Vindictiveness: A Place in the Law?

Legal cases that are based upon differing treatment for individuals are not uncommon. Employers, generally, and governmental entities, specifically, are not permitted to discriminate based on race or gender (among other classifications).

Congress has the power to make anti-discrimination laws because the 14th Amendment to the U.S. Constitution guarantees everyone “equal protection” of the laws. Section 5 of the 14th Amendment specifically grants to Congress the “…power to enforce, by appropriate legislation, the provisions …” of the 14th Amendment. Congress has certainly done so, and apparently has done so to excess.¹

The 14th Amendment is supposed to give Congress the power to proscribe action or conduct that classifies people in a manner that it deems unfair. Discrimination that would violate the verbiage of the 14th Amendment, then, may become the subject of federal laws that govern all employers.²

The 14th Amendment and its guarantee of equal protection is not just an enabling device that grants power to Congress. The Equal Protection Clause stands on its own as a guarantee against governmentally imposed discrimination. The Supreme Court has said that the Equal Protection Clause prohibits discrimination on the basis of gender, United States v. Virginia, 518 U.S. 515, 534 (1996); alienage, Truax v. Raich, 239 U.S. 33, 39

¹ Recent Supreme Court cases have limited the power of Congress to make anti-discrimination laws that operate against State Governments. Kimel v. Florida Board of Regents, (No. 98-791, January 11, 2000). Congress does not have the power to change the interpretation of the Constitution under the guise of enforcing the 14th Amendment. (i.e. Flores v. City of Boerne, 521 U.S. 507 (1997).

² States, of course, have the right to make their own anti-discrimination laws. There is no reason that the State’s laws against discrimination must mirror the federal laws. States are free to give more protection, different remedies, or to protect classes that Congress has not chosen to protect. But, a State cannot make laws that attempt to override the Congressional determination that some classes are entitled to protection. For example, Texas could not decide that women are proper subjects of discrimination in employment.

The Fourteenth Amendment was passed in response to this country’s failure to adequately address racial discrimination by the States in the post-Civil War era. See *Strauder v. West Virginia*, 100 U.S. 303 (1879). The Supreme Court has traditionally kept this evil in mind when construing the Equal Protection Clause by creating “classes” in order to aid just adjudication. Under this approach, a complaining party must only prove membership in an inherently suspect class, such as race, and purposeful State discrimination. The burden then shifts to the State to justify the classification and the discrimination, with the required level of justification rising according to the vulnerability of the class and the weight of the right asserted.

In every equal protection case, we have to ask certain basic questions.

- What class is harmed by the legislation?
- Has that class been subjected to a traditional disfavor by our laws?
- What is the characteristic of the disadvantaged class that justifies the disparate treatment?3

Is there a requirement that the class be of a certain number before Constitutional protection is available? Can there be a class of two persons, or even one person that has

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3 *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring)
been subjected to disfavor in the past, and that is being treated disparately without
justification?

Here are some interesting facts –

Mrs. Olech lived in the Village of Willowbrook, Illinois for over 10 years. In
1989, she and some of her neighbors (including Mrs. Olech’s daughter) filed a lawsuit
against the Village claiming damages for flooding on their lands from storm water.
Naturally, both the lawsuit and the verdict received substantial press coverage. The case
was, all agree, bitterly contested, and generated what lawyers politely call “substantial ill
will” between the parties to the case. And, as one might expect in a small town, the
animus was very personal. The City fathers took the allegations in the suit very
personally, and right up until the verdict called the suit “frivolous and meritless”. The
Olech family didn’t help things, because when the Village requested easements for
drainage of the storm water, the Olech family refused to oblige. Mrs. Olech’s case went
to a jury and she won $20,000 from the Village. The same jury awarded her daughter
$135,000.

What goes around, comes around. In the spring of 1995 (while the lawsuit was
still pending), the private well that provided potable water to Mrs. Olech’s house broke
down beyond repair. Mrs. Olech lived in an area that was not served by a public water
system. In fact, there are no public streets adjoining Mrs. Olech’s property, nor are there
even easements in the area where public roads could be located. Mrs. Olech found a
temporary solution to her water problem by running a garden hose across her property to
her neighbor’s well. That is how she got water for drinking and bathing. It certainly
worked while the weather was warm, but wasn’t going to do any good when winter came.
So, Mrs. Olech went to her nemesis – the Village – and asked to be hooked into the public water system immediately. Regardless of its feelings towards their opposition in the pending lawsuit, Illinois law obligated the Village to provide water to its residents.

At the time Mrs. Olech made her request, the Village had already adopted a plan for extending the municipal water system to Mrs. Olech’s neighborhood. The plan called for a gradual extension of the system from the spring of 1995 to sometime in 1997 (a two-year plan). The Village acted rather promptly on Mrs. Olech’s request, and started the extension of water lines to her property. The only condition that the Village put on the extension was that Mrs. Olech pay her fair share of the cost (since she needed immediate access to the water system). Mrs. Olech paid the Village $7,012.67 in July of 1995, as requested.

It would come as no surprise to learn that Mrs. Olech’s water problem did not get solved as she had hoped. Still mired in the litigation with Mrs. Olech, the City put a new condition on the extension of the water line about a month after getting the Mrs. Olech’s $7,000.00. In August of 1995, the Village decided that there would be no new water line unless Mrs. Olech and all of her neighbors granted to the Village a 33-foot strip of property for the construction and maintenance of a road (including pavement, sidewalks and public utilities). This would result in a 66-foot wide dedicated street.

Now a 66-foot wide street is unusual in any rural community, and the Village essentially admitted this. In a letter, the Village Attorney said, “[A] fifteen foot (15’) easement, along with a temporary construction easement of five feet (5’) on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.” In other words, the policy of the Village was
to require only a fifteen-foot easement on each side of the road – making a thirty-foot wide road.

While the dispute over the width of the road continued, Mrs. Olech’s garden hose solution failed in November of 1995 (it froze). Almost immediately, the Village agreed to the 15-foot easement for the extension of the water line, and water was finally provided to Mrs. Olech’s home by March of 1996.

Mrs. Olech, an experienced litigant by this point, sued the Village for a second time. This time she was seeking damages for being without water for the period between November of 1995 (when her hose froze) to March of 1996 (when water was restored by the new, public, water line). She claimed that the decision to demand a 33-foot easement was “irrational and wholly arbitrary” – a demand not made of other property owners similarly situated. She claimed that the demand for a 33-foot easement was motivated by the ill will generated in a separate lawsuit, and by her own prior refusal to grant a drainage easement. For these two reasons, the Village treated her differently, and discriminated against her.

This is an equal protection case. It has a history of unfavorable treatment, and an unjustified disparate treatment. The real question was whether a single person could be a “class” that is harmed by the government action or conduct. Ultimately, the United States Supreme Court is called upon to say whether the law authorizes an equal protection claim for a “class of one”.

Before considering the judicial opinions in Mrs. Olech’s case, it would be valuable to think about situations where similar claims might arise.
Student A is a member of the Gay/Straight Alliance Club (GSA) at ABC School District. The purpose of the group is to promote acceptance among and for gay and straight students at the school. A “constitution” for the club is submitted to the principal in accordance with school policy, along with a mission statement. The GSA obtains a faculty advisor, and they apply for permission to meet on school property. Student A is elected President of the Club pending formal approval. The ABC School District has 38 clubs formed for purposes unrelated to curriculum, including the Asian Club, Black Student Union, Christian Club, and the Key Club.

The GSA application is not approved, and the GSA cannot “rush” for members in the fall with the other clubs. The GSA goes to court, and seeks an injunction to require approval of their “charter” and permission to meet on school property – asserting rights under the 1st Amendment (Freedom of speech and association) and under the Free Access Act. The case is widely followed in the press, with much that was unfavorable on both sides.

While the case is pending, there are numerous reports to the principal of harassment against Student A. Student A is constantly ridiculed for being gay (he’s not), and for suing the school district. Some of the worst comments come from teachers. Student A’s parents set up a meeting with the principal. With the GSA suit fresh on his mind, the principal promises to address the problem. He delays. It is unclear whether the harassment is based on sex, and it is unclear how severe the harassment really is. Either way, the principal is worried that anything that he would do might affect the outcome of the GSA litigation, and he is hoping that the GSA suit is over before he has to address the complaints made by Student A and his parents.

Before he does anything, and before the ruling in the case, Student A’s parents send a letter that says they are pulling Student A out of public school and sending him to private school.

Can you guess what is coming?

Free Access and First Amendment rights are not the only area where students and administrators can be at odds over appropriate action or conduct. There are mundane issues – like grades, routine discipline, and attendance. There are complex issues – like IDEA hearings, 504 determinations, Free Appropriate Public Education, and privacy of
student records. Any of these areas are ripe for dispute, emotional reaction, “substantial ill will”, and differing treatment. This is especially true since many issues in education require individualized plans, but similar treatment for those similarly situated. With the emotional baggage that comes with many decisions made by educators and administrators, it is not difficult to imagine that many affected by those decisions might claim that the result was vindictive – without any legitimate purpose, wholly arbitrary, or irrational.

The law permits an equal protection claim that is based on vindictiveness. Circuit courts have recognized equal protection claims based on vindictive behavior for many years. And, when Mrs. Olech’s case reached the Supreme Court, it took only five pages for the unanimous Court to authorize her suit to continue.

“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.” See Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) [a taxpayer taxed at full rate where others similarly situated were intentionally and systematically taxed at a lower rate]; Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989). [Landowner challenging assessment of his property by tax assessor as arbitrary and capricious]. In so doing, we have explained that ‘[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.’” Sioux City Bridge Co., supra, at 445 (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918) [tax assessor setting taxable basis of plaintiff’s property at an arbitrarily high amount compared to others similarly situated].

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4 One argument advanced in support of the “class of one” is the very language of the 14th Amendment. It purports to protect “any person”, not a group of persons. The 15th Amendment speaks of “the right of citizens” to vote, as does the 19th Amendment. Congress clearly knows how to speak in the plural when it wants to.
More importantly, the Court was unanimous in its opinion that the basis for such a complaint is that the conduct of the Government was “irrational and wholly arbitrary”. The Court held that “[t]hese allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.” Id. The Supreme Court’s determination – that subjective motivation may not always be relevant – is a departure from the “class of one” cases from the various Circuit courts.

Mrs. Olech probably would have been perfectly happy with the opinion of the 7th Circuit in her case. The 7th Circuit had held, in prior cases, that “official harassment” and “sheer malice” were sufficient to state an equal protection claim. And, in Mrs. Olech’s case, the 7th Circuit refused to draw a distinction between the “substantial ill will” that Mrs. Olech alleged and the “sheer malice” found sufficient in other cases. What was important to the 7th Circuit was that the Government had an improper motive for its disparate treatment. A mere difference in treatment may be merely an example of uneven law enforcement which is common and which is usually constitutionally innocent. Prosecutorial discretion that is honestly exercised (even if inept and even if arbitrary) provides no basis for an equal protection claim. Instead it is where the exercise of discretion is poisoned by improper motive that the Equal Protection Clause provides a remedy according to the 7th Circuit.

The 7th Circuit recognized that providing a remedy for vindictive action poses its own problems –
“Of course we are troubled … by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the ‘vindictive action’ class of equal protection cases requires proof that the cause of the differential treatment of which the Plaintiff complains was a totally illegitimate animus toward the Plaintiff by the Defendant. If the Defendant would have taken the complained-of action anyway, even if it didn’t have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action.”

Not only is there some risk of turning a “squabble” into federal case (in every sense of the words), but differing treatment for the similarly situated in often the best use of limited resources.\(^5\)

In Mrs. Olech’s case, the 7\(^{th}\) Circuit relied on its own decision in a prior case, *Esmail v. McCrane*, 53 F.3d 176 (7\(^{th}\) Cir. 1995).\(^6\) In that case, a plaintiff was denied his liquor license on the basis of charges that the jury found to be patently untrue. The 7\(^{th}\) Circuit approved his “class of one” equal protection claim, saying –

“...If the power of government is brought to bear on a harmless individual merely because a powerful state of local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court … Esmail’s suit thus is not barred by the ‘class of one’ rule, because there is no such rule. Nor is it barred by the principle that malicious prosecution does not work a deprivation of property and therefore is not actionable in a civil rights suit based on the due process clause of the Fourteenth Amendment.

Esmail has taken a different route, that of the equal protection clause, which does not require proof of a deprivation of life, liberty or property. What it does require, and what Esmail may or may not be able to prove, is that the action taken by the state, whether in

\(^5\) The police cannot catch *every* speeder; towns cannot prosecute *all* ordinance violators. Selective enforcement is more often the rule than the exception.

the form of prosecution or otherwise, was a spiteful effort to ‘get’ him for reasons wholly unrelated to any legitimate state objective. This is more demanding than merely having to prove that a prosecution lacked probable cause, the meaning of ‘malice’ in the tort of malicious prosecution. Id. at 179-180.

Of course, so long as the “class” (no matter its size) is not one that has historically been subject to discrimination, the conduct of the government need only be supported by some rational basis in order to survive a constitutional challenge. “A classification ‘must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.’” Reed v. Reed, 404 U.S. 71 (1971). Governmental conduct that is rational (even if ill-advised) in the sense that it has some prospect of meeting a legitimate goal of governments, generally, is appropriate – even if motivated by vengeance.7 “[E]ven malicious or vindictive actions are not actionable … in the absence of articulable discrimination …” Weber v. Holiday Inn, 42 F.Supp. 2d 693, 699 (1999). But, where there is differing treatment, and the only reason for the differing treatment is an impure heart, then the rational basis test (or any other test for judging governmental conduct) becomes immaterial. Vengeance, as a motive for governmental conduct, fails every test under the Equal Protection Clause because is it not reasonable; it is arbitrary; and it rests on no ground having a fair relationship to legitimate governmental purpose.

So, there seem to be two theories that support a “class of one” equal protection claim. One theory, approved in the 7th Circuit, focuses on the motivation behind the governmental action. If the motive is impure, then it cannot be justified, and the

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7 “The motivations, goals, purposes, or objectives of those who enact laws may help courts to understand the effects of those laws. But it has never been held that ‘a legislative act may violate equal protection solely because of the motivations of the men who voted for it.’” Palmer v. Thompson, 403 U.S. 217, 224 (1971).
discrimination is improper. Another theory, apparently endorsed by the Supreme Court, looks not at the motive, but at the result. That is, where the discrimination exists, and it has no reason, then the mental state of the actors is irrelevant.\(^8\) It matters not whether the government actors hated the Plaintiff, or whether the government was “out to get him”.

Cases from the 1st Circuit have also discussed the availability of a remedy when government conduct is based on vindictiveness. It is hard to better describe the facts of a New Hampshire case involving vindictive conduct than to quote the case itself:

This action appears to be the latest in a series of lawsuits stemming from a disputed parcel of land in Marlborough, New Hampshire. Plaintiff contends here that he was the victim of a conspiracy to injure him because he is a “public figure” at the center of a “public controversy” over the Marlborough land. Plaintiff asserts that the challenged conspiracy evolved out of the New Hampshire Supreme Court’s July 21, 1997 decision regarding the Marlborough property. Although the New Hampshire Supreme Court is not a defendant in this action, its decision allegedly prompted a party at Penuche’s Ale House, held just days later on July 26, 1997, at which defendants planned to and carried out a conspiracy to injure plaintiff and deprive him of the equal protection of the law.

At the party, plaintiff ruptured his Achilles tendon while playing volleyball. When the injury occurred, plaintiff, his brother David Veale, and a few witnesses all thought that another guest, defendant Christina Perkins, had accidentally stepped on plaintiff’s ankle during the volleyball game. Plaintiff immediately left the party and went to the Cheshire Medical Center to have his ankle treated. He contends that the Cheshire Medical Center provided negligent care and failed to contact the local police in furtherance of the conspiracy to deprive plaintiff of his equal protection rights. Plaintiff’s ankle was cast, however, and he returned to the party.

The next day plaintiff reported the incident to the police, telling how he believed the injury was intentionally caused, because no ball was in play at the time it occurred. The police commenced an investigation into the alleged assault. In October, the police

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\(^8\) All agree that the discrimination must be intentional, and not a mere accident. But, where vindictive minds act, it is rarely an accident.
informed plaintiff that Perkins denied “saying anything or seeing anything” which would assist the assault investigation.

After that phone call, plaintiff and his brother surmised that in fact Perkins had not cause the injury, but that the owner of Penuche’s, defendant Todd Tousley, fired a rubber ball at his ankle from a paint gun, which caused his Achilles tendon to rupture. As several patrons of Penuche’s owned “Paintball Guns,” the two brothers concluded that Tousley had injured plaintiff. Plaintiff called the police back to inform them of his new theory.

Then, in mid-January, 1998, David Veale recalled seeing Tousley with an apparatus, which resembled a paint gun. David Veale called the Swanzey police to inform them again of the paint ball gun theory. Although the police advised David Veale that they would consider his recollection, on January 28, 1998, the Swanzey police closed its investigation into the alleged assault, concluding that no “person or persons had the motive or intent to purposely injury [plaintiff].”


In Mr. Veale’s case, he was a “class of one” “… because of his personal problems and notoriety”. Of course, he was unsuccessful with the private individuals that he sued, because the Equal Protection Clause is aimed at government, not private action.9 As to the government defendants, Veale relied upon 1st Circuit authority that provides recovery for selective enforcement of the law. In Yeradie’s Moody St. Restaurant & Lounge, Inc. v. Bd. Of Selectmen, 878 F.2d 16, 21 (1st Cir. 1989), the Court held that a Plaintiff may recover if he shows:

(1) that he, compared with others similarly situated, was selectively treated; and

(2) that 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.

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9 There is a statute that covers private actors who participate in conspiracies to deprive a person of constitutional rights, 42 U.S.C. §1985.
But, whether Mr. Veale is singled out for bad treatment because of his notoriety, or whether he was treated differently from other local notables, he still has to show the differing treatment. He did not offer evidence of anyone similarly situated, and lost his case.

In reviewing Mr. Veale’s case, though, the District Judge noted that the 1st Circuit had not specifically approved “class of one” equal protection claims. “[A]rbitrary discrimination,… must be against an identifiable group, not just an individual.” Hayden v. Grayson, 134 F.3d 449, 454 (1st Cir. 1997). In essence, the 1st and 2nd Circuits find a basis for an equal protection claim where the plaintiff has been singled out for differing treatment because of his membership in a protected group, or because of his exercise of a constitutionally protected right. LeClair v. Saunders, 627 F.2d 606, 610 (2nd Cir. 1980); Rubinovitz v. Rogato, 60 F.3d 906, 911 (1st Cir. 1995); FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2nd Cir. 1992). These courts have used “bad faith” or “malice” as equivalent to “membership in a protected group or because of the exercise of a constitutionally protected right”. They have not specifically determined whether “personal animosity” is a constitutionally impermissible consideration for differing treatment. See Government of the Virgin Islands v. Harrigan, 791 F.2d 34, 36 (3rd Cir. 1986); Futernick v. Sumpter Township, 78 F.3d 1051, 1057-1058 (6th Cir. 1996); Stern v. Tarrant County Hosp. Dist., 778 F.2d 1052, 1058 (5th Cir. 1985); E & T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987).10

10 The Supreme Court of Connecticut has approved a “class of one” theory of equal protection claims. It is based, loosely, on the selective treatment cases, but it firmly grounded in the personal animosity and vindictiveness of the government officials toward a citizen. Thomas v. City of West Haven, 734 A.2d 535 (Conn. 1999).
There have been cases where the plaintiff argued for the creation of a “class of one” in the educational arena. In *Wheeler v. Miller*, 168 F.3d 241 (5th Cir. 1999), a doctoral student at a Texas University claimed that he was maligned with untrue allegations of cheating, resulting in low grades, and no degree. In reviewing his claim, the 5th Circuit said:

“We are not convinced that Wheeler has even asserted a cognizable equal protection claim. While his petition alleges a “pattern of discrimination” and that Wheeler “has been discriminated against,” his petition did not allege discrimination based on his membership in a particular class. Ordinarily equal protection claims are premised on allegations of such class-based discrimination.

In essence, Wheeler claims that he was individually singled out for unfair treatment—that he is a “class of one.” Whether equal protection rights extend to such claims simply because the plaintiff claims “discrimination” is unclear.

Further, Wheeler could point to no individual with a similarly poor academic performance who was awarded a doctorate. For example, he concedes that no other student has ever failed comprehensive oral examinations. While Dr. Jolly testified that the faculty was "expecting some things of [Wheeler] they had not expected from other students," under our deferential review of academic decisions we cannot say that closer scrutiny of Wheeler or special expectations were unwarranted in light of his overall academic performance. *Id.* at 251-252.11

In essence, Wheeler lost his case because he could not prove different treatment, not because he could not prove a particular mental state of the school’s administrators.

The cases dealing with vindictiveness are sometimes confusing, probably because the courts are making an honest effort to establish a set of rules that will vindicate an

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11 Other courts have expressly refused to accept the 7th Circuit’s “class of one” rationale. *Homeowner/Contractor Consultants, Inc. v. Ascension Parish Planning and Zoning Com’n*, 32 F.Supp.2d 384, (D.C. La. 1999). [Plaintiff claimed it was denied equal protection when a city Planning Commission granted another developer the right to subdivide a similar tract of property, but denied the plaintiff's application].
abuse of government power that they see in a specific set of facts. In attempting the fashion a set of rules, it is logical that many judges would focus on the impure hearts of the government actors. That is conduct that is morally wrong, and the law ought to speak to it – and ought to condemn it. However, the impure heart or the vindictive motive is often difficult to prove, and the more traditional format for judging claims under the Equal Protection Clause is up to the task of dealing with vindictive conduct. Equal protection cases require proof of intentional discrimination (that is, the classification and differing treatment was the intended result of the governmental conduct). Where the differing treatment is proven, it is up to the government to justify the differing treatment. In most cases, it can do this by proving a rational basis for the conduct. That is a light burden – which easily screens out routine “squabble over municipal services” that is so common. But, where the conduct is truly based on an improper motive – a motive of vengeance, hatred, ill will or the like – then the government will not be able to prove a rational basis (some ground of difference having a fair and substantial relation to the object of the legislation). The Supreme Court’s opinion in Village of Willowbrook v. Olech essentially teaches that litigants and judges need only focus on the government’s justification for its action. 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 Equal Protection Clause provides a remedy, regardless of subjective motivation.