

# Irrationality and Animus in Class-of-One Equal Protection Cases

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Introduction .....	493
I. Olech and Its Progeny .....	495
A. Olech's Facts .....	495
B. The Lower Courts' Decisions.....	496
C. The Supreme Court's Affirmance .....	496
D. Post-Olech Resistance by the Lower Courts.....	498
II. Animus and Irrationality in Equal Protection Law .....	501
A. The Role of Animus and Irrationality in Equal Protection Law.....	501
B. Equal Protection Claims and the Need for "Fit".....	503
C. Pure Irrationality and the Class of One .....	509
Conclusion.....	515

## INTRODUCTION

*Village of Willowbrook v. Olech*,<sup>1</sup> decided by the Supreme Court in 2000, is a small case that potentially says much about basic issues in the law of the Equal Protection Clause.<sup>2</sup> In a remarkably short per curiam opinion,<sup>3</sup> the Court in *Olech* decided that a landowner engaged in a spat with a municipality could bring an equal protection claim without asserting either the deprivation of a fundamental right or discrimination based on membership in a large class, such as one defined by race. *Olech*

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1. 528 U.S. 562 (2000).

2. U.S. CONST. amend. XIV § 1.

3. The actual text of the opinion takes up less than four pages in the U.S. Reports. See *Olech*, 528 U.S. at 563–66.

held that a person could bring an equal protection claim simply by asserting that she herself, as a “class of one,” was intentionally treated differently from relevantly similar individuals and that that treatment was irrational. Importantly, the Court explicitly did not require the plaintiff to allege animus or ill will on the part of the government defendant. All it required was intentionally different treatment lacking a rational basis.

Initially, *Olech* caused a great deal of concern among government officials, as it held the potential to expand their federal liability for disputes growing out of everyday local issues ranging from land use to police protection. For the most part, experience has not borne out this fear. Continued application of traditional deferential rational basis analysis dooms most of these claims.<sup>4</sup> In the land use context in particular, the uniqueness of each property parcel makes it even less likely that a court would find both that two parties were relevantly similarly situated and that the differential treatment lacked any conceivable rational basis.<sup>5</sup> *Olech*'s most noticeable practical effect may well turn out to be the increased litigation leverage enjoyed by plaintiffs, as *Olech* allows a plaintiff to survive a motion to dismiss without having to plead anything more than irrational government action.<sup>6</sup>

As a more theoretical matter, though, *Olech* raises fundamental issues about equal protection law: does equal protection protect only against class-based discrimination or does it also guard against government singling out of individuals without reference to their possession of a class characteristic such as race or gender? *Olech* clearly and unanimously extended the equal protection guarantee to situations of such individual singling-out, or “classes of one.” But the Court, and especially post-*Olech* lower courts, have split on a second issue: whether such class-of-one claims can be based purely on claims of irrational government action, or whether government animus is an essential part of the claim.

This Article focuses on this latter question of animus, although in doing so it will necessarily comment briefly on the first. After Part I sets forth the context—*Olech* and its reception in the lower courts—Part II considers the relationship between animus and irrationality in equal protection law and what *Olech* reveals about that relationship. Considering examples drawn mainly, but not exclusively, from land use law, Part II concludes that the fact-specific nature of many government

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4. See generally William D. Araiza, “*Olech*'s Impact on Land-Use Litigation,” Georgetown University Law Center, Continuing Legal Education, Litigating Regulatory Takings Claims (Oct. 26, 2006) (on file with the author and *Ecology Law Quarterly*).

5. *Id.*

6. Even this need not always be the case, as sometimes courts will dismiss at the pleading stage claims where a plausible rational basis is supported by the allegations in the complaint. See, e.g., *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992).

decisions singling out an individual make it difficult for courts to employ standard equal protection “fit” analysis in a meaningful way. This Article’s analysis leads to the conclusion, contrary to that of the Supreme Court, that class-of-one claims must include allegations of animus or ill will in order to proceed.<sup>7</sup> It also suggests that class-of-one claims lacking such allegations, such as claims simply alleging irrational, if “innocent,” government action, should be relegated to the Due Process Clause for review under standards developed to ensure that government action satisfies some minimal level of substantive reasonableness.<sup>8</sup>

#### I. OLECH AND ITS PROGENY

##### A. *Olech’s Facts*

In *Village of Willowbrook v. Olech*, the Court considered the constitutional implications of a classic neighborhood spat. The problem started when the Olechs, residents of Willowbrook, Illinois, requested that the Village connect their home to the town water supply after the Olechs’ water well had broken beyond repair. The Village agreed, but insisted on a thirty-three-foot easement across the property (and across the properties of two other property owners to which the new municipal water pipe would also extend). But only fifteen feet of this easement was needed for installation and maintenance of the water main. Indeed, in prior situations like this the Village had only required fifteen feet. The Village claimed it needed the remaining eighteen feet demanded of the Olechs and their neighbors in order to pave the street and install sidewalks.

The Olechs and the other neighbors refused to grant the additional eighteen feet and eventually the Village relented. However, the to-and-fro took several months, during which time the Olechs were without water. The Olechs sued based on that temporary injury, alleging that the Village requested the additional eighteen-foot easement because several years earlier the Olechs and their neighbors had sued the Village over an unrelated matter. According to their complaint, those lawsuits generated “substantial ill will” on the part of the Village toward the residents, which in turn motivated the Village to demand the extra easement. The Olechs claimed that ill will–based demand violated the Equal Protection Clause.<sup>9</sup>

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7. See *infra* Part II.A.

8. See *infra* Part II.B.

9. 528 U.S. 562, 563 (2000); *Olech v. Vill. Of Willowbrook*, No. 97 C 4935, 1998 WL 196455, \*1–2 (N.D. Ill. Apr. 13, 1998).

*B. The Lower Courts' Decisions*

The district court granted the Village's motion to dismiss the complaint.<sup>10</sup> It distinguished an earlier Seventh Circuit case, *Esmail v. Macrane*,<sup>11</sup> in which the appellate court found that the plaintiff's allegations of municipal ill will could state an equal protection claim. *Esmail* considered an equal protection claim by the owner of a liquor store who alleged that the city's denial of his permit renewal was motivated by city officials' "deep-seated animosity" toward him.<sup>12</sup> According to the district court in *Olech*, the official treatment in *Esmail* amounted to an "orchestrated campaign of official harassment" motivated by "sheer malice"; by contrast, it described the Village's conduct in *Olech* as, at most, "unreasonabl[e]" and based on "ill will."<sup>13</sup>

The Seventh Circuit, in an opinion by Judge Posner, reversed the district court and reinstated the suit.<sup>14</sup> It failed to find a constitutionally significant difference between the "ill will" alleged in the *Olechs'* complaint and the "orchestration" and "sheer malice" alleged in *Esmail*.<sup>15</sup> Importantly, however, the court made clear that the *Olechs'* complaint alleged more than simple "uneven enforcement." Judge Posner described such uneven law enforcement, namely, the enforcement of the law against one violator but not another, such as when a traffic officer stops and tickets one speeder but not another, as "common" and usually "constitutionally innocent."<sup>16</sup> By contrast, he described the *Olechs'* complaint as alleging that the unevenness (the requirement of the extra eighteen-foot easement) was caused by "a totally illegitimate animus toward the plaintiff by the defendant."<sup>17</sup> In this way, Judge Posner allowed the suit to go forward while avoiding the specter that troubled both him and the district court, of "turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case."<sup>18</sup>

*C. The Supreme Court's Affirmance*

The Supreme Court, in a brief per curiam opinion, affirmed the Seventh Circuit. But it did so on a different, broader ground. The Court began by stating that "[o]ur cases have recognized successful equal

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10. *Olech v. Vill. of Willowbrook*, 1998 WL 196455, at \*1.

11. 53 F.3d 176 (7th Cir. 1995).

12. *Id.* at 177-78 (quoting *Esmail's* complaint).

13. 1998 WL 196455, at \*3.

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

15. *See id.* at 388.

16. *See id.*

17. *Id.*

18. *Id.*

protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”<sup>19</sup> In support of this proposition, the Court cited two property tax cases it characterized as class-of-one cases: *Sioux City Bridge Co. v. Dakota County*<sup>20</sup> and *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*.<sup>21</sup> In these cases, the Court found actual or (in *Sioux City*) potential equal protection violations in differential methods of valuing property for property tax purposes.<sup>22</sup> The Court tied its recognition of class-of-one claims to what it described as the Equal Protection Clause’s mandate to secure against “intentional and arbitrary discrimination.”<sup>23</sup>

The Court then applied this somewhat skeletal reasoning to the Olechs’ claim. It concluded that the complaint could be read as alleging that the Village “intentionally” treated the Olechs differently from other village residents, that the demand for the extra eighteen-foot easement was “irrational and wholly arbitrary,” and that the Village eventually retreated and hooked up the Olechs to the city water system after receiving “a clearly adequate 15 foot easement.”<sup>24</sup> The Court then concluded as follows: “These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternate theory of ‘subjective ill will’ relied on by that court.”<sup>25</sup>

Justice Breyer concurred in the judgment.<sup>26</sup> He expressed the same concern found in the lower court opinions that allowing such claims to go forward without requiring an allegation of ill will “would transform many ordinary violations of city or state law into violations of the Constitution.”<sup>27</sup> Importantly, he noted that “[z]oning decisions . . . will often, perhaps always, treat one landowner differently from another,” and that “one might claim that, when a city’s zoning authority takes an action that fails to conform to a city zoning regulation, it lacks a ‘rational basis’ for its action (at least if the regulation in question is reasonably clear).”<sup>28</sup>

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19. 528 U.S. 562, 564 (2000).

20. 260 U.S. 441 (1923).

21. 488 U.S. 336 (1989).

22. *Sioux City* and *Allegheny Pittsburgh* are discussed in Part II.C.

23. *Sioux City*, 260 U.S. at 445.

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

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

Justice Breyer then attempted to mitigate the effect he feared might follow from the per curiam opinion. He noted that the Olechs had in fact alleged something more than mere irrationality—something he said the Seventh Circuit had called “vindictive action,” “illegitimate animus,” or “ill will.”<sup>29</sup> For that reason, he concluded that allowing the Olechs’ claim to go forward did not implicate his concern about opening the federal courts to equal protection claims growing out of simple differential treatment at the hands of state and local government.<sup>30</sup>

#### D. *Post-Olech Resistance by the Lower Courts*

Despite *Olech*’s seemingly clear statement to the contrary, some lower courts have continued to insist that the plaintiff show some ill will on the part of the government defendant. The most notable of these post-*Olech* opinions comes from Judge Posner himself in *Hilton v. City of Wheeling*.<sup>31</sup> *Hilton* was not a land use case; rather, it involved claims that the police enforced the law unequally against the plaintiff based on a long series of confrontations over petty neighborhood conduct issues such as noise and disorderly conduct. What is significant is Judge Posner’s refusal to accept the seemingly clear message from *Olech* that motive (i.e., ill will) is not a necessary component of a class-of-one claim. Indeed, he wrote in *Hilton* that “[t]he role of motive is left unclear by the Supreme Court’s decision [in *Olech*].”<sup>32</sup> Stressing that the Court found constitutional fault with treatment both “irrational and wholly arbitrary,”<sup>33</sup> Judge Posner repeated what he had said in his opinion in *Olech* and what Justice Breyer had argued in his concurring opinion. He again articulated the idea that class-of-one claims required the plaintiff to show that the defendant “deliberately sought to deprive [the plaintiff] of the equal protection of the laws for reasons of a personal nature,”<sup>34</sup> and that the cause of that differential treatment was ““a totally illegitimate animus toward the plaintiff by the defendant.””<sup>35</sup>

It is tempting to dismiss Judge Posner’s statement in *Hilton* as an unusually independently minded federal appellate judge’s stubborn refusal to abandon what he believes to be the correct law he stated in an earlier case. However, other courts have followed Judge Posner’s lead.<sup>36</sup>

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29. *Id.* at 566.

30. *Id.* at 565–66.

31. 209 F.3d 1005 (7th Cir. 2000).

32. *Id.* at 1008.

33. *Id.*

34. *Id.*

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

36. See, e.g., *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000); *Cordi-Allen v. Conlon*, No. 05-10370-PBS, 2006 WL 2033897, \*6 (D. Mass. July 19, 2006); *DDA Family Ltd. P’ship v. City of Moab*, No. 2:04CV00392 PGC, 2006 WL 1409124 (D. Utah May 19, 2006); *Unique*

Perhaps being less self-assured than Judge Posner, judges in some of these cases have tried to straddle a line between requiring more than the mere lack of a rational basis and requiring some subjective ill will. For example, in *Cordi-Allen v. Condon* the district court cited controlling First Circuit law that class-of-one claims required that the government action be a “gross abuse of power.”<sup>37</sup> The same district court in *Lakeside Builders, Inc. v. Planning Board of Franklin* relied on *Hilton*’s language that the differential treatment must be based on personal reasons, and rejected the plaintiff’s argument that *Olech* had established the irrelevance of the government actor’s subjective motivation.<sup>38</sup> The Utah Supreme Court in *Patterson v. American Fork City* similarly cited Judge Posner’s “reasons of a personal nature” language.<sup>39</sup>

Other courts have been more aggressive. For example, the district court in *DDA Family Limited Partnership v. Town of Moab* simply repeated Judge Posner’s conclusion in *Hilton* that class-of-one claims require that the complained-of action be motivated by a “totally illegitimate animus.”<sup>40</sup> In other cases, the New York Court of Appeals required “malicious or bad faith intent,”<sup>41</sup> while a Michigan appellate court required “that the defendant acted vindictively, and that it exhibited ‘illegitimate animus’ and ‘ill will.’”<sup>42</sup> A Texas appellate court case, *Maguire Oil Co. v. City of Houston*, completely muddled the issue.<sup>43</sup> In partially reversing the grant of the government’s summary judgment motion on a class-of-one equal protection claim, the court concluded that, even assuming that *Olech* requires animus, the plaintiffs raised a material issue of fact going to the animus issue “because the proof shows the differential enforcement [of a city rule] disproportionately favors a single company.”<sup>44</sup>

Other cases adhere to a closer reading of *Olech* and allow class-of-one claims without reference to subjective intent, animus, or any other related concept.<sup>45</sup> Indeed, two Seventh Circuit cases, *Nevel v. Village of*

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Props., LLC v. Terrebonne Parish Consol. Gov’t, No. 01-3503, 2004 WL 1278001, \*6 (E.D. La. June 8, 2004); *Lakeside Builders, Inc. v. Planning Bd. of Franklin*, No. 00-12170-GAO, 2002 WL 31655250, \*3-4 (D. Mass. March 21, 2002); *Bowers Assocs. v. Town of Pleasant Valley*, 814 N.E.2d 410 (N.Y. 2004).

37. *Cordi-Allen*, 2006 WL 2033897, at \*6 (citing *Tapalian v. Tusino*, 377 F.3d 1, 6 (1st Cir. 2004)).

38. 2002 WL 31655250, at \*3-4.

39. 67 P.3d 466, 476 (Utah 2003).

40. 2006 WL 1409124, at \*9.

41. *Bowers Assocs.*, 2 N.Y.3d at 631.

42. *Merry v. Livingston County Road Comm’n*, No. 258315, 2006 WL 932398 \*4 (Mich. Ct. App. Apr. 11, 2006).

43. 69 S.W.3d 350 (Tex. App. 2002).

44. *Id.* at 372.

45. See, e.g., *Ex parte McCord-Baugh*, 894 So. 2d 679 (Ala. 2004).

*Schaumburg*<sup>46</sup> and *Albiero v. City of Kankakee*,<sup>47</sup> offer an alternative class-of-one theory that requires the plaintiff to show “only” that the government action lacks rational basis.<sup>48</sup> “Only” is in quotations here because, as discussed later, the rational basis standard is still quite difficult for a plaintiff to satisfy.<sup>49</sup>

Judge Posner suggested in 2004 that his insistence on subjective ill will may amount to “a doomed rearguard action” in light of the Supreme Court’s opinion in *Olech*.<sup>50</sup> However, this might be an uncharacteristically self-effacing concession, given the number of courts that have to one degree or another followed his lead in *Hilton*. The fact that this issue remains so hotly contested and so muddled reflects the depth of courts’ concerns about allowing every zoning or other land use dispute to rise to the level of an equal protection claim.

Part of this concern might be the ease with which *Olech* allows plaintiffs to survive a motion to dismiss on the pleadings. In a number of cases, courts have denied government defendants’ motions to dismiss, concluding that all a plaintiff needs to allege is that he was treated differently from a similarly situated party without any reason.<sup>51</sup> The release from the need to allege animus or ill will surely makes it easier for plaintiffs to state class-of-one claims—assuming, of course, that the court in question reads *Olech* as dispensing with the need for such allegations. This relative ease of pleading could represent one of plaintiffs’ biggest victories from *Olech*, to the extent the threat of protracted fact-finding might lead a government defendant to settle the underlying dispute.

Regardless of the reason, however, and despite Judge Posner’s suggestion that his emphasis on subjective ill will is doomed, the reaction of lower courts to *Olech* suggests that they remain concerned about allowing class-of-one claims to proceed without an allegation of animus. Their reaction suggests that hidden issues lurk in *Olech*’s seemingly straightforward application of equal protection doctrine.

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46. 297 F.3d 673 (7th Cir. 2002).

47. 246 F.3d 927 (7th Cir. 2001).

48. See *Nevel v. Vill. of Schaumburg*, 297 F.3d 673, 680 (7th Cir. 2002) (explicitly recognizing alternate paths to successful class-of-one equal protection claims); *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (same).

49. See *infra* pages 494-95.

50. *Bell v. Duperrault*, 367 F.3d 703, 711 (7th Cir. 2004) (Posner, J., concurring).

51. See, e.g., *Genesis Envtl. Servs. v. San Joaquin Valley Unified Air Pollution Control Dist.*, 6 Cal. Rptr. 3d 574, 580 (Ct. App. 2003) (“[W]e conclude an equal protection claim contains the following essential elements: (1) plaintiff was treated differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) there was no rational basis for the difference in treatment,” and concluding that the plaintiff had successfully satisfied these requirements by alleging that the plaintiff “arbitrarily . . . [was] denied the opportunity [to continue working for the government entity] while other participants, cited for non-adherence . . . with the [entity’s] rigid standard . . . [were allowed to continue] . . . until said participants could validate compliance.”).

## II. ANIMUS AND IRRATIONALITY IN EQUAL PROTECTION LAW

*Olech* and its subsequent treatment by lower courts force us to consider the relationship between animus and irrationality in equal protection law. Courts and commentators agree that a government action can violate the equal protection guarantee either by failing to satisfy the requisite degree of fit or having an illegitimate purpose, often described as animus.<sup>52</sup> *Olech*, by allowing a claim to go forward without direct evidence of such illegitimate animus, ostensibly fits within this principle. Yet lower courts have resisted *Olech*'s disavowal of animus as a prerequisite to a class-of-one claim. While this resistance is surely due in part to concern about federal courts having to deal with large numbers of trivial disputes turned equal protection cases, closer inspection reveals a deeper problem with the Court's analysis, one that goes to the relationship between animus and irrationality. This part of the Article argues that class-of-one claims differ from their more standard class-based relatives in a way that makes direct evidence of animus a necessary and appropriate part of the plaintiff's case. The first subpart of this Article begins this analysis by examining the relationship between animus and irrationality both in class-of-one cases and in their more conventional class-based claims that are also reviewed under the rational basis standard.

A. *The Role of Animus and Irrationality in Equal Protection Law*

The lower courts' reaction to *Olech*, discussed above,<sup>53</sup> is striking for its reluctance to take at face value the Supreme Court's dismissal of animus as a necessary component of a class-of-one equal protection claim. Part of this reluctance may simply reflect lower courts' concern that the Court's more generous rule opens the floodgates for plaintiffs to convert trivial local disputes into equal protection claims.

As a doctrinal matter this explanation is unsatisfying. Despite its possible original purpose to guarantee equality only with regard to the rights specified in the Civil Rights Act of 1866, the Equal Protection Clause has come to be understood as a general guarantee of equality without explicit regard to the nature or the triviality of the benefit at issue.<sup>54</sup> Concerns about floodgates are not unreasonable from a practical

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52. See, e.g., Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343-65 (1949) (discussing both ill fit and illegitimate purpose as reasons for striking laws down and citing supporting case law).

53. See *supra* Part I.D.

54. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (considering challenge to city decision denying a permit to a group home for the mentally retarded); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (considering equal protection challenge to statute regulating advertising on the sides of trucks).

point of view, but they are an unprincipled reason for completely excising some instances of unequal treatment from the clause's purview. Even if one reads the lower courts' reaction as speaking to a more principled concern about federalism-based limits on federal courts' authority, the need remains for some principle to distinguish between judicially-cognizable claims and government action that does not implicate equal protection.

The cases in which the Supreme Court has found equal protection violations after applying the rational basis standard give insight into this principle. These cases, intriguing because of their tension with the fundamental rule describing rational basis review as exceptionally deferential, reveal much about important concepts underlying equal protection review.<sup>55</sup> The best-known of these cases, *U.S. Department of Agriculture v. Moreno*,<sup>56</sup> *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>57</sup> and *Romer v. Evans*,<sup>58</sup> all conclude that the lack of a rational basis for the government's action revealed, with varying degrees of directness, what the *Moreno* Court famously described as a "bare . . . desire to harm a politically unpopular group,"<sup>59</sup> which *Moreno* in turn observed was not a legitimate government interest.<sup>60</sup> These cases, then, revealed the animus that constitutes one of the core prohibitions of the Equal Protection Clause.<sup>61</sup>

Justice O'Connor's concurrence in *Lawrence v. Texas* seconded the understanding of these cases as focusing on animus.<sup>62</sup> In the course of concluding that the Texas sodomy statute in *Lawrence* violated equal protection, Justice O'Connor explained cases such as *Moreno* and *Romer* by stating that laws that "exhibit[] such a desire to harm a politically unpopular group" receive "a more searching form of rational basis review."<sup>63</sup> To be sure, Justice O'Connor's explanation differed slightly from the one provided above,<sup>64</sup> in which a lack of a rational fit to a

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55. See, e.g., William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TULANE L. REV. 519 (2005) (discussing what the Supreme Court's exposition of the rational basis standard implies about congressional power to enforce the Equal Protection Clause).

56. 413 U.S. 528 (1973).

57. 473 U.S. 432 (1985).

58. 517 U.S. 620 (1996).

59. *Moreno*, 413 U.S. at 534; see also *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (repeating the language from *Moreno*); *Cleburne*, 473 U.S. at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . .").

60. *Moreno*, 413 U.S. at 534.

61. See Araiza, *supra* note 55, at 551-55.

62. 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment).

63. *Id.* at 580.

64. See *supra* text accompanying notes 55-61.

legitimate interest revealed the animus behind the government action. In (slight) contrast, for her a hint of animus triggered heightened scrutiny.

Regardless of whether rational basis review reveals animus or animus appropriately calls forth more searching rational basis review, the fact remains that animus and irrationality are closely related in cases such as *Moreno*, *Cleburne*, and *Romer*. *Olech*, however, features a much more attenuated relationship between these two concepts. In *Olech* the Supreme Court dispensed with a requirement that a plaintiff *allege* animus in order to make out an equal protection claim. Ostensibly this is consistent with the *Moreno/Cleburne/Romer* trilogy; in those cases the Court's decision to strike down the law resulted, at least technically, from the law lacking a rational basis. But, as suggested above, irrationality alone was not at work in the government actions struck down in those cases: either irrationality revealed an underlying animus, or, as Justice O'Connor read those cases, an "exhibition" of animus triggered more searching judicial review.

*Olech*, however, cuts any explicit tie between rationality and animus. Moreover, in an *Olech* class-of-one situation, it is unlikely that rationality review itself would reliably reveal animus. The reason is that the kinds of decisions made in class-of-one cases are different in type than the kinds of decisions normally subjected to judicial review under the Equal Protection Clause (at least before *Olech* opened the courthouse doors to review of this new class of government decisions). Most fundamentally, class-of-one decisions are not based on a class characteristic such as race or gender.

### B. Equal Protection Claims and the Need for "Fit"

The unusual nature of class-of-one decisions requires a rethinking of how basic equal protection concepts apply to such decisions. Before embarking on this rethinking, it is necessary to consider, if only briefly, the more fundamental question whether class-of-one decisions should be cognizable at all under the Equal Protection Clause. After all, if class-of-one claims don't belong under equal protection's umbrella then there is no reason to examine how to modify equal protection to account for such claims. Thus, this subpart begins by briefly discussing the evidence and the arguments in favor of characterizing such claims as raising equal protection issues, and tentatively concludes that, at the very least, an argument exists for including such claims within the equal protection framework. However, it then notes that the doctrine's focus on class-based claims has led to a doctrinal focus on "fit" that simply does not respond to—indeed, that does not fit with—the fact structure of class-of-one claims. In particular, class-of-one claims involve situations where government burdens an individual based on the individual's unique characteristics. The particularistic basis of the government's action makes a focus on "fit" inappropriate to these claims. In turn, this insight suggests the importance of direct evidence of

animus as a way for courts to perform equal protection review in these types of cases.

It has been argued that class-of-one decisions should not give rise to equal protection claims since a focus on discrimination based on a class-wide characteristic is both more faithful to the anti-caste origins of the Fourteenth Amendment and more consistent with recent scholarly theories of equal protection.<sup>65</sup> A full exploration of this question is beyond the scope of this Article. It is worth noting, though, that the Fourteenth Amendment's antebellum origins in concern about "class" legislation<sup>66</sup> reflected, at least in part, a worry that governments would single out particular individuals for unfavorable treatment or even favorable treatment, for example, through the grant of monopolies or corporate charters.<sup>67</sup> This general concern, without reference to race, was an important part of the impetus for the Equal Protection Clause, even if by 1866 lawmakers' primary focus had shifted to race-based legislation, most notably the post-Civil War Black Codes.<sup>68</sup>

Moreover, there remains a strong normative attraction to an equal protection principle that forbids government from singling out an individual for inappropriate reasons of any sort. The rhetoric of equal protection as protecting individual rights, not group rights, reflects this preference, even if the main axes on which individuals enjoy this protection turn on membership in a racial, gender, or other social grouping. Nor is such a principle necessarily best vindicated through substantive protection, whether through constitutional provisions such as the Privileges and Immunities or Due Process Clauses of the Fourteenth Amendment, or principles of administrative law. While this Article does not purport to provide a full argument on this point, it is worth considering the possibility that the ultimate vice of such singling-out may not lie in its deprivation of some important right, nor in the violation of a substantive norm,<sup>69</sup> nor in the substantive arbitrariness corrected by

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65. See generally Timothy Zick, *Angry White Males: The Equal Protection Clause and 'Classes of One'*, 89 KY. L.J. 69 (2000-2001).

66. See, e.g., Melissa L. Saunders, *Equal Protection, Class Legislation and Colorblindness*, 96 MICH. L. REV. 245, 285-93 (1997-1998) (discussing the views of the Fourteenth Amendment's framers about the origins of the Equal Protection Clause as a guard against "class legislation").

67. See, e.g., EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, 98-99 (1990) (noting the concerns of the Equal Protection Clause's drafters about "class legislation" and that term's basis in antebellum concerns about unfavorable singling out); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE* 33-45 (1995).

68. See, e.g., *Atchison, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 104 (1889) ("[T]he equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated.").

69. The "shock the conscience" standard of substantive due process is one example. See Zick, *supra* note 65, at 124-33 (suggesting that this may be the appropriate standard for

judicial review of administrative action. Rather, the ultimate vice lies in the grant of a benefit to or the imposition of a burden on one person, when another equally deserving person is, respectively, denied or spared, especially when the government action is not based on good-faith pursuit of a legitimate public interest.<sup>70</sup>

Nevertheless, focusing our constitutional concern on class-based distinctions rightly occupies a central place in equal protection jurisprudence. Class-based distinctions are necessarily general, and, at least conceptually, generalizable.<sup>71</sup> For this reason, class-based distinctions make possible the fit analysis that not only is the staple of our standard approach to equal protection,<sup>72</sup> but also allows us to infer animus in at least some of the cases where the fit is extraordinarily poor. In other words, considering whether the class's distinctive trait (e.g., its status as black, mentally retarded, or Chinese) is a satisfactory proxy for the conduct the government seeks to regulate allows us to make easier determinations about whether the burdening of blacks, the mentally

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substantive constitutional review of class-of-one claims); *see also infra* text accompanying notes 104–105 (suggesting that this standard may be appropriate for class-of-one claims lacking an allegation of animus).

70. In the case of unequal, or selective, law enforcement, the public interest being pursued is the equal enforcement of laws within the confines of inevitable resource constraints that make it impossible for law enforcement to respond to every act of law breaking. This understanding of the public interest makes comprehensible both the constitutionally innocent nature of “simple” selective enforcement, *see, e.g.*, *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) (dismissing such “uneven” law enforcement as usually “constitutionally innocent”), and the more problematic nature of selective enforcement decisions based on something other than a good-faith response to resource constraints. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“‘Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.’ In particular, the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification . . . .’”) (quoting *United States v. Batchelder*, 442 U.S. 114 (1979) and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Even if claims of selective enforcement rarely succeed in court due to the difficult proof requirements courts have imposed, the fact that such claims are at least theoretically cognizable suggests the animus/good faith distinction this Article concludes should underlay the law of class-of-one claims.

71. The archetypical example of such a distinction is the phenomenon of Jim Crow legislation, under which a wide variety of government action would vary depending on the class characteristic. But even the seemingly particularized decision in *Cleburne* to deny a particular zoning variance was, under this definition, general because the denial was based on the residents’ status as mentally retarded—not particularized facts about their *particular* mental retardation, but the assumed characteristics of mentally retarded people in general. The same might be said for the string of particularized permit denials to Chinese laundries in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). For our purposes, the only difference between the decision in *Cleburne* and the one in *Yick Wo* was the explicitness of the government’s reliance on the class characteristic as the motivation for its action.

72. *See* Tussman & tenBroek, *supra* note 52, at 344–53 (discussing standard ends-means fit analysis).

retarded, or Chinese people reflects the animus that forms one of the underlying concerns of the Equal Protection Clause.<sup>73</sup>

By contrast, many class-of-one decisions are based on particularistic justifications. In such situations, government has made a decision about one individual based on his particularized factual circumstances (e.g., granting a zoning variance based on the facts of a particular application). The particularized nature of such decisions makes it more difficult for courts to engage in the fit analysis that helps determine whether the classification (even into a class of one) is rational, which in turn helps ferret out improper motive. Consider a case where the government denied the landowner a development permit based in part on the unique characteristics of the property, for example, its particular topography or its location in relation to other types of property.<sup>74</sup> In such a case the equal protection claim rests on the allegation that the two properties (one permitted and the other not) were in fact relevantly similarly situated and thus required equal treatment. But, unlike in standard class-based equal protection cases, in this kind of case the basis for the classification is highly particularized—indeed, in some sense it is unique. People are not burdened or denied a benefit because of their race, their legitimacy status, or some other single trait, but because of a set of characteristics unique to them (or, in this case, their properties).<sup>75</sup>

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73. This is the case regardless of the level of scrutiny accorded that particular type of classification. In a rational basis case such as *Romer v. Evans*, the Court concluded that the fit between Colorado's Amendment 2 and any legitimate state interest was so attenuated that the provision could only be explained as an expression of animus. See 517 U.S. 620, 634–35 (1996). In the race context, the Court has explained that the use of ends-means analysis is designed to “smoke out” illegitimate intent by revealing the lack of fit. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); see also, e.g., Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 437 (1997). Of course, the fit required in the race context is, at least ostensibly, tighter than in other contexts. But that is because race is so rarely relevant to legitimate government action that anything less than a tight ends-means fit suggests that something more invidious is afoot. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (“[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification . . .”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)); *Croson*, 488 U.S. at 493 (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”).

74. See, e.g., *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452 (7th Cir. 2002) (rejecting an equal protection claim based on a government decision denying development permit to property owner on these bases, among others).

75. In this sense this situation echoes, if only distantly, the intersectionality analysis of many critical legal studies scholars, who argue that reducing equality claims to claims based on one characteristic ignores the unique experiences of those who possess a particular combination of characteristics, such as a poor African-American woman. See, e.g., Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). Crenshaw's work has been cited as introducing the notion of intersectionality into

The fact-intensiveness of these kinds of decisions makes it very hard for courts to perform conventional fit analysis. When the basis for a decision lies in a complex combination of factors embedded in a unique factual context—a situation often prevalent, for example, in land use cases—a court considering an equal protection claim has to determine whether disfavored persons were relevantly similar to more favored ones. But when each person is unique it becomes difficult for courts to compare the resulting apples and oranges. In the property context, for example, one court summarily concluded that the unique characteristics of each parcel made such comparisons inherently impossible, and on that basis concluded that land use decisions could not generate valid equal protection claims.<sup>76</sup> The same could probably be said for most class-of-one cases except the clearest examples of favoritism, in which the favored and disfavored parties were obviously relevantly alike.<sup>77</sup>

The deferential nature of the rational basis test only makes the judicial task harder. Regardless of its impetus—concerns about federalism or judicial competence or simply an understanding that equal protection does not require governmental perfection—rational basis review of fact-intensive distinctions makes meaningful equal protection review difficult because it allows the court to hypothesize a legitimate reason for the distinction. This feature makes meaningful judicial scrutiny especially difficult when the fact-intensiveness of the decision provides a large number of legitimate rationales. For example, a court considering a permit denial might cite the land's possible unsuitability for that type of development, the inconsistency of the denied use with existing surrounding or hoped-for future uses, or even the cumulative effect of the denied use, despite the fact that surrounding properties are put to that same use.<sup>78</sup> Faced with a nearly limitless number of hypothetical justifications for the challenged decision and a large number of potentially relevant factual bases, it becomes nearly impossible for a court *not* to be able to find a hypothetical justification supported by at least some rationally findable facts.

Militating against this concern is the principle that adjudicative-type decisions affecting only one party, based on facts unique to it generally

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legal scholarship. See Robert S. Chang & Jerome M. Culp Jr., Commentary, *After Intersectionality*, 71 UMKC L. REV. 485, 485 (2002).

76. See *Little v. City of Oakland*, No. C 99-00795 WHA, 2000 WL 1336608, \*5 (N.D. Cal. Sept. 12, 2000).

77. See, e.g., *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) (finding two paramedics to be similarly situated when both had responsibility for the care of a patient who died, with the result that a decision to discharge one but not discipline the other violated equal protection when the discharge was based on pressure from the media and the deceased's family).

78. See, e.g., *McDonald's Corp. v. City of Norton Shores*, 102 F. Supp. 2d 431 (W.D. Mich. 2000) (upholding a denial of a permit for a drive-through restaurant on a street with several such restaurants, on the ground that the street's capacity could not handle one more such use).

must come with at least some reason, as a matter of procedural due process.<sup>79</sup> Thus, a court considering an equal protection challenge to such a decision might not be totally at sea when considering the fit between the singling-out and a legitimate government purpose. But, even assuming that a court doing rational basis review is bound by the government's statement of reasons,<sup>80</sup> a statement of reasons does not completely cabin a court's ability to hypothesize a government purpose underlying the stated reason. For example, a court considering a decision not to allow an additional drive-through restaurant on a street, faced with the government's stated reason that it did not think the street could handle an additional facility of that sort,<sup>81</sup> still might be able to hypothesize a variety of legitimate government purposes behind limiting stress on the street—purposes that could range from safety to pollution to traffic control to a desire to remake the street as a less-crowded secondary route. Thus, a court might still be able to link the stated government reason for the action with more than one government purpose. With a large, complex set of facts in front of it, a court in such a case retains significant flexibility in hypothesizing a legitimate purpose for the challenged action.

The upshot is that in such cases direct proof of animus would greatly help a court considering an equal protection challenge. Indeed, the structure of rational basis review makes it nearly impossible for courts to perform such review in the absence of direct evidence of animus. This conclusion does not justify as a theoretical matter some post-*Olech* courts' continued insistence on animus; in theory, a "pure irrationality" class-of-one claim is still possible. But, given the improbability of a plaintiff victory in such a case, it may explain why courts have all but required a claim of animus as part of the plaintiff's case. Indeed, this tension between the theoretical possibility of a "pure irrationality" class-of-one case and the reality that such cases will almost never result in plaintiff victories may explain the equivocal and confused nature that mark some lower courts' insistence on animus.<sup>82</sup>

These courts' insistence on animus harkens back to Justice O'Connor's description of the *Moreno* line of cases. As she understands

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79. Compare *Londoner v. Denver*, 210 U.S. 373 (1908) (requiring a hearing before individual property owners could be assessed street paving fees based on factors unique to each property owner) with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915) (not requiring a hearing before all property owners in a jurisdiction had the assessed values of their properties raised, and distinguishing *Londoner* because in that case "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds.").

80. But see, e.g., *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006) (rejecting this assumption).

81. See *City of Norton Shores*, 102 F. Supp. 2d 431.

82. See *supra* Part I.D.

them, *Moreno* and its progeny suggest that direct evidence of animus may well ease the plaintiff's burden and lead to the type of heightened scrutiny she discussed in her *Lawrence* concurrence. But if Justice O'Connor's description of these cases is accurate, then an honest statement of the doctrine would in fact feature, if not a requirement that the plaintiff provide direct evidence of animus, then at least an alternate path for the plaintiff other than the standard requirement that the plaintiff prove the utter irrationality of the government's action. Under this alternate path, a less-than-completely irrational government action might still be struck down if the plaintiff disclosed direct evidence of animus. Several circuits have in fact embraced such a two-track approach.<sup>83</sup>

It is possible to read *Olech* as consistent with such a two-track approach to class-of-one cases. Indeed, the Court's explicit refusal to reach the animus theory as a basis for allowing the suit to proceed<sup>84</sup> suggests that this two-track theory is in fact the best reading of *Olech*. There is nothing in *Olech* that questions the fundamental difficulty plaintiffs would have in actually prevailing on "pure irrationality" claims. But fully engaging *Olech* requires considering whether such claims should go forward even as a theoretical matter. The next section discusses this issue and considers the troubled precedent for such pure irrationality claims. The lack of clarity in that precedent, the factual features of class-of-one claims, and the availability of the Due Process Clause as a doctrinal home for claims lacking allegations of animus combine to suggest that class-of-one claims lacking animus may be described as sounding in due process rather than in equal protection.

### C. Pure Irrationality and the Class of One

Beyond the practical difficulty a plaintiff faces in pressing a "pure irrationality" class-of-one claim, such claims present conceptual difficulties as well. The *Olech* Court, in support of its conclusion that irrationality *sans* animus could make out an equal protection violation in such cases, cited two property tax cases, *Allegheny Pittsburgh* and *Sioux*

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83. See, e.g., *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (explicitly recognizing alternate paths to successful class-of-one equal protection claims). Other courts have accepted it as well, though their exact formulas sometimes vary. See *Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005) ("A 'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by negating every conceivable basis which might support the government action or by demonstrating that the challenged action was motivated by animus or ill-will." (internal quotations omitted)); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (distinguishing between claims of irrationality claims and claims of selective enforcement based on impermissible motive); *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 500 (2d Cir. 2001) (accepting possibility of two types of class-of-one claims).

84. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000).

*City*.<sup>85</sup> *Olech* cited these cases for a more specific proposition, namely, that irrational government action violated equal protection *even when the action impacted only a class of one*.<sup>86</sup> As we have already considered the class-of-one issue,<sup>87</sup> we focus here on these cases' discussion of the rational basis standard.

*Sioux City*, decided in 1923 and thus before the enunciation of the modern rational basis standard, does not squarely decide this issue.<sup>88</sup> In that case, the Court merely decided that a landowner-plaintiff who successfully raised an equal protection claim growing out of differential tax treatment could not be remitted to the unworkable remedy of the court reassessing upward the assessed values of the properties taxed too lightly.<sup>89</sup> *Olech* appears to have cited *Sioux City* merely for the proposition that class-of-one claims were cognizable under equal protection.<sup>90</sup>

By contrast, *Allegheny Pittsburgh* does squarely hold that the government action in that case was sufficiently irrational as to violate the Equal Protection Clause, without suggesting any direct or underlying animus.<sup>91</sup> The holding in that case rested on the severe lack of fit between

85. *See id.* at 564.

86. *Id.*

87. *See supra* Part II.A.

88. *See generally* *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446 (1923) (“We construe the action of the [lower] court not to be equivalent to a finding that such [unconstitutional] intentional discrimination existed between the valuation of the Bridge Company’s property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100 per cent. valuation of its property. It was on the same principle, doubtless, that the district court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination . . .”).

89. *Id.* at 446–47. Indeed, the facts of that case at least suggest the possibility of animus or bad faith on the part of the government, and possibly even retaliation for the exercise of constitutional rights. As the Court explained, after the taxpayer protested the original assessment the county board of equalization convened a hearing at which no witnesses were called and no evidence presented, but, “the board of equalization, on the appeal of the [taxpayer] for reduction, raised the assessment above that of the assessor \$100,000.” *Id.* at 442. Thus, even if the case could be read as relevant to whether “pure irrationality” claims could be made, the facts of that case make it very weak support for the proposition that they can.

90. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”) (citing *Sioux City* and *Allegheny Pittsburgh*).

91. The Court’s holding in *Allegheny Pittsburgh* cannot be understood as resting on animus. There was no direct discussion of animus in the cases, unlike in *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 537 (1973) (citing legislative history critical of “hippie communes” receiving food stamps), and *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (noting constituent fear and dislike of the mentally retarded as at least partially motivating the government’s decision), nor did the Court conclude that the lack of legitimate explanations or fit with such explanations suggested that animus had to be at work, as in *Cleburne*, 473 U.S. at 450 (concluding that the government’s decision rested on an “irrational

the state constitution's requirement of equal taxation based on current property values and the county tax assessor's practice of using acquisition value as the touchstone for assessing value for tax purposes, supplemented by only minor, periodic reassessments for properties that had not been recently sold.<sup>92</sup> Essentially, the Court concluded that the assessor's slow pace of periodic reassessments created a systematic inequality between recently-sold properties and other properties that violated equal protection.<sup>93</sup> Understanding this analysis in light of the Court's upholding of California's Proposition 13's acquisition value assessment scheme three years later in *Nordlinger v. Hahn*,<sup>94</sup> the irrationality of the county assessor's scheme in *Allegheny Pittsburgh* must have lain not in the varying assessments for objectively similar plots of property, but rather in the severe failure of the assessor's reassessments to maintain rough equality as that equality was defined by state law.<sup>95</sup>

In light of *Nordlinger's* upholding of an acquisition value scheme very similar to the one struck down in *Allegheny County, Allegheny County* is best read as a case in which a local administrator's violation of state law created an extreme inequality in terms of the state's own determination of which types of parties were similarly situated. This

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prejudice" against the mentally retarded), and *Romer*, 517 U.S. at 632 (concluding that Amendment 2 was so overbroad that it "seems inexplicable by anything but animus" against gays and lesbians). Nor did *Allegheny Pittsburgh* implicate a federalism-based concern about states creating unequal state citizenship statuses, as did *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Zobel v. Williams*, 457 U.S. 55 (1982). See *Zobel*, 457 U.S. at 66-67 (Brennan, J., concurring) (concluding that Alaska's discrimination against more recent residents raises a possible federalism-based concern in unrestricted national travel); *id.* at 71 (O'Connor, J., concurring in the judgment) (arguing that the Alaska statute violates the Privileges and Immunities Clause of Article IV); *Hooper*, 472 U.S. at 624 (Brennan, J., concurring) (concluding that New Mexico's favorable tax treatment for veterans only when they were state residents when beginning military service violated the constitution for the same reasons he expressed in his *Zobel* concurrence).

92. See *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 345 (1989) (noting the tension between the assessor's actions and the requirements of the state constitutional provision relating to taxation); *id.* at 344 (noting the magnitude and longevity of the differential tax burdens placed on different parcels, despite the state law's requirement of equality).

93. See *id.* at 344-45.

94. Proposition 13 provided that property would be assessed, for property tax purposes, based largely on its acquisition value rather than its current market value. See CAL. CONST. art. XIII A (approved on June 6, 1978). The effect of this, as exemplified in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), is that very similar properties are assessed wildly different values, and thus subject to different tax amounts, depending on the date of the property's acquisition and trends in the real estate market.

95. This is not to defend the soundness of the Court's implicit understanding of *Allegheny Pittsburgh* and *Nordlinger*. As Justice Thomas noted in his concurrence in the latter case, finding an equal protection violation in a state's consistent failure to follow its own law raises serious questions about both the consistency of that conclusion with precedent, see 505 U.S. at 18, 26 (Thomas, J., concurring in the result) (citing *Snowden v. Hughes*, 321 U.S. 1 (1944)), and also the wisdom of such a rule.

understanding takes us back to *Olech*, and to Justice Breyer's concern that under the majority's "pure irrationality" approach *any* local government violation of a legal rule, say, a zoning regulation, might be transformed into a violation of the Equal Protection Clause.<sup>96</sup> Thus, *Allegheny Pittsburgh*, considered in light of *Nordlinger*, supports *Olech*'s apparent conclusion that a local government's violation of a state (or local) law transforms the state law violation into an equal protection violation.

When viewed this way, one can perhaps understand the desire of some lower courts to cabin *Olech*'s potentially expansive theory by imposing an animus requirement. The question is whether principle, rather than judicial fiat, can cabin this theory. For example, following the above description of *Allegheny Pittsburgh*, is it possible to cabin this theory without imposing an animus requirement by requiring that the local government's violation of the state law be "irrational?" While this move would harmonize *Allegheny Pittsburgh* and *Olech* with traditional equal protection doctrine, it is not clear whether one can legitimately label some violations of state law "irrational" and others not. What would distinguish them?

One approach might focus on the clarity of the law and the obviousness and severity of the violation. Thus, at certain points *Allegheny Pittsburgh* focused on the systematic, permanent, and quantitatively severe nature of the inadequacy of the assessor's periodic reassessments of property not recently sold—inadequate, that is, in terms of the state law's explicit requirement of equal assessment based on current market value.<sup>97</sup> While it requires some effort to tease out, the picture painted by the Court in *Allegheny Pittsburgh* seems to be one in which a systematic practice led to severe inequality that would not be resolved literally for centuries; in turn, the practice that caused these effects seemed to create a result (assessments not based on current value) that explicitly contravened state law. Such an approach echoes, albeit only remotely, Justice Breyer's speculation in *Olech* whether under the Court's reasoning a local government's violations of state law would violate the Equal Protection Clause only, or perhaps especially, if the state law was "reasonably clear."<sup>98</sup>

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96. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (Breyer, J., concurring in the judgment).

97. *See Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 341 (1989) (describing the difference in assessment rates between comparable properties as "systematic" and "dramatic," with some rates "35 times" others, and noting that the assessor's reassessments, if performed at the current pace, would equalize the assessments only after "more than 500 years").

98. *Olech*, 528 U.S. at 565 (Breyer, J., concurring in the judgment).

This approach, focusing on the severity of the inequality in combination with the clarity of the violation of state law, may provide a method of cabining the potentially expansive “pure irrationality” theory of *Allegheny Pittsburgh* and *Olech*. But such an approach probably exceeds the judicial ken. In the former case, the Court found it relatively easy to quantify (or least purport to quantify) the severity of the inequality. By contrast, even if a court were inclined to find an equal protection violation based on a pure irrationality theory in an *Olech*-type situation, it might be more difficult there to quantify the severity of the inequality when the challenged decision takes the form of a detailed application of a local law to a particularized set of facts. Such an analysis would be quite different from the analysis in *Allegheny Pittsburgh*, in which the Court was faced with a single policy—assessing property based on purchase price, with only periodic reassessments of longer-held property—rather than a unique application of a rule to a particular set of facts.<sup>99</sup>

With one important caveat, these doctrinal contortions may ultimately be of only theoretical interest. Even if a court allows a pure irrationality class-of-one claim to go forward to a verdict, plaintiffs are unlikely to prevail in any sizable number of cases. Plaintiffs making these claims face two major hurdles: the deferential nature of traditional rational basis review (especially when, as in pure irrationality claims, animus is not alleged)<sup>100</sup> and the difficulty of finding favored and disfavored parties similarly situated when the challenged decisions are so fact intensive.<sup>101</sup> Still, *Olech*'s approval of pure irrationality claims may have some real-world effects: as these types of claims will now survive motions to dismiss, plaintiffs may well find it easier to extract settlements

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99. It would not be enough, for example, for a landowner to provide evidence of the amount by which his property lost value due to the legal violation/unequal treatment, since it would still be impossible to know the magnitude by which the other properties were in fact being treated better, given the inherent uniqueness of every government decision of this sort. Thus, if one property were denied a development permit that another was granted, the extent of the inequality could not be easily quantified simply by recourse to the value of the permit, even if one could estimate how much more valuable the property would have been with the permit. Rather, one would have to calculate “how unequal” the treatment was given the extent to which the favored property was more appropriate for development, and the burdened property less appropriate. If they were absolutely equally suited for development, then the loss of value, and thus, the magnitude of the inequality, could be determined fairly easily. But if the magnitude of the inequality turns in part on how unfair the permit denial was in light of *how* similar the two properties were, then the inequality becomes far more difficult to quantify.

100. See, e.g., E. CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 652 (2d ed. 2002) (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test . . . [T]he Court often has stated that a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government’s actual purpose. The result is that it is very rare for the Supreme Court to find that a law fails the rational basis test.”); see also *supra* note 78 and accompanying text. See *supra* pages 494-95.

101. See *supra* note 76 and accompanying text.

from government.<sup>102</sup> It will also presumably lead to more federal court litigation, though the magnitude of the increase is impossible to know.

The question, then, is whether these effects justify not just a limiting principle that simply makes an already-unlikely verdict for plaintiffs even more unlikely, but an actual doctrinal disavowal of pure irrationality claims in the class-of-one context. In considering this question it is helpful to note that such claims are far from the core of equal protection concern: they do not implicate race or even classes in general, and they implicate animus only indirectly. It also bears noting that the adjudicative nature of many of these decisions means that they will often feature some type of hearing or reason-giving by government, which will create at least the skeleton of a record that a court could examine for direct evidence of animus.

Thus, to allow such claims to go forward without even an allegation of animus ends up favoring increased litigation and federalization of state law-based claims. This will likely result in nothing more than giving plaintiffs more leverage to extract settlements. This result occurs in a context—singling out of an individual—that will in many (perhaps most) instances feature at least some semblance of a record that might have revealed direct evidence of animus, if in fact it existed. In addition, if one also believes that pure irrationality class-of-one claims lie at the periphery of the Equal Protection Clause's concern, then a convincing case appears for requiring direct evidence of animus in class-of-one claims. This is not to diminish the force of the argument that the Equal Protection Clause implicates class-of-one claims in general, and that the theoretical basis for such claims rests on concerns about unequal government treatment rather than substantive wrongdoing. But it does suggest the propriety of cutting off judicial cognizance of such claims when courts are manifestly unable to uncover constitutional violations that are peripheral to the Constitution's concerns.<sup>103</sup> This is especially true when the institutional context of those violations may reveal actual violations by a more direct route.

Finally, cutting off such pure irrationality claims need not completely shut the door to federal judicial relief. Rather, these claims might fit as substantive due process claims under the “shocks the conscience”

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102. See *supra* text accompanying note 51.

103. It is possible that Congress, via its Section 5 power, may be better equipped to determine when some instances of state and local government irrationality do in fact rise to the violation of equal protection violations. See *generally* Araiza, *supra* note 55 (suggesting Congress' superior institutional competence when constitutional issues rest on complex empirical judgments).

standard set forth by the Supreme Court.<sup>104</sup> Even though these claims ultimately speak to unequal treatment, and thus are logically thought of as belonging in the Equal Protection Clause, the lack of an allegation of animus moves them even farther from the central concern of equal protection. Moreover, the basis of such claims—that a government classification was innocently irrational—makes it defensible to consider these claims as complaints about substantive wrongs rather than unequal treatment. Indeed, the Supreme Court’s recognition that simple negligence is not actionable under the “shocks the conscience” standard but that gross negligence or recklessness might be<sup>105</sup> comes as close as any verbal formula can to the level of conduct that lies at the base of allegations of “pure irrationality.” Moreover, the illogic of performing standard “fit” analysis on these claims reveals their fundamentally noncomparative nature. This insight again suggests the appropriateness of a legal standard that is substantive rather than comparative.

#### CONCLUSION

Everything about the Supreme Court’s decision in *Olech* makes the case appear straightforward. Its per curiam authorship, short length, and striking paucity of substantive citations all suggest an easy case. So does its analysis, at least at first glance. Its recognition that irrational government classifications violate the Equal Protection Clause reflects hornbook law. And while class-of-one cases are not the standard fare of equal protection litigation, the proposition that the Equal Protection Clause guards against any “discrimination” that rises to a certain level of seriousness seems uncontroversial, with the difficult issues reserved for identifying and then applying the appropriate level of scrutiny.

But as this Article suggests, class-of-one cases are different. The Court may not have fully appreciated this difference when considering simply whether the Olechs, the alleged victims of petty bureaucratic vindictiveness,<sup>106</sup> had pleaded a good equal protection claim. Perhaps a case with more facts developed, in which a lower court has had to struggle with applying standard equal protection analysis to a class-of-one case alleging pure irrationality, will cause the Court to reconsider its

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104. See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (setting forth and expounding on this standard); cf. *Zick*, *supra* note 65 (suggesting substantive due process as a doctrinal home for *all* class-of-one claims).

105. See *Lewis*, 523 U.S. at 846–47, 849.

106. The Olechs’ complaint explicitly alleged that the Village’s demand for a larger-than-normal easement arose from the ill will Village officials harbored toward them, based on the prior litigation and the surrounding publicity. See Brief for Respondent at 1–10, *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (No. 98-1288), 1999 WL 1146879, \*1–10.

overly generous holding, which went beyond even what the Olechs themselves argued was constitutionally required.<sup>107</sup>

Or perhaps not. Since traditional rational basis review is so government-friendly, and since the fact-intensive nature of class-of-one cases makes it even easier for the court to hypothesize the requisite rational relationship and thus rule for the government, the Court may well conclude in a future case that existing doctrine takes care of the problem. Unfortunately, such a conclusion would create little good, and at most, transfer unwarranted settlement leverage to plaintiffs.<sup>108</sup> It might even harm plaintiffs if it prevents a rethinking of the doctrine and a relocation of pure irrationality class-of-one claims to the Due Process Clause, where they might fit better both logically and in terms of allowing the development of a workable judicial standard for their evaluation.

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107. *See id.* at 18–29 (arguing that equal protection is violated by unequal treatment resulting from “ill will or other animus” on the part of the government).

108. *See supra* text accompanying note 6.