their plats and city registration violated plaintiffs’ equal protection rights."\textsuperscript{228} Rather, the plaintiffs cited to state cases, "assert[ing that] the Village ordinances on business regulations and zoning were not properly published under state law."\textsuperscript{229} Doing its own survey of federal equal protection law, the Tenth Circuit "found no authoritative opinion in this circuit," but cited the \textit{Esmail} case as sufficiently analogous.\textsuperscript{230} The court held, however, that the law on this type of "class of one" suit was "not well enough established to hold the individual defendants to knowledge of it," and granted them qualified immunity.\textsuperscript{231}

\textbf{b. Immunity Denied}

In \textit{Levenstein v. Salafsky},\textsuperscript{232} the Seventh Circuit discussed the role of qualified immunity in the context of an \textit{Olech} claim. The \textit{Levenstein} court reviewed a

\begin{flushleft}
\textsuperscript{221} See id.
\textsuperscript{222} 483 U.S. 635 (1987). See supra note 218, and accompanying text.
\textsuperscript{223} Norton v. Vill. of Corrales, 103 F.3d 928 (10th Cir. 1996).
\textsuperscript{224} Id. at 933. The plaintiffs attempted to argue that the Village’s and individual defendants’ bias towards them was both personal and because of their “business of providing low to moderate income housing in [the] community.” Id. at 930.
\textsuperscript{225} Id. at 933.
\textsuperscript{226} Id. at 929.
\textsuperscript{227} Id. at 933.
\textsuperscript{228} Id. at 933-34. The thrust of the case was that the Village’s ordinances under which the denials occurred were void under state law, and that the bias of “anti-development” city officials who evaluated their plans constitutionally tainted the decision, violating their rights to substantive due process and equal protection of the law: Id. at 929-30.
\textsuperscript{229} Id. at 934.
\textsuperscript{230} Id.
\textsuperscript{231} Id. It is fairly clear, however, that absent an allegation of unequal treatment, no cause of action would arise under \textit{Esmail} or any other leading “class of one” equal protection case. It is somewhat puzzling, therefore, why the court in this case chose to base its holding on the basis of qualified immunity rather than affirming the 12(b)(6) dismissal on the basis that it failed the first prong of the immunity test: finding that the plaintiff failed to allege a violation of a constitutional right. See supra text accompanying note 225.
\textsuperscript{232} 164 F.3d 345 (7th Cir. 1998).
\end{flushleft}
lower court's refusal to dismiss the case when the defendant attempted to claim the benefit of qualified immunity.\footnote{Id. at 347.} Once the court found this issue appealable and ripe for decision, the court stated the relevant burdens as such: "[O]nce the public official raises the defense of qualified immunity, the plaintiff bears the burden of showing (1) whether he or she has asserted a violation of a constitutional right, and (2) whether the applicable constitutional standards were clearly established at the time in question."\footnote{Id. at 351.} The latter standard, based on the Harlow line of cases, is an objective one. Quoting Anderson v. Creighton,\footnote{483 U.S. 635 (1987).} the court stated:

"[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." . . . Public officials should not need to have the insight of constitutional law scholars, or the hindsight of Monday morning quarterbacks, to succeed in a qualified immunity defense.\footnote{Levenstein v. Salafsky, 164 F.3d at 351 (quoting Anderson v. Creighton, 483 U.S. at 640) (first alteration in original).}

As to the first prong of the test for qualified immunity—clear pleading of a violation of a constitutional right—the court found Levenstein's equal protection claim to be "tenuous," but nonetheless sufficiently pleaded "for purposes of resisting the immunity defense."\footnote{Id. at 352.} Applying the second prong of the qualified immunity burdens test, the court found that the relevant constitutional standards were well established at the time the University defendants acted. So-called "class of one" equal protection claims, cases "in which a governmental body treated individuals differently who were identically situated in all respects rationally related to the government's mission," have been allowed in this circuit since at least Ciechon.\footnote{Levenstein v. Salafsky, 164 F.3d at 353 (quoting Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs, 101 F.3d 1179, 1181 (7th Cir. 1996) (internal citations omitted).}

It seems, at the very least, a stretch for the Levenstein court to argue that the existence of a "class of one" cause of action within the Seventh Circuit is clearly established law in a "particularized, and hence more relevant, sense" that the Anderson court required.\footnote{Anderson v. Creighton, 483 U.S. at 640. The "established law" is particularly unclear in light of the conflicting authorities emanating from the Seventh Circuit. See supra text accompanying note 97.} Rather, it is more suggestive of a "level of generality" on a par with stating that the right to equal protection under the law is "clearly established," just the sort of reasoning the Anderson Court rejected.\footnote{Id. at 639.}

\section*{D. The Olech Case}

With this extensive background it becomes easier to understand both the issues at stake in the Olech case and the problems left open by the Supreme Court's holding. \textit{Olech} arose out a relatively routine zoning decision that was challenged by a plaintiff with a colorable claim of malicious intent.\footnote{See supra text accompanying notes 16-18.} The plaintiff had re-
quested a hook-up to the municipal water system after her well had run dry.\textsuperscript{242} The Village began the work after receiving the customary installation fee, but stopped soon thereafter and demanded an additional eighteen feet of easement (over the initial fifteen foot request) in order, it was alleged, to pave the street, install sidewalks, and add public utilities.\textsuperscript{243}

This occurred in the context of Olech having filed lawsuits against the Village that she alleged “made Willowbrook and its officers and employees ‘look bad.’ Olech further allege[d] that these lawsuits generated ‘substantial ill will’ on the part of Willowbrook and its officers and employees.”\textsuperscript{244} After three months, the Village relented, asking only for a fifteen foot easement for the water main “consistent with Village policy regarding all other property in the Village.”\textsuperscript{245} By this time, the delay caused the work to be put aside until after winter, and Olech’s only source of water—an overground hose run from the neighbor’s house—froze, leaving her without water.\textsuperscript{246} The additional easement request, coupled with the three-month delay formed the basis for Olech’s equal protection challenge.\textsuperscript{247}

The trial court held that Olech failed to state a claim because its reading of \textit{Esmail} was that a “class of one” suit based on malice required one to plead either “‘malignant animosity’ or [an] ‘orchestrated campaign of official harassment.’”\textsuperscript{248} “At most, Olech’s Complaint alleges that the Village acted unreasonably and out of ‘ill will’ in requiring her to give up an extra eighteen feet of easement space that was not required of other property holders.”\textsuperscript{249} It further found, in dictum, an apparent rational basis for the request: The Village wanted to “install a paved public roadway . . . with sidewalks and public utilities—something it apparently could not do without the additional 18 feet of space.”\textsuperscript{250}

In reversing the lower court Judge Posner criticized the lower court’s cramped reading of the \textit{Esmail} holding:

> While it may have been important in \textit{Esmail} that the plaintiff alleged an “orchestrated campaign,” it was not important here. The district judge did not try to hook up the requirement of an “orchestrated campaign” to the language or policy of the equal protection clause, and we cannot think of any hook either.\textsuperscript{251}

The appeals court decision went on to state “that the ‘vindictive action’ class of equal protection cases requires proof that the \textit{cause} of the differential treatment . . . was a totally illegitimate animus.”\textsuperscript{252} However, the court held, “if the defendant would have taken the complained-of action anyway . . . the animus would not condemn the action.”\textsuperscript{253} In light of the district court’s finding, based on Olech’s pleading as the procedural posture dictates, that the Village wanted the extra-large

\begin{itemize}
    \item \textsuperscript{243} Id. at *3-*5.
    \item \textsuperscript{244} Id. at *5.
    \item \textsuperscript{245} Id. at *4-*5.
    \item \textsuperscript{246} Id. at *5.
    \item \textsuperscript{247} Id. at *5-*6.
    \item \textsuperscript{248} Id. at *9 (quoting \textit{Esmail} v. Macrane, 53 F.3d 176, 178 (7th Cir. 1995)).
    \item \textsuperscript{249} Id. at *9-*10.
    \item \textsuperscript{250} Id. at *10.
    \item \textsuperscript{251} Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998).
    \item \textsuperscript{252} Id. (emphasis added).
    \item \textsuperscript{253} Id.
\end{itemize}
easement to build a roadway, it appears that there exists a purely factual dispute which cannot be settled short of a trial.

As noted above, the Supreme Court's holding (aside from Justice Breyer’s concurrence) passed on the question of malice as an element of Olech claims. The only answer necessitated by the question presented in the case was that "successful equal protection claims [may be] brought by a 'class of one.'" The Court went on to add that such a claim arises "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." The Court explained that "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."

Applying this standard to the case, the court held:

Olech’s complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. The complaint also alleged that the Village’s demand was “irrational and wholly arbitrary” and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.

However, the Court declined to “reach the alternative theory of ‘subjective ill will’” relied on by the Seventh Circuit. In the only signed opinion, however, Justice Breyer concurred specifically “because the Court of Appeals found that in this case [plaintiff] had alleged an extra factor as well—a factor that the Court of Appeals called ‘vindictive action,’ ‘illegitimate animus,’ or ‘ill will.’” To Breyer, this “added factor” was enough to allay his “concern [of] transforming run-of-the-mill zoning cases into cases of constitutional right.”

In many ways, the majority’s holding in Olech is reminiscent of the “magic words” pleading standard laid out by Judge Learned Hand in Burt. It suggests that in order to survive a motion to dismiss, one need only allege treatment dissimilar from others equal to oneself in relevant ways, and that the difference in treatment is irrational. Irrationality is to be measured by the standard of “intentional and purposeful discrimination,” which, as noted by the Second Circuit in

254. See supra text accompanying notes 21-23.
255. See Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (“We granted certiorari to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a ‘class of one’ where the plaintiff did not allege membership in a class or group.”).
256. Id.
257. Id.
258. Id. (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).
259. Id. at 565 (internal citations omitted and emphasis added).
260. Id.
261. Id. at 565-66 (citing Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998)) (Breyer, J., concurring).
262. Id. at 566.
263. See supra text accompanying note 75.
A motion to dismiss should only be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Thus it must be that the Supreme Court found within Olech's complaint sufficient facts that, if proved, would support a judgment for her on the § 1983 allegations. What exactly would those be? What is the necessary evidentiary threshold? And is "malice" or "ill will" a part of this necessary proof, going either towards proving the "lack of a rational basis" or "intentional and arbitrary discrimination" part of the pleading requirement? These questions will be addressed, infra, in Part IV.

III. CASES DECIDED IN THE WAKE OF OLECH

"Class of one" equal protection suits are intensely factual and arise in a wide variety of contexts. Therefore, the approach taken in this Comment is to discuss the various cases in somewhat greater depth than perhaps the merits of the individual case may seem to warrant. One problem engendered by allowing Equal Protection suits by individuals for personal torts committed by public officials is precisely that filed cases will run the gamut from truly egregious to patently frivolous. Looking at how the courts have handled this range of cases, therefore, helps to shape our understanding both of the development of the substantive law and of how effectively courts are using procedural tools as screening devices.

With that caveat, the discussion is organized as follows: Cases discussing the state of "class of one" equal protection law in the wake of Olech are divided into those holding that the element of malice has been eliminated, those that incorporate the Breyer concurrence, and those circuits which have conflicting decisions on this point. Then, mirroring the pattern established in Part II, cases which demonstrate various approaches to dispositive motions and the issue of qualified immunity are highlighted. Finally, some of the noteworthy decisions that underscore the significance of the Olech decision are discussed. In these cases, Olech has wrought changes to substantive law in various areas, leading to reversals of established precedent.

A. Courts Which Require a Showing of Malice or Bad Faith

As stated, these cases have all held that malice is an element of the cause of action. The interesting thing to pay attention to is how strictly the courts interpret this element at the various procedural stages. That is, what does one need to plead, and what evidence is sufficient to generate an issue of material fact?

1. The Seventh Circuit

As one would expect, the Seventh Circuit and Judge Posner has sided with Justice Breyer, holding that malice was indeed a necessary element of an Olech
case. In Hilton v. City of Wheeling, the plaintiff claimed violations of his right to petition for redress and of equal protection under the law after being cited some fifteen times for such offenses as "disorderly conduct, battery, and violating noise ordinances." Hilton claimed the police always took the side of his neighbors during a seven-year feud that resulted in some eighty visits by the police, who only once took action against Hilton's neighbors while arresting Hilton as well. The case was dismissed on a Rule 56 motion for summary judgment, and Hilton appealed.

Judge Posner took issue with the Supreme Court's decision not to reach his "alternative theory of 'subjective ill will,'" agreeing instead with Justice Breyer. We gloss "no rational basis" in the unusual setting of "class of one" equal protection cases to mean that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position.

There was no evidence of animus uncovered or even alleged in this case, so the court affirmed the holding. The Hilton court pointed out that "[i]f a merely unexplained difference in police treatment of similar complaints made by different people established a prima facie case of denial of equal protection of the laws, the federal courts would be drawn deep into the local enforcement of petty state and local laws." This view of Olech has its appeal because whether the standard is an intentional difference in treatment or that the action be "irrational and wholly arbitrary," something must evidence the intent or irrationality. Justice Breyer and the Seventh Circuit, in holding that that something is animus, illegitimate personal motivation, or bad faith, provide at least some guidance to courts as to what it is plaintiffs must demonstrate in order to win their case. The focus on the public actor's subjective intent, however, takes the spotlight away from an inquiry into whether his or her action had any rational basis, which is the ultimate standard on which liability will be judged. This focus also puts this cause of action on a collision course with the interests the Court sought to protect in its Harlow decision by creating a fact-intensive query into subjective motivations that cannot be resolved short of a trial. To the extent

267. 209 F.3d 1005 (7th Cir. 2000).
268. Id. at 1006.
269. Id. Hilton was certainly no angel. The feud began when his neighbors called the police when they saw him beating his Rottweiler puppy with what they described as a baseball bat, and which he claimed was a "chew stick." Id.
270. Id.
271. Id. at 1008.
272. Id.
273. Id.
274. Id.
275. See Greenspring Racquet Club, Inc. v. Baltimore County, No. 99-2444, 2000 U.S. App. LEXIS 27207, at *18 (4th Cir. Oct. 31, 2000) (citing Front Royal & Warren County Indus. Part Corp. v. Town of Front Royal, 135 F.3d 275, 290 (4th Cir. 1998)), for the proposition that "[w]hen 'government action [does] not burden a fundamental right or employ a suspect classification, the pertinent question for determining whether the governmental action violated the Equal Protection Clause is whether the . . . officials reasonably could have believed that the action was rationally related to a legitimate governmental interest'") (alterations in original).
that a complaint, such as Olech's, suggests that what otherwise is a valid exercise of police power (i.e., a request for an easement to construct a roadway and sidewalks) becomes actionable under § 1983 because it is motivated by ill will, then all discovery is a search for the subjective motivations of public officials.

This dynamic and the attendant problems it raises is apparent in Albiero v. City of Kankakee, where the district court granted summary judgment for defendants on an Olech claim after earlier rejecting a motion to dismiss under Rule 12(b)(6). Albiero, an owner of several rental properties who had often brought the City to court, challenged the City for posting a sign in front of one his properties calling him a “slumlord” and identifying Albiero by name and address. This was part of a policy enforced against several property owners with cited properties that were slow to respond to complaints and deficiencies and had long histories of operating substandard units.

In earlier denying the defendant's 12(b)(6) motion, the court held that the plaintiff could prevail if he could prove “that the action taken by the state... was a spiteful attempt to ‘get’ him for reasons wholly unrelated to any legitimate state objective.” The court went on to say that “the flip side of this retaliation rhetoric is that any legitimate state objective for the defendant[s'] actions is a complete defense.” After wide-ranging discovery—including depositions of city officials—and extensive pleadings, the Albiero court found that plaintiff failed not only to show a lack of legitimate basis, but also held that Albiero failed to demonstrate that he was singled out.

The real question raised by a case like Albiero is what new information emerged during discovery that was not apparent either on the face of the plaintiff's complaint or from the City's answer? Evidence showed that “the City had put up 14 slumlord signs” in accordance with written criteria before the amended complaint was filed, and the plaintiff was unable to adduce any evidence other targeted buildings “were in worse condition than his properties.” This makes one wonder how Albiero could have pleaded in good faith that he was “singled out” or treated differently than others similarly situated.

The court also held that “there can be no real dispute that trying to get property owners to bring their properties into code compliance is a ‘legitimate state objective.’” Since the court had earlier stated that “any ‘legitimate state objec-
tive' for the defendant[s'] action is a complete defense," one might ask, if the "code enforcement" rationale was not clear from the complaint itself, should it not have been made apparent in the defendants' answer? If, as it clearly is from the disposition of this case, whether a state objective is "legitimate" is a question of law, then why did the court allow such extensive discovery before deciding it? It seems that little insight must have been gained, but very high costs were incurred. Neither the Hilton decision nor Justice Breyer's concurrence provide an answer to this conundrum.

2. The Fourth Circuit

The Fourth Circuit has issued just one opinion thus far in the wake of Olech. In Greenspring Racquet Club v. Baltimore County, the court affirmed a lower court's dismissal under Rule 12(b)(6) of claims that the new zoning ordinance which doomed a redevelopment project "was adopted in bad faith, with an attempt to discriminate against Greenspring, and that the [ordinance] fails to advance a legitimate state interest." The court found that the equal protection claim was subject only to rational basis review and that the zoning law "easily passes."

Holding that the law equally applied to all property, thus treating all alike, and that it had a rational basis of restricting growth near rural conservation zones, the court went on to observe:

While Greenspring is free to speculate about the hostility that local officials directed toward them, in order to state an equal protection claim Greenspring also must demonstrate that there is no other legitimate purpose for the law. . . . Greenspring must allege that malice and bad faith were the only conceivable bases for enacting Bill 111-98, and this they cannot do.

This is an example of tying the element of malice to a heightened pleading standard which is, perhaps, the strictest enunciated in any circuit. If it could be upheld, such an approach solves the dilemma identified in Albiero of allowing a case to proceed through discovery to certain termination on summary judgment.

Prior to Olech, the Fourth Circuit had never squarely addressed the question of whether a "class of one," vindictive action equal protection claim was cognizable in any of its decisions. Its take on the Olech decision, therefore, was

289. Id. at 1210 (quoting Court Order (#19)) (alteration in original).
291. Id. at *6.
292. Id. at *18.
293. Id. at *19 (emphasis added).
295. See supra text accompanying notes 278-87. See also American Fabricare v. Township of Falls, 101 F. Supp. 2d 301 (E.D. Pa. 2000) (dismissing a case at summary judgment after lengthy discovery which added no additional information to the pleadings, discussed infra, at text accompanying notes 420-22).
296. See Edwards v. City of Goldsboro, 178 F.3d 231, 250 (4th Cir. 1999) (stating that the facts of the case did not require deciding "whether such a theory of liability under the Equal Protection Clause is viable in our circuit").
really of first impression. The Greenspring court enunciated the proposition that an equal protection claim subject to rational basis review fails “[w]here an obvious, legitimate purpose is evident on the face of a challenged law.”²⁹⁷ In a footnote to this sentence, the court addressed Olech stating: “This fundamental tenet of equal protection jurisprudence is not changed by the Supreme Court’s recent decision in Olech.”²⁹⁸ The Fourth Circuit distinguished Olech stating that the Supreme Court held that the complaint, which alleged that the local zoning decision was “irrational and wholly arbitrary,” was sufficient to state a claim for relief under traditional equal protection analysis. Because the local zoning decision at issue in the instant case is not “irrational and wholly arbitrary,” Greenspring’s complaint is easily distinguished from the complaint at issue in Olech.²⁹⁹

The Greenspring court is being disingenuous in making this distinction. The court conflates its own conclusion about the merits of the complaint with what it is the plaintiff actually alleged.

Olech, if anything, liberalized the pleading standards, throwing into question the issue of whether a case can be dismissed at the 12(b)(6) stage merely on the finding of a rational basis. After all, the trial judge in Olech did discern a rational basis, and—though not addressed at either level of appellate review—it was unequivocally held that an equal protection claim had been stated. The Fourth Circuit would have been on more solid ground by simply confining the holding to the failure of the complaint to adequately allege differential treatment from other similarly situated businesses. As for the thrust of the complaint itself, Greenspring seemed to make the same claim as Olech: a zoning decision was made with malicious and discriminatory intent that had no legitimate State purpose, and that, the Supreme Court has said, states a claim.³⁰⁰

3. The Eleventh Circuit

In dictum, the Eleventh Circuit, in Williams v. Pryor,³⁰¹ apparently endorsed the need for malice as an element. In Williams, the court summarized Olech as “holding that plaintiff stated constitutional Equal Protection Clause cause of action by alleging that village acted irrationally, wholly arbitrarily, and out of malice toward plaintiff when it demanded a 33-foot easement from plaintiff, contrary to 15-foot easements obtained from others similarly situated.”³⁰²

²⁹⁸. Id. at *20 n.4 (citations omitted).
²⁹⁹. Id. (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000)).
³⁰⁰. Greenspring had apparently contended, unlike Olech, that the law would apply only to itself and one other site, while the County contended that the law affected 150 sites. Id. at *4. It is unclear how the County’s assertion made its way into the record given the procedural posture. Although, as the court ruled on a motion to dismiss the second amended complaint, it is possible that the County had answered the first complaint. See id. at *4-*6.
³⁰¹. 240 F.3d 944 (11th Cir. 2001).
³⁰². Id. at 951 (citing Vill. of Willowbrook v. Olech, 528 U.S. at 563-64) (emphasis added).
B. Courts Which Require No Showing of Malice

1. The First Circuit

The First Circuit, in Burns v. State Police Association of Massachusetts,\(^{303}\) signaled that it will read malice out of the “class of one” equal protection cause of action thereby reversing its earlier case law.\(^{304}\) Burns, however, was a case involving a claim under 42 U.S.C. § 1985(3) against a private party for conspiracy to deprive the plaintiff of his civil rights,\(^{305}\) and the issue was not before the court. In dictum, however, the court discussed Olech stating:

In Village of Willowbrook v. Olech, the Supreme Court observed that an equal protection claim could be stated where a 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” creating a “class of one” cause of action, without regard to subjective motivation.\(^{306}\)

This can be taken to imply that the First Circuit is not going to follow the Seventh Circuit in reading Justice Breyer’s concurrence into the holding of Olech. However, while several district court decisions suggest that while malice is not a necessary pleading requirement at the 12(b)(6) stage,\(^{307}\) the Pariseau v. City of Brockton\(^{308}\) court brought malice back in at the summary judgment stage as a necessary element of the claim, as one way of demonstrating “discriminatory intent.”\(^{309}\)

2. The Sixth Circuit

No Sixth Circuit “class of one” equal protection case yet decided in the wake of Olech has involved a claim of improper motivation or malice. However, from the holdings courts in the circuit have made, it appears that the Sixth Circuit does not find such an allegation a necessary element. Alsenas v. City of Brecksville,\(^{310}\) the only Sixth Circuit Court of Appeals opinion citing Olech, suggests that irratio-

\(^{303}\) 230 F.3d 8 (1st Cir. 2000).

\(^{304}\) Id. at 12. See, e.g., Rubinovitz v. Rogato, 60 F.3d 906 (1st Cir. 1995), discussed supra at notes 180-94.

\(^{305}\) Burns v. State Police Ass’n of Mass., 230 F.3d at 9. This was based on alleged racial animus by the police union. Id. The case was dismissed on summary judgment because a “conspiracy could not exist between a corporation and one of its officers acting in his official capacity,” and the First Circuit affirmed, but on the grounds that the plaintiff failed to show racial animus. Id.

\(^{306}\) Id. at 12 n.4 (quoting Vill. of Willowbrook v. Olech, 528 U.S. at 564) (citation omitted) (emphasis added).


\(^{309}\) Id. at 263-64. “Plaintiffs’ claim does not survive the Willowbrook equal protection analysis because there is no evidence of discriminatory intent.” Id. at 263. Rubinovitz v. Rogato, 60 F.3d 906 (1st Cir. 1995), discussed supra at notes 180-94, was then cited by the court as allowing evidence of “bad faith or a malicious intent to injure” to meet this requirement. Id. at 264.

nality, not malice, is the crux of a "class of one" equal protection claim. In this case, Alsenas was denied a permit to construct a home on a lot he owned in a residential neighborhood. This was a paradigmatic nightmare case in which the very first recourse upon denial was to eschew administrative and state law remedies in favor of filing a constitutional claim against the City and its mayor, council members, law director, engineer, building commissioner, members of the Board of Design and Construction Review in federal court. With respect to the equal protection claim, the court briefly dismissed it because "he did not show that there was no rational basis for treating his application differently." The City was concerned about two factors, the "irregular topography" of the lot and a boundary dispute with the neighbor, both of which the court credited.

This reading of the status of Olech's pleading requirements is bolstered by McDonald's Corp. v. City of Norton Shores. McDonald's challenged the denial of a building permit based on a determination that it would add too much traffic flow to a commercial area, despite the City having previously allowed other fast-food restaurants to receive such permits. The court stated that "to prevail on this claim, the Plaintiff must show that the government treated the Plaintiff 'differently from others similarly situated and that there [was] no rational basis for the difference in treatment.' The McDonald's court granted the defendant's summary judgment motion after strictly analyzing the plaintiff's claim that they were "similarly situated" to other permit applicants and finding they were not. As to the rationality prong, the court held, "[a]lthough, it was rational to decide that an additional drive-through restaurant... would cause too much traffic even if previous drive-through restaurants had been allowed because each zoning decision affecting traffic must be made in light of the traffic concerns then posed by the proposed use." In the court's analysis, it was not sufficient to overcome this rational basis to attempt to generate an issue of material fact by employing an expert to say that the road could handle additional traffic.

In Joubran v. McCord, a case involving a claim that a teacher's disparaging remarks about two students' great uncle, coupled with other unfavorable treatment, the court dismissed the equal protection claim on a motion for summary judgment. The Joubran court held Olech inapplicable on the following grounds:

311. See id. The plaintiff, proceeding pro se, did not appear to allege that the City acted with malice. The focus of the court was on the possible "irrationality" of the City's decision, which it could not find. Id. at *4.
312. Id. at *2-3.
313. Id. at *3.
314. Id. at *5 (citing Vill. of Willowbrook v. Olech, 528 U.S. 567, 564 (2000)).
315. Id. at *3.
317. Id. at 438.
318. Id. (quoting Vill. of Willowbrook v. Olech, 528 U.S. at 564) (alteration in original).
319. Id. The court distinguished McDonald's from a K-Mart on the same street which had received a restaurant permit at about the same time by noting that K-Mart's restaurant "did not involve a drive-through." Id. "[T]he other drive-through restaurants in the City that had obtained zoning approval either were not located on [the same street] or had obtained their approval substantially before McDonald's," and thus were not "similarly situated zoning requests." Id.
320. Id.
321. See id. at 434, 438 n.7.
323. Id. at *1-2.
It is important to note, however, that Willowbrook, and all of the cases cited in support of it, involved claims of disparate treatment by property owners under various property and zoning laws. Plaintiffs have not cited any authority, and the Court's own research has not found, any application of the "class of one" theory outside of the property-owner context. Thus, it is unclear whether it is applicable to the circumstances at hand.\footnote{324. Id. at *7 (citations and footnote omitted).}

As noted above, this seemed like a good ground for distinguishing Olech before the Supreme Court; however, at this juncture it appears as if the Joubran court was not looking all that hard for other types of cases.\footnote{325. See supra text accompanying note 14.}

3. The Eighth Circuit

In Costello v. Mitchell Public School District\footnote{327. 266 F.3d 916 (8th Cir. 2001).} the Eighth Circuit's only case to date involving an Olech claim, the court upheld dismissal of an equal protection challenge on summary judgment.\footnote{328. Id. at 918.} A high school student who had previously been identified as having learning disabilities was dropped from special education programs upon entering a new school because the school felt these problems had abated.\footnote{329. Id. at 918-19.} The student did poorly and was failing her band class, whose teacher, she alleged, abused her both verbally and, to a lesser extent, physically.\footnote{330. Id. at 919-20.} She ultimately withdrew from school, continuing her education at home, and brought charges under \$ 1983 alleging, among other things, violations of her equal protection rights.\footnote{331. Id. at 920.}

The circuit court held that "retardation" was not a "quasi-suspect classification calling for a more exacting standard of judicial review," and thus her "class of one" suit was subject to rational basis review.\footnote{332. Id. at 921 (quoting Heidemann v. Rother, 84 F.3d 1021, 1031 (8th Cir. 1996) (internal quotations omitted).} Without suggesting that malice was an element, nor addressing the charges of the music teacher's animus,\footnote{333. Other students had complained about his verbal and physical abuse as well. Id. at 919-20.} the court simply held that the plaintiff failed to raise a genuine issue of material fact that her dismissal from the band was not "rationally related to a legitimate governmental purpose—namely, providing Sadonya with a public education that is conducive to learning."\footnote{334. Id. at 921.}
WITH MALICE TOWARD ONE

Olech majority’s holding. The Little v. City of Oakland court granted summary judgment for the defendant’s against a claim that its decision to demolish a warehouse determined to be a “public nuisance” constituted a § 1983 violation.

As to the equal protection claim, the court stated:

To sustain her equal protection argument, plaintiff has the burden to show she was treated differently than other similarly situated [sic] with no rational basis for the difference. Every parcel is unique. Every owner’s circumstances are different. Taking into account the actual record involving the warehouse in question and its history of abatement, no illegal discrimination could be found on this record.

This decision not only indicates that the court is not looking to malice as an essential element, but also places a high burden on the plaintiff bringing an Olech claim in the context of a zoning decision to demonstrate similarity to others. Taken to its logical extreme, this importation of the notion from real property law that each piece of land is unique makes it extremely difficult for a landowner to show that a zoning or other decision respecting their land gives rise to an equal protection claim.

C. Circuits With Conflicting Holdings on the Element of Malice

Two circuits, the Second and Fifth, have issued rulings which conflict on the issue of malice or impermissible motivation as an element of a “class of one” equal protection claim. Cases from each of these circuits are taken in turn.

1. The Second Circuit

Gelb v. Bd. of Elections of New York involved a challenge to a refusal by New York City’s board of elections to allow the plaintiff to stand as, and vote for, a write-in candidate in a primary election absent the filing of a petition for the opportunity to ballot. The facts of the case suggested that the board had “intentionally discriminated” against write-in candidates in favor of the major party choices for primary ballot access, but the question addressed was whether New York election law required access for write-in candidates in primary elections. If so, the court suggested, an equal protection claim might arise.

The interesting thing about this opinion is that the court only required the intent to discriminate in order for the Olech claim to go forward and suggested that
summary judgment on the issue might be inappropriate. In light of the repeated refusals of the City Board to afford Gelb (and others) write-in voting privileges in primary elections, it may well be that the Board engaged in arbitrary, purposeful and intentional discrimination. This does not appear to be a case of mere unintended irregularities. The court viewed the controlling issue as a matter of “state of mind,” and noted “that summary judgment is generally inappropriate” for deciding such questions. The Gelb court’s ruling appears to comport with the plain language of the Olech decision, sans any additional requirement of malice, but it is one of the few decisions that make it clear that the inquiry into discrimination is a subjective one similar to that of malice.

In contrast, the Katz v. Stannard Beach Association court stated the Olech pleading requirements as thus:

[T]o state a cause of action under Section 1983 based on the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must allege that: (1) compared with others similarly situated, the plaintiff was selectively treated; and (2) 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.

The claim in this case was that the plaintiffs’ equal protection rights were violated because a quasi-governmental association used plaintiffs’ own tax dollars to bring suit against them for an easement and damages in order to secure a private benefit. It was dismissed for failure to state a claim because (1) it failed to allege differential treatment from others similarly situated and (2) made no allegations of intentional discrimination based on, among other things, “bad faith, ‘illegitimate animus,’ ‘ill will,’ or malice to injure them.” So in contrast to Gelb, the Katz court looked to Breyer’s concurrence in Olech and read an ill will requirement into the pleading standard.

In Economic Opportunity Comm’n of Nassau County, Inc. v. County of Nassau, involving a tax foreclosure on property being renovated by the EOCNCI and “interference” in the administration of a HUD grant, the court agreed with Katz that “bad faith intent to injure a person” remains a necessary pleading

344. Id.
345. Id. (internal quotes omitted).
346. Id. This case was before the court on the trial court’s holding for the state defendants on their motion for summary judgment. Id. at 150.
347. 95 F. Supp. 2d 90 (D. Conn. 2000).
348. Id. at 95 (citing Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir. 1996)) (emphasis added). This, of course, was the established view of “class of one” cases prior to Olech. See discussion supra, at Part II.A.2.
349. Id. at 92-93.
350. Id. at 95 (citing Crowley v. Courville, 76 F.3d 47, 53 (2d Cir. 1996); Vill. of Willowbrook v. Olech, 528 U.S. at 565-66) (Breyer, J., concurring).
351. See also Anderson v. City of New York, 2000 U.S. Dist. LEXIS 10222, *10 (E.D.N.Y. July 19, 2000) (noting Justice Breyer’s concurrence stressing the “extra factor of ‘vindictive action’ or ‘ill will,’”). Malice must be directly alleged, it will not be inferred from differential treatment. See Roth v. City of Syracuse, 96 F. Supp. 2d 171, 182 (N.D.N.Y. 2000) (“The paucity of evidence in the record which suggests that plaintiffs were treated differently as they allege does not, in itself, show malice. A plaintiff cannot establish an equal protection violation based on selective enforcement simply by showing that a regulation or policy was not enforced against others similarly situated.” (internal citations and quotation marks omitted)).
element. The EOCNCI court held that for purposes of defeating a 12(b)(6) motion to dismiss the claim regarding the tax lien sale it was enough to allege “that the County acted in malicious bad faith to drive EOC out of business. . . . [T]he Court must allow the Plaintiffs an opportunity to prove their claims.” The test for sufficiently pleaded similarity was stated as “whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.”

The court rejected the argument that Esmail and Olech dispensed with the need of showing that others, similarly situated, were treated differently, pointing out that “[t]he Equal Protection clause is essentially a direction that all persons similarly situated should be treated alike,” and noting that both the Esmail and Olech courts held that the plaintiffs had adequately pleaded differential treatment.

The Second Circuit’s confused approach to the issue of malice was drawn starkly in Jackson v. Burke. In that case, a prisoner charged that court documents mailed to him by his mother were intentionally mutilated and effectively destroyed by prison officials, thereby violating his rights of access to the courts, due process, and equal protection. In denying the equal protection claim, the court focused on the element of being “intentionally singled out for treatment different from that accorded other prisoners for no legitimate governmental reason.”

The court found that, though the prisoner was “well situated to allege facts from which a reasonable juror could infer that one or more prison employees held an animus against him[. . .]; he has wholly failed to do so.”

The Jackson court stated: “To be sure, proof of subjective ill will is not an essential element of a ‘class of one’ equal protection claim.” It then, however, muddied the waters by saying that the accidental mutilation of mail, not just in prison but in the everyday world, is a sufficiently common experience that Jackson was at least required, following discovery, to show that there was something sufficiently distinct about this mail, this incident, or his relation to the relevant prison authorities that could give rise to a reasonable inference that he was in fact being treated differently from all others similarly situated. As it is, he has not even adduced evidence that other

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353. Id. at 439.
354. Id. at 440. It should be noted that the main thrust of the complaint was that this apparent advocacy group for low-income and minority citizens had provoked the ire of county, village, and various local officials because of its protest activities. Id. at 438. Such assertions were found to sufficiently support a § 1983 claim based on denial of First Amendment rights by some of the county and some individual defendant officials. Id. While it may be that some part of these allegations have carried over to the Equal Protection Clause claim, the plain language of the opinion suggests that the mere allegation of “malicious bad faith” alone is enough to survive a 12(b)(6) even in the face of countervailing evidence that the County had helped the OEC to get HUD loans. Id. at 440.
355. Id. at 439-40 (citing Econ. Opportunity Comm’n of Nassau County v. County of Nassau, 47 F. Supp. 2d 353, 370 (E.D.N.Y. 1999)).
356. Id. at 441 (citing City of Cleburne v. Cleburne LivingCtr., Inc., 473 U.S. 432, 439 (1985)).
357. 256 F.3d 93 (2d Cir. 2001) (per curiam).
358. Id. at 95.
359. Id. at 96.
360. Id. at 96-97.
361. Id. at 97.
prison mail did not on occasion suffer similar mishandling. In the absence, therefore, of any basis for inferring that his mail was being singled out, his equal protection claim must be dismissed.\textsuperscript{362}

In light of this determination that "something" needs to be shown to state an equal protection claim, subsequent decisions in the Second Circuit have noted that the issue of whether or not malice is an element of an\textit{Olech} claim has been undecided.\textsuperscript{363}

\textbf{2. The Fifth Circuit}

The Fifth Circuit, in\textit{Bryan v. City of Madison},\textsuperscript{364} has taken what is safe to say a unique view of the\textit{Olech} decision. This circuit had never directly decided whether it considered a "class of one" selective enforcement equal protection claim to be viable.\textsuperscript{365} To state such a claim, the court held, "a plaintiff must prove that the government official’s acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right," but it refused to address whether personal vindictiveness is an "improper consideration."\textsuperscript{366} Although the plaintiff had charged that the mayor blocked his development project in response to public pressure, the court found that absent improper public motivations, "such as race," responding to citizen pressure "is not . . . a malevolent motive for selective enforcement purposes."\textsuperscript{367}

\textsuperscript{362} \textit{Id.}

\textsuperscript{363} \textit{See} Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494 (2d Cir. 2001). Harlen contends that the Supreme Court’s decision in\textit{Olech} modified the second part of the\textit{LeClair} analysis by removing the requirement that malice or bad faith be shown in order to state a valid "class of one" equal protection claim. \textit{See Olech}, 528 U.S. at 565 (holding that allegations of "irrational and wholly arbitrary" government action are sufficient to state an equal protection claim without inquiry into the defendants’ subjective motivation). Indeed, we recently indicated in \textit{dicta} that this reading of\textit{Olech} is the correct one. \textit{Jackson v. Burke}, 256 F.3d 93, 97 (2d Cir.2001) (per curiam) (noting that "proof of subjective ill will is not an essential element of a ‘class of one’ equal protection claim"); \textit{see also Gelb v. Board of Elections of New York}, 224 F.3d 149, 157 (2d Cir.2000) (noting, where plaintiff made no allegation of animus, that claim could survive summary judgment because "it may well be that the Board engaged in arbitrary, purposeful and intentional discrimination"). However, the district court and a number of our sister circuits have read\textit{Olech} differently, holding that it did not remove the requirement that a plaintiff alleging an equal protection violation based on selective enforcement show that the governmental action at issue was motivated by personal animus. \textit{E.g., Hilton v. City of Wheeling}, 209 F.3d 1005, 1008 (7th Cir.2000), \textit{cert. denied}, 531 U.S. 1080, 121 S.Ct. 781, 148 L.Ed. 2d 678, (2001); \textit{Shipp v. McMahon}, 234 F.3d 907, 916 (5th Cir.2000). We need not decide which reading is the correct one in order to resolve this case, as Harlen’s claim fails even if no showing of animus is required.

\textit{Id.} at 499-500.

\textsuperscript{364} 213 F.3d 267 (5th Cir. 2000).

\textsuperscript{365} \textit{See Allred’s Produce v. U.S. Dept. of Agric.}, 178 F.3d 743, 748 (5th Cir. 1999) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)) ("[I]t must be shown that the selective enforcement ‘was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification’."). \textit{See also supra} note 174.

\textsuperscript{366} \textit{Bryan v. City of Madison}, 213 F.3d at 277 & 277 n.18. This holding followed a lengthy discussion of\textit{Esmail}. \textit{Id.} at 277.

\textsuperscript{367} \textit{Id.} at 277.
With respect to the Olech decision, the Bryan court stated:

[T]he Supreme Court explained that "our cases have recognized successful equal protection claims brought by a 'class of one.'" As we read this part of the holding, it merely stands for the proposition that single plaintiffs may bring equal protection claims. They need not proceed on behalf of an entire group. But this statement had nothing to do with whether they must assert membership in a larger protected class. The decision does not, therefore, alter our requirement of an improper motive, such as racial animus, for selective enforcement claims.  

This bit of dictum indicates that the Fifth Circuit feels that, despite the very clear language of Olech, no equal protection violation exists short of a trampling of a fundamental right or class-based discrimination.

Where Bryan holds to a very traditional view of equal protection law, a different panel of Fifth Circuit judges took quite a different tack six months later in Shipp v. McMahon, which assumed malice to be an element in an Olech claim. The case was before the circuit court on an appeal of an order granting the defendant's 12(b)(6) motion based on qualified immunity. The Fifth Circuit—on rehearing—reversed itself and the district court, sustaining the defense of qualified immunity but allowing the plaintiff to amend her complaint to include an Olech claim. This unusual decision was likely prompted by the particularly egregious facts of the case, which involved a domestic violence situation in which an abused wife was ultimately shot by her estranged husband. The sheriff's office (which employed the husband's mother) repeatedly failed to respond to Shipp's and her family's complaints.

The court, after granting the defendants' qualified immunity on the ground that they are just in this opinion "clearly establishing" the law, discussed the option of making an Olech claim. In essence, the court laid out a map for the plaintiffs to an alternate claim they could—but actually did not—make. Of interest here was that the Fifth Circuit automatically assumed malice to be an element by virtue of the Supreme Court's Olech decision: "To state a claim sufficient for relief, a single plaintiff must allege that an illegitimate animus or ill-will motivated her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment."

The court turned to Judge Posner's decision in Hilton as another case involving unequal provision of police protection, stating that establishing a lack of a "rational basis requires a plaintiff to 'present evidence that the defendant deliber-

368. Id. at 277 n.17 (quoting Vill. of Willowbrook v. Olech, 528 U.S. at 564).
369. 234 F.3d 907 (5th Cir. 2000).
370. Id. at 909.
371. Id. at 917.
372. Id. at 910.
373. Id.
374. Id. at 915-16. On the matter of qualified immunity, the issue revolved around whether it was "clearly established law" that treatment of assaults in the domestic context in a different manner than other assaults (or having "policies, practices, and customs" that discriminate against victims of domestic abuse) offends the Equal Protection Clause because most of its victims are women. Id. at 912. Here the court sought to "clearly establish" that law by holding that a plaintiff must show that there was a practice of affording lesser protection; that the reason it was adopted was to discriminate against women; and that the injury was caused by the policy. Id. at 914-15.
375. Id. at 916 (citing Vill. of Willowbrook v. Olech, 528 U.S. at 565).
ately sought to deprive him of the equal protection of the laws for reasons of a personal nature."  

Reading the complaint in a reasonable light, the court stated that if defendant Betty Shipp, mother of the abusive husband and police officer, "influenced the level of protection [plaintiff] Shipp received from the [Webster Parish Sheriff's Office], Shipp may be able to establish an unequal police protection claim within the framework elucidated in" Olech.

D. Motions to Dismiss, Summary Judgment, and Qualified Immunity

Following on the pattern of discussion established in Part II, some representative cases are summarized below in order to demonstrate the variety of ways courts have handled Olech cases at these various procedural stages.

1. Motions to Dismiss

Singleton v. Chicago Sch. Reform Bd. of Trs involved serious allegations of sexual harassment of a female teacher by the school's male principal. Charging that his behavior led to a constructive discharge, and after having fully availed herself of the administrative remedies, Singleton was denied reemployment after taking a medical leave on the grounds that she had taken secondary employment to mitigate damages while her case was pending. The complaint also leveled charges at the school board and other officials on grounds that they never investigated her claims and that her dismissal was a "mere pre-text to hide unlawful retaliation." The claim included four counts under Title IX of the Educational Amendments of 1972 and § 1983 claims for violations of substantive due process and equal protection.

The Singleton court rejected defendant's motion to dismiss the equal protection claims under both Esmail and the Supreme Court's Olech standards, giving very short shrift to the latter. As the court read the law, this "vindictive action" cause of action required a two-prong test be met in order to state a claim. First, and quite interestingly, the court stated that "the relevant issue is whether defendants' actions toward Plaintiff, including her termination, were motivated by vindictiveness and spite." The complaint contained the necessary, if conclusory, appellations of "vindictiveness" and "wholly illegitimate," but more importantly alleged specific facts that tended to support those conclusions.

The second prong requires a showing that the defendants' actions were "wholly unrelated" to a legitimate state purpose. Singleton alleged she was "terminated

376. Id. (quoting Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000)).
377. Id. at 916-17.
379. Id. at *4-*5.
380. Id. at *5-*8.
381. Id. at *9.
384. Id. at *25-*30.
385. Id. at *27-*28.
386. Id. at *27.
387. Id. at *28.
388. Id.
for engaging in part-time work while employed by the Board, but claim[ed] that the Board does not terminate other employees for the same conduct." 389 Further she claimed that this reason was a "pretext to hide unlawful retaliation," and this, the court found, was an adequate allegation of a lack of legitimate purpose and that an *Esmail* equal protection claim had been sufficiently stated. 390

The court distinguished an *Esmail* vindictive action claim from a "class of one" *Olech* claim, although it held that this too was sufficiently pled. 391 The defendants had tried to argue that the claim failed because the plaintiff did not explain "the 'class of one' to which she belongs." 392 The court noted that *Olech* did away with the plaintiff's need to "identify herself with a particular group. In *Olech*, the Court merely requires that the plaintiff alleges that she has been intentionally treated differently than others similarly situated and that there is no rational basis for the difference in treatment." 393 In essence, the *Singleton* court maintained that the Seventh Circuit recognizes a heightened pleading standard over and above that required by *Olech*.

Another Seventh Circuit decision which displayed a much stricter adherence to the pleading requirements was *Purze v. Village of Winthrop Harbor*. 394 Here the defendant Village prevailed at the 12(b)(6) stage because the court held, on the authority of *Hilton*, 395 against the Purzes on the grounds that animus was insufficiently pled. 396 The plaintiffs tried to argue that their clearly nonconforming housing development plans were repeatedly denied approval (whereas others had received variances) because of a personal animus evidenced by: (1) the denials themselves, (2) "a board member’s comment that plaintiffs did not help support the building of a road near their property," and (3) an adjoining property owner’s political support for a Village Trustee/Board candidate, when that neighbor opposed the variance. 397 The *Purze* court held that

\[\text{[in a class of one equal protection case, "plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." In other words, the Purzes must show that the Village's actions were impossible to relate to legitimate government objectives.} 398\]

The allegations made, the court held, did "not come close to the degree of personal ill will or animus required to state an equal protection claim." 399

This is probably a correct and wise holding, and demonstrates a practice that the *Albiero* court might have benefited from employing. However, it should be

389. *Id.* at *29.
390. *Id.*
391. *Id.* at *30.
392. *Id.* at *29-*30.
393. *Id.* at *30.
397. *Id.* The court stated that the "Plaintiffs offer no evidence to support" the third claim. *Id.* at *6-*7 (quoting *Hilton v. City of Wheeling*, 209 F.3d at 1008 (7th Cir. 2000)) (citation omitted).
398. *Id.* at *6-*7 (quoting *Hilton v. City of Wheeling*, 209 F.3d at 1008 (7th Cir. 2000))
399. *Id.* at *7.
400. *See supra* text accompanying notes 278-89.
noted that it appears to conflict with the Seventh Circuit’s decision in *Levenstein*\(^{401}\) in holding the plaintiff to what is in essence a heightened pleading standard. It is plausible that this discrepancy can be attributed to the simple fact that Levenstein had a more compelling case than did the Purzes.

A district court in the Seventh Circuit has upheld the validity of applying rational basis review when deciding a motion to dismiss, thereby affirming that portion of the holding in *Wroblewski v. City of Washburn*.\(^ {402}\) The *Baumgardner v. County of Cook*\(^ {403}\) court discussed the tension presented when the lenient pleading standards mandated by Rule 12(b)(6) meet with the presumption of constitutionality that state action is to be granted “if any set of facts reasonably may be conceived to justify its classification.”\(^ {404}\) Addressing this “dilemma,” the *Baumgardner* court stated:

> The rational basis standard, of course, cannot defeat the plaintiff’s benefit of the broad 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim.\(^ {405}\)

Continuing to quote *Wroblewski*, the *Baumgardner* court said: “To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.”\(^ {406}\) The court then found the plaintiff’s allegation that he received a job demotion “solely because of his disability” sufficient to state a claim that the governmental actor’s behavior may not have borne a “rational relationship to a legitimate government interest.”\(^ {407}\)

The use of the *Wroblewski* decision here—even though *Baumgardner* is eminently distinguishable from *Olech* in that it involves class-based discrimination\(^ {408}\)—is that the Seventh Circuit’s decisions in *Esmail* and *Olech* seemed to rob *Wroblewski* of its vitality. This is because after having laid out the interplay between the procedural standard and the substantive burden, the *Wroblewski* court went on to hold that “[t]his allegation [of ill will] does make dismissal under Rule 12(b)(6) a closer question. Even this allegation, however, assumed true as it must be, is insufficient to defeat the City policy’s presumed rationality.”\(^ {409}\) This is precisely the step the district court in *Olech* took and the Seventh Circuit apparently rejected.

Courts in the Third Circuit have adopted what could be considered extremely liberal pleading standards in deciding motions to dismiss, but have taken a much firmer stand at the summary judgment window. Thus, in *Michelfelder v. Bensalem Township School District*,\(^ {410}\) the district court held that “Plaintiffs’ allegations that

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\(^{401}\) Levenstein v. Salafsky, 164 F.3d at 352. The *Levenstein* court held that discovery was essentially a substitute for pleading the “similarly situated” element. See supra text accompanying note 139.

\(^{402}\) 965 F.2d 452 (7th Cir. 1992). See supra text accompanying notes 141-51.


\(^{404}\) *Id.* at 1055.

\(^{405}\) *Id.* (quoting *Wroblewski* v. City of Washburn, 965 F.2d at 459-60).

\(^{406}\) *Id.* (quoting *Wroblewski* v. City of Washburn, 965 F.2d at 460).

\(^{407}\) *Id.* at 1055-56.

\(^{408}\) See infra text accompanying notes 449-56.

\(^{409}\) *Wroblewski* v. City of Washburn, 965 F.2d at 460, discussed supra in text accompanying notes 141-51.

... defendants allowed other residents to attend Bensalem School District schools free of charge while demanding tuition for minor plaintiffs with knowledge that they too were residents states an equal protection claim sufficient to withstand a motion to dismiss.\textsuperscript{411} The Michelfelder court stated, however, that the complaint included "no allegation that any defendant treated other children believed not to be residents of defendant School District differently than they did plaintiffs."\textsuperscript{412} While it seems clear that the court could have rejected this implied "class of one" equal protection claim\textsuperscript{413} as insufficiently stated, it may well have been persuaded that on the facts—which are fairly egregious\textsuperscript{414}—the plaintiffs deserved to have their "day in court."

Similarly, the Marchese v. Umstead\textsuperscript{415} court held that an Olech claim was stated by a car dealership owner who charged that others (including his predecessor-in-interest) escaped enforcement of general property laws to which he was subjected, although the plea failed to allege any lack of a rational basis for the Borough's enforcement of its laws.\textsuperscript{416} Stating that the "essence of the Equal Protection Clause is that, absent a rational basis for doing otherwise, the state must treat similarly situated persons alike," the Marchese court found the mere allegation that "others" had escaped enforcement of the laws "for over 40 years is sufficient to withstand a motion to dismiss."\textsuperscript{417}

2. Summary Judgment

At the summary judgment stage many courts take a much tougher stance regarding the quantum of evidence needed to raise a question of material fact. In what is, in all likelihood, the future of the Marchese case,\textsuperscript{418} the same judge decided in American Fabricare v. Township of Falls\textsuperscript{419} to grant the defendant's summary judgment against a laundry business's charge that the Township's imposition of higher than normal sewer tapping fees as a condition for receiving permits vio-

\textsuperscript{411} Id. at *10.
\textsuperscript{412} Id. at *10 n.4.
\textsuperscript{413} "Plaintiffs' claims for 'Discrimination on the Basis of Ancestry' and 'Denial of Equal Access to State Funded Education' fairly suggest a violation of [equal protection] cognizable under 42 U.S.C. § 1983." Id. at *9. The "ancestry" charge related to ill will towards members of the Michelfelder family, which "does not constitute a class or group, much less a protected one." Id.
\textsuperscript{414} Michelfelder charged that the school district's investigations into whether minor children plaintiffs domiciled with their grandmother were residents of the district, and its demands for tuition from plaintiffs, were motivated by the grandmother's testimony against the school district in a truancy case 20 years earlier. Id. at *2-*4. The school district's alleged actions included having "harassed plaintiffs over many years and knowingly misrepresented" that children were not residents; following the children "in the public streets"; surveilling her home; knocking on her door at early hours; and questioning her neighbors. Id. at *3-*4.
\textsuperscript{415} 110 F. Supp. 2d 361 (E.D. Pa. 2000).
\textsuperscript{416} Id. at 371. This case resembles Albiero, discussed supra at text accompanying notes 278-98, in that the decision that such a pleading states a claim is going to force the Borough to be subject to discovery (unless it pleads qualified immunity prior to the Rule 56 stage). In the end, the court is likely to find that the government does not have to "prosecute all known lawbreakers" in order to prosecute one. See supra text accompanying note 49. So what interest is served by allowing this pleading?
\textsuperscript{417} Id. at 371 (citing Vill. of Willowbrook v. Olech, 528 U.S. at 564).
\textsuperscript{418} See supra notes 416-17 and accompanying text.
\textsuperscript{419} 101 F. Supp. 2d 301 (E.D. Pa. 2000).
lated its equal protection rights. After finding that the rates were assessed in accordance with state law, the court had an easy time holding that the relationship between higher tapping rates and higher discharge was rationally related to the government’s interest in “maintaining the physical and fiscal integrity of its sewage system.” Further, the plaintiff “offered no examples of other high-discharge businesses in the Township that were not required to pay additional sewer tapping fees based on increased usage.”

A state statute likewise provided a rational basis for denial by a community college of an instructor’s military credits in Allan v. Board of Trustees. The Allan court characterized Olech as holding that if one “is alleging membership in a ‘class of one’ for purposes of equal protection, he must prove that his treatment was intentional, irrational, and wholly arbitrary.” The court asserted that the plaintiff did not meet this burden because there was a rational statutory basis for the denial of military credits.

Given the decisions in Allan and American Fabricare, one wonders what hope there is for the plaintiff in the Marchese case—or any other plaintiff whose complaint admits violations of facially valid laws—of ever succeeding on the merits of that claim.

3. Qualified Immunity

The case of Romer v. Morgenthau is notable for its extended discussion of qualified immunity. The Romer court stated that whether the plaintiff’s right allegedly violated was “clearly established” depends on if “a reasonable official would have known his actions were unlawful.... [T]he question is not whether defendants should have known of an abstract federal right but whether they should have known that their acts specifically violated a plaintiff’s right....” This

420. Id. at 302, 306.
421. Id. at 306.
422. Id. In a footnote, the court easily distinguished Olech on procedural grounds. Id. at 309 n.14. Its take on the case is interesting:
Reviewing the district court’s dismissal for failure to state a claim, the Court merely held that the complaint had stated a cognizable equal protection claim by alleging that the city’s requirement was irrational and wholly arbitrary, particularly in light of the allegations that plaintiffs were treated differently than other similarly situated individuals. Unlike Willowbrook, this case is at the summary judgment stage, and to survive a summary judgment plaintiff must do more than merely state an equal protection claim; it must produce evidence to support its claims of disparate treatment. Id. (citation omitted).
423. Civil No. 98-4193 (JBS), 2000 U.S. Dist. LEXIS 2329 (D. N.J. Mar. 7, 2000). Granting of the military credits would have boosted Allan’s pay by giving years of service credit for time spent in the military. Id. at *4.
424. Id. at *24 (citing Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000)).
425. Id. at *25. Allan also charged § 1983 violations for retaliation for his union activities, which the court dealt with in a separate section. Id. at *23 n.5. Such charges would, of course, support a constitutional claim under the First Amendment but also would supply the element of “malice” or “discrimination” for an Olech claim. Here the court found the charges unfounded on the evidence offered, which the Allan court held to consist of “bare assertions, conclusory allegations, and suspicions.” Id. at *33.
426. See supra text accompanying notes 416-17.
428. Id. at 355 (paraphrasing Shechter v. Comptroller of City of New York, 79 F.3d 265, 270-71 (2d Cir. 1996)) (emphasis added).
comports with the "strict test" similarly required by Supreme Court decisions on the issue (though not always followed by the lower courts). As the Romer court further noted, defendants may still be held qualifiedly immune even if they violate clearly established rights "if it was 'objectively reasonable' for [the] defendant to believe that his acts did not violate those rights in that 'officers of reasonable competence could disagree' on their legality." In dictum, the court in Allan v. Board of Trustees addressed the availability of qualified immunity of the defendant college director, claiming that even if Allan had shown a constitutional violation his claim would still fail at this stage because the named plaintiffs sued in their individual capacity would be eligible for qualified immunity. The Allan court found: "[T]he law relating to military credits is hardly 'clearly established,' with respect to its availability to a non-certified, non-degreed instructor like the plaintiff. . . . [Defendant] would thus be immune from liability under § 1983 with respect to that determination." E. Post-Olech Cases Involving Changes to Other Law

A case with potentially large implications is Byers v. Illinois State Police. In Byers, two female police officers, alleging that they were passed over for promotion to Master Sergeant in favor of less qualified males, brought suit under Title VII of the Civil Rights Act of 1964 along with an Olech claim. The only issue addressed was the sufficiency of the "class of one" equal protection claim of the type accepted by the Supreme Court in Olech to survive a motion to dismiss. The Byers court easily found the allegation of dissimilar treatment in the charge that the plaintiffs had been passed over for promotion by less qualified men. The court analyzed the second pleading requirement in light of Hilton, saying that one must allege facts sufficient to show a deprivation by the state of equal protection "for reasons of a personal nature unrelated to the duties of the defendant's position." This was met by the assertion that the "Defendants' actions were willful, malicious, wanton, and in reckless disregard of Plaintiffs' rights." The plaintiffs, however, faced another hurdle. Part of their "class of one" challenge was premised on alleged retaliation by the department for their previously filing sex discrimination charges with the Equal Employment Opportunity

429. See supra text accompanying note 220.
435. Id. at *1-*2.
436. Id. at *5-*6. The Defendants did not challenge the Title VII charges at this stage, and other counts were resolved in the briefing process. Id. at *2-*4.
437. Id. at *6-*7.
438. Id. at *11 (quoting Hilton v. Wheeling, 209 F.3d at 1008) (internal quotations omitted).
439. Id. at *13.
The defendants challenged the propriety of bringing such a claim under § 1983, relying on *Yatvin v. Madison Metropolitan School District* where the Seventh Circuit found that “although sex discrimination by state agencies has been held to violate the equal protection clause, retaliating against a person for filing charges of sex discrimination is not the same as discriminating against a person on grounds of sex...”. The court found that it was not “plausible that Congress would have wanted to allow a victim of a Title VII violation to bypass the administrative procedures created by the statute... and go directly to court, through the illogical expedient of equating discrimination against a person for filing charges of sex discrimination to sex discrimination itself.”

The defendants argued that this was still good law, but the *Byers* court stated that it “can find no reason why these claims should be dismissed at this early stage in the litigation.” It held that *Yatvin* was based on the assumption that plaintiffs asserting an equal protection claim must be members of a class, finding that retaliation claims are based on the conduct of the actor, not the actor’s membership in a particular class. Defendants, however, ignore the impact of *Olech*. *Olech* found that a plaintiff does not have to allege membership in a class or group to assert a valid Equal Protection Claim, which undermines the basis for the holding in *Yatvin*.

In a footnote the court stated that it may be the Seventh Circuit and Supreme Court “did not intend to create a cause of action under the Equal Protection Clause based upon Title VII-style retaliation,” but it found nothing in any decisions precluding this claim.

The court also discussed the different burdens at the 12(b)(6) and Rule 56(c) stages in light of *Hilton*. To defeat a motion for summary judgment under *Hilton*, “a plaintiff must submit evidence of improper motive which demonstrates that ‘the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature.’” The *Byers* court held that at the dismissal stage, allegations of “malicious, wanton, and... reckless disregard of Plaintiff’s rights” are enough to carry the case forward (though “just barely”).

Of similar moment is the decision in *Baumgardner v. County of Cook*, which involved a § 1983 case brought in conjunction with an ADA claim. The question presented by the court in its ruling on defendant’s 12(b)(6) motion was whether the Americans with Disabilities Act foreclosed a § 1983 action predicated on the same nucleus of operative facts, though based on a violation of the equal protection clause (i.e., not to enforce rights under the ADA itself). The court held one could bring such a parallel action. Baumgardner was disabled and charged that
he was demoted and discriminated against in his employment by a supervisor because of "irrational prejudice."\textsuperscript{451}

While this claim was not of the "class of one" variety—Baumgardner was alleging class-based discrimination as against disabled persons—and the Seventh Circuit had previously allowed § 1983 claims involving violations of equal protection parallel to claims under the ADA,\textsuperscript{452} the \textit{Baumgardner} court also noted the Supreme Court's ruling that class-based discrimination was not a prerequisite to an equal protection claim.\textsuperscript{453} This is important because the Supreme Court, in \textit{Board of Trustees of the University of Alabama v. Garrett},\textsuperscript{454} held that while "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational,"\textsuperscript{455} \textit{Olech} insures a cause of action remains against a state for any deprivations solely based on any discriminatory actions not specifically mandated by the needs of the job.\textsuperscript{456} That is to say, state actions that are not "rational."

\section*{IV. DISCUSSION}

Judges constantly face the dilemma of balancing a desire to see justice done with the need to administer an increasingly heavy caseload. It is a simple fact that people bring a plethora of what many would consider frankly meritless lawsuits.\textsuperscript{457} The Federal Rules of Civil Procedure provide judges with tools necessary to "weed out" the insubstantial cases while allowing meritorious claims, which allege substantive violations of rights, to proceed. But, of course, such a statement ultimately turns out to be circular in that cases are only "insubstantial" to the extent that they fail to assert a violation of a right as defined by the substantive law. Canny lawyers—the "artful complainers" with whom the \textit{Futernick} court was concerned\textsuperscript{458}—are gifted in the art of defining substantive law and utilizing the rules of civil procedure in an ongoing effort to get their clients their "day in court." The dialectic of this struggle is the heart of the common law system.\textsuperscript{459}

The \textit{Olech} decision and the so-called "class of one," "vindictive action," or "selective treatment" equal protection cause of action provide a ripe field for this

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\item \textsuperscript{451} \textit{Id.} at 1055-56 (internal quotations omitted).
\item \textsuperscript{452} \textit{Id.} at 1048-50.
\item \textsuperscript{453} \textit{Id.} at 1053.
\item \textsuperscript{454} 531 U.S. 356 (2001). The case held that Congress could not use its Fourteenth Amendment, § 5 powers to vitiate the Eleventh Amendment sovereignty of states, unless it is "enforc[ing] the substantive guarantees contained in § 1" or, if the interest sought to be protected is beyond the § 1 guarantees, the legislation "exhibit[s] 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" \textit{Id.} at 365 (quoting \textit{City of Boerne v. Flores}, 521 U.S. 507, 520 (1997)). Finding that discrimination against a non-suspect class like the disabled survives rational basis review under § 1, \textit{id.} at 365-68, and no pattern of discrimination was found, the Court held that suits for money damages under Title I of the ADA were barred by the Eleventh Amendment. \textit{Id.} at 374.
\item \textsuperscript{455} \textit{Id.} at 367.
\item \textsuperscript{456} Note that the holding of \textit{Garrett} is inapposite to the \textit{Baumgardner} decision in that it relies on state sovereign immunity under the Eleventh Amendment, and that immunity does not extend to municipal corporations and local governments. \textit{Id.} at 368-69.
\item \textsuperscript{457} See, e.g., \textit{Summers v. City of Raymond}, 105 F. Supp. 2d 549 (S.D. Miss. 2000) (family brings federal equal protection claim because, on two occasions, their illegally parked cars were towed by City).
\item \textsuperscript{458} \textit{See supra} text accompanying note 106.
\item \textsuperscript{459} This discussion owes much to the teaching of Professor Mel Zarr of the University of Maine School of Law. The weaknesses are all the Author's.
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constant battle. Unfortunately, courts are currently somewhat unarmed because the substantive law in this field is not yet firmly established. The cost of this failure is a large amount of waste of judicial resources as lenient pleading standards enunciated by the court allow cases to proceed at least as far as summary judgment, when all that the court needed to know to decide the case was readily apparent at the conclusion of the pleading stage. Once the substantive law is clarified, judges, plaintiffs, and defendants alike will have the ability to more realistically assess whether or not a case is "substantial." Defining the law in this area, which is, after all, a matter of constitutional concern involving citizens' rights under the Equal Protection Clause, in a way that is sustainable under current law and upholds the principles of justice, however, is difficult work.

This Comment seeks merely to point out some of the possibilities for achieving a workable "class of one" jurisprudence that is gleaned from the case law as it has been developing over the past twenty years or so. This discussion will begin with a look at the policies behind the doctrine of qualified immunity and how they interact with the substantive law governing Olech suits. Then it undertakes a brief overview of some of the procedural methods courts can employ to take control litigation of "class of one" suits, followed by some examples, drawn from the cases discussed herein, of approaches used by courts to define the law and protect the various interests at stake. Finally, this analysis is applied to the Olech case.

A. Supreme Court Admonitions in Qualified Immunity Cases

One of the most pressing areas of the substantive law governing the "class of one" equal protection suit needing "judicial gloss" is that of malice.460 One question in need of an answer is: Is malice an element of the cause of action itself or is demonstrating it merely one of perhaps many different ways that a public actor's "irrationality" may be made apparent? It seems unobjectionable that actions by public officials undertaken solely to punish disliked citizens lack what most Americans would consider a "rational basis." But if, as Judge Posner's suggestion in Olech seems to imply 461—that such motives only raise constitutional concerns if there is no other valid reason for the action—then each malice-based § 1983 suit in the future will require a trial on this inherently factual question. This puts Olech (at least as decided by the Seventh Circuit) squarely at odds with the policy behind the Supreme Court's jurisprudence in the realm of qualified immunity.

In Harlow v. Fitzgerald,462 the Court adjusted the substantive law governing qualified immunity by freeing defendants from the burden of having to prove the "subjective element of good faith" in § 1983 suits alleging some improper motivation on the part of a public official.463 This left only the "objective" test of whether the defendant's actions violate "clearly established law," because subjective inquiries as to whether an official acted with malice "has been considered to be a question of fact that some courts have regarded as inherently requiring resolution

460. Or improper motive, ill will, bad faith intent to injure, or vindictive action. These are used here interchangeably to indicate the subjective element of the cause of action.
461. See supra text accompanying notes 252-53.
463. Id. at 816-18. For an example of how courts have struggled with this subjective element, see the discussion supra at note 93 for the LeClair court's difficulties.
464. Id. at 818.
by a jury."^{465} The Harlow Court, stating “bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery,” concluded that government agents “performing discretionary functions generally, are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”^{466}

The values that this decision was meant to enforce include the mitigation of the “social costs” of suits against public officials such as “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”^{467} However, the Court also recognized that extending qualified immunity to public officials came at a cost: “The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”^{468} In other words, extending immunity under certain circumstances will work an injustice on a plaintiff harmed by a government official’s acts. In weighing the balance, however, the Court was persuaded that reliance on a subjective standard of good faith simply allowed too many “insubstantial lawsuits”—defined as “claims... run[ning] against the innocent”—to proceed to trial.^{469}

Recently, a divided Supreme Court revisited the issue of qualified immunity in the context of constitutional torts in which malice is a necessary part of the element of proof of the underlying claim. Crawford-El v. Britton^{470} was a § 1983 case involving a prisoner asserting that a prison official interfered with his constitutional right of access to the courts by spitefully diverting his court records and personal effects after he was transferred to another prison. The Court held that it was improper for circuit courts to require plaintiffs alleging § 1983 violations in which “motive is a necessary element” to prove subjective motivation by “clear and convincing evidence” in order to survive a motion for summary judgment.^{472}

The Crawford-El Court distinguished between the Harlow admonition that “a defense of qualified immunity may not be rebutted by evidence that the defendant’s conduct was malicious or otherwise improperly motivated” and a plaintiff’s burden of proving a constitutional violation in which “an essential element... is a charge that the defendant’s conduct was improperly motivated.”^{473} In other words, “although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff’s affirmative case.”^{474}

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465. Id. at 816.
466. Id. at 817-19.
467. Id. at 814.
468. Id. at 813-14.
469. Id. at 814.
471. Id. at 578-79.
472. Id. at 585, 589. The Circuit Court for the District of Columbia, however, reversed an earlier decision requiring plaintiffs to plead direct evidence of malicious intent to survive a motion to dismiss. See id. at 581.
473. Id. at 588.
474. Id. at 589. In the context of the plaintiff’s claim in Crawford-El, this holding meant that he was entitled to discovery and, if he could generate a question of material fact on the matter, a trial on the issue of whether the prison official sought to interfere with his constitutional right of access to the courts by diverting his legal papers because she was motivated by hostility towards him. See id. at 578-80, 592. This is because the “constitutional right of access to the courts was well established” at the time of the violation, id. at 580, and she is not entitled to qualified immunity. Id. at 590-91.
As a result, "'[i]f the law was clearly established, the immunity defense should ordinarily fail,'" and the plaintiff should be entitled to discovery and, if necessary, a trial on the issue of the defendant's impermissible motivation.475

On balance, the majority in Crawford-El found there was no "unfairness [in] holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff."476 The Court also saw the inquiry as being aimed not at "any possible animus directed at the plaintiff," but at the specific motivation behind the deprivation of rights of which the defendant is accused.477 Even in cases where the defense of qualified immunity fails, "there may be doubt as to the illegality of the defendant's particular conduct" and "there must also be evidence of causation," that is, an official may prevail at summary judgment if he or she can show they would have taken the same action for some permissible reason.478

Returning to the issue of the "class of one" equal protection claim, it seems reasonable to assume that no matter what adjustments are made to the substantive law, a conflict with the policies enervating the issue of qualified immunity is likely to emerge. Whether or not malice is itself an element, some subjective inquiry is necessary in the determination of whether the particular acts of a government official violates the rights of a citizen, because any criteria established to determine the rationality of the act or whether "intentional or purposeful discrimination" is present entails reference to the motivations present.479 Therefore, viewing Harlow and Crawford-El together, courts are charged with the precarious task of balancing the rights of public officials to be free of insubstantial suits with the right of the plaintiff to have some opportunity to discover whether the complained of action was spurred by unconstitutional motives.

One suggestion that would at least put all parties on notice as to just exactly what the playing field is would be to adopt the Breyer/Posner requirement "that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."480 This element, be it termed malice, an illegitimate animus, intent to harm, or ill will, would provide courts with a measuring stick by which it can assess the validity of claims. Further, it is not "unfair," as the Crawford-El Court put it, to hold public officials accountable for acts motivated solely by hostility toward a member or members of the public.481

On the other hand, given that Olech claims—unlike the claim at issue in Crawford-El which involved fundamental rights guaranteed by the constitution—are subject only to rational basis review,482 any finding that a legitimate public

475. Id. at 591 (quoting Harlow v. Fitzgerald, 457 U.S. at 818-19).
476. Id.
477. Id. at 592.
478. Id. at 592-93.
479. See supra text accompanying notes 88-91.
480. Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000).
482. This is a somewhat controversial statement. While most courts have determined that Olech claims involve no fundamental rights and no suspect classifications, and thus are subject only to rational basis review, see, e.g., Baumgardner v. County of Cook, 108 F. Supp. 2d at 1055, it is true that the crux of the cause of action is an Equal Protection Clause violation, and equal
purpose may also support the action should be cause for dismissing the case in favor of the defendant. If such is apparent from the face of the complaint, then the defendant should be entitled to dismissal under Rule 12(b)(6), and if it becomes apparent from the answer, then the court should grant a verdict for the defendant either on a Rule 12(c) motion for judgment on the pleadings, or in a motion for summary judgment without allowing wide-ranging discovery. Finally, courts should strictly construe the elements of the qualified immunity defense when raised by a defendant, insuring that the right the plaintiff seeks to vindicate is “clearly established” in a particularized sense.483

B. Procedural Tools Available to Courts

The Crawford-El Court reiterated the Harlow statement that “firm application of the Federal Rules of Civil Procedure is fully warranted” in cases involving the subjective motivations of public officials to facilitate “the prompt disposition of insubstantial claims.”484 While it held heightened standards of pleading or proof invalid, the Court stated that “[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, . . . [the court] must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.”485

The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant’s or a third party’s answer under Federal Rule of Civil Procedure 7(a), or grant the defendant’s motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff “put forward specific, nonconclusory factual allegations” that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. . . . Second, if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery.486

The Court also discussed a judge’s options with respect to discovery, suggesting use of Rule 26 to “tailor discovery narrowly” and to limit the number and length of depositions and interrogatories.487 Finally, the Crawford-El Court held that “the court may postpone all inquiry regarding the official’s subjective motive until discovery has been had on objective factual questions such as whether the plaintiff suffered any injury or whether the plaintiff actually engaged in protected conduct that could be the object of unlawful retaliation.”488

This “strict application” of the rules is intended to protect the important societal interests identified in Harlow489 while still giving plaintiffs with “meritori-

483. See supra text accompanying notes 218-20.
485. Id. at 597-98.
486. Id. at 598 (citations and footnotes omitted).
487. Id.
488. Id. at 599.
489. See supra text accompanying note 467.
ous" claims an opportunity to prove their case. The theory is that if a case can survive these hurdles, it is deemed to be substantial under the substantive law, and plaintiffs who can meet the challenge will be entitled to their day in court in order to prove their claim.

C. Tools Available to Courts Under Existing "Class of One" Case Law

As apparent from the discussion of existing case law, there is a wide variation among the circuits—and even within some—as to the willingness of courts to use the pleading standards announced by courts in "class of one" cases both prior to and after the Olech decision to terminate suits which apparently lack merit at the 12(b)(6) stage. One tool courts have used is a strict adherence to the requirement that the plaintiff allege that they are similarly situated in all relevant respects to others who have escaped what the plaintiff alleges to have suffered.490

Courts also have the option of rigorously adhering to the requirement that plaintiffs plead that the action is "not rationally related to a legitimate public purpose." This element can take the form of pleading some facts which suggest "intentional discrimination": malice, ill-will, or personal animus unrelated to a proper governmental function; or a "bare desire to harm" the plaintiff. Whatever the standard developed in the particular circuit, the pleading element should line up with a standard of proof that is susceptible to some quantum of evidence obtainable short of a wide-ranging fishing expedition for subjective intent. If such evidence is merely circumstantial at the summary judgment stage, the judge is going to have to decide if a rational fact-finder could hold for the plaintiff on the basis of such evidence. Perhaps this determination could be linked, if only in the informed judgment of the judicial officer, to (1) the gravity of the harm suffered by the plaintiff and/or (2) the egregiousness of the public official's behavior. The likelihood of repeated violations to the plaintiff or others in the community might also be a factor.

Finally, strong use could and should be made of the Wroblewski court's rational basis test when deciding motions to dismiss.491 Particularly in cases such as American Fabricare,492 Albiero,493 Allan,494 and Marchese495 where the "violation" alleged is enforcement of facially neutral laws, and either facts are pleaded which suggest others have been similarly subject to the laws or the "malice" element is weakly pleaded, should courts discern a rational basis and dismiss the suit. It is highly unlikely that discovery in cases like these is going to uncover any "smoking gun" sufficient to defeat the facial rationality of the government's action. If such pleas are held to state a claim, then such suits become a tool for motivated plaintiffs to harass public officials, or for plaintiffs' attorneys who may try to seek settlements that governments may prefer to the hassle and expense of defending the suits. Such cases may also provide fertile ground for use of Rule 12(c) motions for judgments on the pleadings, or Rule 12(e) requests for more definite statements.

490. See, e.g., Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs, 101 F.3d 1179 (7th Cir. 1996), discussed supra at notes 161-65; see also Wroblewski v. City of Washburn, 965 F.2d 452 (7th Cir. 1992), discussed supra at notes 141-51.
491. See supra text accompanying notes 148-50.
492. See supra text accompanying notes 420-22.
493. See supra text accompanying notes 278-86.
494. See supra text accompanying notes 423-25.
495. See supra text accompanying notes 416-17.
D. The Olech Case

The facts of the Olech case in many ways resemble American Fabricare or Albiero in that the Village was requesting an easement in order to provide public services that are clearly within its legal purview. On the other hand, it is impossible to know from the pleadings whether the procedures followed comport with local or state law, a factor that may weigh heavily in a determination of whether or not Olech should be allowed an opportunity to get discovery into the subjective motivations of the Village officials. Olech's claim is certainly more "meritorious" than one might initially suspect, and more compelling than those of the plaintiffs in American Fabricare or Albiero. First of all, Olech had a right to receive the municipal water hook-up upon meeting the statutory requirements, which she did. Secondly, it cannot be said that she received no deprivation—being without water for an entire winter, and having only a neighbor's hose as the only source of water for six months prior, by anyone's measure, involves serious harm. Finally, the Village was, in essence, requesting eighteen additional feet of her property, while offering no compensation.

If such behavior was predicated, as was alleged, on "ill will" towards Olech by the public officials involved in the decision, then such behavior is surely reprehensible. It speaks gravely to the feelings of mistrust and antipathy many Americans feel towards the various units of government. And it should be condemned.

But when the question becomes "Should this claim result in an award of damages under § 1983 for a violation of Olech's right to equal protection?" the answer should be "no." From the face of the complaint, as the trial judge found, the extra-easement was required for the legitimate public purpose of building a paved roadway, sidewalks, and public utilities. One can easily imagine that Village officials, planning to do this road work at some point anyway, felt that there were economies of scale to be gained by doing all the work at the same time, or that the water main would be inconveniently placed if a road was later built over it. Presumably, Olech would enjoy the benefit of a two-lane paved roadway and sidewalks. And all residents on her street equally shared the burden or benefit of the easement request and road construction.

An allowance of discovery would only prolong the suit, leading to additional expenses for the Village and Olech (or her attorney), and a search for malice, even if found, would likely prove unavailing because the court is, in the end, most likely to find that the request was neither irrational nor illegitimate.

V. CONCLUSIONS

This Comment has examined the Supreme Court's decision in Village of Willowbrook v. Olech and argued that the substantive law and pleading standards it announced for the so-called "class of one" equal protection suit must be more clearly defined to avoid a waste of judicial resources and to help apprise judges, defendants, and plaintiffs of just exactly what the law demands. It recognizes, however, that this type of suit is potentially a powerful tool for vindicating the rights of people harmed by improper government actions, but for which many circuits had previously denied any relief under existing law.

In order to meet the opposing demands of terminating "frivolous" suits while letting well founded claims make their way to trial, and paying heed to the admo-
nition of the Supreme Court to limit suits based on subjective intent of government officials, requires a "firm application of the Federal Rules of Civil Procedure."\textsuperscript{496} Courts should make greater use of Rule 7 requests for more definite statements to insure that complaints have an adequate basis and are subject to objective proof. Also, more of these cases should be decided on Rule 12(c) motions for judgments on the pleadings, which allow the public official to respond to the complaint, and give judges a better basis on which to decide the case.

Matters of qualified immunity should be based on whether the facts alleged constitute a violation of clearly established law of which the public official should be aware, and not on the general basis that "class of one" equal protection claims are recognized by the Court. Also, courts, facing what appear to be "insubstantial" or matters principally concerned with local or state law, can require strict application of the requirement that plaintiffs plead that they are "similarly situated in all relevant respects."\textsuperscript{497} Further, any rational basis for the action, whether discernable from the complaint or which emerges in the motions for summary judgment or responses, should be sufficient to provide judgment for the defendants.

Attempts by courts to impose heightened pleading standards in "class of one" cases will likely result in the Supreme Court taking a fresh look at \textit{Olech}. It is unclear why the Court chose to decide the case as a \textit{per curiam} decision, and why its opinion was so abbreviated. Quite possibly either the facts were sufficiently ambiguous to make a firmer statement impossible, or the briefs did not raise the issue the Court wished to address. In any event, having started this ball rolling, it is very likely that they will be faced with the matter of \textit{Olech} pleading standards and substantive law in the near future.

\textit{Shaun M. Gehan}


\textsuperscript{497} The objective test used by the \textit{Econ. Opportunity Comm'n of Nassau County, Inc. v. County of Nassau}, 106 F. Supp. 2d at 439-40, court for determining whether a plaintiff is similarly situated to other comparators is a reasonable approach. See supra at text accompanying note 355.