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By the Way - The Equal Protection Clause Has Always Protected a Class-of-One: An Examination of Village of Willowbrook v. Olech

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BY THE WAY – THE EQUAL PROTECTION CLAUSE HAS ALWAYS PROTECTED A "CLASS-OF-ONE": AN EXAMINATION OF *VILLAGE OF WILLOWBROOK V. OLECH*

I. INTRODUCTION

The Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[1] The basic principle of equal protection is that similarly situated individuals must be treated the same by government officials.[2] The United

1 U.S. CONST. amend. XIV, § 1.

2 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW –

States Supreme Court has traditionally applied equal protection analysis when a law or government action adversely impacts a group or class of persons.[3]

However, in *Village of Willowbrook v. Olech*,[4] the Court made it clear that the Equal Protection Clause covered individual claims or claims by a "class-of-one."[5] The case presented the Court with a fundamental question regarding the basic scope of the Equal Protection Clause: Does the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provide a cause of action to one who is not a member of a protected class when no fundamental right is infringed upon?[6] Prior to this decision, the Supreme Court never explicitly recognized a "class-of-one" as a legitimate claimant under the Equal Protection Clause.[7] In deciding *Willowbrook*, the Court resolved a split in the circuits regarding the availability of the Equal Protection Clause as a cause of action when no protected class is involved.

One potential concern following the decision is that allowing a dispute over the availability of municipal services to be recast as a federal constitutional claim may open the courts up to a flood of lawsuits.[8] The International City/County Management Association and the National League of Cities wrote that extending equal protection claims to include a "class-of-one" sets "a dangerous precedent that will invite the federal courts to interfere in routine government decision-making in the guise of enforcing the Equal Protection Clause."[9] "[T]he Supreme Court must balance the interest in protecting individuals from arbitrary government action on the one hand and the interest in preventing government officials from being subjected to a flood of lawsuits on

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SUBSTANCE & PROCEDURE, § 14.7, at 567-68 (3d ed. 1999).

3 *See infra* Part II.

4 528 U.S. 562 (2000).

5 In *Willowbrook*, the plaintiff alleged that the Village of Willowbrook treated her differently than similarly situated residents by requesting a 33-foot easement as a condition of connecting her property to the municipal water supply. She contended that the Village required only a 15-foot easement from other property owners when installing water lines. In addition, she alleged that the demand for additional footage was "irrational and wholly arbitrary" and motivated by "ill will" resulting in her previous filing of a successful (unrelated) lawsuit against the Village. *See id.* at 563, 564. *See also infra* Part III.

6 *See* Brief for Petitioners at i, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (No. 98-1288).

7 *See infra* Part IV.

8 Judge Posner wrote, "Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998).

9 *See* Brief for the International City/County Management Association, et al., as Amici Curiae at 3, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (No. 98-1288), *quoted in* David L. Hudson, Jr., *Can the Equal Protection Clause Protect a "Class of One"?*, 2000 PREVIEW U.S. SUP. CT. CAS. 199, 201 (1999).

the other."[10]

This Comment discusses the scope of the Equal Protection Clause in light of the Court's decision in *Willowbrook* and analyzes its likely effect on the Supreme Court's Equal Protection Clause jurisprudence. In doing so, Part II of this Comment will provide a brief history of the Supreme Court's traditional equal protection jurisprudence. Part III of the Comment reviews the pre-*Willowbrook* decisions in the circuit courts and outlines the facts and holdings of Court's decision in *Willowbrook*. Part IV explores the development of the "class-of-one" in the Supreme Court to determine the extent that *Willowbrook* expanded the protections of the Equal Protection Clause. Finally, the balance of this Comment addresses *Willowbrook*'s early progeny and discusses the possible impact the decision may have on government action in the future.

II. THE EQUAL PROTECTION CLAUSE

A. *The Origin and Purpose of the Fourteenth Amendment*

The United States Constitution was amended following the Civil War increasing federal power over the states.[11] Together the Thirteenth, Fourteenth, and Fifteenth Amendments abolished slavery, recognized African Americans as citizens, and extended "equal protection" of the laws to all persons within the United States.[12] The initial purpose of the post-war amendments was to eliminate discrimination[13] and protect the rights of former slaves from white controlled governments.[14]

In 1886, in developing the scope and proper analysis of the Fourteenth Amendment, the Court announced in *Yick Wo v. Hopkins*[15] that "[t]hese provisions are universal in their application, to all persons within the territorial juris-

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[10] Hudson, *supra* note 9, at 201.

[11] U.S. CONST. amends. XIII, XIV, XV. *See also* Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring) ("Today equal protection has become the Court's chief instrument for invalidating state laws."); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 193-94 (1997); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 146-54 (1999).

[12] U.S. CONST. amends. XIII, XIV, XV.

[13] *See* Miller v. Johnson, 515 U.S. 900, 934 (1995) (O'Connor, J., concurring) ("The driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks."). *See also* Timothy Zich, *Angry White Males: The Equal Protection Clause and "Classes of One"*, 89 KY. L.J. 69, 71 (2001); Linda Carter Batiste, Comment, *Balancing States' Rights With Individual Rights: Tipping the Scales Against the Rights of Non-Suspect Classes*, 104 W. VA. L. REV. 143, 153-58 (2001).

[14] John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1197 (1999).

[15] 118 U.S. 356 (1886).

diction, without regard to any differences of race, of color, or of nationality; and equal protection of the laws is a pledge of the protection of equal laws."[16] Importantly, the law at issue in *Yick Wo* was neutral on its face in that it did not explicitly separate classes. However, based on the actions of local officials, a class was created and the Court found state action that is "purely personal and arbitrary" to be a violation of the Equal Protection Clause.[17] Then, thirty-two years later, the Court noted in *Sunday Lake Iron Co. v. Township of Wakefield*[18] that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by [the state's] improper execution through duly constituted agents."[19]

Following *Yick Wo* and *Sunday Lake*, the Court appeared reluctant to invoke the Equal Protection Clause to overturn legislation. For instance, in *Buck v. Bell*,[20] Justice Holmes described equal protection as "the usual last resort of constitutional arguments."[21] For many years the impact of decisions like *Yick Wo* was very limited.[22] Many of the early Court decisions invalidating state economic regulation, for example, relied on substantive due process analysis rather than the Equal Protection Clause.[23] However, recent Supreme Court decisions, most importantly those made by the Warren Court, suggest the Equal Protection Clause has become one of the most important constitutional guarantees for pro-

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16 *Id.* at 369. For a discussion of the facts and decision in *Yick Wo*, see *infra* notes 91-94 and accompanying text.

17 *Yick Wo*, 118 U.S. at 369.

18 247 U.S. 350 (1918).

19 *Id.* at 352. In *Sunday Lake*, the Michigan state board of tax assessors raised the assessment on the plaintiff's property without ordering a survey. The plaintiff claimed that the actual value of the property was only one-third of the new assessed level. The court rejected the equal protection claim stating that "[i]t is also clear that mere errors of judgment . . . will not support a claim of discrimination. There must be something more – something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Id.* at 353, *quoted in* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564. *See also* Dwight H. Merriam, *Good and Evil in the Village of Willowbrook: The Story of the Olech Case*, ZONING & PLAN. L. REP., May 2000, at 33 (stating the *Willowbrook* decision "apparently doesn't change the law").

20 274 U.S. 200 (1927).

21 *Id.* at 208.

22 *See infra* note 24.

23 From the Court's decision in *Lochner v. New York* in 1905 through the 1930s, the Court used substantive due process to invalidate a number of laws. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to [one's] business is part of the liberty of an individual protected by the Fourteenth Amendment."); Nebbia v. New York, 291 U.S. 502, 525 (1934) (holding that the Fifth and Fourteenth Amendments "do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process").

tecting individual rights.[24]

B. *The Supreme Court Refines Equal Protection Analysis*

The Supreme Court fashioned its equal protection jurisprudence[25] by applying varying degrees of scrutiny when evaluating state action under the Fourteenth Amendment.[26] Generally, and particularly in the early development of the Equal Protection Clause, the Court upheld the constitutionality of most legislation so long as there was some reasonable relationship between the statute and a legitimate end the legislature had in mind.[27] Over time, when statutes differentiated among classes, the Court developed and applied a higher degree of scrutiny for members of suspect or protected classes.[28]

Before detailing the exact framework of the Court's Equal Protection Clause jurisprudence and tests, it is important to note that the analysis of a claim arising under the Equal Protection Clause is almost identical to that used under the due process clauses.[29] Under both the Due Process Clause and Equal Protection Clause, unless some sort of fundamental right is involved, the Court must usually determine if the government action rationally relates to a legitimate government end. If a fundamental right is involved, the government must have a higher interest, depending on the nature of the fundamental right.

Two prominent commentators have stated that "[t]he difference in the method of analysis under the due process and equal protection guarantees relates only to whether or not the governmental act classifies persons."[30] In other words,

> [i]f a law burdens all persons equally when they exercise a spe-

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[24] J. Michael McGuinness, *Esmail: Equal Protection For Ordinary Victims of Governmental Misconduct*, W. VA. LAW., Oct. 1996, at 14. *See also* Loving v. Virginia, 388 U.S. 1 (1967) (holding that state law restricting the freedom to marry based solely on racial classifications violates the Equal Protection Clause); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregation of children based on race violates the Equal Protection Clause).

[25] *See* Anthony Lewis, *The Role of the Supreme Court*, A.B.A. J., Sept. 1959, at 911, *reprinted in* THE SUPREME COURT AND ITS JUSTICES 67-68 (Jesse H. Choper, ed., 2001) (discussing Felix Frankfurter's book *Mr. Justice Holmes and the Supreme Court*). In the book, Frankfurter lists 232 cases in which the Supreme Court held a state action invalid under the Fourteenth Amendment between 1877 and 1938. *See id.* Of those 232 cases, ninety-percent concerned economic issues and only 26 cases dealt with personal rights. *See id.*

[26] *See* ROTUNDA & NOWAK, *supra* note 2, § 14.7, at 567-68.

[27] *See* Robert Glennon, *Will the Real Conservatives Please Stand Up?*, A.B.A. J., Aug. 1990, at 48, *reprinted in* THE SUPREME COURT AND ITS JUSTICES 330, 331-34 (Jesse H. Choper, ed., 2001).

[28] The court has generally applied three levels of scrutiny – rational basis, intermediate scrutiny and strict scrutiny. *See* ROTUNDA & NOWAK *supra* note 2, § 14.7 at 567-68. *See also* Batiste, *supra* note 13, at 153-54.

[29] ROTUNDA & NOWAK, *supra* note 2, § 14.7 at 566-67.

[30] *Id.*

> cific right, then the courts will test the law under the due process clause. If however, the law distinguishes between who may and who may not exercise a right, then judicial review of the law falls under the equal protection guarantee because the issue now becomes whether the distinction between these persons is legitimate.[31]

Essentially, equal protection guarantees prohibit the government from classifying individuals as different in type when dispensing government benefits or burdens.[32] Violations are found either when the regulation creates classes on its face or when in the application of the laws are applied in such a manner as to create distinctions between classes, as in *Yick Wo*.

C. *The Standard of Review Under the Equal Protection Clause*

Once it has been decided that the law either distinguishes between classes on its face or is written in a neutral fashion but is applied so as to intentionally make a distinction between classes, the Supreme Court has a framework for interpreting and applying the Equal Protection Clause.[33] Over time, the Court has applied three levels of scrutiny within this framework: rational basis, intermediate scrutiny, and strict scrutiny when analyzing an equal protection claim.[34]

The first determination is what level of scrutiny should be applied. Before strict scrutiny will be applied, a plaintiff must show that the classification is

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31 *Id.*

32 *Id.*

33 *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 464-65 (2000). In considering the scope of the Equal Protection Clause, it is important to remember that although the original intent of the Equal Protection Clause was to eliminate discrimination against African Americans, the court extended Fourteenth Amendment protection to cover persons who are members of a suspect class or vulnerable group that faces discrimination. *See* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) ("The existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (stating that the aim of the Equal Protection Clause "was against discrimination because of race or color"). *See also supra* note 24.

34 Some commentators argue that the Court has applied a fourth standard somewhere between rational basis and intermediate scrutiny. *See* James Audley McLaughlin, *Majoritarian Theft in the Regulatory State: What's a Takings Clause For?*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 161, 205 & nn.168-69, 218-19 (1995). Professor McLaughlin suggests the court recognizes a fourth tier "where the complaint has a sufficient interest to merit heightened concern but not enough to qualify under either prong of the heightened scrutiny doctrine [strict scrutiny or intermediate scrutiny]." *Id.* at 205. He suggests that the following cases were decided, in part, using such an approach: City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); and Reed v. Reed, 404 U.S. 71 (1971).

based upon suspect classifications or infringes upon a fundamental right.[35] Suspect classifications include race, alienage, and national origin.[36] Fundamental rights include the right of interstate migration,[37] the right to vote (and the related right to participate as a candidate),[38] and the right to use the courts.[39] "The current multi-tiered approach [aims] principally to separate permissible legislative generalizations based upon group characteristics from illegitimate generalizations based upon stereotypes or other impermissible criteria."[40]

Because the initial purpose of the Fourteenth Amendment was to prohibit states from enacting legislation that treated former slaves differently from whites, classifications based on race are immediately suspect, and presumptively invalid. In *Korematsu v. United States*,[41] Justice Black wrote "[a]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[42] Chief Justice Warren, describing the strict scrutiny standard of review, wrote: "[I]f [racial classifications] are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth

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35 This essentially began with the now famous *Carolene Products* footnote four, in which the Court suggested that the normal presumption of constitutionality will not apply to legislation that disadvantages "discrete and insular minorities." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See also* Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (discussing the Court's "famous words" of footnote four and the rational in the decision in *Carolene Products*); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (describing footnote four as the "most celebrated footnote in all of constitutional law").

36 Korematsu v. United States, 323 U.S. 214, 216 (1943) ("All legal restrictions which curtail the civil rights of a single racial group are immediately suspect."). *See also* Yick Wo v. Hopkins, 118 U.S. 356 (Asians); Hernandez v. New York, 500 U.S. 352 (1991) (national origin); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (stating that discrimination of any racial group, including whites, will now merit strict scrutiny).

37 Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that the right to interstate travel is constitutionally protected).

38 *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (holding the right to vote to be fundamental); Reynolds v. Sims, 377 U.S. 533 (1964).

39 *See* Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (stating that the right to counsel is one of those rights that is "fundamental and essential to a fair trial" and is thus made obligatory upon the states by the Fourteenth Amendment); Griffin v. Illinois, 351 U.S. 12, 17-21 (1956) (stating that due process requires all indigent defendants be furnished a transcript to prepare appellate brief).

40 Zich, *supra* note 13, at 71.

41 323 U.S. 214 (1944).

42 *Id.* at 216 (holding that the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny"). *See also* City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) (stating that discrimination of any racial group, including whites, will now merit strict scrutiny); Batson v. Kentucky, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) ("[T]he Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes.").

Amendment to eliminate."[43] Consequently, once a court finds that strict scrutiny applies, the Court requires the government to show the questioned classification is narrowly tailored to achieve a compelling state interest.[44]

If the classification does not fit within the fundamental rights or does not distinguish on the basis of one of the classes that the Court has determined is protected with strict scrutiny, the court may still apply a heightened level of scrutiny—the intermediate tier of scrutiny. The Burger Court added this tier of review to include classifications based on characteristics such as gender[45]and illegitimacy.[46] In other words, these are classes that have not been discriminated against to the extent of race, and therefore, the level of protection is not as great—they are "quasi protected." Under this standard of review the government must show that a classification "serve[s] important governmental objectives and must be substantially related to achievement of those objectives."[47]

However, analysis under the Equal Protection Clause does not stop when a person is not a part of a protected or quasi-protected class that would mandate either strict or intermediate scrutiny.[48] In such circumstances the Court applies the rational basis test. This test is generally an easy burden for the government to meet. Initially, the court presumes the classification is constitutional when determining whether there is a rational relationship between the state action and the classification.[49] The burden is on the plaintiff to show that the classification bears no legitimate purpose.[50] The plaintiff must show that the differential treatment is irrational or wholly arbitrary to overcome a motion to dismiss.[51] Generally, the state can show at least some legitimate reason for the de-

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43 Loving v. Virginia, 388 U.S. 1, 11 (1967) (invalidating a Virginia statute that banned interracial marriage).

44 *Id.*

45 *See* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 468 (1981) ("[We] have held that traditional minimum rationality takes on a somewhat sharper focus when gender-based classifications are challenged."); Craig v. Boren, 429 U.S. 190 (1976) (invalidating an Oklahoma law that established a different drinking age for males and females).

46 The Court has invalidated illegitimacy classifications on several occasions. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

47 *Boren*, 429 U.S. at 197.

48 ROTUNDA & NOWAK, *supra* note 2, § 14.7, at 567-68.

49 *Id.*

50 *Id.*

51 *See* Bush v. Gore, 531 U.S. 98, 101 (2000) (per curiam); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In *Bush*, the Supreme Court applied the equal protection clause examining the standards used by the Florida court in determining a valid vote. The Court explained that "having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104. The majority opinion applied classic Equal Protection analysis of non-arbitrariness and uniform standards

cision (no matter how tenuous) and thus overcome a challenge.[52]

For instance, in *City of Cleburne v. Clebourne Living Center*,[53] the Court found a violation of equal protection when the city denied a building permit for the construction of a home for mentally disabled residents while allowing permits for other multiple dwelling facilities.[54] The Court found no rational relationship between the contested city ordinance and the classification of disabled persons.[55] The rejection of the building permit was based on "mere negative attitudes . . . fear and irrational prejudice."[56] This holding is consistent with the Court's decision in *Yick Wo*[57] where the court found a violation of equal protection for unequal application of a facially neutral San Francisco ordinance.[58]

Similarly in *Romer v. Evans*,[59] the Court found a Colorado Amendment to the State Constitution prohibiting any legislative, judicial, or executive action designed to protect homosexuals to be unconstitutional. Even though homosexuals are not a recognized protected class, the court found the amendment lacked a rational relationship to any legitimate state interest.[60]

With this emphasis on classes, the expansion of the scope of the Equal Protection Clause has generally focused on discrimination against classes or groups – not individuals. In fact, the court specifically discusses the clause in terms of the effect legislation (or other government action) has on a protected class:

> In every equal protection case, we have to ask certain basic questions. What *class* is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the *disadvantaged class* that justifies the disparate treatment?[61]

See also James J. Brown, Recent Development, *Constitutional Law: Equal Protection, Village of Willowbrook v. Olech*, 30 STETSON L. REV. 1092, 1094 (2001).

52 ROTUNDA & NOWAK, *supra* note 2, § 14.7 at 566-67.

53 473 U.S. 432 (1985).

54 *Id.* at 453.

55 *Id.*

56 *Id.* at 448-50.

57 *See infra* notes 91-94 and accompanying text.

58 *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

59 517 U.S. 620 (1996).

60 *Id.*at 621.

61 *City of Cleburne*, 473 U.S. at 453 (Stevens, J., concurring).

However, in *Willowbrook*, the plaintiff alleged an equal protection violation even though she was not within any particular class and the case did not involve a fundamental right. At first glance, one might think that under the Equal Protection Clause, if there was no classification, then there could be no violation.[62] Rejecting this argument, the Court held the plaintiff, although, a "class-of-one," did state a claim for relief under traditional equal protection analysis by alleging that the Village treated her differently from others similarly situated and there was no rational basis for the difference in treatment.[63] Even though the focus of the Equal Protection Clause has been based on classifications of groups and when the substance of the laws made distinctions among classes, the Court recognized that even in the administrative context, when an individual believes she has been singled out and treated in an entirely different manner than other similarly situated individuals she may bring a claim under the equal protection clause as a "class-of-one." Indeed, the text of the Fourteenth Amendment does speak of "persons" not classes or groups of persons.[64] The Court treated the question of a "class-of-one" as having already been decided by prior cases.[65] The decision appears to expand the reach of the Equal Protection Clause and allow for almost unlimited use when a person is adversely affected by a local land use decision. It is to these issues that this Comment now turns.

III. *WILLOWBROOK V. OLECH*

A. *Pre*-Willowbrook – *The Split in the Circuits*

Prior to *Willowbrook*, the circuits were split regarding the viability of "class-of-one" equal protection claims. The Sixth Circuit, in *Futernick v. Sumpter Township*,[66] held that "classes of one" are not entitled to bring an equal protection claim.[67] The plaintiff in *Futernick*, a mobile park owner, claimed that

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62 As we shall see, some circuits adopted this view in rejecting "class of one" claims. *See infra* Part III.A.

63 The plaintiff, Grace Olech, requested to be connected to the city water supply. Two neighbors also made the same request. The Village of Willowbrook requested a 33-foot easement from each of the residents. The Supreme Court noted that the complaint "could be read to allege a class of five [Olech, her husband, neighbors Rodney and Phyllis Zimmer (Grace Olech's daughter and neighbor) and Howard Brinkman]." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 n.* (2000). *See infra* Part III.B.

64 *See* Adarand Constructors, Inc. v. Pena 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments of the Constitution protect persons, not *groups*."); Zich, *supra* note 13, at 73.

65 *Willowbrook*, 528 U.S. at 564 (citing Allegheny Pittsburgh Coal Co. v. Comm'n of Webster Cty., 488 U.S. 336 (1989); Conley v. Gibson, 355 U.S. 41 (1957); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350 (1918)).

66 78 F.3d 1051 (6th Cir. 1996).

67 *Id.* at 1053.

selective or vindictive enforcement of local regulations denied him equal protection. The court simply stated that selective enforcement of the law against a particular individual was not a classification that in turn warrants Fourteenth Amendment Equal Protection.[68] Additionally, the Seventh Circuit (just prior to its decision in *Olech v. Willowbrook*) noted that "discrimination based merely on individual, rather than group, reasons will not suffice" to succeed on an Equal Protection Claim.[69] However, in *Esmail v. Macrane*,[70] Judge Posner announced that "vindictive action" on the part of a government employee may provide the basis for an equal protection claim even though an individual is not part of a particular class.[71]

The plaintiff in *Esmail* was the owner of a liquor store in Naperville, Illinois. The plaintiff claimed that the mayor of Naperville "saw to it" that his liquor license was not renewed. He alleged in his complaint that the mayor acted out of "deep-seated animosity" toward him.[72] Posner wrote that "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."[73] This attitude was reflective of that shown in *Yick Wo v. Hopkins*,[74] where the Supreme Court noted, "[w]hen we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."[75] Although the statute that provided for the granting of liquor licenses was not substantively violative of equal protection in the sense that it distinguished among classes on its face, because of the administrative actions in interpreting the law and enforcing the provisions of the law, the individual was allowed to bring an equal protection claim.

Consequently, it can reasonably be argued that governmental action that burdens only a few persons may require some form of heightened scrutiny. It is easy to conceive of a situation where a government official singles one out or disfavors a person who is not a member of a suspect class. That person may very

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68 *Id.*

69 New Burnham Prairie Homes, Inc. v. Vill. of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990). In *Burnham*, the court held that a Village official did not act irrationally when denying a building permit to a landowner and developer. The court required membership in a protected classification for the Equal Protection Clause to apply. *See id.*

70 53 F.3d 176 (7th Cir. 1995).

71 *Id.* at 177.

72 *Id.* at 177-78.

73 *Id.* at 179.

74 118 U.S. 356 (1886). *See also infra* notes 91-94 and accompanying text.

75 *Yick Wo*, 118 U.S. at 369-70.

well be entitled to the protection of the Fourteenth Amendment. As Posner wrote, "classifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all."[76] Therefore, some circuits held that there was no such thing as a "class of one," while on the other hand, other circuits hinted that not only could there be classes of one, but that such classes may be entitled to more than rational protection. As we shall see, the Court in *Willowbrook* answered at least some of these questions.

B. The Facts and Holding of the Court

In the spring of 1995, the Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue (a non-dedicated unimproved road within the Village boundary where the plaintiff resides) to be connected to the municipal water supply. Under the plan, the road was to be improved and the water line installed by spring 1997.[77] In May 1995, the plaintiff's well failed and she requested that the city connect her to the water supply "right away." Philip Modaff,[78] the Director of Public Works, agreed to extend the water main ahead of schedule on the condition that each homeowner along Tennessee Avenue pay a pro rata share of the project. Each of the residents paid the appropriate fee.[79]

During the planning stage for the project, the Village discovered that a portion of Tennessee Avenue (including a portion of the plaintiff's property) had never been dedicated as a public street and no easement had been granted to any governmental body for use of the road. In order to address this issue, Modaff informed the plaintiff that the project would not proceed unless each resident granted the Village a 33-foot easement along Tennessee Avenue. According to the complaint, the demand for a 33-foot easement as a condition of the extension of the water line was not consistent with the policy of Willowbrook regarding other property within the Village.

Instead of agreeing to the right of way, Mrs. Olech filed suit. The com-

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[76] *Esmail*, 53 F.3d. at 180.

[77] The facts of the case are drawn from the following: Plaintiff Grace Olech's Response to Defendants' Interrogatories filed with Magistrate Judge Schenkier, Northern District of Illinois, No. 97 C 4935, October 13, 2000; Memorandum Opinion and Order from Judge George M. Marovich, United States District Court, Northern District of Illinois, Eastern Division, No. 97 C 4935, April 13, 1998; Brief for Defendants-Appellees, Olech v. Willowbrook, 160 F.3d 386 (7th Cir. 1998) (Gen. No. 98-2235); Brief for Petitioners, Vill. of Willowbrook v. Olech, 528 U.S. 563 (2000) (No. 98-1288). Additionally, over the past months the author has had several conversations with defendant, Philip Modaff.

[78] Philip Modaff is the author's brother-in-law and was named as a defendant in this case.

[79] In addition to the plaintiff, Grace Olech, four other residents of the Village requested a connection to the municipal water supply: Thaddeus Olech (the plaintiff's husband), neighbors Rodney and Phyllis Zimmer and Howard Brinkman. Both the Zimmers and Brinkman were involved in the previous lawsuit against the Village, which allegedly created the ill will motivating the excessive demand. *See supra* note 5 and accompanying text.

plaint alleges the Village treated the plaintiff differently from other property owners in Willowbrook because of ill will generated by a previous lawsuit the plaintiff filed against the Village.[80] The plaintiff alleges the decision to treat her differently was "irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook."[81] The Village eventually revised its request and required only a 15-foot easement for the water line. From the time Phil Modaff first demanded the 33-foot easement in August 1995 until the 15-foot easement was granted in November 1995, no progress was made on the project.

The complaint further alleges "that as a proximate result of the three month delay in the project caused by the initial refusal of the defendants to proceed with the project unless . . . Willowbrook was granted the . . . easement . . . the plaintiff . . . was without running water during the winter of 1995-6, suffered great inconvenience, humiliation, and mental and physical distress."[82] In addition, Olech contends the initial refusal to proceed with the project unless a 33-foot easement was granted "deprived [her] of her rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."[83]

The District Court granted the defendant's motion to dismiss for failure to state a claim because membership in a protected class was not alleged.[84] In addition, the court addressed the issue of "ill will" raised in *Esmail*[85] stating:

> Assuming that all of the allegations contained in Olech's Complaint are true, it appears to this Court that there may be "ill will" on the part of both Willowbrook and Olech. Nevertheless, this Court finds that the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal-protection claim under the standards as set forth in Esmail.[86]

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80 Olech and her husband, Thaddeus, together with Howard Zimmer and Rodney and Phyllis Zimmer (and others) filed a lawsuit against the Village of Willowbrook (and other defendants) in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 on August 8, 1989. The plaintiff's sought money damages as a result of flooding of the plaintiff's property by storm water. Brinkman's claim was dismissed, the Olechs were awarded $20,000 and the Zimmers $135,000. Grace Olech is Phyllis Zimmer's mother. *See* Brief for Respondent at 2-3, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (No. 98-1288).

81 Amended Complaint, U.S. District Court for the Northern District of Illinois, July 11, 1997. Olech v. Vill. of Willowbrook (Gen. No. 97 C 4935).

82 *Id.*

83 *Id.*

84 Esmail v. Macrane, 53 F.3d 176, 178 (7th Cir. 1995)

85 *Id.* (stating that the Equal Protection Clause applies when a claim involves "orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice").

86 Olech v. Vill. of Willowbrook, 1998 WL 196455 (N.D. Ill. 1998).

The Seventh Circuit reversed, stating, "Nothing in the *Esmail* opinion, however, suggests a *general* requirement of 'orchestration' in vindictive-action equal protection cases, let alone a legally significant distinction between 'sheer malice' and 'substantial ill will,' if, as alleged here, the ill will is the sole cause of the action of which the plaintiff complains."[87]

The Supreme Court, in a short per curiam opinion, affirmed the Seventh Circuit and held that the plaintiff, although a "class-of-one," did state a claim for relief under traditional equal protection analysis by alleging that the Village treated her differently than others similarly situated and that there was no rational basis for the treatment.[88] The decision confirms that the Court will entertain a claim by a person who does not allege a fundamental right is being infringed and is not a member of a protected class. In *Willowbrook*, the Supreme Court held that the plaintiff's complaint, alleging that the Village of Willowbrook was demanding a larger easement from Olech, constituted an "irrational and wholly arbitrary" act and was "sufficient to state a claim for relief under traditional equal protection analysis."[89]

IV. A "CLASS-OF-ONE": THE ROAD TO *WILLOWBROOK* IN THE SUPREME COURT

The Equal Protection Clause has long been used to protect groups or suspect classes of individuals from discrimination.[90] The *Willowbrook* Court summarily treated class of one claims as firmly established stating: "Our cases have recognized successful equal protection claims brought by a 'class of one.'"[91] Although there was a split in the circuits, the Court issued a short per curiam opinion that included little analysis of the Equal Protection Clause and seems to ignore "a century of jurisprudence that has in main interpreted the clause to prohibit only disparate treatment based upon group or class factors."[92] One of the real questions therefore, is whether the Supreme Court actually ex-

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

88 *See supra* note 53 and accompanying text.

89 *Willowbrook*, 528 U.S. at 563; *see also* J. Michael McGuinness, *The Rising Tide of Equal Protection: Willowbrook and the New Non-Arbitrariness Standard*, 11 GEO. MASON U. CIV. RTS. L.J. 263 (2000) (discussing the *Willowbrook* decision and implications for future Equal Protection claims) [hereinafter McGuinness, *The Rising Tide of Equal Protection*].

90 J. Michael McGuinness, *Decisions of the Past Decade Have Expanded Equal Protection Beyond Suspect Classes*, N.Y. ST. B.J., FEB., 2000, at 36.

91 *Willowbrook*, 528 U.S. at 564 (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350 (1918); Conley v. Gibson, 355 U.S. 41 (1957)).

92 *See* Zich, *supra* note 13, at 74. The Court relied, in part, on *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.* 488 U.S. 336 (1989) in allowing a "class of one" claim to proceed. Until *Willowbrook* the Court had not cited this case approvingly when addressing an equal protection claim. *See* Laurence H. Tribe, *Erog .v Hsub and its Disguises: Freeing Bush v. Gore From its Hall of Mirrors*, 115 HARV. L. REV. 170, 225-26 (2001).

panded the scope of the Equal Protection Clause in *Willowbrook*.

Before delving into the case-law of the Court, it is important to note that traditionally, "class-of-one" claimants do not need the protection of the Equal Protection Clause because adequate state and federal remedies exist.[93] The use of injunctive relief, mandamus and substantive due process claims protect a "class-of-one" claimant from arbitrary state action.[94] However, as noted above, the text of the Fourteenth Amendment reads that no state shall "deny to *any person* within its jurisdiction the equal protection of the laws."[95]

As explained above, the Supreme Court has traditionally addressed the issue of equal protection claims by persons that are not part of a recognized protected or quasi-protected class, or on the basis of a breach of a fundamental right, by applying the rational basis test. Generally, successful equal protection claims brought by individual claimants arise from the discriminatory application of a neutral law which creates a class or from a finding that a state action specifically targets an group.[96] However, there are some cases which show insight into the Court's rationale in *Willowbrook* when the Court stated that the Equal Protection Clause has always protected "classes of one" who are treated differently than similarly situated individuals, even though there was not a typical class being discriminated against.

For instance, in *Yick Wo*, the Court invalidated a San Francisco ordinance requiring persons engaged in the laundry business to obtain "the consent of the board of supervisors, except the same be located in a building constructed of either stone or brick."[97] When the ordinance was passed there were approximately 320 laundries in the city and county of San Francisco, 310 of which were constructed of wood.[98] Chinese immigrants owned approximately 240 of the laundry facilities. Although the law was neutral on its face, the ordinance was

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93 *See* Brief for Petitioners at 7, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (No. 98-1288).

94 Both the plaintiff and the ACLU, in support of Olech, argue that she should not be required to ask a state court for relief before asserting a constitutional claim. In addition, they point out that mandamus is rarely used and "almost always involves egregious conduct." As to substantive due process the ACLU writes "Ms. Olech should not be relegated to that route any more than any other equal protection claimant." *See* Brief for the ACLU as *Amicus Curiae* at 9-10, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (No. 98-1288) (citing Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995)). *See also* Brief for Respondents, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000)(No. 98-1288).

95 U.S. CONST. amend. XIV, § 1.

96 *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Nicole Richter, *A Standard for "Class of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Classed Based Discrimination From Vindictive State Action*, 35 VAL. U. L. REV. 197, 210-15 (2000); J. Michael McGuinness, *Equal Protection for Non-Suspect Class Victims of Government Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 CAMPBELL L. REV. 333, 340-41 (1996).

97 118 U.S. at 357.

98 *Id.* at 350.

used exclusively against the Chinese owners while the non-Chinese owners "were left unmolested, and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination."[99] The Court held that "[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[100]

Then, in *McFarland v. American Sugar Refining*,[101] the Court invalidated a statute that provided any sugar refiner who paid less for sugar in Louisiana than he pays in other states is "presumed to be a party to a monopoly."[102] The statute was invalidated on equal protection grounds because it "bristles with severeties that touch the plaintiff alone . . . [and] at least is arbitrary beyond possible justice, and a creation of presumptions and special powers against [the plaintiff] that can have no foundation except the intent to destroy."[103]

The Court explicitly mentioned the "class of one" in *Nixon v. Administrator of General Services*.[104] However, the challenged legislation was affirmed and the "class of one" claim was not explicitly recognized by the court. In *Nixon*, former President Nixon challenged the Presidential Recordings and Materials Preservation Act[105] as a violation of equal protection and an unconstitutional Bill of Attainder.[106] The Act directed the General Service Administration (GSA) to take custody of Nixon's presidential memos and tape recordings and have them screened by an archivist.[107] Materials deemed personal and private in nature were to be returned to Nixon and those having historical value were to be retained by the GSA and made "available for use in judicial proceedings subject to 'any rights, defenses or privileges which the Federal Government or any person may invoke.'"[108] Essentially, like *McFarland*, the legislation was directed at

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99 *Id.* (taken from petition for Yick Wo, plaintiff in error).

100 *Id.* at 374.

101 241 U.S. 79 (1916).

102 *Id.* at 81.

103 *Id.* at 86.

104 433 U.S. 425 (1977).

105 Title I of Pub.L. 93-576, 88 Stat. 1695, note following 44 U.S.C. § 2107 (1970 ed., Supp. V), *cited* in Nixon v. Administrator of General Services, 433 U.S. 425, 429 (1977).

106 *Nixon*, 433 U.S. at 425. *See* U.S. CONST. art. I, § 9, cl. 3.

107 *Nixon*, 433 U.S. at 429-30 (citing Title I of Pub.L. 93-576, 88 Stat. 1695, note following 44 U.S.C. § 2107 (1970 ed., Supp. V)).

108 *Nixon*, 433 U.S. at 425 ("After [Nixon] had resigned as President of the United States, he executed a depository agreement with the Administrator of General Services that provided for the storage near appellant's California home of Presidential materials (an estimated 42 million pages of documents and 880 tape recordings) accumulated during appellant's terms of office. Under this agreement, neither appellant nor the General Services Administration (GSA) could

Nixon alone, and he raised the equal protection clause as one challenge to the legislation. However, the court held that the legislation directed at President Nixon was not an unconstitutional Bill of Attainder[109] even though he "constituted a legitimate class of one" and the legislation disfavored him as an individual.[110]

Additionally, in *Snowden v. Hughes*,[111] the Court found administration of a neutral law violates the equal protection clause only if a plaintiff can show "an element of intentional or purposeful" discrimination in its application.[112] The plaintiff in *Snowden* alleged that the state election board "willfully and maliciously" refused to list his name as a candidate in an election for the Illinois General Assembly.[113] However, the Court did not find the allegations enough to show "purposeful discrimination" and disallowed the claim under the equal protection clause. The argument raised by the plaintiff in *Snowden* foreshadows the successful claim raised in *Esmail v. Macrane*[114] – a case that laid the foundation for the *Willowbrook* decision.

Finally, in *Allegheny Pittsburgh Coal Company v. Webster County Commission*, the Supreme Court found a violation of equal protection based on an assessor's arbitrary decision to re-value property only in the year immediately following a sale.[115] Application of this policy led to "widely varying as-

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gain access to the materials without the other's consent. Appellant was not to withdraw any original writing for three years, although he could make and withdraw copies. After the initial three-year period he could withdraw any of the materials except tape recordings. With respect to the tape recordings, appellant agreed not to withdraw the originals for five years and to make reproductions only by mutual agreement. Following this five-year period the Administrator would destroy such tapes as appellant directed, and all of the tapes were to be destroyed at appellant's death or after the expiration of 10 years, whichever occurred first. Shortly after the public announcement of this agreement, a bill was introduced in Congress designed to abrogate it, and about three months later this bill was enacted as the Presidential Recordings and Materials Preservation Act (Act) and was signed into law by President Ford.").

109 *Id.* at 469-71. ("[E]very person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain that he or it is being subjected to unwarranted punishment. However, expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burden some persons or groups but not all other plausible individuals") (citing United States v. Lovett, 328 U.S. 303, 324 (1946)). U.S. CONST. art. I, § 9, applicable to Congress, provides that "[n]o Bill of Attainder or ex post facto law shall be passed."

110 *Id.* at 472 ("In short, [Nixon] constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors.").

111 321 U.S. 1 (1944).

112 *Id.* at 8.

113 *Id.* at 3-6.

114 53 F.3d 176 (7th Cir. 1995). *See infra* Part V.A.

115 488 U.S. 336 (1989).

sessments of property currently worth essentially the same amount."[116] Until *Willowbrook*, the court had not cited this case approvingly when addressing an equal protection claim.[117]

In each of these cases prior to *Willowbrook*, the Court recognized that the rights of individuals or non-protected classes *may* be protected by the Fourteenth Amendment. Additionally, *Willowbrook* can be seen as consistent with *Yick Wo*[118] and *Sunday Lake Iron Company*[119] holding that the provisions of the Fourteenth Amendment are universal in their application and the purpose of the clause is to protect "every person against intentional and arbitrary discrimination by a state."[120] In this sense, the "class of one" could really be seen as a misnomer, and involves situations that go to the very heart of the Equal Protection Clause as these claims go to ensure that similarly situated individuals are treated in similar ways. Consequently, viewed through the lens of *Yick Wo* and implicit in the rationale of cases like *Nixon* and *Allegheny Power*, the Court had a viable argument that the Equal Protection Clause has always protected individual persons and not just classes. Indeed, one might argue that instead of calling them "classes of one," the *Willowbrook* Court could have avoided confusion by simply stating that individual "persons," and not just classes, have always been protected by the Fourteenth Amendment.

However, until *Willowbrook*, the Court never explicitly recognized the "class-of-one" as a legitimate claimant under the Equal Protection Clause. And at least some of the circuits believed that there was no cause of action for the "class of one" and so it is at least arguable that the Court did expand the scope of the Fourteenth Amendment in *Willowbrook*. Prior to *Willowbrook*, the Seventh Circuit wrote:

> In order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate

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[116] Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 123 (2001) (stating that the *Allegheny* decision is significant because Chief Justice Rehnquist wrote it recognizing that he is willing to invalidate local decisions on the basis of arbitrariness).

[117] The *Allegheny Pittsburgh* decision is also significant because it was relied on, in part, in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) following the 2000 presidential election. *See* McGuinness, *The Rising Tide of Equal Protection*, *supra* note 89, at 292; Tribe, *supra* note 92, at 225-26. Tribe argues that the application of the *Allegheny/Willowbrook* arbitrariness standard in *Bush* may have been unwarranted. He also points out that "Florida did not single out any class from disparate treatment . . . [n]othing in the record indicated that the Florida legislature, the state judiciary, or the county recount teams intended to discriminate against any class, suspect or otherwise, including any *class of one*." *See id.* at 225-26. *See also* Tushnet, *supra* note 116. In his article, Professor Tushnet points out that prior to *Bush*, the Supreme Court only cited *Allegheny Pittsburgh* approvingly once - in the *Willowbrook* decision.

[118] 118 U.S. 356 (1886).

[119] 247 U.S. 350 (1918).

[120] *Id.* at 352.

> treatment based on membership in a particular group. Discrimination based merely on *individual*, rather than group, reasons will not suffice.
>
> A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual.[121]

Regardless of whether the scope of the Fourteenth Amendment was expanded in *Willowbrook*, the decision in *Willowbrook* ended the debate and resolved the split in the Circuit Courts, making it clear that the Court reads the Fourteenth Amendment as protecting "persons" and not only classes or groups.[122] While *Willowbrook* allows a "class-of-one" claimant to bring a claim under the Equal Protection Clause, the Court did not provide a clear standard for analyzing such claims. Prior to *Willowbrook*, the Seventh Circuit issued several decisions (most notably *Esmail*) recognizing expansion of the Fourteenth Amendment to include "class of one" claims. Following *Willowbrook*, Judge Posner articulated a clear standard for "class-of-one" claims,[123] and other circuits have developed different standards for "class of one" claims.

V. THE AFTERMATH

The *Willowbrook* decision makes it clear that when a person is a sub-

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[121] New Burnham Prairie Homes, Inc. v. Vill. of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990) (emphasis in the original). *See also* Futernick v. Sumpter Township, 78 F.3d 1051 (6th Cir. 1996) ("Classes of one are not entitled to bring an equal protection claim"); Huebschen v. Dep't of Health and Social Servs., 716 F.2d 1167, 1171 (7th Cir. 1983) ("[T]he decision maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in sprit of,' its adverse effects *upon an identifiable group.*") (quoting Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)) (emphasis added by the Seventh Circuit). Related to this argument, is of course, the firmly entrenched principle that prosecutors, subject to very few exceptions, do not violate equal protection when deciding to prosecute some cases while opting not to go forward with others. *See* Snowden v. Hughes, 321 U.S. 1 (1944) (An equal protection based on selective enforcement must be premised on some "unjustifiable standards"); United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962) (stating that the prosecutor's decision may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification").

[122] At a minimum, if the "class-of-one" has always been protected under the Fourteenth Amendment, most people did not know it, and therefore, the clarity of the *Willowbrook* decision may increase equal protection claims.

[123] *See* Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995). *See also* LeClair v. Saunders, 627 F.2d 606 (2d Cir. 1980) (applying a "malicious or bad faith intent to injure" standard); Rubinovitz v. Rogato, 60 F.3d 906 (1st Cir. 1995) (requiring a "malicious, orchestrated campaign causing substantial harm").

jected to different treatment that is "irrational or wholly arbitrary," she may bring a claim under the Equal Protection Clause.[124] However, the Court did not address the role that motive or "subjective ill will" plays in making the determination.[125] The Court specifically noted that "[we] do not reach the alternative theory of 'subjective ill will' relied on [by the Seventh Circuit]."[126] Justice Breyer, alone concurring in the result, noted "the presence of that added factor [subjective ill will] in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."[127]

A strict reading of the majority decision appears to allow any person, who is denied a variance for example, to allege the local governmental body approved similar requests, but arbitrarily denied hers.[128] In effect, the decision allows ordinary decisions by city officials to be transformed into constitutional violations. The majority considered the difference in treatment alone and did not focus on the Village's purpose.[129]

The concern following the decision is that any person, who alleges she was treated differently by a government official, and there is no rational basis for the difference in treatment, may file an equal protection claim.[130] A race to the courthouse door may follow every adverse decision by a government official. If, on the other hand, the courts follow Breyer and Posner requiring proof of "ill will" or personal animus the courthouse door may be open, but to a lesser extent.[131] A survey of *Willowbrook*'s early progeny indicates, that although municipalities have faced a number of "class-of-one" claims, they "usually win, and often in short order."[132]

A. Willowbrook*'s Progeny in the Seventh Circuit*

A number of claims based on the "class-of-one" theory followed the *Willowbrook* decision.[133] In *Hilton v. City of Wheeling*,[134] the Seventh Circuit

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124 *Willowbrook*, 528 U.S. at 563.

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

126 *Id.* at 565.

127 *Id.* at 566.

128 *See* Seth D. Jaffe & Stephanie Goldenhersh, *The Supreme Court Constitutionalizes Local Permit Disputes*, B.B.J., Oct. 2000, at 6, 20.

129 *Id.*

130 *See* Paul D. Wilson, *What Hath Olech Wrought? The Equal Protection Clause In Recent Land-Use Damages Litigation*, 33 URB. LAW. 729 (2001) (reporting on the early application of *Willowbrook v. Olech* in the federal courts).

131 *See id.*

132 *Id.* at 752.

133 *See id. See also* John C. Cooke & Christine Carlisle Odom, *Judicial Deference to Local Land Use Decisions and the Emergence of Single-Class Equal Protection Claims*, 30 ENVTL. L. REP. 11049 (2000); J. Michael McGuinness, *The Impact of Willowbrook on Equal Protection*

held "that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."[135] Consequently, evidence of improper motive is necessary to sustain a claim under the class of one theory. *Willowbrook* demonstrates "vindictive action cases" and requires "proof that the cause of the differential treatment . . . was a totally illegitimate animus toward the plaintiff by the defendant."[136]

Additionally, the Seventh Circuit held that equal protection claim's are not subject to special ripeness requirements.[137] In *Forseth v. Village of Sussex*,[138] the court noted "[t]his Circuit has read *Williamson* broadly, rejecting attempts to label 'takings' claims as "equal protection' claims and thus requiring ripeness."[139] In *Forseth*, a real estate developer alleged "malicious" action on the part of the village board when seeking approval for a subdivision development. The plaintiff alleged the village board, as a condition for approval, required him to sell land to a homeowner whose property abutted the proposed development at a price ninety-percent under its value.[140] The homeowner who was to acquire the land at the discounted price was the president of the village board. The court found "the actions of defendants were taken for improper purposes 'wholly unrelated to any legitimate state objective' [constituting a] bona fide equal protection claim."[141]

Thus, in the Seventh Circuit, it appears that a plaintiff must show some equivalent of "ill will" or animus to proceed under a "class-of-one" claim. Additionally, the *Williamson* ripeness requirement is not necessary to bring an equal protection claim in a land use dispute. If the Supreme Court adopts this approach, the burden will be on the plaintiff to prove intent to deprive one of equal

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and Selective Enforcement Claims, 641 PLI/LIT 469 (2000) [hereinafter McGuinness, *The Impact of Willowbrook*]. Professor McGuinness suggests that since *Willowbrook* requires proof of arbitrariness, the courts should apply substantive due process analysis.

134 209 F.3d 1005 (7th Cir. 2000).

135 *Id.* at 1006-08 (Plaintiff had been arrested or cited by police fifteen times by the local police after neighbors complained. He claimed that the police sided with his neighbors in an ongoing dispute and effectively withdrew police protection from him violating the Equal Protection Clause).

136 *Id.* at 1008.

137 *See* Williamson County Reg. Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (holding that property rights claims are precluded in federal court until: "(1) the regulatory agency has had an opportunity to make a considered definitive decision, and (2) the property owner exhausts available state remedies for compensation").

138 199 F. 3d 363 (7th Cir. 2000).

139 *Id.* at 370.

140 *Id.*

141 *Id.* (citing Olech v. Vill. of Willowbrook, 160 F.3d 386 (7th Cir. 1998); Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995)). *See also* Wilson, *supra* note 130, at 733.

protection and the necessary "ill will" or animus that drove the defendant to treat the plaintiff differently. The other circuits addressing the issue have been less willing to allow "class-of-one" claims to proceed.

B. The Application of Willowbrook *Outside the Seventh Circuit*

The Fourth Circuit, in *Greenspring Racquet Club, Inc. v. Baltimore County*,[142] dismissed a claim where a developer alleged a restrictive zoning change was "adopted in bad faith, with an intent to discriminate against [the plaintiff]."[143] The Fourth Circuit applied traditional equal protection analysis requiring only a rational relation between the decision and a legitimate government interest in rejecting the claim.[144] The court noted that the *Willowbrook* did not change fundamental equal protection jurisprudence.[145] "Where an obvious, legitimate purpose is evident on the face of a challenged law, an equal protection claim under rational basis review must fail."[146]

The Fifth Circuit, in *Bryan v. City of Madison*,[147] held that "to successfully bring a selective enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right."[148] The Fifth Circuit addressed *Willowbrook* stating "[*Willowbrook*] merely stands for the proposition that single plaintiffs may bring equal protection claims . . . [b]ut this statement has nothing to do with whether they must assert membership in a larger protected class. The decision does not, therefore alter our requirement of an improper motive, such as racial animus, for selective enforcement claim."[149]

The federal district courts are split in the application of *Willowbrook*.[150] The courts generally follow one of four paths: (1) dismiss the claim finding no differential treatment;[151] (2) apply the Posner "ill will" requirement;[152] (3) reject

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142 2000 WL 1624496 (4th Cir. Oct. 31, 2000) (unpublished decision).

143 *Id.* at *2. *See also* Wilson, *supra* note 130, at 735.

144 *Id.*

145 Wilson, *supra* note 130, at 736 (citing *Greenspring*, 2000 WL 1624496 at *6 n.4).

146 *Id.*

147 213 F.3d 267 (5th Cir. 2000).

148 *Id.* at 268.

149 Wilson, *supra* note 130, at 736 (citing Bryan v. City of Madison, 213 F.3d 267, 277 n. 17 (5th Cir. 2000)).

150 See id. at 741 for a detailed analysis of the Federal District Court decisions.

151 *See* Albiero v. City of Kankakee, 91 F. Supp. 2d 1208 (C.D. Ill. 2000). In *Albiero*, the plaintiff in this case, like Mrs. Olech, had previously sued the city. The city placed a sign marking one of the apartment buildings he owned with a sign stating that the owner "chooses not to bring this property into compliance thereby significantly contributing to the blight of the neighborhood." *Id.* at 1210. The plaintiff raised *Willowbrook* and brought suit against the city. The court rejected the claim because the signs were placed on other properties in the city. *Id.*

equal protection claims in spite of *Willowbrook*;[153] or (4) allow claims absent the Posner/Breyer required animus.[154] Some commentators suggest the *Willowbrook* standard requires proof of arbitrariness on the part of the government official.[155] Professor McGuinness proposes that the courts apply substantive due process analysis when determining whether an official act is arbitrary.[156] He advocates the application of the factors identified by the Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corporation.*[157] Those factors are:

> (1) The impact of governmental action;
> (2) The historical background of the decision, particularly if it reveals a series of actions taken for invidious purposes;
> (3) The sequence of events leading up to the decision;
> (4) Departures from normal procedure;
> (5) Departures from normal substantive criteria;
> (6) The legislative or administrative history;
> (7) Contemporaneous statements by members of the decision making body.[158]

Certainly, the burden should be on the plaintiff to show more than just an adverse decision made by a government employee in order to survive a motion to dismiss. Requiring proof of "ill will" or applying a balancing test, as suggested in *Metropolitan Housing Development Corporation*, would limit the number of claims and possibly weed out frivolous claims, and would serve to help ease some of the worries of courts and commentators who fear the constitutionalization of zoning disputes. Once the plaintiff passes this initial hurdle, the government should, absent a recognized protected class, be required only to

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[152] Most notably the courts in the Seventh Circuit. *See* Wilson, *supra* note 130, at 743-44.

[153] *See* Katz v. Stannard Beach Assoc., 95 F.Supp.2d 90 (D.Conn. 2000). In *Katz*, the plaintiff challenged an easement claimed by a homeowners association. The court held that to state a claim under § 1983, based on the Equal Protection Clause, "a plaintiff must allege that: (1) compared with others similarly situated, the plaintiff was selectively treated; and (2) such selective treatment was based on impermissible considerations, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Id.* at 95 (citing Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir. 1996)).

[154] *See* Wilson, *supra* note 130, at 745-46. These courts apply *Willowbrook* and allow a claim to proceed when a plaintiff alleges different treatment from others similarly situated and no rational basis for the treatment. This is a literal reading of *Willowbrook* with no additional animus requirement.

[155] *See* McGuinness, *The Impact of Willowbrook*, *supra* note 133, at 514.

[156] *Id.*

[157] 429 U.S. 252 (1977).

[158] McGuinness, *The Impact of Willowbrook*, *supra* note 133, at 515 (citing *Arlington*, 429 U.S. at 266-268).

show a rational basis for the adverse decision in order to overcome the claim. In the end, we will probably have to wait for the Supreme Court to speak again before we will know which standard applies to the "class of one." Until that time, litigants should be aware of all of the potential standards and the ramifications that those standards may have on the chance of success in bringing a "class of one" claim under the Equal Protection Clause.

VI. CONCLUSION

In deciding that Mrs. Olech had a valid claim under the Equal Protection clause, the Supreme Court stated that previous 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."[159] The Court applied this reasoning to the set of facts alleged in Olech's complaint. The allegations that the Village of Willowbrook treated Olech differently than similarly situated owners is enough to state a claim upon which relief can be granted under traditional equal protection analysis. The Court did not rely on the theory of "subjective ill will" as applied by Posner.

Because the trial will be held in the Seventh Circuit, the trial court will most likely apply the "ill will" standard articulated by Judge Posner in *Olech v. Village of Willowbrook*.[160] Accordingly, the fact that Olech is a "class-of-one" does not relieve her of bearing the burden of proving the Village of Willowbrook's illicit motives at trial.[161] Her burden is no different that any other equal protection plaintiff, even those belonging to a recognized protected class. She must first show that she is being discriminated against by the government action and must prove that the discrimination is either unreasonable or based on "ill will." If she doesn't satisfy that burden at trial she will not prevail.

The decision in *Willowbrook*, viewed as expansion of the Equal Protection Clause or, even if viewed as a mere clarification or a restatement of the obvious as the Court viewed it, appears to be justified. A person who is singled out for spiteful or different treatment by a government official is surely in need of the protection of the Fourteenth Amendment. The ACLU wrote, "[r]ejection of Ms. Olech's claim provides unwanted protection for patently vindictive governmental conduct; recognition of her claim promotes good government."[162]

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159 *Willowbrook*, 528 U.S. at 564.

160 160 F.3d 386 (7th Cir. 1998).

161 Trial was held in October of 2002. A verdict was returned in favor of the defendants on all counts.

162 Brief for the ACLU as *Amicus Curiae* at 14, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (No. 98-1288).

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