EQUAL PROTECTION FROM EMINENT DOMAIN: PROTECTING THE HOME OF *OLECH'S* CLASS OF ONE

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"Government is instituted to protect property. . . . This being the end of government. . . ."

James Madison[1]

"An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean . . . . [A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."[2]

I. INTRODUCTION

Tragically, the victims of eminent domain takings for private development tend to be those least prepared to fight against it. The Supreme Court exacerbated this unfortunate fact in the landmark case *Kelo v. City of New London*, where it held that the government can use the power of eminent domain to take a person's home for the purpose of private development that might improve the community's economy.[3] While *Kelo* generated many effective eminent domain reform bills in the states, this seminal case foreclosed a golden opportunity to restore meaningful protection for property rights under the Public Use Clause.[4] This ruling made challenging eminent domain takings for private development under the Fifth Amendment a daunting, if not impossible, task. Because eminent domain takings incongruously fall on the poor, uneducated, or minorities who have difficulty competing in the political process,[5] *Kelo* greatly impacted the ability of the weakest parts of society to keep their own homes free from the path of the bulldozer. This Article proposes a novel alternative avenue to challenge these takings and guarantee equal protection from eminent domain.

In 2000, five years before *Kelo*, the Supreme Court held in *Village of Willowbrook v. Olech* that plaintiffs can establish a class of one under the

1. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al., eds., 1983), *available at* http://www.vem.duke.edu/POI/madison.pdf (last visited Jan. 14, 2010).

2. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted).

3. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

4. *See generally* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) (evaluating post-*Kelo* legislation). The Public Use Clause is part of the Fifth Amendment. *See* U.S. CONST. amend. V.

5. *See* discussion *infra* Part II.

Equal Protection Clause.[6] Historically, equal protection suits required that the plaintiff define a class based on certain inherent conditions, such as race, nationality, or gender. Under the class of one approach, a single person can present himself as a class irrespective of these characteristics. Despite the recency and prominence of *Olech*, the scholarly literature has largely overlooked this significant ruling, having underestimated its ability and propensity to implement a fundamental revolution in modern equal protection jurisprudence. This Article seeks to shed light on this powerful but largely neglected precedent.

Prior to *Olech*, plaintiffs arguably could only establish classes based on inherent characteristics, such as race or religion. However, after *Olech*, homeowners can establish a class of one (i.e., the person whose home the government takes) if their property is singled out for eminent domain while other similarly situated properties are not. The singled-out homeowner or homeowners can bring suit to challenge the arbitrariness of the decision to take the property.

While many plaintiffs have used *Olech* to challenge zoning and other land use restrictions, none to date have proposed using the *Olech* rule to challenge an eminent domain taking for private development. This Article argues that an *Olech* claim is an essential mechanism to enable homeowners—especially the poor, uneducated, or minority citizens whose participation in the political process is more difficult and less effective than political insiders—to challenge the different treatment and rationality of an eminent domain taking for private development.

This Article proceeds as follows. Part II recounts the history of urban renewal. Urban renewal was a movement wherein governments used the broad power of eminent domain to condemn homes as blighted, effectively—perhaps intentionally—displacing poor and minority homeowners. Although eminent domain takings are presumptively no longer motivated by racial animus, modern statistics show the effects of this process disproportionately fall on the poor, uneducated, and minorities.

Part III begins by explaining how suits are filed under the Equal Protection Clause through 42 U.S.C. § 1983 and then explores *Village of Willowbrook v. Olech* in detail. *Olech* provides that a plaintiff can establish a class of one, irrespective of traditional classifications, such as race, religion, or gender. *Olech* represents a significant tool plaintiffs can use to seek remedies against land use regulations when they are intentionally singled out by the government for different treatment than other similarly

6. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (per curiam). For a discussion of the *Olech* decision, see *infra* Part III.C.

situated homeowners. Following *Olech*, plaintiffs have had considerable success in challenging government decisions subject only to rational basis review, even in the absence of proving governmental malice.[7] In 2008, the Supreme Court addressed *Olech* in *Engquist v. Oregon Dept. Of Agriculture* and held that *Olech*'s class of one claims did not extend to the employment law context.[8] The Court did not impose a malice requirement on *Olech* claims, and the core holding of *Olech* with respect to property claims remains wholly intact.[9]

Part IV develops the necessary elements of a viable equal protection claim challenging an eminent domain taking for private development under *Olech*. First, the plaintiff must establish that he is a member of a class. This is a facile task in light of *Olech*'s holding that a class of one can exist. Second, the plaintiff must establish that the government intentionally treated him differently than similarly situated homeowners. Third, the plaintiff must show that the decision to take the property was irrational. Relying on Justice Kennedy's concurring opinion in *Kelo*,[10] Justice Thomas's dissent in *Kelo*,[11] as well as footnote four of *United States v. Carolene Products Co.*[12] and Professor Ely's representation reinforcement theory,[13] this Article argues that the courts should apply a heightened form of scrutiny to protect the interests of the poor, uneducated, and minority homeowners who lack access to the political channels. By applying standards used in *City of Cleburne v. Cleburne Living Center*[14] and *Romer v. Evans*,[15] the courts can faithfully apply the principles behind footnote four of *Carolene Products*, and help protect the most vulnerable members of society and those most in need of security against eminent domain.

II. EMINENT DOMAIN TAKINGS FOR PRIVATE DEVELOPMENT AND POOR, UNEDUCATED, AND MINORITY HOMEOWNERS

Following World War II, the urban renewal movement led governments to take many inner city residents' homes through the power of

7. *See* discussion *infra* Part III.C.4.

8. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146, 2156 (2008).

9. *See* discussion *infra* Part III.C.5.

10. Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

11. *Id.* at 505 (Thomas, J., dissenting).

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

13. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77-78 (1980) (arguing that the courts should ensure that all groups receive sufficient representation and access to the political and legislative processes).

14. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

15. Romer v. Evans, 517 U.S. 620 (1996).

eminent domain.[16] In scores of cases, the government veiled this scheme as a means to eliminate blight and rebuild better communities, but in reality the practice displaced thousands of poor black families.[17] In most cases the displaced homeowners could not afford the new more expensive properties and were left homeless.[18] Presently, though decisions to take property are presumptively no longer based on race or income, statistically, the takings still have a incongruous impact on minorities as well as poor and uneducated homeowners, who lack the political clout to challenge the action.[19]

A. EMINENT DOMAIN AND URBAN RENEWAL

"Urban renewal" refers to the government's process of taking "blighted" properties in downtown areas through the power of eminent domain, displacing the resident population, and constructing commercial properties on that land.[20] During a boom of redevelopment in the 1950s and 1960s, the population displaced was "disproportionately ethnic or minority communities and/or low-income."[21] Throughout the 1950s and 1960s, over one million people were displaced through eminent domain takings,[22] and many of those displaced were "disproportionately from ethnic or minority communities."[23] Further, these populations were "more likely to be low-

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16. David Beito & Ilya Somin, *Battle Over Eminent Domain is Another Civil Rights Issue*, KANSAS CITY STAR, Apr. 27, 2008, *available at* http://www.cato.org/pub_display.php?pub_id=9361. Beito and Somin report:

> Some 3 to 4 million Americans, most of them ethnic minorities, have been forcibly displaced from their homes as a result of urban renewal takings since World War II. [T]he city of Alabaster, Ala., used 'blight' as a pretext to take 400 acres of rural property, much of it owned by low-income black people, for a new Wal-Mart. Many of the residents had lived there for generations, and two other Wal-Mart stores were located less than fifteen miles away. Several of the landowners, particularly those who lacked political clout and legal aid, ended up selling out at a discount.

Id.

17. *Id.*

18. Beito & Somin, *supra* note 16.

19. *Id.*

20. *See, e.g.*, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 33 (2003) ("While race was always central to definitions of blight, after the great migrations of World War II, race played an increasingly important role in city planning. By the mid-1940s, the expanding minority black and Latino ghettos were the main concern of business leaders and urban politicians.").

21. DICK M. CARPENTER II & JOHN K. ROSS, INSTITUTE FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 4-5 (June 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

22. Pritchett, *supra* note 20, at 47; *see also* Raymond A. Mohl, Planned Destruction: The Interstates and Central City Housing, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 226 (John Bauman et al. eds., 2000).

23. Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of*

income or urban poor."[24]

During the 1950's, urban renewal tended to mean "negro removal."[25] Of the 120,000 families relocated between 1949 and 1963 due to urban renewal, 78% were non-white.[26] In many instances, urban renewal intensified racial segregation, and constrained the mobility of African-Americans.[27] To implement an urban renewal plan, the government would designate minority neighborhoods "as blighted areas . . . for redevelopment," thereby enabling "institutional and political elites to relocate minority populations and entrench racial segregation."[28] This process "played a crucial role in redistributing urban populations and creating additional obstacles to efforts to achieve integration."[29] For example, in 1950, "the Los Angeles City Planning Commission designated eleven areas as blighted," all but one of which had a "population that was majority Mexican-American or African-American."[30] In Chicago in the 1940s, city planners designated twenty square miles as blighted, and this area almost entirely overlapped with Chicago's "black belt" on the Southside.[31]

In post-World War II Chicago, elites, fearing that the influx of black people would harm their real estate investments, joined with business leaders and nonprofit organizations to "renew" downtown areas by removing the poor citizens and building properties appealing to middle-

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Eminent Domain Target Poor and Minority Communities?, 46 (11) URB. STUDIES 2447, 2449 (2009) [hereinafter *Testing O'Connor and Thomas*].

24. Carpenter & Ross, *supra* note 23, at 2450.

25. Brief of Amici Curiae NAACP et al. in Support of Petitioners at 7, Kelo v. City of New London Connecticut, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057 [hereinafter Brief of NAACP et al.]; *see also* Kevin F. Gotham, *A City Without Slums: Urban Renewal, Public Housing, and Downtown Revitalization in Kansas City, Missouri*, 60(1) AM. J. ECON. & SOC. 285, 305-06 (Jan. 2001), *available at* http://www.tulane.edu/~kgotham/ACityWithoutSlums.pdf.

26. *Testing O'Connor and Thomas*, *supra* note 23, at 2450.

27. *See, e.g.*, RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA (1996); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960 (1983); ZANE MILLER & BRUCE TUCKER, CHANGING PLANS FOR AMERICA'S INNER CITIES: CINCINNATI'S OVER-THE-RHINE AND TWENTIETH-CENTURY URBANISM (1998); JOEL SCHWARTZ, THE NEW YORK APPROACH: ROBERT MOSES, URBAN LIBERALS, AND REDEVELOPMENT OF THE INNER CITY (1993); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996); JUNE MANNING THOMAS, REDEVELOPMENT AND RACE: PLANNING A FINER CITY IN POSTWAR DETROIT (1997).

28. Pritchett, *supra* note 20, at 6.

29. *Id.*

30. *Id.* at 33-34; *see also* ROBERT E. ALEXANDER & DRAYTON S. BRYANT, REBUILDING A CITY: A STUDY OF REDEVELOPMENT PROBLEMS IN LOS ANGELES 38 (1951) (providing a diagram of the eleven blighted areas of Los Angeles in 1950).

31. ARTHUR HILLMAN & ROBERT CASEY, TOMORROW'S CHICAGO 70 (1950).

income citizens.[32] The president of the Illinois Institute of Technology boldly proclaimed, "We have two choices, either to run away from the blight or to stand and fight."[33] Even advocates of the urban renewal plan acknowledged that the condemnation of the Lake Meadows community "ignored 'actual slum areas completely' and planned 'the demolition of a well-kept Negro area where the bulk of property is resident owned, its taxes paid, and its maintenance above par.'"[34] Protestors labeled the moves as "'Negro clearance' rather than slum clearance" and said, "If it is a slum clearance program, then let's make it that and start where the slums are."[35] By using euphemistic labels such as "slum clearance" or "neighborhood revitalization," the government was able to "channel minority settlement into certain areas and to uproot minority communities in other areas."[36]

The seminal Supreme Court case in the urban renewal movement was *Berman v. Parker*, which upheld the condemnation of many homes in Southwest Washington D.C. for blight.[37] Justice Douglas upheld the taking under a broad interpretation of the Fifth Amendment's Public Use Clause, deferring to the government's finding that the properties were blighted but ignoring the racial implications.[38] Interestingly, the *Berman* Court noted that 97.5% of the renewal area was populated by "[n]egroes."[39] It is quite ironic that most of the residents in *Berman* were poor black families, and the redeveloped properties were far more expensive than they could afford.[40] Even more ironic is the fact that *Berman* was argued shortly after the landmark school desegregation case *Brown v. Board of Education*.[41] The parties did not challenge the taking under the Equal Protection Clause, despite the impact among black families and the attempt to "reshape the racial and economic geography of cities."[42] Following *Berman*, by the

32. Pritchett, *supra* note 20, at 34.

33. *Id.* (quoting METRO. HOUSING & PLAN. COUNCIL, RECLAIMING CHICAGO'S BLIGHTED AREAS (1946)).

34. Pritchett, *supra* note 20, at 34 (quoting HIRSCH, *supra* note 27, at 125).

35. *Id.* at 34-35 (quoting *Housing Project Hangs Fire: Charges 'Clearance' of Negroes is Aim*, CHI. DEFENDER, May 7, 1949, at 4).

36. *Id.* at 47.

37. Berman v. Parker, 348 U.S. 26, 36 (1954).

38. *See id.* at 35-36 (noting that courts will defer to the politician branches for decisions to invoke eminent domain).

39. *Id.* at 30.

40. Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 9 (2005).

41. *Id.*; *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

42. Pritchett, *supra* note 20, at 46 ("Urban renewal, however, was an economic development program with profound racial implications that were ignored by all the parties to the litigation. The reality of urban renewal was that redevelopment was used to reshape the racial and economic geography of cities.").

1960s, the once predominantly black neighborhood became a predominantly white neighborhood.[43]

One of the leading discussions of the process of urban renewal was presented by Justice Thomas's dissent in *Kelo*.[44] Justice Thomas noted that approximately 63% of all families (177,000) who lost their homes due to urban renewal between 1949 and 1963 were "nonwhite."[45] Specifically, Justice Thomas pointed to the public work projects in St. Paul, Minnesota and Baltimore, Maryland during the 1950s and 1960s, which destroyed predominantly minority communities.[46] Moreover, Justice Thomas recounted the famous 1981 eminent domain taking in Detroit, Michigan to build a General Motors plant, which displaced largely poor, minority, and elderly residents in the Poletown neighborhood.[47] Justice Thomas concluded that while urban renewal projects were ostensibly intended to benefit communities, such projects have "long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as Negro removal.'"[48]

B. Eminent Domain Takings for Private Development Takings Incongruously Impact Poor, Uneducated, and Minority Homeowners

In *Kelo*, the NAACP, along with the AARP and the Southern Christian Leadership Council, argued as amicus curiae that using eminent domain for private development "will disproportionately harm racial and ethnic minorities, the elderly, and the economic underprivileged."[49] Justice Thomas recognized how dangerous *Kelo*'s expanded definition of "public use" would be to those with the least means to fight it. He noted that "[a]llowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities."[50]

Governments using the power of eminent domain for private

43. *See* Howard Gillette Jr., Between Justice and Beauty: Race, Planning, and the Failure of Urban Policy in Washington, D.C. 160-69 (1995).

44. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting).

45. *Id.* at 522 (Thomas, J., dissenting) (citing Bernard J. Frieden & Lynne B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities 28 (1989)).

46. *Id.* (Thomas, J., dissenting).

47. *Id.* (Thomas, J., dissenting) (citing Jeanie Wylie, Poletown: Community Betrayed 58 (1989)).

48. *Id.* (Thomas, J., dissenting) (quoting Pritchett, *supra* note 20, at 47).

49. Brief of NAACP et al., *supra* note 25 at 3.

50. Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

development disproportionately impact poor, uneducated, and minority homeowners.[51] Activist David H. Harris, Jr. has identified eminent domain as a primary cause of the loss of property by African Americans.[52] Professor Imperatore contended that "[b]light removal takings often impose a disproportionately racial burden on those who inhabit condemned sites, and there exists a close relationship between findings of blight and urban renewal and economic redevelopment projects."[53]

By comparing census data from areas targeted for eminent domain with those of the surrounding community, Dr. Dick Carpenter revealed how eminent domain abuse disproportionately impacts the poor, those with less education, and minorities.[54] Taken together, more residents in areas targeted by eminent domain—as compared to those in surrounding communities—are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and live at or below the federal poverty line in significantly greater numbers.[55]

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51. Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City With Resident Control*, 27 U. MICH. J.L. REFORM 689, 740-41 (1994). Quinones says:

> In essence, the powers and internal pressures (of the blight condemnation process) create a mandate to gentrify selected areas, resulting in a de facto concentration of poverty elsewhere, preferably outside the decision makers' jurisdiction. Numerous past experiences indicate that the process has been driven by racial animosity as well as by bias against the poor. The net result is that a neighborhood of poor people is replaced by office towers, luxury hotels, or retail centers. The former low-income residents, displaced by the bulldozer or an equally effective increase in rents, must relocate into another area they can—perhaps—afford. The entire process can be viewed as a strategy of poverty concentration and geographical containment to protect the property values— and entertainment choices—of downtown elites.

Id.; *see also Testing O'Connor and Thomas*, *supra* note 23, at 2447 ("The use of eminent domain 'disproportionately affects' those who are poor and minority.").

52. *See* David H. Harris, Jr., *The Battle for Black Land: Fighting Eminent Domain*, NBA NAT'L B. ASS'N MAG., Mar.-Apr. 1995, at 12.

53. Edward Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1030 (2008).

54. *Testing O'Connor and Thomas*, *supra* note 23, at 2455-56 tbls.3 & 4; *see also* CARPENTER II & ROSS, *supra* note 21, at 6.

55. *See Testing O'Connor and Thomas*, *supra* note 23, at 2456.

	Eminent Domain Project Areas	Surrounding Community
Minority*	58%	45%
Median Income*	$18,935.71	$23,113.46
Poverty*	25%	16%
Children	25%	26%
Senior Citizens	13%	12%
Less than High School Diploma*	34%	24%
High School Diploma	28%	28%
Some College*	22%	25%
Bachelor's Degree*	9%	13%
Master's Degree*	3%	5%
Professional Degree*	1%	2%
Doctorate*	.6%	.9%
Renters*	58%	45%

*Difference between eminent domain project areas and surrounding communities is statistically significant (p<.05, which means we can be sure with 95% confidence that the difference here in the sample data will be true in the greater population).

Specifically, 58% of the homeowners living in areas targeted by eminent domain are minorities, as compared with only 45% minorities in surrounding communities.[56] Those targeted by eminent domain have a median income less than $19,000, and 25% of them live at or below the poverty line.[57] In surrounding communities, the median income is $23,000, and only 16% live below the poverty line.[58] Finally, as an indicator of the educational level of those targeted by eminent domain for private development, a greater percentage of those targeted have less than a high school diploma.[59]

In 2006, the Paso Del Norte Group and the city of El Paso, Texas sought to use eminent domain to take an area that consisted of almost 100% minority residents, 56% living below the poverty line, and 80% having less than a high school degree.[60] In San Jose, California, 95% of homes targeted for eminent domain are Hispanic or Asian-owned, despite the fact that only

56. *Testing O'Connor and Thomas*, *supra* note 23, at 2455.

57. *Id.*

58. *Id.*

59. *Id.* at 2455 tbl.3.

60. Vic Kolenc, *Store Owners Want to Stay*, EL PASO TIMES, Apr. 9, 2006, at 1E.

30% of businesses are owned by minorities.[61] When the city of Detroit condemned homes in the Poletown neighborhood to sell the land to General Motors Corporation in order to develop a plant, most of the people who were displaced were elderly, retired, and of Polish ancestry.[62] In Atlantic City, 40% of homeowners in an area targeted for condemnation for economic redevelopment were Latino.[63] This small sampling of numbers is not conclusive, but it shows a strong trend toward governments using the power of eminent domain against communities consisting of the poor, uneducated, or minorities. Similarly, poor and minority citizens are disproportionately affected by decisions of where to locate locally undesirable land uses.[64]

In many instances, these homeowners represent the path of least resistance, as they are not capable of adequately representing their interests in the political process.[65] Today, although eminent domain takings are presumptively no longer motivated by racial animus, the effects of the process continue to fall disproportionately on the poor, uneducated, or minorities. Professors Balkin and Siegel accurately characterize this conundrum in modern equal protection jurisprudence:

> But not all state action that subordinates employs group-based classifications, and not all inequality is produced by evil minds . . . . Bias in decision making often plays a role but so, too, do institutional arrangements and rules that entrench unequal resources and opportunities. Today's equal protection law tends not to reach these forms of bias. Instead constitutional doctrine prohibits the kinds of openly invidious laws that legislatures no longer enact—while allowing laws whose hidden, unconscious, or structural bias is not openly expressed.[66]

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61. *See* Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 350 (2001).

62. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

63. Erik Schwartz, *Progress or Discrimination? Facing Displacement, Minorities Battle Towns' Eminent Domain*, COURIER-POST, July 30, 2004.

64. Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and The Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002 (1993). Been opines that

> [b]ecause local protest can be costly, time-consuming, and politically damaging, siting decision makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest efficiently. . . . Indeed, many representatives of low income and predominantly African American, Latino, or other minority neighborhoods charge that industry and governmental siting officials have adopted a PIBBY—put it in blacks' backyards—strategy for siting LULUs [locally undesirable land uses].

Id.

65. *See* discussion *infra* Part IV.E.1.

66. JACK M. BALKIN & REVA B. SIEGEL, *Remembering How To Do Equality*, *in* THE

For this reason, a more holistic approach to defining classes and scrutinizing actions of the government in the context of eminent domain and property rights will help to bring equal protection law in line with eliminating state imposed inequality.

III. USING THE EQUAL PROTECTION CLAUSE AND SECTION 1983 TO CHALLENGE EMINENT DOMAIN TAKINGS FOR PRIVATE DEVELOPMENT

While eminent domain takings are conventionally challenged under the Fifth Amendment's Takings Clause, plaintiffs can also challenge such takings by filing a Section 1983 claim under the Equal Protection Clause. Such a suit would challenge whether the plaintiffs were intentionally and arbitrarily treated differently than similarly situated homeowners. This section discusses *Village of Willowbrook v. Olech* and how it enabled a plaintiff to establish a "class of one" to sue under the Equal Protection Clause.

A. THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment's Equal Protection Clause provides that no state can "deny to any person within its jurisdiction the equal protection of the laws."[67] At the most abstract level, the clause mandates that the government treat similarly situated people alike.[68] More concretely, the Supreme Court has developed a framework to determine when the government treats people unequally. Modern equal protection jurisprudence is analyzed under three tiers of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.

Strict scrutiny is the highest tier of scrutiny, and applies when a classification burdens a fundamental right[69] or a suspect class.[70] The Supreme Court has established that race,[71] citizenship, and national origin[72] are suspect classes. A suspect class either possesses an "immutable characteristic determined solely by the accident of birth,"[73] or is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to

CONSTITUTION IN 2020, at 93, 96 (2009).

67. U.S. CONST. amend. XIV, § 1.

68. Plyler v. Doe, 457 U.S. 202, 216 (1982).

69. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND PRACTICES 638 (1997).

70. *Id.* at 550.

71. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

72. *See* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 606 (1976).

73. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

command extraordinary protection from the majoritarian political process."[74] When applying strict scrutiny, the courts uphold the challenged action only if the government can show that such action is narrowly tailored to serve a compelling government interest[75] and that the end cannot be accomplished through less discriminatory means.[76] The government can seldom overcome strict scrutiny, and it is generally fatal.[77] The heightened standards of strict scrutiny deny judges the discretion to evaluate group-based classifications, and, as a result, judges "are extraordinarily resistant to extending heightened scrutiny to new groups, even groups widely acknowledged to have suffered invidious treatment . . . [as] the Supreme Court has not conferred suspect status on any group since the 1970s."[78]

Intermediate scrutiny is the second tier, and is reserved for classifications involving gender[79] and illegitimacy.[80] The test for intermediate scrutiny is whether the classification is substantially related to a significant governmental interest.[81] This test is less stringent than strict scrutiny. If the government fails this burden, the challenged action is unconstitutional.[82] This tier has seldom been invoked by the Supreme Court, and generally the government cannot satisfy intermediate scrutiny.

Rational basis scrutiny is the lowest tier.[83] All social or economic classifications that are not based on race, citizenship, gender, or illegitimacy are judged under the rational basis test. An action considered under rational basis scrutiny is constitutional if it is rationally related to a legitimate state interest.[84] This standard is supremely deferential to the legislature, as courts employing this method almost always uphold actions as long as some

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74. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

75. *Cleburne*, 473 U.S. at 440.

76. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

77. Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)); *see also* BALKIN & SIEGEL, *supra* note 66, at 96 ("Either, legislation is presumptively unconstitutional and the Court decides what constitutional equality requires; or legislation bears an almost irrebuttable presumption of democratic legitimacy, and neither the Court nor the political branches has the authority or the obligation to promote the Fourteenth Amendment's guarantees.").

78. BALKIN & SIEGEL, *supra* note 66, at 96.

79. United States v. Virginia, 518 U.S. 515, 531-34 (1996).

80. Clark v. Jeter, 486 U.S. 456, 461 (1988).

81. Craig v. Boren, 429 U.S. 190, 197-98 (1976).

82. *Id.* at 204.

83. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

84. Romer v. Evans, 517 U.S. 620, 632 (1996).

possible, conceivable basis can justify it.[85] In *FCC v. Beach Communications, Inc.* the Supreme Court issued an extremely deferential standard, stating that "[i]n areas of social and economic policy, a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[86] Courts evaluating an equal protection claim under the rational basis test grant broad deference to the legislature's actions and are very reluctant to question the legislature's motives.[87] The government seldom, if ever, loses under this deferential level of review.

Before continuing, this Article will address concerns about using the Equal Protection Clause to challenge takings when textually, the Fifth Amendment Takings Clause, as incorporated through the Due Process Clause of the Fourteenth Amendment, supplies a remedy.[88] The Supreme Court has addressed this issue in a related context. In *Albright v. Oliver*, the defendant challenged a government search on substantive due process grounds, when the Fourth Amendment provided the appropriate remedy.[89] The Supreme Court rejected the defendant's strategy, holding that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim."[90] In other words, a

85. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (finding that rational basis review is a "virtual rubber stamp"); *see also* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to 'negative every conceivable basis which might support it." (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (finding a challenged classification will fail only if it is completely arbitrary). For criticisms of rational basis scrutiny, see Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 897 (2005).

86. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

87. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("[C]ourts refrain from reviewing the merits of [legislators' and administrators'] decisions, absent a showing of arbitrariness or irrationality."); Lee v. S.C. Dept. of Natural Res., 530 S.E.2d 112, 115 n.4 (S.C. 2000) (stating that "the actual motivations of the enacting governmental body are entirely irrelevant" when determining the purpose and validity of the law under equal protection analysis); *see also* Leon Friedman, *Purpose, Intent and Motive in Constitutional Litigation*, LITIG. & ADMIN. PRAC., Nov. 1998, at 713, 715 (finding that "[i]nquiries into congressional motives or purposes are a hazardous matter").

88. For a discussion of how the Fourteenth Amendment actually "incorporates" protections in the Bill of Rights, see Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the State*, 8 GEO. J.L & PUB. POLICY 1, 56 (2010), *available at* http://ssrn.com/abstract=1503583.

89. Albright v. Oliver, 510 U.S. 266, 273 (1994).

90. *Id.* (internal quotation marks omitted) (quoting Graham v. Connor, 490 U.S. 386, 395

defendant cannot avail himself of substantive due process when the Constitution textually provides for protection, in the case of *Albright*, the Fourth Amendment. While equal protection claims and substantive due process claims are not identical, their similarity emanates related concerns of unbounded judicially created rights.

At first glance, this admonition would seem to counsel against a litigant utilizing the Equal Protection Clause to challenge eminent domain takings, because the Fifth Amendment's Takings Clause, as incorporated through the Fourteenth Amendment, would ostensibly qualify as an "explicit textual source of the constitutional protection." Why challenge a taking under the Equal Protection Clause when the Takings Clause does the trick? Resolving this tension is essential to validly positing *Olech* as a constitutional and pragmatic approach to challenging eminent domain abuse.

However, upon closer scrutiny of what the *Olech* claim seeks to accomplish, this situation is distinguishable. The Takings Clause provides "nor shall private property be taken for public use without just compensation."[91] In the lexicon of *Oliver*, the plain text of the Amendment suggests three primary constitutional inquiries: (1) whether there is a taking; (2) whether the taking is for public use; and (3) whether the government provides just compensation.[92] According to *Oliver*, these are the "explicit textual source[s] of constitutional protection against a particular sort of government behavior."[93] Thus, if one were to use the Equal Protection Clause to challenge any of these three protections, *Oliver* would control. For example, if a litigant contended that a taking did not constitute a public use under the Equal Protection Clause, the Court should disregard such an extracurricular appeal to this extraneous constitutional clause. Similarly, if a litigant argued that the compensation was not just, a claim under the Equal Protection Clause should be dismissed under *Oliver*.

In contrast, an *Olech* claim, based on the Equal Protection Clause, guards against a totally different evil. The *Olech* claim protects a class of one that is intentionally and irrationally treated differently from other similarly situated homeowners, and the governmental action results in the taking of his property. The three threshold questions of the Fifth Amendment are not implicated. First, this claim does not query whether a taking exists. Second, the definition of a public use is irrelevant. Third,

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(1989)).

91. U.S. CONST. amend. V.

92. *Id.*

93. Albright v. Oliver, 510 U.S. 266, 273 (1994) (internal quotation marks omitted) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

whether just compensation is provided is of no matter. The *Olech* claim can *only* find refuge in the Equal Protection Clause. The Fifth Amendment provides no textual anchor for challenging this species of governmental action. Thus, *Oliver* does not control, and an appeal to the Equal Protection Clause is an appropriate means in this limited context to challenge eminent domain takings.

B. SUITS BROUGHT UNDER 42 U.S.C. § 1983

When a citizen feels that his equal protection rights have been violated, he can bring suit under 42 U.S.C. § 1983 (Section 1983).[94] To bring a Section 1983 claim, the plaintiff must allege two elements: (1) a federal right was violated and (2) the person who violated the right did so under the color of state law.[95] Plaintiffs can seek damages or injunctive relief from state officials who violate their rights.[96] In the case of using Section 1983 to challenge the designation of a property for eminent domain takings, the federal right violated would be equal protection under the law as guaranteed by the Fourteenth Amendment.[97] The defendant could be the person or entity who effectuated the condemnation proceeding. By definition, such a proceeding takes place under color of state law.[98] The homeowner's desired remedy would likely be injunctive relief. Just compensation would not be necessary if the taking is halted.

C. *OLECH* AND EQUAL PROTECTION CLAIMS FOR A CLASS OF ONE

Village of Willowbrook v. Olech represented the Supreme Court's first clear articulation that a plaintiff can establish a "class of one" for purposes of filing suit under the Equal Protection Clause. The short per curiam opinion, accompanied by a brief concurring opinion by Justice Breyer, widely broadened the range of plaintiffs who are able to utilize Section 1983 to challenge unequal treatment, especially in land use decisions. This section discusses the case and attempts to reconcile the majority opinion with the concurring opinion by analyzing how the federal circuits have interpreted the holding of *Olech*.

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94. 42 U.S.C. § 1983 (2006).

95. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

96. 42 U.S.C. § 1983; *see also* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 644-45 (1987).

97. U.S. CONST. amend. XIV.

98. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that cities and counties may be sued directly under Section 1983 for damages or for declaratory injunctive relief where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers").

1. BACKGROUND

In *Village of Willowbrook v. Olech*, plaintiff Grace Olech requested connection to the municipal water supply.[99] While the Village usually only required a fifteen-foot easement to facilitate the hookup, in the case of the Olech's home, the Village requested a thirty-three foot easement.[100] Olech filed suit under Section 1983, challenging the unequal easement request and alleged that she was being treated differently due to the Village's malice toward her.[101] In the past, Olech had filed successful lawsuits against the Village, which she contended "made Willowbrook and its officers and employees 'look bad,' and [thus generated] 'substantial ill will.'"[102] The trial court found that Olech failed to state a claim under existing circuit precedent and found that a class of one suit required the plaintiff to plead either "'malignant animosity' or [an] 'orchestrated campaign of official harassment.'"[103]

On appeal circuit Judge Posner found that an "orchestrated campaign" was a sufficient, but not necessary, condition to state a claim as a class of one and "that the 'vindictive action' class of equal protection cases requires proof that the cause of the differential treatment . . . was a totally illegitimate animus."[104] Judge Posner remanded for further factual findings.[105]

2. PER CURIAM SUPREME COURT OPINION

The Supreme Court granted certiorari and issued an uncharacteristically terse per curiam opinion "to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group."[106] The Court answered this question in the affirmative and held that "'successful equal protection claims [may be] brought by a 'class of one.'"[107] The Court noted that a class of one equal protection claim is made "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis

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99. Vill. of Willowbrook v. Olech, 528 U.S. 562, 563 (2000) (per curiam).

100. *Id.*

101. *Id.*

102. Olech v. Vill. of Willowbrook, No. 97-4935, 1998 U.S. Dist. LEXIS 5494, at *3-*5 (N.D. Ill. Apr. 13, 1998), *rev'd*, 160 F.3d 386 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000) (per curiam).

103. *Id.* at *9.

104. Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000) (per curiam).

105. *Id.* at 389.

106. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

107. *Id.*

for the difference in treatment."[108]

The Court identified two elements underlying Olech's claim: differential treatment and irrationality. First, the Court recognized that Olech's complaint established differential treatment by alleging that "the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners."[109] Second, the Court noted that "[t]he complaint also alleged that the Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement."[110]

Despite the lengthy discussion of malice in both the District and Circuit Court opinions, the Supreme Court did not address whether subjective ill will or malice is a necessary element to state a claim for a class of one.[111] Instead, the Court noted that it did "not reach the alternative theory of 'subjective ill will' relied on by the Seventh Circuit."[112] The Court explained that Olech's allegations of differential treatment and irrationality, "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis."[113] Thus, the Court left the matter of subjective ill will unresolved.

3. JUSTICE BREYER'S CONCURRING OPINION

Justice Breyer added a brief concurrence to the per curiam opinion.[114] Justice Breyer wrote to clarify his agreement, recognizing that "the Court of Appeals found that in this case [the plaintiff] had alleged an extra factor as well-a factor that the Court of Appeals called 'vindictive action,' 'illegitimate animus,' or 'ill will.'"[115] To Justice Breyer, the ill will factor, which the Supreme Court did not address, was sufficient to assuage his "concern [of] transforming run-of-the-mill zoning cases into cases of

108. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Comm'n of Webster County, 488 U.S. 336 (1989)).

109. *Id.* at 565.

110. *Id.*

111. *Id.* ("We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of 'subjective ill will' relied on by that court.").

112. *Id.*

113. *Id.*

114. *Vill. of Willowbrook*, 528 U.S. at 565 (per curiam) (Breyer, J., concurring).

115. *Id.* (Breyer, J., concurring) (citing Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998)).

constitutional right."[116] The inferior courts, however, have not yet resolved how *Olech* should be read with respect to the malice requirement. Thus, the question of whether Justice Breyer's concurring opinion will control remains unresolved.

4. SUCCESS OF SECTION 1983 CLAIMS AFTER *OLECH*

Recent cases provide anecdotal evidence that *Olech* claims have a higher chance of success against the rational basis test as compared to conventional equal protection challenges. Between 1971 and 1996, the Supreme Court considered one hundred ten rational basis equal protection cases; of these cases the plaintiffs won only ten times, a 9% success rate.[117] However, in the three years following *Olech*, plaintiffs in "class of one" Equal Protection cases, prevailed in thirty out of eighty-six federal district court opinions, a 35% success rate.[118]

In Section 1983 claims filed under the deferential rational basis standard, courts readily dismiss petitions at a very early stage.[119] However, in cases after *Olech*, some courts have adopted less deferential standards.[120] The Court in *Olech* found that an equal protection claim can survive Rule 12(b)(6)[121] when the complaint alleges that the plaintiff was (1) treated differently than a similarly situated individual and (2) the treatment was irrational and arbitrary.[122]

In *Russo v. City of Hartford*,[123] the United States District Court for the District of Connecticut rejected the government's motion to dismiss an

116. Vill. of Willowbrook v. Olech, 528 U.S. 562, 566 (2000) (per curiam) (Breyer, J., concurring).

117. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 app. (1999) [hereinafter *Successful Rational Basis Claims in the Supreme Court*].

118. Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 416 (2003) [hereinafter *Classes, Persons, Equal Protection and* Olech]. However, comparing Supreme Court opinions to district court opinions is difficult, and whether the continued success of this novel claim remains is yet to be determined.

119. *Id.* at 418.

120. *Id.* at 419.

121. FED. R. CIV. P. 12(b)(6).

122. *See* Hortensia S. Carreira, *Protecting the "Class of One,"* REAL PROP. PROB. & TR. J. 331, 355 (2001). In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the Court cited *Conley v. Gibson*, 355 U.S. 41 (1957), which stands for the proposition that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Olech*, 528 U.S. at 565 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Following *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court requires that the plaintiff plead a "plausible" claim in order to survive a 12(b)(6).

123. Russo v. City of Hartford, 184 F. Supp. 2d 169, 190, 194 (D. Conn. 2002).

Olech claim.[124] The court put the burden on the government to show a legitimate basis for disparate treatment, noting that the plaintiff "has alleged that similarly situated individuals were treated differently and that the defendants have not expressed any legitimate basis for the differential treatment."[125] Acknowledging that it could "dismiss the count on the pleadings if it can conceive of any rational basis for the classification," the *Russo* court "refuse[d] . . . to speculate as to conceivable rational bases for the defendants' actions."[126] This standard is quite different from the traditional rational basis approach discussed in *FCC v. Beach Communications, Inc.*[127]

In *Stone v. Hope*, the United States District Court for the Southern District of Indiana refused to dismiss an *Olech* claim, even though it was not properly pled, noting that "all reasonable inferences are to be drawn in favor of the plaintiff. Under this standard, the plaintiff has provided Defendants with fair notice of his claims and the grounds upon which they are based."[128] This implies that the plaintiff only needs to provide some notice; whereas, under *Beach Communications, Inc.*, the plaintiff must disprove all of the defendant's conceivable reasons.[129] The *Stone* standard is a far cry from the *Beach* standard, and perhaps is another sign that the courts are less likely to more stringently scrutinize class of one claims at the pleading stage. It is unclear if the reason behind these more lenient standards is because *Olech* changed the standards, or whether courts are unsure about how to proceed under this novel case law. Further, much of this evidence is anecdotal. But what is clear is that in these cases, since the claims were not dismissed at the early stage, the court enabled the plaintiffs to proceed, and gave an equal protection claim subject to rational basis review a shot at life; whereas, in other circumstances, the court might have shot it down right away. Under *Olech*, the standard rational basis test is "turn[ed] on its head," with the courts "mak[ing] it substantially easer for a plaintiff to survive a motion to dismiss and thus force the government defendant to continue to litigate the case, through discovery, summary judgment, and possibly trial."[130] Further, when a case survives a motion to dismiss or summary judgment, defendants have incentive to settle out of court, thus providing plaintiffs greater leverage than would have existed in

124. Russo v. City of Hartford, 184 F. Supp. 2d 169, 190-91 (D. Conn. 2002).

125. *Id.* at 190 (citation omitted).

126. *Id.* at 195-96 (citing Connolly v. McCall, 254 F.3d 36, 42 (2d Cir. 2001)).

127. *Classes, Persons, Equal Protection and* Olech, *supra* note 118, at 418 (citing FCC v. Beach Commcn's, Inc., 508 U.S. 307 (1993)).

128. Stone v. Hope, No. IP-01-0058-C-T/K, 2002 WL 663468, at *4 (S.D. Ind. Mar. 7, 2002).

129. *Classes, Persons, Equal Protection and* Olech, *supra* note 118, at 420-21.

130. *Id.* at 421.

the past.[131] In the context of eminent domain, the government may be coaxed into providing a higher compensation amount for the settlement than the just compensation paid at trial.

5. IS A FINDING OF MALICE REQUIRED AFTER *OLECH*?

In the wake of *Olech*, it is not clear whether an equal protection claim must include a malice element. This uncertainty is significant because showing malice requires a very high threshold, and courts are not willing to recognize such a factor as met unless extremely egregious circumstances exist. Some scholars are of the opinion that a finding of ill will is not a necessary condition of an equal protection claim under *Olech*. According to Dean Erwin Chemerinsky, "The Court's decision is clear that an allegation of a retaliatory motive or subjective ill will is unnecessary. But the Court does not reject improper motivation as an alternative way of showing a denial of equal protection. The Court just says that it need not reach the issue."[132] That malice was an essential portion of the Seventh Circuit opinion, yet was not addressed in the Supreme Court, lends credence to Dean Chemerinsky's theory. This section chronicles some of the recent cases that have discussed *Olech*. Some circuit courts find that malice is not a required element, some find that it is a required element, and some have adopted conflicting standards. This circuit split of an important issue of constitutional law is ripe for review by the Supreme Court.[133]

a. Circuits Where Showing of Malice Not Required

In *Alsenas v. City of Brecksville*,[134] the Sixth Circuit hinted that irrationality, and not subjective motivation, is the crux of "class of one" equal protection suits.[135] The *Alsenas* court dismissed the suit because the plaintiff did not show that government lacked a rational basis for treating

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131. *See Classes, Persons, Equal Protection and* Olech, *supra* note 118, at 424.

132. Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, 36 J. TRIAL LAW. AM. 89, 90 (2000), *available at* 36-May Trial 89 (Westlaw).

133. SUP. CT. R. 10(a). Rule 10 (a) specifies:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . . a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Id.

134. Alsenas v. City of Brecksville, No. 99-4063, 2000 U.S. App. LEXIS 14520 (6th Cir. June 19, 2000).

135. *See generally id.*

his application differently.[136] Similarly, in *McDonald's Corp. v. City of Norton Shores*, the court found that "to prevail on this claim, the Plaintiff must show that the government treated the Plaintiff 'differently from others similarly situated and that there [was] no rational basis for the difference in treatment.'"[137] The court made no mention of malice as a requirement to state a claim. However, the court granted summary judgment in favor of the defendant, finding that the plaintiffs were not similarly situated and that the government's action possessed a rational basis.[138]

In *Costello v. Mitchell Public School District 79*, an *Olech* equal protection case, the Eighth Circuit held that the plaintiff's "class of one" claim was subject to rational basis review, without addressing any malice, animus, or subjective motivations.[139] In *Little v. City of Oakland*, a Section 1983 suit, the District Court for the Northern District of California held that for a plaintiff to maintain an equal protection argument, the plaintiff must show that "she was treated differently than other[s] similarly situated with no rational basis for the difference."[140] However, the *Little* court did not identify malice or ill will as a necessary condition to state a claim.[141]

In *Griffin Industries, Inc. v. Irvin*, the Eleventh Circuit resolved an *Olech* claim by looking solely at whether the defendants intentionally treated the plaintiff differently from others who were similarly situated, and whether there was a rational basis for the difference in treatment.[142] The court did not adopt Justice Breyer's concurring opinion requiring a showing of animus of malice.[143]

b. Circuits Requiring Showing of Malice

In the Seventh Circuit—the origin of *Olech*—Judge Posner reaffirmed his insistence that an equal protection claim must show a "vindictive action" which requires proof of a "totally illegitimate animus" against the plaintiff.[144] Judge Posner adopted Justice Breyer's alternative theory and

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136. Alsenas v. City of Brecksville, No. 99-4063, 2000 U.S. App. LEXIS 14520, at *5 (6th Cir. June 19, 2000) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam)).

137. McDonald's Corp. v. City of Norton Shores, 102 F. Supp. 2d 431, 438 (W.D. Mich. 2000) (quoting *Olech*, 528 U.S. at 564) (alteration in original).

138. *Id.*

139. Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 921-22 (8th Cir. 2001).

140. Little v. City of Oakland, No. 99-00795, 2000 U.S. Dist. LEXIS 13633, at *16 (N.D. Cal. Sept. 13, 2000) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam)).

141. *See id.* at *16-*17.

142. Griffin Indus., Inc. v. Irvin, 496 F.3d 1189 (11th Cir. 2007).

143. *See id.*

144. Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (Posner, J.); *see also* Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7 Cir. 1998), *aff'd*, 528 U.S. 562 (2000) (per

mandated a finding of subjective motivations.[145] Citing its decision in *Olech*, the *Hilton* court noted that the claim requires "proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant."[146] Because the plaintiff did not prove that the government action was motivated by an illegitimate animus, the court found that the plaintiff had not pled a class of one.[147] Making a policy argument against flooding the federal courts with cases where plaintiffs are merely treated differently, Judge Posner reasoned that "[i]f a merely unexplained difference in police treatment of similar complaints made by different people established a prima facie case of denial of equal protection of the laws, the federal courts would be drawn deep into the local enforcement of petty state and local laws."[148]

Yet, there are some grumblings in the Seventh Circuit as to whether the plaintiff must prove both intentionally different treatment *and* illegitimate animus; in 2002, a panel of the Seventh Circuit found that either condition would satisfy *Olech*.[149] A 2002 district court case agreed, and held that *Hilton's* attempt to "narrow the range of options available to class of one equal protection plaintiffs simply cannot be squared with *Olech*."[150] This issue is yet to be resolved.

The traditionally conservative Fourth Circuit has taken a very narrow reading of the *Olech* holding. In *Greenspring Racquet Club, Inc. v. Baltimore County*, the Fourth Circuit found that an equal protection claim must establish that "malice and bad faith were the *only conceivable* bases" for enacting a zoning ordinance.[151] In this case, the court only addressed

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curiam) ("But bear in mind that the 'vindictive action' class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.").

145. Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (Posner, J.). Judge Posner noted:

> We gloss 'no rational basis' in the unusual setting of 'class of one' equal protection cases to mean that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position.

Id.

146. *Id.* (citing Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7 Cir. 1998), *aff'd*, 528 U.S. 562 (2000) (per curiam).

147. *Id.*

148. *Id.*

149. Nevel v. Vill. of Schaumburg, 297 F.3d 673, 681 (7th Cir. 2002).

150. Nw. Univ. v. City of Evanston, No. 00-7309, 2002 WL 31027981, at *4 (N.D. Ill. Sept. 11, 2002).

151. Greenspring Racquet Club, Inc. v. Baltimore County, Nos. 99-2444, 00-1012, 2000 U.S. App. LEXIS 27207, at *18 (4th Cir. Oct. 31, 2000), *rev'd on other grounds*, 232 F.3d 887 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1485 (2001).

Olech in a footnote, finding that the "fundamental tenet of [e]qual [p]rotection jurisprudence is not changed by the Supreme Court's recent decision in [*Olech*]."[152] The Fourth Circuit failed to recognize the possibility that the per curiam opinion lowered the pleading standard and did not specifically require a showing of malice. That the Fourth Circuit finds that nothing changed is perhaps a convenient reading of this new precedent.

c. Circuits With Conflicting Standards

Because of the novelty of *Olech*, several circuits have not yet adopted a unified approach to a malice standard in class of one equal protection claims. In *Gelb v. Board of Elections of New York*, the Second Circuit considered whether New York election law required that a write-in candidate have access to the ballot in primary elections.[153] With respect to the *Olech* claim, the court required a showing of an intent to discriminate to state a claim, but not a showing of subjective malice.[154]

In a conflicting case, *Katz v. Stannard Beach Association*, the District Court for the District of Connecticut held that to state a cause of action under Section 1983 as a class of one, a plaintiff must show 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."[155] This standard specifically required a malicious intent. The case was dismissed on summary judgment because the plaintiff failed to allege that he was treated differently from a similarly situated citizen, and made no showing of intention discrimination resulting from the defendant's "bad faith, 'illegitimate animus,' 'ill will,' or malice to injure."[156] Thus, the *Katz* court adopted Justice Breyer's concurring opinion and required a showing of ill will.[157] A 2000 case from the Eastern District of New York reaffirmed the holding in *Katz*, rejecting the proposition that *Olech* eliminated the

152. Greenspring Racquet Club, Inc. v. Baltimore County, Nos. 99-2444, 00-1012, 2000 U.S. App. LEXIS 27207, at *20 (4th Cir. Oct. 31, 2000), *rev'd on other grounds*, 232 F.3d 887 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1485 (2001).

153. Gelb v. Bd. of Elections of N.Y., 224 F.3d 149, 150-51, 157 (2d Cir. 2000).

154. *Id.* at 157.

155. Katz v. Stannard Beach Ass'n, 95 F. Supp. 2d 90, 95 (D. Conn. 2000) (emphasis added) (citing Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir. 1996)).

156. *Id.*

157. *Id.* (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (per curiam) (Breyer, J., concurring); *see also* Shaun M. Gehan, *With Malice Toward One: Malice and The Substantive Law In "Class Of One" Equal Protection Claims In The Wake of* Village of Willowbrook v. Olech, 54 ME L. REV. 329, 368 (2002).

requirement of proving malice to satisfy a class of one equal protection claim.[158]

However, in *Jackson v. Burke*, the Second Circuit found that "[t]o be sure, proof of subjective ill will is not an essential element of a 'class of one' equal protection claim."[159] This finding is limited, as a plaintiff must show "*something* sufficiently distinct . . . that could give rise to a reasonable inference that he was in fact being treated differently from all others similarly situated."[160] Whether this "something" is malice, or some derivation thereof, is currently undecided by the Second Circuit.[161] In a later case, the Second Circuit contended that *Olech* modified the class of one analysis and eliminated the requirement of a showing of bad faith.[162]

In *Burns v. State Police Association of Massachusetts*, the First Circuit hinted that it will not require a showing of malice in a class of one equal protection claim.[163] The *Burns* court noted that

> [i]n *Village of Willowbrook v. Olech*, the Supreme Court observed that an equal protection claim could be stated where a plaintiff alleges that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" creating a "class of one" cause of action, *without regard to subjective motivation.*[164]

In a subsequent case in the District Court of Massachusetts, the court noted that a plaintiff must prove three elements to prevail under *Olech*: that the defendant "(1) intentionally treated [her] differently (2) from others similarly situated (3) without a rational basis for the difference in treatment."[165] This standard does not require a showing of animus.[166]

In *Cordi-Allen v. Conlon*, the First Circuit recognized that "[w]e need not reach any question of whether, post-*Olech*, a plaintiff must demonstrate malice or bad faith intent to injure when there is no discrimination based on

158. Econ. Opportunity Comm'n of Nassau County, Inc. v. County of Nassau, 106 F. Supp. 2d 433, 439-42 (E.D.N.Y. 2000).

159. Jackson v. Burke, 256 F.3d 93, 97 (2d Cir. 2001) (per curiam) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam)).

160. *Id.* (emphasis added).

161. Gehan, *supra* note 157, at 370.

162. *See* Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499-500 (2d Cir. 2001).

163. *See* Burns v. State Police Ass'n of Mass., 230 F.3d 8, 12 n.4 (1st Cir. 2000) (discussing *Olech*, 528 U.S. at 564).

164. *Id.* (emphasis added) (quoting *Olech*, 528 U.S. at 564).

165. *See* Pariseau v. City of Brockton, 135 F. Supp. 2d 257, 263 (D. Mass. 2001) (citing *Olech*, 528 U.S. at 564).

166. *See id.*

typically impermissible categories."[167] In 2004, however, the First Circuit, citing Justice Breyer's concurring opinion in *Olech*, required a subjective malice element in the equal protection analysis.[168] This issue has yet to be resolved by the First Circuit.[169]

The Fifth Circuit has taken a curious approach, only finding an equal protection violation when the government violates a fundamental right or engages in class-based discrimination.[170] In *Bryan v. City of Madison*, the Court held that *Olech* does not alter the Fifth Circuit precedent requiring a showing of "improper motive, such as racial animus, for selective enforcement claims."[171] In *Shipp v. McMahon*, the Fifth Circuit found that an *Olech* claim requires a showing of malice, observing that "[t]o state a claim sufficient for relief, a single plaintiff must allege that an *illegitimate animus or ill-will motivated* her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment."[172]

6. *OLECH POST-ENGQUIST*

In 2008, the Supreme Court addressed *Olech* in *Engquist v. Oregon Dept. of Agriculture.*[173] Chief Justice Roberts, writing for the Court, held that *Olech*'s class of one claims did not extend to employment law cases.[174] However, the Court did nothing to take away *Olech*'s validity in property cases. *Engquist* arose in the context of employment, and the Supreme Court went to great lengths to distinguish the case where the government acts as employer and employs a worker, as opposed to where the government acts as a sovereign and invokes the power of eminent domain to seize property.[175] Despite the current circuit split on this topic, the

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167. Cordi-Allen v. Conlon, 494 F.3d 245, 250 n.3 (1st Cir. 2007) (citing Bizzarro v. Miranda, 394 F.3d 82, 88 (2d Cir. 2005)).

168. Tapalian v. Tusino, 377 F.3d 1, 5-6 (1st Cir. 2004) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam) (Breyer, J., concurring)).

169. *See, e.g.*, Walsh v. Town of Lakeville, 431 F. Supp. 2d 134, 144 (2006) ("This Court is left in the tenuous position of attempting to harmonize seemingly antithetical case law.").

170. Gehan, *supra* note 157, at 370.

171. Bryan v. City of Madison, 213 F.3d 267, 277 n.17 (5th Cir. 2000) (citing *Olech*, 528 U.S. at 564).

172. Shipp v. McMahon, 234 F.3d 907, 916 (5th Cir. 2000) (emphasis added) (citing *Olech*, 528 U.S. at 564-65), *overruled by* McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002).

173. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146 (2008). For a critique of *Engquist*, see Roger Pilon, *In A Class of Your Own*, LEGAL TIMES, June 16, 2008, *available at* http://www.cato.org/pub_display.php?pub_id=9465.

174. *Engquist*, 128 S. Ct. at 2157.

175. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146, 2151 (2008). The Court opined that

> [o]ur traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with unique considerations applicable when the

Supreme Court did not address whether a malice requirement exists for class of one claims. Based on this narrow holding, it would appear that *Olech's* vitality in the property context remains.

The Court also took great efforts to exclude class of one claims from governmental decisions involving "discretionary decisionmaking based on a vast array of subjective, individualized assessments."[176] In a somewhat tautological fashion, Chief Justice Roberts wrote that "[i]t is no proper challenge to what in its *nature* is a subjective, individualized decision that it was subjective and individualized."[177] Does the *nature* of eminent domain involve subjective, individualized decisions? According to *Engquist*, the answer to this question is no.

When discussing which claims fall outside of *Olech*, Chief Justice Roberts focused on the concept of "discretion" given to public employers. He explained that the "rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the *discretion* granted."[178] Elsewhere, Chief Justice Roberts found that "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very *discretion* that such state officials are entrusted to exercise."[179] What is the nature of the discretion granted? Chief Justice Roberts answered this question, explaining that it "typically characterizes the employer-employee relationship."[180] And why is discretion so critical to the holding of *Engquist*? The answer to this question lies in the core distinction between why the Court upheld Grace Olech's claim, but denied Anup Engquist's claim.

The public employment context is unique and differs from decisions to condemn land for eminent domain. In Dormant Commerce Clause jurisprudence, the Supreme Court has drawn a similar distinction between the state acting as a market regulator and as a market participant.[181] While "employment decisions are quite often subjective and individualized,

government acts *as employer as opposed to sovereign*, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.

Id. (emphasis added).

176. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146, 2154 (2008).

177. *Id.* (emphasis added). This mimics Chief Justice Roberts' famous maxim that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

178. *Engquist*, 128 S. Ct. at 2154 (emphasis added).

179. *Id.* (emphasis added).

180. *Id.* at 2155.

181. *See, e.g.*, Reeves, Inc. v. State, 447 U.S. 429 (1980).

resting on a wide array of factors that are difficult to articulate and quantify[,]"[182] the decision to take property cannot be subjective, but rather, it must be part of a "comprehensive development plan" to satisfy the requirements of public use.[183] The broad discretion inherent in employment decisions[184] cannot constitutionally exist when the government is acting as sovereign and taking a homeowner's property. This is a critical distinction. The Court favorably cited Engquist's brief, in which she distinguished decisions by zoning officials from decisions by public employers, explaining that

> [t]he public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace. The close relationship between the employer and employee, and the varied needs and interests involved in the employment context, mean that considerations such as concerns over personality conflicts that would be unreasonable as grounds for 'arm's-length' government decisions (e.g., zoning, licensing) may well justify different treatment of a public employee.[185]

A decision to condemn a homeowner's land cannot be based on issues like personality conflicts that are commonplace in arm's-length employment.[186] As Chief Justice Roberts explained, "[u]nlike the context of arm's-length regulation, such as in *Olech*, treating seemingly similarly situated individuals differently in the employment context is par for the course."[187] Even requirements imposed by procedural due process allow certain subjective employment decisions to be made by public employers as long as certain procedures are provided.[188] This rationale underscores the core holding of *Engquist*, reaffirming the wall the Court erected between

182. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146, 2154 (2008).

183. Kelo v. City of New London, 545 U.S. 469, 484 (2005). The Court noted:

> Given the *comprehensive character of the plan*, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment. (emphasis added).

Id.; *see also id.* at 493 (Kennedy, J., concurring) ("This taking occurred in the context of a *comprehensive development plan* meant to address a serious citywide depression, and the projected economic benefits of the project cannot be characterized as *de minimus*.") (emphasis added).

184. *Engquist*, 128 S. Ct. at 2154 ("This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.").

185. *Id.* (quoting Brief for Petitioner at 48, *Engquist*, 128 S. Ct. 2146 (2008) (No. 07-474)).

186. *See id.*

187. *Id.* at 2154-55.

188. Matthews v. Eldridge, 424 U.S. 319, 348 (1976).

governmental decisions in the role of a sovereign affecting property and government decisions affecting public employment.[189] Thus, even under *Engquist*, decisions to condemn land do not constitute subjective and individualized assessments and can still make up a claim under *Olech*.[190]

Further, it is important to note that consistently conservative Justices, including Justices Thomas and Scalia, signed the *Olech* per curiam opinion.[191] That these two Justices were willing to embrace this malice-less lenient pleading standard indicates how the Roberts Court would rule on a future *Olech* claim. Finally, Chief Justice Roberts and Justice Alito, who were not on the Court for *Olech*, as well as Justice Breyer, who authored the concurring opinion in *Olech*, signed onto *Engquist*.[192] This apolitical alignment shows a confluence of thought, indicating *Olech*'s continued efficacy.

In addition, Justice Stevens, writing for the three dissenting Justices, implied that malice was not a requirement, noting that "the outcome of *Olech* was dictated *solely* by the absence of a rational basis for the discrimination."[193] He wrote further that the jury finding that a rational basis did not exist for the employment decision was dispositive, as "[u]nder our reasoning in *Olech*, the absence of any justification for the discrimination sufficed to establish the constitutional violation."[194] Justice Stevens does not mention a malice requirement, clearly suggesting that satisfying the rational basis test is sufficient.[195] Thus, it appears that at least eight Justices would find that malice is not a requirement for a class of one claim. This circumstantial evidence tends to imply that the core holding of *Olech* remains intact. Thus, an *Olech* class of one claim, lacking malice, comports with current Supreme Court equal protection jurisprudence.

IV. ELEMENTS OF *OLECH* CLAIM AGAINST EMINENT DOMAIN TAKING FOR PRIVATE DEVELOPMENT

By adopting the Supreme Court's existing precedent to state *Olech* claims, this section discusses the elements of a viable equal protection claim against eminent domain takings for private development. Professor Davidson argues that because the Takings Clause's emphasis is on protecting existing property rights, as opposed to finding discriminatory

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189. *See generally* Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146 (2008).

190. *See generally id.*

191. *See generally* Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam).

192. *See generally Engquist*, 128 S. Ct. 2146.

193. *Id.* at 2158 (Stevens, J., dissenting) (emphasis added).

194. *Id.* at 2159 (2008) (Stevens, J., dissenting).

195. *See id.* at 2157-61 (Stevens, J., dissenting).

purposes, the Takings Clause "is not the place to remedy that problem."[196] The Equal Protection Clause, rather, is uniquely situated for this task. To state a Section 1983 claim under the Equal Protection Clause against an eminent domain taking, a plaintiff will have to allege that (1) he is a member of a class of one; (2) the government intentionally treated him differently from others similarly situated; and (3) the difference in treatment lacked a rational basis.[197]

A. ASSUMPTIONS

In order to develop the elements of this claim, several assumptions are necessary, as the Supreme Court in *Olech*, and later in *Engquist,* left many matters unresolved. As with any assumptions, the Supreme Court may ultimately disagree with these ideas and weaken this Article's thesis. But, until the Supreme Court takes such action, this Article argues that this framework is an effective means to advance this novel legal claim.

1. MALICE NOT REQUIRED ELEMENT OF *OLECH*

It is unclear whether Justice Breyer's concurring opinion will control, or whether the *Olech* per curiam opinion will stand by itself, and, as some circuit courts have read, not require a showing of malice in class of one claims. Further, even if Justice Breyer's concurring opinion is adopted, "is malice an element of the cause of action itself or is demonstrating it merely one of perhaps many different ways that a public actor's 'irrationality' may be made apparent?"[198] For the purposes of this Article, it is assumed that a showing of malice is not required. Eliminating the malice requirement avoids a huge hurdle that fails to reflect modern legislative decisions that may not be based on race but still disproportionately burden those with a lack of affluence and education.[199] These easy targets to bully represent the path of least resistance.[200]

While individual zoning variances and other land use decisions that are quickly made are easily susceptible to legislators imposing a malicious ill will on homeowners, eminent domain takings are usually the result of lengthy proceedings and are less likely to be influenced by a particular legislator's malice.[201] However, *Olech* specifically leaves the door open to

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196. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 51-52 (2008).

197. *See infra* Part IV.B-D.

198. Gehan, *supra* note 157, at 380.

199. *See* discussion *supra* Part II.B.

200. *See* discussion *infra* Part IV.E.

201. *See, e.g.*, Carreira, *supra* note 122, at 361-62.

allow claims where a person is intentionally treated differently but not as the result of discrimination or other invidious purpose. A key reason why malicious intent need not be an important factor in this test is that condemnation boards will focus on the poorest communities regardless of the racial animus.[202] For the purpose of this Article, *Olech* will be analyzed as several circuit courts have:[203] not requiring a showing of malice. Ultimately, the Supreme Court indeed may hold that malice is a required element, but presently this assumption comports with current equal protection law.

2. QUALIFIED IMMUNITY NOT BARRIER TO RECOVERY

A corollary to Section 1983 is the doctrine of qualified immunity. Under Section 1983, courts grant state officials absolute or qualified immunity.[204] Most government officials receive qualified immunity, which serves as an affirmative defense that prevents fear of lawsuits.[205] The test for qualified immunity is whether a government official "performing discretionary functions" had violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[206]

If a plaintiff brought an *Olech* claim under Section 1983, the "court would ask whether a reasonable official in the defendant's position would have known that she was violating the plaintiff's [e]qual [p]rotection rights when she singled her out for differential treatment."[207] Because *Olech* established that intentionally singling out citizens for disparate treatment is unconstitutional, the courts would answer this question in the affirmative.[208] Under this approach, qualified immunity would no longer stand as an impenetrable wall against a section 1983 class of one equal protection

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202. *See, e.g.*, Kelo v. City of New London, 843 A.2d 500, 509 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

203. *See* discussion *supra* Part III.C.5.a.

204. Michael C. Fayz, *Civil Rights*, 1995 DETROIT COLL. L. REV. 343, 404 (1995). Fayz asserts:

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

Id.

205. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982); *see also* Fayz, *supra* note 204, at 417.

206. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

207. Nicole Richter, *A Standard For "Class Of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination From Vindictive State Action*, 35 VAL. U. L. REV. 197, 242 (2000).

208. *Id.* at 242-43.

claim.

In *Olech*, the plaintiff filed suit against two village officials as well as the Village of Willowbrook itself.[209] Plaintiffs can file suit against the municipality where officials act pursuant to a government policy or custom.[210] While most class of one suits in the land use and zoning context will be against individual officials,[211] in the context of eminent domain takings for private development, the suit is likely to be launched against the municipality, a development corporation, or some other quasi-governmental entity that determines the property to be taken. Further, qualified immunity only comes into play if one is asking for damages. It does not apply to requests for injunctive or declaratory relief. While the anticipated relief under an *Olech* claim would be injunctive or declaratory relief, a plaintiff may seek additional monetary damages. Therefore, this analysis assumes that qualified immunity need not serve as an absolute barrier, and an *Olech* claim could proceed. Having made these two important assumptions, the next section proceeds to develop the elements of this claim.

B. Element 1—Define the Class

The first step in making any equal protection claim is to define the relevant class. Under *Olech*, this step becomes facile. The class could be a single homeowner alleging he is being treated differently than other similarly situated homeowners[212] or a group of homeowners alleging they are being treated differently from other similarly situated homeowners. Likewise, the class could consist of an entire community set to be condemned, and that group could allege that other similarly situated communities were not targeted for such treatment. No longer need the class be based on some inherent condition, such as race, gender, or illegitimacy.

Consider the facts in *Kelo*.[213] If Susette Kelo and the other New London homeowners brought a suit under *Olech*, the homeowners, either

209. Brief for Respondent at 8, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) (No. 98-1288).

210. Monell v. Dep't of Social Servs., 436 U.S. 658, 690-91, 701 (1978) ("[M]unicipal bodies sued under Section 1983 cannot be entitled to an absolute immunity.").

211. *See, e.g.*, Olech v. Vill. of Willowbrook, 160 F.3d 386, 387-88 (7th Cir. 1998), *aff'd*, 528 U.S. 562 (2000) (per curiam) (two "high" village officials); Esmail v. Macrane, 53 F.3d 176, 177-78 (7th Cir. 1995) (mayor); LeClair v. Saunders, 627 F.2d 606, 607-08 (2d Cir. 1980) (dairy farm inspector).

212. An inherent problem lies in the class of one doctrine. How large can a group get before a class of one analysis no longer applies? If there is no upper limit, that really stretches the doctrine. If there is an upper limit, would the adoption of this test give localities incentives to expand the scope of their takings to avoid class of one scrutiny? This may be a more general weakness in the class of one doctrine, one not limited to takings.

213. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

individually or as a group, could have established themselves as a class. They could have shown that they were being treated differently from other similarly situated homeowners in the neighborhood, and they were being targeted for eminent domain.

Once the class is defined, the appropriate level of scrutiny can be selected. It may be possible to allege that the class is defined by race. For example, if *all* homeowners in a group targeted for eminent domain were black, while other similarly situated white homeowners were not targeted, the classification would be suspect and strict scrutiny would apply. However, if the designation for condemnation is not strictly based on race, but comports with other factors such as low income, poor education, and lack of political clout, the classification would not be suspect and the rational basis test would apply. The Supreme Court held in *San Antonio Independent School District v. Rodriguez*[214] that wealth is not a suspect or a quasi-suspect classification.[215]

I pause here to stress that the methods described in this Article to establish the class of one stand in contrast to the doctrine of disparate impact, first articulated in *Griggs v. Duke Power Co.*[216] In *Griggs*, brought under Title VII of the Civil Rights Act of 1964, the power company required employees to take an IQ test to qualify for certain positions.[217] Due to poor test scores, African American applicants were excluded from these jobs.[218] The Supreme Court held that if these tests disparately impacted ethnic minority groups, the defendant must demonstrate that these tests are "reasonably related" to the job to which the applicant applied.[219] *Griggs* and its progeny heavily consider statistical evidence to ascertain whether an employment policy disparately impacts minorities.[220] A violation of Title VII exists even if the employer did not engage in disparate treatment or intentional discrimination.

While the class of one claim may bear superficial similarities to this doctrine, the differences are distinct. In the context of disparate impact, statistics are heavily relied upon to show that an employment examination or other managerial decision had a disproportionate impact on certain ethnic groups.[221] Even if the employer engaged in no overt conduct to impact

214. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

215. *Id.* at 28-29.

216. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

217. *Id.* at 427-28

218. *Id.*

219. *Id.* at 436.

220. *See generally Griggs*, 401 U.S. 424.

221. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

these people, a disparate impact can be found. The focus on *Olech* statistics is not to understand the *impact* on the homeowners. Rather, the *Olech* statistics seek to *establish the group*—in other words, the equal protection class—of homeowners affected. *Griggs* statistics are used to show the impact on the people. *Olech* statistics focus on the class, not on the impact. Further, unlike disparate impact where there need not be any intentional or overt action, in the eminent domain context, the intentional action clearly is the eminent domain proceeding. While seemingly similar, these approaches are fundamentally different.

The disparate impact analysis came under intense scrutiny in the recent landmark civil rights case, *Ricci v. DeStefano.*[222] Although the Supreme Court deferred decision on whether the disparate analysis impact violates the Constitution,[223] Justice Scalia's concurrence sounded the clarion call. Like Jacob's vision of the ladder, Justice Scalia's concurrence warned of "the evil day on which the Court will have to confront the question" of "[w]hether, or to what extent, . . . the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 [are] consistent with the Constitution's guarantee of equal protection."[224] The class of one claim proposed in this Article resides outside the scope of Justice Scalia's entreaty, and will remain unscathed in the "war between disparate impact and equal protection [that] will be waged sooner or later."[225]

C. ELEMENT 2—ESTABLISH INTENTIONAL DIFFERENTIAL OR UNEQUAL TREATMENT

After defining the class, the plaintiff must establish that he was intentionally treated differently than a similarly situated plaintiff.[226] In some contexts, "the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high."[227] The Supreme Court in *Engquist* further explained this standard:

222. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

223. *Id.* at 2676 ("[B]ecause respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.").

224. *Id.* at 2682 (Scalia, J., concurring).

225. *Id.* at 2683 (Scalia, J., concurring).

226. Whiting v. Univ. of S. Miss., 451 F.3d 339, 348 (5th Cir. 2006) ("For a 'class of one' to withstand summary judgment, [the plaintiff] must have established a genuine question of material fact as to whether . . . she 'was intentionally treated differently from others similarly situated.'" (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam))).

227. Neilson v. D'Angelis, 409 F.3d 100, 104 (2nd. Cir. 2005), *overruled by* Appel v. Spiridon, 531 F.3d 138 (2d Cir. 2008) (overruling *Neilson* only to the extent that it conflicts with *Engquist v. Or. Dept. of Agric.*, 128 S. Ct. 2146 (2008)).

> When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment."[228]

Many courts stress that people are similarly situated when the plaintiffs are "prima facie identical."[229] However, such stringent tests are generally applied in the employment context, and no standard has been specifically adopted for similarly situated homeowners in a class of one analysis.

Olech referred to the similarly situated standard in the context of those "intentionally treated differently from others similarly situated."[230] This broad definition suggests that "similarly situated" is a self-defining term without reference to external considerations, giving the lower courts wide latitude.[231] Some courts have been willing to relax the "similarly situated standard" in *Olech* claims. In *Kiser v. Naperville Community Unit*, the court considered the case of a plaintiff who was fired from his job as an attorney for the school district.[232] The defendant moved to dismiss, arguing that the plaintiff did not establish that other similarly situated lawyers worked for the school district, and thus, failed to state an equal protection claim.[233] The court rejected this reasoning, holding that in the pleading stage, a plaintiff need not explicitly establish similarly situated groups because "[t]he potential relevance of other lawyers is obvious from the complaint."[234] It is possible that, in light of *Olech*, courts will adopt a looser standard to prove differential treatment.

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228. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146, 2153 (2008) (citing *Olech*, 528 U. S. at 564).

229. *E.g.*, Goldfarb v. Town of W. Hartford, 474 F. Supp. 2d 356, 366-67 (D. Conn. 2007) ("In order to succeed on a 'class of one' claim, the level of similarly between plaintiffs and persons with whom they compare themselves must be extremely high." (quoting *Neilson*, 409 F.3d at 105)); Inturri v. City of Hartford, 365 F. Supp.2d 240, 251 (D. Conn. 2005) (holding that, to be considered similarly situated, "employees must be similarly situated in all material respects"); Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002) ("In order to succeed, the [plaintiffs] must demonstrate that they were treated differently than someone who is *prima facie* identical in all relevant aspects.").

230. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

231. *Classes, Persons, Equal Protection and* Olech, *supra* note 118, at 412.

232. Kiser v. Naperville Cmty. Unit, 227 F. Supp. 2d 954, 959-60 (N.D. Ill. 2002).

233. *Id.* at 972.

234. Kiser v. Naperville Cmty. Unit, 227 F. Supp. 2d 954, 959-60 (N.D. Ill. 2002).

In *Olech*, while the Village required a fifteen-foot easement to facilitate a sewage hookup, it requested a thirty-three foot easement from Grace Olech.[235] Thus, the similarly situated homeowner would be a neighbor who only had to provide a fifteen-foot easement as opposed to a thirty-three foot easement. To again use *Kelo*[236] as an example, the plaintiffs could have brought suit as a class of homeowners. To establish differential treatment, the New London homeowners could have shown that other homes of almost the exact same value in very similar locations were not designated for condemnation. In New London, the Italian Dramatic Club, where many of the local politicians fraternized, as well as many private residences that were quite close to Susette Kelo's home, were spared from the eminent domain bulldozer.[237] Establishing that the decision to treat similarly situated houses differently—whether it was made without or without malice—would satisfy the second element of this test.

D. Element 3—Show That the Government Acted Irrationally

Once the plaintiff has defined the class and established that he was intentionally treated differently than a similarly situated homeowner, he must satisfy the action under appropriate standard of review. Class of one claims are likely not based on a suspect or quasi-suspect class, and as such are subject to rational basis review.[238] To defeat the traditional presumption of government rationality, the plaintiff must show that the government acted arbitrarily or irrationally.[239] The courts have defined "arbitrary" to mean "without adequate determining principle . . . [or] [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned," and "capricious" to mean "apt to change suddenly; freakish; whimsical; humorsome."[240] Challenging an eminent domain decision post-*Kelo* under the rational basis test is an arduous, if not impossible, barrier to recovery. An *Olech*-type claim, by contrast, is to be judged as irrational is not the decision to take the property for a public use

235. Vill. of Willowbrook v. Olech, 528 U.S. 562, 563 (2000) (per curiam).

236. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

237. *Telling the* Kelo *Story–Jeff Benedict's* Little Pink House, Posting of Ilya Somin to The Volokh Conspiracy, http://volokh.com/posts/1235208323.shtml (Feb. 21, 2009 3:25 CST).

238. *Vill. of Willowbrook*, 528 U.S. at 564 ("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.").

239. *See* discussion *supra* notes 83-87 and accompanying text.

240. United States v. Carmack, 329 U.S. 230, 243 n.14 (1946) (internal citations omitted).

as that standard is very broad under *Kelo*.[241] What should be judged for rationality is the decision *where* to take the property, and whether that choice is arbitrary or irrational.

This determination must be distinguished from a query regarding the necessity of the taking. In federal courts, challenges to the necessity of the taking almost always fail.[242] The *Olech* question is not asking whether the taking is *necessary* to achieve a certain public purpose, but rather scrutinizes the decision to take the *particular plot* of property. This inquiry would not question whether the City of New London *needed* to take Susette Kelo's home to improve the economic development of the area. Rather, the inquiry would be to question the choice to take Susette Kelo's home, as opposed to other similarly situated properties. This query cuts to the heart of equal protection jurisprudence.

Under the traditional rational basis test, it is very difficult, if not impossible, to conceive of irrational decisions. An example of an irrational decision may possibly include the choice to condemn a home on top of a mountain to build a rehabilitation facility for quadriplegic patients, while a similarly situated property was available at sea level. Another example would be taking a homeowner's property to build a community garden, sited on a former toxic waste dump, while a similarly situated property had fertile soil. These hyperboles are simply intended to illustrate that, under traditional rational basis review, most decisions will be upheld as rational.[243]

However, the Supreme Court in certain instances has adopted a form

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241. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

242. *See, e.g.*, United States v. 80.5 Acres of Land, More or Less, in Shasta County, State of Cal., 448 F.2d 980, 983 (9th Cir. 1971). The Ninth Circuit said:

> Once an administrative agency designated by Congress has been delegated authority to take lands for a public use, courts have no jurisdiction to review action of that administrative agency in its determination as to the parcels of land that are or are not necessary to the project. The *necessity* of taking or appropriating private property for public use is legislative in nature and one over which courts lack jurisdiction.

Id. (emphasis added); Kaw Valley Drainage Dist. of Wyandotte County, Kan. v. Metro. Water Co., 186 F. 315, 319 (8th Cir. 1911). According to the Eighth Circuit,

> [t]he power of eminent domain is one which the state may exercise for any public purpose. Whether the purpose for which property is sought to be taken and used be a public one is undoubtedly the subject of judicial determination in a proper case. If the use be a public one, and it is here, whether the necessity for the taking exists is exclusively within the province of the Legislature of the state to say; such necessity may be determined by a direct legislative enactment, or its determination may be by the Legislature delegated to some officer or board. The question of the necessity is not necessarily one of a judicial character.

Id.

243. The government could rationally argue the patients would get cleaner air atop the mountain, and that they have an interest to rehabilitate the former toxic waste dump to improve the local environment.

of heightened rational basis scrutiny. The next section discusses cases where the Court has adopted a more searching form of rational basis review, and posits several justifications why this heightened form of scrutiny should be applied for eminent domain takings for private development that affects a class of one.

E. HEIGHTENED SCRUTINY WARRANTED BECAUSE GOVERNMENT HAS GREATEST INCENTIVE TO TAKE THROUGH THE PATH OF LEAST RESISTANCE

The appropriate standard of review for a class of one claim is the rational basis test. However, considering footnote four of *Carolene Products*[244] and the representation reinforcement theory of constitutional law, many *Olech* classes of one could be considered "discrete and insular minorities" that need extra protection to secure their rights.[245] As such, this

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244. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Footnote four says:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id.

245. For criticisms of the constitutionality of footnote four, see RANDY BARNETT, RESTORING THE LOST CONSTITUTION THE PRESUMPTION OF LIBERTY (2005). These concerns are not raised by using footnote four to provide greater scrutiny of government action. For a discussion of the Supreme Court's regular citations to footnote four to provide great scrutiny of government actions, but scarce citations to footnote four to bifurcate and denigrate unenumerated rights, *See* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the State*, 8 Geo. J.L & Pub. Policy 1, 71-75 (2010), *available at* http://ssrn.com/abstract=1503583. Blackman and Shapiro noted:

> Nevertheless, a close inspection of the Supreme Court's use of [f]ootnote [f]our over the last seven decades suggests that it is the footnote itself that has been bifurcated, not the rights it comprehends. A search of every citation to [f]ootnote [f]our over the last 72 years reveals that the former provision, regarding minority rights, has been cited by the Supreme Court at least 23 times. These citations have primarily been used in cases dealing with race-based classifications, sex-based classifications, alienage classifications, age-based classifications, voting rights cases, and discrete and insular groups in need of assistance with the political process. The second provision, however, bifurcating our rights, has been cited sparingly by the Supreme Court. While cases from the 1930s through the 1970s routinely recognized the bifurcation of rights, during the last three decades, only Justice Stevens has used [f]ootnote [f]our to recognize this constitutional distinction. Other modern justices have seldom if ever discussed the bifurcation of rights and broad presumption of legislative constitutionality to the degree Justice Stone did. The Supreme Court's growing preference for the first part of [f]ootnote [f]our and the weakening of the second reflects an inherent tension in Stone's classic formulation. That is, the Court has narrowly construed the power-granting portion of

Article argues that in certain cases they are deserving of a heightened form of rational basis review to scrutinize the purposes behind the governmental action.

1. PROTECTING DISCRETE AND INSULAR MINORITIES

a. Footnote Four and Representation Reinforcement Theory

According to the late Professor John Hart Ely's "representation reinforcement" theory of the Constitution, courts should focus not on specific outcomes, but rather on assuring that all groups of people receive sufficient representation and access to the political and legislative processes.[246] Ely's theory built upon footnote four from *United States v. Carolene Products*, which grants judicial deference to the elected branch, unless the laws do harm to "discrete and insular minorities" that lack the political clout to intervene in the legislative process.[247] According to Ely, who did not trust the elected branches to protect the interests of citizens without political gravitas, judicial review should focus "only [on] questions of participation, and not with the substantive merits of the political choice under attack."[248] Ely viewed the Constitution as a means to police the process of representation.[249] The protection of specific substantive rights is irrelevant as long as "the opportunity to participate either in the political processes . . . or in the accommodation those processes have reached."[250] This theory lends itself very well to a class of one claim based on protecting the poor, uneducated, or minority homeowners that cannot easily challenge eminent domain condemnations.

b. Representation Reinforcement Theory and the Class of One

While the Supreme Court has adopted footnote four to provide heightened protection based on race, in order to be truly faithful to the representation reinforcement theory, the Court should protect all those who are "discrete and insular," regardless of a person's inherent attributes. Although "discrete and insular" originally was treated as referring only to racial minorities, it has grown to include other groups that satisfy

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> [f]ootnote [f]our, while broadly construing the liberty-granting portion. It is thus [f]ootnote [f]our itself that has been bifurcated, rather than the rights it discusses. The provisions that enhance liberty have been dutifully cited, while those restricting liberty have been minimized.

Id.

246. *See* ELY, *supra* note 13, at 77-88.

247. *Id.* at 75-77 (citing United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938)).

248. *Id.* at 181.

249. *Id.* at 73.

250. *Id.* at 77.

appropriate criteria and lack access to the political channels.[251] This group should include those who are poor and lack an education.[252] In recent years, the Supreme Court has reaffirmed and heeded Justice Harlan's prescient call from *Plessy v. Ferguson*[253] that the Constitution should be color-blind.[254]

The continued relevance and vitality of the conventional definition of footnote four is questionable.[255] The redefined definition of discrete and insular minorities this Article proposes comports with that philosophical shift of the modern Supreme Court's equal protection jurisprudence, as well as the evolution of our society and culture. Footnote four speaks to discrete and insular minorities, not just racial minorities. The focus should be on whether these people have access to the political process, not their skin color. To be consistent with footnote four, poor and uneducated citizens,

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251. While Justice Stone accurately characterized certain racial minorities in his time as discrete and insular, the fact remains that today, President Obama holds the highest office in the land. While the ultimate goal of racial equality and color-blindness is still a dream of the hopefully not-so-distant future to which society should continually strive, such a historic accomplishment, that was once unthinkable, is a reality today.

252. *See* Carreira, *supra* note 122, at 348-49. Carreira notes that

> the widespread belief that the Equal Protection Clause protects individuals as members of groups who historically have experienced prejudice or, in the words of *Carolene Products*, are 'discrete and insular minorities,' generally corresponds to the belief that these groups either are vulnerable or otherwise unable to defend themselves by means of the political process.

Id.

253. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is *color-blind*, and neither knows nor tolerates classes among citizens." (emphasis added)), *overruled by* Brown v. Bd. of Educ. of Topeka, Shawnee County, Kansas, 347 U.S. 483 (1954) (overruling *Plessy*'s separate but equal doctrine).

254. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). Scalia's concurrence said, in part:

> [T]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id.; *Id.* at 241 (Thomas, J., concurring). Justice Thomas opined:

> But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.

Id.

255. Accordingly, it may be necessary to rethink footnote four for the twenty-first century. *See* Blackman & Shapiro, *supra* note 245, at 70-75 (2010), *available at* http://ssrn.com/abstract=1503583.

who lack political clout, should be given a higher level of scrutiny than those who have the skills, time, and resources to seek rents and game the political system. Enabling a class of one claim should "widen[] the scope of vulnerable parties to include a person as a person" beyond traditionally recognized minority groups.[256]

That the Court has stepped in and applied heightened intermediate scrutiny for women and illegitimate children, even where "discreteness" and "insularity" were not applicable, shows that the Court recognizes the "broader understanding of *Carolene Products*" as "the attributes of vulnerability and experience of prejudice endure as justifications for judicial intervention."[257] As Bruce Ackerman argues, "the organizational weaknesses of anonymous or diffuse groups make them more disadvantaged in pluralist bargaining, all else remaining equal, than the groups upon whom *Carolene* courts have focused their concern."[258]

Further, footnote four also seeks to provide enhanced protection for "legislation [that] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments."[259] Since the Takings Clause is within a specific prohibition in the first ten Amendments, and private property is a fundamental building block of our republic,[260] footnote four suggests that claims arising under that prohibition should warrant heightened scrutiny.[261] Following the deferential standard announced in *Kelo*,[262] however, that rationale is greatly weakened, footnote four notwithstanding.

c. Poor, Uneducated, and Minority Homeowners Represent The Path of Least Resistance

Citing footnote four and referring to Ely's reinforcement theory, Justice Thomas observed that the poorest members of society, who are

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256. Carreira, *supra* note 122, at 349.

257. *Id.* at 348-49 n.81.

258. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 735 n.40 (1987).

259. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

260. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting) ("Long ago, William Blackstone wrote that the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property. The Framers embodied that principle in the Constitution, allowing the government to take property not for public necessity, but instead for public use." (internal quotations and citations omitted)).

261. *See also* Josh Blackman, *Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty: An Originalist Critique of the* Heller *Dissents and Judges Posner's and Wilkinson's Unoriginalist Assault on the Liberty to Keep and Bear Arms* (Dec. 19, 2008), http://ssrn.com/abstract=1318387 (arguing that pursuant to footnote four of *Carolene Products*, the Second Amendment should receive heightened protection because it is in the Bill of Rights).

262. *Kelo*, 545 U.S. 469.

more likely to have their property taken by eminent domain, are "the least politically powerful."[263] Justice Thomas concluded, that "[i]f ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects."[264] Similarly, Justice O'Connor recognized that "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" can easily victimize the weak.[265]

Professor Boudreaux argues that poor people deserve heightened protection for two reasons: (1) the poor are less able to lobby local governments and influence choices to take certain properties (a public choice analysis), and as a result, (2) to maximize tax revenues and minimize expenditures, the homes of poor families are highly likely to be targeted for eminent domain.[266] This section explores how poor homeowners' inability to engage in the political process and *Kelo*'s perverse incentive to replace homes with businesses that can generate more revenues triggers Professor Ely's concerns to help reinforce their representation.

d. Using Eminent Domain for Economic Development

Governments will target the poorest homeowners, as they represent the path of least resistance and can be replaced with properties that can generate more revenue for the community.[267] The poorest citizens, those who represent the path of least resistance for property developers,[268] "are

263. Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

264. *Id.* at 521-22 (Thomas, J., dissenting) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

265. *Id.* at 505 (O'Connor, J., dissenting); *see also* Boudreaux, *supra* note 40, at 6. Boudreaux proposes that

> eminent domain should be impermissible in those instances in which government takes the homes predominantly of poorer persons, and then transfers the land to private parties. In these cases, we have strong reason to suspect that the targets of eminent domain did not get adequate representation in the legislative and administrative branches of government. A tougher standard for eminent domain and 'public use' should focus on trying to ensure that poor persons are not forced to lose their homes simply because they are poor.

Id.

266. Boudreaux, *supra* note 40, at 50.

267. Brief of NAACP et al., *supra* note 25, at 11 ("Condemning authorities target areas with low property values because it costs the condemning authority less (as market value is the measure of 'just compensation') and the state and/or local governments gain financially when they replace areas with low property values with those with higher values."); *see also* Imperatore, *supra* note 53, at 1034 ("Those who are impoverished and politically powerless, likewise, are the least likely to resist successfully the use of eminent domain.").

268. Boudreaux, *supra* note 40, at 47 ("[L]ocal officials have 'no apparent interest in attending' to the needs and wishes of the poor.") (citing ELY, *supra* note 13, at 151).

quintessential 'outs' in local government decision making."[269] Factoring in the large statistical overlap between "poor" and "minority" homeowners, tragically the burden of eminent domain disproportionately falls on those least prepared to fight it. The *Kelo* standard, which considers increasing the potential tax base of a community to be a public use, "encourages government to choose too readily the places where lower income people live as the location for new projects that can be accomplished through eminent domain, because taking those places is less costly."[270]

Justice Thomas recognized that the poorest members of society cannot generate as much revenue as wealthier members, as they are "less likely to put their lands to the highest and best social use."[271] With the power of eminent domain, poor homeowners can be tossed out of their "blighted" residences to make way for more wealthy homeowners or taxpayers.[272] Allowing the government to condemn properties for private development "relegates rent seekers to preying upon the poorest and least politically connected segment of society" where the property can be taken with the least costs.[273]

Following *Kelo*, "local governments are encouraged not only to use eminent domain to shape the climate for business, but also to try to shape the composition of their citizenry."[274] This objective often manifests in the form of "exclusionary zoning," which jettisons poor home owners by limiting more affordable housing (apartments, group homes, etc.) and encourages wealthier home owners to move in by constructing more expensive housing.[275] It is not rational to consider the needs or desires of the poor when the government's permissible objective is to increase the tax base.[276] Evidence exists that "localities across the nation are using eminent

269. *Id.* (quoting ELY, *supra* note 13, at 20 (stating that the law should protect the "outs" from the tyranny of the "ins")).

270. J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 151 (2005).

271. Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

272. Boudreaux, *supra* note 40, at 19; Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 N.W. U. L.REV. 1931, 1941 (2007) [hereinafter *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor*] ("[R]eal-world blight condemnations frequently harm the poor, often benefiting wealthy or middle class interests at their expense." (citing David Dana, Colloquy, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 381-82, 370 (2007) ("But blight nonetheless does connote poor, especially urban and poor, and it decidedly does not connote wealthy or prosperous."))).

273. Byrne, *supra* note 270, at 141.

274. Boudreaux, *supra* note 40, at 19.

275. *Id.*

276. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 (5) J. POL. ECON. 416 (1956), *available at* http://www.unc.edu/~fbaum/teaching/PLSC541_Fall08/tiebout_1956.pdf.

domain to discourage poor residents and to encourage the affluent, either through attractive (and high-priced) housing stock or retail facilities that both pay high taxes and attract an affluent clientele."[277]

e. Poorest Homeowners Lack Political Clout to Engage in Political Process

According to the NAACP's amicus brief in *Kelo*, "[t]he reason [minorities, the poor, and the elderly] are disproportionately affected is that they are palatable political and economic targets. Condemnations in predominately minority or elderly neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action."[278] In Professor Wendell Pritchett's study of blight, he observed that findings of blight in many cases are "prefabricated" in that the government chooses land that will be most profitable, whether or not it is actually run down, and is easiest to take because it is occupied by poor minorities with little political clout to oppose the taking.[279] Further, poor citizens suffer from collective action problems, as they lack the time and resources to organize and challenge eminent domain proceedings, such as through grass roots activism or legal challenges.[280] These are the people Professor Ely sought to protect. More affluent homeowners have less difficulty with this process, as they can more easily lobby the legislature, arouse the media's interest, and if necessary, engage in protracted and costly litigation.[281]

Ely considered poor people to be especially deserving of additional protections.[282] Today, few laws discriminate based on racial categories, so it "remains a challenge to apply Ely's theory to strengthen the claims of other categories of persons who deserve to have their representation

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277. Boudreaux, *supra* note 40, at 20.

278. Brief of NAACP et al., *supra* note 25, at 11 (citing Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 435-36 (1983)).

279. *See* Pritchett, *supra* note 20, at 33.

280. Imperatore, *supra* note 53, at 1034. Imperatore notes:

> [T]hose displaced through blight removal often lack the resources necessary to combat their plight through the political process. Impoverished minorities displaced by urban-renewal projects may suffer from a collective-action problem in mounting resistance to eminent domain. In the midst of declining property values, poor property owners have little incentive to improve their properties, let alone to contest the determinations of municipal agencies.

Id.

281. Boudreaux, *supra* note 40, at 43 ("A rule of eminent domain that requires courts to scrutinize economic claims is, moreover, likely to be most beneficial to those parties that hold the financial resources necessary to marshal expert witnesses and complicated data inherent in such challenges.").

282. *See* ELY, *supra* note 13, at 161-62.

reinforced."[283] As Ely did not trust the political process to "decide who stays out," he argued that the courts should "unblock[] stoppages in the democratic process."[284] Ely felt that courts had a distinct role to "protect those who can't protect themselves politically."[285]

f. *Olech* Can Minimize Effects of Rent Seeking

The main goal of representation reinforcement "is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[286] This aim healthily describes the dynamic between poor, uneducated, and minority homeowners, eager rent-seeking interest groups, and the complicit rent-providing legislatures who seek to turn a low tax-base community into a high tax-base community. In such instances, the interests of the poor homeowners are not being represented in the process and deserve additional considerations.[287]

The now infamous condemnation of the Poletown neighborhood of Michigan to build a factory for General Motors (GM) serves as a veritable case study of rent seeking and eminent domain for private development.[288] Historian John Bukowczyk remarked that GM "'exerted a disproportionate, indeed, a determinant influence upon the public policy process.'"[289] As Bukowczyk described it, "'the game was rigged' in GM's favor" as GM had captured the political process.[290] As Professor Somin has noted "there are three major reasons why economic development takings are especially vulnerable to this threat: the nearly limitless applicability of the development rationale [post-*Kelo*, this rationale is infinitely limitless], severe limits on electoral accountability caused by low transparency [of certain voters], and time horizon problems."[291] By faithfully applying

283. Boudreaux, *supra* note 40, at 46.

284. ELY, *supra* note 13, at 117, 120.

285. *Id.* at 152.

286. *Id.* at 151.

287. *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor*, *supra* note 272, at 1941 ("[R]eal-world blight condemnations frequently harm the poor, often benefiting wealthy or middle class interests at their expense.") (citing Dana, *supra* note 272, at 370, 381-82 ("But blight nonetheless does connote poor, especially urban and poor, and it decidedly does not connote wealthy or prosperous.")).

288. *See, e.g.*, Adam Mossoff, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock, 2004 MICH. ST. L. REV. 837 (2004).

289. Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock, *Economic Development Takings, and The Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1021 (2004) (quoting John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood:* Poletown v. G.M. *and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 70 (1948)).

290. *Id.*

291. Somin, *supra* note 289, at 1021.

representation reinforcement methodologies discussed previously, the quantum of economic development takings can be decreased, and thus the effects of rent seeking, even in the context of eminent domain, can be minimized.

g. *Olech* Can Protect Those Most Vulnerable

Olech, when used to protect poor homeowners victimized by eminent domain abuse, comports with footnote four, as it enables the courts to focus on cases where the political process fails those most vulnerable, even if they do not fall into a traditionally recognized suspect class.[292] Further, scholars intimate that because the *Olech* Court did not reach the subjective ill will theory[293] "the narrower use of animus . . . rejected by the Court in *Olech*, [may have] usher[ed] in a tightened rational basis standard."[294] Although the Equal Protection Clause "became associated with the protection of suspect classes, its allowing class of one claims is nonetheless vindicated to the extent it draws attention to the need for court intervention when political processes are unlikely to work."[295]

Professor Davidson argues that footnote four analyses do not lend themselves well to a regulatory takings analysis, where differentially burdened property holders trigger heightened scrutiny.[296] But even Professor Davidson acknowledges that "the political economy of a robust equality dimension in regulatory takings law stands in sharp contrast to the patterns often seen in the direct exercise of eminent domain."[297] Therefore, in light of the fact that *Olech* enables a plaintiff to state a class of one claim due to his lack of wealth, lack of access to the political process, or lack of education, the courts are enabled to protect those homeowners most deserving of protection from eminent domain abuse.

2. Rational Basis With Bite

Having established why the Court should apply a heightened standard of review for *Olech* claims that burden those without access to the political

292. Carreira, *supra* note 122, at 349 ("Although the *Carolene Products* footnote became associated with the protection of suspect classes, its allowing class of one claims is nonetheless vindicated to the extent it draws attention to the need for court intervention when political processes are unlikely to work.").

293. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam).

294. Carreira, *supra* note 122, at 362.

295. *Id.* at 348-49 ("Recognizing class of one claims does not question the vulnerability of members of minority groups who historically have experienced prejudice; instead, it implicitly widens the scope of vulnerable parties to include a person as a person.").

296. *See* Davidson, *supra* note 196, at 38-44.

297. *Id.* at 43.

process, this section will explain what that standard of review should be in the eminent domain context. In two prominent cases, the Supreme Court has struck down legislation, even though the law was only subject to a rational basis review, by engaging in a heightened form of review. This focused review is commonly referred to as rational basis with bite. This Article proposes adopting this enhanced rational basis review for *Olech* claims affecting poor, uneducated, and minority homeowners targeted for eminent domain abuse.

a. *City of Cleburne v. Cleburne Living Center*

In *City of Cleburne v. Cleburne Living Center*, the Court considered the city's denial of a special use permit for the operation of a home for mentally disabled patients.[298] The relevant zoning ordinance required a special use permit for "hospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions."[299] The Center brought suit under Section 1983, alleging that the zoning ordinance violated its equal protection rights as applied to the residents of the home, because as other similarly situated properties were not denied the permit.[300] The Supreme Court considered the case using the rational basis test and held that mentally disabled patients were not a suspect class warranting heightened scrutiny.[301]

Historically, once the Court establishes that a class is not suspect, the rational basis test applies, and the Court then attempts to find a way to uphold the law.[302] However, rather than engaging in the traditional rational basis analysis, the *Cleburne* Court actively scrutinized the City's proffered reason for treating the home differently than other similarly situated institutions within the zoned area.[303] By engaging in a "searching inquiry" into the reasons why the City denied the permit, the Court departed from

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298. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

299. *Id.* at 436.

300. *Id.* at 437.

301. *Id.* at 442-43.

302. *See generally* Clark Neily, *No Such Thing: Litigating Under The Rational Basis Test*, 1 N.Y.U. J. L & LIBERTY 897 (2005).

303. *Id.* at 458 (Marshall, J., dissenting) (noting that the Court engaged in a "probing inquiry"); *see also* Richter, *supra* note 207, at 245; Sean C. Doyle, Note, *HIV-Positive, Equal Protection Negative*, 81 GEO. L.J. 375, 403 (1992). Doyle says:

> First, the Court did not search its collective imagination to find 'any' rational relationship to a legitimate state interest. On the contrary, the *Cleburne* Court carefully explained only the reasons proffered by the legislature for treating the mentally retarded differently from fraternities, sororities, nursing homes, and the like with respect to special use permits. . . . Second, the Court . . . required a high degree of correlation [between the classification and the purpose of the ordinance].

Id.

the traditional deference accorded to the government under rational basis analyses.[304] Ultimately, the Court struck down the zoning ordinance as unconstitutional, finding no rational basis behind the statute, as it was based on "irrational prejudice against the mentally retarded."[305]

Mentally handicapped people are prototypical victims in need of protection by footnote four and representation reinforcement theory. Due to their handicap, which does not give rise to a suspect class, they are comparatively uneducated, lack access to political channels, and possess little to no clout to effectuate the changes. Although the Court did not cite these theories, implicit in their finding for mentally handicapped patients is, for lack of a better word, *empathy* for the patients and their situations.

b. *Romer v. Evans*

The Court applied a similar form of heightened scrutiny in *Romer v. Evans*.[306] Colorado passed an amendment to its constitution that prevented government action to protect homosexuals against discrimination.[307] Even though sexual orientation is not a suspect class warranting heightened scrutiny, the Court engaged in a searching inquiry. The Court observed that "'[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"[308] The *Romer* Court noted that the fact that the amendment focused solely on homosexuals created an "inevitable inference" that the law was motivated by an impermissible animus.[309] Because passing a law to the detriment of a single unpopular group is not a valid governmental interest, the Supreme Court struck the Colorado amendment down as violating the Equal Protection Clause of the federal Constitution, as it did not have a rational relationship to a legitimate governmental end.[310] The *Romer* Court closely scrutinized the justifications behind the Colorado constitutional amendment, and in contrast to conventional rational basis standards, looked "beyond any conceivable rational basis to evaluate the motivations behind the amendment."[311] Like in *Cleburne*, even though the class was not suspect, the Court did not grant the legislature the traditional deference given under rational basis review and struck down the

304. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459-60 (1985) (Marshall, J., dissenting).

305. *Id.* at 450.

306. Romer v. Evans, 517 U.S. 620 (1996).

307. *Id.* at 635-36.

308. *Id.* at 633 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928)).

309. *Romer*, 517 U.S. at 634.

310. *Id.* at 635-36.

311. *See* Richter, *supra* note 207, at 251.

amendment.[312]

c. How to Apply Heightened Scrutiny in Olech Claims

Justice Kennedy's concurring opinion in *Kelo* sheds some light on how to apply a form of heightened scrutiny in eminent domain takings for private development in *Olech* claims.[313] Although *Kelo* announced a very deferential standard, Justice Kennedy's influential concurring opinion alludes to specific instances where a heightened standard of review should apply:

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.[314]

Justice Kennedy does not suggest that a heightened scrutiny need apply simply because the taking is for private development. Rather, heightened scrutiny should apply when the taking is tainted because it benefits a favored party. This reasoning can be extended to the class of one. That Justice Kennedy focuses on transfers that directly favor private parties at the expense of insular homeowners who lack political clout comports with the reinforcement representation theory. This situation can occur when a specific homeowner or group of homeowners that lack access to the political process is singled out and treated differently than similarly situated homeowners. In many respects, these "[s]ingled out private parties are less likely to influence the political process and hence are more vulnerable" to state action that benefits private parties.[315]

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312. *See Romer*, 517 U.S. at 640 (Scalia, J., dissenting) ("The Court's entire novel theory rests upon the proposition that there is something *special*—something that cannot be justified by normal 'rational basis' analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.").

313. *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

314. *See id.* at 493 (2005) (Kennedy, J., concurring) (internal citations omitted). *But see* E. Enters. v. Apfel, 524 U.S. 498, 549-50 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause).

315. Carreira, *supra* note 122, at 349; *see also* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344-48 (1991).

Justice Kennedy directly cited the rational basis with bite approach taken in *Cleburne*, analogizing this approach to his proposed heightened level of scrutiny in *Kelo*:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.[316]

Much like *Cleburne* focused on mentally handicapped patients and *Romer* focused on discriminated-against homosexuals—neither suspect classes—courts should similarly consider poor, minority, or uneducated homeowners excluded from the political process who cannot effectively challenge majoritarian politics that directly limit their property rights. Therefore, adopting a heightened form of scrutiny in such cases comports with the logic behind Justice Kennedy's significant concurring opinion.

For example, to adopt the reasoning in *Cleburne*, if a community redevelopment board decided to condemn a group of houses that were inhabited by poor homeowners who could not effectively challenge the taking, but spared other similarly situated homes where the residents were wealthier, had access to the political process, and could put up a strong fight, the heightened standard of rational basis review would be triggered. Or, to adopt the reasoning in *Romer*, a taking focused exclusively on poor homeowners who lack the funds to litigate in court and are likely to accept the condemnation without a legal challenge, while the board avoids taking similarly situated homes owned by more affluent citizens, may also trigger the heightened rational basis review. That is not to say that the taking would be invalidated. Rather, the Court would provide a meaningful review to consider the specific circumstances and the government's justifications for the action.

Because the analyses used in both *Cleburne* and *Romer* are considered rational basis approaches, and the Court in *Olech* specifically stated that class of one suits are adjudged under the rational basis approach,[317] a heightened form of scrutiny in this context fits snugly into modern equal

316. Kelo v. City of New London, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47, 450 (1985)).

317. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) ("[S]uccessful equal protection claims brought by a 'class of one' [have been recognized] 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.").

protection jurisprudence.[318]

F. REMEDY

When a plaintiff seeks to challenge a condemnation of property under Section 1983, the desired remedy is likely to be injunctive relief to block the taking.[319] In Fifth Amendment takings cases, because lucrative monetary damages are not involved, poor homeowners have difficulty obtaining counsel to protect their property rights. However, under Section 1983, plaintiffs can also seek monetary damages.[320] This could attract attorneys to serve on a contingent-fee basis and enable those who are most in need of legal representation to be able to challenge the taking in court.[321] Also, Section 1988 can be used as a corollary to Section 1983 to award attorney fees, thus giving civil rights plaintiffs greater options for counsel and representation by public interest law firms.[322]

V. CONCLUSION

By strengthening *Olech* as a means to fight against arbitrary land use decisions, property rights can be fortified, as the government will be more wary about seeking to take property without valid rationales. On some level, especially for those who may agree with *Kelo*, this approach may potentially diminish the ability of the government to use eminent domain for private development. If the government has a harder time taking the property of poor homeowners, will this hinder or cripple the community's ability to develop and renew? Not likely.

As Justice Stevens observed in his dissent in *Engquist*, "[p]resumably the concern that actually motivates today's decision is fear that governments will be forced to defend against a multitude of 'class of one' claims unless the Court wields its meat-axe forthwith."[323] Justice Stevens sagaciously advises the Court that

> [e]xperience also demonstrates that there are in fact rare cases in which

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318. *See* Baumgardner v. County of Cook, 108 F. Supp. 2d 1041, 1055 (N.D. Ill. 2000) ("[A]lthough the *Cleburne* and *Romer* cases addressed government policies regarding entire classifications, . . . the test applies equally to individual actions taken by government officials against individuals who are members of a particular classification."); *see also* Richter, *supra* note 207, at 251-52.

319. Imperatore, *supra* note 53, at 1055.

320. 42 U.S.C. § 1983 (2006).

321. *See* ROBERT G. DREHER & JOHN D. ECHEVERRIA, KELO'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT 42 (2006).

322. 42 U.S.C. § 1988 (2006).

323. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146, 2160 (2008) (Stevens, J., dissenting).

> a petty tyrant has misused governmental power. Proof that such misuse was arbitrary because unsupported by any conceivable rational basis should suffice to establish a violation of the Equal Protection Clause without requiring its victim also to prove that the tyrant was motivated by a particular variety of class-based animus.[324]

In other words, the sky is not falling. In the rare event that a government official abuses his authority, the class of one will stand to protect a citizen's property. Otherwise, the government can carry on business as usual.

This framework will not open the floodgates for litigation, nor will it put a dike in the deluge of takings. The plaintiff will still need to establish the class, show that he was treated differently than similarly situated citizens, and get past the rational basis test. The rational basis test, even if applied with bite, is still almost always fatal to the plaintiff's claims. The Sovereign could still engage in the power of eminent domain, but would have to do so in a "manner that did not disproportionately harm the poorer citizens of the community."[325] Through this approach, homeowners can now avail themselves of a novel alternative avenue to challenge these takings, and fight for equal protection from eminent domain.

324. *Id.* at 2161.

325. Boudreaux, *supra* note 40, at 51.

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