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Taking the Home of a Class of One And the Path of Least Resistance: How The Equal Protection Clause and Village of Willowbrook v. Olech Can Protect Homeowners from Eminent Domain Abuse

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How The Equal Protection Clause and Village of Willowbrook v. Olech Can Protect Homeowners from Eminent Domain Abuse

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Table of Contents

INTRODUCTION ........................................................................................................................................................... 1

I. Eminent Domain Takings for Private Development and Poor, Uneducated, and Minority Homeowners .............................................................................................................................................. 3
   A. Eminent Domain and Urban Renewal .................................................................................................................. 3
   B. Eminent Domain Takings for Private Development Takings Disproportionately Affect Poor, Uneducated, Minorities

II. Using The Equal Protection Clause and Section 1983 To Challenge Eminent Domain Takings For Private Development .............................................................................................................................................. 9
   A. The Equal Protection Clause ............................................................................................................................. 9
   B. Section 1983 ....................................................................................................................................................... 11
   C. Olech and the Equal Protection Claim for a Class of One .................................................................................. 11
      1. Background ................................................................................................................................................... 12
      2. Per Curiam Supreme Court Opinion ........................................................................................................... 12
      3. Justice Breyer’s Concurring Opinion ........................................................................................................... 13
      4. Success of Section 1983 Claims After Olech ............................................................................................... 14
      5. Is A Finding of Malice Required After Olech? ............................................................................................... 16

III. Elements of Viable Equal Protection Claim Against Eminent Domain Taking for Private Development Against a Class of One ............................................................................................................................................. 21
   A. Assumptions ....................................................................................................................................................... 21
      1. Malice Not Required Element of Olech .......................................................................................................... 22
      2. Qualified Immunity Not Barrier to Recovery ................................................................................................. 23
   B. Element 1 - Define the class ............................................................................................................................. 24
   C. Element 2 - Establish Intentional Differential or Unequal Treatment ................................................................ 25
   D. Element 3- Show Government Acted Irrationally ............................................................................................. 26
   E. Heightened Scrutiny Warranted Because Government Has Greatest Incentive To Take Through The Path of Least Resistance ............................................................................................................................................. 27
      1. Protecting Discrete and Insular Minorities ....................................................................................................... 27
      2. Rational Basis With Bite ..................................................................................................................................... 33
   F. Remedy ............................................................................................................................................................... 37

CONCLUSION ....................................................................................................................................................... 38
“Government is instituted to protect property. . . . This being the end of government.”

James Madison

“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.”

INTRODUCTION

In the landmark case of *Kelo v. City of New London*, the Supreme Court held that the government can use the power of eminent domain to take a person’s home for the purpose of private development that can perhaps improve the community’s economy. This case dealt a deathblow to property rights, and made challenging eminent domain takings for private development under the Fifth Amendment a daunting, if not impossible task. Because eminent domain takings disproportionately fall on poor, uneducated, minorities who lack access to the political process, *Kelo* greatly impacted the ability of the weakest parts of society to keep their own homes free from the path of the bulldozer. In this article, I propose a novel alternative avenue to challenge these takings.

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 Equal Protection clause. Prior to *Olech*, arguably, plaintiffs could only establish classes based on inherent characteristics, such as race or religion. However, after *Olech*, homeowners whose property is singled out for eminent domain, while other similarly situated properties are not, can establish a class of one (i.e., those whose homes are taken) and can bring suit to challenge the arbitrariness of the decision to take the property. While *Olech* has been used to challenge zoning and other land use restrictions, to date it has not been proposed as an means to challenge an eminent domain taking for private development. In this article, I advance the argument that an *Olech* claim is an essential mechanism to enable homeowners, especially poor, uneducated, minority citizens who cannot

1 James Madison, Property, Nat'l Gazette, Mar. 27, 1792, reprinted in 14 The Papers of James Madison 266 (Robert A. Rutland et al. eds., 1983).
2 Calder v. Bull, 3 Dall. (U.S.) 386, 388 (1798) (emphasis deleted).
4 See infra Part I. A.
actively participate in the political process, to challenge the differential treatment and rationality of an eminent domain taking for private development.

This article proceeds as follows. In Part I, I discuss the history of urban renewal. Urban renewal was a movement wherein governments used the broad power of eminent domain to condemn homes as blighted, and effectively, and perhaps intentionally, displace poor and minority homeowners. Today, although eminent domain takings are no longer motivated by racial animus, statistically the effects of this process disproportionately fall on the poor, uneducated minorities.

In Part II, I begin by explaining how suits are filed under the Equal Protection clause through 42 U.S.C. § 1983. Next, I explore Village of Willowbrook v. Olech in detail. Olech established 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 situated homeowners. In many cases following Olech, plaintiffs have had a very high success rate of challenging the rational basis test, even in the absence of proving governmental malice. 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. However, the Court did not impose a malice requirement on Olech claims.

In Part III, I develop the necessary elements of a viable equal protection claim challenging an eminent domain taking for private development under Olech. First, the plaintiff needs to 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 citizens. Third, the plaintiff must show that the decision to take the property was irrational. Relying on Justice Thomas’s dissent from Kelo, as well as Footnote Four of United States v. Carolene Products and Professor Ely’s representation reinforcement theory, I argue that the courts should apply a heightened form of

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9 See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
scrutiny to protect the interests of the poor, uneducated, minorities who lack access to the political channels. By applying standards using in *City of Cleburne v. Cleburne Living Center*\(^\text{10}\) and *Roemer v. Evans*,\(^\text{11}\) the courts can faithfully apply the principles behind Footnote Four, and help protect the most vulnerable members of society, and those most in need of protection against eminent domain.

I. Eminent Domain Takings for Private Development and Poor, Uneducated, and Minority Homeowners

Tragically, the victims of eminent domain takings for private development tend to be those least prepared to fight against it. Following World War II, a movement known as urban renewal led governments to take the homes of many inner city residents through the power of eminent domain. In many cases, this scheme was veiled as a means to eliminate blight, and rebuild better communities, but in reality displaced thousands of black families. In most cases the displaced poor owners could not afford the new more expensive properties, and were left homeless. Presently, though decisions to take property are (presumably) no longer based on race or income, statistically, the takings still have a disproportionate impact on minorities, as well as poor and uneducated homeowners, who lack the political clout to challenge the action.

A. Eminent Domain and Urban Renewal

Urban renewal was a term used to refer to the process of the government taking “blighted” properties in downtown areas through the power of eminent domain, displacing the resident population, and constructing commercial properties on that land.\(^\text{12}\) During a boom of redevelopment in the 1950s and 1960s, the population displaced was “disproportionately ethnic or minority communities and/or low-income.”\(^\text{13}\) Throughout the 1950s and 1960s over one

\(^{10}\) 473 U.S. 432 (1985).
\(^{11}\) 517 U.S. 620 (1996).
\(^{12}\) See e.g., Wendell E. Pritchett, *The “Public Meaning” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol’y Rev. 1, 33-34 (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 [in Chicago]”).
\(^{13}\) Dick M. Carpenter II, *Victimizing the Vulnerable*, Institute for Justice 4-5 (June 2007).
million people were dislocated through eminent domain takings, and the majority of the families were minorities.\(^{14}\)

During the 1950’s, urban renewal tended to mean “negro removal.”\(^{15}\) In many instances, urban renewal intensified racial segregation, and constrained the mobility of African-Americans.\(^{16}\) In order to implement an urban renewal plan, the government would designate minority neighborhoods “as blighted areas . . . for redevelopment . . . [and] the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.”\(^{17}\) This process “played a crucial role in redistributing urban populations and creating additional obstacles to efforts to achieve integration.”\(^{18}\) In 1950, “the Los Angeles City Planning Commission designated eleven areas as blighted, all but one of them had a population that was majority Mexican-American or African-American.”\(^{19}\) In Chicago in the 1940s, city planners designed twenty square miles as lighted, and this area almost entirely overlapped with Chicago’s “black belt” on the Southside.\(^{20}\)

In Chicago after World War II, elites fearing that the influx of black people would harm their real estate investments, joined with business leaders and nonprofit organizations to “renew” the areas downtown by removing the poor citizens and building properties appealing to middle-income citizens.\(^{21}\) 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.”\(^{22}\) 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

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14 Pritchett, supra note 12, at 47; See Raymond A. Mohl, Planned Destruction: The Interstates and Central City Housing, in From Tenements to the Taylor Homes 227 (John Bauman et al. eds., 2000).
17 Pritchett, supra note 12, at 6.
18 Id.
20 ARTHUR HILLMAN & ROBERT CASEY, TOMORROW’S CHICAGO 70 (1950).
21 Pritchett, supra note 12, at 34.
22 METRO. HOUSING & PLAN. COUNCIL, RECLAIMING CHICAGO’S BLIGHTED AREAS (1946).
where the bulk of property is resident owned, its taxes paid, and its maintenance above par.”

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.”

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.”

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. Justice Douglas upheld the taking under a broad interpretation of the public use clause of the Fifth Amendment, deferring to the government’s finding that the properties were blighted, but ignoring the racial implications.

In Berman, Justice Douglas noted that 97.5% of the renewal area was populated by “[n]egroes.” 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. Even more ironic, is Berman was argued shortly after the landmark school desegregation case, Brown v. Board of Education. 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.” Following Berman, by the 1960’s the once predominantly black neighborhood became a predominantly white neighborhood.

One of the leading discussions of the process of “urban renewal” was presented by Justice Thomas in dissent in Kelo. Approximately 63% of all families (177,000) who lost their

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25 Pritchett, supra note 12, at 47.
27 See Berman, 348 U.S. at 35-36 (courts will defer to the politician branches for decisions to invoke eminent domain).
30 Id.
31 Pritchett, supra note 12, at 47 (“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.”).
homes due to “urban renewal” between 1949 and 1963 were “nonwhite.” Justice Thomas noted that public work projects destroyed predominantly minority communities in St. Paul, Minnesota and Baltimore, Maryland during the 1950s and 1960s. Justice Thomas also recounted the famous eminent domain taking in Detroit, Michigan in 1981 to build a General Motors plant that displaced largely poor, minority, and elderly residents in the Poletown neighborhood. While ostensibly urban renewal projects were intended to benefit the communities, they have “long been associated with the displacement of blacks; ‘[i]n cities across the country, urban renewal came to be known as Negro removal.’”

B. Eminent Domain Takings for Private Development Takings Disproportionately Affect Poor, Uneducated, Minorities

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.” 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.”

Governments using the power of eminent domain for private development disproportionately impact poor, uneducated, and minority homeowners. Activist David H.

34 *Id.*
39 Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM, 689, 740-41 (1994) (“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
Harris, Jr. has identified eminent domain as a primary cause of the loss of property by African Americans.\textsuperscript{40} “Blight 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.”\textsuperscript{41}

By comparing census data from areas targeted for eminent domain, with those of the surrounding community, Dr. Carpenter of the Institute for Justice\textsuperscript{42} revealed how eminent domain abuse disproportionately impacts the poor, those with less education, and minorities.\textsuperscript{43} “Taken together, more residents in areas targeted by eminent domain-as compared in those in surrounding communities-are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and significantly more of them live at or below the federal poverty line.”\textsuperscript{44}

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

*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).

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.”).

\textsuperscript{40} See David H. Harris, Jr., \textit{The Battle for Black Land: Fighting Eminent Domain}, NBA NAT’L BAR ASS’N MAG., Mar.-Apr. 1995, at 12, available at 9-APR NBAM 12 (Westlaw).


\textsuperscript{42} The Institute for Justice (“IJ”) is a non-profit public interest law firm that litigates to secure economic liberty, school choice, private property rights, freedom of speech and other liberties. The Institutes strategic research program produces high-quality research to inform public policy on debates of issues central to IJ’s mission. Although IJ’s research should be viewed in light of their zealous advocacy for eminent domain abuse, their research is the most thorough and comprehensive in the literature, and I will rely on it with that caveat in this article.

\textsuperscript{43} Victimizing, \textit{supra} note 13, at 6.

\textsuperscript{44} Id.
Specifically, 58% of the population living in areas targeted by eminent domain are minority homeowners as compared with only 45% in surrounding communities. Those targeted by eminent domain have a median income less than $19,000 and 25% of them live at or below the poverty line. In surrounding communities, the median income is $23,000, and only 16% live below the poverty line. Finally, as a commentary 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 and other levels of higher education.

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. In San Jose, California, 95% of homes targeted for eminent domain are Hispanic or Asian-owned, despite the fact that only thirty percent of businesses are owned by minorities. When the city of Detroit condemned homes in the Poletown neighborhood to develop a plant for General Motors Corporation, most were elderly, retired, and Polish-American immigrants. In Atlantic City, 40% of homeowners in an area targeted for condemnation for economic redevelopment were Latino. In Mt. Holly Township, New Jersey, the government has selected for condemnation a community in which the Black (44%) and Hispanic Population (22%) was double that of the entire Township. This small sampling of numbers is not conclusive, but it shows a strong trend towards governments using the power of eminent domain focuses on communities consisting of the poor, uneducated, and minorities. Similarly, poor and minority citizens are also disproportionately affected by the decision of where to locate environmental hazard dumps.

45 V. Kolenc, Store Owners want to Stay, El Paso Times, 4/9/2006, 1E.
46 Id.
47 Id.
48 Id.
49 Id.
50 See Derek Werner Note: The Public Use Clause, Common Sense and Takings, 10 B.U. PUB. INT. L.J. 335, 350 (2002).
54 Vicki Been, What's Fairness got to do with it? Environmental justice and the siting of locally undesirable land uses, 78 Cornell Law Review 1001 (1993) (“Because local protest can be costly, time-consuming, and politically damaging, siting decisions [where to locate locally undesirable land uses] makers often take the path of least resistance – choosing sites in neighborhoods that are least likely to protest efficiently. Indeed, many representatives
I argue that this propensity to impact minorities is due to the fact that these people represent the path of least resistance, as they are not capable of adequately representing their interests in the political process.\textsuperscript{55} For this reason, such eminent domain decisions warrant heightened scrutiny.

\section*{II. 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 takings clause, plaintiffs could also challenge the decision to take their property by filing a Section 1983 claim under the Equal Protection clause. This suit would challenge whether they were intentionally and arbitrarily treated differently that a similarly situated homeowner. In this section I will discuss Village of Willowbrook \textit{v. Olech}, and how that case enabled a plaintiff to establish a “class of one” to sue under the Equal Protection clause.

\subsection*{A. The Equal Protection Clause}

Under the Equal Protection clause of the Fourteenth Amendment, no state can “deny to any person within its jurisdiction the Equal Protection of the laws.”\textsuperscript{56} At the most abstract level, the Amendment mandates that the government treat similarly situated people alike.\textsuperscript{57} Modern Equal Protection jurisprudence is analyzed under three tiers of scrutiny.

The highest tier of scrutiny is “strict scrutiny” which applies when a classification burdens a fundamental right,\textsuperscript{58} or a suspect class.\textsuperscript{59} The Supreme Court has found that race,\textsuperscript{60} citizenship, and national origin\textsuperscript{61} are suspect classes. A suspect class either “possesses an immutable characteristic determined solely by the accident of birth,”\textsuperscript{62} or is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to

\footnotesize{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.”).\textsuperscript{55} See infra Part III. E.1.\textsuperscript{56} U.S. CONST. amend. XIV, § 1.\textsuperscript{57} Plyler \textit{v. Doe}, 457 U.S. 202, 216 (1982)\textsuperscript{58} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 638 (1997).\textsuperscript{59} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 550 (1997).\textsuperscript{60} See \textit{City of Cleburne}, 473 U.S. at 440.\textsuperscript{61} See Examining Bd. \textit{v. Flores de Otero}, 426 U.S. 572, 606 (1976).\textsuperscript{62} Frontiero \textit{v. Richardson}, 411 U.S. 677, 686, (1973).}
such a position of political powerlessness as to command extraordinary protection from the
majoritarian political process.”63 When applying strict scrutiny, the Court upholds the
classification only if the government can show that the law is narrowly tailored to serve a
compelling governmental interest,64 and the end cannot be accomplished through less
discriminatory means.65 The government can seldom overcome strict scrutiny, and it is generally fatal.66

The second tier is known as intermediate scrutiny, and is reserved for classifications
involving gender67 and illegitimacy.68 The test for intermediate scrutiny is whether the
classification is substantially related to a significant governmental interest.69 This test is less
stringent than strict scrutiny. If the government fails this burden, the law is unconstitutional.70

If strict or intermediate scrutiny is not applicable, generally all other cases are judged
under rational basis scrutiny, the lowest level of scrutiny.71 All social or economic
classifications that are not based on race, citizenship, gender, or illegitimacy are judged under the
rational basis test. A law judged under the rational basis test is constitutional as long as it is
rationally related to a state interest.72 This standard is supremely deferential to the legislature,
and upholds laws as long as there is some possible, conceivable, basis to justify it.73 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 their motives.74

64 City of Cleburne, 473 U.S. at 440.
accomplish the State's asserted purpose must be specifically and narrowly tailored to accomplish that purpose.”).
66 Gerald Gunther, The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court:
70 Id., at 204.
71 See City of Cleburne, 473 U.S. at 440.
73 See also 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”); FCC v. Beach
Communications, Inc., 508 U.S. 307, 314 (1993) (stating that rational basis review is the “paradigm of judicial
restraint”). In Beach, the Court found that “those attacking the rationality of the legislative classification have the
burden to ‘negate every conceivable basis which might support it.’” Id. at 315. See also 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 test, see Clark Neily, No Such Thing: Litigating Under the Rational Basis
evaluating motives without a showing of arbitrariness or irrationality); Lee v. South Carolina Dept. of Natural
B. Section 1983

When a citizen feels that his Equal Protection rights were violated, he can bring suit under 42 U.S.C. § 1983, commonly referred to as Section 1983. To bring a claim under Section 1983, the plaintiff must allege that (1) a federal right was violated; and (2) the person who violated the right did so under the color of state law. Plaintiffs can seek damages or injunctive relief from state officials who violate their rights. 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 guaranteed by the Fourteenth Amendment. The defendant could be the person(s) or entity who effectuated the condemnation proceeding. Such proceedings take place under color of state law. The homeowner’s desired remedy would likely be injunctive relief, as the takings clause provides for “just compensation.”

C. Olech and the Equal Protection Claim 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 Circuit Courts have understood the holding of _Olech_.

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Resources, 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); Leon Friedman, _Purpose, Intent and Motive in Constitutional Litigation_, 596 PLI/LIT. 713, 715 (1998) (finding that “[i]nquiries into congressional motives or purposes are a hazardous matter”).


78 U.S. CONST. amend. V.
1. **Background**

In *Village of Willowbrook v. Olech*, plaintiff Grace Olech requested a hook-up to the municipal water supply.\(^{80}\) 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.\(^{81}\) 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 towards her.\(^{82}\) In the past, Olech had filed successful lawsuits against the Village, and had ‘made Willowbrook and its officers and employees ‘look bad,’ [thus generating] ‘substantial ill will.’”\(^{83}\) 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.’”\(^{84}\)

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.”\(^{85}\) Judge Posner reversed for further factual findings.

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.”\(^{86}\) The Court answered this question in the affirmative, and held that “‘successful Equal Protection claims [may be] brought by a ‘class of one.’”\(^{87}\) A class of one equal protection claim is made

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\(^{81}\) Id. at *3-*5.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id. at *9 (quoting Esmail v. Macrane, 53 F.3d 176, 178 (7th Cir. 1995).

\(^{85}\) Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998).


\(^{87}\) Id.
“where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”

The Court identified two elements underlying Olech’s claim: differential treatment and irrationality. First, the Court recognized the differential treatment in 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.” Second, “the complaint also alleged that the Village's demand was ‘irrational and wholly arbitrary’ and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement.”

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. Instead, the Court noted that it did “not reach the alternative theory of ‘subjective ill will’ relied on by” the Seventh Circuit. The Court wrote that “these allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional Equal Protection analysis.” The Supreme Court left this matter, ostensibly, unresolved.

3. Justice Breyer’s Concurring Opinion

The per curium opinion was joined by a brief concurrence by Justice Breyer. Justice Breyer wrote to clarify his agreement with the per curiam opinion, and recognized 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.’” To Justice Breyer, the additional 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 constitutional

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88 Id.
89 Id. at 565.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id. at 565-66 (citing Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998)) (Breyer, J., concurring).
right.” However, the inferior courts have not yet resolved how *Olech* should be read with respect to the malice requirement, and whether Justice Breyer’s concurring opinion will control.

4. **Success of Section 1983 Claims After Olech**

There is evidence that *Olech* claims have a higher chance of success against the rational basis test as compared to more conventional Equal Protection challenges. Between 1971 and 1996, the Supreme Court considered one hundred ten rational basis Equal Protection cases, and in these cases the plaintiff won only ten times (9% success rate). However, following *Olech*, in “class of one” Equal Protection cases, the plaintiff prevailed in thirty out of eighty-six federal district court opinions (35% success rate).

In Section 1983 claims filed under the deferential rational basis standard, courts readily dismiss petitions at a very early stage. The Supreme Court in *FCC v. Beach Communications* issued an extremely deferential standard, such 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.” However, in cases after *Olech*, some courts have adopted less deferential standards. The Court in *Olech* hinted that an Equal Protection claim can survive Rule 12(b)(6) when it alleges that the plaintiff was (1) treated differently than a similarly situated individual, and (2) the treatment was irrational and arbitrary.

In *Russo v. City of Hartford*, the district court of the District of Connecticut rejected the government’s motion to dismiss an *Olech* claim; the court put the burden on the government to show a legitimate basis for disparate treatment, and held that the plaintiff “has alleged that

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95 Id. at 566.
97 Robert Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 Wash. L. Rev. 367, 416-17 (2003). 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.
98 Id. at 418.
99 508 U.S. 307 (1993) (Under this standard, “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it,’” and “legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”).
100 See Hortensia S. Carreira, *Protecting the “class of One”*, REAL PROPERTY, PROBATE AND TRUST JOURNAL 331, 355 (Summer 2001). *Olech*, 528 U.S. at 565. The Court cites Conley v. Gibson, 355 U.S. 41, 45-46 (1957), 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.”
similarly situated individuals were treated differently and that the defendants have not expressed any legitimate basis for the differential treatment.”

Acknowledging that it could “[d]ismiss the count on the pleadings if it can conceive of any rational basis for the classification,” the court “refuse[d], however, to speculate as to conceivable rational bases for the defendants’ actions.” This standard is quite different from the traditional rational basis approach, as discussed in *Beach*.

In an *Olech* claim in the Southern District of Indiana, the court refused to dismiss the claim, even though it was not properly pled, finding 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.” This implies that the plaintiff only needs to provide some notice, whereas under *Beach*, where the plaintiff must disprove all of the defendant’s conceivable reasons. This is a far cry from the *Beach* standard, and perhaps is another sign that courts are willing to scrutinize class of one claims more stringently at the pleading stage. In addition, plaintiffs have had greater success having defendant’s motion for summary judgment denied.

It is not clear if the reason behind these more lenient standard is because of *Olech* changing the standards, or whether courts are unsure of how to proceed under this new standard. 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, it would have been shot down right away. The standard rational basis test is “turn[ed] on its head” and the courts “make it substantially easier 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.” Further, when a case survives a motion to dismiss or summary judgment, defendants

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102 Id. at 195-96.
103 Farrell, *supra* note 97, at 418.
have a great incentive to settle out of court, thus providing plaintiffs greater leverage than would have existed in the past.\footnote{See, Farrell, supra note 97, at 424 (2003).}

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 is significant because showing malice requires a very high threshold, and courts are not willing to recognize such a factor 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 subject 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.”\footnote{Erwin Chemerinsky, *Suing the Government for Arbitrary Actions*, 36 JOURNAL OF TRIAL LAWYERS OF AMERICA 89 (May 2000).} 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. In this section, I will chronicle some of the recent cases that have discussed *Olech*. Some circuit courts have found that malice is not a required element, some circuit courts find that it is a required element, and some circuit courts have adopted conflicting standards.

a. **Circuits Where Showing of Malice Not Required**

In Alsenas v. City of Brecksville, the Sixth Circuit hinted that irrationality, and not subjective motivations, is the crux of “class of one” Equal Protection suits.\footnote{No. 99-4063, 2000 U.S. App. LEXIS 14520 (6th Cir. June 19, 2000).} In this case, the court dismissed the suit because the plaintiff did not show that there was no rational basis for treating his application differently.\footnote{Id. at *5 (citing Vill. of Willowbrook v. Olech, 528 U.S. 567, 564 (2000)).} In a later case, McDonald's Corp. v. City of Norton Shores, quoting *Olech*, 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
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, as it found the plaintiffs were not similarly situated, and the government had a rational basis.

In Costello v. Mitchell Public School District 79, the Eight Circuit in an Olech Equal Protection claim held that the plaintiff’s “class of one” claim was subject to rational basis review, without addressing any malice, animus, or subjective motivations. In Little v. City of Oakland, in a Section 1983 suit, the District Court for the Northern District of California in the Ninth Circuit required the plaintiff to show “she was treated differently than other similarly situated [sic] with no rational basis for the difference.” However, the court did not identify malice or ill-will as a necessary condition to state a claim.

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. The court did not mention, nor adopt, Justice Breyer’s concurring opinion that required a showing of animus of malice.

b. **Circuits Requiring Showing of Malice**

In the Seventh Circuit, the origin of Olech, Judge Posner reaffirmed the requirement that an Equal Protection claim must show a “vindictive action” which requires proof of a “totally illegitimate animus” against the plaintiff. Judge Posner adopted Justice Breyer’s alternative theory and mandated a finding of subjective motivations. Citing Olech, the court found the claim requires “proof that the cause of the differential treatment of which the plaintiff complains...”

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113 Id.
114 266 F.3d 916, 919-21 (8th Cir. 2001).
116 Griffin Industries, Inc. v. Irvin, 496 F.3d 1189 (11th Cir. 2007).
118 Id. at 1008 (”[W]e 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.”)
was a totally illegitimate animus toward the plaintiff by the defendant."\textsuperscript{119} 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."\textsuperscript{120} Making a policy argument against opening the courtroom doors of the federal courts to cases where plaintiffs are merely treated differently, Judge Posner reasoned "[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."\textsuperscript{121}

Yet, there are some grumblings in the Seventh Circuit as to whether the plaintiff must prove both intentionally different treatment \textit{and} illegitimate animus; one court in 2001 found that either condition would satisfy \textit{Olech}.\textsuperscript{122} A 2001 district court case agreed, and held that \textit{Hilton}'s attempt to "narrow the range of options available to class of one Equal Protection plaintiffs simply cannot be squared with \textit{Olech}."\textsuperscript{123} This issue is yet to be resolved.

The Fourth Circuit, has taken a very narrow reading of the holding in \textit{Olech}. In \textit{Greenspring Racquet Club v. Baltimore County}, the Fourth Circuit found that an Equal Protection claim must establish that "malice and bad faith were the \textit{only} conceivable bases” for enacting a zoning ordinance.\textsuperscript{124} The court explicitly recognized that a subjective intent must be applied to satisfy this heightened pleading standard. In this case, the court only addressed \textit{Olech} in a footnote, finding that the "fundamental tenet of Equal Protection jurisprudence is not changed by the Supreme Court's recent decision in \textit{[Olech].}"\textsuperscript{125} 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.

\textsuperscript{119} Id. at 1008 (citing \textit{Olech v. Vill. of Willowbrook}, 160 F.3d 386, 388 (7th Cir. 1998), aff'd, 120 S. Ct. 1073 (2000) (per curiam)).
\textsuperscript{120} \textit{Hilton}, 209 F.3d at 1008.
\textsuperscript{121} Id.
\textsuperscript{122} Nevel v. Village of Schaumburg, 297 F.3d 673, 681 (7th Cir. 2002).
\textsuperscript{123} Northwestern Univ. v. City of Evanston, 2002 WL 31027981, at *4 (N.D. Ill. Sept. 11, 2002).
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 the Second Circuit, in Gelb v. Bd. Of Elections of New York, the court considered whether New York election law required that a write-in candidate have access to the ballot in primary elections. 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.

In a conflicting case, in Katz v. Stannard Beach Association, the District Court for the District of Connecticut stated that to state a cause of action under Section 1983 as a class of one, the 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.” This standard specifically required a malicious intent. The case was dismissed on summary judgment because the plaintiff failed to (1) allege he was treated differently from a similarly situated citizen, and (2) made no showing of intention discrimination resulting from “bad faith, ‘illegitimate animus,’ ‘ill will,’ or malice to injure them.” In this, the court adopted Justice Breyer’s concurring opinion, and required a showing of ill will. A 2000 case from the Eastern District of New York reaffirmed the holding in Katz, and rejected the proposition that Olech eliminated the requirement of proving malice to satisfy a class of one Equal Protection claim.

However, in 2001, the Second Circuit in Jackson v. Burke found that “To be sure, proof of subjective ill will is not an essential element of a [Olech] ‘class of one’ Equal Protection claim.” Yet, this finding is limited, noting that to establish a claim, the plaintiff must show “something sufficient distinct . . . that could give rise to a reasonable inference that he was in fact

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126 224 F.3d 149, 157 (2d Cir. 2000).
127 Id.
128 95 F. Supp. 2d 90, 95 (D. Conn. 2000) (citing Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir. 1996)).
129 Id.
132 256 F.3d 93, 97 (2d Cir. 2001) (per curiam).
being treated differently from all others similarly situated.”133 Whether this “something” is malice, or some derivation thereof, is currently undecided by the Second Circuit.134 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.135

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.136 The Court observed that, “In Village of Willowbrook v. Olech, the Supreme Court observed that an Equal Protection claim could be stated where a plaintiff alleges that ‘she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment’ creating a ‘class of one’ cause of action, without regard to subjective motivation.”137 The District Court of Massachusetts phrased the Olech test as whether the defendants 1) intentionally treated her differently 2) from others similarly situated and 3) without a rational basis for the difference in treatment.138 No showing of animus is required by this standard.

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 typically impermissible categories.139 In 2004, however, the First Circuit cited Justice Breyer’s concurring opinion, and required a subjective malice element in the Equal Protection analysis.140 This issue is still to be resolved by the First Circuit.141

The Fifth Circuit has taken a curious approach, and only finds an Equal Protection violation when the government violates a fundamental right or a class-based discrimination.142 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

133 Id.
134 Gehan, supra note 130, at 370.
136 230 F.3d 8 (1st Cir. 2000).
137 Id. at 12 n.4 (quoting Vill. of Willowbrook v. Olech, 528 U.S. at 564) (citation omitted) (emphasis added).
139 494 F.3d 245 (1st Cir. 2007.) citing (Bizzarro v. Miranda, 394 F.3d 82, 88 (2d Cir. 2005)).
140 See Tapalian v. Tusino, 377 F.3d 1, 5-6 (1st Cir.2004).
141 See e.g., Walsh v. Town of Lakeville, 431 F.Supp.2d 134 (2006) (“This Court is left in the tenuous position of attempting to harmonize seemingly antithetical case law.”).
142 Gehan, supra note 130, at 370.
In Shipp v. McMahon, the Fifth Circuit found that an Olech claim requires a showing of malice; “To state a claim sufficient for relief, a single plaintiff must allege that an illegitimate animus or ill-will motivated her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment. 144

III. Elements of Viable Equal Protection Claim Against Eminent Domain Taking for Private Development Against a Class of One

By adopting the Supreme Court’s existing precedent to state Olech claims, this section will discuss the elements of a viable Equal Protection claim against eminent domain takings for private development. Professor Davidson argues that because the Taking’s Clause emphasis is on protecting existing property rights, as opposed to finding discriminatory purposes, the takings clause “is not the place to remedy that problem.”145 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 different from others similarly situated; and (3) the difference in treatment lacked a rational basis.

A. Assumptions

In order to develop the elements of this claim, I need to make several assumptions as the Supreme Court in Olech left many matters unresolved. As with any assumptions, the Supreme Court ultimately may disagree with these ideas, and weaken my thesis. But, until the Supreme Court takes such action, I argue that this framework is an effective means to advance this novel legal claim.

143 Bryan v. City of Madison, 213 F.3d at 277 & 277 n.17 (5th Cir. 2000) (quoting Vill. of Willowbrook v. Olech, 528 U.S. at 564).
144 234 F.3d 907, 916 (5th Cir. 2000) (citing (Vill. of Willowbrook v. Olech, 528 U.S. at 565)) (emphasis added).
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?”\(^{146}\) For the purposes of this paper, I will assume 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 wealth and education.\(^{147}\) These easy targets to bully represent the path of least resistance.\(^{148}\)

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.\(^{149}\) However, *Olech* specifically leaves the door open to claims where a person is intentionally treated different, but not due to discrimination. A key reason why malicious intent need not be an important factor in this test, is that communities will focus on the poorest communities regardless of the racial animus.\(^{150}\) For the purpose of this Article, I will read *Olech*, like several Circuit Courts have done,\(^{151}\) to not require a showing of malice. 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.\(^{152}\) But, despite the current Circuit split on this topic, the Court did not impose a malice requirement on *Olech*. Thus, an *Olech* class of one claim, lacking malice, still comports with current Supreme Court equal protection jurisprudence. Ultimately, the Supreme Court indeed may hold that malice is not a required element, but presently, this assumption comports with current Equal Protection law.

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\(^{146}\) Gehan, *supra* note 130, at 380.

\(^{147}\) See *supra* Part I. B.

\(^{148}\) See infra Part III. E.

\(^{149}\) See e.g., Carreira, *supra* note 100, at 362.

\(^{150}\) See e.g., *Kelo*, 843 A.2d at 509 (Conn. 2004) (even without discriminative motives, condemning authorities will target poor areas).

\(^{151}\) *Supra*

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. Most government officials receive qualified immunity, which serves as an affirmative defense that prevents liability. 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.”

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 Equal Protection rights when she singled her out for differential treatment.” Because Olech established that intentionally singling out citizens for disparate treatment is unconstitutional, the Courts would answer this question in the affirmative. Under this approach, qualified immunity would no longer stand as an impenetrable wall against a Section 1983 class of one Equal Protection claim.

In Olech, the plaintiff filed suit against two village officials as well as the Village of Willowbrook itself. Plaintiffs can file suit against the municipality where officials act pursuant to a government policy or custom. While most “class of one” suits in the land use and zoning context will be against individual officials, in the context of eminent domain takings for private development, the suit is likely to be launched against the municipality, a development

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153 Michael C. Fayz, Civil Rights, DET. C. L. REV. 343, 404 (1995) (“[i]mmunity 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.”).
157 Id.
160 See e.g., Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998), aff’d, 120 S. Ct. 1073 (2000) (per curiam) (two “high” village officials violated the plaintiff’s constitutional rights); Esmail v. Macrane, 53 F.3d 176, 178 (7th Cir. 1995) (mayor violated the plaintiff’s Equal Protection rights); LeClair v. Saunders, 627 F.2d 606, 607 (2d Cir. 1982) (filing a Section 1983 action against an individual dairy farm inspector).
corporation, or some other quasi-governmental entity that determines the property to be taken. Therefore, for the purposes of this analysis, I will assume that qualified immunity need not serve as an absolute barrier, and an Olech claim could proceed.

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. The class could consist of a group of homeowners alleging they are being treated differently than other similarly situated homeowners. Or, 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.

To take Kelo as an example, none of the homeowners in New London, CT, were minorities, elderly, or impoverished. Yet, if they were to have brought a suit under Olech, the homeowners either 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.
C. Element 2 - Establish Intentional Differential or Unequal Treatment

After defining the class, the plaintiff must establish that he was intentionally treated differently or unequally\(^{161}\) than a similarly situated plaintiff. In some contexts, “the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high.”\(^{162}\) Many courts stress that the people are similarly situated when the plaintiffs are “prima facie identical.”\(^{163}\) 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 “intentionally treated differently from others similarly situated.”\(^{164}\) This implies that “similarly situated” is a self-defining term without reference to external considerations, and gives the lower courts wide latitude.\(^{165}\) Some courts have been willing to relax the “similarly situated standard” in *Olech* claims. In *Kiser v. Naperville Community Unit*, the plaintiff was fired from his job as an attorney for the school district.\(^{166}\) The defendant moved to dismiss, and argued that the plaintiff did not establish that other similarly situated lawyers worked for the school district, and because he did not identify a similarly situated group, he failed to state an Equal Protection claim.\(^{167}\) The court rejected this reasoning, and held that in the pleading stage, the plaintiff need not explicitly establish similarly situated groups; “[t]he potential relevance of other lawyers is obvious from the complaint” and the plaintiff did not need to mention the other group explicitly.\(^{168}\) It is possible that courts, in light of *Olech*, will adopt a looser standard to proving differential treatment.

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\(^{161}\) *Whiting v. University of Southern Mississippi*, 451 F.3d 339, 348 (5th Cir. 2006) (“In order to withstand summary judgment under his ‘class of one’ claim, [plaintiff] must have established a genuine question of material fact as to whether he ‘was intentionally treated differently from others similarly situated.’ ”) (quoting *Olech*, 528 U.S. at 564, 120 S.Ct. 1073).
\(^{162}\) *Neilson v. D’Angelis*, 409 F.3d 100, 104 (2nd Cir. 2005).
\(^{165}\) *Farrell*, *supra* note 97, at 412.
\(^{166}\) 2002 WL 2010185, *02 (N.D. Ill. Aug. 29, 2002).
\(^{167}\) *Id.* at 14.
\(^{168}\) *Id.*
To again use *Kelo* as an example, the plaintiffs could have brought suit as a class of homeowners. To establish differential treatment, they could have showed that other homes, of almost the exact same value in very similar locations were not sited for eminent domain. In New London, a social club where the local politicians fraternized, as were other homes, which were quite close to Suzette Kelo’s home, were spared from the eminent domain bulldozer. Establishing that the decision to treat similarly situated houses different, whether it was made without or without malice, would satisfy the second element of this test.

**D. Element 3- Show 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 challenge the appropriate standard of review. “Class of one” claims are not based on a suspect or a quasi-suspect class, and as such are subject to rational basis review. To defeat the traditional rational basis test, the plaintiff must show that the government acted arbitrarily or irrationally. The courts have defined arbitrary as “without adequate determining principle . . . [or] fixed 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 as “apt to change suddenly, freakish; whimsical; humorsome.” Challenging an eminent domain decision post-*Kelo* under the rational basis test is an arduous, if not impossible barrier to recovery.

What is to be judged as irrational is not the decision to take the property for a “public use,” as that is very broad under *Kelo*. What is judged for rationality is the decision where to take the property, and whether that choice is arbitrary or irrational. Under the traditional rational basis test, is very difficult, if not impossible, to conceive of irrational decisions. An example of an irrational decision could include the choice to take someone’s home on top of a mountain to build a rehabilitation facility for quadriplegic patients, when a similarly situated property was available at sea level. Or, taking a homeowner’s property to build a communal garden on the site of a former toxic waste dump, where a similarly situated property had fertile soil. My hyperbolic

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169 Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1074 (2000) (“Our cases have recognized successful equal protection claims brought by a ‘class of one’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”).

examples are simply intended to illustrate that under traditional rational basis review, most
decisions will be upheld as rational.\textsuperscript{171}

However, the Supreme Court in certain instances has adopted a form of heightened
rational basis scrutiny. The next section will discuss cases where the Court has adopted a more
searching form of rational basis review, and posit several justifications why this heightened form
of scrutiny should be applied for an eminent domain taking for private development that affects
certain classes of one.

\section*{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 \textit{Carolene Products}, and the representation reinforcement
theory of Constitutional law, many \textit{Olech} classes of one could be considered “discrete and
insular minorities” that need extra protection to secure their rights.\textsuperscript{172} As such, I argue that in
certain cases they are deserving of a heightened form of rational basis review to scrutinize the
purposes behind the governmental action.

\subsection*{1. Protecting Discrete and Insular Minorities}

\subsubsection*{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.\textsuperscript{173} Ely’s theory is built upon Footnote Four from \textit{United States v. Carolene Products},
which grants judicial deference to the elected branch, unless the laws do harm to “discrete and

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\textsuperscript{171} The government could likely argue the patients would get cleaner air atop the mountain, and they have an interest
to rehabilitate the former toxic waste dump to improve the local environment.
\textsuperscript{172} Although I question the validity of Footnote Four, which disparages those rights not explicitly enumerated in the
Bill of Rights, \textit{see generally}, RANDY BARNETT, \textit{RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY}
(2005), I have no qualms with Footnote Four enabling the Courts to grant more liberty to citizens. In sum, I am
opposed to portions of Footnote Four that constrain liberty, but am comfortable with portions that expand liberty.
\textsuperscript{173} Ely, \textit{supra} note 9.
\end{flushright}
insular minorities” that lack the political clout to intervene in the legislative process.\textsuperscript{174} 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.”\textsuperscript{175} Ely viewed the Constitution as a means to “police[] the process of representation.”\textsuperscript{176} To Ely, protection of specific substantive rights was irrelevant as long as “the opportunity to participate either in the political processes . . . or in the accommodation those processes have been reached.”\textsuperscript{177} This theory lends itself very well to a class of one claim based on protecting poor, uneducated, minority homeowners that cannot easily challenge eminent domain condemnations.

b. \textit{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 “discrete and insular” minorities regardless of skin color, who lack access to the political channels. This group should include those who are poor and lack an education.\textsuperscript{178} Footnote Four speaks to discrete and insular minorities, not racial minorities. The focus is on whether they have access to the political process, not their skin color. To be consistent with Footnote Four, poor and uneducated citizens, who have no political clout, should be given a higher level of scrutiny than those who have the skills, time, and resource to game the political system. Enabling a class of one claim “widens the scope of vulnerable parties to include a person as a person” beyond traditionally recognized minority groups.\textsuperscript{179}

That the Court has stepped in and applied heightened scrutiny for women and homosexuals, even where “discreteness” and “insularity” were not applicable, shows the Court recognizes the “broader understanding of Carolene Products” as “the attributes of vulnerability

\textsuperscript{174} United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (noting that courts should protect “discrete and insular minorities”). Ely, 78.
\textsuperscript{175} Ely, supra note 9, at 181.
\textsuperscript{176} Ely, supra note 9, at 73.
\textsuperscript{177} Ely, supra note 9, at 77.
\textsuperscript{178} Carreira, supra note 100, at 348-49 (“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.”).
\textsuperscript{179} Carreira, supra note 100, at 349.
and experience of prejudice endure as justifications for judicial intervention."\textsuperscript{180} 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.”\textsuperscript{181}

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.”\textsuperscript{182} That the Fifth Amendment takings clause is within a specific prohibition of the first Ten Amendments, claims arising under that prohibition should warrant heightened scrutiny.\textsuperscript{183} However, following the deferential standard announced in \textit{Kelo},\textsuperscript{184} despite Footnote Four, that rationale is greatly weakened.

c. \textit{Poor, Uneducated, Minority Homeowners Are The Path of Least Resistance}

Professor Boudreaux argues that poor people should deserved 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 (2) as a result to maximize tax revenues and minimize expenditures, the homes of poor families are highly likely to be targeted for eminent domain.\textsuperscript{185} In this section, I explore how poor homeowner’s inability to engage in the political process, and how \textit{Kelo}’s perverse incentive to replace homes with businesses that can generate more revenues, triggers Professor Ely’s concerns to help reinforce their representation.

\section{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

\begin{thebibliography}{9}
\bibitem{180} \textit{Id.} at 348–49.
\bibitem{181} Bruce Ackerman, \textit{Beyond Carolene Products}, 98 HARV. L. REV. 713, 735 n.40 (1987)
\bibitem{182} United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938)
\bibitem{183} 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( December, 19 2008). Available at SSRN: http://ssrn.com/abstract=1318387 (arguing that because Second Amendment is in Bill of Rights, under Footnote Four, it should receive heightened protection).
\bibitem{185} Boudreaux, \textit{supra} note 29, at 50.
\end{thebibliography}
community. The poorest citizens, those who represent the path of least resistance for property developers, “are quintessential ‘outs’ in local government decision making.” The Kelo standard, which considers increasing the potential tax base of a community a public use, “encourages governments 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.”

Justice Thomas recognized that the poorest members of the society cannot generate as much revenue as more wealthy members, as they are “less likely to put their lands to the highest and best social use.” With the power of eminent domain, poor homeowners can be tossed out of their “blighted” residences to make way for more wealthy homeowners/taxpayers. 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.

Following Kelo, local governments have an incentive not only to use eminent domain to affect the business climate of the community, but also to “try to shape the composition of their citizenry.” 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 constructive more expensive housing. It is not worthwhile to consider the needs or desires of the poor or rich when the government’s permissible objective is to increase the tax base. Evidence exists that “localities across the

186 Brief of NAACP Kel o As Amicus Curiae, Kelo v. City of New London Connecticut 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 41 (“Those who are impoverished and politically powerless, likewise, are the least likely to resist successfully the use of eminent domain.”).
187 Boudreaux, supra note 29, at 47 (local officials have “no apparent interest in attending” to the needs and wishes of the poor). Ely, supra note 9, at 151.
188 Id. See also, Ely, supra note 9, at 20 (the Law should protect the “outs” from the tyranny of the “ins”).
191 Boudreaux, supra note 29, at 19.
192 J. Peter Byrne, Condemnation of Low Income Residential Communities Under the Takings Clause, 23 UCLA J. ENVTL. L. & POL’Y 131, 141 (2005)
193 Boudreaux, supra note 29, at 19.
194 Id.
nation are using eminent 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."

(2) Poorest Homeowners Lack Political Clout To Engage in Political Process

According to the NAACP’s amicus brief in *Kelo*, “[t]he reason [minority, uneducated, and 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.” In Professor Wendell Pritchett study of blight, he observed 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. 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. These are the people Professor Ely sought to protect. Wealthier homeowners have less difficulty with this process, as they can lobby the legislature, arouse the media’s interest, and if necessary, and engage in protected litigation.

Ely considered “poor” people to be especially deserving of additional protections. 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

\[198\] See Pritchett, *supra* note 12, at 33.
\[199\] Imperatore, *supra* note 41, at 1034 (“[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.”).
\[200\] Boudreaux, *supra* note 29, 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.”).
\[201\] See Ely, *supra* note 9, at 161-62.
representation reinforced.” 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.” Ely felt that courts had a distinct role to “protect those who can’t protect themselves politically.” Specifically, the point of representation reinforcement “is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending.” This healthily describes the relationship between poor, uneducated, minority homeowners and eager rent-seeking legislators 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.

(3) **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. Further, scholars intimate that because the court did not reach the “alternative theory” of “subjective ill will,” “the narrower use of animus . . . rejected by the Court in *Olech*, [may have] usher[ed] in a tightened rational basis standard.” 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.”

Citing Footnote Four, and referring to Ely’s reinforcement theory, Justice Thomas observed that the poorest members of society, who are more likely to have their property taken by eminent domain are “the least politically powerful.” Justice Thomas concluded, that “[i]f ever

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203 Ely, *supra* note 9, at 117.
204 Ely, *supra* note 9, at 152
205 Ely, *supra* note 9, at 151
206 Carreira, *supra* note 100, 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.”).
207 528 U.S. at 565.
208 Carreira, *supra* note 100.
209 Carreira, *supra* note 100, 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.”).
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.”210 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.”211

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. 212 But even Professor Davidson acknowledges “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 power.”213 Therefore, 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, enables the courts 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 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, referred to as rational basis with bite. I propose adopting this enhanced rational basis review for Olech claims affecting poor, uneducated, and minority homeowners targeted for eminent domain abuse.

211 Kelo, 2677 (O’Connor, J., dissenting). See also Boudreaux, supra note 29, at 6 (“I propose 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.”).
213 Id. at 43.
a. City of Cleburne v. Cleburne Living Center

In City of Cleburne v. Cleburne Living Center, a home for mentally retarded patients applied for a special use permit, and the city denied it.\(^{214}\) The relevant zoning ordinance required a special use permit for “hospitals for the insane or feebleminded, or alcoholic or drug addicts, or penal or correctional institutions.”\(^{215}\) The Center alleged the zoning ordinance violated their Equal Protection rights as applied to the residents of the home, as other similarly situated properties were not denied the permit, and brought suit under 42 U.S.C. § 1983.\(^{216}\) The Supreme Court considered the case using the rational basis test, and held that mentally retarded patients were not a suspect class warranting heightened scrutiny.\(^{217}\) Traditionally, once the Court established that the class was not suspect, the rational basis test would be applied, and the Court would go through the motions to uphold the law.

However, rather than engaging in traditional rational basis analysis, the Court actively scrutinized the City’s proffered reason for treating the home different from other similarly institutions within the zoned area.\(^{218}\) By engaging in a “searching inquiry” into the reasons why the City denied the permit, the Court departed from the traditional deference accorded to the government under rational basis analyses.\(^{219}\) 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.\(^{220}\)

\(^{215}\) Id. at 447-55.
\(^{216}\) Id. at 447-55.
\(^{217}\) Cleburne, 473 U.S. at 442.
\(^{218}\) See City of Cleburne, 473 U.S. at 458 (Marshall, J., dissenting) finding that the Court engaged in a “probing inquiry” when it evaluated the statute). See Richter, supra note 156, at 245; Sean C. Doyle, Note, HIV-Positive, Equal Protection Negative, 81 Geo. L.J. 375, 403 (1992) (Rather than searching its “collective imagination” to find a rational relationship to a state interest, the Court carefully examined the City’s justifications for treating the mentally retarded differently than other housing communities. Furthermore, the Court required a “high degree of correlation” between the classification and the purpose of the ordinance.).
\(^{219}\) Cleburne, 473 U.S. at 460 (Marshall, J., dissenting).
\(^{220}\) Cleburne, 473 U.S. at 448, 450.
b. **Romer v. Evans**

The Court applied a similar form of heightened scrutiny in *Romer v. Evans*.221 Colorado passed an amendment to their constitution that prevented government action to protect homosexuals from discrimination.222 Even though homosexuality is not a suspect class warranting heightened scrutiny, the Court engaged in a searching inquiry. The Court observed that “discrimination of an unusual character especially suggest[s] careful consideration to determine whether [it is] obnoxious to the constitutional provision.”223 That the amendment focused solely on homosexuals created an “inevitable inference” that the law was motivated by an impermissible animus.224 Because passing a law to the detriment of a single unpopular group was not a valid governmental interest, the Supreme Court struck the amendment down as violating the Equal Protection clause, as it did not have a rational relationship to a legitimate governmental end.225 The Court in *Romer* 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.”226 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 amendment.

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. Although *Kelo* announced a very deferential standard, in Justice Kennedy’s influential concurring opinion, he alluded to specific instances where a heightened standard of review should apply:

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222 *Id.* at 635-36.
223 *Romer*, 517 U.S. at 633.
224 *Id.* at 634.
225 *Id.* at 634.
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. Cf. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549-550, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.  

In his concurring opinion, Justice Kennedy did not suggest that a heightened scrutiny need apply simply because the taking is for private development, but rather when the taking is tainted by benefiting a favored party. In the context of the “class of one,” this reasoning can be extended. That is, 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. That Justice Kennedy focuses on transfers that directly favor private parties at the expense of homeowners who lack such benefits comports with the reinforcement representation theory. 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.  

Justice Kennedy directly analogized the rational basis with bite approach taken in an Equal Protection challenge in *Cleburne* to his proposed heightened level of scrutiny under the Public Use clause. Much like *Cleburne* focused on mentally retarded patients and *Romer* focused on homosexuals, although not suspect classes, poor, minority, and uneducated homeowners are often excluded from the political process, and cannot effectively challenge majoritarian politics that directly limits their property rights. Therefore, to adopt a heightened form of scrutiny in such cases comports with the logic behind Justice Kennedy’s concurring opinion.

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227 *Kelo*, 2670-71 (Kennedy, J., concurring)  
229 *Kelo*, 491 (Kennedy, J., concurring) (“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”) citing (*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446—447, 450 (1985)).
For example, to adopt the reasoning in *Cleburne*, if a community redevelopment board decided to take a group of houses, all of which consisted of poor, uneducated, and minority homeowners who could not 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*, if a taking focused exclusively on poor homeowners who lack the funds to litigate in court, and are likely to accept the condemnation without challenge, yet the board avoids taking similarly situated homes owned by more affluent citizens, this decision may also trigger the heightened rational basis review.

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, that the Supreme Court could adopt a heightened form of scrutiny if there is such treatment, fits snugly into modern Equal Protection jurisprudence.

**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. 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. 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. Also, § 1988 can be used as a corollary to § 1983 in order to award attorney fees, thus giving civil rights plaintiffs greater options for counsel and representation.

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230 *Olech*, at 1074.
231 See also Baumgardner, 2000 WL 1100438, at *13-15 (finding that although Cleburne and Romer involved classifications, the reasoning in those cases is applicable to “class of one” claims). See Richter, *supra* note 156, at 251.
CONCLUSION

It is far from clear how the courts will consider the Olech pleading I describe in this article. The Supreme Court has never articulated an equal protection test for eminent domain takings for economic development. Therefore, in order to institute this test, nothing would have to be overruled.

By strengthening Olech as a means to fight against arbitrary land use decisions, property rights in general can be solidified, as the government will be more wary in seeking to take property without valid rationales. For those who may agree with Kelo, on some level, this approach very well may 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.

This technique will not open the floodgates for litigation, nor will it put a dike in the deluge of takings. The Plaintiff still needs to establish the class, show that he was treated differentially than similarly situated citizens, and get past rational basis test. The rational basis test, even if applied with bite, is still almost always fatal to the plaintiff’s claims. The Government 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.”235

235 Boudreaux, supra note 29, at 51.