Surgery or Butchery? Engquist v. Oregon, Class-of-One Equal Protection, and the Shift to Categorical Treatment of Public Employees' Constitutional Claims

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“Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection ‘class of one’ claims, the Court should use a scalpel rather than a meat-axe.”

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I. PRELUDE: THE CASE OF EVA CIECHON

A career paramedic employed by the City of Chicago, Ms. Ciechon was called to her shift fourteen hours early during the record-setting Chicago Blizzard of 1979.\(^2\) While on her twenty-seventh call during her twenty-seventh hour of work, Ms. Ciechon and a fellow paramedic were treating an elderly man at his home.\(^3\) The man was short of breath after chipping ice and shoveling snow.\(^4\) He refused to be taken to the hospital but demanded that oxygen be administered to him.\(^5\) Through her initial questioning of the patient, Ms. Ciechon determined that he had a prior condition, a collapsed lung, which made the administration of oxygen outside of a controlled medical environment a dangerous, perhaps life-threatening, proposition.\(^6\) After unsuccessfully pleading with the

\(^2\) Ciechon v. City of Chicago, 686 F.2d 511, 513 (7th Cir. 1982).
\(^3\) Id. at 514.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
patient to accept hospital treatment, Ms. Ciechon and her colleague left the scene. Soon thereafter the patient died. His family, understandably distraught, had the city conduct an investigation into the incident. Ms. Ciechon boasted a spotless record and three years of experience. Yet, it was she, and she alone, who was terminated from employment. Although not a member of any class traditionally protected under the Fourteenth Amendment, Ms. Ciechon was vindicated by the Seventh Circuit Court of Appeals on equal protection grounds. The court expressed disbelief “that a three-year career paramedic with a theretofore unblemished record would be discharged for a single incident of alleged improper conduct.” It concluded:

In this case the family’s grief was expressed in pointless vengeance and, in view of media and family pressure, the official investigation was single-mindedly and intentionally directed to ruining the career of one, but only one, of the employees involved in this unfortunate incident. Because of these two factors, we have no difficulty in finding [a violation] of . . . equal protection.

As an employee of the city of Chicago, Ms. Ciechon enjoyed the protection of the Constitution from the adverse employment action taken against her. Today, however, the same right that she relied upon is no longer available to public employees subjected to similar mistreatment.

In 2008, the United States Supreme Court’s opinion in Engquist v. Oregon Department of Agriculture substantially altered the law of the Equal Protection Clause in the public employment context. Post-Engquist, plaintiffs like Ms. Ciechon are denied the right to assert equal protection claims when they cannot allege

7. Id.
8. Id. at 515.
9. Id.
10. Id. at 516.
11. Id. at 515.
12. See 16B AM. JUR. 2D Constitutional Law § 802 (1998) (“While the principal target of the Equal Protection Clause is discrimination against members of vulnerable groups, the clause also protects ‘class-of-one’ plaintiffs victimized by wholly arbitrary acts.” (citing Ind. State Teachers Ass’n v. Bd. of Sch. Comm’rs of the City of Indianapolis, 101 F.3d 1179 (7th Cir. 1996))).
14. Id. at 516.
15. Id. at 516–17.
class-based discrimination.\textsuperscript{18} Even if public employees are treated differently from their coworkers for arbitrary and malicious reasons, the Equal Protection Clause is unavailable to them under the class-of-one theory.\textsuperscript{19}

II. INTRODUCTION: CONSTITUTIONAL RIGHTS IN THE PUBLIC EMPLOYMENT CONTEXT

A state’s citizens wield a wider constitutional shield than its employees. The United States Supreme Court has long held that “[t]he government as employer indeed has far broader powers than does the government as sovereign.”\textsuperscript{20} On this basis, the Court has concluded that “government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.”\textsuperscript{21}

Although these principles are well established, the Court recently employed the constitutional wiggle-room it affords government employers to effect a significant change in public employment law. First, in the 2006 case of \textit{Garcetti v. Ceballos}, the Court held that “when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline.”\textsuperscript{22} Essentially, the First Amendment no longer shields speech in the public employment context conducted as part of an employee’s job. This \textit{per se} rule is a significant departure from the Court’s prior First Amendment jurisprudence. In prior cases, a balancing approach was employed to determine whether a public employee should be afforded First Amendment protection.\textsuperscript{23} In the 2008 case

\begin{itemize}
\item \textsuperscript{18} Engquist v. Or. Dep’t of Agric., 128 S. Ct. 2146, 2157 (2008).
\item \textsuperscript{19} \textit{Id}.
\item \textsuperscript{20} Waters v. Churchill, 511 U.S. 661, 671 (1994) “The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” \textit{Id}. at 675.
\item \textsuperscript{21} \textit{Engquist}, 128 S. Ct. at 2151.
\item \textsuperscript{22} 547 U.S. 410, 421 (2006).
\item \textsuperscript{23} Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968). This approach balances the interest of the employee in his or her right to freedom of expression under the First Amendment against the countervailing interest of the employer in the orderly operation of the workplace. \textit{Garcetti} adds a threshold question before the \textit{Connick-Pickering} balancing test can be reached in public employment speech cases—was the employee acting in his or her official capacity when the expression in question took place? \textit{Garcetti}, 547 U.S. at 421. Even after \textit{Garcetti}, the balancing test is still employed in determining whether a public employee’s First Amendment rights were violated by an adverse employment action done in response to speech exercised outside of that employee’s official capacity. \textit{Id}.
\end{itemize}
of *Engquist v. Oregon*, the Court again categorically denied public employees the right to assert a constitutional claim, holding the class-of-one theory of equal protection inapplicable in the public employment context. On its face, this shift in the treatment of public employees' constitutional claims is indicative of the current Court's legal philosophy with respect to these types of cases. However, the movement from a balancing approach to a categorical approach also signals the Court's desire to effect a change in judicial process for public employees' constitutional claims in general. This development has altered the distinctive nature of public employment, making it more similar to its private sector counterpart.

The rationales set forth in *Engquist* and *Garcetti* reflect that the shift to categorical treatment of public employees' constitutional claims was motivated by two major concerns. In *Garcetti*, the Court feared the “displacement of managerial discretion with judicial supervision.” In *Engquist*, the Court echoed this concern in support of a related, but not identical, apprehension. It was feared that the entanglement of the federal judiciary in discretionary employment matters would lead to a flood of litigation. Both of these rationales deserve skepticism and scrutiny.

The Court's new *per se* approach to public employees' constitutional claims has been criticized in the First Amendment context as a harmful departure from prior law that could “fail to advance—and may even harm—the important interests at stake.” Concern regarding the displacement of managerial discretion with judicial supervision seems a "slender reed" upon which to base such a significant change in the law. With respect to class-of-one equal protection claims, the unsubstantiated fear of a potential

24. *Engquist*, 128 S. Ct. at 2148–49 ("We hold that such a 'class-of-one' theory of equal protection has no place in the public employment context.").

25. Ramona L. Paetzold, *Supreme Court's 2005–2006 Term Employment Law Cases: Do New Justices Imply New Directions?*, 10 EMP. RTS. & EMP. POL'Y J. 303, 348–49 (2006). The author explains that the addition of Justices Roberts and Alito has shifted the balance of the Court in employment law cases toward the conservative end of the spectrum. She examines this change in the Court's composition in light of *Garcetti* and posits that it may result in a “significant conservative shift in legal ideology, if not outcomes.” *Id.* at 348.


27. *Id.*

28. *Id.*


flood of constitutional litigation in the public employment context also appears to be a flimsy justification for the categorical denial of such claims. One commentator has advanced the view that:

Concerns about floodgates are not unreasonable from a practical point of view, but they are an unprincipled reason for completely excising some instances of unequal treatment from the [Equal Protection Clause's] purview . . . . [T]he need remains for some principle to distinguish between judicially-cognizable claims and government action that does not implicate equal protection. 31

It is ironic that a constitutional right has been denied to public employees based on the potential that too many of them might invoke its protection. In his dissent in Engquist, Justice Stevens criticized the majority’s rule as being “based upon speculation about inapt hypothetical cases.” 32 Indeed, the Court offered no concrete support for its assertion that the class-of-one theory’s application in the public employment context would cause a flood of litigation. The denial of these claims in this area is too harsh because it eliminates what could be the only viable remedy for a certain set of plaintiffs. Further, the Court’s dual rationale for that denial is flawed. First, the Court erred by applying principles to the public employment context that are more closely related to private employment. Second, the Court failed to substantiate its flood concern with actual cases. The implications of the shift to categorical treatment of public employees’ constitutional claims not only include the alteration of the judicial process with respect to these cases, but also encompass the erosion of the distinguishing traits of public employment through the misplaced application of private employment law principles.

This Comment will address the concerns expressed by the Court in Engquist and will suggest an approach that would limit, but not deny, the availability of class-of-one equal protection claims to public employees. Part III will present an overview of the relevant Supreme Court jurisprudence, including an introduction to the class-of-one theory and an analysis of the link between the Court’s rationales in Garcetti and Engquist. It will also address the second justification offered by the Court in Engquist for its holding. By relating all of these rationales, Part III will ultimately posit that these two cases have changed the legal rights afforded to

32. Engquist, 128 S. Ct. at 2159 (Stevens, J., dissenting).
public employees in such a way as to make public employment more similar to private employment. Part IV will examine a sample of federal class-of-one equal protection claims, both in district courts and circuit [courts of appeals.] The analysis of these cases will determine whether the Court’s concerns regarding unnecessary judicial involvement in public employment disputes and the resulting flood of litigation are justified. Finally, Part V will suggest an alternative to the categorical treatment of public employees’ class-of-one claims. This approach limits class-of-one cases and allows potentially valid claims to proceed on the merits.

III. THE SHIFT TO CATEGORICAL TREATMENT OF CONSTITUTIONAL CLAIMS IN THE PUBLIC EMPLOYMENT CONTEXT: BACKGROUND, EFFECT, AND IMPLICATIONS

A. Class-of-One Equal Protection and Village of Willowbrook v. Olech

Grace and Thaddeus Olech resided in the peaceful village of Willowbrook, a small town just west of Chicago. They requested that the municipality connect their home to the local water supply. This required the Olechs and any other residents who desired municipal water service to grant the village an easement on their property. Although it had only required fifteen-foot easements from the other residents, the village demanded a thirty-three-foot easement on the Olech’s property without any justification. The Olechs sued the village, alleging violation of their rights under the Equal Protection Clause. They claimed that the village’s “demand was irrational and wholly arbitrary” and “that [it] was actually motivated by ill will resulting from their previous filing of an unrelated successful lawsuit against the village.” In a short per curiam opinion, the United States Supreme Court explained that its “cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated

35. Olech, 528 U.S. at 563.
36. Id.
37. Id.
38. Id.
39. Id.
differently from others similarly situated and that there is no rational basis for the difference in treatment.\(^4\)

The Court cited two of its landmark cases in support of the class-of-one theory.\(^4\) This indicates that, to the unanimous Justices so holding, the formal recognition of the class-of-one theory was not a change in the law. The Court merely issued a reminder of what had always been a valid cause of action under the Equal Protection Clause. "Indeed, one might argue that instead of calling them ‘classes of one,’ the . . . Court could have avoided confusion by simply stating that individual ‘persons,’ and not just classes, have always been protected by the Fourteenth Amendment."\(^4\)

Although the Court was clear in its position that the Equal Protection Clause has always protected "classes of one,"\(^4\) it was feared that courts would go from seeing no class-of-one claims to processing hundreds of them.\(^4\) Immediately after Olech one commentator suggested:

If anyone can sue the government for an equal protection violation merely by alleging that she was treated differently than others with no rational basis for the different treatment, then governmental law offices should be hiring new attorneys to defend against an avalanche of lawsuits from disappointed citizens . . . .\(^4\)

A member of the Olech Court had the foresight to address this concern. In his concurrence, Justice Breyer suggested adoption of the Seventh Circuit Court of Appeals' rationale.\(^4\) That court required class-of-one plaintiffs to allege "an extra factor . . . a

\(4\). Id. at 564.

\(41\). Id. (citing Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Comm’n of Webster County, 488 U.S. 336 (1989)).

\(42\). David S. Cheval, Note, By the Way—The Equal Protection Clause has Always Protected a “Class-of-One”: An Examination of Village of Willowbrook v. Olech, 104 W. VA. L. REV. 593, 610 (2002).


\(46\). Olech, 528 U.S. at 566 (Breyer, J., concurring).
factor that the Court of Appeals called ‘vindictive action,’ ‘illegitimate animus,’ or ‘ill will.’” He explained that this additional requirement would be “sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.”

Despite Justice Breyer’s expressed concern and suggested remedy, the Court was unmoved by the potential flood of litigation at that time. It expressly did “not reach the alternative theory of ‘subjective ill will’ relied on by [the Seventh Circuit].” The Court’s failure to affirm this portion of the Seventh Circuit’s opinion has been interpreted as a failure to overrule it. As a result, the application of this subjective factor to class-of-one claims is discretionary. Indeed, after Olech many federal courts have applied such an element in class-of-one cases. Still, the Supreme Court was unfazed by the fear that a flood of litigation would result from Olech’s formal recognition of class-of-one equal protection. After the passage of time, changes in the Court’s composition, and presentation of the same concern in a new context, the Court’s position on this issue changed dramatically.


Eight years after Olech, the Supreme Court was faced with a class-of-one equal protection claim in the public employment context. In Engquist v. Oregon, the flood concern raised by Justice

47. Id.
48. Id.
49. Id. at 565 (majority opinion).
51. Id.
52. Nicole Richter, A Standard for “Class of One” Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination from Vindictive State Action, 35 VAL. U. L. REV. 197, 228–31 (2000) (noting that even after the Supreme Court’s failure to address the subjective element relied upon by the Seventh Circuit in Olech, the First, Second, and Seventh Circuits continued to apply a subjective illegitimate animus factor, in various articulations, to class-of-one equal protection claims).
53. See Paetzold, supra note 25 (discussing the appointments of Chief Justice Roberts and Justice Alito to the United States Supreme Court and their impact on the Court’s conservative leanings). Compare Olech, 528 U.S. at 562 (Court permitted class-of-one claim in the municipal zoning context), with Engquist v. Or. Dep’t of Agric., 128 S. Ct. 2146 (2008) (Court denied a class-of-one claim in the public employment context).
Breyer in Village of Willowbrook was recognized. On top of its recognition, the Court supported the categorical denial of public employees' class-of-one claims with this once-ignored issue. Although this appeared to be a dramatic development, it was not the first time the Court abrogated a previously valid constitutional claim in the area of public employment.

In Garcetti, the Court denied First Amendment protection to public employees while acting in their official capacities. This denial was based upon the concern that permitting these claims would unnecessarily involve federal courts in employment disputes concerning discretionary decisions. In Engquist, the Court used this rationale to bolster its hypothesis that allowing class-of-one claims in the public employment context would cause a flood of litigation. Although separate, these justifications are linked. Displacing managerial discretion with judicial supervision inevitably results in the federal judiciary's involvement in these types of employment matters through civil suits.

In Engquist, the Court predicted that this possibility would result in a flood of class-of-one cases. The fear of the displacement of managerial discretion was substantial enough for the Court to impose a partial denial of First Amendment protections to government employees in Garcetti. However, in Engquist, the Court employed this reasoning along with the flood rationale to support the complete denial of class-of-one equal protection rights to that same group of citizens.

In Olech, the flood concern went unmentioned. Yet in Engquist, it was deemed so worrisome in the public employment context as to require the categorical denial of class-of-one equal protection claims to government employees. This shift in the treatment of public employees' constitutional claims not only changes the judicial process with respect to these types of cases, but also alters public employment through the influence of private employment law.

54. Engquist, 128 S. Ct. at 2157.
55. Id.
57. Id.
58. Engquist, 128 S. Ct. at 2157.
59. See id.
60. Id.
61. Garcetti, 547 U.S. at 423.
Anup Engquist was employed by the Oregon Department of Agriculture as an international food standards specialist. She challenged being passed over for a promotion and her eventual termination under a class-of-one equal protection theory, "alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for 'arbitrary, vindictive, and malicious reasons.'" In a six-to-three opinion, with Chief Justice Roberts writing for the majority, the Court held the class-of-one theory inapplicable in the public employment context. The creation of this per se rule was supported by the concern that allowing public employees to assert this type of claim would result in a flood of meritless law suits. The Court explained:

The practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack. The Equal Protection Clause does not require "[t]his displacement of managerial discretion by judicial supervision." Although not an unreasonable concern, this assertion was left unsubstantiated. Eight years after Olech there was class-of-one jurisprudence that the Engquist Court could have referenced in support of its contention. This deficiency was not lost on the dissenting members of the Court.

Justice Stevens, joined in dissent by Justices Ginsberg and Souter, criticized the majority's approach as a sort of butchery, stating, "[p]resumably the concern that actually motivates today's decision is fear that governments will be forced to defend against a multitude of 'class of one' claims unless the Court wields its meat-axe forthwith." It is disconcerting that the guardian of the
Constitution would take such a broad stroke with its judicial blade so as to completely cut off a constitutional claim from the body of rights afforded to a certain group of citizens. The Court failed to even consider an alternative approach that might prevent a flood of frivolous litigation and still preserve meritorious claims. Unlike the majority, Justice Stevens at least attempted to support his view with actual evidence:

Experience demonstrates, however, that these claims are brought infrequently, that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial. Experience also demonstrates that there are in fact rare cases in which a petty tyrant has misused governmental power.69

Though Justice Stevens disagreed with the majority’s categorical rule, he failed to advance an alternative that would address the flood concern and still preserve viable class-of-one claims. Indeed, no member of the Court addressed the subjective “ill will” prong advocated by Justice Breyer in Olech. The dissenting Justices could have strengthened their position and weakened the asserted necessity for the majority’s categorical rule if they had at least acknowledged the availability of an alternative.

2. Garcetti v. Ceballos and the Link to the Rationale of Engquist

Richard Ceballos, an assistant district attorney, was reassigned, transferred, and denied a promotion after drafting a memorandum that identified serious misrepresentations in an affidavit used to obtain a search warrant.70 He claimed that the adverse employment actions taken against him were retaliation for his exposure of the flawed affidavit71 and sought redress in federal court, alleging violation of his First Amendment rights.72 The Court replaced the balancing test that it traditionally used in public employment speech cases with a per se rule when public employees assert First Amendment claims based upon job-related expression.73 The Court held that public employees acting in their official capacity no longer enjoy the protection of the First Amendment.74 In doing so,

69. Id.
71. Id. at 415.
72. Id.
73. Id. at 421.
74. Id. at 426.
the Court created a threshold inquiry into the public employees’ status at the time of expression before the traditional balancing analysis could be reached. This shift to categorical treatment of these types of constitutional claims was supported in part by the rationale that was later set forth in Engquist for the same treatment of class-of-one claims in the public employment context. The Court in Garcetti opined:

Ceballos’ proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents.

Even though this was the sole justification in Garcetti, the Court in Engquist used this concern as support for the possibility that permitting class-of-one claims in the public employment context would lead to a flood of these types of claims. Admittedly, these rationales are not identical. However, they are closely related. The displacement of managerial discretion by judicial supervision would not be a significant concern if not for the possibility that such judicial involvement in discretionary employment matters would occur too often. It seems counterintuitive that the Court would disclaim its responsibility as guardian of public employees’ constitutional rights because it does not want to second-guess government employers’ decisions. The protection of those rights may require judicial scrutiny. It is even more disturbing that a similar denial could be based on fears that too many individuals might seek vindication of a particular constitutional right.

Rights exist for their protection to be claimed. If individuals do so, it is the responsibility of the courts to accept those claims and determine their merits. A citizen’s right to seek legal redress of injuries and grievances has been an inextricable part of constitutional law for more than two centuries. In Marbury v. Madison, Chief Justice John Marshall recognized that:

75. Id. at 421. See also Emily Gold Waldman, Returning to Hazelwood’s Core: A New Approach to Restrictions on School Sponsored Speech, 60 FLA. L. REV. 63, 82 (2008) (“[T]he initial threshold inquiry rests primarily on whether the employee was speaking in his capacity as a citizen, rather than on whether the speech related to a matter of public concern.”).

76. Garcetti, 547 U.S. at 423.
The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.\footnote{5 U.S. (1 Cranch) 137, 163 (1803).}

The application of Engquist and Garcetti's categorical rules eliminates what may be the only remedies available when particular rights are violated. Undoubtedly, Chief Justice John Marshall would view this as being in direct conflict with the "very essence of civil liberty."\footnote{See id.} Such a significant departure from Supreme Court precedent must have been motivated by something more than fears of unnecessary judicial supervision of government employers and a flood of constitutional claims by government employees. The retrenchment of constitutional protections in the public employment context diminishes one of the traditional distinctions between private and public employment—the ability of public employees to challenge adverse employment actions through constitutional claims.\footnote{See 43 AM. JUR. Trials 1 § 1 (2008) (database).} Private employment law's influence on the Court's holding in Engquist is even more apparent upon examination of the second justification offered for the categorical denial of class-of-one claims to public employees.

C. Class-of-One Equal Protection, Employment-at-Will, and Other Factors Motivating the Categorical Treatment of Public Employees' Constitutional Claims

In Engquist, the Court advanced a second concern separate from the fear of a flood of class-of-one litigation. The Court also predicted that permitting the assertion of class-of-one claims in the public employment context would destroy the practice of at-will employment.\footnote{Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2156 (2008).} Chief Justice Roberts explained:

State employers cannot, of course, take personnel actions that would independently violate the Constitution. But recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the
State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine.  

This bold assertion did not go unnoticed by Justice Stevens in his dissent. He found that "[the majority's] conclusion [was] based upon . . . an incorrect evaluation of the importance of the government's interest in preserving a regime of 'at will' employment." The Court's concern regarding the impact that the class-of-one theory might have on public employment is misplaced. By its application of a private employment concept to public employment, the Court has made the latter institution more like its private sector counterpart.  

1. Dissenting Critiques: Circuit Judge Reinhardt and Justice Stevens  

In its opinion in Engquist, the Supreme Court asserted that permitting class-of-one claims in the public employment context would be "contrary to" the concept of at-will employment and would result in the repudiation of "that familiar doctrine." The Ninth Circuit Court of Appeals expressed the same misgivings. It reasoned that "[a]plying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public at-will employment." In his dissent, Circuit Judge Reinhardt concluded that the Ninth Circuit imposed its categorical denial "because it [was] needlessly concerned that the class-of-one rule would eliminate at-will employment." He explained that "there [was] no cause for the majority's concern" because "[t]he application of class-of-one equal protection principles is hardly fatal to at-will employment." Judge Reinhardt concluded that "[i]t is certainly not necessary, in order to preserve the concept of at-will employment, to hold that government may freely treat its employees maliciously and irrationally."  

81. *Id.* (citations omitted).  
82. *Id.* at 2159 (Stevens, J., dissenting).  
83. *Id.* at 2156 (majority opinion).  
84. Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2008).  
85. *Id.* at 995.  
86. *Id.* at 1012.  
87. *Id.*  
88. *Id.*
Justice Stevens reached the same conclusion with respect to the majority opinion's elimination-of-employment-at-will argument. He lent support to Judge Reinhardt's position by drawing "a clear distinction between an exercise of discretion and an arbitrary decision."\(^8\) Justice Stevens explained that "the Equal Protection Clause proscribes arbitrary decisions—decisions unsupported by any rational basis—not unwise ones."\(^9\) Thus, "a discretionary decision with any 'reasonably conceivable' rational justification will not support an equal protection claim; only a truly arbitrary one will."\(^9\) For Justice Stevens, this logic rendered the public employment exception for class-of-one equal protection claims unnecessary.\(^9\)

Justice Stevens also dismissed the majority's contention because today public employment and the at-will doctrine are incompatible. He explained that "[i]n the 1890's [the employment-at-will] doctrine applied broadly to government employment, but for many years now the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."\(^9\) He continued by pointing out that "recent constitutional decisions and statutory enactments have all but nullified the significance of the doctrine."\(^9\) He concluded that "preserving the remnants of 'at-will' employment provides a feeble justification for creating a broad exception to a well-established category of constitutional protections."

Public employment is not entirely comparable to at-will employment. Many government employees are not employed at will. For example, a state university professor might enjoy tenure status, which prevents that public employer from terminating the professor except in a very limited set of circumstances.\(^9\) Also, at a very basic level, the Constitution proscribes adverse employment actions taken against public employees that violate their constitutional rights. In the private sector, an adverse employment action cannot be challenged under the Constitution no matter what

90. Id.
91. Id.
92. See id. at 2161.
93. Id. at 2160 (citations omitted).
94. Id.
95. Id.
constitutional provision it might violate. Thus, the Court's assertion that permitting class-of-one equal protection claims in the public employment context would result in the repudiation of the doctrine of at-will employment is simply false. Employment-at-will is more prevalent and applicable to private sector jobs than public sector jobs. Perhaps it is the Court's unstated fear that public employment law will influence private employment so as to result in negative effects upon the doctrine of at-will employment in the private sector, but Engquist actually achieved the opposite result. The Court has significantly altered public employment through the application of private employment law principles, resulting in diminished constitutional protection of government employees.

2. The Relationship of Private Employment and Public Employment: Reciprocal Influences

Professor Samuel Issacharoff, a constitutional law scholar at New York University School of Law, has recognized the influence of public employment law on private employment rights jurisprudence. He noted "the dramatic expansion of public-sector employment and the critical role that public-sector litigation has played in the development of common law." To Issacharoff, "it is not surprising that courts seeking to redress wrongful-discharge claims routinely look to the public sector cases for guidance." He characterized public employment as a "natural arena for the pioneering of substantive claims to employment rights," observing that "since the 1960s, the public sector has been the source of

98. Engquist, 128 S. Ct. at 2160 (Stevens, J., dissenting) ("[F]or many years now 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" (citations omitted)). See also Bijal J. Patel, MySpace or Yours: The Abridgment of the Blogosphere at the Hands of At-Will Employment, 44 Hous. L. Rev. 777, 795 (2007) ("Employment at-will is a widely accepted doctrine governing private employment in the United States."); Tom Ivester, Employment Law: Classification in Oklahoma Public Employment: Does it Really Matter?, 53 Okla. L. Rev. 143, 145 (2000) ("In the early 1950s, however, the Supreme Court began to apply due process protections to public employment and move away from employment-at-will.").
100. Id. at 616.
101. Id. at 617.
dramatic expansions in employee rights to free expression, due process, and privacy.\textsuperscript{102}

The recent developments in the Supreme Court's public employment jurisprudence, however, indicate an opposite trend to that identified by Professor Issacharoff. The Court's concern in \textit{Engquist} with respect to at-will employment and its fear in \textit{Engquist} and \textit{Garcetti} with regard to the displacement of managerial discretion both signal the significant influence of private employment law upon these decisions. \textit{Engquist} made public employment more like private employment through its denial of a constitutional protection to public employees and its misplaced concern regarding the repudiation of at-will employment.\textsuperscript{103} \textit{Garcetti} also had this effect. Private sector employees have never enjoyed the degree of protection that public employees have with respect to speech and expression.\textsuperscript{104} Through its retrenchment of public employees' First Amendment rights, \textit{Garcetti} placed public employees in a similar position to private employees. When acting in their official capacity, public and private employees are now both estopped from challenging adverse employment actions as violations of their First Amendment rights.

The Court's creation of two categorical rules with respect to public employees' First Amendment and class-of-one equal protection rights alters the government workplace to more closely resemble the private workplace. These changes are manifestations of the Court's current conservative ideology with respect to constitutional claims in the public employment context.\textsuperscript{105} Government employers are the beneficiaries of public employees' diminished constitutional rights. The Court has elevated the interest of the government employer in the orderly operation of the workplace above the interest of the government employee in the protection of the Constitution. Not only is this development supported by the recent pronouncements of the Court, but also by recent changes in the Court's composition.

When \textit{Olech} was decided, the Court's composition was slightly different than it is today. Chief Justice John Roberts and Associate

\textsuperscript{102} Id. at 616.
\textsuperscript{103} See \textit{Engquist}, 128 S. Ct. at 2156.
\textsuperscript{104} 82 AM. JUR. 2D \textit{Wrongful Discharge} § 80 (2003) (citing Barr v. Kelso-Burnett Co., 478 N.E.2d 1354 (Ill. 1985) (holding that"[a]n employer publisher was a private entity, not a governmental entity, and thus was legally incapable of violating anyone's First Amendment rights.").
\textsuperscript{105} See Paetzold, \textit{supra} note 25. Professor Paetzold asserts that the \textit{Garcetti} opinion is emblematic of the Supreme Court's current conservative stance. Id. at 349. It is this author's opinion that the \textit{Engquist} opinion is also an indication of the Court's conservative leanings.
Justice Samuel Alito took their seats on September 29, 2005 and January 31, 2006, respectively. Both were appointed in time to take part in the Court’s opinion in Garcetti. After evaluating the Court’s decision in Garcetti, Dr. Ramona L. Paetzold, Professor and Mays Research Fellow of the Mays Business School at Texas A&M University, concluded that the “sweeping, per se rule” enunciated therein “renders public employment much more similar to private employment, making public service marginally less attractive than it previously was.” The tongue-in-cheek jab that followed Professor Paetzold’s observation of Garcetti’s significance raises another important point. Presumably, one of the benefits of public employment is the added protection that public employees are afforded by the Constitution. However, the Court’s shift to categorical treatment of certain constitutional claims in the public employment context has the effect of eroding one of the characteristics that differentiates public employment from private employment. Although Professor Paetzold reserved judgment as to what direction the Court will ultimately take on public employment matters, this Comment has the benefit of the further development that she awaited—the Court’s opinion in Engquist. The retrenchment of constitutional protections afforded to public employees represents a substantial shift in the legal philosophy of the Court. Two new, conservative-leaning Justices have influenced the Court to fashion rules in the public employment context that render it more like private employment.

Since its formal recognition, the Court has limited the class-of-one equal protection theory by denying its application to public employment. The concerns expressed by Justice Breyer, although not heeded by the Court in Olech, were heard loud and clear by the Court in Engquist. With the arrival of Chief Justice Roberts and Justice Alito, a concern that before was only a minority view has become the foundation upon which a categorical denial of a constitutional claim is based. This development is also indicative of the influence of private employment law upon the Court’s posture toward public employment.

108. Paetzold, supra note 25, at 346.
109. Id. Professor Paetzold sarcastically observes that if public employment were not already unattractive enough, the diminishment of constitutional protection afforded to public employees, arguably one of the benefits of public employment, makes it even less attractive.
110. Id. at 348–49.
IV. EXAMINATION OF FEDERAL CLASS-OF-ONE CASES

A. Introductory Comments: Purpose and Limitation

The Supreme Court’s flood rationale in Engquist can be critically assessed through an examination of federal class-of-one cases. Ultimately, the analysis of these cases will validate the assertion of Justice Stevens’s dissent “that ['class of one'] claims are brought infrequently, that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial.”11

Although Justice Stevens lamented the majority opinion’s reliance on “inapt, hypothetical cases” for its holding,12 this critique of the Court’s categorical rule has the benefit of several years of class-of-one litigation.13 The disposition of each of these cases provides a basis upon which the necessity of that rule can be judged.

The analysis begins with 2001 federal jurisprudence, the year after Olech’s formal recognition of the class-of-one theory, and extends to present cases. This examination is confined to cases in which the public employees’ claims are expressly stated as class-of-one. However, class-of-one claims have been asserted in the public employment context without being labeled class-of-one.14 It must be conceded that this sample does not include all class-of-one claims asserted by public employees during the period analyzed. Still, the search that produced the sample was designed to retrieve all cases that involved claims by public employees specifically identified as class-of-one. The volume of cases in the sample is at least representative of the number of claims formally

112. Id. at 2159.
113. Class-of-one equal protection claims of public employees were identified using a Westlaw terms-and-connectors search in the “ALLFEDS” database, performed as follows: class-of-one and “equal protection”/“public employee” or “public employees.” The search returned 139 results, 108 of which involved formally stated class-of-one claims and 105 of which are relevant to this study. This search was originally performed in the fall of 2009. Since, the amount of results that the search returns has increased.
114. E.g., Ciechon v. City of Chicago, 686 F.2d 511, 517 (7th Cir. 1982). Although this case was decided well before Olech’s formal recognition of the class-of-one theory, the Seventh Circuit upheld the public employee’s class-of-one type claim under the Equal Protection Clause. Judge Posner has called Ciechon “the extreme case that kicked off the ‘class of one’ movement.” Lauth v. McCollum, 424 F.3d 631, 634 (7th Cir. 2005). Based on this characterization, it can be assumed that plaintiffs followed Ciechon’s framework and did not label their claims as class-of-one.
stated as class-of-one claims. Also, the fact that this sampling is not comprehensive does not diminish the significance of the proportion of the cases that involve multiple federal claims and that are dismissed on preliminary motions.

B. Analysis: Circuit Court of Appeals and United States District Court Opinions

1. Cases Examined by Year

The sample contained three class-of-one claims asserted in 2001, two at the appellate level and one at the district court level. In both court of appeals cases, the plaintiffs asserted other federal law claims along with the class-of-one claim. In each case, the appellate courts affirmed summary judgment as to all federal law claims. In the district court case, the public employee asserted three other federal law claims along with his class-of-one claim. The court granted the employee’s motion for a preliminary injunction on equal protection and other grounds.

For 2002, nine class-of-one claims were returned in the sample. Three were circuit court of appeals cases, and six were district court cases. At the appellate level, all three cases involved multiple constitutional claims. In two of the three cases, the courts of

115. Giordano v. City of New York, 274 F.3d 740 (2d Cir. 2001) (Former officer challenged discharge under the Americans with Disabilities Act (ADA), the Due Process Clause, the Equal Protection Clause, and state and city law. Court of appeals affirmed district court’s grant of summary judgment in favor of the city as to officer’s ADA, due process, and equal protection claims. Court of appeals remanded state and city lay claims to state court.); Bartell v. Aurora Pub. Sch., 263 F.3d 1143 (10th Cir. 2001) (Employee asserted due process and class-of-one equal protection claims, as well as pendent state law claims. The court of appeals affirmed the district court’s grant of summary judgment in favor of the employer as to all claims.);

116. Giordano, 274 F.3d 740; Bartell, 263 F.3d 1143.

117. Caudell v. City of Toccoa, 153 F. Supp. 2d 1371 (N.D. Ga. 2001) (City commissioner challenged state legislative act under a class-of-one equal protection theory, the Voting Rights Act of 1965, the First Amendment, the Bill of Attainder Clause, and the Home-Rule provisions of Georgia law. District court held that the act violated plaintiff’s rights under the Equal Protection Clause.);

118. Id. at 1378.

119. Conlon v. Austin, 48 F. App’x 816 (2d Cir. 2002) (Fire department lieutenant challenged transfer on First Amendment and class-of-one equal protection grounds. Court of appeals affirmed district court’s grant of summary judgment in favor of employer as to both claims.); Wojcik v. Mass. State Lottery Comm’n, 300 F.3d 92 (1st Cir. 2002) (Employee challenged termination on procedural due process, substantive due process, and class-of-one equal protection grounds. Court of appeals affirmed district court’s grant of summary judgment in favor of employer as to all claims.); Bower v. Vill. of Mount Sterling, 44 F. App’x
appeals affirmed summary judgment in favor of the employer on all claims. In the other case, the court of appeals reversed summary judgment in favor of the employer on the class-of-one claim. At the district court level, five of the six cases involved multiple federal claims. Of those five cases, two were completely dismissed on summary judgment. In one of those five cases, the employee’s class-of-one claim was the only federal claim dismissed on summary judgment. In two of the five district court cases that involved multiple federal claims, the class-of-one claims survived motions for summary judgment. One of the six district court cases involved only a class-of-one claim that also survived a motion for summary judgment.

For 2003, six class-of-one claims were returned in the sample, two at the appellate level and four at the district court level. In the circuit courts of appeals, both cases involved multiple
constitutional claims. In each case, all of the claims were dismissed on motions for summary judgment. In the district courts, three of the four cases involved multiple federal claims. In all three, the employees' claims were dismissed on summary judgment. The one district court case that involved only a class-of-one claim survived the defendant's motion for summary judgment.

The sample contained six class-of-one claims asserted in 2004, two in the circuit courts of appeals and four in the district courts. At the appellate level, both cases involved multiple federal claims. In one of those cases, the court of appeals affirmed the district court's dismissal of all the employee's claims. In the other case, the court of appeals affirmed the lower court's denial of

127. Doubet v. Eckelberg, 81 F. App'x 596 (7th Cir. 2003) (Police officer challenged demotions and termination on due process, First Amendment, and class-of-one equal protection grounds. Court of appeals affirmed the district court's grant of summary judgment on all claims in favor of the employer.); Campagna v. Mass. Dep't of Envtl. Prot., 334 F.3d 150 (1st Cir. 2003) (Employee challenged disciplinary employment actions under the First Amendment and a class-of-one equal protection theory. Court of appeals affirmed district court's grant of summary judgment in favor of employer as to both claims.).

128. Doubet, 81 F. App'x 596; Campagna, 334 F.3d 150.


132. Carpenter v. City of Torrington, 100 F. App'x 858 (2d Cir. 2004) (Employee brought Title VII, due process, and class-of-one equal protection claims. Court of appeals affirmed the district court's dismissal of all claims.); Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004) (Employee challenged disciplinary action, asserting First Amendment and both selective prosecution and class-of-one equal protection claims. Court of appeals reversed judgment in favor of employees on First Amendment and selective prosecution equal protection. However, court of appeals affirmed the denial of employer's motion for judgment as a matter of law on the class-of-one equal protection claim but remanded that claim for a new trial due to an erroneous jury instruction.).

133. Carpenter, 100 F. App'x 858.
Thus, in that case, the class-of-one claim had already proceeded through trial. In the district courts, three of the four cases involved multiple federal claims. In all three of those cases, the class-of-one claims were dismissed on summary judgment. In the one case that only asserted a class-of-one claim, the defendant’s motion for summary judgment was denied.

For 2005, fifteen class-of-one claims were returned in the sample, three in the circuit courts of appeals and twelve in the district courts. While this was an increase in claims compared to the years previously analyzed, the plaintiffs’ success rate for this set of cases decreased significantly. At the appellate level, all three cases involved only class-of-one claims. Two of those cases were dismissed on preliminary motions. In the other case, the court of appeals reversed the district court’s post-trial grant of judgment as a matter of law for the employee. Thus, in that case,

134. Cobb, 363 F.3d 89.
135. Kelley v. City of Albuquerque, 375 F. Supp. 2d 1183 (D.N.M. 2004) (Employee asserted Title VII discrimination and class-of-one equal protection claims. District court found that, in the Tenth Circuit, class-of-one equal protection claims applied in the public employment context. However, court found that defendants were entitled to qualified immunity on the class-of-one claim.); Levesque v. Town of Vernon, 341 F. Supp. 2d 126 (D. Conn. 2004) (Employee asserted procedural and substantive due process, First Amendment, and equal protection claims as well as pendent state law claims. District court found that town officials were not entitled to qualified immunity from due process claims and dismissed First Amendment and equal protection claims.); Patrolmen’s Benev. Ass’n of City of N.Y., Inc. v. City of New York, No. 02 Civ. 3976(BSJ)(FM), 2004 WL 3262798 (S.D.N.Y. Aug. 19, 2004) (Employee asserted claims under the Due Process Clause, the Privileges and Immunities Clause, and the Equal Protection Clause under a class-of-one theory, as well as pendent local and state law claims. All constitutional claims were dismissed.).
137. Montanye v. Wissahickon Sch. Dist., 327 F. Supp. 2d 510 (E.D. Pa. 2004) (Employee alleged violation of equal protection and state constitution. Even though teacher did not assert class-of-one claim explicitly, court permitted claim under that theory. The claim was upheld.).
138. Lauth v. McCollum, 424 F.3d 631 (7th Cir. 2005) (Police officer challenged suspension under a class-of-one theory. Court of appeals affirmed the district court’s dismissal of the claim.); Neilson v. D’Angelis, 409 F.3d 100 (2d Cir. 2005) (Officer challenged disciplinary action on class-of-one grounds. Court of appeals reversed district court’s grant of summary judgment in favor of the officer.); Bizarro v. Miranda, 394 F.3d 82 (2d Cir. 2005) (Employees challenged institution of disciplinary charges under a class-of-one equal protection theory. Court of appeals reversed the district court’s denial of a motion for summary judgment for employer on qualified immunity grounds.).
139. Lauth, 424 F.3d 631; Bizarro, 394 F.3d 82.
140. Neilson, 409 F.3d 100.
the class-of-one claim had already proceeded through trial. At the district court level, eleven of the twelve cases involved multiple federal claims. In all eleven cases, the class-of-one claims were dismissed on preliminary motions. In the case in which the plaintiff only asserted a class-of-one claim, the district court dismissed the case on summary judgment. Thus, out of the fifteen total claims, only one proceeded to trial.


143. Young v. Mahoning County, Ohio, 418 F. Supp. 2d 948 (N.D. Ohio 2005) (Employee asserted state municipal liability and class-of-one equal protection
The sample contained fourteen total class-of-one claims asserted by public employees in 2006, five at the appellate level and nine at the lower level. In the circuit courts of appeals, four of the five cases involved multiple federal claims. In all four of these cases summary judgment was affirmed in favor of the defendants on the class-of-one claims. In the case that involved only a class-of-one claim, the appellate court also affirmed the lower court’s dismissal on summary judgment. In the district courts, eight of the nine cases asserting class-of-one claims involved other federal claims. In five of those eight cases, the

claims. District court ruled in favor of employer on its motion for summary judgment as to both claims.

144. Eggleston v. Bieluch, 203 F. App’x 257 (11th Cir. 2006) (Employee asserted class-of-one equal protection, First Amendment, and procedural due process claims. Court of appeals affirmed grant of summary judgment in favor of employer on the class-of-one and First Amendment claims.; Matsey v. Westmoreland County, 185 F. App’x 126 (3d Cir. 2006) (Employee challenged termination, asserting First Amendment, class-of-one equal protection, due process, and state law claims. Court of appeals affirmed the district court’s grant of summary judgment as to all claims.); Nance v. New Orleans & Baton Rouge Steamship Pilots’ Ass’n, 174 F. App’x 849 (5th Cir. 2006) (Employee challenged suspension on procedural due process and class-of-one equal protection grounds. Court of appeals reversed the district court’s denial of employer’s motion for summary judgment on qualified immunity grounds as to both claims.); Golden v. Town of Collierville, 167 F. App’x 474 (6th Cir. 2006) (Employee challenged denial of promotion on procedural due process and class-of-one equal protection grounds. Court of appeals affirmed the district court’s grant of summary judgment in favor of employer as to both claims.);

145. Eggleston, 203 F. App’x 257; Matsey, 185 F. App’x 126; Nance, 174 F. App’x 849; Golden, 167 F. App’x 474.

146. Sellars v. City of Gary, 453 F.3d 848 (7th Cir. 2006) (Employee brought class-of-one equal protection and breach of contract claims against employer. Court of appeals affirmed grant of summary judgment on both claims in favor of the employer.);

147. Axt v. City of Fort Wayne, No. 1:06-CV-157-TS, 2006 WL 3093235 (N.D. Ind. Oct. 30, 2006) (Employee asserted due process and class-of-one equal protection claims. District court granted employer’s motion to dismiss as to employee’s equal protection claim but denied the motion as to employee’s due process claim.); Barry v. Luzerne County, 447 F. Supp. 2d 238 (M.D. Pa. 2006) (Employee alleged violations of First Amendment, Due Process Clause, and Equal Protection Clause under a class-of-one theory. District court granted defendants’ motion for summary judgment as to due process and class-of-one equal protection claims. As to First Amendment claims, employee was permitted to proceed against all defendants except one.); Bailey v. Town of Evans, N.Y., 443 F. Supp. 2d 427 (W.D.N.Y. 2006) (Employee asserted First Amendment and class-of-one equal protection claims. District court denied employer’s motion to dismiss as to both claims.); McGee v. Green, 425 F. Supp. 2d 249 (D. Conn. 2006) (Employee asserted First Amendment and class-of-one equal protection claims, as well as state law claims. District court granted employer’s motion for summary judgment
class-of-one claims were dismissed on preliminary motions. In three of the eight cases involving multiple federal claims, the class-of-one claims survived motions to dismiss. The one district court case that involved only a class-of-one claim was dismissed on summary judgment. Although the success rate of plaintiffs in 2006 slightly increased compared to previous years, it did so only marginally.

For 2007, sixteen cases involving class-of-one claims were returned in the sample, two at the appellate level and fourteen at the lower court level. In the circuit courts of appeals, both cases involved multiple federal claims, and both courts affirmed the dismissal of the class-of-one claims by the lower courts. In the district courts, thirteen of the fourteen cases involved multiple federal claims. Of those thirteen cases, nine were dismissed on
protection claims, First Amendment claim, and deprivation of constitutional rights. District court granted defendant's motion for summary judgment as to all equal protection claims and the deprivation claim. District court denied defendant's motion for summary judgment on the First Amendment claim.; Milardo v. City of Middletown, 528 F. Supp. 2d 41 (D. Conn. 2007) (Employee asserted First Amendment retaliation and class-of-one equal protection claims. District court granted employer's motion for summary judgment as to both claims.); Meer v. Graham, 524 F. Supp. 2d 1044 (N.D. Ill. 2007) (Employee challenged termination, asserting procedural and substantive due process, First Amendment, and class-of-one equal protection claims, as well as state law claims. District court denied defendants' motion to dismiss as to all constitutional claims.); Maglietti v. Nicholson, 517 F. Supp. 2d 624 (D. Conn. 2007) (Employee asserted Title VII, Rehabilitation Act (RA), First Amendment, procedural and substantive due process, and class-of-one and selective enforcement equal protection claims. District court granted employer's motion for summary judgment as to employee's RA, First Amendment, substantive due process, and equal protection claims. However, employer's motion for summary judgment was denied as to employee's Title VII and procedural due process claims.); Paola v. Spada, 498 F. Supp. 2d 502 (D. Conn. 2007) (Employee asserted First Amendment retaliation and class-of-one equal protection claims. District court granted employer's motion for summary judgment as to employee's class-of-one claim but denied the motion as to the First Amendment claim.); Lami v. Stahl, No. 3:05CV1416 (MRK), 2007 WL 2221162 (D. Conn. July 31, 2007) (Employee asserted class-of-one equal protection and First Amendment retaliation claims. District court granted employer's motion for summary judgment as to both claims.); Pina v. Lantz, 495 F. Supp. 2d 290 (D. Conn. 2007) (Employee brought substantive and procedural due process, class-based equal protection, class-of-one equal protection, and Title VII discrimination claims. District court granted employer's motion for summary judgment as to employee's due process claims but denied the motion as to employee's equal protection and Title VII claims.); Jackson v. City of Chicago, 521 F. Supp. 2d 745 (N.D. Ill. 2007) (Employee asserted Americans with Disabilities Act (ADA), First Amendment retaliation, and class-of-one equal protection claims. District court granted employer's motion to dismiss as to employee's ADA claim but denied the motion as to employee's First Amendment and class-of-one claims.); Hayden v. Ala. Dep't of Pub. Safety, 506 F. Supp. 2d 944 (M.D. Ala. 2007) (Employee asserted First Amendment retaliation, due process, and class-of-one equal protection claims, as well as state law claims. District court granted employer's motion to dismiss as to employee's due process claims but denied the motion as to employee's class-of-one claim. District court permitted employee time to amend complaint with respect to the First Amendment claim.); Ferguson v. City of Rochester Sch. Dist., 485 F. Supp. 2d 256 (W.D.N.Y. 2007) (Employee asserted class-of-one equal protection and due process claims. District court granted employer's motion to dismiss as to employee's equal protection claim.); Sharer v. Oregon, 481 F. Supp. 2d 1156 (D. Or. 2007) (Employee asserted class-of-one equal protection and Family and Medical Leave Act (FMLA) claims, along with state law claims. District court held that employee's class-of-one claim was barred by the Ninth Circuit's holding in Engquist. Employer's motion for summary judgment was granted as to employee's FMLA claim.); Gaskin v. Vill. of Pachuta, 484 F. Supp. 2d 551 (S.D. Miss. 2007) (Employee asserted due process and class-of-one equal protection claims. District court granted employer's motion for summary judgment as to both claims.); Goldfarb v. Town of West Hartford, 474 F.
preliminary motions, while four survived preliminary motions. In the case that involved only a class-of-one claim, the district court denied the defendant's motion to dismiss. Thus, of the sixteen class-of-one federal cases examined from 2007, five claims had the potential to proceed to trial. Although the class-of-one claims were dismissed less frequently than in prior years, the plaintiffs' success rate in 2007 was only thirty-eight percent.

The sample contained thirty-six total class-of-one claims asserted by public employees in 2008, eight at the appellate level and twenty-eight at the district court level. An examination of the 2008 federal cases reveals that thirty-one of the thirty-six class-of-one claims were dismissed based on either the Supreme Court's rule in Engquist or the Ninth Circuit's holding in that same case.
As such, whether the class-of-one claims in these cases were dismissed on preliminary motions does not further the inquiry as to the accuracy of Justice Stevens' dissenting opinion. Still, whether these cases included other federal claims along with the class-of-one claims calls into question the necessity of the Court's categorical rule. In the circuit courts of appeals, six of the eight cases involved multiple federal claims. In the district courts, twenty-seven of the twenty-eight cases involved multiple federal claims. Although the volume of cases returned in the sample for


157. Porr, 299 F. App'x 84 (Former public school teacher asserted First Amendment retaliation and class-of-one equal protection claims.); Kelley, 542 F. 3d 802 (Employee brought Title VII and class-of-one equal protection claims.); Pignanelli v. Pueblo Sch. Dist. No. 60, 540 F. 3d 1213 (10th Cir. Sept. 10, 2008) (Former public school teacher asserted First Amendment, class-of-one equal protection, and due process claims.); Brillionar, 2008 WL 3864383 (Former police officer challenged termination asserting Age Discrimination in Employment Act, class-of-one equal protection, and First Amendment claims.); Williams v. Riley, 275 F. App'x 385 (10th Cir. 2008) (Employees challenged terminations, asserting First Amendment retaliation and class-of-one equal protection claims.); Price v. The City of New York, 264 F. App'x 66 (2d Cir. 2008) (Former police officer asserted ADA and class-of-one equal protection claims.).

158. Bowman, 2008 WL 5427910 (Former police officer challenged his discharge, asserting due process and class-of-one equal protection claims.); Vigor, 2008 WL 5225821 (Firefighter asserted First Amendment, procedural and substantive due process, and class-of-one equal protection claims.); Kaiser, 2008 WL 5157450 (Employee asserted ADA and “class of one” equal protection claims, as well as state law discrimination claims.); Kamholtz, 2008 WL 5114964 (Employee asserted First Amendment retaliation, class-of-one equal protection, and malicious prosecution claims, along with state law claims.); Kwentoh, 588 F. Supp. 2d 292 (Employee asserted Title VII, First Amendment retaliation, and class-of-one equal protection claims.); Marino, 2008 WL 5068639 (Former teacher asserted procedural due process and class-of-one equal protection claims.); Wheeler, 2008 WL 4963106 (Former teacher asserted procedural due process, class-of-one equal protection, First Amendment retaliation, and Fifth Amendment claims.); Shak, 2008 WL 4444122 (Former corrections officer asserted FMLA retaliation, and class-of-one and class-based equal protection claims.); Brady, 573 F. Supp. 2d 712 (Employee brought ADA, First Amendment retaliation, due process, class-of-one equal protection, and conspiracy claims, along with state law claims.); Kearney, 573 F. Supp. 2d 562 (Former police officer brought Title VII, First Amendment, due process, and class-of-one and class-based equal protection claims.); Dones, 2008 WL 2742108 (Former police officer asserted due process,
2008 was significantly greater than the other years examined, all but three of the thirty-six cases involved multiple federal claims. *Engquist*’s categorical rule did not prevent any of the plaintiffs in those cases from pursuing their other federal claims.

One of the 2008 cases signals a separate development that could also undermine the Court’s rationale for *Engquist*’s categorical rule. In *Eaton v. Siemens*, the district court dismissed the plaintiff’s class-of-one claim but granted him leave to amend in order to assert a class-based equal protection claim.159 In the previous cases examined, several have involved both class-of-one and class-based equal protection claims.160 Thus, class-of-one

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159. 2008 WL 4347735 at *4.
public employees can sometimes also assert class-based discrimination, which is not foreclosed by Engquist. The Court’s per se rule has the potential to create meritless claims itself by motivating class-of-one plaintiffs to attempt to fit themselves into protected classes in order to assert viable claims. Further, if plaintiffs are permitted to amend their petitions to allege class-based discrimination, then federal courts will have to consider motions to dismiss in these cases not once, but twice. This might implicate the flood concern even more so than permitting plaintiffs to assert the proper claim in the first place.

2. Overall Assessment

(Out of 105 Total Cases Examined)

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The cases examined support the assessment of Justice Stevens much more than they support the Court’s flood concern. From 2001 to 2008, 105 cases asserting class-of-one claims were sampled for analysis. Ninety-two of those cases involved multiple federal claims. Therefore, the application of Engquist’s categorical rule would not have prevented these plaintiffs from reaching the courts. Further, fifty-two of the class-of-one claims from 2001 to 2007 were disposed of on preliminary motions. In these cases, outright denial of the class-of-one claims would have been unnecessary. In 2008, Engquist’s per se rule required the automatic dismissal of thirty-one of the thirty-six class-of-one claims examined. The dismissal rate of these cases does not support or detract from the Court’s rationale. But, with respect to the fifty-two class-of-one claims that were dismissed on preliminary motions from 2001 to 2007, the Court’s flood concern becomes moot when the displacement of managerial discretion with judicial supervision can be avoided through conventional procedural devices. Although the cases examined do not represent the entirety of class-of-one jurisprudence in the public employment context, the low volume of cases in the sample at least supports that claims explicitly labeled

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161. These cases were dismissed as a matter of law under Engquist, not on substantive grounds.
class-of-one are rare. Ultimately, these numbers illustrate "that ['class-of-one'] claims are brought infrequently, that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial."\textsuperscript{162}

V. SUGGESTED CHANGE TO AND IMPLICATIONS OF CURRENT LAW

A. Fashioning a Rule with the Surgeon's Tool: Relating Justice Breyer's Concurrence in Village of Willowbrook v. Olech to Justice Stevens' Dissent in Engquist v. Oregon

In his criticism of Engquist's \textit{per se} rule, Justice Stevens likened the categorical denial of class-of-one claims in the public employment context to a sort of butchery.\textsuperscript{163} He stated:

\begin{quote}
Today, the Court creates a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State. Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection "class of one" claims, the Court should use a scalpel rather than a meat-axe.\textsuperscript{164}
\end{quote}

Despite this criticism, Justice Stevens did not suggest an approach to limiting these claims that would allay the Court's flood concern and simultaneously afford deserving litigants the class-of-one remedy. Yet, in his concurrence in \textit{Olech}, Justice Breyer provided a workable alternative to Engquist's categorical rule several years before the Court asserted its necessity.\textsuperscript{165} Justice Breyer's suggested approach would operate to discourage frivolous class-of-one claims while preserving valid ones.

In \textit{Olech}, Justice Breyer was concerned with the potential flood of litigation that the Court's formal recognition of class-of-one equal protection might cause.\textsuperscript{166} Accordingly, he concurred to suggest that the Court employ the approach used by the Seventh Circuit in that same case.\textsuperscript{167} Justice Breyer believed that requiring plaintiffs to prove "illegitimate animus" or "ill will" on the part of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{162} Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2160–61 (2008) (Stevens, J., dissenting).
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id. at 2158.
\item \textsuperscript{166} Id. at 565.
\item \textsuperscript{167} Id. at 565–66.
\end{enumerate}
\end{footnotesize}
the state actor, along with arbitrary action, would be “sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.” Of course, it is not surprising that Justice Breyer voted with the majority in Engquist. After all, he was the only member of the Olech Court who expressed any concern regarding the flood of litigation that formal recognition of the class-of-one theory might generate. It is also not surprising that he did not write separately in Engquist to advocate application of the ill-will prong. In Olech, Justice Breyer advocated this approach to limit class-of-one claims in zoning cases. In Engquist, advocacy of this requirement in the public employment context would have undermined the Court’s per se rule. Indeed, if class-of-one claims may be successfully limited, there is far less justification for their categorical denial. The flood concern favored denial over limitation. However, it is surprising that none of the dissenting members of the Engquist Court suggested adoption of the ill-will requirement. The existence of this limiting approach makes the necessity of a per se rule questionable. Further, some federal courts already employ this heightened pleading in class-of-one cases. Judicial familiarity with this alternative lends even more support to its adoption.

Of the successful “class-of-one cases” examined in Part IV, some of the courts that ruled in favor of the plaintiffs did so, in part, based on the existence of an element of ill-will. A closer look at these cases illustrates that plaintiffs who can allege ill-will are deserving of Fourteenth Amendment protection, even though the discrimination at issue is not class-based.

In Caudell v. City of Toccoa, the plaintiff challenged a state legislative act that would have prohibited any person from serving on the city commission and the hospital board simultaneously. The plaintiff was the “only person in the entire State of Georgia affected by [the Act].” Thus, the court deemed it “fair to infer that plaintiff [had] been singled out for a special burden to which others have not been subjected.” The court also expressed curiosity that the act only affected the plaintiff’s municipality and

168. Id. at 566.
169. Id.
170. Id.
171. See Gehan, supra note 44, at 359–63. (discussing the Federal Circuit Courts of Appeals’ requirement of a showing of “malice” or “ill-will” in class-of-one cases post-Olech); see also Richter, supra note 52, at 228–31.
173. Id.
174. Id.
not the other two county municipalities. Only residents in the plaintiff's town were prevented from serving in both roles, while those in the other two towns could if they so wished. The court hinted that it suspected some personal politics were at play in the passage of the act. Thus, in this class-of-one claim that survived a motion for summary judgment, the court at least suspected there was an element of ill-will or personal animosity in the challenged act. Such an arbitrary enactment, especially in light of its singular effect on one county municipality, should not survive constitutional scrutiny. Yet if the plaintiff in Caudell had been unable to assert a class-of-one claim, this discriminatory legislative act would have escaped the scope of the Equal Protection Clause.

In Bower v. Village of Mount Sterling, the plaintiff challenged the local police force's decision not to hire him. The court explained that "[t]he factual allegations could be reasonably construed as the Mayor employing the Villages' hiring process to 'get' Plaintiff due to Plaintiff's association with his parents who are political opponents of [the Mayor]." One should not be denied a job based on his or her parents' political associations. Essentially, this plaintiff, in a "class of one," was denied employment because of his unique family ties. Such personal animosity has no place in public employment, especially when it affects individuals indirectly, based on factors over which they have no control. If the class-of-one theory had been unavailable to the plaintiff in Bower, then the arbitrary and vindictive action taken against him would have been outside the reach of the Equal Protection Clause.

In Carr v. Village of Willow Springs, a police officer alleged that he was singled out for unwarranted discipline because of the chief of police's personal animosity toward him. He asserted that his superior perceived him as a formidable opponent for the chief of police position. A state official should not be able to prevent an employee's advancement based on such illegitimate animus and still escape the Equal Protection Clause's purview. However, because the action taken against him was not based on his membership in any protected class, the plaintiff in Carr would have been unable to claim the Equal Protection Clause's guarantee without the class-of-one theory.

175. Id.
176. Id.
177. Id. at 1376.
178. 44 F. App'x 670, 672 (6th Cir. 2002).
179. Id. at 678.
180. No. 01 C 7807, 2002 WL 1559665, at *3 (N.D. Ill. 2002).
181. Id.
If Engquist’s categorical rule had been applied in Caudell, Bower, and Carr, these employees would have been deprived of the remedies provided by the class-of-one theory. Then, the arbitrary and vindictive actions taken against the employees might have escaped constitutional scrutiny. The per se denial of class-of-one equal protection claims to public employees should be abandoned in favor of a rule that limits the availability of the class-of-one theory in the public employment context. By heightening class-of-one pleading requirements, these cases will be limited but not totally denied. This alternative addresses the Court’s flood concern, yet it still preserves meritorious claims. When a person suffers an injury, the law should provide a remedy.182 A limiting approach better serves both employees and their government employers. Workplace morale and efficiency could be negatively affected by employee lawsuits just as much as they might be by unfair adverse employment actions that go unnoticed and unpunished.

The Court acted too quickly on its concerns regarding the effect of the class-of-one theory in the public employment context before evaluating whether its categorical denial was necessary. The appropriate initial approach is not to bar class-of-one public employees from the courts, but to limit their claims in such a way as to prevent meritless ones and permit viable ones. Application of the ill-will requirement to these claims could achieve this effect. However, by failing to even consider an alternative, the Court has prevented any evaluation of such a method. A prudent doctor would never decide to amputate before considering surgery to save a patient’s limb, but this is precisely what the Engquist Court did by severing class-of-one claims from public employees’ body of constitutional rights.

B. Another Right in Danger of Denial in the Public Employment Context: Due Process

Judge Posner characterized Ciechon v. City of Chicago as “the extreme case that kicked off the ‘class of one’ movement.”183 But, Ms. Ciechon did not base her case solely on the Equal Protection Clause. She also sought redress under the Due Process Clause of the Fourteenth Amendment.184 If it is the intention of the Supreme Court to remove the federal judiciary from discretionary public employment matters and to avoid the flood of litigation that this

182. 30A C.J.S. Equity § 130 (2007).
183. Lauth v. McCollum, 424 F.3d 631, 634 (7th Cir. 2005).
184. Ciechon v. City of Chicago, 686 F.2d 511, 517 (7th Cir. 1982).
judicial involvement might cause, then public employees’ rights under the Due Process Clause may be in jeopardy of denial as well. Today, although the class-of-one theory would be unavailable to her, Ms. Ciechon could at least invoke the protection of due process. Unfortunately, based on the cases analyzed herein, the Court’s flood concern could lead to the denial of public employees’ due process claims.

Of the 108 cases examined, fifty-two involved alleged violations of due process. This is evidence of the relative

185. See infra Part IV.

frequency with which public employees bring these claims. *Garcetti* and *Engquist* set a dangerous precedent. Courts could easily justify the categorical denial of constitutional claims based on the fact that others are already barred in the public employment context. If unsubstantiated fear and "inapt hypothetical cases"\(^{187}\) can serve as the foundation for such *per se* rules, then it is at least a possibility that the same result could follow for public employees' rights under the Due Process Clause.

**VI. CONCLUSION: ADDRESSING JUDICIAL CONCERN AND PRESERVING CONSTITUTIONAL PROTECTION**

The shift to categorical treatment of certain constitutional claims in the public employment context is a significant change in the law. However, *Engquist's per se* rule lacks support in the rationales upon which it is based. Far from resulting in a flood of litigation, the class-of-one theory has led to relatively few cases in federal courts, most of which assert other claims and are dismissed on preliminary motions. This reality makes the necessity of a categorical rule to deny these claims questionable. Absent a substantial volume of cases, the concern regarding the displacement of managerial discretion with judicial supervision is diminished because such intervention would seldom occur. Also, the Court's reticence to permit judicial intervention into employment disputes may deprive public employees of the only remedies available to challenge adverse employment actions. If a government employee is treated arbitrarily for vindictive reasons, that person should be afforded a remedy. In some cases, the Equal Protection Clause may provide the only remedy. Finally, the Court's concern regarding the effect that class-of-one claims in the public employment context would have on the doctrine of at-will employment is misplaced. Employment-at-will in the private sector, where it is most prevalent, would be unaffected by the constitutional claims of public employees.

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The Court’s reliance on private employment law in the public employment context has blurred the lines that separate these institutions. Both the retrenchment of constitutional protections and the Court’s misplaced reliance on employment-at-will has eroded the traditional distinctions between private and public employment. Perhaps this is an unstated but intended result of Engquist and Garcetti. The two opinions benefit government employers by affording them greater discretion in employment matters and preventing judicial intervention into these affairs. The Court’s recent change in composition has resulted in a more conservative-leaning ideology. Engquist and Garcetti are a manifestation of this shift in legal philosophical posture.

A far more reasoned and principled approach would be to limit class-of-one claims, not to completely deny them. Requiring class-of-one plaintiffs in the public employment context to allege an element of ill-will could appease both contingents. It would afford deserving plaintiffs a cause of action while allaying the Supreme Court’s fear of a flood of litigation. Instead of making the rash decision to cut off class-of-one equal protection from the corpus of constitutional rights afforded to public employees, the Court should have first performed a more calculated surgery. If such an approach were to fail, the Court could always hack away with its meat-axe later.

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