

## FLUNKING THE CLASS-OF-ONE / FAILING EQUAL PROTECTION

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### ABSTRACT

*This Article considers the equal protection “class-of-one” doctrine in light of recent developments, both at the Supreme Court and in the lower courts. After Part I explains the background and current state of the doctrine, Part II considers how that doctrine provides insights into such basic equal protection concepts as discriminatory intent and animus. It also critiques the Court’s analysis of the class-of-one, arguing that the Court has mishandled these concepts and in so doing caused doctrinal anomalies and lower court confusion. Part II offers an alternative approach to the class-of-one that corrects those problems while still addressing the concerns that may have influenced the Court to embrace its mistaken analysis.*

*Part III considers how the Supreme Court’s mishandling of the class-of-one risks infecting other areas of equal protection law and American constitutionalism more generally. It explains how the Court’s approach threatens the core constitutional commitment that government action must seek to promote a public purpose. It also discusses a subsequent Court decision that cites its most recent class-of-one case in a way that aggravates that threat. The Article concludes by calling on the Court to reconsider both its aggressive reading of its class-of-one jurisprudence and the direction of that jurisprudence itself, in order to reverse the doctrinal and conceptual damage it has caused. The Article thus demonstrates that the class-of-one provides insight into larger equal protection issues. At the*

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*same time, it risks infecting those larger issues with the mistakes flowing from the Court's mishandling of this under-studied and poorly understood doctrine.*

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## INTRODUCTION

As anyone who has ever worked a crossword puzzle knows, a difficult problem can sometimes be solved by approaching it from a different angle. An impenetrable “across” clue can become comprehensible with the help of a “down” answer. So too with constitutional law. Fundamental questions about equal protection law—the appropriateness and role of the intent requirement,<sup>1</sup> the role of animus,<sup>2</sup> the puzzle of rational basis review,<sup>3</sup> the level of judicial under enforcement,<sup>4</sup> and the implications of the Court’s insistence that equal protection rights are “personal”<sup>5</sup>—have generated volumes of scholarship without definitively clarifying these issues. This Article considers how those debates can be enriched and their underlying issues clarified by improving our understanding of a rarely-studied corner of equal protection: the class-of-one.

The class-of-one theory holds that a plaintiff can bring an equal protection claim alleging discrimination against her in her capacity as an individual. This theory contrasts with equal protection’s standard template, in which a plaintiff claims unconstitutional discrimination based on her group status—as a member of a particular racial group, or her sex, or some affinity or social group status. Class-of-one claims are hard to win. Unlike claims based, for example, on racial discrimination, class-of-one claims succeed only

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1. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (explaining and critiquing the intent requirement in equal protection law).

2. See, e.g., Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012) (attempting to synthesize the Supreme Court’s understanding of the concept of animus).

3. See, e.g., *id.* at 898-900 (discussing the Supreme Court’s rational basis cases); H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 U. WASH. L. REV. 217, 245-53 (2011) (discussing rationality review); see also William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889, 897-98 (2011) (discussing Justice Stevens’s approach to rationality review).

4. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing the underenforcement issue).

5. See, e.g., Robert C. Farrell, *Affirmative Action and the “Individual” Right to Equal Protection*, 71 U. PITT. L. REV. 241 (2009) (discussing this characterization of equal protection rights).

if the plaintiff proves that the government's singling-out lacked a rational basis. But as a conceptual matter, such claims obtained the Supreme Court's unanimous endorsement in the 2000 case of *Village of Willowbrook v. Olech*.<sup>6</sup> Indeed, the Court appeared to think the matter was uncontroversial; *Olech* was a short<sup>7</sup> *per curiam*<sup>8</sup> opinion with only one concurring justice embracing an alternative, more limited, version of the theory.<sup>9</sup>

Despite *Olech's* sanguine view about the theory's bona fides, the class-of-one concept remains a doctrinal anomaly. It is far removed from both the Equal Protection Clause's preeminent concern with race<sup>10</sup> and discrimination against other groups whose status can be analogized, with more or less precision, to that of freed slaves after the Civil War.<sup>11</sup> Indeed, as a branch of equal protection that, by definition, does not focus on discrimination against members of groups, it fits uneasily with both the anti-classification<sup>12</sup> and anti-subordination<sup>13</sup> theories that comprise modern doctrinal and scholarly understandings of equal protection.<sup>14</sup> Moreover, the class-of-one's focus on individualized discrimination demands considerable intellectual dexterity to locate it within the debate about the

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6. 528 U.S. 562 (2000).

7. The opinion for the Court comprised fewer than five pages in the U.S. Reports. *Id.*

8. *Id.*

9. *See id.* at 565-66 (Breyer, J., concurring).

10. *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. 36, 82 (1872) (expressing doubt that the Equal Protection Clause would ever be used in a context other than racial discrimination).

11. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (analogizing the situation facing women with that facing African-Americans as support for its conclusion that sex discrimination merited heightened judicial scrutiny); *see also* MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 121-22 (1999) (arguing that sex discrimination often reflects the same view of the targeted group's lack of full humanity as discrimination against African-Americans).

12. *See, e.g.*, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-44 (1949) (giving a classic statement of the anti-classification understanding of equal protection).

13. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (explaining the anti-subordination theory and explaining her view that it is superior to the anti-classification theory).

14. *See, e.g.*, William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L. Q. 493, 494-95 (2007) (explaining the difficulty of superimposing class-of-one claims on the standard anti-classification template of equal protection).

role of discriminatory intent, which, along with a group focus, is the other major organizing principle of standard equal protection law.<sup>15</sup>

Thus, the class-of-one seems to be a doctrinal outlier. Yet it is also deeply resonant of fundamental equal protection principles. Most intuitively, it reflects the Supreme Court's insistence that equal protection rights are "personal" rights.<sup>16</sup> After all, what could be more personal than a right to be free from discrimination, not based on your status as an African-American,<sup>17</sup> a woman,<sup>18</sup> or a disabled person,<sup>19</sup> but simply for being you? Moreover, despite the seeming incongruence of the terminology, the class-of-one theory can claim at least some provenance as the modern manifestation of what is often thought to be the antebellum precursor to the equal protection principle: the right to be free from so-called "class legislation"<sup>20</sup> favoring<sup>21</sup> particular corporations<sup>22</sup> or individuals.<sup>23</sup>

For these reasons the class-of-one concept has a strong intuitive claim to doctrinal legitimacy, even if it does not follow equal

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15. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (imposing the intent requirement). For classic analyses and critiques of the intent requirement, see Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976); Lawrence, *supra* note 1, at 318.

16. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742-43 (2007) (referring to equal protection rights as "personal" rights); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (same); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (referring to Fifth and Fourteenth Amendment rights as "personal").

17. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954) (striking down segregation of African-American schoolchildren).

18. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (striking down discrimination against women).

19. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985) (striking down discrimination against mentally retarded people).

20. See, e.g., Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 245-48 (1997) (discussing the role of class legislation in the development of equal protection doctrine).

21. Because such laws often singled out individuals for *benefits* rather than *burdens*, the analogy is imperfect. But the objections to such laws—that they inappropriately singled out individuals—applies equally to claims of burdensome singling out as to singling out for benefits.

22. See, e.g., JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970*, at 30-37 (2004) (explaining Jacksonian-era critiques of corporations as founded on the special treatment implicit in the practice of legislatures granting corporations special charters).

23. See, e.g., Saunders, *supra* note 20, at 245-48; see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (discussing the class legislation concept as a matter of Fourteenth Amendment law during the *Lochner* era).

protection's traditional path. If so, then perhaps like a crossword's "down" answer that solves an otherwise impenetrable "across" clue, the class-of-one may illuminate thus far elusive answers to fundamental questions about equal protection.

But the class-of-one doctrine can play that helpful role only if the Court gets it right. So far its record is disheartening. After a sloppy start in *Olech*, the Court over corrected in *Engquist v. Oregon Department of Agriculture*, its only other class-of-one opinion to date.<sup>24</sup> The result has been extensive confusion in the lower courts. Emblematic of such confusion, although by no means its only example, was the severe split in the Seventh Circuit's 2012 en banc decision in *Del Marcelle v. Brown County Corporation*.<sup>25</sup> In *Del Marcelle*, the court—in many ways the incubator of the class-of-one doctrine<sup>26</sup>—split badly on the best approach to the class-of-one in the wake of Supreme Court precedent.<sup>27</sup> As this Article explains, this confusion is due largely to the confusing, troubling, and counterintuitive signals the Court has sent.

Thus, the Supreme Court continues to flunk the class-of-one. As intrinsically unfortunate as that fact is, its inadequate performance also causes the Court, more seriously, to fail equal protection—not in the sense of flunking it, but in the deeper sense of disserving its core principles. This failure is especially troubling because, like rips in actual fabric, rips in doctrinal fabric have a way of expanding from obscure locations to more prominent ones. This Article reveals the tear the Court's class-of-one jurisprudence has created in the fabric of equal protection law. It also explains how a subsequent Court opinion citing *Engquist* expands that tear into more prominent locations, threatening core constitutional principles.<sup>28</sup>

Stated more positively, a more careful analysis of the issues raised by the class-of-one doctrine would help reinforce core equal protection principles. That help is needed now more than ever: the

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24. 553 U.S. 591 (2008).

25. 680 F.3d 887, 888 (7th Cir. 2012) (en banc).

26. See *infra* Part I; see also *Engelbrecht v. Clackamas Cnty.*, No. CV05-665-PK, 2006 WL 2927244, at \*11 (D. Or. Oct. 11, 2006) (describing a 1982 Seventh Circuit case, *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), as "the flagship case for 'class-of-one' equal protection claims").

27. *Del Marcelle*, 680 F.3d at 889 (noting the court's inability to agree).

28. See *infra* notes 175-200 and accompanying text.

Court's seeming abandonment of *Carolene*-style political process review<sup>29</sup> has left it adrift, deciding equal protection cases in an unsatisfying, ad hoc manner. The Court could begin placing its equal protection doctrine on a firmer footing by engaging more seriously with the class-of-one doctrine. This Article calls for such an engagement.

This Article proceeds in three parts. Part I briefly summarizes the history and current state of the class-of-one doctrine. Part II explains how *Olech* and *Engquist*, the Supreme Court's two class-of-one decisions, mishandled basic concepts of equal protection law, most notably the intent requirement and equal protection's core prohibition against animus-based government action. This poor performance has created both doctrinal anomalies and lower court confusion. Part II offers a better methodology, which corrects these problems while still resolving the practical concerns that may have influenced the Court to embrace its mistaken approach.

Part III expands the Article's scope by arguing that the Court's sloppy work has begun to infect broader equal protection doctrine. By appearing to permit government action motivated by animus or other illegitimate purposes, the Court's most recent analysis of the class-of-one doctrine in *Engquist* threatens the core constitutional principle that, at a minimum, government action must seek to promote a public purpose. As such, the Court's approach to the class-of-one doctrine threatens basic assumptions of American constitutionalism. Indeed, in an ominous development the Court has cited *Engquist* in a way that expands that threat. Part III concludes the Article by considering the significance of that latest development. It calls on the Court to reconsider both its aggressive reading of *Engquist* and its analysis in that case itself, in order to reverse the doctrinal and conceptual damage it has caused and prevent further damage. If nothing else, this Article demonstrates that this seemingly small doctrine merits more careful scrutiny than it receives, both from scholars and the Court itself.

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29. See *infra* note 202 (demonstrating that abandonment).



## I. THE CURRENT STATE OF THE CLASS-OF-ONE

At the Supreme Court, the class-of-one doctrine dates to 2000, when the Court decided *Village of Willowbrook v. Olech*.<sup>30</sup> But lower courts had acknowledged and applied the doctrine for at least the preceding two decades.<sup>31</sup> Pre-*Olech* lower court decisions confronted some of the basic questions posed by the doctrine, even if their resolutions had to be adjusted to account for the Supreme Court's seemingly offhand opinion in *Olech*. Because of the importance of the Supreme Court's entry into this area, this Part begins the class-of-one story with *Olech* and brings in pre-*Olech* case law as needed to address the subsequent evolution of the class-of-one doctrine.

### A. *Olech*

As with many class-of-one claims,<sup>32</sup> *Olech* concerned a local spat. The Olechs, homeowners in the Village of Willowbrook, Illinois, sought to have their home hooked up to the municipal water supply.<sup>33</sup> Village officials agreed but, allegedly in retaliation for the Olechs' successful prosecution of an unrelated lawsuit against the city, they insisted that the Olechs give up a significantly larger easement than the Village normally required for such hookups.<sup>34</sup> The Olechs sued, alleging that they were the victims of discrimination, not based on their membership in any group or possession of any status trait, but rather, as a class-of-one.<sup>35</sup> The district court dismissed the claim, concluding that the complaint did not allege the level of "ill will" required by Seventh Circuit case law.<sup>36</sup> The

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30. 528 U.S. 562 (2000).

31. See, e.g., *Ciechon v. City of Chicago*, 686 F.2d 511, 522 (7th Cir. 1982); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980).

32. See, e.g., *Geinosky v. City of Chicago*, 675 F.3d 743, 745 (7th Cir. 2012) (considering a class-of-one claim in the context of a marital conflict); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (considering a class-of-one claim in the context of a feud between neighbors).

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

34. *Id.*

35. *Id.* at 563-64.

36. *Olech v. Vill. of Willowbrook*, No. 97C4935, 1998 WL 196455, at \*3 (N.D. Ill. Apr. 13, 1998).

Seventh Circuit, relying on its relatively long and developed class-of-one jurisprudence, reversed, holding such claims did not require the official “orchestration” the district court had understood that case law to require.<sup>37</sup>

Nevertheless, the appellate court, speaking through Judge Posner, expressed sympathy with the district court’s concern that a more plaintiff-friendly standard would “turn[] every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case.”<sup>38</sup> But the court noted that its precedent did in fact require that the plaintiff prove animus—not just the level of animus the district court had understood to be required.<sup>39</sup> It also noted that animus was a “but-for” requirement; Judge Posner explained that the lawsuit would fail, even assuming animus, if the government-defendant would have taken the same action in the absence of that animus.<sup>40</sup>

The Supreme Court affirmed, in a very short *per curiam* opinion that endorsed a much broader reading of the class-of-one than the Seventh Circuit’s.<sup>41</sup> Relying on two corporate taxation cases, one from 1923 and a more recent one notable for its muscular but controversial use of rational basis review, the Court stated that it had “recognized” successful class-of-one cases in the past.<sup>42</sup> The Court then described equal protection’s purpose as protection against “intentional and arbitrary” discrimination.<sup>43</sup> Because the Olechs had alleged such discrimination, the Court held that they

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

38. *Id.* at 388.

39. *Id.*

40. *Id.*

41. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).

42. *Id.* at 564 (citing *Allegheny Pittsburgh Coal Co. v. Comm’n of Webster Cnty.*, 488 U.S. 336 (1989); *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923)). *Sioux City* focused on the remedy for a successful unequal taxation claim. 260 U.S. at 446. *Allegheny Pittsburgh* used rational basis review to find a violation of equal protection when a corporation’s property was assessed based on a valuation theory not provided for by the state constitution, with the result that its property was subject to higher taxes. 488 U.S. at 343. Justice Thomas later criticized the implicit conclusion that an administrator’s misapplication of state law and consequent unequal treatment violated equal protection. *Nordlinger v. Hahn*, 505 U.S. 1, 27-28 (1992) (Thomas, J., concurring) (criticizing *Allegheny Pittsburgh* on this ground and calling for its overruling).

43. *Olech*, 528 U.S. at 564.

had adequately stated an equal protection claim, “quite apart from the Village’s subjective motivation.”<sup>44</sup>

Justice Breyer concurred only in the judgment.<sup>45</sup> Like Judge Posner, he expressed concern about the breadth of a rule allowing plaintiffs to state class-of-one claims without alleging that government officials had harbored animus against the plaintiff.<sup>46</sup> Again like Judge Posner, he feared that such a rule “would transform many ordinary violations of city or state law into violations of the Constitution.”<sup>47</sup> Nevertheless, he concurred in the judgment, because the Olechs, in addition to alleging “intentional and arbitrary” discrimination, had also alleged the requisite animus that both he and Judge Posner believed would cabin the reach of the class-of-one theory.<sup>48</sup>

### *B. Olech in the Lower Courts*

*Olech*’s explicit rejection of subjective motivation as a necessary component of class-of-one claims forced lower courts to consider how best to rein in the expansive litigation possibilities opened by the Court’s approach. Some courts responded by heightening pleading requirements, requiring plaintiffs to plead facts either establishing the existence of similarly-situated persons<sup>49</sup> or negating any possible rational basis for the differential treatment.<sup>50</sup> Other courts raised the ultimate standard for similar-situatedness, for example, by requiring that the similarity be “extremely high.”<sup>51</sup>

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44. *Id.* at 565.

45. *Id.* (Breyer, J., concurring).

46. *Id.*

47. *Id.*

48. *Id.* at 565-66.

49. See William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What it Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 50 n.143 (2009) (collecting cases).

50. See *id.* at 50 n.144 (citing *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992)).

51. *Clubsides, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006); see also Araiza, *supra* note 49, at 51-52 (discussing additional cases). Scholars have noted that in other discrimination contexts courts have also imposed stringent comparator requirements. See, e.g., Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 753-55 (2011) (noting the stringency with which courts have imposed this requirement in statutory employment discrimination claims). Nevertheless, courts have stated that class-of-one claims require

Perhaps surprisingly, other courts continued to insist on animus.<sup>52</sup> First appearances notwithstanding, such cases may not reflect as shocking a defiance as one might think of what is at least explicit Supreme Court dicta.<sup>53</sup> In at least some of these cases, one can understand this continued insistence as reflecting courts' use of animus as an evidentiary factor tending to prove the existence of the "intentional and arbitrary"<sup>54</sup> discrimination the *Olech* Court identified as equal protection's fundamental requirement. Nevertheless, it remains uncontestable that these courts were at the very least expressing their unease at the Supreme Court's cavalier disregard of that limiting principle. And in some cases, they may in fact have been talking back to the Court.<sup>55</sup>

### C. Engquist

The lower court reaction to *Olech* made it clear that at least some judges favored limits on expansive class-of-one liability.<sup>56</sup> The Court's second, and to date final, foray into the class-of-one suggested that the Court had absorbed this lesson—perhaps too well.

*Engquist v. Oregon Department of Agriculture* concerned a class-of-one claim brought by Anup Engquist, an employee of the defendant state agency.<sup>57</sup> After the agency fired her, Ms. Engquist sued, alleging, among other things, that she constituted a class-of-one that had been subjected to irrational discrimination motivated

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application of an especially stringent similarity requirement. *See, e.g., Clubside*, 468 F.3d at 159 (noting that, at the summary judgment phase, the relatedness requirement for a class-of-one claim is more stringent than that in an employment claim); *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 687 (S.D. Tex. 2009) (reiterating the *Clubside* standard); *see also Willis v. Town of Marshall*, No. 1:02CV127, 2007 WL 1100836, at \*10 (W.D.N.C. Apr. 12, 2007) (same).

52. *See Araiza, supra* note 49, at 53.

53. *See id.* (suggesting that this insistence may not constitute such lower court defiance).

54. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

55. *See, e.g., Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 891 (7th Cir. 2012) (Posner, J.) (expressing mystification as to why the *Olech* Court had dismissed the animus requirement so off-handedly).

56. *See supra* notes 49-55 and accompanying text.

57. 553 U.S. 591, 595 (2008).

by animus.<sup>58</sup> A jury found for her on this claim,<sup>59</sup> but a divided Ninth Circuit panel reversed that verdict, holding that the class-of-one doctrine was inappropriate in the government employment context.<sup>60</sup>

By a six-to-three vote, the Supreme Court agreed.<sup>61</sup> Writing for the majority, Chief Justice Roberts attempted to harmonize the Court's exclusion of employment claims from class-of-one liability with its expansive opinion in *Olech*. He explained that *Olech* had featured a "clear standard"—the normal easement size the Village required for water hookups—the deviation from which triggered equal protection scrutiny via the rational basis standard.<sup>62</sup> By contrast, he identified other "forms"<sup>63</sup> of government action, "which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments."<sup>64</sup>

At this point, Chief Justice Roberts could have dispensed with many class-of-one employment claims—and, indeed, many class-of-one claims more generally—simply by observing that claims challenging such "subjective, individualized assessments" would normally fail to feature either the requisite similar-situatedness or irrationality. If such decisions—for example, to choose one employee over another for a budget-mandated layoff—turned on assessments of the nuanced, individualized collages of each employee's employment-relevant characteristics, then presumably the fired worker would face an exceptionally difficult time proving that a similarly situated comparator existed and received better treatment.<sup>65</sup> Had he wished to take this route, the Chief Justice could have acknowledged lower courts' evolving post-*Olech* theory

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58. *See id.* at 594-95.

59. *See id.* at 596.

60. *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007).

61. *Engquist*, 553 U.S. at 609.

62. *Id.* at 602.

63. *Id.* at 603.

64. *Id.*

65. For a general discussion of the issues posed by the use of comparators in employment discrimination law, see Goldberg, *supra* note 51, at 731. Professor Goldberg's article considers the use of comparators in the context of alleged discrimination on the basis of a statutorily forbidden ground, such as race. *Id.* at 743; *see also infra* note 117 (discussing how claims of trait-based discrimination are similar to, and different from, class-of-one claims for purposes of comparator analysis).

about the need for especially strict application of the similar-situatedness requirement in class-of-one cases.<sup>66</sup> The same result—the plaintiff likely loses—would also have followed from application of rational basis scrutiny, not just because such scrutiny is so deferential, but also because the “subjective, individualized” nature of the challenged decision would easily—indeed, naturally—lend itself to a judge hypothesizing a rational basis for the disparate treatment. In sum, these kinds of government actions are tailor-made for court decisions finding either no similarly situated comparator or a rational basis for the differential treatment.

Instead, the Court charted a different course. Chief Justice Roberts argued that such individualized decisions were, as a formal, *per se* matter, not amenable to a rule requiring equal treatment:

In such cases [involving subjective, individualized assessments] the rule that people should be treated alike, under like circumstances and conditions is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.<sup>67</sup>

He then provided an analogy of a police officer stationed on a busy highway where many motorists speed and where it is thus impractical to expect the officer to ticket every speeder.<sup>68</sup> He explained that the unlucky recipient of a traffic ticket, if chosen at random, rather than, say, on the basis of his race, would not have an equal protection claim, even though in some sense he had been singled out as a class-of-one.<sup>69</sup> According to Chief Justice Roberts,

[A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion

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66. *Neilson v. D'Angelis*, 409 F.3d 100, 106 (2d Cir. 2005) (explaining the rationale for using a higher than normal similar-situatedness requirement for class-of-one cases); see *Araiza*, *supra* note 49, at 51-52 (citing cases imposing this higher-than-normal requirement).

67. *Engquist*, 553 U.S. at 603 (internal quotations omitted).

68. *Id.* at 603-04.

69. *Id.* at 604.

inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.<sup>70</sup>

The Chief Justice's argument elicits two responses. First, it bears noting that, despite his attempt to lump together the traffic officer and employment cases as both entailing subjective and individualized decision making,<sup>71</sup> the comparison is far from precise. The traffic officer analogy postulates a situation in which the government official has, literally, no reason to choose between ticketing one driver instead of another. By contrast, many workplace cases involve a situation in which the official had a panoply of reasons—the set of employment-relevant factors such as collegiality and work quality, among others—for distinguishing between individual employees.<sup>72</sup> Thus, even if the hypothesized employment decision can be described as subjective and individualized, it is analytically distinct, for equal protection purposes, from the police officer analogy.

Second, even on its own terms the Chief Justice's analysis is open to question. Rather than viewing a situation such as the traffic example as one in which the official's need to make a random choice itself constituted a rational basis for the randomness, the Court instead simply placed such examples outside of equal protection's domain. This distinction between finding the officer's random decision rational, and thus consistent with equal protection, and refusing to engage in equal protection review of the decision may

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70. *Id.*

71. *See id.* at 603-04 (describing employment decisions in this way and describing the traffic officer example using these same adjectives).

72. In his dissent, Justice Stevens addressed the issue somewhat differently. He postulated the employment example as creating a situation in which the supervisor has to choose among several equally-culpable employees for the purpose of laying one of them off. *Id.* at 613-14 (Stevens, J., dissenting). *But see id.* at 611-12 (Stevens, J., dissenting) (noting how the case before the Court differed from such a case). Such a case is perhaps closer to the police officer analogy, *see id.* at 613 (Stevens, J., dissenting) (conceding the analogy), but is arguably a less realistic illustration of employment decisions, especially when the workplace consists of employees performing more unique roles than the classic assembly-line employment that characterized industrial America. *See, e.g.,* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 5-6 (2004) (noting the transformation of the American workplace in this direction). But even employees in nonunique jobs nevertheless perform in ways that distinguish them from their coworkers in relevant ways—for example, by working accurately, promptly, and in a collegial fashion.

seem quite fine. But, as explained below, the formal exclusion of such decisions from equal protection's domain carries both practical consequences and surprisingly serious implications for our theoretical understanding of equal protection and American constitutionalism more generally.<sup>73</sup>

Regardless of those implications, the fact remains that in *Engquist*, the Court, analogizing employment class-of-one claims to the traffic officer example, excised such claims from equal protection review.<sup>74</sup> Thus, even though Ms. Engquist had alleged that the employer was motivated by animus and ill will, and a jury had found for her on that count, the Court dismissed her suit.<sup>75</sup>

#### D. Engquist's Impact

*Engquist* immediately affected lower courts' resolutions of class-of-one claims. Most straightforwardly, courts began dismissing employment-related class-of-one claims.<sup>76</sup> More generally, they began considering whether *Engquist's* analysis applied to situations beyond employment that featured the same type of discretionary decision making *Engquist* had identified as the key factor in its analysis.<sup>77</sup> Post-*Engquist* decisions relied on that analysis to dismiss claims based on selective parole decisions,<sup>78</sup> government contracting,<sup>79</sup> and municipal code<sup>80</sup> and criminal law enforcement<sup>81</sup>

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73. See *infra* Part III.

74. 553 U.S. at 604.

75. *Id.* at 596-97.

76. Blank v. Benzie Cnty. Bd. of Comm'rs, No. 1:10-cv-201, 2012 WL 1085471, at \*4-5 (W.D. Mich. Mar. 30, 2012); Lear v. Zanick, 850 F. Supp. 2d 481, 487-88 (M.D. Pa. 2012); McDonald v. City of Saint Paul, 819 F. Supp. 2d 881, 888 n.6 (D. Minn. 2011); see Araiza, *supra* note 49, at 67 n.239 (collecting early post-*Engquist* employment cases).

77. See Araiza, *supra* note 49, at 67 n.239 (collecting early post-*Engquist* cases analogizing nonemployment contexts to *Engquist's* analysis of government employment).

78. *E.g.*, Adams v. Meloy, 287 F. App'x 531, 534 (7th Cir. 2008).

79. *E.g.*, Heusser v. Hale, 777 F. Supp. 2d 366, 382-85 (D. Conn. 2011) (applying *Engquist* to defeat a claim by a towing service plaintiff against the government, on the ground that the towing company was best considered a government employee); *cf.* Bekele v. Ford, No. C 11-01640 WHA, 2011 WL 4368566, at \*7-8 (N.D. Cal. Sept. 17, 2011) (allowing a class-of-one claim to proceed at the behest of a parking lot operator, on the ground that the defendant-government entity was acting as a proprietor, not a licensor or regulator, when it allegedly discriminated against the plaintiff).

80. *E.g.*, Papas v. Randall, No. 3:10-CV-00550-BR, 2012 WL 1445853, at \*12-15 (D. Or. Apr. 25, 2012); Occhionero v. City of Fresno, No. CV F 05-1184 LJO SMS, 2008 WL 2690431,



and prosecution.<sup>82</sup> At the same time, other courts have declined to read *Engquist* as broadly.<sup>83</sup> In at least some cases, the courts have reached diametrically opposite results.<sup>84</sup>

The confusion implicit in these cases was recognized by, and reflected in, the Seventh Circuit in 2012. In *Del Marcelle v. Brown County Corp.*, that court granted en banc review to a case in which the plaintiff alleged a class-of-one violation in a police department's failure to investigate the activities of a motorcycle gang the plaintiff alleged was harassing him.<sup>85</sup> Judge Posner explained that the court granted en banc review in order to clarify the standard to be applied to class-of-one cases.<sup>86</sup> *Del Marcelle* is notable in part because it considered the appropriate standard for a class-of-one claim in the context of a selective law enforcement claim, a subject one might have thought was at least arguably foreclosed from judicial review by *Engquist's* analysis of the traffic officer hypothetical.

Adding confusion to that uncertainty, the court failed in its self-appointed task of clarifying the class-of-one doctrine, splitting three ways on the proper mode of analysis and its application to selective

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at \*9 (E.D. Cal. July 3, 2008).

81. *E.g.*, *Flowers v. City of Minneapolis*, 558 F.3d 794, 799-800 (8th Cir. 2009); *Earnest v. King*, No. 2:11-cv-738, 2011 WL 5075380, at \*7-8 (W.D. Pa. Oct. 24, 2011); *Larson v. Roussell*, No. 09-3600 (PAM/AJB), 2011 WL 1533151, at \*3 (D. Minn. Apr. 21, 2011).

82. *E.g.*, *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1073-74 (D. Ariz. 2012) (investigative and prosecutorial decisions); *Gusler v. City of Long Beach*, 823 F. Supp. 2d 98, 135 (E.D.N.Y. 2011) (citing and following cases disallowing class-of-one cases in the context of selective enforcement claims brought by government employees); *Dowdell v. United States*, No. 3:307-cr-0010, 2011 WL 2270466, at \*8 (W.D. Va. May 3, 2011) (prosecutorial decisions).

83. *E.g.*, *Aliberti v. Town of Brookhaven*, 876 F. Supp. 2d 153, 165 (E.D.N.Y. 2012) (declining to apply *Engquist* to zoning decisions); *Cutie v. Sheehan*, No. 1:11-cv-66 (MAD/RFT), 2011 WL 4736358, at \*7-9 (N.D.N.Y. Oct. 5, 2011) (declining to apply *Engquist* to decisions to decertify a Medicaid provider); *Vlahadamis v. Kiernan*, 837 F. Supp. 2d 131, 144-45 (E.D.N.Y. 2011) (recognizing the possibility of a class-of-one claim against the government in its capacity as licensor, as long as the licensing decision could be thought of as being based on a standard); *Chestang v. Alcorn State Univ.*, 820 F. Supp. 2d 772, 780 (S.D. Miss. 2011) (stating that *Engquist* applies only in the employment context).

84. *Compare, e.g.*, *DC3, LLC v. Town of Geneva*, 783 F. Supp. 2d 418 (W.D.N.Y. 2011) (applying *Engquist* to bar a class-of-one claim challenging a zoning decision), *and* cases cited *supra* note 82 (applying *Engquist* to bar class-of-one claims challenging law enforcement decisions), *with Aliberti*, 876 F. Supp. 2d at 165 (declining to apply *Engquist* to a challenge to a zoning decision), *and Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (declining to apply *Engquist* as a per se bar to a class-of-one theory challenging a law enforcement decision).

85. 680 F.3d at 888-89.

86. *Id.* at 889.

law enforcement claims. Judge Posner, writing for four judges, continued to insist that class-of-one plaintiffs point to some type of animus or, in a concession to the Supreme Court, at least improper personal motivation on the part of the government official-defendant.<sup>87</sup> Judge Wood, writing for five judges, tried harder to conform her standard to *Olech*'s rejection of an animus requirement. She proposed a test that imposed on the plaintiff a duty to show "intentional" and "irrational" discrimination.<sup>88</sup> Animus played a role in her analysis, but of an evidentiary sort. As she explained, "[p]leading animus or improper purpose will often be an effective way to accomplish [the] goal" of proving "intentional" and "irrational" discrimination.<sup>89</sup> Judge Easterbrook, writing for himself alone, concluded that the plaintiff lost both because resource constraints provided a rational basis for the police's decision not to investigate<sup>90</sup> and because the Constitution did not provide any right to police protection.<sup>91</sup>

As *Del Marcelle* illustrates, the Supreme Court's class-of-one jurisprudence has severely unsettled the lower courts. On the one hand, *Olech*'s breezy dismissal of animus as a necessary element in class-of-one cases triggered lower court pushback, as other judges echoed Judge Posner's and Justice Breyer's concern about opening federal courts to constitutional claims whenever the government treats one citizen differently from another.<sup>92</sup> On the other hand, *Engquist*'s "meat axe" approach to cabinining the class-of-one doctrine<sup>93</sup> has caused considerable uncertainty, as lower courts struggle not just with whether other contexts are analogous to employment, but also with whether fact patterns *within* those contexts call for varied results, depending on a more precise understanding of the challenged government action.<sup>94</sup> This

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87. *See id.* at 899 (announcing this standard); *see also id.* at 891-92 (noting his opinion in *Olech* requiring animus and defending his post-*Olech* decision in *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000), which required the plaintiff to prove that the defendant acted for "reasons of a personal nature").

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

89. *Id.* at 917 (Wood, J., dissenting).

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

91. *Id.* at 901 (Easterbrook, J., concurring).

92. *See supra* notes 49-55 and accompanying text.

93. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 610 (2008) (Stevens, J., dissenting) (characterizing the majority's approach in this way).

94. *See supra* notes 77-84 and accompanying text.

pushback and uncertainty is evident in *Del Marcelle*, in which nine of the ten circuit judges entertained the possibility of a class-of-one suit in the context of law enforcement—the very subject of *Engquist’s* traffic officer analogy.<sup>95</sup> Indeed, to complete the circle back to class-of-one first principles, the two opinions gaining the adherence of those judges debated the proper role of animus—the very concept *Olech* insisted was irrelevant.<sup>96</sup>

This pushback and confusion strongly suggest that something is wrong with the Court’s approach. Parts II and III consider, respectively, the nature of the problem and its seriousness—in particular, whether any flaws remain confined to the class-of-one doctrine or whether they infect other areas of equal protection law. Part II makes clear that there is a problem. Part III explains that the Court’s jurisprudence may indeed be problematic beyond the “murky corner of equal protection law”<sup>97</sup> inhabited by the class-of-one.

## II. FLUNKING THE CLASS-OF-ONE: INTENT AND ANIMUS IN THE CLASS-OF-ONE

The class-of-one doctrine squarely implicates foundational components of equal protection doctrine. In particular, it raises questions about the nature of the motivation required to satisfy the doctrine’s intent requirement and the relationship of that intent to animus, and thus to ultimate questions about when government action violates equal protection.

### A. *Intent and the Class-of-One*

Intent plays a well-known, if controversial, role in standard equal protection analysis. Standard doctrine requires a plaintiff to prove that the challenged action was motivated by an intent to classify on a particular ground—for example, race or sex—after which the court

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95. See *Del Marcelle*, 680 F.3d at 899; *id.* at 913 (Wood, J., dissenting).

96. See *id.* at 891-94; *id.* at 913-15 (Wood, J., dissenting).

97. *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980) (describing the class-of-one doctrine as “a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply”).

applies the appropriate level of scrutiny to the classification.<sup>98</sup> Intent is understood as crucial to this inquiry; equal protection violations arise only when the government has classified “‘because of,’ not merely ‘in spite of,’”<sup>99</sup> a certain trait, whose inherent invidiousness or lack thereof determines the proper level of scrutiny.

Class-of-one cases present unique difficulties when applying the intent requirement. For that reason they also shed light on the proper role of intent in equal protection analysis more generally. In most class-of-one cases there is no serious question but that, in the common understanding of the term, the government official intended to treat the plaintiff differently from others. The village officials in *Olech* surely intended to impose a more severe burden on the Olechs when they demanded a larger easement from them than from other homeowners, and the supervisor in *Engquist* intended to treat Ms. Engquist differently from her co-workers when he fired her. Similarly, the police officer in Chief Justice Roberts’s hypothetical in *Engquist* presumably intends to issue a ticket to the speeder he selects, while intending to let other speeders continue on.

But courts considering class-of-one claims often require more of plaintiffs than a simple showing that the government official did what he intended to do.<sup>100</sup> As noted earlier, pre- and even post-*Olech* courts often required that the defendant not only have intentionally singled-out the plaintiff for poor treatment but have done so with a bad subjective motivation.<sup>101</sup> More recently, courts have continued to experiment with such second-order intent requirements, even in

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98. See Pollvogt, *supra* note 2, at 895-97 (describing the Court’s modern “tiers-of-scrutiny” framework).

99. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

100. In one sense this insistence on “more” intent reflects black-letter equal protection law that deems government’s awareness of its discriminatory action insufficient to constitute discriminatory intent. See *id.* at 279 (holding that such awareness is insufficient to establish the requisite discriminatory intent). In the class-of-one context, however, “mere” awareness of the type at issue in *Feeney* melds into more direct intent. For example, the supervisor in *Engquist* was surely both aware that he was firing Ms. Engquist and, in a fundamental way, “intended” to fire her. This is distinct from a situation such as that in *Feeney*, in which the government may concede that it was aware that its purposeful action would disparately impact one group, but still deny that it intended to classify on that basis. The distinction between these two situations reflects the more complex relationship between the intent requirement and the class-of-one, and thus warrants a closer examination of how the intent requirement should apply to class-of-one claims.

101. See *supra* notes 31-40, 49-51 and accompanying text.

cases in which *Engquist* suggests a per se rule precluding an equal protection claim. For example, in *Del Marcelle* Judge Wood suggested an approach that would allow a law enforcement class-of-one claim to go forward as long as the plaintiff showed that the government official acted in a way that reflected more than a simple use of his discretion to make a subjective decision.<sup>102</sup> She suggested that the plaintiff could satisfy this burden in several ways, including by alleging that the defendant singled the plaintiff out because of animus.<sup>103</sup> In such a case, animus would not function as a constitutional requirement, in light of the Court's explicit rejection of such a requirement in *Olech*; rather, an allegation of animus would play an evidentiary role, buttressing the plaintiff's ultimate claim of intentional discrimination.<sup>104</sup> She also suggested that a set of facts could be so egregious that, in a manner akin to the doctrine of *res ipsa loquitur*, they would suffice to demonstrate intentional discrimination, triggering equal protection scrutiny.<sup>105</sup>

The class-of-one theory requires such nuanced application of the intent requirement's demand that government have targeted a plaintiff "because of, not merely 'in spite of,'"<sup>106</sup> the forbidden trait, because in class-of-one cases no forbidden trait exists; the plaintiff is singled out as an individual, not as a member of a racial or other group. This feature of class-of-one claims requires a translation of the standard intent formula into the unique context of the class-of-one. Properly harmonizing the "because of, not merely 'in spite of'" formula with this unique characteristic of class-of-one claims should therefore require that the official have singled out the plaintiff *because of who the plaintiff is*—that is, *because of her identity*. This understanding of intent honors the Court's intuition in *Engquist* that the traffic officer cannot be the legitimate object of a class-of-

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102. See, e.g., *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 915 (2012) (Wood, J., dissenting).

103. *Id.* at 914.

104. See *id.*

105. See *id.* (citing *Geinosky v. Chicago*, 675 F.3d 743 (7th Cir. 2012) as an example of such facts). In *Geinosky* the plaintiff alleged that he was the victim of class-of-one discrimination based on a long series of parking tickets he received, some of which were inconsistent with each other—for example, with one ticket claiming that the car was parked in one spot at a particular moment when another ticket claimed the same car was parked in a different spot at exactly the same moment. 675 F.3d at 745.

106. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

one claim because his job necessarily requires him to ticket some speeders while letting others go unticketed.<sup>107</sup> But it does so by concluding that the officer did not have the requisite intent, even if, as a technical matter, he intended to ticket the plaintiff while intending to leave another speeder untouched. This first order, common parlance type of “intent” does not satisfy the intent requirement because the officer did not decide to ticket the plaintiff “because of” the driver’s identity.<sup>108</sup> Only if the official based his decision on the plaintiff’s identity—for example, because he recognized a romantic rival’s car and on that basis selected him for the ticket—should we say that a class-of-one defendant acted with the requisite discriminatory intent.

Unfortunately, Chief Justice Roberts did not take this analytical route in *Engquist*. Instead, he reasoned that the subjective and discretionary nature of the officer’s decision, like employment decision actually at issue in *Engquist*, justified a wholesale, per se rule excluding such class-of-one claims from the Constitution’s equal protection guarantee.<sup>109</sup> And indeed, even though he cautioned that the Court in *Engquist* was simply deciding the fate of class-of-one government employment claims,<sup>110</sup> lower courts have subsequently relied on his analysis to justify extending *Engquist*’s per se rule to a variety of other contexts featuring similarly subjective and discretionary decision making.<sup>111</sup> Those cases include situations in which the decision maker satisfied the intent requirement, as Judge Wood’s analysis explains it. For example, the Court’s approach would bar a class-of-one claim brought by a government employee (or speeder) who could prove that her supervisor (or the ticketing officer) singled her out because he knew the plaintiff and laid her off (or ticketed her) out of vindictiveness. It is hard to see how such claims would not be governed by *Engquist*; after all, the claim

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107. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 603-04 (2008).

108. Indeed, in such a case the officer lacks even the *awareness* of the driver’s identity that *Feeney* held fails to satisfy the intent requirement, in the context of standard group-based equal protection. *See Feeney*, 442 U.S. at 279 (“‘Discriminatory purpose’ ... implies more than intent as volition or intent as awareness of consequences.”).

109. *See Engquist*, 553 U.S. at 603-04.

110. *See id.* at 607 (limiting the Court’s holding to employment claims).

111. *See supra* notes 77-82 and accompanying text (noting lower court cases applying *Engquist* beyond the employment context).

rejected in *Engquist* itself featured an allegation that the employer had acted out of animus.<sup>112</sup>

This result is unfortunate, both in terms of class-of-one doctrine in particular and equal protection more generally.<sup>113</sup> The problem is not primarily with the results, although results will be different in a very small number of cases.<sup>114</sup> Class-of-one claims challenging subjective and discretionary decisions should in fact usually fail. But those results should not flow from a per se rule excluding such decisions from equal protection scrutiny. Rather, they should usually fail for other reasons. In the employment context, for example, such claims should usually fail because the decision's subjective or discretionary nature normally means that the decisional criteria are so particularized that a plaintiff cannot prove the existence of a similarly-situated comparator. Scholars of employment discrimination law have forcefully criticized the comparator requirement.<sup>115</sup> Whatever its limitations as a tool in deciding standard discrimination cases, however, the unique context of class-of-one cases renders the comparator question useful—though not necessarily dispositive<sup>116</sup>—in culling meritless claims.<sup>117</sup> Thus, courts applying this approach would continue to

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112. See *Engquist*, 553 U.S. at 594.

113. For the argument that *Engquist's* analysis is unfortunate for equal protection doctrine more generally, see *infra* Part III.

114. One likely example of this small set of cases is *Ciechon v. City of Chicago*, 686 F.2d 511, 524 (7th Cir. 1982), in which the court found a class-of-one violation in the employment context when the employer was held to have disciplined the plaintiff-employee simply out of a desire to find a scapegoat for the poor provision of government services. Presumably, as an employment case *Ciechon* would have come out in the government's favor had it been decided after *Engquist*. Under this Article's proposed analysis, however, the illegitimate motivation driving the government decision would have yielded a result in favor of the plaintiff. Of course, *Engquist* itself would also have come out differently, given the plaintiff's animus-based argument, which a jury accepted. See *Engquist*, 553 U.S. at 596.

115. See generally Goldberg, *supra* note 51 (critiquing what she views as courts' overreliance on comparator analysis in statutory employment discrimination law).

116. See, e.g., *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 914 (2012) (Wood, J., dissenting) (discussing a case in which the facts are so egregious that one can infer a likely class-of-one violation despite the lack of a realistic comparator).

117. Most notably, class-of-one cases are distinct from other discrimination cases, such as those based on employment discrimination statutes, in that they do not rest on a particular identity trait—for example, sex—as a forbidden ground of discrimination. Rather, the central feature of a class-of-one claim is the plaintiff's allegation that he was treated differently, not on the basis of a broad-based characteristic such as sex, but rather from some other individual. Thus, while comparator analysis might not always accurately uncover the

reject the vast majority of class-of-one claims challenging decisions that require the decision maker to make decisions based on a collage of particularized pieces of data, such as an employment decision based on factors such as performance, collegiality and absenteeism.

This sounder analytical approach would also reject equal protection challenges to decisions, such as the officer's decision to ticket one driver rather than another, that cannot be explained because, rather than being based on too many factors, they are based on no factors at all. In the traffic officer case it is quite reasonable to say that the officer has not intentionally treated the

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existence of illegal characteristic-based discrimination, such analysis may be more appropriate when evaluating the class-of-one plaintiff's allegation of worse treatment than another particular individual.

This distinction can be overstated. As Professor Goldberg notes, the rise of "second-generation" discrimination, in particular, discrimination claims revolving around the plaintiff's intersectional identity—that is, her composite identity, say, as an Asian woman rather than "merely" an Asian or a woman—are not easily susceptible to comparator analysis. *See* Goldberg, *supra* note 51, at 764-66. To the extent that such intersectional plaintiffs run into trouble because their alleged ground of discrimination is so precise that no workplace comparator exists, such claims approach, at least conceptually, the problem faced by a class-of-one plaintiff whose unique set of relevant characteristics dooms her claim for lack of a comparator. Still, the fact that the sex discrimination plaintiff alleges discrimination based on a particular forbidden ground renders her claim more judicially-manageable than an analogous claim by a class-of-one plaintiff. Thus, it may be less justifiable for courts considering ordinary discrimination claims to stake their analysis entirely on a search for comparators. *See, e.g., id.* at 780-85 (suggesting ways in which courts can cut through the problems posed by comparator analysis in employment claims to perceive more directly whether the defendant engaged in the forbidden discrimination).

But even here one can perceive a distant analogy to the class-of-one context. In particular, this Article's focus on animus as a crucial component of class-of-one claims distantly echoes Professor Goldberg's argument that, at base, what employment discrimination law prohibits is, literally, discrimination that is based on the forbidden ground, with comparator analysis appropriately playing at most only an evidentiary rather than a dispositive role in the inquiry. *See, e.g., id.* at 785. So too with this Article's class-of-one analysis: its focus on animus as the key to class-of-one claims rests on the conclusion that what the class-of-one idea prohibits is discrimination based on the identity of the plaintiff as an individual. As explained above, such identity-based discrimination fundamentally means discrimination based on a desire to burden the plaintiff based on that identity—in other words, animus. *See supra* text accompanying notes 106-08. Indeed, one can envision a meritorious class-of-one claim that lacks a realistic comparator. *See, e.g., Del Marcelle*, 680 F.3d at 914 (Wood, J., dissenting) (discussing a case in which the facts are so egregious that one can infer a likely class-of-one violation despite the lack of a realistic comparator); *cf. Olmstead v. Zimring*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring) (suggesting in a statutory discrimination context that a finding of animus might substitute for a discrimination plaintiff's lack of a comparator in establishing the defendant's liability); Goldberg, *supra* note 51, at 732 (discussing Justice Kennedy's statement in *Olmstead*).



plaintiff differently, as long as “intent” focuses on the plaintiff’s status as a particular individual. Perhaps ironically then, an officer’s shrug of the shoulders and simple “I don’t know” response to the question asking why he ticketed A rather than B—if not disproven—should doom the plaintiff’s claim.

The reason for these results is simple, but reflective of a fundamental equal protection principle: in neither the employment nor the ticketing case can the plaintiff successfully prove intentional differential treatment of similarly-situated persons. This approach thus continues to ensure that government escapes liability as long as its decision making process honors equality principles to the extent that process allows.<sup>118</sup> In other words, it adapts the intent requirement to the special case of the class-of-one and, indeed, the subset of class-of-one claims involving what the *Engquist* Court described as “subjective and individualized” decisions.<sup>119</sup> As courts both before and after *Engquist* recognized, applying this type of approach at the pleading phase of litigation protects government not just from inappropriate liability but also from frivolous litigation that both absorbs government time and raises the specter of nuisance settlements.<sup>120</sup> But, unlike the approach adopted in *Engquist*, this proposed approach still allows claims to go forward when discretionary decisions are alleged to have been contaminated by dissimilar treatment of similarly-situated people that reflects the

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118. For a more despairing—or potentially simply cavalier—treatment of government’s equal treatment obligations in difficult contexts, see *Engquist*, 553 U.S. at 604 (“But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances.... [A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.”). It is hard to read this language as anything less than a curt dismissal of the possibility that vindictive or other inappropriately-motivated singling out of an individual by a government officer might amount to differential treatment that violates the equal protection guarantee.

119. *Id.*

120. See, e.g., *Del Marcelle*, 680 F.3d at 914 (noting the need for some class-of-one plaintiffs to plead their facts more precisely); Araiza, *supra* note 49, at 50 nn.143 & 144 (citing pre-*Engquist* cases imposing a similar requirement).

level of intent discussed above.<sup>121</sup> That level of intent corresponds to the analogous requirement in standard equal protection cases. Imposing that requirement, but allowing claims to go forward if the plaintiff satisfies it, both harmonizes the class-of-one with the rest of equal protection doctrine and, as explained in the next two subsections, protects equal protection's core values in a judicially manageable way.

### *B. Animus and the Class-of-One*

Properly understood, the intent requirement fits comfortably with the fundamental equal protection rule that government action must promote a public purpose and not be based on personal motivations, most notably—but not exclusively<sup>122</sup>—animus. Standard equal protection doctrine requires that government always act pursuant to a public purpose,<sup>123</sup> a requirement that deems an official's private goals an illegitimate justification for official conduct.<sup>124</sup> Courts may

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121. Indeed, this approach, by asking these questions, would quite likely be easier for lower courts to apply than *Engquist's* blunt rule disallowing class-of-one challenges to all subjective and discretionary decisions. For example, the issue in *Del Marcelle*, in which the police department failed to investigate the plaintiff's complaints about a gang's harassment, bears a superficial resemblance to *Engquist's* traffic officer example. In both cases, the argument goes, the police have too many wrongdoers—or complaints about wrongdoing—and have to make discretionary judgments about which ones to pursue. By contrast, under this approach the *Del Marcelle* example would be more analogous to the employment situation: just like a supervisor's decision whom to lay off, the sheriff's decision in *Del Marcelle* regarding which crimes to investigate would presumably be based on a large number of considerations, such as the seriousness of the complaints, their likely veracity, and the attention particular neighborhoods have or have not received from law enforcement. Utilizing this more precise method of understanding a given class-of-one claim challenging subjective and discretionary decisions would help courts better identify the pleading and factual hurdles appropriately imposed on the given class-of-one plaintiff—at least as compared with the imprecision inherent in *Engquist's* overly simplistic focus simply on the decision's subjective and discretionary nature.

122. See *infra* notes 145-48 (citing cases involving various types of illegitimate motives).

123. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (“[A] court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.”).

124. See, e.g., *Tussman & tenBroek*, *supra* note 12 at 350. (“[T]he requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups—a theory which puts forward some conception of a ‘general good’ as the ‘legitimate public purpose’ at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of the legislative process.”); see also *R.R. Ret. Bd. v.*

be incapable of completely enforcing this rule.<sup>125</sup> Most notably, under traditional, highly deferential, rational basis review courts may hypothesize a legitimate public purpose which the challenged classification might be assumed to pursue.<sup>126</sup> This generous review standard raises the real possibility that government action would be upheld despite its reflection of either officials' own personal interests or their cooperation with private parties' rent-seeking.<sup>127</sup> Nevertheless, the public purpose/anti-animus requirement remains, even if underenforced, as a foundational principle of equal protection<sup>128</sup> and American constitutionalism more generally.<sup>129</sup>

The search for animus often takes an indirect form when courts apply more than standard rational basis review to an equal protection claim. As is well-known, courts applying more stringent judicial scrutiny subject the challenged action to a rigorous ends-means test. Both justices and scholars have explained the most stringent version of this test, strict scrutiny, as a way of uncovering ultimate illegitimate intent. For example, in *City of Richmond v. J.A. Croson Co.*, Justice O'Connor employed this rationale to defend the Court's use of strict scrutiny to evaluate the constitutionality of a race classification decision against the argument that "benign"

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Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring) ("I ... believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.").

125. *But see infra* Part III (noting the possibility that *Engquist* may come to be understood as announcing a more relaxed constitutional requirement, which is completely enforced by rational basis review).

126. *See, e.g.*, *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988) ("In performing this [rational basis] analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts.").

127. *See, e.g.*, Powell, *supra* note 3, at 246 (describing the statute upheld in *Williamson v. Lee Optical*, 348 U.S. 483 (1955), as quite possibly reflecting such cooperation with private rent-seeking); *see also* Einer R. Elhague, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 45-48 (1991) (discussing scholars who have called for more stringent judicial review to curb rent-seeking legislation).

128. *See supra* notes 122-24.

129. *See Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) (describing the public purpose requirement as fundamental); *infra* note 174 (discussing recognition of the fundamental nature of the public purpose requirement).

uses of race did not merit such review.<sup>130</sup> She argued that heightened scrutiny “smoked out” illegitimate uses of race by revealing when the use of race was, in fact, not necessary to the achievement of an appropriate government interest.<sup>131</sup> Her analysis suggests that the inevitable inference to be drawn if the action fails strict scrutiny is that that action was motivated by an illegitimate intent.<sup>132</sup>

Such an indirect search is not limited to explicitly heightened scrutiny. Consider *Romer v. Evans*, the 1996 case in which the Supreme Court claimed to use rational basis review to strike down Colorado’s constitutional amendment barring state government and its local units from conferring protected status on the basis of sexual orientation.<sup>133</sup> The Court considered Colorado’s justifications for the law—protection of persons’ associational rights and conservation of enforcement resources for combating other types of discrimination—and found them insufficiently related to the law to credit as possible justifications.<sup>134</sup> With those legitimate justifications discarded as possible explanations for the law, the Court concluded, essentially by a process of elimination, that the only remaining justification for the law was simple dislike of gays and lesbians.<sup>135</sup> So understood, *Romer* reflects the same type of analysis as that performed in *Croson*, with its only remarkable feature being the Court’s willingness to reject the government’s justifications so readily despite the Court’s ostensible use of rational basis review.

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130. 488 U.S. 469, 721 (1989).

131. *See id.*; PERRY, *supra* note 11, at 102 (explaining strict scrutiny of governmental uses of race “is the Court’s shrewd, practical way of ferreting out, indirectly or by proxy, what might otherwise be the hidden racist rationale for a law”); Powell, *supra* note 3, at 236 (“In *Croson*, Justice O’Connor’s rationale for employing strict scrutiny seems to rely on an underlying view of equal protection that identifies the intentional or purposeful infliction of harm as the primary concern of equal protection with respect to race.”); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136-45 (1980) (explaining heightened scrutiny on a theory based on the uncovering of government intent).

132. *See Croson*, 488 U.S. at 493 (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”).

133. 517 U.S. 620, 623 (1996).

134. *Id.* at 635.

135. *Id.* at 635-36. This conclusion was buttressed by the alternative theory offered in *Romer*, that the Colorado law constituted a literal violation of equal protection by placing gays, lesbians and bisexuals outside the protection of state law. *See id.* at 632-34 (setting forth this argument).

Sometimes the facts of a case allow the search for animus to take a more direct form. For example, in *City of Cleburne v. Cleburne Living Center*, the Court struck down a local government's decision to deny a zoning variance to allow the establishment of a group home for the mentally retarded in a particular neighborhood.<sup>136</sup> The Court's surprising conclusion that the challenged decision failed rational basis review was likely aided by the trial court's finding that the zoning decision was motivated in part by the local residents' fear of the mentally retarded persons who would live in the home.<sup>137</sup> The trial court's finding about the role private biases played in the government action revealed the sort of explicit animus that was lacking in *Croson* and *Romer*. That suspicion of animus likely played a role in the Court's use of an unusually stringent version of rationality review.<sup>138</sup>

In all these cases, animus or another non-public-regarding motive<sup>139</sup> was the conclusion to which the Court's analysis inevitably led. On their face, class-of-one cases seem amenable to the same approach, involving judicial testing of the classification against either the proffered or any hypothesized justification. If the classification lacked a rational connection to any of those justifications, the court would strike it down, concluding, either explicitly or as a necessary implication, that the government's action was motivated by an inappropriate purpose.

But applying such conventional rationality review to class-of-one claims raises both practical and conceptual difficulties. First, as a matter of litigation practicalities, the deferral of the application of rational basis review until after either a trial or even a period of discovery raises the specter of frivolous and costly litigation that would cost the government either time and resources or the money necessary to fund settlements offered to avoid the nuisance cost of litigating. Such costs always exist in litigation, but the limitless scope for class-of-one litigation after *Olech's* endorsement of a broad

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136. 473 U.S. 432, 435 (1985).

137. See *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191, 194, 202 (5th Cir. 1984) (noting trial court findings on the City Council's reasons for its denial of the permit).

138. Cf. *Cleburne*, 473 U.S. at 458-60 (Marshall, J., concurring) (pointing out the stringency of the Court's ostensible rational basis review).

139. See *infra* note 135.

class-of-one theory<sup>140</sup>—a scope that remains potentially broad even after *Engquist*, given *Engquist*'s uncertain reception in the lower courts—makes the specter of such costs particularly problematic in the class-of-one area.<sup>141</sup> Second, the existence of cases such as *Engquist*'s traffic officer hypothetical—in which, quite literally, the government lacks any reason for its action—raises the specter of government liability for failure to satisfy even the defendant-friendly rational basis test.<sup>142</sup> These concerns may well have motivated the *Engquist* Court to excise what it described as “subjective” and “discretionary” government decisions from potential class-of-one liability.

These concerns are reasonable, especially in the context of at least some subjective and discretionary decisions in which it might be difficult for courts to articulate a rational justification for the plaintiff's unfavorable treatment.<sup>143</sup> But the Court could have chosen a more nuanced method of limiting class-of-one litigation and potential liability. Rather than rejecting entire categories of class-of-one claims outright, the Court could have required, either generally or in cases involving subjective and discretionary government decisions, that plaintiffs show direct evidence of animus. As

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140. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (endorsing class-of-one claims without requiring the plaintiff to plead or allege animus); see also *id.* (Breyer, J., concurring) (expressing concern about the wide scope of liability endorsed by the Court's approach).

141. It may also be particularly problematic because claims of animus against an individual may be especially fact-intensive, and thus resistant to dismissal on the pleadings.

142. It may be important to consider at this point the possibility of government offering as a reason for its differential treatment the brute need to burden someone, without regard to the identity of that person. Most notably, *Engquist*'s traffic officer hypothetical may yield a government explanation that the officer had to ticket someone, even if he had no reason for ticketing one driver rather than another. As explained in the prior subsection, such a justification, if not disproven, should in fact win the case for the government—but only because it establishes that the officer did not have the requisite intent to harm the motorist who was randomly chosen to receive the ticket. See *supra* Part II.A. Indeed, without such intent it would be impossible for the plaintiff to prove unconstitutional animus. In sum, then, the Court might be reasonable in having this concern—especially given its breezy dismissal of an animus requirement in *Olech*. 528 U.S. at 565. However, this concern can be resolved through a means much less draconian than *Engquist*'s per se rule excising such claims from equal protection's domain.

143. The qualifier “at least some” is appropriate here because, as explained earlier in the context of employment claims, even many subjective and discretionary government decisions may be amenable to a court's articulation of a rational justification for the disparate treatment. See *supra* text accompanying notes 71-72 (explaining this dynamic in the context of employment claims).

lower courts have recognized, that limitation, especially if imposed as part of pleading and not just ultimate proof requirements, helps cull inappropriate uses of the class-of-one theory. Many—probably most—examples of government action distinguishing between two citizens are presumably made innocently—that is, as an application of a decision-making process free of personal bias against the citizen or other inappropriate personal motivations. Modern impersonal bureaucracies process claims, consider applications, and render decisions in massive quantities. Occasions in which such decisions are infected by bias or other inappropriate personal motive, such as corruption, are likely quite small. That likelihood makes the animus requirement an effective litigation gatekeeper.

Animus is also a principled gatekeeper. A foundational principle of American constitutionalism holds that government must act in pursuit of a public purpose. Government may sometimes fail in that pursuit; no institution is perfect.<sup>144</sup> But it remains the case that government must at least try or, more precisely, must not aim at the opposite: a purely private-regarding outcome. Institutional incapacity may make it impossible or inappropriate for courts to infer such illegitimate motivation indirectly, beyond the special circumstances of explicitly or implicitly heightened review as in *Croson* and *Romer*, respectively. In particular, courts would be stretching their competence and authority to the breaking point if they examined the millions of discretionary decisions government makes every year to determine if their lack of rationality implied illegitimate personal motives.<sup>145</sup> But even if that larger task exceeds the judicial grasp, courts presumably remain capable of adjudicating the smaller universe of allegations of explicit animus: vindictiveness,<sup>146</sup>

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144. Of course, some—presumably a very small—percentage of government actions may be “innocent”—that is, untainted by animus—but nevertheless utterly irrational. Such cases of “innocent irrationality” may well be better understood as implicating the Due Process Clause in light of their lack of animus toward the targeted individual that would otherwise characterize such claims as sounding in equal protection. *See, e.g.,* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (acknowledging that due process limits the ability of government to act arbitrarily and explaining that the particular standard to apply when determining arbitrariness varies with the factual context of the challenged government action); *see also* Araiza, *supra* note 14, at 509-15 (discussing “pure irrationality” claims).

145. *Cf. Washington v. Davis*, 426 U.S. 229, 248 (expressing concern about the prospect of stringent judicial scrutiny of every government action that caused a racially disparate impact).

146. *See, e.g., Olech v. Village of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 2000) (class-of-

corruption,<sup>147</sup> or other phenomena that infect government action with an illegitimate, private motivation.<sup>148</sup> This is especially true when courts require plaintiffs not just to prove such a motive, but to plead it.

In allowing class-of-one claims to go forward if animus is appropriately pled and to be vindicated if animus is proven, courts honor, in a workable manner, the fundamental precept of American constitutionalism that government must always seek to promote the public interest. In removing from equal protection's domain claims such as Ms. Engquist's, which included allegations that the government action was infected by animus, the Court did more than cut class-of-one claims off in too wholesale a manner. More importantly, it excised class-of-one claims that reflect a core commitment of the Equal Protection Clause, and the Constitution more generally. As explained in Part III, *Engquist's* approach constitutes a serious flaw in the Court's constitutional jurisprudence, one whose implications extend far beyond the limited confines of the class-of-one.

### *C. Intent and Animus Reconsidered*

Before turning to *Engquist's* broader impact on American constitutionalism, a concluding word should be said about the class-of-one's lessons for both the relationship between intent and animus, and the logic of the intent requirement. The intent requirement has been heavily criticized as unduly constricting equal protection's scope.<sup>149</sup> Despite those critiques, it has remained a feature of equal protection law for a generation<sup>150</sup> with no indication

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one claim involving allegation of vindictiveness).

147. See, e.g., *Forseth v. Vill. of Sussex*, 199 F.3d 363, 369 (7th Cir. 2000) (class-of-one claim involving allegation of corruption).

148. See, e.g., *Ciechon v. City of Chicago*, 686 F.2d 511, 517 (7th Cir. 1982) (class-of-one claim involving allegation of government scapegoating to deflect unfavorable publicity).

149. See, e.g., Kenneth Karst, *The Supreme Court, 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 49-51 (1977); Lawrence, *supra* note 1, at 319-20.

150. See *Washington v. Davis*, 426 U.S. 229, 248-49 (1976) (requiring equal protection plaintiffs to prove intent). *Davis* has come to be understood as the foundational case stating this requirement. See Karst, *supra* note 149, at 49 (describing *Davis* as "the leading citation for the 'purpose' doctrine").



that it is going away.<sup>151</sup> This Article's discussion of intent's role in the class-of-one raises the question whether its insights offer more general lessons about that requirement.

This Article has argued that the intent requirement plays two useful and interrelated roles in class-of-one analysis. First, it provides a principled basis for rejecting class-of-one claims challenging the sort of random government action at issue in *Engquist's* police officer hypothetical.<sup>152</sup> Of course in *Engquist*, Chief Justice Roberts provided his own reasoning for rejecting such claims. But recall that his reasoning was quite broad and would justify rejecting class-of-one challenges to all subjective and discretionary decisions, even when the government conduct is conceded to be vindictive, corrupt, or otherwise privately-motivated.<sup>153</sup> Our intuitive reluctance to embrace a per se rule excluding this latter type of claim from equal protection's domain reveals the second useful role the intent requirement plays. By focusing judicial concern on actions in which the government official intended to burden the plaintiff because of the plaintiff's identity,<sup>154</sup> that requirement captures the situations in which such illegitimate motivations are likely to exist. Thus, in the class-of-one context, the intent requirement helps cull lawsuits, while allowing claims to proceed when they allege a violation of equal protection's core prohibition on private-regarding government action. It does so by exploiting the close logical connection between the concepts of discriminatory intent and unconstitutional animus.

Does the intent requirement play a similarly helpful and principled filtering role in other equal protection contexts? The above analysis suggests that the answer turns on the characteristics of the particular context at issue. It explains that, in class-of-one cases, the intent requirement helps sharpen courts' focus on core constitutional violations—specifically, violations of the prohibition on private-regarding action. In other contexts, most notably race, the intent requirement may not play such a role. For example, one

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151. See, e.g., Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 940-41 (2008) (noting the modern Court's continued adherence to the intent requirement).

152. See *supra* Part I.C.

153. See *supra* Part I.D.

154. See *supra* text accompanying note 106.

can easily understand that, in the context of race, equal protection's core meaning focuses on uprooting the system of racial hierarchy reflected not just in slavery but in the Black Codes that were the specific target of the Civil Rights Act of 1866.<sup>155</sup> As scholars have noted, the pervasiveness of racism and racial hierarchy in American society and the Fourteenth Amendment's commitment to uproot it may justify a different decision about the constitutional need for an intent requirement in that context.<sup>156</sup>

At one level, then, the class-of-one doctrine says little about the appropriateness of the intent requirement as a general feature of equal protection law. But that very lack of general meaning reveals an important insight. By insisting that evaluation of the intent requirement focus on the particular type of discrimination at issue, and how that requirement addresses that type of discrimination, the class-of-one doctrine illustrates the intent requirement's contextual nature. The class-of-one example thus liberates equal protection law from the formalistic comprehensiveness of the intent requirement, revealing instead that requirement's more contextualized relationship to the constitutional guarantee. Sometimes, as in the class-of-one doctrine itself, an intent requirement is indispensable. At other times, as with race, perhaps it is not.<sup>157</sup>

This analysis yields a final insight about the intent requirement. The more contingent understanding of the intent requirement revealed above in turn suggests that the intent requirement constitutes something less than core constitutional law and more of

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155. Scholars with very different views on the Fourteenth Amendment all agree that at least one of its primary motivations was to provide a secure constitutional foundation for that statute. *E.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 26-27 (2d ed. 1997); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 104 (1988); JACOBUS TENBROEK, *EQUAL UNDER LAW* 224-25 (1965).

156. *See, e.g.*, Karst, *supra* note 149, at 51 ("If we were talking about some new form of discrimination—say, discrimination against persons with red hair, or discrimination against whites—then the 'purpose' doctrine would make eminent sense.... But in America today, where the problem of racism is the problem of eliminating a long-established stigma of inferiority ... it is as plain as a cattle prod that we are talking about something quite different. A legislature oblivious to this existing stigma of caste will nonetheless reinforce the stigma when it produces racially discriminatory effects through ostensibly 'neutral' legislation.").

157. This Article does not purport to be a comprehensive discussion of how the intent requirement should apply in race cases. For a sample of the voluminous literature on that question, see Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Lawrence, *supra* note 1; Lawrence, *supra* note 151; Karst, *supra* note 149, at 41.

a decision rule open to congressional alteration. Such an understanding fits nicely with existing doctrine, which recognizes Congress's power to dispense with a plaintiff's obligation to prove discriminatory intent when alleging equal protection violations.<sup>158</sup> Such legislative waivers may be appropriate, for example, as a practical matter when evidentiary difficulties in proving intent threaten to defeat meritorious claims of invidious discrimination or, more fundamentally, when structural or unconscious racism or sexism yields violations of the equality norm without actually exhibiting the type of intent identified by the doctrine.<sup>159</sup> These concerns are easily accommodated when the intent requirement is understood less as an inflexible, across-the-board, core constitutional command and more as a constitutional decision rule appropriate in some circumstances but not in others. The analysis of intent's role in class-of-one cases suggests the correctness of such an understanding.

### III. FAILING EQUAL PROTECTION: THE CLASS-OF-ONE, THE RATIONAL BASIS STANDARD, AND THE CONSTITUTION

The Court's class-of-one jurisprudence threatens to create a serious tear in the fabric of rational basis review and, with it, American constitutionalism more generally. Rational basis review is often a stepchild of constitutional law jurisprudence and scholarship. Except when it appears to hide more muscular scrutiny, as with the well-known equal protection trio of *Moreno v. Department of Agriculture*,<sup>160</sup> *City of Cleburne v. Cleburne Living Center*,<sup>161</sup> and *Romer v. Evans*,<sup>162</sup> and (possibly) the Court's due process decision in

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158. See, e.g., *Washington v. Davis*, 426 U.S. 229, 248 (1976) (noting the practical difficulties courts would face if they accorded higher scrutiny to all decisions that had racially disparate impacts, and stating that expansion of government liability for discrimination was a job better left for Congress); see also *City of Rome v. United States*, 446 U.S. 156, 173 (1980) (holding, on the same day that it decided that discriminatory intent was required to show a violation of the Fifteenth Amendment, that Congress's power to enforce that amendment included the power to wipe away that limitation).

159. See, e.g., *Lawrence*, *supra* note 1, at 319-20 (arguing that the intent requirement does not account for a great deal of discrimination that should be understood as violating equal protection).

160. 413 U.S. 528, 534-35 (1973).

161. 473 U.S. 432, 448 (1985).

162. 517 U.S. 620, 634-35 (1996).

*Lawrence v. Texas*,<sup>163</sup> rationality review usually elicits little jurisprudential or scholarly attention. This lack of attention is understandable; with the exception of the *Moreno-Cleburne-Romer* trilogy, *Lawrence*, and the scattering of other heightened rational basis cases,<sup>164</sup> rationality review reliably yields a government victory with little judicial analysis.<sup>165</sup> But, however understandable, this inattention is still unfortunate. Even if it rarely triggers careful judicial analysis, the requirement that government action be rational remains, along with the anti-animus requirement to which

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163. 539 U.S. 558, 578 (2003). It should be noted that the description of *Lawrence* as a rational basis case is not unanimously accepted. *See, e.g.*, Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 782 (2013) (noting that *Lawrence* declined to identify the scrutiny level it was applying, and suggesting the possibility that the *Lawrence* Court “rejected the tiers-of-scrutiny framework entirely”).

164. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 338 (1989) (striking down, as failing equal protection rational basis review, application of a property tax valuation method that conflicted with the state constitution’s mandate of “equal and uniform” property taxes); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 624 (1985) (striking down, as failing equal protection rational basis review, a state tax exemption for veterans that applied only to veterans who were state residents when they performed their military service); *Plyler v. Doe*, 457 U.S. 202, 205, 223-24 (1982) (striking down, as failing equal protection rational basis review, a state law denying public education opportunities to children of persons illegally in the United States); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (striking down, as failing equal protection rational basis review, a state law allocating shares of a state trust fund based on the length of residence in the state).

165. *But see* Araiza, *supra* note 3, at 898-99 (examining Justice Stevens’s more careful approach to rationality review).

it is often related,<sup>166</sup> a foundational principle of American constitutionalism.<sup>167</sup>

The Court's class-of-one jurisprudence raises questions about that foundational principle as applied to equal protection and beyond.<sup>168</sup> Most notably, in *Engquist* the Court implied that some examples of

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166. See, e.g., Powell, *supra* note 3, at 228 (emphasis omitted) ("Rational-basis scrutiny, as traditionally understood, flows from a presupposition of American constitutionalism so basic and pervasive that it is easy to overlook: in its dealings with persons, the American government is under a constitutional obligation to act rationally. Rationality in turn requires both that public actions make sense and that they make good sense, that they have some legitimate purpose."); *id.* at 274 (citation omitted) (internal quotation marks omitted) (brackets omitted) ("Although the Constitution's text does not demand, in so many words, that government act rationally, the dominant assumption has long been that irrational official decisions are inconsistent with the constitutional norms of due process and equal protection. Furthermore ... the rationality necessary to affirm the validity of a law or other public action turns on the presence in official decisions of independent considerations in the public interest, independent of sheer caprice or the desire to use public authority to pursue private or malicious ends."); see also Pollvogt, *supra* note 2 (discussing the anti-animus requirement in the context of rationality review cases).

The Court reaffirmed the centrality of the anti-animus requirement in its 2013 decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), striking down Section 3 of the Defense of Marriage Act (DOMA). In *Windsor* the Court largely (though not completely) eschewed the traditional equal protection inquiry into the precision with which the challenged law served a legitimate government purpose. Instead, it directly examined DOMA's text and legislative history, and based on that examination concluded that its "principal purpose and necessary effect" was "to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695.

*Windsor's* method of inquiry elevates the animus determination to a central role. Indeed, even the Court's earlier opinion in *Romer v. Evans*, 517 U.S. 620 (1996), also written by Justice Kennedy and with which *Windsor* will likely be compared, reached its animus conclusion through a more indirect path. In *Romer*, the Court noted the unusual breadth of Amendment 2 and, partially on that basis, rejected as irrational any connection between it and any legitimate state interest. *Windsor* distantly echoed this approach when it expressed concern about DOMA's breadth and its assertedly unusual characteristic of rejecting a state's definition of marriage—indeed, describing the latter characteristic as "strong evidence" that the law's "purpose and effect" was "disapproval of [the] class" of same-sex couples. 133 S. Ct. at 2693. But while *Romer* at least tested the fit between the challenged law and the government's justification for the challenged law, the *Windsor* majority did not. See, e.g., *id.* at 2707-08 (Scalia, J., dissenting) (pointing out this omission). Instead, as suggested above, it appears to have grounded this animus conclusion in a more direct examination of the statute itself. See also William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constructionism*, 94 B.U. L. Rev. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2310586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310586) (discussing how *Windsor* largely abandoned traditional equal protection "fit" analysis in favor of a more direct inquiry into whether the challenged legislation was motivated by animus).

167. See *supra* note 129 and accompanying text.

168. See Powell, *supra* note 3, at 253 (suggesting that Justice Scalia's explanation of the rational basis standard in footnote 27 in *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008), applies to due process as well as equal protection).

irrationality simply did not rise to the level of constitutional violations.<sup>169</sup> As Chief Justice Roberts concluded, the discretionary and subjective nature of government employment decisions excluded them from constitutional protection under the class-of-one theory.<sup>170</sup> Lower courts have indicated that his analysis may apply beyond employment cases.<sup>171</sup>

The potentially radical nature of *Engquist's* analysis makes it important to consider its status as constitutional law. In particular, it requires us to examine whether, under *Engquist*, class-of-one discrimination in government employment simply does not violate the Equal Protection Clause or whether equal protection violations in such cases do exist but are so rare that it makes no sense for courts to enforce against them via rationality review. This distinction, as academic as it might sound,<sup>172</sup> matters for at least two reasons. First, if judicial doctrine—here, the exclusion of such claims from equal protection review—does not exhaust the constitutional command, then at least a theoretical case could be made for congressional enforcement power to fill in the gap left by judicial underenforcement of that command.<sup>173</sup> Second, and by contrast, if rational basis review does in fact exhaust the underlying constitutional command, then we need to rethink our basic assumption that American constitutionalism prohibits arbitrary or irrational government action or indeed whether it even prohibits government action motivated by purely personal gain.<sup>174</sup>

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169. See, e.g., Powell, *supra* note 3, at 264 (describing *Engquist* as stating that “subjective and individualized decisions, which Chief Justice Roberts identified as within the exercise of broad discretion, simply cannot be cabined even by a requirement that they be rational”).

170. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 605 (2008).

171. See *supra* notes 77-82 (citing lower court decisions applying *Engquist* beyond the government employment context).

172. Cf. Powell, *supra* note 3, at 234 (“The obvious question ... is whether there is anything more than theoretical significance to the fact that constitutional doctrine is characterized by the admitted doctrinal gap between its content and the Constitution’s direct commands.”).

173. See William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 570-71, 576-77 (2005) (discussing the opening that the nonexhaustive character of rational basis review provides for congressional enforcement power).

174. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 61 (2001) (“[T]he American constitutional tradition has long recognized a judicial authority, not necessarily linked to any specifically enumerated guarantee, to invalidate truly arbitrary legislation.”); see also *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) (noting the fundamental nature of the rule against government action in pursuit of purely private interests).

At least Justice Scalia, one of the members of the *Engquist* majority, reads that case as reflecting all that the Constitution requires, quite apart from courts' institutional incapacity to enforce a stricter command. In his opinion for the Court in *District of Columbia v. Heller*, the 2008 case holding that the Second Amendment protected a personal right to possess firearms,<sup>175</sup> he wrote in a footnote that rational basis review, rather than constituting simply a level of judicial scrutiny, itself exhausted the constitutional command in cases in which it applied.<sup>176</sup> Notably, he cited *Engquist* as an example of the full extent and force of the Equal Protection Clause.<sup>177</sup> Thus, according to Justice Scalia, *Engquist's* exclusion of some discrimination claims from any equal protection review reflects core constitutional meaning—a meaning that provides no protection at all for class-of-one government employee-plaintiffs or presumably others who can be analogized to them.<sup>178</sup>

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Professor Powell has suggested that this distinction also matters for purposes of the application of stare decisis. See Powell, *supra* note 3, at 235.

175. 554 U.S. 570, 595 (2008).

176. See *id.* at 628 n.27 (citing *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 602 (2008)) (“Justice Breyer correctly notes that [the challenged gun control] law, like almost all laws, would pass rational-basis scrutiny. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, ‘rational basis’ is not just the standard of scrutiny, but the very substance of the constitutional guarantee.”). For an early, necessarily thumbnail discussion of footnote 27, see William D. Araiza, *Judicial Supremacy in a Footnote?*, PRAWFSBLAWG (May 12, 2009), <http://prawfsblawg.blogs.com/prawfsblawg/2009/05/judicial-supremacy-in-a-footnote.html>. For a subsequent comprehensive and scholarly discussion of footnote 27, see generally Powell, *supra* note 3.

177. See *Heller*, 554 U.S. at 628 n.27; see also Powell, *supra* note 3, at 262-63.

178. In theory it might be possible to read footnote 27 as simply reiterating the fact that in most cases equal protection requires that the challenged government action be rational, without reading that footnote as simultaneously enshrining the judicially developed rational basis standard, with all its presumptions and allocations of proof burdens, as itself stating core constitutional meaning. Such a reading would render that footnote consistent with an approach to judicial doctrine in which a judicial review standard is not understood as necessarily reflecting the full extent of relevant constitutional meaning. Cf. Powell, *supra* note 3, at 222 (noting the possibility of a “doctrinal gap” between constitutional meaning and judicial doctrine); Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3 (2004) (discussing the gap concept more generally). However, such a reading of footnote 27 is implausible. Rather, in footnote 27 Justice Scalia explicitly equates judicial scrutiny under the rational basis standard with the Constitution's requirement of government rationality. See *Heller*, 554 U.S. at 628 n.27 (citation omitted) (“[W]hen evaluating laws under constitutional commands that are themselves prohibitions on irrational laws ... ‘rational basis’ is not just the standard of scrutiny, but the very substance of the constitutional guarantee.”).

The correctness and ultimate staying power of Justice Scalia's understanding of *Engquist* presents a question with high stakes. Professor H. Jefferson Powell, remarking on Justice Scalia's *Heller* footnote and its citation to *Engquist*, postulates that it creates an increased space for politics at the expense of law—that is, an increased realm for purely discretionary decisions, unrestrained by legal requirements such as equal protection and due process.<sup>179</sup> Although such a realm has always existed,<sup>180</sup> its extension to a potentially broad range of day-to-day government decision making constitutes an innovation—and a troubling one, given the lack of clear and effective political accountability over such decisions.<sup>181</sup> This concern takes on concrete form when one realizes how lower courts are applying *Engquist* to a variety of types of government action.<sup>182</sup>

Citing *Engquist* as authority for this innovation is doubly troubling for the fabric of equal protection law because that case involved animus, not simply “innocent irrationality.”<sup>183</sup> *Engquist*'s exclusion of some animus-motivated government action from equal protection's concern throws into question the centrality of animus

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179. See Powell, *supra* note 3, at 258-59.

180. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) (recognizing the existence of nonreviewable discretionary power in the executive branch).

181. By contrast one might note how narrowly the Court has construed the Administrative Procedure Act's provision under which agency actions are exempt from judicial review by virtue of being “committed to agency discretion by law.” 5 U.S.C. § 701(a) (2006); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (explaining that that provision is “narrow,” and applies only when laws are written in such broad terms that there is “no law to apply”); *Webster v. Doe*, 486 U.S. 592, 599 (1988) (applying the “no law to apply” formula). Perhaps notably, in *Webster* Justice Scalia wrote separately to advocate for a broader understanding of the “committed to agency discretion by law” exception to judicial review. *Webster*, 486 U.S. at 606-11 (Scalia, J., concurring in part and dissenting in part) (arguing that the APA exception for actions “committed to agency discretion by law” extends beyond situations in which there is no law to apply); see also Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2056, 2062 (2011) (noting the existence of statutory interpretation canons limiting what would otherwise be grants of broad agency discretion).

182. See *supra* notes 76-84 (citing those lower court cases).

183. See *Engquist v. Or. Dep't. of Agric.*, No. Civ.02-1637-AS, 2004 WL 2066748, at \*5 (D. Or. Sept. 14, 2004) (noting that the plaintiff's theory of her class-of-one claim required her to prove “that she was singled out as a result of animosity” on the part of the government official-defendants), *rev'd*, 478 F.3d 985 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008); see also *Engquist*, 553 U.S. at 595-96 (stating the same). The jury eventually found for her on that claim. See *id.* at 596.



in equal protection law.<sup>184</sup> In turn, *Heller's* highlighting of *Engquist* as an exemplar of “the very substance of the constitutional guarantee”<sup>185</sup> provided by the Equal Protection and Due Process Clauses<sup>186</sup> reinforces the view that *Engquist* demarcates the Constitution’s actual outer limit, rather than simply the limit of competent judicial enforcement. The result is a Constitution that leaves citizens explicitly and unambiguously vulnerable to government action motivated by undeniably illegitimate goals.

So understood, *Engquist* fails equal protection in two distinct senses. In addition to “failing” it in the sense of reaching results inconsistent with other components of equal protection doctrine,<sup>187</sup> *Engquist* also “fails” equal protection by abandoning its deepest commitments. These two failures are, of course, closely related. Equal protection doctrine, as intricate as it might be, ultimately seeks to honor the fundamental requirement that government not classify except reasonably and in pursuit of a public purpose.<sup>188</sup> Institutional difficulties may keep courts from fully enforcing that guarantee, a phenomenon that is largely responsible for the Court’s application of mediating rules such as *Carolene's* tiered-scrutiny structure.<sup>189</sup> Such difficulties may also lead the Court to create other doctrinal rules, such as the burden-shifting structure that is part of its intent doctrine<sup>190</sup> and even the intent requirement itself.<sup>191</sup> But they all seek to implement equal protection’s basic command.

If the Court had wished, it could have taken the same approach in *Engquist*. By insisting that plaintiffs provide proof of animus or some other private motivation, the Court could have cut directly to

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184. For one attempt to explain the role of animus, see Pollvogt, *supra* note 2, at 937.

185. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

186. Of course, in some cases equal protection and due process may require more than either rationality or the rational basis standard of judicial review. For example, race classifications receive strict scrutiny. In footnote 27, Justice Scalia made clear that he was referring to the rational basis standard as all the Constitution requires *in cases in which courts apply that standard*. *See id.*

187. *See supra* Part II (explaining how *Engquist* is in tension with the Court’s understanding of doctrinal concepts such as discriminatory intent and animus).

188. *See supra* notes 123-29 and accompanying text.

189. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

190. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Auth.*, 429 U.S. 252, 265-66 (1977) (setting forth this structure).

191. *See supra* notes 158-59 and accompanying text (suggesting the decisional-rule nature of the intent requirement).

the requirement that marks equal protection's foundational principle. Indeed, it could have gone even farther and imposed a litigation rule analogous to the intent requirement's burden-shifting structure,<sup>192</sup> insisting that animus be pled with some specificity. Just as with the traditional understanding of rational basis scrutiny, such a doctrinal requirement would have likely resulted in the rejection of at least some meritorious claims.<sup>193</sup> Nevertheless, that cost might be justifiable in light of the difficulties posed by judicial attempts to enforce the anti-animus rule to its full extent.

But by outright excluding a category of class-of-one claims that otherwise would be meritorious under equal protection's core public-purpose requirement, the Court has gone far beyond adopting a decision rule that seeks to implement a constitutional requirement. Instead, as Professor Powell has suggested, it has altered that constitutional requirement.<sup>194</sup> This subtle shift may not yield radically different results. Nor are those results necessarily problematic. As this Article has stated several times, class-of-one claims *should* be very difficult for plaintiffs to win and, indeed, perhaps somewhat challenging even to plead.<sup>195</sup> But demarcating a subset of such claims as formally outside the boundaries of equal protection inevitably tears at our understanding of the minimum requirements the Constitution imposes on government action. Before *Engquist*, the Constitution was generally understood to require that government action aim at promoting the public good. After *Engquist* that is not so obvious.

The implications of this doctrinal tear are not clear at this early stage. But that uncertainty gives no reason to be sanguine. Already, a majority of the Court in *Heller* has more explicitly endorsed the idea, only implicit in *Engquist*, that the Constitution countenances government action taken with the avowed aim of serving the official's private interests.<sup>196</sup> *Heller*'s endorsement of that idea increases its force, by virtue of the fact that it now appears as a bald

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192. See *supra* note 191 and accompanying text.

193. Cf. Powell, *supra* note 3, at 246 (suggesting that the statute upheld in the paradigmatic equal protection rational basis case, *Williamson v. Lee Optical*, 348 U.S. 483 (1955), quite possibly reflected simple rent-seeking by private parties).

194. See *id.* at 260-61.

195. See *supra* text accompanying notes 6, 113-17.

196. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

proposition in Supreme Court case law, torn from the surrounding context and potential limitations of the reasoning in *Engquist* itself.<sup>197</sup> This situation creates a troubling potential for doctrinal “mission creep.” As Justice Jackson warned nearly seventy years ago in another troubling, but much better known, equality case, a principle announced in a judicial opinion takes on a life of its own.<sup>198</sup> Indeed, as he further warned, such a principle has its own “generative power,” molding future doctrine to fit it,<sup>199</sup> and “expand[ing] itself to the limit of its logic.”<sup>200</sup>

That expansion has already begun. As noted earlier, some lower courts have already read *Engquist* broadly, relying on it to exclude additional varieties of class-of-one claims from constitutional protection.<sup>201</sup> *Heller* footnote 27, by explicitly conferring upon the *Engquist* principle the status of constitutional law, has laid the groundwork for further expansion. That expansion may not be limited to class-of-one cases. Rather, one can at least conceive of courts reading *Engquist* and footnote 27 together as casting doubt on any equal protection analysis that rests on conclusions about animus. Such an expansion could well aggravate the rip *Engquist* created in the fabric of equal protection law. Explicitly animus-based analysis may well become more prominent in future equal protection doctrine as the Court continues to eschew reliance on *Carolene*-style suspect-class analysis in favor of a more direct examination of a classification’s reasonableness and public purpose.<sup>202</sup> This evolution may accelerate as the Court confronts

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197. This Article has, of course, criticized that reasoning. See generally *supra* Part II. Nevertheless, *Engquist* did suggest limits on the scope of the opinion. See, e.g., *Engquist v. Or. Dep’t. of Agric.*, 553 U.S. 591, 607 (2008) (explicitly limiting its holding to government employment); *infra* text accompanying notes 206-07 (suggesting that its analysis is based on institutional and prudential concerns rather than constitutional commands).

198. See *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

199. *Id.* at 246 (“[A]ll that [an announced legal principle] creates will be in its own image.”).

200. *Id.* (quoting BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

201. See *supra* notes 76-84.

202. It bears noting that the Court has not performed a serious suspect class analysis in nearly thirty years, since *City of Cleburne*. Yet during that time it has struck down laws as failing equal protection rational basis scrutiny, largely based on conclusions about animus. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (concluding that the challenged provision of the Defense of Marriage Act reflected unconstitutional animus and thus violated the equality guarantee of the Fifth Amendment’s Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (concluding that the challenged state law reflected animus against the burdened group); see also *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J.,

emerging claims of discrimination that fit uneasily within the standard suspect class template.<sup>203</sup> If *Engquist* and *Heller* combine to provide a countervailing doctrinal tug away from a focus on animus, the resulting stress could cause a serious tear. Of course, it remains to be seen whether *Engquist* and *Heller* will provide that tug. But if they do, it would not be the first time that dicta and imprecise reasoning in a seemingly minor case yielded unforeseen and unintended results.<sup>204</sup>

At least for now, however, *Engquist* need not be read as reflecting such a limited underlying meaning of equal protection. Thus, the troubling understanding of *Engquist* that *Heller* endorsed as core constitutional meaning remains open to reconsideration.

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concurring) (applying an explicitly more searching version of equal protection rational basis scrutiny based on the law's apparent "desire to harm a politically unpopular group"); Araiza, *supra* note 166 (describing *Windsor*'s particularized focus on animus); *see also supra* note 166 (discussing *Windsor*). It has also modulated the effective level of scrutiny for a given type of classification based on the Court's understanding of whether the classification reflected real differences or inaccurate stereotypes. *Compare* *United States v. Virginia*, 518 U.S. 515, 542 (1996) (strongly suggesting that, as long as one woman could succeed at and benefit from the unique pedagogical program at a state military school, the school's sex discriminatory admissions policy was insufficiently-precisely tailored), *with* *Tuan Ahn Nguyen v. INS*, 533 U.S. 53, 62-63 (2001) (accepting as adequate generalizations about the different intensity of the contact a mother and father would likely have with a child). During this period the Court has also come close to dismissing the relevance of political process theory to the level of scrutiny to be accorded race classifications. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989). This abandonment of suspect class analysis has not gone unnoticed by lower courts, whose equal protection cases have turned more and more on direct examination of the law's reasonableness and public purpose. *See, e.g.*, *Perry v. Brown*, 671 F.3d 1052, 1093-95 (9th Cir. 2012) (striking down California's reinstatement of its ban on same-sex marriage as reflecting simple and illegitimate disapproval of same-sex couples and gays and lesbians).

203. *See, e.g.*, Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 26 (1997) (considering obesity discrimination); *cf.* *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-08 (D.D.C. 2008) (considering transgender discrimination in a statutory context); Jessica Roberts, *Preempting Discrimination: Lessons From the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 488 (2010) (considering the constitutional status of genetic discrimination). *See generally* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451 (2010) (discussing the challenges new types of equal protection claims pose to standard equal protection doctrine).

204. *See, e.g.*, *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531-32 (2005) (correcting a quarter-century long mistake in takings law derived from "simple repetition of a phrase" that over time became "ensconced" in the Court's takings jurisprudence); *see also* *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring) (explaining that the Court's Speech Clause rule according strict scrutiny to content-based laws originated in an equal protection case that involved speech, and critiquing that borrowing as having occurred "by accident").

Concededly, Chief Justice Roberts's opinion in *Engquist* does attempt to explain why the type of decision at issue in the government employment context does not implicate equal protection concerns. His description of *Olech* as a case involving a clear standard against which the government's action could be tested, and his contrasting description of employment decisions as necessarily involving discretionary and subjective judgments,<sup>205</sup> suggests an argument that the latter type of decision simply does not fit within the template of decisions susceptible to a requirement of equal treatment of similarly-situated persons. Yet at other times his *Engquist* opinion suggests an alternative, prudential, and institutional competence-based understanding of the Court's result. For example, he relied on the availability of other legal protections for government employees as a justification for excluding them from protection under the class-of-one doctrine.<sup>206</sup> At one point he explicitly, and colorfully, analogized meritorious class-of-one employment claims to needles in haystacks.<sup>207</sup> Taking the Chief Justice at his word, it must be that such meritorious claims—"needles"—exist, at least as a theoretical matter.<sup>208</sup>

Thus, the way is still open for the Court to reconsider its understanding of *Engquist*. An alternative reading remains open, in which government employment class-of-one claims are acknowledged as conceptually possible but are deemed simply too difficult, intrusive, and unnecessary for courts to resolve as matters of constitutional law.<sup>209</sup> Adoption of this alternative reading would go a long way toward squelching *Heller* footnote 27 and mitigating the damage it otherwise causes to our traditional constitutional understandings, by recognizing the existence of what Professor Powell calls the

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205. See *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601-03 (2008).

206. See *id.* at 606-07. In this sense the Chief Justice's analysis begins to resemble the more straightforwardly pragmatic approach to the class-of-one doctrine taken by Judge Richard Posner. See generally Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory*, 58 S.D. L. REV. 197, 197-203 (2013) (contrasting the formalism of Chief Justice Roberts' opinion in *Engquist* with the explicitly pragmatic approach taken in class-of-one cases by Judge Posner).

207. See *Engquist*, 553 U.S. at 608.

208. See Araiza, *supra* note 49, at 61.

209. Cf. *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 898 (7th Cir. 2012) (noting that some class-of-one claims were unnecessary, to the extent other legal remedies would be available for the plaintiff).

“doctrinal gap”<sup>210</sup> between constitutional meaning and judicial doctrine—a gap footnote 27 denies. Finally, footnote 27 itself should not be understood as announcing the Court’s considered judgment denying the existence of that gap. As a footnoted response to a secondary argument posed by a dissent, its radical reconceptualization of basic constitutional guarantees should not be accepted as the Court’s authoritative and binding wisdom on this fundamental question. The Court understands Congress not to hide elephants in mouseholes;<sup>211</sup> it should understand its own handiwork similarly.

Indeed, even as footnote 27 and *Engquist* together purport to announce an extreme and formalistic revision of the role rationality and public purpose play in American constitutionalism, lower courts have continued their struggle to craft a class-of-one doctrine that recognizes the traditional understanding of those concepts.<sup>212</sup> Among the exemplars of that ongoing work are the opinions in *Del Marcelle*, which, in their critical reception to both *Olech*’s dismissal of animus and *Engquist*’s seeming exclusion of law enforcement class-of-one claims, reflect a healthy skepticism about overreading the Court’s statements on those issues.<sup>213</sup> One can only hope that lower courts will continue resisting the urge to take those statements, and *Heller* footnote 27, too literally and instead continue developing creative, appropriate methods for cabining class-of-one litigation, while still honoring both equal protection doctrine and principle.

If lower courts continue that work, then perhaps eventually the Supreme Court may acknowledge the lessons of their nuanced experimentation as superior to its own veering from a wooden over enthusiasm about the class-of-one doctrine in *Olech* to an equally wooden over skepticism in *Engquist*. In particular, perhaps the Court could go beyond the reinterpretation of *Engquist* suggested above,<sup>214</sup> and explicitly hold that a plaintiff in any context can bring a class-of-one claim, as long as she satisfies judge-made proof and pleading requirements that appropriately cabin litigation, settle-

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210. Powell, *supra* note 3, at 222.

211. See, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress ... does not, one might say, hide elephants in mouseholes.”).

212. See *supra* Part I.B.

213. See *supra* notes 85-96 and accompanying text.

214. See *supra* text accompanying notes 210-12.

ment, and mistaken-liability costs. If the Court fails to seriously engage with the creative thinking lower courts have done about how to cabin such claims without undermining basic constitutional commitments, then it will continue to flunk the class-of-one. Even more tragically, it will continue to fail equal protection and, with it, the American constitutional tradition.

### CONCLUSION

Sometimes back entrances provide the easiest access to a structure. Equal protection law has featured heated debates about animus, the intent requirement, and other foundational issues.<sup>215</sup> Those debates are illuminated by a focus on the doctrinal back entrance that is the class-of-one.<sup>216</sup> This Article's discussion of the class-of-one doctrine illuminates the role played by intent; even more clearly, it highlights the centrality of the public purpose requirement and, by extension, the concepts of animus and rationality.

If this Article is correct in arguing that *Engquist* risks undermining the public purpose requirement, then the class-of-one doctrine becomes important as more than just a back entrance into the structure of equal protection law. In that case, *Engquist's* misconceived cut-back on the class-of-one would also, to mix metaphors, constitute a latent construction defect; indeed, thanks to *Heller* footnote 27, that defect would threaten the entire structure. The fact that *Engquist's* overbroad cut-back was likely triggered by *Olech's* similarly mistaken overbroad endorsement of that same doctrine only adds irony to the tragedy. It is time for the Court to begin repairing its shoddy workmanship. Sadly, up until now it has shown no inclination to do so.<sup>217</sup>

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215. See *supra* Parts II.A, II.B.

216. See *supra* Part II (explaining how the class-of-one illuminates the concepts of discriminatory intent and animus). Other issues it touches on include the existence and implications of the distinction between constitutional law and judicial decision rules in equal protection, see *supra* text accompanying note 206, and the role comparators play and should play in equal protection analysis, see *supra* note 117.

217. The Court denied certiorari in *Del Marcelle v. Brown Cnty. Corp.* in November 2012. 133 S. Ct. 654 (2012).