

The United States Supreme Court Eliminates the “Class-of-One” Equal Protection Claim in Public Employment [*Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146 (2008)]

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*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.*¹

I. INTRODUCTION

Currently, there are over nineteen million people in the United States employed by a local, state, or federal government.² In recent years, the United States Supreme Court has narrowed the scope of certain constitutional rights available to these public employees.³ In 2006, for example, the Court utilized an unprecedented categorical balancing test, which limited public employees’ First Amendment free speech

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. U.S. Census Bureau, 2006 Public Employment Data: Local Governments, <http://ftp2.census.gov/govs/apes/06locus.txt> (last visited Jan. 16, 2009); U.S. Census Bureau, State Government Employment Data: March 2005, <http://ftp2.census.gov/govs/apes/05stus.txt> (last visited Jan. 16, 2009); Federal Government Employment by Function: December 2005, <http://www.census.gov/govs/www/apesfed05.html> (click “Viewable Data” under “Available Data”) (last visited Jan. 16, 2009). As of 2006, there were approximately 16,963,413 state and local full-time employees. 2006 Public Employment Data: Local Governments, *supra*; State Government Employment Data: March 2005, *supra*. The total number of civilian federal employees was 2,720,462 in 2005, including both full- and part-time workers. Federal Government Employment by Function: December 2005, *supra*. The estimated U.S. population in January 2009 was 305,628,629. U.S. Census Bureau, Census Bureau Home Page, <http://www.census.gov/> (last visited Jan. 16, 2009). Anup Engquist, the plaintiff in this case, was one of the United States’ nineteen million public employees until January 31, 2002, when her superior fired her for arbitrary and vindictive reasons unrelated to any legitimate government interest. See *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 991-92 (9th Cir. 2007).

3. See Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 234-35 (2008); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 561-62 (2008); Patricia C. Camvel, Note, *Waters v. Churchill: The Denial of Public Employees’ First Amendment Rights*, 4 WIDENER J. PUB. L. 581, 583 (1995); Margo Pave, Comment, *Public Employees and the First Amendment Petition Clause: Protecting the Rights of Citizen-Employees Who File Legitimate Grievances and Lawsuits Against Their Government Employers*, 90 NW. U. L. REV. 304, 312-17 (1995).

rights because of the efficiency concerns of government employers.⁴ The Supreme Court's 2008 decision in *Engquist v. Oregon Department of Agriculture*⁵ represents a similar limitation on the constitutional rights of public employees. In *Engquist*, the Court created a unique exception to the Equal Protection Clause by holding that public employees cannot bring a "class-of-one" equal protection claim against their employer.⁶ A class-of-one claim is an equal protection claim in which a person does not allege discriminatory treatment by the government based on an invidious classification but asserts that the government has intentionally treated that individual differently than others similarly situated, without a rational basis.⁷ While the Court has most often interpreted the Equal Protection Clause to prevent invidious governmental classification,⁸ in *Village of Willowbrook v. Olech*,⁹ the Court explicitly held that the Equal Protection Clause also protects a class of one.¹⁰ Following the Court's decision in *Olech*, seven United States Circuit Courts of Appeals extended the class-of-one claim to the public employment context.¹¹

With the ruling in *Engquist*, the Court effectively limited the equal protection rights available to public employees and further insulated government employers from liability for violations of the Equal Protection Clause. In many respects, the Court's decision appears to be an attempt by the majority to further restrict the constitutional protections available to public employees.¹² Although the Court asserted it only prohibited class-of-one claims in public employment for efficiency reasons, it is more likely the Court did so to constrain the avenues by which public employees can seek redress against their governmental employers.¹³ Efficiency may justify *limiting* the scope of a public employee's constitutional rights, but the fear of possible litigation should not be a legitimate reason to *eliminate* constitutional rights.¹⁴ Because of this decision, Anup Engquist and over nineteen million other public employees now enjoy one less constitutional right as public employees than they enjoy in their capacity as American citizens. Therefore, this deci-

4. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

5. 128 S. Ct. 2146 (2008).

6. *Id.* at 2157.

7. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

8. Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 367-71 (2003); see *infra* Part III.C.

9. 528 U.S. 562 (2000).

10. *Id.* at 564.

11. See *infra* Part III.D.

12. See *infra* Part V.D.1.

13. *Id.*

14. William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493, 501-02 (2007) (stating, "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 clause's purview").

sion will not have the de minimis impact that the Court suggested when it stated, “the class-of-one theory of equal protection has no application in the public employment context—and that is *all* we decide. . . .”¹⁵

This Comment analyzes how the Supreme Court limited the constitutional rights of public employees by prohibiting the class-of-one equal protection claim in public employment. Part II explains the factual background and procedural history of *Engquist*. Part III provides a brief history of the Supreme Court’s jurisprudence regarding the constitutional rights of public employees and a general discussion of equal protection claims involving a class of one. Part IV explains the Court’s majority and dissenting opinions. Finally, Part V argues that the Court has unjustifiably removed the ability of a public employee to assert a class-of-one equal protection claim and addresses the unconvincing rationale the Court used to take that right away.

II. CASE DESCRIPTION

In 1992, the Oregon Department of Agriculture (ODA) hired Anup Engquist, an Indian woman, to work “as an international food standards specialist in the Export Service Center (‘ESC’).”¹⁶ The ESC is a laboratory located in the ODA’s Laboratory Services Division (LSD).¹⁷ Norma Corristan, the director of the LSD, hired Engquist.¹⁸ Engquist’s main responsibility was to garner business for the ESC and to consult with the ESC’s customers that export food to other countries.¹⁹ In addition, Engquist developed an international database for food regulations, marketed the ESC’s services, and created several food-safety training programs.²⁰

In 1990, the ODA hired Joseph Hyatt to work as a systems analyst.²¹ Hyatt never got along with Engquist and frequently impeded her ability to perform her job.²² He failed to communicate with her, withheld information she needed to complete her job, made derogatory comments about her to others, and monitored her behavior excessively.²³ Because of Hyatt’s adverse treatment, Engquist complained to

15. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2156 (2008) (emphasis added).

16. *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 990 (9th Cir. 2007). The Supreme Court decision did not give a detailed discussion of the facts surrounding this case. As a result, this presentation of the facts relies largely on the briefs of each party and the opinion of the United States Court of Appeals for the Ninth Circuit. In addition, “[t]he facts set forth are taken from the extensive record of the eleven-day jury trial.” Brief for the Petitioner at 2 n.3, *Engquist*, 128 S. Ct. 2146 (No. 07-474).

17. *Engquist*, 478 F.3d at 990; Brief for the Petitioner, *supra* note 16, at 2.

18. *Engquist*, 478 F.3d at 990. Like Engquist, Norma Corristan was also a minority. Brief for the Petitioner, *supra* note 16, at 3.

19. Brief for the Petitioner, *supra* note 16, at 3.

20. *Engquist*, 478 F.3d at 990; Brief for the Petitioner, *supra* note 16, at 3.

21. *Engquist*, 478 F.3d at 990.

22. *Id.*; Brief for the Petitioner, *supra* note 16, at 3.

23. *Engquist*, 478 F.3d at 990; Brief for the Petitioner, *supra* note 16, at 3.

Corristan on numerous occasions.²⁴ Corristan responded by initiating disciplinary action against Hyatt, requiring him to complete anger management and diversity training programs.²⁵ In December 1999, Hyatt asked Corristan to promote him to the ESC manager position, but she refused because she believed he was not ready to become a manager.²⁶ After Corristan refused to promote Hyatt for a second time, he transferred out of the LSD to the Administrative Services Division, but continued to harass Engquist.²⁷

In June 2001, John Szczepanski, an assistant director of the ODA, began to oversee the ESC.²⁸ Shortly thereafter, he and Hyatt began developing a plan for the reorganization of the ESC.²⁹ That same month, Szczepanski removed Corristan's authority to manage the ESC.³⁰ While making additional changes, Szczepanski told a customer that both Corristan and Engquist "would be gotten rid of."³¹ After removing Corristan's management authority, Szczepanski began looking for a replacement for the ESC manager position.³² Both Engquist and Hyatt applied for the position.³³ Engquist had a significantly better educational background and much more customer service experience than did Hyatt; however, Szczepanski offered Hyatt the position in October 2001.³⁴ After becoming manager of the ESC, Hyatt resumed his negative treatment toward Engquist.³⁵

On October 5, 2001, the state notified the ODA of a budget crisis that made reductions in the ODA's budget necessary.³⁶ Szczepanski terminated Corristan's employment and eliminated her position "allegedly because of the budget crisis."³⁷ On January 31, 2002, Szczepanski eliminated Engquist's position for similar reasons and gave her the opportunity to transfer to another position.³⁸ Ultimately, however,

24. *Engquist*, 478 F.3d at 990.

25. Brief for the Petitioner, *supra* note 16, at 3.

26. *Id.* at 4.

27. *Id.*

28. *Engquist*, 478 F.3d at 990.

29. *Id.*

30. Brief for the Petitioner, *supra* note 16, at 4.

31. *Engquist*, 478 F.3d at 990. Additionally, Hyatt told an ODA employee that "he and Szczepanski were working to 'get rid of' Corristan and Engquist." *Id.* At the time of these conversations and dealings between Szczepanski and Hyatt, Hyatt did not even work in the LSD with Corristan or Engquist. Brief for the Petitioner, *supra* note 16, at 4-5.

32. *Engquist*, 478 F.3d at 990. While Engquist and Corristan worked at the ESC, the department generated a \$250,000 profit for the State. Brief for the Petitioner, *supra* note 16, at 2 n.4. After Engquist and Corristan were terminated, the ESC operated at a loss of over \$662,000. *Id.*

33. *Engquist*, 478 F.3d at 990.

34. *Id.* at 990-91. Szczepanski ignored the recommendation of an independent expert that he hire Engquist and departed from the standard interview questions when he interviewed Hyatt. Brief for Petitioner, *supra* note 16, at 5. Szczepanski claimed that he hired Hyatt because of his superior business experience and his knowledge as a chemist. *Engquist*, 478 F.3d at 991.

35. Brief for the Petitioner, *supra* note 16, at 5.

36. *Engquist*, 478 F.3d at 991.

37. *Id.*

38. *Id.*

Engquist was found to be unqualified for the new position and her employment was terminated.³⁹ Engquist eventually filed suit asserting an equal protection claim against Hyatt, Szczepanski, and the ODA, under the class-of-one theory, among other constitutional and statutory claims.⁴⁰ The Federal District Court for the District of Oregon granted the respondents' motion for summary judgment on most of Engquist's claims; however, the equal protection class-of-one claim survived.⁴¹ The district court found "that the Equal Protection Clause does provide protection to plaintiffs under the 'class of one' theory and that this theory applies with equal force in the employment context."⁴² Respondents then filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit, and Engquist cross-appealed.⁴³

On appeal, the Ninth Circuit noted that the class-of-one theory of equal protection in the public employment context presented an issue of first impression.⁴⁴ Although the court recognized that seven other circuit courts had analyzed the class-of-one claim in the public employment context and had chosen to uphold the validity of the claim, the Ninth Circuit refused to allow the claim.⁴⁵ First, the court stated that because the government's powers are more expansive when it acts as an employer than when it acts as a sovereign,⁴⁶ "the class-of-one theory of equal protection is another constitutional area where the rights of public employees should not" outweigh the employment interests of the government.⁴⁷ Second, the court did not want to infringe on the government's practice of at-will employment.⁴⁸ Therefore, distinguishing the

39. *Id.*

40. *Id.*; Brief for the Petitioner, *supra* note 16, at 6-7. Engquist also brought several civil rights claims against Hyatt, Szczepanski, and the Oregon Department of Agriculture, including: harassment, discrimination, and retaliation predicated on race, sex, and/or national origin pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 2000e-2(a), 2000e-3(a); violations of 42 U.S.C. § 1981; substantive due process violations; and intentional interference with her contract. *Engquist*, 478 F.3d at 991; Brief for the Petitioner, *supra* note 16, at 6 n.6. Prior to this trial, Corristan sued respondents in state court, and the court awarded her \$1.1 million in damages. *Engquist*, 478 F.3d at 991. The court specifically "found that Hyatt discriminated against Corristan because of her gender or ethnicity, and that respondents violated her equal protection and procedural due process rights." *Id.*

41. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2149 (2008).

42. *Engquist v. Or. Dep't of Agric.*, No. Civ. 02-1637-AS, 2004 WL 2066748 at *5 (D. Or. Sept. 14, 2004). The court awarded Engquist \$175,000 in compensatory damages for all violations and \$175,000 in punitive damages based on the equal protection, class-of-one violation. *Engquist*, 478 F.3d at 992.

43. *Engquist*, 478 F.3d at 992.

44. *Id.*

45. *Id.* at 992-94.

46. "Sovereign" denotes when the government acts in its capacity as the governing and regulating authority.

47. *Engquist*, 478 F.3d at 994-95.

48. *Id.* In a powerful dissent, Judge Stephen Reinhardt criticized the court for creating a circuit split that was unwarranted by both the Ninth Circuit's precedent in class-of-one claims and the Supreme Court's holding in *Olech*. *Id.* at 1010-15 (Reinhardt, J., dissenting). In addition, he maintained that the best approach to follow would be the approach taken by the Ninth Circuit in *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004). *Id.* at 1013-14. In *Squaw Valley*, the court held that a plaintiff could prove a valid class-of-one claim by showing he was treated differently than

Supreme Court's holding in *Olech*, and refusing to apply the class-of-one claim in the public employment context, the Ninth Circuit stated, “[W]e believe that *Olech* is too slender a reed on which to base such a transformation of public employment law. ‘It seems unlikely that the Supreme Court intended such a dramatic result in its *per curiam* opinion in *Olech*.’”⁴⁹

III. BACKGROUND

A. Public Employees’ Constitutional Rights

Generally, “[t]he Supreme Court has recognized that the interests of at least three parties—the employer, the employee, and the public—are relevant to the process of determining the constitutional rights of public employees.”⁵⁰ Until the early 1950s, public employees often had to sacrifice constitutional freedoms that they retained as citizens in order to work for the government.⁵¹ Even before the 1950s, the Court consistently acknowledged that public employees have an interest in retaining their constitutional rights, but the Court has given great deference to the government’s interest in efficiency.⁵² Thus, the most fre-

others similarly situated or the treatment was motivated by arbitrary malice, and there was no rational basis for the difference in treatment. *Engquist*, 478 F.3d at 1013 (citing *Squaw Valley*, 375 F.3d at 945-46). Judge Reinhardt also countered the at-will employment argument by stating that the presumption of at-will employment has not been harmed in all other circuits applying the class-of-one claim to public employment. *Id.*

49. *Engquist*, 478 F.3d at 996 (majority opinion) (quoting *Campagna v. Mass. Dep’t of Env’t Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff’d*, 334 F.3d 150 (1st Cir. 2003)).

50. *The Constitutional Rights of Public Employees*, 97 HARV. L. REV. 1738, 1739 (1984).

51. *Id.*; see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1012-17 (2005) (discussing the history of public employees’ free speech rights). Many Supreme Court cases showed that before the 1960s, public employees had fewer rights as employees than as citizens. See, e.g., *Adler v. Bd. of Educ.*, 342 U.S. 485, 496 (1952) (holding that a civil service law which prohibited anyone from working in public schools if that person had ever advocated to overthrow the government was constitutional); *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 720-21 (1951) (holding that a city ordinance that compelled people to take an oath against overthrowing the government and revealing if they were ever a member of the Communist Party was constitutional); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 103-04 (1947) (holding that federal executive branch officers could be prohibited from taking part in political campaigns). This view of public employees’ limited constitutional rights was first espoused by then-Judge Oliver Wendell Holmes in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (1892). Judge Holmes stated that “[t]he petitioner [public employee] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id.* at 517. Justice Douglas disagreed with this line of reasoning and particularly with the majority’s opinion in *Adler*. Justice Douglas stated:

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society.

Adler, 342 U.S. at 508 (Douglas, J., dissenting).

52. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (stating that “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively”) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)); *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (stating that efficiency is not a legitimate reason for silencing a citizen’s free speech rights, but it may be a legitimate reason for an employer to silence an employee); *Connick*, 461 U.S. at 151 (stating that the government’s strong interest in efficiency may justify limiting the constitutional rights of its employees) (citing *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); see also *Constitutional Rights*,

quent rationale given by the Court when restricting the constitutional rights of public employees is that it is necessary to ensure the efficient functioning of government employment.⁵³ Consequently, the government has discretion to terminate employees who impede the ability of the government to function efficiently.⁵⁴

The free speech context best exemplifies the Court's jurisprudence concerning public employees' rights. Over the last fifty years, the Supreme Court has struggled to establish the degree to which public employees retain their First Amendment free speech rights.⁵⁵ By the early 1950s, and until the late 1960s, the Court began to impose limitations on the government as an employer and increasingly protected public employees' free speech rights.⁵⁶ In 1967, in *Keyishian v. Board of Regents of the University of the State of New York*,⁵⁷ the Court first rejected the notion that public employees only have the constitutional rights that government employers allow them.⁵⁸ One year later, the Court handed down its landmark freedom of expression case, *Pickering v. Board of Education of Township High School District 205*,⁵⁹ which also represented the high point of public employees' constitutional rights.⁶⁰

In *Pickering*, the school district fired a public school teacher after he sent a letter to a local newspaper criticizing the school district's allocation of funding to athletics.⁶¹ To adjudicate this dispute, the *Pickering*

supra note 50, at 1739; Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 807-08 (2007) (stating that until the 1960s the Supreme Court was deferential to the interests of government employers in the free speech context).

53. See *Garcetti*, 547 U.S. at 419-21; *Waters*, 511 U.S. at 675; *Connick*, 461 U.S. at 151.

54. 63C AM. JUR. 2D *Public Officers and Employees* § 188 (1997) (stating that public employers may terminate employees for poor job performance, excessive absences, tardiness, and other similar behavior).

55. *Constitutional Rights*, *supra* note 50, at 1738-49 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (stating that governmental interests are legitimate, but they may not be pursued unnecessarily at the expense of fundamental individual rights)); see *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 555 (1956) (stating that there is a constant struggle to balance the interests of the state and the interests of the employee). Although the Warren Court did emphasize the interests of the employee over the interests of the government employers, it still recognized that there might be governmental interests that trump the individual interests of employees. See *Constitutional Rights*, *supra* note 50, at 1746-47.

56. *Constitutional Rights*, *supra* note 50, at 1739-41. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (holding that the state's interest in firing a teacher for speaking about the school administration did not outweigh the teacher's interest in free speech); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604-06 (1967) (holding that a New York statute conditioning employment in a state university on the requirement that an employee sign a certificate stating he or she has never been a communist was unconstitutional); *Wieman v. Updegraff*, 344 U.S. 183, 189-92 (1952) (holding that a state could not compel its employees to take an oath denying past affiliation with the Communist Party); see also Garry, *supra* note 52, at 801 (stating that beginning in the early 1960s the Court began to dispense with the rights-privilege distinction, which emphasized the interests of the employer and began to expand the rights of public employees).

57. 385 U.S. 589 (1967).

58. *Id.* at 604-06; see Kozel, *supra* note 51, at 1014 (stating that *Keyishian* "suggested a movement away from the Holmesian notion that public employees take their jobs on their employers' terms").

59. 391 U.S. 563 (1968).

60. See *Constitutional Rights*, *supra* note 50, at 1748; Garry, *supra* note 52, at 808-09.

61. *Pickering*, 391 U.S. at 566.

Court developed an ad hoc balancing test for evaluating the First Amendment free speech rights of public employees.⁶² The test requires courts to balance the employee's interest in commenting on matters of public concern with the government employer's interest in promoting efficiency in public service.⁶³ Although this test did not explicitly favor either the employee or the employer, it did show that the Court was concerned about the rights of employees and not just the government employer.⁶⁴ After applying the ad hoc balancing test, the Court held that the speech was of public concern and did not hamper the school district's ability to carry out its tasks efficiently; thus, the restriction on speech was unconstitutional.⁶⁵ After *Pickering*, the Court has generally used this type of ad hoc balancing test to weigh the interests of the government as an employer and the interests of the employee as a citizen.⁶⁶

From *Pickering* until *Connick v. Myers*,⁶⁷ the Court gradually expanded the First Amendment protections available to public employees.⁶⁸ In *Connick*, however, the Court began to emphasize the interests of the government as an employer over the employee as a citizen.⁶⁹ The *Connick* Court did not reject the ad hoc balancing test applied in *Pickering*, but instead used that test to hold that the interests of the government outweighed the interests of the employee.⁷⁰ An assistant district attorney in that case, displeased with the possibility of a transfer within the office, prepared and distributed a questionnaire for her colleagues to fill out regarding the competency of her supervisors.⁷¹ As a result, the assistant district attorney was fired.⁷² The Court held that the nature of the questionnaire did not relate to the public concern and essentially created a "mini-insurrection" within the office.⁷³ Because the questionnaire impeded the office's ability to carry out its operations ef-

62. *Id.* at 568.

63. *Id.*

64. See *Constitutional Rights*, *supra* note 50, at 1748 (stating that "the *Pickering* test is neutral on its face—it does not intrinsically favor employees over employers").

65. *Pickering*, 391 U.S. at 574-75.

66. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 668 (1994); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983). *Contra* *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (employing a categorical balancing test).

67. 461 U.S. 138 (1983).

68. Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 533-34 (1998) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (holding that an untenured teacher could not be fired for giving a radio station a memorandum of the school's new dress code)); see *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979) (holding that the district could not fire a teacher who had complained to the principal about the district's racially discriminatory policies).

69. Garry, *supra* note 52, at 810-11; Rosenthal, *supra* note 68, at 535-36.

70. *Connick*, 461 U.S. at 154; see Rosenthal, *supra* note 68, at 535-36 (stating that the *Connick* Court used the *Pickering* balancing test and decided against the employee because of the disruptive nature of her speech).

71. *Connick*, 461 U.S. at 140-41.

72. *Id.* at 141.

73. *Id.* at 151.

ficiently, the Court upheld the employer's free speech restriction.⁷⁴

Four years after *Connick*, in *Rankin v. McPherson*,⁷⁵ the Court reiterated its concern for government efficiency, yet it struck down the restriction on free speech.⁷⁶ The Court struck down the speech restriction in *Rankin* because the government could not articulate a legitimate employment interest that outweighed the First Amendment free speech rights of the employee.⁷⁷ Although the restriction on free speech was invalidated in *Rankin*, both *Connick* and *Rankin* reveal a shift of the Court's emphasis from protecting individual employee rights to protecting the government's interest in making its own workplace policies.⁷⁸

The Court continued its preference for employer interests over employee rights in *Waters v. Churchill*.⁷⁹ In *Waters*, a nurse in a public hospital voiced her displeasure to a colleague about whether the hospital's obstetrics department was adequately addressing patient care.⁸⁰ The colleague interpreted her statements as criticizing the nurse's supervisor on a personal level and "knocking the department."⁸¹ After learning of this, the hospital fired the nurse.⁸² The Court held that regardless of which version of the statements was true, the hospital's interest in efficiency justified firing the nurse.⁸³ The *Waters* Court went one step further than *Connick* and held that a government employer may fire an employee if the employer reasonably, even if incorrectly, believed that the speech at issue was unprotected.⁸⁴ Like *Connick*, the plurality opinion in *Waters* stressed the interests of the government in the efficient operation of its workplace over the interests of the public employee in retaining her constitutional rights.⁸⁵

74. *Id.*

75. 483 U.S. 378 (1987).

76. *Id.* at 388, 392. The Court in *Rankin* stated:

We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

Id. at 388 (internal citations omitted).

77. *Id.* The plaintiff in *Rankin* stated after the assassination attempt on President Reagan that, "[i]f they go for him again, I hope they get him." *Id.* at 380. Because the plaintiff was a low-level administrative employee in a county sheriff's office, her statements did not rise to the level of interfering with workplace efficiency. *Id.* at 388-89.

78. See *id.* at 388; *Connick*, 461 U.S. at 151.

79. 511 U.S. 661 (1994).

80. *Id.* at 664-66.

81. *Id.* at 665.

82. *Id.* at 666.

83. *Id.* at 675-79.

84. *Id.*

85. *Id.* at 675 (stating that "[t]he government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose

Most recently, in *Garcetti v. Ceballos*,⁸⁶ the Supreme Court further restricted the constitutional free speech rights of government employees.⁸⁷ The Court disposed of the ad hoc *Pickering* balancing test and adopted a categorical balancing test to hold that the First Amendment does not protect a government employee's speech made pursuant to his official duties.⁸⁸ Unlike the ad hoc balancing test, which seeks to weigh the interests of both employee and employer on a case-by-case basis, the categorical balancing test generalizes each party's interests in a given situation so that the court can apply it as a blanket rule in future cases.⁸⁹ In *Garcetti*, the Court held that a deputy district attorney, who spoke out against a prosecution his office was pursuing, was speaking as an employee pursuant to his official duties.⁹⁰ The Court also stated, "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."⁹¹ Because his speech had the potential to affect the government's ability to operate efficiently, the Court held it was not protected speech.⁹² Ultimately, *Garcetti*, *Churchill*, and *Connick* show that the Supreme Court has usually emphasized the interest of the government employer over the interest of the public employee when analyzing free speech rights.⁹³ While the government may be able to fire its employees for actions that impede workplace efficiency, a public employer generally may not fire an employee "at-will."

B. Public At-Will Employment

The traditional doctrine of at-will employment provides that an employer may discharge an employee for good cause, no cause, or for

of effectively achieving its goals, such restrictions may well be appropriate.").

86. 547 U.S. 410 (2006).

87. Nahmod, *supra* note 3, at 561-62.

88. *Garcetti*, 547 U.S. at 421. A categorical balancing test has been described as a "judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that rule of reason—the normal mode of analysis—can be dispensed with." Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?: Garcetti v. Ceballos and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 613 (2008) (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978)); see Christie S. Totten, Note, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under Garcetti v. Ceballos*, 12 LEWIS & CLARK L. REV. 233, 264-65 (2008) (concluding that the Court's decision in *Garcetti* struck a poor balance between the constitutional rights of the employee as a citizen and the interests of the government employer by applying a categorical balancing test).

89. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 977, 979, 981 (1987) (providing a history of the various types of constitutional balancing used by the Supreme Court).

90. *Garcetti*, 547 U.S. at 421.

91. *Id.* at 418.

92. *Id.* at 422-23.

93. See *id.* at 421-23; *Waters v. Churchill*, 511 U.S. 661, 675 (1994); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983).

bad cause so long as the discharge does not violate the employee's constitutional rights.⁹⁴ Until the early 1960s, this doctrine dominated both public and private sector employment.⁹⁵ Since that time, the presumption of at-will employment has been subjected to several exceptions in the private sector and is almost non-existent in the public sector.⁹⁶ State and federal civil service statutes further restrict the right of public employers to fire their employees without cause.⁹⁷ In addition, numerous federal statutes prohibit an employer from firing an employee for enumerated reasons.⁹⁸ The public policy exception to at-will employment provides further protection to public and private employees.⁹⁹ The exception essentially allows an employee to file a claim against her employer if her termination violated a public policy.¹⁰⁰ State law determines what constitutes a violation of public policy and is generally defined by what is right and just or a matter that strikes at the heart of an individual's social rights.¹⁰¹

94. 63C AM. JUR. 2D *Public Officers and Employees* § 177 (1997); Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 (2000). Three important Supreme Court cases all rejected the argument that public employees could be dismissed or denied transfers or promotions at-will when the employment decision violates the Constitution. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (holding that denying public employees promotions, transfers, and recalls after layoffs for political purposes was impermissible when political affiliation was not an important qualification for the job); *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980) (holding that a public employee may not be fired for political patronage reasons); *Elrod v. Burns*, 427 U.S. 347, 349 (1976) (holding that patronage dismissals in public employment violate the First Amendment).

95. See Ballam, *supra* note 94, at 654.

96. MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 98, 105, 117, 162, 178 (2005) (supporting the claim and providing examples). The most common exceptions to at-will employment are when an employee has an express or implied contract of continued employment. See *id.* at 105, 117. Employee handbooks often establish implied contracts, which also prevent an employer from terminating an employee at-will. See *id.* at 117-23. Additionally, Montana has enacted legislation that "requires a legitimate business reason for the termination of an employee," thus effectively removing the at-will presumption in all employment contexts in that state. Deborah L. Markowitz, *The Demise of At-Will Employment and the Public Employee Conundrum*, 27 URB. LAW. 305, 311 (1995) (citing MONT. CODE ANN. § 39-2-904 (2007)).

97. CRAIN ET AL., *supra* note 96, at 98. "Government workers on the federal, state and local level usually are protected by statutes and regulations establishing a just cause standard for discharge." 6 EMP. COORD. § 58.6 (2008); see 15A. AM. JUR. 2D *Civil Service* § 4 (2000) (listing several federal civil service statutes that protect federal employees from adverse personnel decisions).

98. See, e.g., 42 U.S.C. §§ 2000e-2 to 2000e-3 (2000) (prohibiting discrimination based on race, color, religion, sex, and national origin); 29 U.S.C. §§ 621-634 (2000) (prohibiting discrimination based on age in certain situations); 5 U.S.C. § 2302(b)(10) (2006) (prohibiting "discriminat[ion] for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others"). Probably the broadest exception to employment at-will comes from anti-discrimination laws at the federal and state level. Ballam, *supra* note 94, at 655 (stating "[n]umerous statutes protect employees from discharge at the whim of their employers"). Additionally, there are many federal whistleblower statutes that protect employees who assert their employment rights under certain statutes. See CRAIN ET AL., *supra* note 96, at 227 (citing 29 U.S.C.A. § 158(a)(4) (2004); 42 U.S.C.A. § 2000e-3(a) (2004); 29 U.S.C.A. § 660(c) (2004)). A majority of states have also enacted whistleblower statutes to protect employees from wrongful discharge. See generally Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999).

99. See Ballam, *supra* note 94, at 656.

100. *Id.* at 656-58. The public policy exception applies in all employment contexts, not just in public employment. See *id.* Currently, most states recognize the public policy exception to at-will employment. CRAIN ET AL., *supra* note 96, at 184.

101. CRAIN ET AL., *supra* note 96, at 188 (citing *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876,

Additionally, public employees have procedural due process rights that protect them from unjustified termination.¹⁰² In 1972, the Court established a new standard for evaluating procedural due process in *Board of Regents of State Colleges v. Roth*¹⁰³ and *Perry v. Sindermann*.¹⁰⁴ The Court required that a public employee alleging a due process violation establish that the governmental action threatened either a property interest or a liberty interest.¹⁰⁵ If a property or liberty interest was established, the employee was entitled to a hearing explaining the reasons for the termination.¹⁰⁶ According to *Roth* and *Sindermann*, a public employee has a property interest in her job if state law entitled her to continued employment.¹⁰⁷ In addition, an employee has a liberty interest in her job if termination (1) affects the employee's good standing in the community, or (2) damages the employee's ability to pursue another career.¹⁰⁸ Thus, while many private employees are still subject to at-will employment, at-will employment is largely non-existent in the public sector.¹⁰⁹ An exhaustive explication of all the restrictions on public at-will employment is beyond the scope of this Comment; nevertheless, it is clear that a government employer generally may not discharge its employees at will.

C. *The Equal Protection Clause: Analytical and Theoretical Standards for Evaluating Government Action*

Over the last century, the Supreme Court has implemented the Fourteenth Amendment's Equal Protection Clause to prevent invidious race-based and non-race-based classifications.¹¹⁰ The Court enunciated

878-79 (Ill. 1981)).

102. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599 (1972); see Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 124-29 (1995) (arguing that procedural due process rights are essential in protecting the First Amendment rights of public employees).

103. 408 U.S. 564 (1972).

104. 408 U.S. 593 (1972).

105. *Roth*, 408 U.S. at 569-70.

106. *Id.*

107. Garry, *supra* note 52, at 799-800. Courts have recognized that a property interest could be derived from sources such as job titles, contracts, and faculty manuals. See *id.* at 801-03. More recently, in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-42 (1985), the Supreme Court held that state law determines if an employee has a property interest in her job, and if she does, that employee is entitled to constitutional protections before being stripped of that right. For an in-depth articulation of the reasoning behind why a public employee should have a property interest in her job, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

108. *Constitutional Rights*, *supra* note 50, at 1788.

109. See CRAIN ET AL., *supra* note 96, at 98.

110. See, e.g., *United States v. Virginia*, 518 U.S. 515, 545-46 (1996) (using the Equal Protection Clause to strike down a government classification on the basis of sex); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537-38 (1973) (using the Equal Protection Clause to strike down legislation based on an impermissible classification of "hippie communes"); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (using the Equal Protection Clause to strike down a race-based classification). The pertinent portions of the Fourteenth Amendment, including the Equal Protection Clause, read:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

the essential purpose of the Equal Protection Clause in *Cooper v. Aaron*.¹¹¹ In *Cooper*, the Court stated that “the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the state taking the action, or whatever the guise in which it is taken.”¹¹² While all government classifications implicate the Equal Protection Clause, the nature of the classification is paramount when determining whether that classification violates the Constitution.¹¹³ Race-based classifications place a heavy burden on the government to prove that it implemented the classification to further a compelling governmental purpose and that it narrowly tailored the means to accomplish that purpose.¹¹⁴

Behind the actual standard used to evaluate governmental classifications based on race, scholars recognize that different Supreme Court Justices often analyze racial classifications under separate and distinct theoretical frameworks.¹¹⁵ The dominant theory, often called the anti-classification theory, has been embraced in decisions like *City of Rich-*

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment and the Equal Protection Clause have been a part of the United States Constitution for over 140 years. REBECCA E. ZIETLOW, ENFORCING EQUALITY 38-39 (2006). During that period, the Court expanded the protections of the Equal Protection Clause despite the fact that “[t]he ‘original understanding’ of the meaning of ‘equal protection’ continues to be the subject of active scholarly debate, and any effort to glean answers to specific questions from the ambiguous ratification debates is bound to lead to frustration.” Timothy Zick, *Angry White Males: The Equal Protection Clause and “Classes of One”*, 89 KY. L.J. 69, 70 (2000). Even though the Equal Protection Clause does protect individuals from any type of invidious classification, the consensus among scholars and courts is that the Equal Protection Clause’s primary purpose, at the time it was adopted, was to extend freedom and equal protection of the laws to the newly freed class of African Americans in all the states of the country. See *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Palmer v. Thompson*, 403 U.S. 217, 219-20 (1971) (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1873)); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 177 (3d ed. 2003) (citing *Strauder v. W. Va.*, 100 U.S. 303 (1879)); see also Jason Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949) (providing an in-depth articulation of the Equal Protection Clause as a protection against class-based discrimination).

111. 358 U.S. 1 (1958).

112. *Id.* at 17 (internal citations omitted).

113. See FARBER ET AL., *supra* note 110, at 383.

114. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). The Court has only recognized a few interests that are compelling enough to warrant racial classification. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that the pursuit of a diverse student body in higher education was a compelling governmental interest); *Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1980) (holding that remedying the effects of past discrimination was a compelling governmental interest); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that “[p]ressing public necessity” could be a compelling governmental interest). Typically, government classifications based on race do not survive equal protection review. See, e.g., *Parents Involved*, 127 S. Ct. at 2755 (holding that the Seattle and Louisville school districts could not implement a racial classification simply for the goal of racial balancing); *Adarand*, 515 U.S. at 238-39 (holding that a federal program which gave contractors additional compensation for hiring socially and economically disadvantaged persons was unconstitutional because it did not further a compelling governmental interest); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-500 (1989) (holding that the city council’s plan requiring non-minority city contractors to subcontract at least thirty percent of their work to minority subcontractors did not serve a compelling governmental interest).

115. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

mond v. J.A. Croson Co.,¹¹⁶ *Adarand Constructors, Inc. v. Pena*,¹¹⁷ and *Parents Involved in Community Schools v. Seattle School District No. 1*.¹¹⁸ Under the anti-classification theory, classification based on race is impermissible in most or all circumstances.¹¹⁹ The other theory, generally referred to as the anti-subordination theory, regards the Equal Protection Clause as a way to prevent subordination of oppressed groups in society.¹²⁰ Essentially, the anti-subordination theory utilizes the Equal Protection Clause to eliminate subordination in society by disapproving of government action that perpetuates subordination and approving of action that seeks to reverse subordination.¹²¹ The anti-subordination theory only applies when there is a history of past or present discrimination. Without subordination, the need for government action to remedy the discrimination is diminished.¹²² The Justices who made up the majority in *Engquist* typically embrace the anti-classification view that the Equal Protection Clause prohibits discrimination that impermissibly classifies individuals without a compelling governmental interest.¹²³ In contrast, the Justices who dissented in *Engquist* have, in the past, been more willing to consider the anti-subordination goals of the Equal Protection Clause while analyzing whether the government's conduct or a given statute serves a compelling governmental interest.¹²⁴

As governmental classification moves away from race-based classi-

116. 488 U.S. 469 (1989).

117. 515 U.S. 200 (1995).

118. 127 S. Ct. 2738 (2007).

119. See Balkin & Siegel, *supra* note 115, at 10.

120. See *id.* (arguing that even though the anti-subordination view of equal protection has not been explicitly embraced by the Supreme Court, anti-subordination has shaped the modern role of the Equal Protection Clause); Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 587-88 (2008) (stating “[t]oday the antisubordination principle exists almost exclusively in scholarship, with little hope of influencing the Court”) (internal citations omitted); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1542 (2004) (arguing that “concerns about subordination shape the concept of classification itself”). However, Justice O’Connor’s majority opinion in *Grutter* and Justice Breyer’s dissenting opinion in *Parents Involved*, provides some recent support for the anti-subordination view of the Equal Protection Clause. See Campos, *supra* at 588 n.12. For further explication of the anti-subordination principle, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (original explanation of the group-disadvantaging, anti-subordination principle).

121. See generally Campos, *supra* note 120, at 586-88.

122. See *id.* at 597 (arguing that the anti-subordination principle is primarily concerned with class assignments that are difficult to avoid).

123. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 346 (Scalia, J., dissenting), 349 (Thomas, J., dissenting), 378 (Rehnquist, J., dissenting), 387 (Kennedy, J., dissenting) (2003). According to Justice Thomas, the use of racial classification, even to combat historical subordination, always fails to satisfy a compelling governmental interest. See *id.* at 349-51 (Thomas, J., dissenting). In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), Justice Scalia stated “[i]n my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction. . . . In the eyes of government, we are just one race here. It is American.” *Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

124. The Justices in the majority in *Grutter* expressed the view that a lack of diversity (subjugation) in law school admissions should be corrected, even if it required classification based on race. *Grutter*, 539 U.S. at 343-44. “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* at 332.

fications, the standard of review under the Equal Protection Clause becomes easier to meet.¹²⁵ Classifications based on gender or sex only need to be substantially related to an important governmental purpose.¹²⁶ When a governmental classification is not based on race, gender, or sex the government has even more discretion to classify without violating the Equal Protection Clause.¹²⁷ Under this type of non-suspect classification, the government must only show that its action was “rationally related to a legitimate state interest.”¹²⁸ While the rational basis test is the most deferential form of judicial review under the Equal Protection Clause, the Supreme Court has used it to strike down government action when the action was completely irrational.¹²⁹ In *United States Department of Agriculture v. Moreno*,¹³⁰ *City of Cleburne v. Cleburne Living Center*,¹³¹ and *Romer v. Evans*,¹³² the Court found the classifications at issue failed rational basis review because the governments’ actions were motivated by ill will.¹³³ In her concurring opinion in *Lawrence v. Texas*,¹³⁴ Justice O’Connor explicitly recognized that government action based on ill will or malice would violate the Equal Protection Clause.¹³⁵ While most of the Court’s equal protection jurisprudence involves governmental classifications, the Equal Protection Clause also guarantees individuals equal protection of the laws.¹³⁶ Re-

125. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993).

126. See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (concerning gender); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (concerning sex).

127. See FARBER ET AL., *supra* note 110, at 305.

128. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Court also uses a more deferential definition of rational basis, which states that government classification will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Beach*, 508 U.S. at 313; see also *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (stating the government classification only needs to relate to the purpose for which it was implemented to be constitutional).

129. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (holding that a Colorado constitutional amendment that prohibited all legislation designed to protect homosexuals from discrimination violated the Equal Protection Clause); *Cleburne*, 473 U.S. at 450 (holding that a city ordinance requiring a special use permit for a group home for the mentally retarded violated the Equal Protection Clause); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (holding that enforcement of the Food Stamp Act violated the Equal Protection Clause because it barred hippies from participating in the food stamp program, and there was no rational reason for the discrimination).

130. 413 U.S. 528 (1973).

131. 473 U.S. 432 (1985).

132. 517 U.S. 620 (1996).

133. Araiza, *supra* note 14, at 502.

134. 539 U.S. 558 (2003);

135. Araiza, *supra* note 14, at 502-03. “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause.” *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring).

136. Farrell, *supra* note 8, at 379-83 (2003). Professor Araiza characterized the Equal Protection Clause’s current status by stating:

Despite [the Equal Protection Clause’s] possible original purpose to guarantee equality only with regard to the rights specified in the Civil Rights Act of 1866, the Equal Protection Clause has come to be understood as a general guarantee of equality without explicit regard to the nature or the triviality of the benefit at issue.

Araiza, *supra* note 14, at 501. The textual constitutional argument for the individual rights view is that the Fourteenth Amendment prohibits any state from denying “any person” the equal protection of the laws. Farrell, *supra* note 8, at 379 (citing U.S. CONST. amend. XIV, § 1). In support of the in-

cently, in *Olech*, the Court provided its clearest support for the Equal Protection Clause as a protector of individual rights.¹³⁷

D. Village of Willowbrook v. Olech and the Class-of-One Claim in Public Employment

The Supreme Court first explicitly recognized a class-of-one equal protection claim in *Olech*.¹³⁸ In *Olech*, a homeowner sued the Village of Willowbrook after the Village demanded a thirty-three foot easement in order to connect Olech's home to the Village's water supply, when all other citizens accessing the water supply only had to grant a fifteen-foot easement.¹³⁹ In a short per curiam opinion, the Court concluded, "Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis."¹⁴⁰ The Court also held that to succeed on a class-of-one claim a plaintiff must satisfy traditional rational basis review: the plaintiff must show "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."¹⁴¹ In a concurring opinion, Justice Breyer stated that class-of-one claims should also require that the discriminatory treatment be motivated by "vindictive action," "illegitimate animus," or "ill will."¹⁴² His primary concern for wanting to include ill will in addition to the traditional rational basis test was due in large part to his concern that without requiring a showing of ill will, increased litigation involving frivolous class-of-one claims would burden

dividual rights position, the Supreme Court has stated 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. v. Dakota County*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918)) (internal quotations omitted). In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), Justice Powell articulated one of the strongest arguments for Equal Protection Clause as a protector of individual rights when he stated:

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then the constitutional standards may be applied consistently. . . . The Constitution guarantees that right to every person regardless of his background.

Bakke, 438 U.S. at 299.

137. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

138. *Id.*; see David S. Cheval, Comment, *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, 611 (2002) (stating that "the Court reads the Fourteenth Amendment as protecting 'persons' and not only classes or groups").

139. *Olech*, 528 U.S. at 563.

140. *Id.* at 564 n.1.

141. *Id.* at 564 (citing *Sioux City Bridge Co.*, 260 U.S. at 441; *Allegheny Pittsburg Coal Co. v. Comm'n of Webster County*, 488 U.S. 336 (1989)).

142. *Olech*, 528 U.S. at 566 (Breyer, J., concurring). Without this added element, Justice Breyer believed it would be impossible to distinguish between constitutional and unconstitutional zoning decisions. See *id.* In addition, absent a showing of ill will, "[a] race to the courthouse door may follow every adverse decision by a government official." Cheval, *supra* note 138, at 612.

the courts.¹⁴³ Despite Justice Breyer's insistence on showing ill will, the majority in *Olech* adhered to the traditional rational basis test and explicitly refused to require that element.¹⁴⁴ Although *Olech* did not explicitly extend the class-of-one claim to the public employment context, seven circuit courts prior to and after *Olech* have applied the class-of-one claim in the public employment context.¹⁴⁵

The first federal court of appeals to recognize the class-of-one claim prior to *Olech* was the United States Court of Appeals for the Seventh Circuit in *Ciechon v. City of Chicago*.¹⁴⁶ After *Ciechon* and prior to *Olech*, most circuits allowed plaintiffs to assert class-of-one claims.¹⁴⁷ The Supreme Court's decision in *Olech* confirmed the Seventh Circuit's acceptance of the class-of-one claim, and since *Olech*, all the circuit courts have allowed plaintiffs to assert class-of-one claims.¹⁴⁸ The Supreme Court has not addressed the class-of-one equal protection claim in the regulatory¹⁴⁹ or the public employment context since *Olech*; however, seven of the circuits have addressed the class-of-one theory of equal protection in the public employment context and held that it was

143. *Olech*, 528 U.S. at 565-66. While scholars and some courts agree that requiring ill will would help limit frivolous class-of-one claims, they also argue that a strict application of the rational basis test can limit frivolous claims. See *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (2005) (holding that a strict interpretation of "similarly situated" was needed in analyzing class-of-one claims). Compare *Araiza*, *supra* note 14, at 501-03 (arguing that the added element of ill will would help reduce frivolous class-of-one claims), with *Farrell*, *supra* note 8, at 407, 411 (arguing that a strict interpretation of "intentional" and "similarly situated" would help limit frivolous class-of-one claims).

144. *Olech*, 528 U.S. at 564. Even without the element of ill will, in order to survive rational basis review, the plaintiff must overcome a strong presumption that the government's discrimination was rational. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). As one commentator has noted, when the Supreme Court evaluates the rationality element of the class-of-one claim with a strong presumption that the government action was rational, "proving irrationality will be difficult." Hortensia S. Carreira, *Protecting the "Class of One"*, 36 REAL PROP. PROB. & TR. J. 331, 357 (2001).

145. See *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 992-94 (9th Cir. 2007).

146. 686 F.2d 511 (7th Cir. 1982). The Seventh Circuit stated, "The disciplinary proceedings against [the claimant] also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among two paramedics . . . who were equally responsible for the welfare of the patient on all ambulance runs." *Id.* at 522. The class-of-one claim, however, also has support in an old Second Circuit case authored by Judge Learned Hand. Shaun M. Gehan, *With Malice Toward One: Malice and the Substantive Law in "Class of One" Equal Protection Claims in the Wake of Village of Willowbrook v. Olech*, 54 ME. L. REV. 329, 338-39 (2002). In *Burt v. City of N.Y.*, 156 F.2d 791 (2d Cir. 1946), the court held that a plaintiff had a claim against a state officer for allegedly denying the plaintiff an architectural license for no justifiable reason. *Burt*, 156 F.2d at 793.

147. See *Farrell*, *supra* note 8, at 385-89, 400-02. Some opinions, however, reject class-of-one claims. See, e.g., *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1060 (6th Cir. 1996); *Wroblewski v. City of Washburn*, 965 F.2d 452, 458-59 (7th Cir. 1992).

148. See *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008); *Nolan v. Thompson*, 521 F.3d 983, 989-90 (8th Cir. 2008); *Wilson v. Libby*, 535 F.3d 697, 721 (D.C. Cir. 2008); *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1045 (11th Cir. 2008); *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 348 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 632 (7th Cir. 2005); *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005); *Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir. 2005); *Campagna v. Mass. Dep't of Env't'l Prot.*, 334 F.3d 150, 156 (1st Cir. 2003); *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001).

149. "Regulatory" is used to denote all government action that is not related to employment. In such situations, the government acts in its capacity as "sovereign."

just as applicable as it was in the regulatory context.¹⁵⁰ The Supreme Court's decision in *Olech* provided some guidance for the circuit courts; nevertheless, after *Olech*, and prior to *Engquist*, there was still some disagreement among the circuits about which standard to apply.¹⁵¹ Generally, all the circuit courts agreed that a plaintiff must show she was intentionally treated differently and there was no rational basis for the differential treatment.¹⁵² Some courts, however, still required a plaintiff to show the existence of ill will.¹⁵³

Regardless of the specific test used, class-of-one claims rarely survive motions for summary judgment.¹⁵⁴ The Ninth Circuit, in *Engquist*,¹⁵⁵ became the first circuit court to hold that the class-of-one theory of equal protection does not apply in the public employment context.¹⁵⁶ Therefore, despite the inconsistency between the circuits regarding whether ill will constitutes a necessary element of the class-of-one claim, it was clear that prior to the Ninth Circuit's decision in *Engquist*, seven other circuit courts specifically held that class-of-one equal protection claims were valid in the public employment context.¹⁵⁷

IV. THE COURT'S DECISION

In *Engquist*, the Supreme Court evaluated its prior decision in

150. See *Hill*, 455 F.3d at 239 (holding that a borough manager could assert a class-of-one claim against a mayor for constructively firing him); *Scarborough*, 470 F.3d at 261 (holding that school superintendent could bring a class-of-one claim alleging his freedom of speech had been violated); *Whiting*, 451 F.3d at 348 (holding that university professor could assert a class-of-one claim against the university for denying her tenure); *Lauth*, 424 F.3d at 632 (holding that police officer could assert a class-of-one claim against police chief who sanctioned him for malfeasance); *Neilson*, 409 F.3d at 104 (holding that senior court officer could bring a class-of-one claim after being fired for unholstering his weapon in the presence of a civilian); *Campagna*, 334 F.3d at 156 (holding that state employee could assert a class-of-one claim against the Massachusetts Department of Environmental Protection); *Bartell*, 263 F.3d at 1149 (holding that school employee could assert a class-of-one claim against the school district).

151. See Farrell, *supra* note 8, at 400-02.

152. See, e.g., *Hill*, 455 F.3d at 239; *Campagna*, 334 F.3d at 156.

153. See, e.g., *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007-08 (7th Cir. 2000). In the last ten to fifteen years, Judge Richard Posner of the Seventh Circuit has been the leading advocate of the view that proving ill will in class-of-one claims is essential. See Farrell, *supra* note 8, at 385; see, e.g., *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (stating that, although the primary purpose of the Equal Protection Clause was not to protect individual employees from arbitrary discrimination, the Equal Protection Clause "has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives"). Under Judge Posner's view, "equal protection does not just mean treating identically situated persons identically"; rather, a person should only have an equal protection class-of-one claim if the individual shows that the government treated her differently based on ill will. *Esmail*, 53 F.3d at 179.

154. *Gehan*, *supra* note 146, at 350. There are a few cases where the plaintiff did survive the summary judgment stage. See, e.g., *Rubinovitz v. Rogato*, 60 F.3d 906, 912 (1st Cir. 1995); *Ciechon v. City of Chi.*, 686 F.2d 511, 525 (7th Cir. 1982).

155. 478 F.3d 985 (9th Cir. 2007).

156. *Id.* at 992.

157. See *Hill*, 455 F.3d at 239; *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 348 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 632 (7th Cir. 2005); *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005); *Campagna*, 334 F.3d at 156; *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001).

Olech and its free speech cases in the public employment context, and held that the class-of-one theory of equal protection does not apply in that context.¹⁵⁸ The Court affirmed the judgment of the Ninth Circuit and resolved the circuit split on this issue.¹⁵⁹ By refusing to apply the class-of-one theory to the public employment context, the Court narrowed its holding in *Olech* and relegated its approval of the class-of-one claim to those instances in which the government acts as a sovereign.¹⁶⁰ In her argument before the Court, Anup Engquist argued that the Equal Protection Clause protects individuals, as well as classes of individuals, and no overriding concern justified taking that protection away from public employees.¹⁶¹ Engquist also argued for the traditional rational basis standard of review applied in *Olech*.¹⁶² Additionally, Engquist argued that allowing the class-of-one claim in the public employment context would not burden the federal courts with a flood of litigation.¹⁶³

In response, the ODA argued that neither the history of the Fourteenth Amendment nor most of the Supreme Court's precedent suggest that the class-of-one claim should be available in the public employment context.¹⁶⁴ "[The] Court should not extend class-of-one equal protection analysis into the public employment context because personnel decisions often are highly subjective, and subjecting them to constitutional scrutiny in federal court could [lead] to random second-guessing of the decisions of public employers."¹⁶⁵ Additionally, respondents argued that the government has more expansive powers as an employer than it does as a sovereign, and, as a result, the government as an employer has greater discretion to curtail the constitutional rights of employees to ensure the efficient operation of government than it has to regulate that behavior directly.¹⁶⁶

The Court, in an opinion authored by Chief Justice Roberts, held that:

Our traditional view of the core concern of the Equal Protection Clause

158. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2148-52 (2008).

159. *Id.* at 2157.

160. *See id.* at 2153-54.

161. Brief for the Petitioner, *supra* note 16, at 29-32.

162. *Id.* at 35. Engquist also argued in the alternative that if the Court is concerned about the flood of litigation these claims would produce, the Court should require the plaintiff to prove the existence of ill will or malice in the government discrimination. *Id.* at 42-45. Additionally, Engquist found that only 162 public employment cases since *Olech*, which was decided in 2000, had even asserted a class-of-one claim. *Id.* at 49. This represents only a fraction of the nearly 15,000 employment claims filed in federal court in 2006 alone. *Id.*

163. Reply Brief for the Petitioner at 19-26, *Engquist*, 128 S. Ct. 2146 (No. 07-474).

164. Brief for the Respondent at 17-24, *Engquist*, 128 S. Ct. 2146 (No. 07-474).

165. *Id.* at 15.

166. *Id.* at 33-35. Like the petitioner, the respondents argued, in the alternative, that if the Supreme Court held that the class-of-one theory was viable in the public employment context, the Court should restrict the theory's reach by requiring the plaintiff to prove the existence of ill will. *Id.* at 42-52.

as a shield against arbitrary classifications, combined with unique considerations applicable when the government acts as [an] employer as opposed to [a] sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context.¹⁶⁷

Chief Justice Roberts based the majority opinion on three main justifications.¹⁶⁸ First, the Equal Protection Clause's main purpose was to protect classes of individuals from discriminatory treatment at the hands of the government; thus, the class-of-one claim did not "implicate[] the basic concerns of the [Equal Protection Clause]. . . ."¹⁶⁹ Second, the government has broader powers when it acts as an employer as opposed to a sovereign, and these broader powers necessitate finding a balance between the constitutional rights of employees and the rights of the government as an employer.¹⁷⁰ Third, the Court was concerned that allowing the class-of-one claim in the public employment context would upset this balance and destroy public at-will employment.¹⁷¹ Consequently, the Court concluded, "the class-of-one theory of equal protection has no application in the public employment context . . . we are guided, as in the past, by the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'"¹⁷²

Justice Stevens wrote a dissenting opinion in which Justice Souter and Justice Ginsburg joined.¹⁷³ Justice Stevens concluded that the Court's holding was an unjustified and poorly reasoned opinion, which stripped government employees of a constitutional right that all other citizens enjoy.¹⁷⁴ Unlike the majority, the dissent believed that *Olech* was not limited to when the government acts as an employer, but also applied in the public employment context.¹⁷⁵ The dissent flatly rejected the justification that unique employment considerations required that an exception "be carved out of our equal protection jurisprudence."¹⁷⁶ Justice Stevens further asserted that, while it is necessary for the government to act with discretion when making employment decisions, "there is a clear distinction between an exercise of discretion and an ar-

167. *Engquist*, 128 S. Ct. at 2151 (2008) (joining in the majority opinion were Justices Scalia, Kennedy, Thomas, Breyer, and Alito).

168. *Id.* at 2150-57.

169. *Id.* at 2152.

170. *Id.* at 2151-52.

171. *Id.* at 2156.

172. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)). Additionally, the Court reasoned that, if the class-of-one claim was extended to public employment, "any personnel action in which a wronged employee can conjure up a claim of differential treatment [would] suddenly become the basis for a federal constitutional claim." *Id.*

173. *Id.* at 2157 (Stevens, J., dissenting).

174. *See id.* 2157-58.

175. *Id.* (stating, "[T]he outcome in *Olech* was dictated solely by the absence of a rational basis for the discrimination").

176. *Id.* at 2159.

bitrary decision.”¹⁷⁷ Justice Stevens also averred that the very purpose of the Equal Protection Clause was to prevent arbitrary decisions by the government.¹⁷⁸

Finally, Justice Stevens criticized the majority for not considering ways to minimize the scope of class-of-one claims, stating:

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.¹⁷⁹

Therefore, Justice Stevens found no compelling reason to limit the scope of the Equal Protection Clause; he believed the majority unjustifiably infringed upon the constitutional rights of public employees.¹⁸⁰

V. COMMENTARY

The Court’s unwillingness to extend the class-of-one claim to the public employment context failed to recognize the important role the Equal Protection Clause plays in protecting individuals from arbitrary and invidious treatment by government action motivated by ill will.¹⁸¹ By not recognizing this claim, the majority also displayed a theoretical inconsistency in its equal protection jurisprudence. Additionally, the Court’s justification for not recognizing the class-of-one theory in public employment came from the majority’s misplaced analysis of the differences between the government acting as a sovereign and the government acting as an employer.¹⁸² The Court concluded that because the government has more power when it acts as an employer, elimination of the class-of-one claim was justified.¹⁸³ In response to the Supreme

177. *Id.* For Justice Stevens, a discretionary decision equals “the power to choose between two or more courses of action each of which is thought of as permissible.” *Id.* (quoting H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 162 (10th ed. 1958)) (internal quotations omitted).

178. *Id.*

179. *Id.* at 2158.

180. Additionally, Justice Stevens stated that, since *Olech*, only about 150 class-of-one claims had reached the district or circuit courts; therefore, the risk that the federal courts would be forced to adjudicate a flood of frivolous claims was unfounded. *Id.* at 2160 n.4. He also found no merit in the Court’s decision to justify the elimination of the class-of-one claims in public employment because of the harm it would do to the doctrine of at-will employment. *Id.* at 2160.

181. See Araiza, *supra* note 14, at 502 (arguing that prohibiting ill will is “one of the core prohibitions of the Equal Protection Clause”); William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 566 (2005) (arguing that “[t]he [ill will] rule goes a long way toward integrating the Court’s approach to equal protection with a richer understanding of the Section 5 power [of the Fourteenth Amendment]”).

182. *Engquist*, 128 S. Ct. at 2151-52. The majority states that these sovereign/employer distinctions require a balancing of employee/employer interests, yet it fails to engage in any balancing. See *id.* at 2153-57.

183. *Id.* at 2151 (stating, “[T]he government as employer indeed has far broader powers than does the government as sovereign”) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)).

Court's decision in *Engquist*, one commentator noted that "[w]hen the Supreme Court affirms a decision of the U.S. Court of Appeals for the 9th Circuit, that's news, especially when nearly every circuit has gone the other way. . . . Unfortunately, the news would be better had the 9th Circuit gotten it right."¹⁸⁴

This Comment analyzes and explains the Court's failure to hold that the Equal Protection Clause protects individual public employees from invidious treatment by government employers motivated by ill will. Second, this Comment demonstrates how the Court's opinion is theoretically inconsistent with the Court's typical equal protection jurisprudence because it did not apply rational basis review to the class-of-one claim. Next, this Comment analyzes what the majority meant when it claimed that the Constitution applies differently when the government acts as an employer rather than as a sovereign, and concludes that the Court's analogy between the free speech and equal protection contexts is significantly flawed. Finally, this Comment argues that by refusing to recognize the class-of-one claim in public employment, the Court did not "stri[k]e the appropriate balance" between the interests of the government as an employer and the interests of the employee as a citizen.¹⁸⁵ In fact, the Court did not strike a balance at all, but created a void in the constitutional rights of public employees, even though the potential harm the Court was concerned about could have been avoided without eliminating the class-of-one claim altogether. Ultimately, this decision leaves Anup Engquist and nineteen million other public employees without certain protections available to all other persons in the United States under the Equal Protection Clause.

A. The Equal Protection Clause Protects Public Employees from Governmental Action Motivated by Ill Will

A critical distinction exists between government action that implicates the Equal Protection Clause and government action that does not.¹⁸⁶ That distinction is difficult to discern when the government action concerns a single individual and not a class of individuals.¹⁸⁷ Frequently, government action that only affects a single individual takes place in the public employment context. Prior to *Engquist*, seven circuit

184. Roger Pilon, *In a Class of Your Own*, LEGAL TIMES, June 16, 2008, at 76, available at http://www.cato.org/pub_display.php?pub_id=9465.

185. *Engquist*, 128 S. Ct. at 2152.

186. See FARBER ET AL., *supra* note 110, at 383 (stating that governmental classifications subject to strict scrutiny are nearly always fatal, while classifications subject to rational basis review almost always survive).

187. See Araiza, *supra* note 14, at 503 (stating, "The unusual nature of the class-of-one decisions requires a rethinking of how basic equal protection concepts apply to such decisions"); see also Cheval, *supra* note 138, at 602 (stating that "[a]t first glance . . . if there was no classification, then there can be no [equal protection] violation").

courts held that a public employee could invoke the protections of the Equal Protection Clause by using the class-of-one claim.¹⁸⁸ When a public employee “impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise,” employers have authority to terminate them because doing so would be rational.¹⁸⁹ When a government employer, however, is motivated by ill will to fire an employee for no rational reason, that decision violates the Equal Protection Clause.¹⁹⁰

The Supreme Court’s refusal to apply the rational basis test to the class-of-one claim in public employment demonstrated a failure to appreciate the crucial role that ill will and malice play when determining whether government action violates the Equal Protection Clause.¹⁹¹ This is significant because the existence of ill will has frequently been at the heart of many equal protection violations not involving a suspect or quasi-suspect classification.¹⁹² In *Romer*, *Cleburne*, and *Moreno*, for example, the Court used the rational basis test to hold that the government action at issue violated the Equal Protection Clause.¹⁹³ In each case, if the government’s action was motivated by ill will to harm an identified class of persons, then the action was irrational.¹⁹⁴ Without the element of ill will, it would have been difficult to discern whether the government action in each case was rational or irrational.¹⁹⁵ Although

188. See *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 348 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 632 (7th Cir. 2005); *Neilson v. D’Angelis*, 409 F.3d 100, 104 (2d Cir. 2005); *Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir. 2005); *Campagna v. Mass. Dep’t of Env’tl Prot.*, 334 F.3d 150, 156 (1st Cir. 2003); *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001).

189. See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

190. See Araiza, *supra* note 14, at 504-09 (arguing that prohibiting ill will is a core part of the Equal Protection Clause).

191. See *id.* at 501-16; see also *Tussman & tenBroek*, *supra* note 110, at 343-65 (arguing that ill will may be a basis for striking down laws that violate the Equal Protection Clause); Araiza, *supra* note 181, at 520 (arguing that “lurking in the rational basis cases is a fundamental principle of equal protection law—the rule against animus”).

192. Araiza, *supra* note 14, at 502 (citing *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973)). “These cases, then, revealed the animus that constitutes one of the core prohibitions of the Equal Protection Clause.” *Id.*

193. See *id.*

194. *Romer*, 517 U.S. at 632 (stating that Colorado’s constitutional amendment prohibiting legislation intended to proscribe discrimination based on sexual orientation was “inexplicable by anything but animus toward the class it affects; it lacks a rational basis to legitimate state interests”); *Cleburne*, 473 U.S. at 447-48 (holding that ill will toward the mentally retarded provided no rational basis for denying a zoning permit for a home for the mentally retarded); *Moreno*, 413 U.S. at 534 (stating that the motivation behind the government action, which “was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program,” could not survive the rational basis test because hostility for hostility’s sake is not a sufficient reason to classify under the Constitution).

195. See Araiza, *supra* note 14, at 508 (stating that without direct evidence of ill will, rational basis review is almost impossible).

these cases all involved governmental classifications, the Court's analysis of ill will was independent of the classification.¹⁹⁶ Therefore, if the Constitution prohibits government action based on ill will toward a class of persons, then it should also prohibit government action based on ill will toward a single individual. The emphasis on prohibiting governmental action based on ill will is equally, if not more, applicable to the class-of-one claim in public employment.¹⁹⁷

Policing ill will is even more important in the public employment context because of the close relationship between government action and rationality in class-of-one public employment cases. Without the existence of the ill will element, it would be nearly impossible to determine what government action is rational or irrational in public employment.¹⁹⁸ In fact, a pure rationality approach, which does not consider ill will, provides no meaningful analysis by which to consider an employer's action against an employee.¹⁹⁹ Consideration of ill will also keeps the employer accountable by prohibiting irrational action, but still gives the employer ample discretion to make necessary decisions in the government workplace.²⁰⁰ The Constitution should allow a government employer to make discretionary decisions in order to ensure the efficient operation of the workplace, but a government employer should not be able to make adverse employment decisions motivated by ill will. As noted by Justice O'Connor in her concurrence in *Lawrence*, "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."²⁰¹ Similarly, in public employment class-of-one claims, a bare desire to harm a single person should constitute a violation of the Equal Protection Clause. If ill will motivates government action, it should make no difference whether that government action bears on one person or a class of persons. Therefore, according to the Court's previous equal protection jurisprudence, there was no analytical reason for prohibiting the class-of-one claim in public employment in *Engquist*. The Court's refusal to recognize the class-of-one claim in the public employment context, however, was not only analytically inconsistent, but also theoretically inconsistent.

196. See *Romer*, 517 U.S. at 635-36; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 537-38.

197. See Araiza, *supra* note 14, at 503. The relationship between ill will and the Equal Protection Clause was critical in *Olech* even though the Court refused to require a showing of ill will. *Cf. id.* at 501.

198. See *id.* at 503. In addition, "in a . . . class-of-one situation, it is unlikely that rationality review itself would reliably reveal animus." *Id.*

199. See *id.* at 514-15 (arguing that "these [pure irrationality] claims might fit as substantive due process claims under the 'shocks the conscience' standard . . ."). Class-of-one claims must include an element of ill will. *Id.* at 495; see also Zick, *supra* note 110, at 124-29 (arguing that the Due Process Clause is better suited to protect individuals under the class-of-one theory than the Equal Protection Clause). *Contra* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000).

200. See, e.g., *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006).

201. *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

B. Inconsistent Application of Equal Protection Clause Theories

While the majority in *Engquist* traditionally subscribed to the anti-classification theory of the Equal Protection Clause, they seemed to give credence to the anti-subordination theory in the *Engquist* decision. By holding that the class-of-one theory is not available to public employees, the Supreme Court refused to apply rational basis review to the actions of the defendants in *Engquist*.²⁰² The Court's failure to apply rational basis review is theoretically inconsistent with its prior equal protection jurisprudence because most of the Justices in the majority have consistently applied the rational basis test to all discriminatory government actions which are not based on race, gender, or sex.²⁰³ Even though rational basis review is highly deferential to governmental action, there is a difference between applying rational basis review and upholding the government action, and refusing to apply rational basis review altogether. While individuals in the first situation retain the right to have their constitutional claims adjudicated, those in the latter lose their constitutional rights completely.

Theoretically, the Court's refusal to apply rational basis review to the class-of-one claim requires a consideration of the anti-subordination theory of equal protection.²⁰⁴ The Justices in the majority, except Justice Breyer, have consistently rejected the anti-subordination theory of the Equal Protection Clause.²⁰⁵ The majority implicitly concluded that because there was no history of subordination against Anup Engquist or individual government employees generally, no constitutional protection was available.²⁰⁶ If this case had presented a situation in which the

202. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2157 (2008).

203. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

204. See *Engquist*, 128 S. Ct. at 2152 (stating that when no group classification is involved, the most important concerns of the Equal Protection Clause are not at stake; thus, the need for constitutional protection is diminished).

205. See Campos, *supra* note 120, at 587-88, 588 n.12 (stating that the anti-subordination principle is almost exclusively relegated to scholarship); see, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

206. The majority's emphasis on the anti-subordination aspects of the Equal Protection Clause in *Engquist* is particularly odd because in *Parents Involved*, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito all rejected using an anti-subordination analysis and maintained that the classification predicated on race was unconstitutional, regardless of whether it was meant to remedy past discrimination. See *Parents Involved*, 127 S. Ct. at 2746-68. In *Engquist*, the same Justices plus Justice Breyer essentially refused to apply rational basis review to class-of-one claims in public employment because there has been no history of government employers engaging in subordination of individual employees. See *Engquist*, 128 S. Ct. at 2157 (implying that since no subordination exists, allowing the class of one claim would only "constitutionalize the employee grievance") (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)). Justice Breyer was the only Justice to vote with the majority who has previously recognized the constitutional viability of the anti-subordination theory. See *id.* at 2148. Justice Breyer's vote in *Engquist* may be the most theoretically consistent opinion of the Justices in the majority. Compare *Grutter v. Bollinger*, 539 U.S. 306, 344-46 (2003) (Ginsburg & Breyer, JJ., concurring) (stating that racial classifications may be necessary to combat subordination and the Court should not forecast how long classifications of that type may be necessary), with *Engquist*, 128 S. Ct. at 2148-57 (implying that the class-of-one theory makes no sense from an anti-subordination point of view and is, thus, not a valid cause of action in the public employment con-

government treated a certain class of persons unequally, the Justices in the majority would have most likely shunned the anti-subordination theory of equal protection and analyzed the government action only to see if it furthered a compelling governmental interest, a substantial governmental interest, or a legitimate governmental interest.²⁰⁷ Consequently, because the Justices in the majority regularly apply some level of judicial scrutiny to all governmental classifications, there was no theoretical reason for refusing to apply the rational basis test in *Engquist*. The only way to explain this theoretical inconsistency is to suggest that the majority gave credence to the anti-subordination principle in *Engquist* merely to restrict the ability of public employees to bring constitutional claims against their employers. One of the Court's primary concerns, which led it not to apply the rational basis test, was that allowing the class-of-one claim would adversely affect public at-will employment.

C. Saving Public At-Will Employment Provides a Feeble Justification for the Elimination of a Constitutional Right

The Court's convoluted analysis of public at-will employment was misplaced and provided a feeble justification for the elimination of a constitutional right.²⁰⁸ While the presumption of at-will employment still survives in some areas of private employment, public at-will employment is largely a relic of the past.²⁰⁹ Numerous federal statutes have limited the ability of public employers to fire employees for various impermissible reasons.²¹⁰ In addition, civil service statutes at the state and federal levels prohibit the firing of public employees without cause.²¹¹ Public employees have protections that prohibit their employers from firing them for arbitrary and vindictive reasons.²¹² The public policy exception explicitly forbids a public employer from taking any action against an employee that substantially violates the employee's social

text). Justice Breyer's vote in *Engquist* is also somewhat consistent with his concurring opinion in *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565-66 (Breyer, J., concurring), in which he expressed reservations about the validity of the class-of-one claim.

207. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976); see *Adarand*, 515 U.S. at 227.

208. See *Engquist*, 128 S. Ct. at 2155-56; see *supra* Part III.B.

209. See *supra* Part III.B. (summarizing the many ways in which public at-will employment has been restricted). The Court seems to accept this proposition, but nonetheless still finds that maintaining public at-will employment justifies the elimination of a constitutional right. *Engquist*, 128 S. Ct. at 2155-56. As Justice Stevens noted in dissent, "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* at 2160 (Stevens, J., dissenting) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-06 (1967)).

210. See *supra* notes 97-98 (listing several federal statutes that prohibit the firing of a public employee for various reasons).

211. See *supra* note 97.

212. See *supra* note 98.

rights.²¹³ Certainly, a termination, such as the one in *Engquist*, violated public policy because it was motivated solely by a desire to “get rid of” Anup Engquist for irrational reasons.²¹⁴

Additionally, constitutional decisions such as *Rutan v. Republican Party of Illinois*,²¹⁵ *Branti v. Finkel*,²¹⁶ and *Elrod v. Burns*²¹⁷ restricted the scope of public at-will employment by prohibiting employment decisions that violate employees’ constitutional rights.²¹⁸ The Court’s procedural due process jurisprudence enunciated in *Roth* and *Sindermann* has made it virtually impossible for a government employer to fire an employee at will.²¹⁹ The various limitations to the doctrine of public at-will employment have done much more to constrain its scope than allowing the class-of-one claim could ever do. Therefore, because public at-will employment no longer exists to any substantial degree, the Court should not have been so concerned with preserving its existence, especially when it comes at the price of a constitutional right. Similarly, the majority’s analogy between the free speech cases and *Engquist* is flawed.

D. *The Majority’s Sovereign/Employer Distinction is Misplaced*

Because the majority in *Engquist* had no precedent to follow for denying public employees the right to assert a class-of-one equal protection claim, the Court tried to justify the decision by claiming that the Constitution applies differently to individuals when the government acts as a sovereign rather than as an employer.²²⁰ The Court justified elimination of the class-of-one claim by following the line of free speech cases in the public employment context that emphasized the interests of the government employer over the constitutional rights of the employee

213. CRAINET ET AL., *supra* note 96, at 188; *see* Ballam, *supra* note 94, at 656 (stating “[t]he most significant limitation on the employment-at-will doctrine has arisen from tort law with a cause of action for wrongful discharge based on public policy claims”).

214. *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 990 (2007).

215. 497 U.S. 62 (1990).

216. 445 U.S. 507 (1980).

217. 427 U.S. 347 (1976).

218. *See supra* note 94.

219. *See supra* notes 103-108 and accompanying text (discussing the Supreme Court’s procedural due process jurisprudence in connection with public at-will employment).

220. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2151-53 (2008). As the Court in *Engquist* recognized, for the last fifty years the Equal Protection Clause has generally applied with full force to public employees. *Id.* at 2150-51 (citing *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 592-93 (1979) (holding that the New York City Transit Authority’s refusal to hire individuals who used methadone did not violate the Equal Protection Clause); *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 199-201 (1979) (holding that although the teacher’s equal protection rights were not violated, the school district’s action in firing her was still subject to rational basis review); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 311-12 (1976) (holding that the State’s mandatory retirement policy for state police officers was subject to rational basis review)). In *Engquist*, however, the Supreme Court “carve[d] a novel exception out of state employees’ constitutional rights.” *Id.* at 2157 (Stevens, J., dissenting). The Court’s class-of-one precedent in *Olech* did not limit its holding to situations in which the government acts as a sovereign, and seven circuits prior to *Engquist* allowed class-of-one claims in public employment. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see* Part III.D.

as a citizen.²²¹ According to the Court, these free speech cases are sufficiently analogous to the equal protection class-of-one claim; thus, the conclusion that the government has more power when it acts as an employer than when it acts as a sovereign applies when free speech or equal protection is at issue.²²² As a result, public employees have no equal protection claim when their employer singles them out for arbitrary and discriminatory treatment. While this analogy appears solid on the surface, it falls apart upon further analysis.²²³ Ultimately, this analogy fails to take into account the critical differences between restrictions on free speech rights and restrictions on equal protection rights in the public employment context.

1. Critical Distinctions Between Restrictions on Free Speech and Restrictions on Equal Protection

Initially, the free speech cases in public employment seem similar to the equal protection case here; however, upon closer examination, the analogy is fraught with critical distinctions, which make the limitations on public employee free speech wholly inadequate to explain why the Court restricted a public employee's ability to assert a class-of-one claim in *Engquist*.²²⁴ The critical distinction between the free speech precedents and the class-of-one claim in *Engquist* concerns the difference in what the Court labels government "efficiency."²²⁵ In *Waters*, the Court succinctly described what it meant when it referred to efficiency by stating, "[t]he government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."²²⁶ Operating with this definition of efficiency, a public employer would have the authority to

221. *Engquist*, 128 S. Ct. at 2151, 2157; see *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (creating a categorical exception to public employees' free speech rights); *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (holding that the government has broader powers in the First Amendment context when it acts as an employer instead of a sovereign); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that a public employee does not have a First Amendment right to speak as an employee about matters of personal interest).

222. *Engquist*, 128 S. Ct. at 2152 (stating "[o]ur public-employee speech cases are particularly instructive").

223. See Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1215-20 (2001) (stating that even though surface similarities may exist within an analogy, the analogy may still be a poor one).

224. *Connick*, *Waters*, *Garcetti*, and *Engquist* all discuss governmental efficiency, and in that respect, the cases are similar. *Connick*, 416 U.S. at 150-52; *Waters*, 511 U.S. at 675; *Garcetti*, 547 U.S. at 420-21; *Engquist*, 128 S. Ct. at 2151-52. In *Connick*, *Waters*, and *Garcetti*, efficiency only related to the ability of the government employer to perform its tasks. *Connick*, 416 U.S. at 150-52; *Waters*, 511 U.S. at 675; *Garcetti*, 547 U.S. at 420-21. In *Engquist*, however, efficiency amounted to the ability of a government employer to fire its employees without worrying about a subsequent lawsuit. See Posting of Bill Araiza to *PrawfsBlawg*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/06/more-on-the-cla.html> (June 16, 2008, 19:37) [hereinafter *PrawfsBlawg*].

225. See *Engquist*, 128 S. Ct. at 2151-52.

226. *Waters*, 511 U.S. at 675.

fire an employee for poor job performance, excessive absences from work, or any other type of behavior that affects the ability of the government to perform the duties of an employer. In *Engquist*, the Court's definition of efficiency, however, only amounts to the ability of government employers to fire their employees without worry of being sued.²²⁷ While curtailing a public employee's free speech rights may be closely linked to governmental efficiency, restricting a public employee's ability to file a class-of-one claim only has a tenuous connection with the efficiency of public employment.²²⁸ An examination of the cases in which the Supreme Court restricted public employees' free speech rights will illuminate the critical distinctions between the two different conceptions of efficiency.

The Court in *Connick* was primarily concerned that an assistant district attorney's speech would constitute an "act of insubordination" and undermine the efficiency of the government to function as an employer.²²⁹ Applying the *Pickering* balancing test, the Court held that the government in the employer-employee relationship did have a legitimate interest in operating efficiently and noted that if speech rises to the level of creating dissension in the workplace, it is likely to hamper efficiency, thus justifying a restriction on such speech.²³⁰ Whether one agrees with the Court's conclusion in *Connick*, it is clear that there was a direct link between efficiency in public employment and restricting the public employee's free speech rights.²³¹ Similarly, the nurse in *Waters* jeopardized the ability of the hospital to function efficiently due to her speech criticizing the functioning of her department.²³² Efficiency for the Court in *Waters* meant the ability of the government employer to accomplish its day-to-day tasks effectively, without having to deal with dissension in the ranks of its employees.²³³ Thus, in *Connick* and *Waters*, efficiency meant the ability to carry out the employers' functions on a day-to-day basis. In contrast, efficiency for the *Engquist* Court meant something quite different.²³⁴

227. See *PrawfsBlawg*, *supra* note 224. It is also possible that the majority was politically motivated to further protect government agencies from being subject to liability for firing employees based on political ideology, such as the dismissal of the nine U.S. Attorneys in December 2006 by then-Attorney General Alberto Gonzales. See Miriam Furman, *Alum Gives Update on Investigation of U.S. Attorneys' Dismissal*, Feb. 21, 2008, http://www.law.columbia.edu/media_inquiries/news_events/2008/february2008/Bharara_talk.

228. See *PrawfsBlawg*, *supra* note 224.

229. *Connick*, 461 U.S. at 141.

230. *Id.* at 147-54.

231. *Id.* Because the employee's speech in *Connick* had the potential effect of disrupting the ability of the district attorney's office to function efficiently, the government's interest in efficiency necessitated a restriction on employee speech. *Id.* The Court in *Rankin v. McPherson* also realized that the government's interest in efficiency could trump an employee's interest in free speech even though it did not in that case. *Rankin*, 483 U.S. 378, 388 (1987).

232. *Waters v. Churchill*, 511 U.S. 661, 679-82 (1994).

233. See *id.*

234. See *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2148-56 (2008). It is clear that when the

The Court in *Engquist* purported to act in the name of government efficiency; however, its decision to eliminate the class-of-one claim in public employment actually does more to perpetuate inefficiency. A governmental employer should have the authority to react to and control employee actions that are problematic or disruptive, but that action becomes inefficient when no problematic or disruptive behavior exists and an employee is fired for arbitrary or vindictive reasons.²³⁵ Specifically in *Engquist*, the Court did not point to a particular fact that showed Anup Engquist's continued employment would undermine the efficiency of the ODA.²³⁶ In fact, none of Engquist's superiors alleged that her conduct interfered with the ODA's ability to carry out its tasks efficiently.²³⁷ There is a critical difference between restricting an employee's free speech rights when necessary to carry out the employer's day-to-day tasks efficiently and making "arbitrary, even vindictive, termination decisions."²³⁸ The *Engquist* decision may be another attempt by the conservative majority of the Court to restrict the constitutional rights of public employees. Consequently, government employers will be free to make irrational and vindictive employment decisions against individual public employees without worrying about committing constitutional violations.²³⁹ Although the Court stated efficiency was the primary reason for denying public employees the ability to assert a class-of-one claim, its reference to ensuring efficiency more closely resembled an attempt to immunize public employers from equal protection claims asserted by their employees.²⁴⁰

The Court in *Engquist* also stated that defending a multitude of class-of-one claims would harm the government's interest in efficiency.²⁴¹ Again, the *Engquist* Court's reliance on the efficiency analysis in *Connick* and *Waters* was misplaced because neither of those decisions held that government efficiency, based on the possibility of increased litigation, would justify restricting an employee's constitutional rights.²⁴² After an examination of *Connick* and *Waters*, it is clear that the *Engquist* Court's interpretation of governmental efficiency is inconsis-

government acts as an employer its interest in efficiency may be jeopardized when an individual employee exercises unbridled free speech rights. See, e.g., *Waters*, 511 U.S. at 675; *Connick*, 461 U.S. at 147-49.

235. See *Rankin*, 483 U.S. at 388-89.

236. See *supra* Part II. Justice Stevens, in dissent, recognized that "the State offered no explanation whatsoever for its decisions; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the workplace or that her colleagues simply did not enjoy working with her." *Engquist*, 128 S. Ct. at 2158-59 (Stevens, J., dissenting).

237. See *supra* Part II; see also Reply Brief for the Petitioner, *supra* note 163, at 17-19.

238. See *PrawfsBlawg*, *supra* note 224.

239. See *id.*

240. *Id.*

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

242. See *Waters v. Churchill*, 511 U.S. 661, 675-77 (1994); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983).

tent with the Court's previous interpretation of that term.²⁴³ The Court also tried to find support for its holding in the more recent free speech case of *Garcetti*.²⁴⁴

Although the Court's analysis of public employees' rights in *Engquist* is more similar to its recent decision in *Garcetti*, the Court still failed to account for critical differences of efficiency in the free speech and equal protection contexts.²⁴⁵ The Court in *Garcetti* essentially abandoned the long-standing ad hoc balancing test enunciated in *Pickering* due to the Court's concern about the government's interest in efficiency.²⁴⁶ Instead, the *Garcetti* Court opted for a categorical balancing test and held that public employees have no freedom of speech protection when they speak pursuant to their official duties.²⁴⁷ Concerns regarding government efficiency, which the Court found so compelling in *Garcetti*, simply are not present in the class-of-one equal protection claim in *Engquist*.²⁴⁸ The link between a public employee's speech when making statements pursuant to his official duties and governmental efficiency is closer than the link between class-of-one equal protection claims and governmental efficiency. The government may have a legitimate efficiency concern that necessitates a restriction on an employee's ability to make statements pursuant to her official duties because the unrestricted ability to make those types of statements could undermine the ability of the public employer to carry out its tasks.²⁴⁹ The ability to fire an employee for irrational reasons based on ill will does not enhance the efficiency of a public employer. Elimination of the class-of-one claim is actually the antithesis of governmental efficiency because it removes the fear of judicial oversight, which makes it easier for upper-level government employees to fire other government employees based on irrational and vindictive reasons. Consequently, there are no "unique considerations applicable when the government acts as employer as opposed to sovereign" that justify the Court's elimination of the class-of-one claim in the public employment context.²⁵⁰ In the end, the Court's feeble analysis of public at-will employment, com-

243. See *supra* Part III.A. (discussing the *Connick* and *Waters* Courts' interpretations of governmental efficiency).

244. *Engquist*, 128 S. Ct. at 2157 (stating "[t]he Equal Protection Clause does not require 'this displacement of managerial discretion by judicial supervision'" (citing *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) (alterations omitted)).

245. The decisions are similar because each case used a categorical balancing test to restrict public employees from asserting certain constitutional rights. See *Engquist*, 128 S. Ct. at 2157; *Garcetti*, 547 U.S. at 421.

246. See Stafstrom, *supra* note 88, at 591. Abandoning the ad hoc balancing test of *Pickering* and adopting a categorical balancing test appeals to the Justices who favor formalism. *Id.* at 613.

247. *Garcetti*, 547 U.S. at 421.

248. See *supra* Part III.A. (discussing the Court's articulation of government efficiency in *Garcetti*).

249. *Garcetti*, 547 U.S. at 421-23.

250. *Engquist*, 128 S. Ct. at 2151.

bined with its misplaced notions of governmental efficiency, led to a failure by the Court to engage in any meaningful balancing of the employer and employee interests.

2. A Lack of Appropriate Balancing

In refusing to extend the class-of-one theory of equal protection to the public employment context, the Court claimed that concerns about public employment necessitated the need to balance the interests of the government as an employer against the interests of the employee as a citizen.²⁵¹ Similar to the balancing test employed in *Pickering*, the Court stated, “[I]n striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as [an] employer.”²⁵² While the Court’s rhetoric suggested that the Court was striking a balance between the two counterpoised interests, it gave no weight to the employee’s interest in its analysis.²⁵³ In fact, the Court did not strike a *Pickering*-type balance at all; it simply declared that the right of a public employee to assert a class-of-one claim does not exist.²⁵⁴ Instead of the ad hoc balancing approach used in *Pickering*, the Court adopted a categorical balancing approach similar to *Garcetti*.²⁵⁵

The categorical balancing test adopted in *Engquist* essentially means that public employees have little or no equal protection interest in avoiding adverse personnel decisions motivated by ill will. However, *Pickering*, *Connick*, and *Waters*, which the Court relied on so heavily, did not hold that an employee has no intrinsic free speech interests in the employment context, but only that the interest must be balanced on a case-by-case basis against government concerns for efficiency.²⁵⁶ By adopting a categorical balancing test the Court has forgotten the important “lesson of *Pickering* . . . when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.”²⁵⁷ Because the Court failed to weigh the interests of the employee, the Court did not actually balance the interests of the government as an employer against the interests of

251. *See id.* at 2152.

252. *Id.*

253. *See id.* at 2151-57.

254. *See id.*

255. *See id.* at 2151.

256. *Waters v. Churchill*, 511 U.S. 661, 668 (1994); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). *Cf. Nahmod, supra* note 3, at 570 (stating that when the Court employs categorical balancing, it “weigh[s] what it considers to be the relevant interests, social and individual, at a fairly high level of generality, and then by balancing those interests, arrive[s] at a generally applicable rule to be applied in later cases without further balancing”).

257. *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting).

the employee as a citizen. Like *Garcetti*, the Court gave higher priority to the policy interests of the employer in *Engquist* than to the constitutional rights of the employee; consequently, the result was one dictated more by unfounded policy concerns than constitutional law.

VI. CONCLUSION

In *Engquist*, the Supreme Court's elimination of a public employee's right to assert an equal protection class-of-one claim was motivated primarily by policy considerations unrelated to the Fourteenth Amendment or the Equal Protection Clause.²⁵⁸ In making its decision, the Court forgot that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."²⁵⁹ The majority was concerned that a flood of litigation would inundate the federal courts and that the doctrine of public at-will employment would be repudiated if the Court allowed the class-of-one claim in the public employment context.²⁶⁰ The Court's concern about a flood of litigation, even if legitimate, provided no justifiable reason to eliminate a constitutional right that the Court in *Olech* recognized as belonging to all other persons in the United States.²⁶¹ In the wake of *Olech*, all seven circuits that analyzed the class-of-one claim in the public employment context concluded that it was a valid claim.²⁶² In addition, at-will public employment no longer exists to any substantial degree, so preserving it should not have been one of the Court's primary concerns.²⁶³

The Court's conclusion in *Engquist* is unjustifiable in light of the considerable differences that exist in restricting public employees' free speech and equal protection rights. Allowing public employees the right to seek constitutional redress under the class-of-one theory would not unduly burden the government's function as an employer, nor would it jeopardize the government's legitimate interest in efficiency. Although the Court conjured up images of dire consequences that would ensue if it allowed class-of-one claims in public employment, the reality of the decision probably lies in the majority's desire to grant legal immunity to government employers from defending class-of-one suits.²⁶⁴ Unfortunately, the Court's decision in *Engquist* is not limited to the factual circumstances of that case. Because of this decision, Anup Engquist, and over nineteen million other public employees, now enjoy one less consti-

258. See *Engquist*, 128 S. Ct. at 2156-57.

259. *Connick*, 461 U.S. at 147.

260. *Engquist*, 128 S. Ct. at 2156-57.

261. See Araiza, *supra* note 14, at 501-02.

262. See *supra* notes 148, 150 and accompanying text.

263. See *supra* Part III.B.

264. See *PrawlsBlawg*, *supra* note 224.

tutional right as public employees than they enjoy as American citizens.