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One-Offs

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ONE-OFFS

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This Article examines the phenomenon of "one-offs": court opinions that are rarely cited by the court that issued them and do not explicitly generate further doctrinal development. At first glance, one might think that such opinions are problematic outputs from an apex court such as the U.S. Supreme Court, whose primary tasks are the exposition of legal principles and doctrine and the overall guidance of the law. Nevertheless, this Article, the first to consider this specific phenomenon, concludes that one-offs can play a legitimate role in the work of legal and doctrinal development.

This Article studies this phenomenon by closely examining three cases that are or have been one-offs. Those cases share an additional doctrinal peculiarity, in that they all reflect pro-plaintiff decisions rendered under the Supreme Court's usually highly-deferential rational basis standard. The fact that these three cases share that peculiarity makes them interesting and fruitful subjects for study and comparison as exemplars of one-offs. The Article concludes that one-offs can play surprisingly useful roles in the work of an apex court. However, it cautions that such opinions stand in an uneasy relationship to cases that have deteriorated into what Justice Frankfurter once described as isolated "derelicts," primed for overruling or simple death by neglect.

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INTRODUCTION

Why do some court opinions generate extensive doctrinal development, while others languish, uncited, unelaborated on, and unused—judicial "one-offs"? An obvious answer is that some opinions simply don't provide the raw materials for doctrinal development, either because of their innate characteristics or because courts and judges move in different directions, leaving the opinion as what Justice Frankfurter once called a "derelict on the waters of the law."[1] The latter explanation is of course case- or doctrine-specific: a court that shifts course on a given issue can be expected, at the very least, to bypass an opinion that expresses a different view. Alternatively, it might frontally assault that opinion, either all at once or over time, with the result that it ultimately overrules the case in question.[2]

But consider instead the first possibility: that a case's innate characteristics render it likely to languish, or at least to fail to generate new doctrine. It might be possible to identify and analyze such characteristics in isolation from the opinion's inconsistency with a later court's doctrinal direction. In other words, a case might languish for reasons that are distinct from

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1 Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

2 *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("The analysis in [a prior case] must be respected . . . unless that precedent is to be overruled *or so limited to its facts that its underlying principle is, in the end, repudiated.*") (emphasis added).

later courts' different ideological or doctrinal preferences. In turn, identifying and analyzing those characteristics may provide useful general insights into the creation and evolution of judicial doctrine. The effort seems worthwhile: recent Supreme Court cases suggest that the one-off idea remains relevant to the work that the Court actually does,[3] and may become even more so.[4]

This Article embarks on that effort, by identifying and examining opinions that one can reasonably describe as what I call "one-offs." After Part I establishes the parameters of the one-off phenomenon, Part II identifies and explains two cases that fit that description and one case that perhaps once did but no longer does. To make the comparison more interesting, all three cases share a doctrinal similarity that renders them unusual and thus potentially related to each other: all three involve the Court ruling for equal protection plaintiffs despite applying that doctrine's seemingly hyper-deferential rational basis standard.[5] Part III examines what these three cases suggest about the potential usefulness of one-offs to an apex court whose primary job is not error correction but instead the general development of legal doctrine.[6] That Part concludes that, despite their seemingly limited domains, one-offs can play important roles in the work of such a court.

Part IV distills lessons from that examination, including how one-offs differ from both Justice Frankfurter's "derelicts"[7] and cases that are "confined to their facts."[8] Part V considers the dynamics between these three types of cases, examining how potentially useful one-offs can decay into "derelicts," ripe for overruling or at least a gradual decline into obscurity, and how, conversely, they can blossom into more explicitly

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3 *See, e.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1569–61 (2021) (overruling a 32-year-old decision allowing retroactive application of a "watershed" new rule of criminal procedure on habeas review, on the ground that since that case had been decided the Supreme Court had never applied that exception despite having decided important criminal procedure cases expanding defendants' rights).

4 *See infra* text accompanying notes 235–236.

5 For a classic exposition of that standard that highlights its deferential nature, see Ry. Express Agency v. New York, 336 U.S. 106 (1949).

6 *See* Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983) (noting that role for the Supreme Court).

7 *See supra* note 1.

8 For a detailed examination of the confining phenomenon, see Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865 (2019).

generative precedents. Part VI considers the larger questions this examination poses.

I
THE CONCEPT OF A ONE-OFF

The concept of a one-off is sufficiently vague and protean as to require some work to delineate its boundaries and thus define it as precisely as possible. Such precision will both help focus the Article's analysis and also identify analogous but not identical phenomena that might illuminate insights about one-offs themselves.

Begin with what a one-off is *not*. It is not a case that a later court has explicitly overruled. To be sure, *stare decisis* principles employ language similar to Justice Frankfurter's vision of a derelict[9] as an indication of a case's susceptibility to overruling. To take one notable example, in *Planned Parenthood v. Casey*, the joint opinion of Justices O'Connor, Kennedy, and Souter counseled that one factor in the *stare decisis* calculus asks "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[10] That criterion is often mentioned in judicial discussions of *stare decisis*.[11]

That characterization both establishes the family resemblance between one-offs and cases ripe for overruling and highlights the differences between that family's two branches. Clearly, the idea of law developing so as to leave the old rule "no more than a remnant of abandoned doctrine" captures at least some of the idea of a case that eventually becomes a one-off.[12] However, a one-off may constitute much more than a

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9 *See supra* note 1.

10 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

11 *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (Breyer, J., dissenting); Altria Grp., Inc. v. Good, 555 U.S. 70, 103 (2008) (Thomas, J., dissenting); Patterson v. McClean Credit Union, 491 U.S. 164, 173 (1989). *See also* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 433 (2010) (describing a "subset of precedents [as] those that have escaped overruling for themselves but that belong to disfavored lines of cases—in the parlance of the Court, precedents whose 'underpinnings' have been 'eroded' by subsequent decisions").

12 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2320 (2022) (Breyer, Kagan, and Sotomayor, JJ., dissenting) ("To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law."). To be sure, the dissent's "came from nowhere" phrase paints a picture of a legal rule that was aberrational from the start, not one that originally fit in with broader legal doctrine but was ultimately left behind.

mere remnant. Instead, as illustrated by one of the examples Part II provides, a one-off can linger on as an exemplar of a legal principle that retains its vitality, but nevertheless is not further reaffirmed and/or remains barren in terms of generating future legal development.[13] Despite this distinction, the concept of doctrinal development rendering a case an outlier helps connect one-offs to categories of cases that are ripe for overruling.

Another concept closely related to the remnant idea is that of a case that is "confined to its facts."[14] When a court limits a case by "confining it to its facts" it often signals that that case is at risk for overruling.[15] At the same time, the case thus confined can also be described as a one-off, unless and until that overruling occurs. Indeed, the very idea of a case "confined to its facts" reflects a case whose generative potential has been explicitly cut off, just as a one-off's potential might be. As with derelicts, however, a one-off does not necessarily share limited cases' status as fodder for likely overruling, if, as explained later,[16] it nevertheless plays a useful role.

One-offs also exhibit a rough similarity with Cass Sunstein's idea of cases reflecting his vision of judicial minimalism.[17] Sunstein discusses the phenomenon of opinions that he describes as shallow and/or narrow. As he uses those terms, a shallow opinion is one whose reasoning is not deeply theorized.[18] Among others, Sunstein offers as an example of a shallow opinion *Roe v. Wade*,[19] explaining that *Roe* is "shallow" (in the non-pejorative sense) because it does not provide a deep, theoretical explanation either for the right to privacy in general or how abortion rights claims implicate that right.[20]

Consider now Sunstein's description of "narrow" opinions. He describes narrow opinions as those that either are written to have, or ultimately end up having, a limited scope of applicability. Thus, for example, he describes as narrow the

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13 *See infra* subpart II.A (discussing Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., 488 U.S. 336 (1989)).

14 *See infra* subpart IV.C (discussing such cases).

15 *See* Rice & Boeglin, *supra* note 8.

16 *See infra* Part IV.

17 *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Foreword*].

18 *See* SUNSTEIN, *supra* note 17, at 11–14.

19 410 U.S. 113 (1973).

20 *See* SUNSTEIN, *supra* note 17, at 18.

Court's 1996 opinion in *Romer v. Evans*,[21] which struck down a state law denying LGBTQ+ persons the protection of state anti-discrimination laws, because it doesn't state a rule that would apply to other species of sexual orientation discrimination.[22] Unsurprisingly, he contrasts such "narrow" opinions with "broad" ones that lay down broadly-applicable rules, such as one according heightened scrutiny to any and all government discrimination on a given basis.[23]

Sunstein's typology exhibits obvious connections to the idea of one-offs. In particular, a narrow opinion may become a one-off if it ends up applying only to a particular (or particularly egregious) fact pattern that justifies its result but does not easily transfer to other, arguably analogous, sets of facts. By contrast, shallow opinions may well generate much follow-up doctrine, if their broad applicability and undertheorized natures generate new law within the confines of their undertheorized and thus accommodating principles.[24]

In sum, one-offs exist as members of a family of cases that includes cases ripe for overruling as "remnants" of otherwise-abandoned doctrine, cases whose generative potential has been explicitly lopped off by courts "confining" those cases "to their facts," and cases that fall under Sunstein's typology as "narrow." But they are not identical to any of these relatives. Instead, each of these categories plays distinct roles in law and judicial decision-making. Acknowledging that this family resemblance may blur the boundaries between these four types of cases, this Article examines the particular phenomenon of one-offs.

Note at the outset one important limitation of this Article's analysis. The cases this Article presents and analyzes are constitutional law cases, not common law or statutory interpretation cases. Despite similarities, the natures of common law[25] and statutory interpretation[26] analyses are sufficiently different

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21 517 U.S. 620 (1996).

22 *See* SUNSTEIN, *supra* note 17, at 10.

23 *See id.* at 137–43.

24 *See id.* at 18 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) as an example of a shallow but broad opinion).

25 *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing in favor of a common law method of interpreting the Constitution).

26 *See* Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy*, 38 CONST. COMMENT. (forthcoming 2023) (analyzing statutory interpretation and constitutional interpretation methodologies as a single unit).

from the nature of constitutional law reasoning that it may be misleading to apply this Article's analysis to those distinct contexts. This is not to suggest that the concept of a one-off has no significance for those other types of legal doctrine. In particular, the fact-based, inductive nature of common-law reasoning tentatively suggests that the one-off idea may be quite relevant to that type of reasoning.[27] Other than this highly provisional speculation, however, this Article brackets cases other than constitutional law ones.

Indeed, this Article focuses even more precisely on a particular type of constitutional law case: equal protection cases that rule for the plaintiff after applying rational basis review. This is obviously an extremely small data set. Moreover, that small sample features cases that both present the same issue and reach the same unusual conclusion (favoring the plaintiff in a case governed by rational basis review). Thus, nobody should think that this Article purports to comprehensively canvas the universe of cases that could fairly be described as one-offs, or even constitutional law one-offs—or even equal protection one-offs.[28]

However, the type of analysis to which this Article aspires—analysis that attempts to draw lessons inductively, from the individual cases studied—requires a manageable, even a small, set of cases. It may well be that this small sample size generates idiosyncratic conclusions, perhaps especially because the cases studied are themselves unusual in the results they reach. But exactly because they reach unusual results, they allow for an interesting comparison: which of these idiosyncratic cases ended up being one-offs, and why, given their idiosyncratic nature, might they have been decided that way in the first place? This approach may not satisfy those skeptical of an approach that focuses on details rather than broad-brush conclusions.

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27 *See* Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQ. L. 387, 519 (2001) ("Common law decision-making is, by definition, fact-intensive, because it entails an inductive approach to decision-making that creates general rules out of the resolution of specific disputes in incremental fashion.").

28 One equal protection case that likely constitutes a one-off is the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). *Bush*'s famous statement limiting the effect of its decision "to the present circumstances" raises obvious parallels to this Article's idea of one-offs. *See id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). This Article brackets *Bush*, because its express self-limitation raises distinct issues regarding the questions this Article examines.

But at the very least, it may generate tentative conclusions that can be tested by others.[29]

One final caveat. This Article considers the doctrinal impact of one-offs on the same court that issued the one-off to begin with. (And, indeed, it confines itself only to the Supreme Court, not lower appellate courts.) The impact a one-off may have on lower courts presents a different issue, given the differing demands of vertical and horizontal *stare decisis*.[30] To keep the analysis manageable, this Article focuses on how a court—indeed, just the Supreme Court—treats *its own* precedent. But if its analysis is promising, it may justify broader examinations of one-offs' impacts on lower courts.

II
A Tale of Three Cases

This Part concretizes Part I's conceptual description of one-offs by identifying two cases that could fairly be described as one-offs and an additional case that, while seemingly amenable to devolving into a one-off, has, by contrast, flowered doctrinally. These cases will provide the raw material for Part III's analysis of one-offs as a category, the lessons Part IV distills from that analysis, their dynamics that Part V considers, and the questions they raise that Part VI identifies.

A. *Allegheny Pittsburgh*

In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*,[31] a unanimous Supreme Court struck down a local official's tax value assessment of the plaintiff's property when that assessment created massive disparities between that land's value and the value of otherwise-equivalent properties. Writing for all nine Justices, Chief Justice Rehnquist went out

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29 One possible subject of further study are the Rehnquist Court opinions considering substantive due process limits on punitive damages awards. Those cases have engendered criticism for lacking any easily-applicable legal standards and thus constituting versions of the one-offs this Article considers. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); *see also* Andrew W. Marrero, Note, *Punitive Damages: Why the Monster Thrives*, 105 Geo. L.J. 767, 807 (2017) (arguing that judicial review of jury awards of punitive damages, like the awards themselves, is standardless).

30 For a discussion of vertical *stare decisis*, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921 (2016).

31 488 U.S. 336 (1989).

of his way to reiterate the leeway states enjoy when assessing taxes, both in terms of the assessment methods they can use and the resulting tax inequalities those methods can create.[32] Nevertheless, he stressed the massive and long-lasting disparity between the tax burdens the assessor's conduct imposed on the plaintiff's property and neighboring parcels.[33]

Allegheny Pittsburgh has generated little Supreme Court law. Since it was decided in 1989, Court opinions have cited it only five times, every time to distinguish it,[34] or, in one case, to cite it for an unrelated proposition.[35] Indeed, when it was first cited, in the 1992 case *Nordlinger v. Hahn*,[36] Justice Thomas, who joined the Court after *Allegheny Pittsburgh* was decided, called for its overruling.[37] The Court rejected his call, but the majority has never relied on it as support for a holding except for the unrelated proposition noted above.[38]

Aside from *Nordlinger*, the Court's most thorough treatment of *Allegheny Pittsburgh* was in *Armour v. City of Indianapolis*.[39] In *Armour*, the majority described *Allegheny Pittsburgh* as "'the rare case where the facts precluded' any alternative reading of state law and thus any alternative rational basis"[40] that would justify a ruling for the government. The dissent, which would have found an equal protection violation, agreed with that assessment of *Allegheny Pittsburgh* as a rare case.[41] Treatments

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32 *See id.* at 344; *see also infra* note 77 (noting how far Justice Rehnquist originally intended that leeway to be).

33 *See Allegheny Pittsburgh*, 488 U.S. at 344, 345–46.

34 *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109–10 (2003); Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602–03 (2008); Nordlinger v. Hahn, 505 U.S. 1, 14–16 (1992); Armour v. City of Indianapolis, 566 U.S. 673, 686–87 (2012). *Engquist* and *Armour* are discussed later in this Article, while *Nordlinger* is discussed in the text immediately after this note.

35 *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citing *Allegheny Pittsburgh* as a case implicitly recognizing the viability of the class-of-one theory). *Olech* is one of the other cases this Article studies. *See infra* subpart II.B.

36 505 U.S. 1 (1992).

37 *See id.* at 18 (Thomas, J., concurring in the judgment); *see also id.* at 14–15 (majority opinion) (distinguishing *Allegheny Pittsburgh*). Justice Stevens agreed with Justice Thomas that *Allegheny Pittsburgh* was indistinguishable from *Nordlinger*, but, unlike Justice Thomas, he cited that argument as a reason to agree with the plaintiff that the law in *Nordlinger* violated the Equal Protection Clause. *See id.* at 31–33 (Stevens, J., dissenting).

38 *See supra* note 35.

39 566 U.S. 673 (2012).

40 *Id.* at 687 (quoting *Nordlinger*, 505 U.S. at 16).

41 *See id.* at 693 (Roberts, C.J., dissenting).

such as *Armour*'s justify reading *Allegheny Pittsburgh* as a classic one-off.

B. *Olech*

The Court decided another ultimately-barren equal protection case in 2000. *Village of Willowbrook v. Olech*[42] concerned a community spat. The Olechs, homeowners in Willowbrook, requested that their property be connected to the village's water service. The village agreed but insisted on an easement significantly greater than those other property owners had been required to grant in exchange for the same service. The Olechs sued, alleging that that unusually onerous demand violated their equal protection rights.

The Supreme Court affirmed the Seventh Circuit's decision that the Olechs could move forward with their suit. In doing so, the Court explicitly endorsed the concept of an equal protection claim based not on group or characteristic-focused discrimination (such as race) but rather, as a "class of one." The Court's decision was unanimous, but Justice Breyer, writing only for himself, concurred only in the judgment.[43] He agreed with the *per curiam* opinion's endorsement of the class-of-one theory, but, contrary to his colleagues, he would have insisted that class-of-one plaintiffs be required to prove bad intent by the defendant, rather than simply demonstrate that the challenged decision lacked a rational basis. Echoing Judge Posner's analysis at the circuit court,[44] Justice Breyer worried that dispensing with a bad intent requirement would allow plaintiffs to challenge, as equal protection violations, mere misapplications of state and local law—as in *Olech* itself, for example, a simple failure to insist on the same limited easement the village required from every other homeowner requesting a village water hookup.[45]

Like *Allegheny Pittsburgh*, *Olech* has not been generative in the court that issued it. Indeed, as of 2023, *Olech*, like

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42 528 U.S. 562 (2000).

43 *See id.* at 565 (Breyer, J., concurring in the judgment).

44 *See* Olech v. Village of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998) ("Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the 'vindictive action' class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.").

45 *See* 528 U.S. at 565–66 (Breyer, J., concurring in the judgment).

Allegheny Pittsburgh, has also been cited only five times by the Supreme Court.[46] More important than that coincidence is the tenor of those citations. One case cites *Olech* simply to distinguish the case before the Court, which did not involve an equal protection claim.[47] Two cases cite it for the proposition that, as a general matter, government singling out of an individual may raise constitutional concerns.[48] The concurring opinion in one case cites Justice Breyer's concurrence to highlight the fact that the plaintiff in the case before the Court alleged the sort of bad faith Justice Breyer argued should be a prerequisite for a class-of-one equal protection claim.[49]

Only one case, *Engquist v. Oregon Department of Agriculture*,[50] involved a class-of-one claim and thus implicated *Olech* in any depth. In *Engquist*, which involved a claim brought by a government employee against her employer, the Court distinguished *Olech* and held the class-of-one theory inapplicable to employment cases. Thus, the class-of-one theory *Olech* embraced has not generated substantial—indeed, any—follow-on law. This is not for lack of discussion in the lower courts. Indeed, lower courts have demonstrated deep confusion about how to apply the *per curiam* opinion's seemingly broad embrace of the class-of-one theory, even after *Engquist* exempted a large swath of government conduct from class-of-one scrutiny.[51] But the Court has not weighed in on those disputes, except in *Engquist* itself, where it held *Olech* to be inapplicable.[52]

C. *Moreno*

In stark contrast to *Allegheny Pittsburgh* and *Olech*, the Court's 1973 decision in *United States Department of Agriculture*

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46 *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008); Wilkie v. Robbins, 551 U.S. 537 (2007); Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018); Bank Markazi v. Peterson, 578 U.S. 212 (2016); Kelo v. City of New London, 545 U.S. 469 (2005).

47 *See Lozman*, 138 S. Ct. at 1951.

48 *See Bank Markazi*, 578 U.S. at 234 n.27; *Kelo*, 545 U.S. at 487 n.17. Neither of these cases were decided on equal protection grounds, and thus neither directly implicated or specifically reaffirmed *Olech*.

49 *See Wilkie*, 551 U.S. at 569 (Ginsburg, J., concurring in part and dissenting in part).

50 553 U.S. 591 (2008).

51 *See generally* William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435 (2013).

52 For a discussion and critique of the Court's failure to provide more guidance on the class-of-one issue, see *id.*

v. Moreno[53] eventually became extremely generative. *Moreno* is the foundation of the Court's "animus" doctrine, which the Court sometimes wields to find equal protection violations even when it declines to find that the group in question merits explicitly heightened judicial protection. Since 1973, the Court has cited *Moreno* thirty-five times. But far more important than that raw number is the fact that in several of those cases the Court relied on *Moreno*'s canonical language—that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"[54]—as support for a decision striking down government action as failing the equal protection rational basis standard.[55] But the Court did not begin to rely on *Moreno* in that way until a dozen years after its decision.[56]

In terms of their results, those cases generated the remarkable set of victories gay rights plaintiffs won at the Court in the two decades between *Romer v. Evans* in 1996 and *United States v. Windsor* in 2013,[57] which provided the foundation for the vindication of same-sex marriage rights in *Obergefell v. Hodges*.[58] The animus theory allowed the Court to rule for gay rights and other equal protection plaintiffs without having to breathe new life into its experiment with suspect class analysis during the 1970s and early 1980s, which had already begun to falter by 1985.[59] Moreover, that theory has given the Court at least some foothold in its attempt to protect free religious exercise when that exercise has encountered government hostility.[60] Regardless of what one might think of the coherence

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53 413 U.S. 528 (1973).

54 *Id.* at 534 (emphasis deleted).

55 *See* United States v. Windsor, 570 U.S. 744, 770 (2013); Romer v. Evans, 517 U.S. 620, 634–35 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985); *see also* Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the judgment).

56 *See Cleburne*, 473 U.S. at 446–47; *see also infra* note 173 (discussing the Court's use of *Moreno* before *Cleburne*).

57 *See generally Windsor*, 570 U.S. 744; *Romer*, 517 U.S. 620; *see also Lawrence*, 539 U.S. 558.

58 576 U.S. 644 (2015).

59 *See* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 140 n.177 (1990) (stating that dicta from *Cleburne* suggests the Court's unwillingness to extend suspect or quasi-suspect class status to a variety of groups whose status the Court has not yet conclusively determined); William D. Araiza, *Was* Cleburne *An Accident?*, 19 U. PA. J. CONST. L. 621, 635–38 (2017) (describing the state of suspect class analysis in 1985).

60 *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (concluding that a state administrative board had failed to give "neutral and respectful consideration" to a merchant's religion-based reasons for

or the normative desirability of the animus idea as a doctrinal tool,[61] it—and thus its doctrinal headwaters in *Moreno*—has become generative indeed.

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These three equal protection cases, all of which feature plaintiff victories after the application of rational basis review,[62] experienced very different fates. *Allegheny Pittsburgh* and *Olech* seemed to have reached doctrinal dead-ends, with the Court citing them, if at all, only to distinguish them. *Olech* appears to have suffered a particularly harsh fate, as the only Court decision to deeply engage with it did so only to curtail its domain substantially. By contrast, *Moreno* eventually came to enjoy a long, healthy life, becoming the foundation for an emerging approach to at least some equal protection claims, as well as claims under the First Amendment's Free Exercise Clause. The next Part considers what these similar cases with different trajectories suggest about the concept of a one-off.

III
WHY ONE-OFFS?

The concept of a one-off raises interesting questions about the judicial function, and in particular, the function of an apex court such as the Supreme Court. It is the job of lower courts to decide cases—a task the federal system reflects in the availability, as of right, of judicial review as long as jurisdictional and other prerequisites are satisfied.[63] By contrast, apex courts often enjoy discretion over their dockets; for example, since 1925 most of the

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violating a state public accommodations provision); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (citing a city's hostility to a particular religion's practices as a reason for striking down restrictions on those practices as violating the Free Exercise Clause).

61 *See generally* Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (canvassing the Court's animus doctrine as it existed in 2010); William D. Araiza, *Animus and its Discontents*, 71 FLA. L. REV. 155 (2019) (evaluating critiques of animus doctrine); Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215 (2019) (critiquing animus); Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195 (2019) (same).

62 For an insightful discussion of the modern Court's applications of equal protection rational basis review more generally, see Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since* Romer v. Evans, 14 GEO. J.L. & PUB. POL'Y 441 (2016).

63 *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (expressing concern about giving broad application to the requirement of administrative exhaustion, given lower federal courts' "virtually unflagging obligation to exercise the jurisdiction given them") (internal quotation omitted).

Supreme Court's caseload has consisted of cases it has chosen to review.[64] That latitude in turn suggests that apex courts'—or at least the Supreme Court's—primary role lies in guiding the development of the law rather than correcting errors.[65]

Sometimes, the Supreme Court explicitly embraces that broader role, by suggesting future legal paths that are, strictly speaking, unnecessary to the decision of the case in front of it. Consider, for example, the famous Footnote 4 from *United States v. Carolene Products*.[66] There, Justice Harlan Fiske Stone[67] laid out, in three intimating paragraphs, a new role for the Supreme Court after its then-recent surrender to the New Deal.[68] Those paragraphs explicitly suggested situations in which the Court's new-found deference to legislative judgments might not apply, despite the fact that simple application of that deference fully sufficed to decide the case in front of it.[69] As such, Footnote 4 self-consciously invited doctrinal development by laying the foundation for a new set of principles governing constitutional law. The Court did not need Footnote 4 to decide the case in front of it. Nevertheless, as legions of scholars have noted, Footnote 4 was exceptionally generative.[70]

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64 *See* Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC'Y REV. 807, 809 (1990) (explaining that, while before 1925 the Supreme Court's jurisdiction was "almost entirely 'obligatory,'" after the Judiciary Act of 1925 it was "almost entirely discretionary") (internal quotations omitted).

65 *See, e.g.*, Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 1, 6 (2014) (citing statements to this effect from Chief Justice Taft to Justice Breyer); Richard Fallon, *Selective Originalism and Judicial Role Morality* 46 (Harv. L. Sch. Pub. L., Working Paper No. 23-15) (distinguishing "between judicial application of law to the facts of particular cases and judicial lawmaking with further, case-transcending, law-altering effects").

66 304 U.S. 144, 152 n.4 (1938).

67 Footnote 4 was not joined by a majority of the Court. *See id.* at 155 (noting that three justices did not join the footnote, while two others did not participate in deciding the case).

68 Whether 1937 really marked the Court's abandonment of its previous approaches to constitutional jurisprudence is a fascinating question, but one that need not detain us. For a careful exploration of this question, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

69 *See Carolene Products*, 304 U.S. at 152 n.4 (suggesting that the Court's deference might not extend to situations involving facial violations of Bill of Rights provisions, laws suppressing opportunities for political participation, and laws borne of "prejudice against discrete and insular minorities," which prevent such minorities from participating in the political process).

70 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (exploring how Footnote 4's insights influenced subsequent constitutional law development).

For both these reasons, Footnote 4, and *Carolene Products* more generally, stands as the very opposite of a one-off.

By contrast, consider cases that are not explicitly generative—what this Article calls "one-offs." The Supreme Court's presumed primary task of generating and sustaining such doctrinal evolution raises an interesting question about such cases' legitimacy. The issue is not one of prediction: it's quite likely that the justices cannot always foretell the jurisgenerative effect of any particular opinion they issue. For example, during the deliberations on *City of Cleburne v. Cleburne Living Center*,[71] a case that was eventually recognized as having resurrected *Moreno*'s animus idea and thus paved the way for its use in future cases, Justice Rehnquist remarked that what was to become the Court's ultimate disposition of the case was likely to go down in the history books as nothing particularly notable.[72] Similarly, Justice Souter, dissenting in *United States v. Lopez*,[73] remarked that "[n]ot every epochal case . . . come[s] in epochal trappings," and observed that the seminal Commerce Clause case *NLRB v. Jones & Laughlin Steel*[74] merely applied pre-existing legal rules in more flexible ways. "But," he cautioned, warning about the potentially similar generative effect of the majority's decision in *Lopez*, "we know what happened."[75]

But leave aside the justices' lack of omniscience about the ultimate influence any particular opinion might end up exerting. Focus instead on what they hope to accomplish with an opinion and what they in fact accomplish. Does deciding one-offs play an appropriate role in the work of an apex court? Does any such role therefore justify that court issuing opinions that stand good chances of becoming one-offs? Simply put, are one-offs appropriate uses, not only of the Court's time, but of its authority?

They might be, for several reasons.

A. Restating Basic Principles

One role one-offs can play is in restating fundamental legal principles. Those principles might not lead to follow-on development at the Court itself. However, the one-off that restates

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71 473 U.S. 432 (1985).

72 *See infra* note 225 (quoting Justice Rehnquist's ultimately inaccurate prediction).

73 514 U.S. 549, 615 (1995) (Souter, J., dissenting).

74 301 U.S. 1 (1937).

75 *Lopez*, 514 U.S. at 615 (Souter, J., dissenting). For another example of such lack of omniscience, see *infra* note 225.

such a principle plays an important role simply by ruling as it does, and thus making it clear to lower courts that the relevant legal principle remains viable.

Allegheny Pittsburgh reflects this role. One understanding of the *Allegheny Pittsburgh* opinion is that it functions to restate the principle that rational basis review is not, to amend Gerald Gunther's famous maxim, "rational basis in theory, but toothless in fact."[76] In other words, that opinion might be thought of as simply reinforcing the principle that rational basis review is meaningful, even if highly deferential. That understanding gains at least circumstantial credence when one remembers that *Allegheny Pittsburgh* was authored by Chief Justice Rehnquist, the member of the Court who during that era was the most insistent on limiting the stringency of rational basis review under the Equal Protection Clause.[77] The Chief Justice's decision to retain the writing assignment in *Allegheny Pittsburgh*[78] suggests a desire on his part to cabin any more expansive message the Court's decision would otherwise send, and thus renders more plausible the argument that his opinion was intended to send merely the message described above. But regardless of whether the Court intended to send that sort of message, the inevitable message *Allegheny Pittsburgh* in fact sent, both by its result but also by the paucity of its legal analysis,[79] was that rational basis review did require meaning-

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76 Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing "scrutiny that was 'strict' in theory and fatal in fact").

77 *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175–79 (1980) (Rehnquist, J., writing for the majority) (applying a very deferential version of rational basis review); *id.* at 180 (Stevens, J, concurring in the judgment) (criticizing that application as "tautological"); *id.* at 186–87 (Brennan, J., dissenting) (leveling the same criticism). Indeed, in the Justices' deliberations on *Allegheny Pittsburgh* itself, Justice Brennan felt constrained to ask Chief Justice Rehnquist to add a qualifying limitation to his draft opinion's seemingly-unlimited grant of authority to states to "divide different kinds of property into classes and assign to each class a different tax burden." 488 U.S. 336, 344 (1989); *see* Letter from Brennan, J. to Rehnquist, C.J. (Jan. 4, 1989) (requesting that the language quoted above be followed by "so long as those divisions and burdens are reasonable"); *see also* 488 U.S. at 344 (including the requested language).

78 *See* Sara C. Benesh, Reginald S. Sheehan & Harold J. Spaeth, *Equity in Supreme Court Opinion Assignment*, 39 JURIMETRICS 377, 378 (1999) (noting the practice of the Chief Justice assigning opinion-writing duties if he votes with the majority at conference).

79 The opinion focused almost exclusively on the severity of the inequality the plaintiff suffered. To be sure, after describing the magnitude of the valuation disparities affecting the plaintiff, *see* 488 U.S. at 344, the opinion noted the possible inconsistency of the assessor's conduct with state law. *See id.* at 345. *But*

ful, if still deferential, scrutiny by lower courts.[80] Such a message is complete in itself; its full application requires nothing more by way of further doctrinal development. Quite literally, the result of the case constitutes the full scope of the doctrinal message the Court conveyed.

One can contrast *Allegheny Pittsburgh* with *Moreno*. Like *Allegheny Pittsburgh*, *Moreno* stated a basic principle of equal protection law: regardless of the appropriate level of scrutiny or the factual context, a private-regarding motivation (such as dislike of the burdened group) can never justify discrimination.[81] But unlike the principle restated by *Allegheny Pittsburgh*, the *Moreno* principle requires further refinement. Indeed, the *Moreno* principle raises a welter of follow-up questions. How can such private-regarding motivation be proven?[82] Is an animus finding necessarily fatal to a government action, or can a government action infected by animus nevertheless survive if it also features more legitimate justifications?[83] Can an action previously tarred as resting on animus be cleansed of that taint, or is government forever precluded from taking that same action regardless of the passage of time and the surfacing of more legitimate motives?[84] These questions have continued to arise in follow-up animus cases, even if the Court's decisions in those cases have not resolved them. Still, those follow-up cases have led, even if only haltingly and thus-far incompletely, to the development of a jurisprudence of animus that has proven resilient even after the retirement of Justice

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see id. at 346 ("Viewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law."). However, the Court then returned to and concluded with a focus on those disparities. *See id.* at 345–46.

80 Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473, 473, 536–37 (1995) ("Lawyers and historians agree that almost everything we need to know about constitutional *law* is found in the Supreme Court's published opinions. Internal Court documents . . . tell us something about the dynamics within the Court but relatively little about constitutional law.").

81 *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

82 *See, e.g.*, United States v. Windsor, 570 U.S. 744, 771 (2013) (citing a law's title as evidence of animus).

83 *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889 (2012) (describing an animus finding as a "silver bullet" that is fatal to the challenged law); *see also* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) (providing an ambiguous answer to this question).

84 *See generally* Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947 (2022); W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2022); William D. Araiza, *Cleansing Animus: The Path Through* Arlington Heights, 74 ALA. L. REV. 541 (2023) (all considering this question).

Kennedy, the author of the Court's modern animus cases until his retirement in 2018.[85]

This comparison of *Allegheny Pittsburgh* with *Moreno* reveals that cases establishing or re-establishing fundamental principles need not generate follow-on doctrine. If, as with *Moreno*, the relevant principle requires the resolution of additional questions,[86] then subsequent doctrinal development might be expected. By contrast, if, as with *Allegheny Pittsburgh*, the relevant principle is complete in itself, then the Court may have discharged its duty simply by issuing an opinion that is destined to become a one-off.

B. This Far and No Further

Somewhat related to the role for one-offs discussed above is the idea that they may be useful in demarcating a legal principle's outer limits. As suggested above, with one-offs those limits sometimes emerge less from the opinion's analysis than its result. Thus, for example, *Allegheny Pittsburgh* stands for the proposition that rational basis review does not constitute rubber-stamp approval of government action. To be sure, such review remains extremely deferential. But if *Allegheny Pittsburgh* "stands for" anything—i.e., if it (re-)establishes any legal principle—it is that such deference does not extend indefinitely. One gets a sense of this understanding of *Allegheny Pittsburgh* from the fact, noted earlier,[87] that Chief Justice Rehnquist's opinion contained very little legal analysis; rather, it simply emphasized the extent of the disparity at issue and concluded that it was too severe to survive even rational basis review. That result thereby established that such deference has a limit.

One can compare *Allegheny Pittsburgh*'s role with *Olech*'s. At first blush, *Olech*'s result—allowing the plaintiff's class-of-one claim to proceed—also seems to establish a legal principle, namely, the viability of the class-of-one theory. However, similarly to the discussion of *Moreno* in the prior subsection, *Olech*'s endorsement of the class-of-one theory left open important questions about that theory's scope and meaning. In

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85 *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S.Ct. 1891, 1915–16 (2020) (reaching the merits of an animus claim even though the case had by then already been decided on a sub-constitutional ground).

86 *See supra* text accompanying notes 82–85 (identifying some of those questions).

87 *See supra* note 79.

particular, *Olech*'s endorsement of a seemingly broad class-of-one theory[88] ultimately required subsequent judicial action clarifying that theory's scope. Nevertheless, with one exception, the Court has left the development of that follow-up law to the lower courts.[89]

But what about that exception? Eight years after *Olech*, the Court decided its thus-far only other class-of-one case, *Engquist v. Oregon Department of Agriculture*.[90] In *Engquist*, the Court held that government employment discrimination cases brought as equal protection claims could not rely on the class-of-one theory. It emphasized that, when government acts as an employer, it enjoys significantly more discretion when making the inevitably "subjective and individualized"[91] decisions that characterize adverse employment actions. For that reason, the Court concluded that the class-of-one theory was a bad fit with employment discrimination claims.[92]

Engquist thus rendered *Olech* a one-off in a different way than *Allegheny Pittsburgh* is. When *Engquist* limited the scope of *Olech*'s class-of-one theory, it effectively isolated *Olech* and the theory it endorsed. Rather than retaining viability as a statement of a principle that lower courts could then apply, *Olech* became, thanks to *Engquist*, something closer to the type of "derelict" Justice Frankfurter identified.[93] To be sure, the extent to which *Olech* is appropriately thus described depends on how broadly the Court construes the reach of *Engquist*'s rule excising situations from class-of-one liability when they involve "subjective and individualized" government determinations.[94] Read aggressively, as some lower courts have, that excision could remove many situations indeed.[95] If one reads *Engquist* broadly, then *Olech* becomes less of a case that is a one-off for stating a principle that requires nothing more than implementation by lower courts—that is, it becomes less of a

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88 *Compare* Village of Willowbrook v. Olech, 528 U.S. 562, 565–66 (2000) (Breyer, J., concurring in the judgment) (urging that limits be placed on that theory).

89 *See* Araiza, *supra* note 51, at 445.

90 Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008).

91 *Id.* at 604.

92 *See id.* at 605.

93 *See supra* note 1.

94 *See* 553 U.S. at 604.

95 *See* Caesars Mass. Mgmt. Co., LLC v. Crosby, 778 F.3d 327, 336–37 (1st Cir. 2015) (exemplifying this potential).

case akin to *Allegheny Pittsburgh*. Instead, it becomes a case that stands for a principle that has been severely limited.

C. Fonts of Doctrinal Development

The path the Court took with the class-of-one doctrine can also be contrasted with the path it took when, in *Moreno*, it suggested what became the animus idea. As noted earlier, *Moreno* raised a set of difficult questions, some of which the Court has engaged, even if not intentionally or conclusively.[96] *Olech* also raised questions. In particular, *Olech* raised questions about both the scope of the class-of-one cause of action's applicability and about the role, if any, that bad intent plays in stating a class-of-one claim.[97] The difference is that the Court resolved the *Olech* issues simply by carving out a large swath of potential class-of-one claims and pronouncing that theory inapplicable to them. That decision reduced the need to expound on the details of class-of-one claims, since so many of them were now simply unviable.

Not so with *Moreno*. After a dozen years of desuetude, the Court in *Cleburne* picked up on the animus idea,[98] thus solidifying its role as an important, if under-theorized, component of equal protection law. Why the difference from *Olech*? Why didn't the Court treat *Moreno* as it treated *Olech*, and cut off its doctrinal development? Doctrine-specific reasons seem to be the cause. There is at least circumstantial evidence to believe that *Moreno*'s animus doctrine ultimately thrived because the Court found it an attractive doctrinal option. When *Cleburne* dusted off the animus idea, the Court's dozen year-long experiment with suspect class analysis—ironically, begun in earnest the same year it decided *Moreno*[99]—appeared to be sputtering

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96 *See supra* text accompanying notes 82-85.

97 To be sure, the *per curiam* in *Olech* ostensibly dealt with this issue by dismissing the need to allege such bad intent, thus triggering Justice Breyer's decision to concur only in the judgment. *See supra* text accompanying notes 44–45. Nevertheless, lower courts after *Olech* continued to push back against that decision, raising the sort of concerns Justice Breyer and, at the lower court level, Judge Posner had raised in *Olech*. *See* Araiza, *supra* note 51 at 452–53 (noting this lower court reaction).

98 *But see infra* note 173 (discussing the Court's use of *Moreno* before *Cleburne*).

99 *See* Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973) (plurality opinion) (announcing what became the standard criteria for determining whether a group is a suspect or quasi-suspect class).

to an inglorious end.[100] If that wasn't clear before *Cleburne*, the *Cleburne* Court's confession that it was denying heightened scrutiny to intellectual disability discrimination because of a concern that too many other groups would then be able to claim similar judicial protection[101] surely suggests the decline of suspect class analysis as a viable path forward for equal protection law. When the Court confronted that dead end, animus was available to pick up the slack.[102]

In short, doctrinal necessity helps influence whether a case will become a one-off. Simply put, the Court might have felt a need to validate the class-of-one theory as a concept but no particular need to expand it or apply it aggressively and thus make *Olech* a font of doctrinal development. Perhaps, just like *Allegheny Pittsburgh*, *Olech* played its intended role simply by planting the Court's flag on particular territory, with the Court remaining content with a largely symbolic affirmation of, respectively, the meaningfulness of rational basis review and the class-of-one idea. Indeed, the imperative to simply plant a doctrinal flag but do nothing else may explain the Court's willingness—after only eight years, with only two personnel changes[103]—to shift from a unanimous embrace of the class-of-one idea in *Olech* to a significant pruning of that idea's effective scope in *Engquist*.

If such a symbolic statement does all the work the Court feels it needs to do, then the Court may well feel like it is doing its job by issuing an opinion that is designed to be, or eventually becomes, a one-off but that remains viable, even if not doctrinally generative. Such conduct creates a distinction

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100 *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011) ("Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed.").

101 *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985) ("[I]f the large and amorphous class of the [intellectually disabled] were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large . . . . We are reluctant to set out on that course, and we decline to do so.").

102 *See id.* at 446–47 ("Our refusal to recognize the [intellectually disabled] as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination . . . . [S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests") citation omitted.

103 Between *Olech* and *Engquist*, Chief Justice Roberts and Justice Alito replaced, respectively, Chief Justice Rehnquist and Justice O'Connor.

between such one-offs and "derelicts" that offer prime targets for overruling.

IV
THE LESSONS OF ONE-OFFS

This examination of the phenomenon of one-offs suggests several lessons about such cases' role in the process of doctrinal creation and evolution.

A. Sometimes, The Result is the Rule

As Part III explained, one lesson one-offs teach is that doctrinal rules can take the form of case results. *Allegheny Pittsburgh* illustrates this point. There is little legal analysis in that opinion. Rather, the Court simply stressed the extreme characteristics of the unequal treatment the state meted out—its longstanding-ness and magnitude—and then concluded that that treatment could not flow from any rational application of state taxation rules.[104] The opinion's rule content derives from the very fact that those characteristics justify a strike-down even under the otherwise highly deferential rational basis standard.

Such a case may remain viable without generating follow-on doctrine. If the main point of the Court's opinion in *Allegheny Pittsburgh* is simply to remind lower courts that the most extreme examples of seemingly unjustified discrimination should indeed be struck down, then the case sends that message without any need for follow-up precedent. Indeed, any such follow-up cases would likely muddy that message. In particular, if a later decision struck down yet another instance of social or economic regulation, lower courts might wonder whether the *de facto* review standard applicable to such regulation is more stringent than had been previously thought.[105] By contrast, if a later decision upheld such regulation, those

104 *See* Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., 488 U.S. 336, 345–46 (1989).

105 *Cf.* SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 483 (9th Cir. 2014) (concluding that the Supreme Court's analyses and results in *Romer* and *Windsor* compelled the conclusion that sexual orientation discrimination merited heighted scrutiny rather than the rational basis review that had previously been thought to apply). To be sure, the Court might feel the need to take this step if lower courts ignored (in the Court's view) the message that the Court wanted its original opinion to send. In that case, its reaffirmation of the original case's principle might be understood less as muddying the doctrine and more as reaffirming that original principle. Thanks to Michael Coenen for this suggestion.

courts might wonder whether the Court was walking back the message it sent in *Allegheny Pittsburgh*.[106]

To be sure, *Allegheny Pittsburgh*'s status as an exemplar of a doctrinally-viable one-off is not completely unambiguous. Three years after deciding that case, the Court decided *Nordlinger v. Hahn*.[107] *Nordlinger* involved California's Proposition 13, a voter initiative that capped increases in property taxes and instituted a tax assessment system that, just like the assessor's action in *Allegheny Pittsburgh*, assessed property values, for tax purposes, based on the value of the property when it was acquired.

The Court in *Nordlinger* upheld the California law on an 8-1 vote. Even accounting for the two personnel changes between that case and *Allegheny Pittsburgh*,[108] the seeming flip-flop is striking, and suggests the dynamic, mentioned above,[109] of a later case seeming to walk back *Allegheny Pittsburgh*'s message. However, *Nordlinger* can be explained. Like the system used by the county tax assessor in *Allegheny Pittsburgh*, Proposition 13 generated massive disparities in the tax bills owed by property owners of otherwise very similar properties.[110] But unlike the system struck down in *Allegheny Pittsburgh*, California's policy rested on an explicit legislative policy choice.[111] Unsurprisingly, Justice Blackmun's opinion for seven justices relied heavily on this distinction.[112] Despite residual ambiguity,[113] lower courts have continued to receive *Allegheny Pittsburgh*'s message.[114]

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106 *See* Clark Neily, *One Test, Two Standards: The On-and-Off Role of "Plausibility" in Rational Basis Review*, 4 GEO. J.L. & PUB. POL'Y 199, 205–06 (2006) (noting this ambiguity when the Court followed *Allegheny Pittsburgh* with cases upholding laws after applying rational basis review).

107 Nordlinger v. Hahn, 505 U.S. 1 (1992).

108 Respectively, Justices Brennan and Marshall were replaced by Justices Souter and Thomas.

109 *See supra* text accompanying note 106.

110 *See Nordlinger*, 505 U.S. at 6–7 (describing the inequality the California law imposed on the plaintiff/new property owner).

111 To be sure, the "legislature" was the people of the State of California acting via the initiative process. *See id.* at 3–4.

112 *See id.* at 16 ("*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, [Proposition 13] was enacted precisely to achieve the benefits of an acquisition-value system. *Allegheny Pittsburgh* is not controlling here.").

113 *See* Neily, *supra* note 106 (explaining that ambiguity).

114 *See infra* note 194 (citing one such example).

Still, for the Court the matter is not as simple as using its near-complete power over its docket to modulate precisely the signals it sends to lower courts.[115] Rather, occasionally its hand is forced. For example, it may feel obliged to respond to applications of rules so erroneous as to warrant correction, despite its consistent admonition that it is not a court of error correction.[116] Alternatively, it may feel constrained to grant review when a lower court strikes down a federal law.[117] As one relevant example, four years after *Allegheny Pittsburgh*, the Court decided *FCC v. Beach Communications*.[118] In that case, the Court reversed the lower court's decision striking down, on rational basis equal protection grounds, a federal statute regulating cable television.[119] The Court explained that it granted certiorari pursuant to its general practice to review cases where the lower court invalidated a federal law.[120]

Still, aside from that relatively unusual latter justification for certiorari,[121] the Court's large degree of control over its docket gives it substantial leeway to rest content with a single statement of a legal principle. In such situations, it is at least sometimes the case that such a single statement—a one-off, in this Article's terminology—adequately discharges the Court's responsibility for guiding the law.

B. Sometimes, "Enough is Enough"[122]

Closely related to the previous section's explanation that sometimes a one-off adequately states the legal principle the

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115 *See* Caldeira & Wright, *supra* note 64 (explaining the development of the Court's discretionary control over its docket).

116 *See, e.g.*, Martin v. Blessing, 571 U.S. 1040, 1045 (2013) (Alito, J.) ("Unlike the courts of appeals, we are not a court of error correction."). Note, however, that *Nordlinger* did not involve the Court correcting what it thought was an erroneous lower court decision, as the Court *affirmed* the lower court decision upholding Proposition 13. 505 U.S. at 18.

117 *See infra* notes 118–120.

118 FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993).

119 *See* Neily, *supra* note 106, at 203–04 (considering how *Beach* may have contributed to confusion about the appropriate application of rational basis review).

120 *See* 508 U.S. at 313 ("Because the Court of Appeals held an Act of Congress unconstitutional, we granted certiorari."); *see also* Hellman, *supra* note 6, at 864 (describing this justification for certiorari as accounting for a smaller number of cert. grants than others, but describing it as "no less important from the standpoint of the Court's role in the American system of government").

121 *See* Hellman, *supra* note 6, at 864 (describing this justification for certiorari as accounting for a relatively small number of cert. grants).

122 Armour v. City of Indianapolis, 566 U.S. 673, 693 (2012) (Roberts, C.J., dissenting).

Court wishes to announce is the idea that a one-off can play the role of demarcating an outer limit, either on a legal rule or on the allowable scope of government conduct. Chief Justice Roberts expressed this view in his dissenting opinion in *Armour v. City of Indianapolis*.[123] *Armour* involved an equal protection challenge to the method by which the City of Indianapolis implemented a policy change regarding how it funded sewer upgrades. Originally, the City had begun funding those upgrades by assessing the landowners abutting the project, allowing them to pay their obligations over time or in a lump sum, but either way requiring them to finance the work. The following year, it abandoned that financing vehicle and cancelled any outstanding debt owed by the landowners paying their obligations over time. However, the City refused to refund any amounts paid by the landowners who had fully paid their assessments in lump sums. Those landowners sued.

The Court rejected their equal protection claim, relying heavily on considerations of administrative convenience.[124] It also distinguished *Allegheny Pittsburgh*, concluding that, unlike that case, Indianapolis's debt forgiveness plan did not violate state law.[125] Chief Justice Roberts, speaking for himself and Justices Scalia and Alito, dissented. He criticized the Court's administrative convenience rationale as insufficient.[126] More relevantly for current purposes, he concluded his dissent by conceding that the majority was correct when it said that "*Allegheny Pittsburgh* is a 'rare case.'"[127] However, he then continued: "But every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context. *Allegheny Pittsburgh* was such a case; so is this one."[128]

Consider those last two sentences. They reflect a view that one proper role of the Court is to draw lines in the sand. Those cases may be "rare."[129] But they are necessary. Why? To ensure that "the Equal Protection Clause . . . retain[s] any force in th[at] context."[130] How does such an opinion accom-

123 *Id.*

124 *See id.* at 682–88.

125 *See id.* at 687.

126 *See id.* at 690–91 (Roberts, C.J., dissenting).

127 *Id.* at 693 (quoting *id.* at 687 (majority opinion)).

128 *Id.*

129 *See id.*

130 *See id.*

plish that task of ensuring the vitality of a particular strand of constitutional law doctrine? Simply, it seems, by saying "enough is enough."[131] Such statements may not require intricate legal analysis that more readily invites doctrinal development. Instead, as discussed earlier in the context of *Allegheny Pittsburgh*'s bare-bones reasoning,[132] they may take the form simply of a restatement of basic principles, followed by a conclusion. Nor does the message require constant reiteration; according to Chief Justice Roberts, it is enough to reiterate the given principle when a once-in-a-generation case requires it.

No need for constant reiteration or application in subsequent cases. Thus, no doctrinal development. A one-off. But still doctrinally necessary.

C. One-Offs, Derelicts, and Cases Confined to Their Facts

The prior two subsections illustrate that one-offs can play legitimate roles in creating and maintaining legal doctrine. As such, one-offs can differ from derelicts. A derelict, by definition, has decayed into an outlier, something inconsistent with the general trend of the law as it has developed since that case's decision.[133] One-offs may satisfy that description, but they need not. Rather, like *Allegheny Pittsburgh*, they may instead reflect viable statements of legal principles, even if the principle in question either cannot be expressed except through factual application or is sufficiently unusual that all a court needs to do to reinforce it is to remind lower courts that it still exists.[134]

Still, the line between these two categories can be blurry. Consider, for example, the intermediate phenomenon of "confining a case to its facts." This move involves appellate courts diminishing a case's precedential weight without explicitly calling it into question, by purporting to limit its binding authority

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131 *See id.*

132 *See supra* subpart III-A.

133 *See, e.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1557 (2021) (identifying Teague v. Lane, 489 U.S. 288 (1989), as such a case); *see also id.* at 1561 ("[N]o *stare decisis* values would be served by continuing to indulge the fiction that *Teague*'s purported watershed exception endures. No one can reasonably rely on a supposed exception that has never operated in practice . . . . At this point . . . we are simply . . . stating the obvious: The purported watershed exception retains no vitality.").

134 *See also* Maine v. Taylor, 477 U.S. 131, 138, 144–47 (1986) (upholding a discriminatory state law as satisfying the dormant commerce clause and possibly sending a message that lower courts should be open to upholding such laws if lower courts truly find that the law satisfies the stringent scrutiny such discriminatory laws trigger).

to cases whose relevant facts are sufficiently similar.[135] Confining a case in this way thus explicitly preserves at least a sliver of its viability, while at the same time equally explicitly cutting it off as a font of further doctrinal development.

This practice is controversial. The authors of the most comprehensive study of confining cases to their facts conclude that that practice is justified, if at all, only to the extent it protects the reliance interests of persons whose facts so closely track those of the narrowed case that their interests in the narrowed case's legal rule are thought to be particularly strong and worthy of protection.[136] This purely private interest-protecting justification stands in at least some tension with the Supreme Court's primary role as expositor of the general principles of federal law.[137] Beyond this broader objection lies the practical difficulty inherent in determining both the relevant facts to which the case is "confined" and how close another case's facts have to be to the narrowed one's to justify bringing it within the rule of the narrowed case.[138]

Nevertheless, assume both the legitimacy and workability of such narrowing. Cases thus confined exhibit at least some similarities to one-offs. Like narrowed cases, one-offs are not designed to be broadly jurisgenerative. But this similarity can be overstated. As the prior two subsections explained, one-offs can play important doctrinal roles in demarcating the outer limit of a particular rule or simply reinforcing that rule's continued vitality. In that sense, they *are* jurisgenerative, even if that generativity occurs only in the lower courts. Thus, at least some one-offs may be more generative than cases confined to their facts.

Despite this difference, the relationship between factually-confined cases, one-offs, and derelicts remains fuzzy. For example, the authors of the above-mentioned study on confining cases to their facts argue that courts may engage in that practice precisely in order to accomplish *de facto* overruling without having to apply the standard criteria courts have established

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135 *See generally* Rice & Boeglin, *supra* note 8 (discussing this phenomenon).

136 *See id.* at 888–91; *but see id.* at 903–04 (questioning why other parties might not have developed similar reliance interests on the narrowed case despite the lack of complete identity between their facts and those of the narrowed case).

137 *See, e.g.*, Hellman, *supra* note 6, at 796 (noting this role).

138 *See* Rice & Boeglin, *supra* note 8, at 881–82 ("[I]dentifying *the* 'facts' of a confined case is easier said than done . . . . In theory, the confined case's residual domain could be exceedingly narrow . . . . [M]ere use of the vocabulary of confining permits later courts, if they are so inclined, to characterize the confined case's 'facts' so precisely as to erase any distinction between confining and overruling.").

when deciding whether formally to overrule a case.[139] Thus, confining a case to its facts may effectively create a derelict, designed at most to protect the reliance interests of private parties, and quite possibly designed to hide a *de facto* overruling. In turn, the derelict status of the confined case primes that case for eventual explicit overruling, should the Court wish to take that step.[140] In other words, confining a case to its facts almost necessarily, and at least logically, creates a derelict ripe for overruling.

In sum, one-offs can play a role in creating and maintaining a given doctrinal structure, in contrast to either the overruling avoidance or purely private interest-protection motivations for confining cases to their facts. This distinction renders one-offs legitimate in ways that confined cases may not be. This conclusion carries with it interesting implications for what we understand as legal doctrine, at least in constitutional law adjudication. But it also raises one final question: how does a one-off decay into a derelict? As the next Part demonstrates, the answer to that question itself carries interesting implications for legal doctrine.

V

THE DYNAMICS OF ONE-OFFS: HOW A ONE-OFF BECOMES A DERELICT, HOW IT AVOIDS THAT FATE, AND HOW IT BLOSSOMS

The prior subsection's analysis distinguishing one-offs from derelicts does not mean that the former can never decay into the latter.[141] What does that decay process look like, and

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139 *See* Rice & Boeglin, *supra* note 8, at 892–94.

140 *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("The analysis in [a prior case] must be respected . . . unless that precedent is to be overruled *or so limited to its facts that its underlying principle is, in the end, repudiated.*") (emphasis added).

141 Whether the reverse is possible—that is, whether a derelict can be revived (or, to keep with the nautical theme, refitted) to become doctrinally vital again—poses an interesting question, but one this Article can bracket for later study. For one possible example of such refitting, consider Justice Douglas's re-imagination, as First Amendment cases, of what had been the *Lochner*-era substantive due process derelicts of Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), in Griswold v. Connecticut, 381 U.S. 479, 482 (1965). For a skeptical evaluation of any claim that *Meyer* and *Pierce* rested on First Amendment grounds as an original matter, see *id.* at 517 (Black, J., dissenting). *See also* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 220 n.35 (1987) ("[T]he Court [in *Griswold*] reinterpreted *Meyer* and *Pierce* to rest on [F]irst [A]mendment rather than substantive due process grounds."). That refitting work eventually proved superfluous once the Court revived substantive due process jurisprudence after *Griswold*. *See, e.g.*, Moore v.

what does it suggest about legal doctrine more generally? Conversely, how can a seeming one-off begin to flower doctrinally? This Part returns to our three-case data set to consider these dynamics.

Unsurprisingly, a key dynamic here is the isolation and decay of whatever legal principle a one-off stands for within the larger sweep of the relevant doctrine. After all, if standing for such a principle is what distinguishes a one-off from a derelict (or a soon-to-be derelict that for now has merely been confined to its facts), then the decay of that principle may prompt the analogous decay of that one-off into a derelict. But the matter is more complex than that.

A. *Olech*

How might a one-off experience such decay? Recall *Olech*, the class-of-one case.[142] At first blush, *Olech* presents a clear example of a doctrinally vibrant one-off. The decision was unanimous—indeed, it is a short,[143] *per curiam* opinion, thus suggesting its uncontroversial nature.[144] It explicitly endorsed class-of-one claims.[145] Thus, *Olech* reads as a clear exemplar of a case that states a doctrinal principle. Moreover, in 2000 one could have easily read that decision as doing all the work the Court needed to do. Just as *Allegheny Pittsburgh* reasserted the meaningfulness of rational basis review, so too *Olech* could

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City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (citing *Meyer* and *Pierce* as substantive due process cases).

142 Village of Willowbrook v. Olech, 528 U.S. 562 (2000); *see supra* subpart II.B (presenting *Olech*).

143 The *per curiam* opinion took approximately two and half pages in the U.S. Reports, of which two paragraphs consisted of its legal analysis. *See* 528 U.S. at 562–65 (overall length, with the actual opinion beginning at page 563); *id.* at 564–65 (length of legal analysis).

144 *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1200 (2012) ("Traditionally, the per curiam was used to signal that a case was uncontroversial, obvious, and did not require a substantial opinion."). Indeed, Justice Stevens's recently-released papers suggest that the *per curiam* opinion—written by Chief Justice Rehnquist, *see, e.g.*, Letter from Souter, J. to Rehnquist, C.J. (Feb. 17, 2000) (Stevens Papers, Box 810, Folder 9) ("I join your *per curiam*.")—did not elicit any suggestions or edits from the other justices. *See generally* Stevens Papers, Box 810, Folder 9 (containing one draft of *Olech*, marked "1st Draft," which tracks very closely the text of the final opinion).

145 *See* 528 U.S. at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

have been understood as asserting, in the first instance,[146] the doctrinal viability of class-of-one claims.

But *Olech* contained within it the seeds of its own decay. Most importantly, the eight-justice *per curiam* opinion explicitly rejected any requirement that class-of-one plaintiffs allege or prove ill-will on the part of the government defendant.[147] It did so in the face of Judge Posner's decision for the Seventh Circuit in *Olech*, which had insisted on the plaintiff alleging and proving that sort of ill-will.[148] At the Supreme Court, Justice Breyer, the only justice who did not join the *per curiam* opinion, adopted Judge Posner's reasoning.[149] Channeling Judge Posner and other lower court judges, Justice Breyer worried that the majority's blithe dismissal of any need to allege bad governmental intent would effectively create class-of-one constitutional claims every time a government official innocently but irrationally accorded different treatment to two similarly-situated plaintiffs.[150] Thus, garden-variety government mistakes that might, for example, trigger state administrative law claims of arbitrary conduct would also trigger federal constitutional claims.[151]

In the years after *Olech*, lower courts labored to cabin the implications generated by the majority's endorsement of such a broad class-of-one theory.[152] Remarkably, many lower courts

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146 To be sure, lower courts had recognized class-of-one claims before *Olech*. *See, e.g.*, Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995) (pre-*Olech* case citing examples of successful class-of-one claims). Moreover, *Olech* itself was able to cite Supreme Court cases it described as reflecting the class-of-one principle. *See* 528 U.S. at 564. Nevertheless, it was *Olech* itself that explicitly and conclusively endorsed the viability of class-of-one claims.

147 *See* 528 U.S at 565 (stating that the plaintiffs' allegations of differential treatment, "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis").

148 *See* Olech v. Village of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998).

149 *See* 528 U.S. at 565 (Breyer, J., concurring in the judgment).

150 *Cf.* William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L. Q. 493 (2007) (examining the relationship between innocent government irrationality and class-of-one claims); *id.* at 494 ("[T]he Court, and especially post-*Olech* lower courts, have split on a second issue: whether such class-of-one claims can be based purely on claims of irrational government action, or whether government animus is an essential part of the claim.")

151 *See* 528 U.S. at 565–66; *cf.* Paul v. Davis, 424 U.S. 693, 701 (1976) (rejecting a reading of the Due Process Clause that would automatically classify as a property or liberty interest any interest the plaintiff lost "wherever the State may be characterized as the tortfeasor").

152 *See, e.g.*, Jennings v. City of Stillwater, 383 F.3d 1199, 1210–11 (10th Cir. 2004) ("[U]nless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors. It is

engaged in near-defiance of the Court's analysis and continued to insist on some form of malice.[153] Perhaps more modestly, other courts struggled to contain *Olech*'s implications by erecting other hurdles for class-of-one plaintiffs. For example, some courts began insisting that the plaintiff show that it was not just similarly, but nearly identically, situated to a comparator who received more favorable treatment.[154] For his part, Judge Posner, the appellate judge who perhaps played the largest role in developing the class-of-one idea in the lower courts,[155] pleaded with the Court to clarify its position on class-of-one claims.[156]

In 2008, the Court granted his wish when it decided *Engquist v. Oregon Department of Agriculture*.[157] In *Engquist*, the Court limited the scope of the class-of-one theory in a case rejecting its applicability to a government employee challenging her dismissal. The Court explained that, unlike *Olech*'s water hookup/easement facts, employment decisions are necessarily subjective, individualized, and discretionary and thus lacked what *Olech*'s facts presented: "a clear standard against which departures, even for a single plaintiff, could be readily

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always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence, that they were treated differently from others, with regard to everything from zoning to licensing to speeding to tax evaluation. . . . This would constitute the federal courts as general-purpose second-guessers of the reasonableness of broad areas of state and local decision-making."); *see also* Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 403 (2003) ("The U.S. Supreme Court's opinion in *Olech* was short and apparently rather simple, but some of the federal courts of appeal treated it like a complex puzzle, to be mined for hidden meaning. Almost immediately after it was reported, both the Seventh and Second Circuits engaged in what they must have viewed as damage control, that is, an attempt to limit *Olech* so that it would not overrun the federal courts with garden variety disputes involving claims against local government."); William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 49–54 (2009) (canvassing lower courts' reactions to *Olech*).

153 *See* Araiza, *supra* note 51, at 446.

154 *See, e.g.*, Neilson v. D'Angelis, 409 F.3d 100, 105 (2d Cir. 2005) (requiring class-of-one plaintiffs to identify comparators who are "prima facie identical" to the plaintiff).

155 *See generally* Robert C. Farrell, *Richard Posner: A Class of One*, 71 SMU L. REV. 1041 (2018).

156 *See* Bell v. Duperrault, 367 F.3d 703, 711 (7th Cir. 2004) (Posner, J., concurring) ("May the Court enlighten us; the fact that the post-*Olech* cases are all over the map suggests a need for the Court to step in and clarify its 'cryptic' per curiam decision.") (citation omitted).

157 553 U.S. 591 (2008).

assessed."[158] Thus, while *Engquist* did not overrule *Olech*, or even formally confine it to its facts, it did limit its reach to situations featuring the requisite "clear standard."

Since *Engquist*, the Court has not taken anotherclass-of-one case. This is not for lack of continued confusion and division among the lower courts. Those courts continued to disagree about the role of bad intent in (further) confining the class-of-one theory.[159] But now, after *Engquist*, they have also clashed over which government decision-making contexts implicate the sort of subjective, individualized, and discretionary decision-making *Engquist* immunized from class-of-one challenges.[160] More relevantly for our purposes, the Court's excision of a chunk of cases from *Olech*'s domain inevitably raises questions about the viability of the class-of-one theory more generally. The Court has not addressed these questions. Reading between the lines, one gets the impression that the Court developed second thoughts about *Olech*, used *Engquist* as a vehicle to cut *Olech* down to size, and has since been content to let the matter rest.[161]

Inevitably, this sequence raises the question of whether the Court has soured on its initial enthusiastic (and seemingly unconditional) embrace of the class-of-one theory.[162] In particular, its refusal to tackle the difficult questions lower courts have continued to debate regarding such claims makes one wonder whether it will be content to let those courts resolve those questions within the ambit of *Olech*'s now-cabined realm.

Assume this is true and that the Court continues to ignore class-of-one cases. Would this sequence inevitably render *Olech* a derelict? On the one hand, one could view *Olech* as analogous to *Allegheny Pittsburgh*: a case that simply states (in *Olech*'s case, explicitly) a legal rule simply for the sake of stating it. On this view, *Engquist* simply reduces the domain of a constitutional claim that nevertheless remains perfectly viable

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158 *Id.* at 9.

159 *See, e.g.*, Del Marcelle v. Brown Cnty. Corp., 680 F.3d 887, 889 (7th Cir. 2012) (en banc) (post-*Engquist* case conceding that circuit's inability to agree on this issue).

160 *Compare* Caesars Mass. Mgmt. Co., LLC v. Crosby, 778 F.3d 327 (1st Cir. 2015) (extending *Engquist*'s refusal to apply the class-of-one theory to any situation involving any discretionary government decision-making) *with* Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135 (2d Cir. 2010) (declining to take that step).

161 *See* Araiza, *supra* note 51, at 481 (criticizing the Court for failing to grant review in further class-of-one cases, despite continued lower court confusion).

162 *See supra* text accompanying notes 143–45.

within its shrunken realm. But other possibilities beckon. In the aftermath of *Engquist*, lower courts began exploring the possibility of skirting *Olech* and the difficult questions it continues to pose by characterizing more and more cases as involving the sort of discretionary government action that is closer to *Engquist* and thus immune from challenge on a class-of-one theory.[163] Since the Court has not granted review on any of those cases in the fifteen years since *Engquist*, one could reasonably conclude that the Court is willing to let *Olech* decay into a case that stands for a small set of cases involving the "clear standard" *Engquist* identified.

That dynamic does not necessarily mean that *Olech* has or will decay into a derelict. However, if the Court is content to let *Olech* shrink into a rule governing an isolated set of unusual facts, then one might be tempted to predict that a future Court will eventually dismiss it as an outlier and close the book on class-of-one claims entirely, either by confining *Olech* to its facts or formally overruling it.

But a countervailing force might prevent that outcome. Concededly, after *Engquist*'s cut-back on the class-of-one theory, it is truer than ever that, as a lower court judge remarked long ago, that theory inhabits "a murky corner of equal protection law."[164] However, the fundamental idea underlying that theory—that one can experience an equal protection violation by suffering discrimination, not based on a class characteristic such as race or sex, but instead based on one's own personal identity—reinforces a core commitment of the modern Court: the idea that equal protection rights are personal rights.[165] Perhaps this is why the Court seemed to find *Olech* so easy; perhaps also this explains why the *per curiam* opinion was so casual in its embrace of a broad class-of-one theory the Court felt the need to walk back in *Engquist*.

Whatever the explanation for *Olech*'s features, its endorsement of the class-of-one theory may prove both long-lasting but also trivial. It may stand the test of the time because of its congruence with the Court's fundamental ideological commitment to the idea that equal protection rights are personal

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163 *See, e.g.*, *Caesars*, 778 F.3d 327.

164 LeClair v. Saunders, 627 F.2d 606, 608 (2d Cir. 1980).

165 *See* Robert C. Farrell, *Affirmative Action and the "Individual Right" to Equal Protection*, 71 U. PITT. L. REV. 241 (2009) (discussing the impact of that commitment on equal protection doctrine).

rather than group-based.[166] But that endorsement may also prove trivial if the Court remains content, as it has since 2008, with limiting the effective scope of that theory and letting lower courts resolve its paradoxes by shunting more and more cases into the *Engquist* category. The result would be that *Olech* ends up reinforcing the Court's rhetorical commitment to the "personal equal protection rights" proposition that remains important to the Court, but doing little effective work beyond that.[167]

In essence, then, a case that otherwise appears to run the risk of decaying into a derelict can avoid that fate if it stands for a principle the Court continues to believe in. At the same time, that case can be safely cabined off, and its impact limited to relatively few (and perhaps very few)[168] actual fact patterns. If this is a correct reading of *Olech*'s ultimate fate, the parallel between it and *Allegheny Pittsburgh* becomes clear. Both cases demarcate the boundaries of doctrine by establishing (in *Olech*) or reestablishing (in *Allegheny Pittsburgh*) a foundational constitutional commitment: respectively, the personal nature of equal protection rights and the meaningfulness of rational basis review. But that is the only role they play.[169] In both situations, follow-up cases (respectively, *Engquist* and *Nordlinger v. Hahn*[170]) limited those cases' expansive potential without calling them into question. As limited, those cases thus occupy a sort of doctrinal suspended animation: valid statements of legal rules that help maintain the Court's broader equal protection structure, but very unlikely candidates for doctrinal devel-

166 For a canonical statement of the opposing view that equal protection rights are fundamentally group-based, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

167 *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (complaining that the joint opinion reaffirming "the essential holding" of *Roe v. Wade* on *stare decisis* grounds had created "a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent").

168 *See Caesars*, 778 F.3d 327 (limiting *Olech's* domain severely).

169 One might compare these cases, thus described, with cases that similarly stand for basic constitutional principles but which, in contrast to one-offs, are frequently cited. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 540 (2000) (describing the post-*Brown per curiae* that, relying ultimately on *Brown*, struck down most forms of official government racial segregation). The *Brown* example illustrates the basic (and likely obvious) truth that citing a foundational principle of law does not thereby necessarily convert the case into a one-off.

170 505 U.S. 1 (1992); *see supra* text accompanying notes 110–112 (explaining how *Nordlinger* cabined *Allegheny Pittsburgh*).

opment. A midway point, perhaps, between a full-on derelict and a vibrant, generative precedent. One-offs, perhaps, but not derelicts. Survivors.

B. *Moreno*

Once again, compare *Allegheny Pittsburgh* and *Olech* to *Moreno*.[171] Decided in 1973, *Moreno*—and most notably, its now-famous insistence that "a bare . . . desire to harm a politically unpopular group can never constitute a legitimate government interest"[172]—lay fallow for a dozen years.[173] This was true despite the fact that *Moreno*'s key language, quoted in the last sentence, reflects a fundamental constitutional commitment, namely, that all government action must at least rationally pursue a legitimate public-regarding goal.[174]

Nevertheless, one should not be surprised by *Moreno*'s temporary decline into desuetude. During those dozen years, the Court experimented with suspect class analysis as a mechanism for expanding the effective reach of the Equal Protection Clause beyond race. That approach, ultimately grounded in the insights of Footnote 4 of *United States v. Carolene Products*,[175] promised to provide a value-free, purely process-based approach to the vexing question of which government-imposed inequalities merit careful judicial scrutiny.[176] Additionally, by focusing the resulting scrutiny on the law's degree of fit with the asserted interest rather than on second-guessing the

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171 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); *see supra* subpart II.C (presenting *Moreno*).

172 413 U.S. at 534 (emphasis deleted).

173 To be sure, during this era the Court sometimes cited *Moreno*'s principle, but almost always to distinguish it. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 87 (1976); Weinberger v. Salfi, 422 U.S. 749, 772 (1975); Johnson v. Robison, 415 U.S. 361, 383 n.18 (1974) (all distinguishing *Moreno*); *but see* O'Connor v. Donaldson, 422 U.S. 563, 575–76 (1975) (providing a "*cf.*" citation to *Moreno* for the proposition that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty" before ruling in the plaintiff's favor in a due process case); *see also* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting) (arguing that *Moreno*'s animus idea should have applied to a city transit agency's refusal to hire methadone users).

174 *See infra* note 178.

175 304 U.S. 144, 152 n.4 (1938).

176 *See generally* ELY, *supra* note 70 (amplifying and defending the Court's attempt to use political process theory as a tool in constitutional adjudication); *cf.* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (critiquing process-based theories such as Ely's).

importance of that interest, suspect class analysis, as practiced, promised a second layer of judicial neutrality.[177]

By contrast, *Moreno*'s statement, foundational as it is,[178] raises a welter of difficult issues that tax courts' competence and authority. Most fundamentally, its explicit focus on government intent requires courts to enter the thicket of divining that intent and raises fraught questions that arise if courts invalidate government action based on such intent.[179] Given these challenges and the availability of the then-new and promising tool of suspect class analysis, one can understand why the Court left *Moreno* on the judicial back burner. Had it remained there, it would have joined *Allegheny Pittsburgh* and *Olech* on the list of one-offs that, at most, served to underscore a fundamental constitutional truth without actually generating doctrinal development.

But *Moreno* did not remain on the back burner. Things changed when the Court's experiment with suspect class analysis encountered obstacles that, in retrospect, hastened the end of that experimentation. The key case was *City of Cleburne v. Cleburne Living Center, Inc.*[180] *Cleburne* marked the Court's definitive confrontation with the limits of suspect class analysis —or at least the limits of its own willingness to apply a more nuanced version of that analysis, as compared to a relatively wooden application of the criteria that had been laid down as

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177 *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 304 (1997) ("The three-tiered approach [to equal protection] tended to look only at the classifications used by the government, which are the means that the government had chosen to accomplish its purposes. It never got around to its promised analysis of the purposes themselves.").

178 *See* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 275 (2011) ("The baseline of the American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in traditional thought has also meant that government's actions are undertaken in good faith and for reasons that are generally seen to be appropriate.").

179 *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (citing scholarship considering when it is appropriate to uphold a government action previously condemned as resting on bad intent, on the theory that that bad intent has been cleansed). Perhaps ironically, around the time *Moreno* was decided, the Court expressed its reluctance about such inquiries. *See* United States v. O'Brien, 391 U.S. 367, 383–84 (1968); Palmer v. Thompson, 403 U.S. 217, 224 (1971). For examples of the academic discussion of this issue around the time of *Moreno*, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971).

180 473 U.S. 432 (1985).

early as 1973.[181] In addition to the Court's unwillingness to probe deeper into the inquiries that analysis called for, the majority opinion in *Cleburne* also rejected quasi-suspect class status for the group in question (intellectually disabled persons) because of an explicit concern about such a holding's implications. As Justice White, writing for the majority, explained:

> [I]f the large and amorphous class of the [intellectually disabled] were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[182]

Immediately after rejecting the plaintiffs' claim for explicitly heightened judicial protection, however, the Court turned back to *Moreno* as part of its application of the rational basis review that followed from its rejection of the plaintiffs' suspect class status.[183] While it took a further eleven years for another major application of *Moreno* in the equal protection context,[184] the "animus" idea with which *Moreno* had come to be associated eventually evolved into a significant, if still deeply undertheorized, component of equal protection law.[185]

It is surely too easy to draw a solid line connecting the final deterioration of suspect class analysis in *Cleburne* with the gradual rise to prominence of animus doctrine and, with

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181 *See* Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973) (plurality opinion) (identifying a group's history of discrimination, the immutability and relevance of its identifying characteristic, and the group's current political powerlessness as relevant to the suspect class determination); *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) (critiquing the Court's allegedly wooden application of those criteria).

182 473 U.S. at 445–46.

183 *See id.* at 444–46 (pivoting from the Court's rejection of suspect class status for the intellectually disabled toward the availability of rational basis review as a tool for ensuring equal protection); *id.* at 446–47 (citing *Moreno* as part of that pivot).

184 *See* Romer v. Evans, 517 U.S. 620 (1996). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court embraced an idea similar to animus in the Free Exercise Clause context. *See* 508 U.S. 520, 541–42 (1993) (noting the hostility of a city's residents and officials to a religious group's particular ritualistic practice during the public debate on whether to restrict that practice).

185 *See* Carpenter, *supra* note 61, at 204.

it, *Moreno*'s eventual status as a jurisgenerative case. Still, the story of *Moreno* and the doctrine it eventually generated suggests that a strong determinant of whether a case becomes a one-off is whether the Court feels a need for the doctrinal tools that case offers. Consider gay rights. By the late 1990s, American society had begun to shift toward, at first, toleration and, eventually, full acceptance of gay rights claims.[186] However, the geographic unevenness of that shift, the polarized nature of the debate, and the stickiness of longstanding prohibitions on same-sex sexual conduct ensured that significant legal regulation of the lives of LGBTQ+[187] persons would remain, thus triggering constitutional litigation.

In confronting this social evolution, the Court's options were limited. *Cleburne* had apparently closed the book on creating additional suspect and quasi-suspect classifications.[188] Simple rational basis review offered an option, but strike-downs of such longstanding (and still somewhat popular)[189] laws on the sole strength of traditional rational basis review raised the prospect of upending assumptions about the Court's proper role under that standard.[190] Viewing the Court's dilemma in these terms makes it understandable why the Court, starting with *Cleburne*,[191] reached back to *Moreno* for its focus

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186 *See, e.g.*, Andrew R. Flores, *National Trends in Public Opinion on LBGT Rights in the United States*, WILLIAMS INST. (Nov. 2014), https://williamsinstitute.law.ucla.edu/publications/trends-pub-opinion-lgbt-rights-us/ [https://perma.cc/UF7D-R3Y7] (showing increased public acceptance of same-sex intimacy and marriage since the 1990s); *see also* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 416, 467–71 (2001) (tracing the evolution of public attitudes toward previously-marginalized groups as passing through several stages, including from toleration to full social acceptance).

187 During this era, transgender rights claims did not yet occupy a prominent place on the constitutional agenda.

188 *See* Yoshino, *supra* note 100, at 756-57 (noting the end of the Court's period of creating new suspect and quasi-suspect classes).

189 *See* Flores, *supra* note 186.

190 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (describing rational basis review as "a paradigm of judicial restraint"). To be sure, Professors Katie Eyer and Earl Maltz have revealed Justices' deliberations during the 1970s, which cast doubt on simple assumptions regarding how long rational basis review remained unambiguously toothless. *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014); Earl M. Maltz, *The Burger Court and the Conflict over the Rational Basis Test: The Untold Story of* Massachusetts Board of Retirement v. Murgia, 39 J. SUP. CT. HIST. 264 (2014).

191 As for *Cleburne* itself, animus may have been an attractive option for the Court because of the evidence that neighborhood dislike of the intellectually disabled triggered the challenged government action. *See* City of Cleburne v.

on animus.[192] For our purposes, the important point is that exogenous pressures—in this case, the Court's felt need to move the law forward and its lack of any other viable doctrinal tool—played a role in eventually rendering *Moreno* the very opposite of a one-off, despite its original relegation to secondary doctrinal status in the 1970s.

VI
LESSONS LEARNED AND QUESTIONS RAISED

Thus, derelicts and one-offs (and, by extension, cases confined to their facts[193]) find themselves intricately related. At the same time, pathways exist by which a one-off can avoid decaying into a derelict and, indeed, blossom into a font of doctrinal development. What do these relationships and dynamics teach about the nature of doctrinal evolution and legal doctrine more generally? What follow-up questions do they raise?

A. One-Offs Can Play Meaningful Doctrinal Roles

The first lesson this examination teaches is that one-offs can play legitimate roles in creating and maintaining doctrinal structures. Consider a classic type of one-off: a case that simply applies a preexisting legal standard but reaches an unusual result and then remains largely uncited and undeveloped. *Allegheny Pittsburgh*, an example of this species, makes clear that such a case can subtly change the law, at least by sending messages to lower courts about the proper meaning of a legal standard such as rational basis.[194]

But leave aside the messages such a case sends to lower courts.[195] Instead, focus on this Article's subject—the impact

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Cleburne Living Ctr., Inc., 473 U.S. 432, 448–49 (1985) (noting the trial court's findings about that dislike).

192 *See id.* at 450 (concluding that the City of Cleburne's action rested on "irrational prejudice"); *see also* Romer v. Evans, 517 U.S. 620, 634 (1996); United States v. Windsor, 570 U.S. 744, 770 (2013) (both relying on animus ideas); Lawrence v. Texas, 539 U.S. 558, 581–83 (2003) (O'Connor, J., concurring in the judgment) (same).

193 *See supra* text accompanying note 135 (describing such cases as occupying an intermediate position between derelicts and one-offs).

194 For one example of lower courts receiving that message, see Downingtown Area Sch. Dist. v. Chester Cnty. Bd. of Assessment Appeals, 913 A.2d 194, 201 (Pa. 2006) (citing *Allegheny Pittsburgh* for the proposition that "federal law clearly contemplates the seasonable attainment of rough equality in treatment among similarly situated property owners," and on that basis proceeding to investigate how the state had subdivided classes of property for property tax purposes).

195 *See* Re, *supra* note 30 (discussing this issue).

of such a case on the same court that decided it. A one-off like *Allegheny Pittsburgh* illustrates the straightforward insight that the effective meaning of a doctrinal rule, such as rational basis review, can shift depending on how a case applies that rule.[196] But this method of lawmaking leaves open the possibility that the court deciding that case will subsequently ignore that shift, simply by ignoring that particular application of an already-recognized legal principle.[197] By contrast, a later court might find it more difficult to ignore an earlier case that had explicitly altered the relevant legal doctrine. In short, both methods of deciding the case might lead a conscientious judge in a later case to conclude that the earlier case had changed the law. But the former type of case is especially susceptible to instead decaying into a derelict that, instead of changing the law, ends up an isolated relic lacking any broad impact.[198]

But not all cases merely implicitly changing the law actually decay into derelicts. Why might some such cases end up surviving, even if they fail to generate further doctrinal evolution? One answer is, simply enough, that the doctrine needs no further development. In that situation, the case plays a meaningful role simply by sitting there, even if uncited (let alone examined and extended as part of a process of doctrinal development). Again, *Allegheny Pittsburgh* stands as an example,

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196 *See* Neily, *supra* note 106 (noting the Supreme Court's shifting applications of the ostensibly same rational basis standard).

197 *See, e.g.*, Heller v. Doe, 509 U.S. 312, 321 (1993) (applying a very deferential version of rational basis review to discrimination against the intellectually disabled, concluding that *Cleburne* had applied exactly that standard rather than a more rigorous version of rational basis review); *cf. id.* at 337 (Souter, J., dissenting) (arguing that the standard the Court applied in *Cleburne* would lead the state law in *Heller* to be struck down); *see also* Neily, *supra* note 106 (discussing a different version of this same issue).

198 *See Heller*, 509 U.S. at 321 (denying that *Cleburne* changed the law of rational basis review). Of course, later cases embraced the animus idea *Cleburne* had found in *Moreno*, thus arguably helping create a new and distinct legal doctrine. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634–35 (1996).

Concededly, other dynamics may encourage other judicial choices. For example, a Justice or Court that wished to minimize overall doctrinal change might prefer that a case threatening such change be recognized as altering the law by creating its own specialized doctrinal category to which that new rule applied, thus avoiding influencing (or "contaminating") the doctrinal pool from which the new case arose. For example, Katie Eyer explains that, perhaps counter-intuitively, it was Justice Rehnquist who was at least partially responsible for describing the Court's moves in the sex and illegitimacy discrimination areas in the mid-1970s as enshrining a new, intermediate standard of scrutiny for such cases. She argues that Justice Rehnquist may have "preferr[ed] such a characterization to the possibility that [those cases] might form the basis for a broader attack on deferential rational basis review." Eyer, *supra* note 190, at 533.

as a case that sits largely uncited (and certainly unextended)—the classic characteristic of a one-off. Yet as Section III.B discussed, such cases can nevertheless play a significant role in setting doctrinal rules, by demarcating the limits of the relevant constitutional doctrine. By its mere existence, *Allegheny Pittsburgh* established that rational basis review is meaningful. There was no such statement in *Allegheny Pittsburgh* itself; rather, it was its result that established that rule. Having done so, the rule was complete—or as complete as the Court wished it to be. Thus, despite being rarely cited in the intervening three-and-a-half decades, the case plays a meaningful role in demarcating and maintaining equal protection doctrine.

Of course, such rules-from-results cases can also play larger roles. In particular, later courts may choose to cite such a case as the source of an explicitly new rule. Consider *Reed v. Reed*.[199] Decided in 1971, *Reed* became the first modern Supreme Court case to rule for women on an explicit equal protection ground.[200] *Reed* did not self-consciously make new law; instead, it purported to apply standard rational basis scrutiny to find that the challenged Idaho intestacy law was unconstitutionally irrational. Thus, *Reed* could have become an early version of *Allegheny Pittsburgh*: a case that simply established that rational basis review remained meaningful and indeed could justify, at least occasionally, a judicial strike-down.

But *Reed* followed a very different trajectory. Two years later, Justice Brennan cited it in his pathbreaking sex equality opinion in *Frontiero v. Richardson*,[201] explaining that *Reed* could not have been intended simply to stand for the occasional exercise of meaningful judicial review under the rational basis standard. Instead, he insisted, *Reed* supported his argument for explicitly heightened scrutiny of sex classifications because *Reed* itself had to be understood as performing such height-

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199 404 U.S. 71 (1971).

200 Cases during the *Lochner* era sometimes struck down laws that restricted women's economic activity—for example, their ability to work for sub-minimum wages. *See, e.g.*, Adkins v. Child.'s Hosp. of the D.C., 261 U.S. 525 (1923). *Adkins*, involving a federal law, arose under the Fifth Amendment and thus technically did not technically implicate the Equal Protection Clause. *See* Truax v. Corrigan, 257 U.S. 312, 331–32 (1921) (explaining how the Due Process Clause provides at least some equality protections, if not as robust as those provided by the Equal Protection Clause). Nevertheless, *Adkins* relied heavily on equality reasoning. *See* 261 U.S. at 553 (citing the gradual equalization of men and women's legal status as a justification to doubt the constitutionality of a law regulating only female workers).

201 411 U.S. 677 (1973).

ened scrutiny.[202] In short, *Reed* could have been a one-off, nothing more than the rare case that found the rational basis standard unmet but that otherwise faded in prominence beyond standing as an outer limit on how deferential that standard is.[203] But instead, later Justices recognized its doctrinal potential and brought that potential to fruition.

This description of *Reed* is not meant to imply that only such bringing to fruition makes a case a "success" in the sense that it remains a vital part of the law. Again, the Court may choose to leave a case like *Allegheny Pittsburgh* alone because it accomplishes everything it needs to accomplish. In other words, a case whose rule-content flows predominantly or even exclusively from its result may play a legitimate role in judicial doctrine. Even though it is a one-off.

B. The Legitimacy of a Case Whose Rule Lies in Its Result

The reality that one-offs can play legitimate doctrinal roles raises interesting follow-up questions about the Supreme Court's institutional role. Some legal scholars argue that appellate cases—and Supreme Court cases in particular and Supreme Court *constitutional* cases even more particularly—are distinctive because the Court constitutes what Ronald Dworkin called "a forum of principle" in which broad constitutional propositions are debated, decided and expressed.[204] One might object that a rule that arises from a mere result—the kind of rule emanating, say, from *Allegheny Pittsburgh*—lacks the qualities Dworkin saw, either empirically or aspirationally, in the Court's work. Is that type of one-off nevertheless a legitimate part of the Court's output? Or does a case deserve such legitimacy only if it explicitly states the principle on which it is basing its decision? In short, is a case such as *Allegheny Pittsburgh* truly a legitimate part of the Court's work product?

That question raises issues that are both difficult and foundational to one's understanding of the Supreme Court's proper

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202 *See id.* at 684 ("Despite the [state's and the lower court's] contentions . . . the Court [in *Reed*] held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme . . . .").

203 *See supra* subpart III.B (describing this role for one-offs).

204 *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517 (1981) ("Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power.").

role.[205] On the one hand, it is at least plausible that opinions that conceal their larger meaning by purporting merely to apply settled law to facts frustrate the function of public debate and decision that Dworkin and others ascribe to the Court. On the other hand, a result—especially an unusual one, such as a rational basis strike-down—does send a message, at least to those who follow the Court's work closely and perhaps even to those who don't.[206] For example, *Reed*'s 1971 invalidation of a sex-discriminatory law made waves. (Consider the front-page headline of the *New York Times* the next day: "Court, for First Time, Overrules A State Law That Favors Men."[207]) Nevertheless, *Reed* failed to ground that result in any new broader rule of heightened scrutiny for sex discrimination. For some scholars, however, that narrowness is a virtue, because, among other things, it leaves open space for democratic deliberation on those broader questions.[208]

So understood, *Allegheny Pittsburgh*, *Reed* and cases like them raise the question whether the Court has a responsibility to provide deeply-theorized reasons for its results.[209] If it does have that responsibility, then at least some one-offs—those that do no more than demarcate the limits of a doctrinal rule simply by applying that rule to reach an unusual result—do seem to evade it. This Article does not purport to answer whether courts do indeed have that responsibility; again, that complex question lies far beyond this Article's scope. But one-offs—in particular, the doctrinal roles they can play—surely deserve to be part of that debate.

C. Statements of Principle

Other cases that at least held the potential of becoming one-offs don't evade any such responsibility discussed immediately

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205 *See infra* note 229 (citing examples of the vast literature discussing these questions).

206 *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 41–53 (2010) (discussing the concept of "acoustic separation," in which Court opinions, depending on how they are written, send distinct messages to different audiences).

207 Fred P. Graham, *Court, for First Time, Overrules A State Law That Favors Men*, N.Y. TIMES, Nov. 23, 1971, at 1.

208 *See, e.g.*, SUNSTEIN, *supra* note 17, at 24–45.

209 *See, e.g.*, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (arguing in favor of "procedural minimalism" that leaves follow-on determinations for democratic deliberation but against "substantive minimalism" that defers to legislative outcomes on matters necessary to decide the case in front of the court).

above.[210] Indeed, some potential one-offs rest on explicit statements of deep constitutional principle. *Moreno*'s "bare . . . desire to harm" language[211] explicitly states such a principle. Indeed, *Moreno* is known today exactly for that statement, and far less for its result striking down a component of the federal food stamp law. Cases such as *Moreno* address the same questions the prior sub-section raised, but from a very different perspective. First, to what extent should a Supreme Court committed to principled adjudication rest decisions, where possible, on statements of foundational principles? Second, and of more immediate relevance, how does reliance on such principles implicate the phenomenon of one-offs?

As context for these questions, recall what the Court did during *Moreno*'s fallow years. Rather than explicitly grounding equal protection decisions on the fundamental principle that government must always have a public-regarding justification for its actions, it instead constructed an elaborate structure of suspect class analysis and ensuing tiered ends-means review based on the result of that analysis.[212] This is a significantly different approach than *Moreno*'s. No constitutional principle mandates that sex discrimination receive intermediate scrutiny or that social and economic legislation receive only rational basis review.[213] Instead, scholars and justices have long explained that such rules are best understood as decision rules that implement the Constitution's otherwise vague mandate that no state deny to any person "the equal protection of the laws."[214] Grounded ultimately in Footnote 4 of *United States*

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210 *See supra* subpart VI.B.

211 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

212 Justice Stevens was well-known for opposing such structures, favoring instead decisions grounded explicitly on core constitutional principles. *See* Andrew Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006); William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889 (2011) (both explaining his approach).

213 By contrast, there may be a constitutional principle requiring that government satisfy a heavy burden of persuasion if it engages in race discrimination (however one might define that term), given the race equality motivations for Section 1 of the Fourteenth Amendment. *See, e.g.*, JACOBUS TENBROEK, EQUAL UNDER LAW (First Collier Books 1965) (1951).

214 *See, e.g.*, Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 5 (2014) (describing tiered scrutiny frameworks as an example of a constitutional decision rule); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 383 (2003) (Breyer, J., dissenting) (using similar terminology to describe the Court's equal protection doctrinal structure).

v. Carolene Products,[215] suspect class analysis attempts to discern when it may be appropriate for courts to review legislative action carefully for unconstitutional discrimination and when, by contrast, judicial intervention is unnecessary, given the ability of the burdened group to make its best deal in the pluralist political process.[216] But such guideposts for judicial action are not the same as underlying constitutional principles.[217]

Does the character of suspect class analysis as a mere decision rule render it a second-best approach to constitutional adjudication when a more direct path to applying core constitutional meaning—the path *Moreno* offered—is available? More relevantly for current purposes (and perhaps counter-intuitively), does relying on such core meaning create the conditions for the Court issuing one-offs, if that reliance preempts the creation of sub-constitutional decision rules that more readily allow doctrinal development by creating stable and easy-to-follow frameworks for such development?

Scholars have debated the merits of opinions based in deeply-theorized principles versus opinions relying on doctrinal formulas. Richard Fallon has argued in favor of relying on such formulas, on the ground that they allow the Court "to avoid deeply theorized grounds for its judgment" and thus leave space for democratic input.[218] Relatedly, but distinctly, Cass Sunstein has urged courts to "leave things undecided"—that is, to reject what he referred to as the judicially "maximalist" approach of deciding cases "in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes."[219] Sunstein's call for minimalism in some ways goes beyond Fallon's: while Fallon applauds doctrinal formulas, Sunstein appears, at least in some cases, to call not just for the "shallow" opinions Fallon also favors, but also for "narrow" opinions that don't purport to decide, via the announcement of broadly-applicable doctrinal rules, cases not (yet) before the Court. Thus, for example, Sunstein applauded

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215 304 U.S. 144, 152 n.4 (1938).

216 *See generally* ELY, *supra* note 70.

217 *See supra* text accompanying notes 213–214; *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (examining the difference between such principles and courts' capacity to discern and apply them).

218 Peters, *supra* note 209, at 1467; *see, e.g.*, Richard H. Fallon, Jr., *The Supreme Court 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 116 (1997).

219 *See* Sunstein, *Foreword*, *supra* note 17, at 15.

Romer v. Evans[220] because it did not purport to decide issues of sexual orientation discrimination beyond the Colorado law at issue in that case.[221]

To be sure, a minimalist decision need not have minimalist effects. *Reed* was a fact-intensive, minimalist decision of the sort Sunstein would applaud, but two years later it served as the foundation for Justice Brennan's broad and deep argument for according explicitly heightened judicial scrutiny to sex discrimination.[222] Of similar effect on the federal commerce power, as Justice Souter noted in his *Lopez* dissent, was the Court's 1937 opinion in *NLRB v. Jones & Laughlin Steel Corp.*[223] Such effects can surprise even the Justices themselves. For example, during their deliberations on *City of Cleburne v. Cleburne Living Center, Inc.*,[224] Justice Rehnquist, acquiescing in the Court's evolving consensus to decide that case on a seemingly fact-intensive, minimalist rational basis ground, predicted—spectacularly inaccurately—that any such grounding would render the case inconsequential.[225] Conversely, cases featuring broad statements of legal principles may decay into one-offs or even derelicts if the Court ultimately moves in a different direction.[226] Nevertheless, the basic point remains: leaving things undecided[227] by deciding cases on narrow, fact-specific grounds arguably increases the chances that they will not generate further doctrinal development—i.e., that they will become one-offs.

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220 517 U.S. 620 (1996).

221 *See* SUNSTEIN, *supra* note 17, at 137–43.

222 *See supra* note 202.

223 301 U.S. 1 (1937); *see also supra* note 75 (citing Justice Souter's description of *Jones & Laughlin* in this way).

224 473 U.S. 432 (1985).

225 *See* Letter from Rehnquist, J. to White, J. (June 5, 1985) ("To simply 'punt' [on the question of whether the intellectually disabled constituted a quasi-suspect class] and turn the case into one of five or six hundred decisions of this Court applying rational basis equal protection analysis to a particular ordinance would, to my mind, rob the decision of any importance which it would otherwise have."); *see also* Christine Basic, *Strict Scrutiny and the Sexual Revolution*: Frontiero v. Richardson, 14 J. CONTEMP. LEGAL ISSUES 117, 121 n.16 (2003) (recounting *Reed*'s author exclaiming, in response to Justice Brennan's draft opinion in *Frontiero*, "The author of *Reed* never remotely contemplated such a broad concept [as 'suspect classification . . . strict scrutiny']. But then, a lot of people sire offspring unintended.").

226 *See, e.g.*, ELY, *supra* note 70, at 148 (describing the Warren Court's "glittering" campaign to make poverty constitutionally suspect, which ended in a defeat he characterized as "a rout").

227 *See* Sunstein, *Foreword*, *supra* note 17 (using that term as the title for his Supreme Court foreword essay).

A generation before Sunstein's argument, Alexander Bickel applauded such narrow decision-making when he called for the Court to exercise restraint in deciding cases and even in deciding *whether* to decide them.[228] Both Sunstein's call to leave things undecided and Bickel's advice that the Court exhibit "the passive virtues" have generated significant critiques,[229] with voices continuing to encourage the Supreme Court's more heroic impulses.[230] This Article does not enter that debate. Rather, for our purposes, the relevant question that debate implicates is the place of one-offs in the relationship between decisions that self-consciously rest on deeply theorized foundational principles, and Sunstein-style "shallow" opinions.[231]

Interestingly, one-offs appear to be capable of description as either type of judicial statement. On the one hand, a one-off like *Allegheny Pittsburgh*, whose law content rests purely on its result, is the opposite of a deeply theorized statement of constitutional principle. But on the other hand, *Olech*'s validation of class-of-one equal protection claims reflects deep theoretical commitments, most notably about the personal nature of equal protection rights. While *Olech* did not explicitly express those deep commitments, the *per curiam* opinion's characteristics at least suggest their presence in the background. Finally, *Moreno did* rest on such a deep principle, explicitly stated, when it announced its now-canonical "bare . . . desire to harm" language. And yet it remained fallow for a dozen years,[232] and might have remained so for many more—i.e., might have remained a one-off—had the Court's suspect class experiment not failed.

One-offs, then, can apparently run the gamut from shallow to deep.[233] Chameleon-like, they can take on the background coloration of a Court opinion that either strives to announce a fundamental principle of constitutional law or rests content

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228 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

229 Notable among this vast literature are Peters, *supra* note 209 (critiquing Sunstein); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (critiquing Bickel).

230 *See, e.g.*, Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347 (2010) (critiquing minimalism).

231 *See supra* text accompanying notes 18–23 (explaining Sunstein's use of these terms).

232 *But see supra* note 173 (describing the Court's citation of *Moreno* during these years).

233 However, to continue using Sunstein's typology, one thing one-offs *cannot* be is broad. *See supra* text accompanying notes 21–23 (explaining "breadth").

merely to apply facts to existing doctrine without elaborating on either that doctrine or the deeper principles on which it rests.

CONCLUSION

This Article has examined the phenomenon of one-offs to determine what it tells us about legal doctrine and the work of apex courts such as the Supreme Court. It has revealed their surprisingly varied impacts on constitutional doctrine, including impacts that often render one-offs legitimate and useful contributions to that doctrine. These qualities render one-offs a species of decision that deserves more study to examine further the issues this Article has identified and analyzed.

One-offs also deserve more study because the current Court's doctrinal trajectory may make them more common. In particular, the Court's much remarked-on historical turn,[234] exemplified by cases such as *New York State Rifle & Pistol Association v. Bruen*,[235] may generate opinions whose applications pose difficult problems the Justices might prefer to avoid. If so, the Court may rest content simply to have planted its ideological flag on that history-focused methodological terrain. In turn, cases such as *Bruen* may become one-offs, but of a different sort than one-offs left isolated and derelict.[236] Instead, they may take their place as cases that remain unelaborated on, but nevertheless, cases that stand for a vibrant principle—here, a methodological one.

In short, the current Court may begin creating not just one-offs, but one-offs of different types. That fact provides all the more reason for scholars to study this phenomenon.

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234 *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 188 NW. L. REV. 433 (2023).

235 142 S. Ct. 2111 (2022).

236 This is not to suggest that that historical turn by its nature generates opinions whose applications pose such problems. A case such as Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), which simply withdraws or denies a constitutional rights claim, may state a legal rule that is quite easy to apply—albeit one that may not require follow-on precedent expanding on it.

To be sure, even in a situation where the Court would prefer to leave a case unelaborated-upon and thus a potential one-off, other circumstances, such as a circuit split, may force the Court's hand. *See, e.g.*, United States v. Rahimi, 143 S. Ct. 2688 (2023) (granting certiorari in a case challenging the constitutionality of a federal statute prohibiting the possession of a firearm by someone who is the subject of a domestic violence restraining order); Petition for Writ of Certiorari, United States v. Rahimi, No. 22-915, 2023 WL 2600091, 14–15 (2023) (noting the existence of a circuit split on the issue the lower court decided).