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EQUAL PROTECTION FOR NON-SUSPECT CLASS VICTIMS OF GOVERNMENTAL MISCONDUCT: THEORY AND PROOF OF DISPARATE TREATMENT AND ARBITRARINESS CLAIMS

J. MICHAEL McGUINNESS

If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court... Neither in terms nor in interpretation is the [equal protection] clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against government action. ... When we consider the nature and the theory of our institutions of government... they do not leave room for the play and action of purely personal and arbitrary power... The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails. ...

I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment mandates that government shall not "deny to any person within its jurisdiction the equal protection of the laws." The constitutional text offers virtually no guidance into the meaning of equal

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protection. The debate over the meaning of equal protection has raged for generations. The most recent cases confirm the divergent approaches to equal protection jurisprudence.

Almost sixty years ago, Justice Holmes characterized equal protection as "the last resort of constitutional arguments." However, in recent years, the equal protection guarantee has become among the most important constitutional sources for the protection of individual rights. Whatever the abstract value or meaning of equality, during the Warren Court era, equal protection became a foremost means for overturning legislation and challenging governmental misconduct. Justice Lewis Powell once described the highest end of judicial review as protecting "the constitutional rights and liberties of individual citizens . . . against oppressive or discriminatory government action."

Perhaps the most traditional notion of equal protection is that all similarly situated persons should be treated alike. This general "nondiscrimination" principle has been applied to a broad range of conduct including cases whereby the government has established some form of classification scheme between individuals. Much of the equal protection case law deals with legislative classification schemes. However, the more typical context where

4. The term equality has been widely attacked as being devoid of meaning, "an empty vessel with no moral content of its own..." Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982).
9. While beyond the scope of this article, legislative classification schemes are frequently the subject of equal protection challenge. Government conduct frequently imposes discrimination, disparate treatment and other injuries without a technical legislative classification.

In the classic legislative context, equal protection generally mandates that classifications not be based upon impermissible criteria or arbitrarily used to burden a group of individuals. Nowak, supra note 6, at § 14.2. Equal protection can be used to challenge the application of a classification scheme where the scheme is not facially invalid. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Under "traditional" equal protection analysis when classification schemes are in issue, a multi-tiered system of review with three levels of scrutiny has been enunciated by the Supreme Court. See Nowak, supra note 6, at § 14.2. The Court's equal protection tests are frequently outcome determinative. An overall assessment suggests that classifications burdening fundamental rights or
individuals need equal protection is where the government has acted, not through a legislative scheme, but through administrative action. When government harms individuals, the injury is often imposed through a denial of some government benefit or privilege such as a job, license or a permit.

Traditional suspect class discrimination cases capture most of the headlines and historical equal protection theory as taught in traditional constitutional law courses tends to focus upon classifi-

suspect classes will not survive challenge while classifications premised upon economic or social matters will survive challenge.

When analyzing matters involving classification schemes, the Supreme Court continues to adhere to the deferential rationality test where the matter in issue involves general economic or social matters. Under these tests, as long as there is a rational basis for the governmental action, the court will not invalidate the governmental action. However, some recent cases have challenged this extreme deference and cases have held governmental action unconstitutional even under the rational basis test. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (application of zoning ordinance to exclude a group home for the retarded held unconstitutional); Williams v. Vermont, 472 U.S. 14 (1985) (Vermont use tax discriminating against certain nonresidents held not to further any legitimate governmental objective); Zobel v. Williams, 457 U.S. 55 (1982) (“Alaska law providing for distribution of state benefits by length of residence held unconstitutional). These cases suggest a rationality standard with more “bite.”

The second type of equal protection review is referred to as “strict scrutiny.” This standard generally applies where there is a “suspect classification” or when there is a “fundamental right” in issue. Classifications based upon race, national origin and alienage are generally held to constitute suspect classes. A narrow range of rights has been identified as fundamental rights including but not limited to “the right to procedural fairness in regard to claims for governmental deprivations of life, liberty or property. See Quill, 80 F.3d at 724; Nowak, supra note 6, at § 14.2. Where a suspect class or a fundamental right is in issue, the government must prove a compelling governmental interest in order to uphold the classification.

The Court has also enunciated a third test known as “intermediate scrutiny.” Under this approach, the court will not uphold a classification unless it has a “substantial relationship” to an “important” governmental interest. This test has been applied by the Court in cases involving gender and illegitimacy.

One wonders whether all these different levels of scrutiny do not denigrate the very concept of equal protection. The obvious result of these various tests are that some get far more equal protection than others. Thus, is it really equal protection after all? These tests for classification schemes often represent the heart of equal protection cases arising from challenges to state or federal legislation. However, these tests have little significance in the garden variety equal protection challenge to local government administrative action which do not involve traditional legislative classification schemes.
cation schemes.\textsuperscript{10} What about citizens not within any so called suspect class who are victimized by egregious governmental misconduct in a variety of contexts? Are they also to be afforded equal protection of the law? What about citizens who are singled out for pervasive harassment by their local government? Are they entitled under the equal protection guarantee to be treated equally as with other citizens? Can an ordinary citizen without any special status or privilege in the law sue a corrupt local official for governmental misconduct if others have been afforded preferred or differential treatment? Are angry white males entitled to any equal protection?\textsuperscript{11} These are indeed troubling questions which have generated conflicting and confusing decisions.

Americans from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power, more often at the local level.\textsuperscript{12} It appears that the greatest threat to civil liberties arises not from more remote sources of government power in Washington or in Raleigh. Rather, individuals are pervasively regulated and often harassed by smaller local governments which appear more likely to act arbitrarily or discriminatorily because the government authority tends to be concentrated among fewer power brokers with few if any checks on their authority. Sheriffs, police chiefs, town managers, building inspectors and other local officials are more subject to direct political pressures and therefore appear more prone to eviscerate the Constitution than typically more rational forces within the state and federal governments.\textsuperscript{13}

\textsuperscript{10} Equal protection cases addressing legislative classification schemes by state and federal legislatures typically present governmental conduct couched in reasonable and non-malicious terms. However, local governments, especially the small towns and villages throughout America, are often run by politicians who could care less about any semblance of equal protection. It is this context that necessitates rigorous equal protection of the law.

\textsuperscript{11} Many believe that white anglo saxon protestants are without any constitutional protection. In one recent case, Carter v. Narron, No. 92 CVS 2434 (Johnston County Superior Court 1993) (on file with author), the Defendants argued their equal protection defense on just such simplistic terms: "Plaintiff is a young, white, protestant, American male. He is not a member of a protected class." Defendants' Summary Judgment Brief at 6, Carter (No. 92 CVS 2434).


\textsuperscript{13} An example of abusive government conduct of local politicians appears in Brewington v. Bedsole and Cumberland County, No. 91-120-CIV-3-H (E.D.N.C. June 4, 1993) (case settled for $300,000.00 following partial summary judgment for plaintiff). \textit{Brewington} involved the termination of a deputy sheriff who had
A broad range of cases including government contracts, land use disputes, building permit squabbles, business regulation, education, licensing and permit schemes, law enforcement matters, occupational licensing and regulation, public employment and other disputes necessitate application of equal protection principles. These areas of traditional local government regulation is where meaningful equal protection is sorely needed.

This article examines the parameters of equal protection for non-suspect class victims of governmental misconduct and disparate treatment. There are several equal protection theories available for individuals not within a so called suspect class. These cases fall into the following categories: disparate treatment, arbitrariness, selective enforcement and gross abuse of government power. Although some of these areas remain "a murky corner of equal protection law," courts in recent years have extended protection to victims under a variety of equal protection theories. Many of these non-suspect class cases do not enunciate clear rules and further refinement of the basic rules is sorely needed.

This article provides an overview of cases exploring non-traditional equal protection principles. In particular, it outlines *Esmail v. Macrane*, a decision of the Seventh Circuit Court of Appeals. *Esmail* better explains how equal protection is not limited to suspect classes, but applies to all individuals regardless of race, gender or other classification. The article also explores other equal protection theories such as selective enforcement, disparate treatment and gross abuse of power cases. Finally, this article develops a practical proof analysis to illustrate what can be offered to demonstrate improper intent for purposes of establishing an equal protection violation.

spoken critically of the Fayetteville, North Carolina, Police Department, an agency that has been plagued with endless troubles. After Brewington spoke at a press conference and after a city council meeting, a network of local politicos immediately went to work to extinguish Brewington’s job. Leading the frenzy was a Fayetteville City councilman, Tommy Bolton, stating, that he would “see to it that the little [expletive] Randy Brewington would have his [expletive] fired.” The County Commissioner asked Bolton about Brewington’s freedom of speech and Bolton responded: “[expletive] . . . it doesn’t mean anything.” This is what the author means by a gross abuse of government power.

15. 53 F.3d 176 (7th Cir. 1995).
II. *Esmail*: Non-Traditional Equal Protection Clarified

In *Esmail*, the Seventh Circuit, speaking through Chief Judge Richard Posner, clarified many of the subtleties of equal protection jurisprudence in equal protection arbitrariness or disparate treatment cases. *Esmail* observed that "[t]he charge here is that a powerful public official picked on a person out of sheer vindictiveness; and we must consider what standing such a charge has in the law of equal protection." 16 The court further observed that *Esmail* was not complaining merely that equally or more guilty licensees were treated more leniently. Rather, he charged that there was "an orchestrated campaign of official harassment directed against him out of sheer malice." 17 *Esmail* essentially held that mistreating a single person because of not liking them violates the Constitution. 18 One commentator suggested that *Esmail* is "apparently the first court in the Country to hold this way." 19 However, a careful examination of prior cases demonstrates that the *Esmail* rule is not completely novel. 20

A. The Facts

Esmail, a liquor dealer in Naperville, Illinois, was subjected to a protracted course of misconduct by his local government. Esmail owned a liquor store in Naperville since 1981. His liquor license was issued by the City and was renewable annually. Esmail’s liquor license was renewed until 1992, when he applied for renewal of his license and for a second license at another location. The city prosecutor moved that both applications be denied on three grounds: that he had given beer to a minor, one of his managers had failed to register as the manager of the liquor store as required by municipal code and Esmail had omitted on his application that his license had once been revoked. 21 Esmail had in fact been a leader in efforts to prevent the sale of liquor to

16. *Id.* at 178.
17. *Id.* at 179.
20. For example, as *Esmail* observed, the Supreme Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985), that some objectives of government action simply are illegitimate. A personal vendetta, malice or bad faith intent to injure are not legitimate governmental objectives.
21. *Id.* at 177.
minors. Esmail had used a 19 year old to conduct a sting opera-
tion against his own store in order to discover whether a store
operator was actually selling alcohol to a minor. Esmail had not
bought the minor alcohol as accused.\textsuperscript{22}

The unregistered store manager had been on duty for an hour
and a half. As for the failure to disclose a revocation, Esmail's
license had been revoked in 1985 because he had bought a glass of
beer for an underage female. However, the offense had not been
committed in Naperville. On appeal, the state liquor commission
reduced the revocation to a 30 day suspension. Esmail had dis-
cclosed the suspension on every application for renewal that he
filed after 1985.\textsuperscript{23}

Naperville's mayor, who is also Naperville's liquor control
commissioner, found Esmail guilty on all charges but having pro-
vided alcohol to a minor. The mayor ordered Esmail's license
revoked and his application for a second one denied. Esmail ini-
tially turned to the state courts, which ordered renewal of his
license and that his second application be granted.\textsuperscript{24} The state
courts found that Esmail's only violation was the employment of
the unregistered manager for an hour and a half, and that viola-
tion was de minimis. What motivated this charade by the mayor?
It was because of a "deep-seated animosity" by the mayor and
other city officials.\textsuperscript{25} This animosity was in part due to the fact
that Esmail had been successful in having the 1985 revocation
changed to a suspension. The "mayor's campaign of vengeance"
against Esmail consisted of denial of liquor licenses, causing the
Naperville police to harass Esmail and his employees with intru-
sive surveillance, causing the police to stop Esmail's car, and caus-
ing false criminal charges to be lodged against Esmail.\textsuperscript{26}

Esmail's equal protection claim was further premised upon
the mayor's conduct in having denied Esmail's two license appli-
cations on the basis of trivial or trumped-up criminal charges while
maintaining a policy and practice of routinely granting new liquor
licenses to persons who had engaged in similar conduct. Esmail
pled a list of examples, of arguably more serious infractions than

\begin{itemize}
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id. Despite the relief in state court, Esmail suffered over $75,000.00 in
    legal fees to get his license applications finally granted.
  \item \textsuperscript{25} Unfortunately, this type of abusive attitude permeates much of
government throughout America. That is why the \textit{Esmail} rule is so significant.
  \item \textsuperscript{26} \textit{Esmail}, 53 F.3d at 178.
\end{itemize}
Esmail was charged with, yet others were punished more lightly or not at all.\textsuperscript{27} The District court dismissed Esmail's complaint for failure to state a claim. The Seventh Circuit reversed and provided an excellent overview of the prevailing equal protection trends in nontraditional discrimination cases.

B. \textit{The Reasoning of Esmail}

Judge Posner's analysis for the court began by outlining the two most common kinds of equal protection cases. "One involves singling out members of a vulnerable group, racial or otherwise, for unequal treatment."\textsuperscript{28} Second, challenges to laws or policies alleged to make irrational distinctions. Esmail did not fit either of these two common forms of equal protection problems.\textsuperscript{29} Nor was Esmail pled as a case of selective prosecution or First Amendment deprivation.

Esmail complained that there was an "orchestrated campaign of official harassment directed against him out of sheer malice."\textsuperscript{30} The question presented was whether the equal protection guarantee is contravened where a powerful public official picked on a person out of sheer vindictiveness. One would surmise that this is a clear and settled proposition. However, some cases reject this reasoning and other cases not only fail to enunciate bright lines but lack any clear identification of the elements of such a claim. Esmail's conclusion is grounded in the Constitution's rich history of preventing government from arbitrarily attacking citizens. Esmail's prohibition of personal harassment is grounded in case law dating back over a hundred years. In \textit{Yick Wo v. Hopkins},\textsuperscript{31} the Supreme Court observed that equal protection precluded the use of "purely personal and arbitrary power."

C. \textit{Smith v. Eastern New Mexico Follows Esmail}

\textit{Esmail} has already been expressly followed in the Tenth Circuit. In \textit{Smith v. Eastern New Mexico},\textsuperscript{32} the court reversed summary judgment for a public employer after the public employee plaintiffs left their positions following a series of alleged wrongful disciplinary actions. The plaintiffs contended that the defendants'
conduct was improper, malicious and motivated by personal animosity. The trial court granted the defendants' motion to dismiss because of the plaintiffs' lack of "membership in a constitutionally protected group." 33 Relying heavily upon *Esmail*, the Tenth Circuit reversed.

The Tenth Circuit observed that the defendants' conduct constituted "fraud, malice and oppression and were motivated by a desire to promote their own economic interests." 34 The court concluded that the Equal Protection Clause protects individuals where there is "an element of intentional or purposeful discrimination" against "an individual victim." 35 As in *Esmail*, no suspect class or fundamental right was present.

**III. The Foundation of the *Esmail* Decision**

The Seventh Circuit recognized the *Esmail* decision was "unusual" but not "unprecedented." 36 However, Judge Posner grounded the court's decision in part upon cases dealing with selective enforcement of neutral laws and policies, i.e. "challenges to laws or polices alleged to make irrational distinctions." 37

**A. Equal Protection Premised Upon Selective Enforcement or Prosecution**

Before *Esmail*, equal protection theories in public employment and other governmental contexts were predicated upon a selective enforcement rationale where there is vindictiveness underlying the government conduct. Since 1944, the Supreme Court has recognized that selective enforcement is a basis of an equal protection claim where there is no protected class. 38 An arbitrary basis for the decision is generally enough to ground a

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33. *Id.* at *1.
34. *Id.* at *6.
35. *Id.* at *7.
37. *Id.*
selective enforcement claim upon as long as the requisite vindictiveness is present.

Esmail heavily relied upon Ciechon v. City of Chicago,\textsuperscript{39} as precedent for its central proposition. Ciechon reasoned that "[e]qual protection demands at a minimum that . . .[government] must apply its laws in a rational and nonarbitrary\textsuperscript{40} way."	extsuperscript{41} The case involved a personnel dispute whereby the plaintiff, a paramedic, was fired as a result of alleged mistreatment of a patient on an ambulance run. However, Ciechon and her partner paramedic, Ritt, were equally responsible for the welfare of a patient. However, Ciechon was fired and Ritt was not punished at all. The court's decision in Ciechon was grounded upon the fact that the "defendants purposely and invidiously chose one of two similarly situated employees for undeserved punishment and misused otherwise legitimate disciplinary procedures. . . ."\textsuperscript{42} No suspect class or fundamental right was present.

Another leading illustrative selective enforcement case in the personnel context appears in Ziegler v. Jackson.\textsuperscript{43} In Ziegler, the Fifth Circuit reversed summary judgment and imposed judgment as a matter of law for the employee where a police officer was terminated for a misdemeanor criminal conviction of a firearm and provocation offense. Three other officers were retained despite their convictions for assault and battery.\textsuperscript{44} The court reasoned that there was no justification for the disparate treatment between the Plaintiff and the three other officers.\textsuperscript{45} Other cases

\textsuperscript{39} 686 F.2d 511 (7th Cir. 1982).
\textsuperscript{40} Arbitrary and capricious is defined as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." \textsc{Blacks Law Dictionary} 96 (5th ed. 1979). For additional definitions of arbitrary and capricious see United States v. Carmack, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned . . . ." \textit{Id.} See also Bruno's, Inc. v. United States, 624 F.2d 592, 594 (5th Cir. 1980) (arbitrary and capricious means either "unwarranted in law" or "without justification in fact").
\textsuperscript{41} Ciechon, 686 F.2d at 522. See Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886).
\textsuperscript{42} Ciechon, 686 F.2d at 517.
\textsuperscript{43} 638 F.2d 776 (5th Cir. 1981).
\textsuperscript{44} \textit{Id.} at 777-778.
\textsuperscript{45} Cases have held other types of employee harassment actionable under equal protection. See Bremiller v. Cleveland, 879 F. Supp. 782, 792 (N.D. Ohio 1995) (sex harassment actionable under equal protection).
are in accord. Ziegler demonstrates how a plaintiff can be culpable of some wrongdoing yet still be subject to the equal protection principle. Ziegler did not involve suspect classes yet applied equal protection principles in favor of the employees involved.

Another landmark case explaining these principles is LeClair v. Saunders where the court held that a "selective treatment" claim may be premised upon "intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." LeClair observed that equal protection may be violated when "unequal administration of a state statute shows intentional or purposeful discrimination." Recent cases using the LeClair theory have been successful.

46. See Olschock v. Village of Skokie, 541 F.2d 1254 (7th Cir. 1976) (differential discipline violative of equal protection); Massey v. Inland Boatman's Union, 886 F.2d 1188 (9th Cir. 1989). Equal protection claims have been stated by inmates where it was alleged that some were subjected to arbitrary denial of hearing procedures while others were not. E.g., Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979); Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980).

47. Cf. Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984) (white employees allowed to misuse city resources without punishment while black fired for such violations).

48. 627 F.2d 606, 609-10 (2nd Cir. 1980).

49. "Singling out [an individual] for different treatment, prejudicial treatment, constitutes a denial of equal protection of the laws. . . . This governmental action is also a denial of Bannum's substantive due process rights." Bannum v. City of Memphis, 666 F. Supp. 1091, 1093 (W.D. Tenn. 1987).

50. 627 F.2d at 609-10 (emphasis added). This test, with alternative standards, is indeed broad and sweeps much government oppression within its ambit.

51. Latrieste v. Port Chester, 40 F.3d 587, 590-91 (2nd Cir. 1994) (selective enforcement claim under LeClair sufficient for jury); Terminate v. Horwitz, 28 F.3d 1335, 1352 (2nd Cir. 1994) (reversing summary judgment); Quartararo v. Catterson, 917 F. Supp. 919, 946 - 47 (E.D.N.Y. 1996)(denying motion to dismiss); see also Moss v. Hornig, 314 F.2d 89 (2nd Cir. 1963).

In Rubinowitz v. Rogato, 60 F.3d 906 (1st Cir. 1995), the First Circuit reaffirmed the basic rule that "a party may establish an equal protection violation with evidence of bad faith or malicious intent to injure." Id. at 911. The court in Rubinowitz relied upon Esmail but questioned whether something substantially more than a single act of malice should be required. Rubinowitz observed that "the malice/bad faith standard should be scrupulously met." Id.
B. Jetstream & the Selective Enforcement/Anti-Harassment Doctrine

In Jetstream AERO Services, Inc. v. New Hanover County, the Fourth Circuit Court of Appeals reversed summary judgment on Plaintiff's equal protection claim. In Jetstream, the plaintiff was a fixed base operator that provided basic support services for airplanes including fuel, repair, parking and storage. Plaintiff's workplace was leased from the County. Plaintiff's operation is subject to a variety of regulations including those in its lease with the County, local rules particular to the airport, state building and safety codes and Federal Aviation Administration rules. In addition to the county, Plaintiff sued other defendants who provide similar support services for airplanes at the New Hanover County Airport.

The Plaintiff alleged that the County wrongfully and intentionally used its regulatory and enforcement powers in a manner calculated to harm the Plaintiff. Plaintiff alleged that the County was discriminating against it by engaging in acts of harassment including unfair enforcement of the lease between the County and Plaintiff. County officials participated in investigatory meetings "in a spirit of anger and hostility against Jetstream."

The Fourth Circuit observed further evidence that the New Hanover County manager had threatened to send inspectors to Jetstream if Jetstream appealed adverse building code decisions. The Fourth Circuit accepted the foregoing as evidence that the County intended to enforce the law selectively against Jetstream and that this was done with a malicious or bad faith intent to harm. The trial court had recognized this as evidence of hostility, but claimed that it was insufficient. The Fourth Circuit reasoned LeClair did not require more, stating, "if defendant went after plaintiff to get him, for any reason, he should be liable." The emphasis in Jetstream and LeClair that if there were evidence that a plaintiff had been harassed for any reason suggests that the threshold for liability, at least so as to avoid summary judgment, is not especially difficult in this equal protection context.

53. Id. at *2.
54. Id. at *3.
55. Id.
56. Id.
In so far as a causation standard is concerned, *Jetstream* held that:

[T]he better rule is one that recognizes that a reasonable temporal conjunction between the evidence of animosity and the occurrence of wrongful acts is more appropriate to equal protection. To require a special connection between each harmful act and specific evidence of intent, particularly in this context where evidence of intent is difficult to achieve, would tend to emasculate the right recognized in *LeClair*. 57

The Fourth Circuit observed that “[o]ur inquiry on this point is directed to whether Jetstream was treated differently.” 58 There was evidence that the County manager was interested in finding a way to shut down Jetstream from part of its functions. Jetstream further offered a number of additional actions taken by the County that were suggestive of arbitrary, discriminatory and unreasonable conduct.

The trial court applied a rational basis test and held that the action of the County must bear only a rational relationship to a legitimate governmental interest. The Fourth Circuit reversed, reasoning that “public authority to harass a business without cause is not a legitimate state interest.” 59 *Jetstream* therefore represents further foundation for the *Esmail* principle.

C. Equal Protection Remedies For Other Governmental Abuses

Before *Esmail*, equal protection was also held to prohibit additional types of governmental misconduct:

Equal protection rights may be violated by gross abuse of power, invidious discrimination, or fundamentally unfair procedures. 60

Equal protection does require at the least, however, that the state act sensibly and in good faith. 61

One court held an equal protection violation may be premised upon proof that government officials “are guilty of grave unfair-

57. *Id.*
58. *Id.* at *4.*
59. *Id.* at *5.*
ness in the discharge of their responsibilities."\textsuperscript{62} However, few cases have successfully applied the equal protection principle in such broad strokes. The gross abuse of government power cases in the equal protection context are analogous to the "shock the conscience" substantive due process line of cases.\textsuperscript{63} For example, \textit{Benigni v. City of Hemet},\textsuperscript{64} held that law enforcement harassment of a business is actionable through substantive due process. There, the evidence indicated that police conduct was intentionally directed towards Benigni's bar to force him out of business. Bar "checks" occurred nightly, up to five or six times per night, and customers were frequently followed from the bar. A verdict of $305,500.00 was affirmed.

In conclusion, before \textit{Esmail}, most individual plaintiffs not members of a suspect class were limited to narrow and difficult-to-prove claims unless they could establish some gross abuse of power or serious lack of good faith. These cases provided the theoretical foundation for the \textit{Esmail} proposition that the Equal Protection Clause protects all individuals, not just arguably special groups or types of people.

\section*{IV. \textit{Futernick v. Sumpter Township}: One Court's Retreat From Equal Protection In Cases of Malice and Personal Vendettas}

In \textit{Futernick vs. Sumpter Township},\textsuperscript{65} the Sixth Circuit affirmed the dismissal of an equal protection claim by an owner of a mobile home park in an action against state and local government officials involved in regulating the plaintiff's mobile home parks. Futernick involved an allegation that the government regulatory agency selectively enforced the local environmental regulations maliciously and in bad faith against the plaintiff. After a disagreement with the plaintiff, the government stopped work on a proposed sewer line extension to one of the plaintiffs' mobile home parks. The trial court dismissed Futernick's equal protection claim pursuant to rule 12(b)(6). The Sixth Circuit affirmed.

\begin{itemize}
  \item \textsuperscript{62} Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988).
  \item \textsuperscript{64} 868 F.2d 307 (9th Cir. 1988).
  \item \textsuperscript{65} 78 F.3d 1051 (6th Cir. 1996).
\end{itemize}
The court in *Futernick* began its analysis by summarily tracing the doctrine of selective enforcement. *Futernick* recognized application of the selective enforcement doctrine where a victim can establish that he or she was intentionally singled out because of membership in a protected group or for the exercise of a constitutionally protect right. "Selective enforcement can also lead to Section 1983 liability if the plaintiff pleads 'purposeful discrimination' intended to accomplish some forbidden aim."  

*Futernick* addressed the elements of "purposeful discrimination" intended to accomplish "some forbidden aim." The court observed that the issue of first impression before the court was "what aims are forbidden ones for purposes of a selective enforcement action under Section 1983." Therefore, the critical issue became what is a "forbidden aim" or "unjustifiable standard" for purposes of an improper intent based equal protection claim.  

The court went on to address the more fundamental issue of whether selective enforcement based upon malicious or bad faith selective enforcement stated an the equal protection claim. The essential question is whether or not malice or personal animosity is a constitutionally permissible consideration. The court observed that the First and Second Circuits recognize a valid selective enforcement claim premised upon the malice and bad faith theory. *Futernick* mentioned but did not distinguish *LeClair* and its progeny. However, *Futernick* miraculously failed to address or mention *Esmail*, or its primary antecedents or progeny.  

The Six Circuit's rationale in *Futernick* and its conclusion failing to afford equal protection for victims of governmental maliciousness, egregious bad faith and/or personal animosity is espe-

66. Id. at 1056.  
67. Id. (emphasis added).  
68. Id.  
69. Id. at 1057. See Oyler vs. Boles. 368 U.S. 448, 456 (1962) ("The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" if "the selection was [not] deliberately based upon an unjustifiable standard.").  
70. *Futernick* observed that a selective enforcement claim could properly be premised upon: (1) race, nationality, religion or gender or (2) punishment of the exercise of a constitutional right. In addition to the traditional suspect classes afforded relief under the equal protection clause, *Futernick* observed that *Oyler* provided that equal protection forbids "other arbitrary classification." Id.  
71. Id. at 1057.  
72. Id. at 1057-58.
cially troubling. The court observed that "we see compelling reasons that the sundry motivations of local regulators should not be policed by the Equal Protection Clause of the United States Constitution, absentee intent to harm a protected group or punish the exercise of a fundamental right." The court observed that "[t]he sheer number of possible cases is discouraging." While this "floodgates" argument is frequently cited as basis to not extend the law, Futernick's particular characterization of this contention underscores the fact that government abuse throughout America is rampant.

The court observed that "a regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law." The court cited no evidence or basis to support its contention that regulators are required to make "completely arbitrary" decisions. In fact, the contrary appears far more likely. Regulators typically have facts, regulations and information to assist them in making regulatory decisions. There is no justification for allowing the government to act at whim or without consideration of the facts. Neither is there any rational basis or other justification to allow the government to carry out a personal vendetta against an individual. The question becomes whether a regulator will reasonably decide the issue based on the facts or whether he or she will orchestrate a campaign of harassment to harm an individual out of vindictiveness or other improper motive.

Futernick observed that "[t]he nature of the right to equal protection also counsels against expanding a federal right to protection from non-group animosity on the part of local officials." However, the court cited no case or other authority to support this sweeping proposition.

Futernick reasoned that "the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution. . . . The Constitution's protection begins only when the incidence of the burden of regulation becomes constitutionally suspicious." Should it make any difference whether improper animosity is inspired by group characteristics or because of a personal dislike or otherwise? The more logical position

73. Id. at 1058.
74. Id.
75. Id. at 1058.
76. Id. at 1059.
77. Id. at 1059.
appears to be that governmental conduct should not be premised upon either group or individual animus. Rather, government conduct should be based upon good faith and a rational application of applicable regulatory criteria. It seems that irrational personal or malicious animosity is an improper consideration in regulatory decisions regardless of what inspires the animosity. A plethora of cases have demonstrated that such irrational personal animosity is sufficient to contravene substantive due process.\textsuperscript{78}

In dicta, \textit{Futernick} observed:

\begin{quote}
[w]e certainly do not sanction the abuse of state or local regulatory power. Regulation out of personal dislike or vendetta is repugnant to the American tradition to the rule of law.\
\end{quote}

The foregoing proposition provides ample support for the \textit{Esmail} doctrine and undercuts the argument developed by the court in \textit{Futernick}.

\textit{Futernick} construed the concept of “arbitrary classification” as a basis for selecting enforcement liability, stating, “[w]e do not believe that choosing to enforce a law against a particular individual is a ‘classification’ as that term is normally understood.”\textsuperscript{79} However, enforcement of the law is certainly government conduct that is actionable through the Equal Protection Clause.

As an alternative remedy, \textit{Futernick} suggested that “[t]hose affected by the unfair regulator have recourse to the state political processes that appointed that regulator in the first place. State courts or the state constitution may provide protection.”\textsuperscript{80} It seems difficult to believe that the court seriously suggested that


In \textit{Browning Ferris v. Wake County}, 905 F. Supp. 312 (E.D.N.C. 1995), the court recently addressed the contours of substantive due process in a dispute over sewer service for certain property. This court granted plaintiff’s motion for summary judgment and reasoned that the governmental action violated substantive due process “if it is arbitrary or capricious, lacks a rational basis, or is undertaken with improper motives.” \textit{Id.} at 319.

“There is a species of substantive due process, apart from any specific of the Bill of Rights... this is a substantive due process right akin to the fundamental fairness concept of procedural due process.” \textit{Wilson v. Beebe} 770 F. 2d 578, 586 (6th Cir. 1985). Substantive due process “is available to protect individual rights against irrational government action.” \textit{Henry H. Perritt, Employee Dismissal Law and Practice}, § 6.13, at 350 (2d ed. 1987).

\textsuperscript{79} \textit{Futernick}, 78 F.3d at 1058.

\textsuperscript{80} \textit{Id.} at 1059. (emphasis added).
the appointing authority for the government official would provide relief for a victimized citizen. The court in *Futernick* does not apparently recognize the inner workings of local politics and patronage throughout America. The court was out of touch with the reality of bureaucratic politics. The suggestion that state courts "may" provide protection is equally telling.

*Futernick* represents a glaring minority position in equal protection jurisprudence fundamentally at odds with over one hundred years of equal protection. *Futernick*’s rationale subverts equal protection to such an extent that it inherently implies, if not suggests, that government officials should be free to maliciously and in bad faith attack individuals out of a personal dislike or vendetta. A personal vendetta employed by a public official to abuse government power to harm an individual should constitute a "forbidden aim" under *Futernick* and an "unjustifiable standard" under *Oyler*.

The rationale offered in *Futernick* is among the most frightening retreats in basic equal protection principles. While on the one hand, *Futernick* generally recognizes that "regulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law," the court proceeded to enunciate a theory inviting further disdain and repugnance to the American tradition of the rule of law.

*Futernick*’s "floodgates" argument was not supported by any citation of authority, any statistics or otherwise. In fact, the few reported decisions construing this particular strand of equal protection jurisprudence are extremely sparse. This is not a legal theory which has been widely used perhaps because of its ill defined elements and the difficulties in the capturing proof of malice. However, despite these theories, speculation of possible floodgates of cases hardly justifies eliminating a developing theory of recovery to combat egregious governmental abuse at a time when individuals throughout America are being more frequently harassed by local politicos and regulators.

*Futernick*’s suggestion that victims of unfair regulators can obtain relief from "state political processes that appointed that regulator in first place" is even more disingenuous. The Sixth Circuit’s position in this regard runs afool of the fundamental place that federal courts have in our system of government and the tradition of the rule of law. In conclusion, *Futernick* is an aberration fundamentally at odds with the vast majority of other circuit court
cases construing this particular strand of the equal protection principle.

V. EQUAL PROTECTION PROOF ANALYSIS TO SHOW IMPROPER INTENT

A. Where Does One Look for Proof?

Given the striking similarities in substantive due process and equal protection analysis, the proof factors developed in substantive due process cases are helpful in assessing certain types of equal protection claims. For example, one court stated that "the existence of bias, bad faith or other improper motive may be an excellent indicator of arbitrary government conduct."

In the leading case of Village of Arlington Heights v. Metropolitan Housing Development Corporation, the Supreme Court identified several factors to be examined to determine whether discriminatory intent or purpose is present. Those factors are:

1. The impact of the governmental action;
2. The historical background of the decision, particularly if it reveals a series of actions taken for invidious purposes;
3. The sequence of events leading up to the decision;
4. Departures from normal procedure;
5. Departures from normal substantive criteria;

81. See Gutzwiller v. Fenik, 860 F.2d 1317, 1328-29 (6th Cir. 1988) (substantive due process and equal protection are "very similar concepts . . . both stem from our American ideals of fundamental fairness and both enmesh the judiciary in substantive review of governmental action . . . they will overlap in certain situations so that a violation of one will constitute a violation of the other."); Brennan v. Stewart, 834 F.2d 1248, 1257 (5th Cir. 1988) (the court delineated the framework of rights afforded under both substantive due process and equal protection); Vasquez v. Cooper, 862 F.2d 250, 254-55 (10th Cir. 1988); Benigni v. City of Hemet, 868 F.2d 307, 312 (9th Cir. 1989) ("the due process and equal protection theories in this case are practically identical, both being grounded on the allegation of arbitrary law enforcement activ[ities] . . ."). See Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988), cert. denied, 488 U.S. 956 (1988) (to show an equal protection or substantive due process violation, a plaintiff must at least establish "grave unfairness").


(6) The legislative or administrative history;
(7) Contemporaneous statements by members of the decision-making body.\textsuperscript{85}

Numerous cases have employed these factors or similar variations thereof.\textsuperscript{86} "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."\textsuperscript{87} A finding of improper intent is certainly not limited to instances where decision-makers articulate some bad purpose. "If proof of a civil right[s] violation depends on an open statement by an official . . . , the Fourteenth Amendment offers little solace to those seeking its protection."\textsuperscript{88} In \textit{Smith v. Town of Clarkton},\textsuperscript{89} the Fourth Circuit recognized that statements revealing improper intent are often "camouflaged."\textsuperscript{90} As Chief Justice Rehnquist has explained: "There will seldom be eyewitness testimony as to the employer's mental processes."\textsuperscript{91}

Invidious discriminatory or improper intent "may often be inferred from the totality of the relevant facts."\textsuperscript{92} The Supreme Court has held that one need not submit "direct evidence of discriminatory intent."\textsuperscript{93} Some direct evidence, however, may often

\textsuperscript{85} \textit{Id.} at 266-68.


\textsuperscript{87} \textit{Arlington}, 429 U.S. at 266.

\textsuperscript{88} Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970).


\textsuperscript{90} Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir. 1982).


\textsuperscript{93} \textit{Postal Service}, 460 U.S. at 717. \textit{See} Kercado-Melendez, 829 F.2d at 264 ("Proof of such an improper motive may be shown via circumstantial evidence."); Rokovich v. Wade, 819 F.2d 1393, 1398 (7th Cir. 1987), \textit{vacated on other grounds}, 850 F.2d 1180 (1988) (proof of actual intent to retaliate against employee for exercise of constitutional rights not required; jury allowed to examine totality of evidence and to "infer a retaliatory motive."); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3rd Cir. 1987) (en banc), \textit{cert. dismissed}, 488 U.S. 1052 (1987) (exhaustive analysis of proof of intent and the burden of proof).
be the key to ultimate success. Finally, it is not necessary to prove that the challenged decision rested solely on an improper or discriminatory purpose. However, it must be established that an improper or discriminatory purpose has been one of the motivating factors involved but it need not be the dominant or primary purpose. While the case law has somewhat eased the technical burden in proving intent, practical proof of improper intent is often difficult to capture.

B. Causation Issues in Equal Protection Cases

The prevailing proof standard essentially requires a Plaintiff to establish that an improper reason was a substantial or motivating factor in the decision to terminate. The "substantial or motivating factor" issue is ordinarily a question of fact to be decided by the jury. In Hall v. Marion, the Fourth Circuit explained that the causation determination "is a factual one."

The doctrine of inferred intent is the primary means by which the typical plaintiff will use to survive summary judgment. In the leading case of Anthony v. Sundlin, the court explained:

[What an actor says is not conclusive on a state-of-mind issue. Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish that which he professes not to have intended.]

In Carrington v. Hunt, et. al., the U.S. District Court for the Eastern District of North Carolina issued a substantial opinion treating the causation issue in a public employee free speech case. The court's analysis demonstrates how imperative it is to afford an employee "the benefit of all conflicting inferences consid-

94. See Arlington Heights, 429 U.S. at 265; Smith, 682 F.2d at 1066.
95. Arlington, 429 U.S. at 265-66; Smith, 682 F.2d at 1066.
96. E.g., Laskaris v. Thornburgh, 733 F.2d 260, 264 (2nd Cir. 1984), cert. denied, 469 U.S. 886 (1984); Rivera-Cotto v. Rivera, 38 F.3d 611, 614 (1st Cir. 1994).
97. Roberts v. Van Buren Public Schools, 773 F.2d 949, 954 (8th Cir. 1985).
99. See, e.g., Rokovich v. Wade, 819 F.2d 1393, 1398 (7th Cir. 1987).
100. 952 F.2d 603 (1st Cir. 1992).
101. Id. at 606.
"pered" in deciding causation on summary judgment. The court then sifted through the contentions and concluded that "the resolution of a question of intent often depends upon the credibility of the witness, which can best be determined by the trier of fact after observing the demeanor of the witnesses during direct and cross examination." Summary judgment was therefore denied. The court observed that the plaintiff raised sufficient evidence to support a credible argument that the Defendant's purported justification for dismissing plaintiff may be a pretextual argument conceived after the initiation of the lawsuit. The recent Fifth Circuit case Fowler v. Smith demonstrates the essence of the causation principle:

[D]irect evidence in proving illegitimate intent is not required to avoid summary judgment in unconstitutional retaliation claims; circumstantial evidence will suffice. . . . We recognize that direct evidence of improper motive is usually difficult, if not impossible, to obtain and requiring direct evidence would effectively insulate from suit public officials who deny an improper motive.

C. Factors Demonstrating Improper Motive & Causation

The following categories have been relied upon as a basis for a sufficient inference of a retaliatory or improper motive to establish a violation of equal protection. Many of these factors are more prevalent in public employment litigation, but most are equally applicable in other constitutional litigation.

(1) Governmental decisionmaker's attitude regarding the conduct of the individual or employee. A hostile attitude suggests an improper motive.

103. Id. at 25.
104. Id. at 29.
105. 68 F.3d 124 (5th Cir. 1995).
106. Id. at 127.
(2) Disparate treatment, particularly unequal discipline among employees or individuals.  

(3) Reduced employee evaluations after engaging in protected conduct.  

(4) Manner, tone and language of how the individual is informed of the deprivation.  

(5) Inadequate investigation of allegations surrounding the adverse action. Failing to review and consider all facts purportedly in the individual’s favor suggests arbitrariness.  

(6) Deviations from routine procedures.  

(7) Lack of reasonable warnings or notice of alleged violation or noncompliance.  

(8) Temporal proximity. Timing of the adverse action following engagement in protected activity.  

(9) The magnitude of the alleged offense. Comparisons of punishment showing that the employee has been more harshly punished than others suggests an improper motive.  

(10) History of employee’s work performance. A drastic alleged decline in performance is suspect.  

(11) Investigation or scrutiny of employee’s conduct following protected conduct.  

(12) The employer’s creation of the problem that is supposedly the basis for the employer’s criticism of the employee.  

(13) Subjectivity in termination or rejection criteria.  

(14) Pretext (proof that the articulated reason is not the true reason).  

(15) Employee’s lack of history of the alleged basis of termination.  

(16) Changed grounds for the adverse action.  


110. See Martinez v. El Paso, 710 F.2d 1102, 1104 (5th Cir. 1983).  


112. See Rowe v. General Motors Corp. 457 F.2d 348 (5th Cir. 1972); Halstead, 802 F.2d 746 (4th Cir. 1987); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976); SPRIGGS, supra note 82, at § 21.3.  

113. Changed asserted grounds for termination are among the most telling factors ascertaining pretext. SPRIGGS, supra note 107, at § 19.24. For example, in Schmitz v. St. Regis, 811 F.2d 131 (3d Cir. 1988), one court was confronted with a similar situation where one reason was initially given to the company officer, another reason was given to an administrative agency and yet a much more sophisticated reason was offered at trial. Cf. Sweat v. Miller, 708 F.2d 655
(17) The government's failure to adhere to its own procedural or substantive regulations.114

(18) Undue delay in processing applications.
(19) Changes in the course of dealings among the parties.
(20) Changes in qualifications or rules after commencement of selection process.
(21) A secret paper trail, without notice to the employee.115
(22) Delayed articulation of alleged justification.116

Under the Esmail test, the threshold for surviving summary judgment on proof issues is relaxed. Some of the foregoing criteria should suffice to infer an improper motive to reach the jury.

VI. Conclusion

Esmail breathes new life into the Equal Protection Clause for the vast array of Americans who are not afforded some special status or privilege in the law through a so called suspect class. Esmail's antecedents afforded a minimal foundation of protection for individuals which Esmail has clarified and expanded.

Esmail reaffirms what should be obvious: the Equal Protection Clause is not limited to suspect classes or fundamental rights. The Equal Protection Clause is a foremost means for all individuals, regardless of status, in the limited arsenal of weapons to combat the increasingly abusive power of government. Equal protection lives to fulfill the thrust of Marbury v. Madison117 -

(11th Cir. 1983) (reversing summary judgment due to the indicia of pretext where differing accounts of the reasons for the termination were in record).

114. The representations made by the government in ordinances, personnel policies and personnel handbooks must be scrupulously adhered to. E.g., Vitarelli v. Seaton, 359 U.S. 535, 546 (1959) (Frankfurter concurring); Service v. Dulles, 354 U.S. 363 (1957); SEC v. Chenery, 318 U.S. 80, 87-88 (1942). Where government employment is premised upon a defined procedure, the procedure should also be scrupulously observed. Vitarelli held that government employment regulations must be adhered to by the government. In that case, the court reversed and found plaintiff's discharge invalid. Accord, Beacom v. EEOC, 500 F. Supp. 428 (D. Ariz. 1980) (public employee must be accorded benefit of agency's regulations). A regulation or rule promulgated by the government may create a property interest without regard to the traditional requirements of contract formation. See Hohmeier v. Leyden, 954 F.2d 461, 464 (7th Cir. 1992).

116. Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1991) (four month delay was evidence of pretext).
117. 5 U.S. (1 Cranch) 137, 163 (1803).
that "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." Governmental misuse of "purely personal and arbitrary power" has been condemned from Yick Wo to Esmail. Persons who are not members of traditional protected classes victimized by a corrupt local politician now have an equal protection prayer for relief under Judge Posner's rationale in Esmail. As it should be.

118. Id. at 163. Accord, Boyd v. United States, 116 U.S. 616, 635 (1885), where the United States Supreme Court observed that "constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon."