

**IDENTITY CRISIS: CLAIM PRECLUSION IN CONSTITUTIONAL CHALLENGES TO STATUTES**

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**ABSTRACT**

*Claim preclusion bars parties from relitigating in a later action claims that were or should have been litigated in a prior action. How does this doctrine apply in constitutional challenges to state and federal statutes? When a plaintiff challenges one provision of a statute in one action, can she challenge a different provision of the same statute in a later action? And when, if ever, can she bring two successive challenges to the same provision?*

*Though the Supreme Court addressed these questions two terms ago in Whole Women’s Health v. Hellerstedt, its answers were incomplete. This Article searches for general principles guiding the Court’s decision and contextualizes them within broader theories of claim preclusion and constitutional adjudication. First, it proposes that Hellerstedt heralds a rejection of the “transactional” approach—a fact-based analysis that poorly approximates the relatedness of claims about the validity of statutory provisions. To determine what kind of rule should take its place, the Article turns to an analysis of the policies motivating claim preclusion and a theory posited by two scholars regarding the proper “phrasing” of its doctrine. Under this theory, the Article proposes, Hellerstedt establishes a narrow prima facie rule for claim preclusion in constitutional challenges to statutes: Only closely related provisions of a statute—i.e., those that impose interlocking requirements, serve similar functions, and take effect around the same time—need to be challenged together in a single action.*

*The Article then asks whether courts’ prevailing approach to claim-preclusion exceptions—which gives judges wide discretion to evaluate the equities in particular cases—is likewise inappropriate for constitutional challenges, where the issues are often both more abstract and more politically charged than in ordinary civil litigation. After concluding that it is, the Article proposes that courts fashion exceptions based instead on the structure of constitutional doctrine, which, the Article demonstrates, interacts with claim preclusion’s underlying policies in predictable ways. Finally, the Article argues that intervening factual developments should always give rise to a new constitutional claim against the same statutory provision—regardless of whether the prior or subsequent challenge was facial or as-applied.*

**TABLE OF CONTENTS**

INTRODUCTION..... 372  
I. CLAIM PRECLUSION IN CHALLENGES TO STATUTES..... 376  
    A. Claim Preclusion and the “Transactional” Approach..... 376

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B. <i>The Claim Preclusion Problems in Whole Women’s Health v. Hellerstedt</i> .....	379
II. SUCCESSIVE CHALLENGES TO RELATED PROVISIONS OF A STATUTE: THE RULE .....	384
A. <i>The Transactional Approach</i> .....	384
1. <i>Possible “Transactions” in a Challenge to a Statutory Provision</i> ....	386
2. <i>The Breakdown of the Transactional Approach</i> .....	390
3. <i>Coda: Does Claim Preclusion Matter in Constitutional Challenges?</i>	391
B. <i>Constructing a New Approach</i> .....	394
1. <i>Hellerstedt’s Rule for Claim Preclusion in Challenges to Statutes</i> .....	396
2. <i>Hellerstedt and the Jurisprudence of Rules and Exceptions</i> .....	399
3. <i>Exceptions: The Restatement and Beyond</i> .....	402
III. SUCCESSIVE CHALLENGES TO RELATED PROVISIONS: SOME EXCEPTIONS .....	406
A. <i>A Framework for Recognizing Structural Exceptions to Claim Preclusion</i> .....	406
1. <i>The Doctrine of Facial and As-Applied Challenges</i> .....	406
2. <i>Parallels with Claim Preclusion</i> .....	412
B. <i>The Structure of Constitutional Doctrine</i> .....	415
1. <i>Factual Tests</i> .....	418
2. <i>Legal Tests</i> .....	425
IV. SUCCESSIVE CHALLENGES TO THE SAME PROVISION .....	427
CONCLUSION.....	431

## INTRODUCTION

Imagine that the legislature in your state has just enacted a comprehensive new gun-control statute. The statute regulates the possession, purchase, and sale of guns; it bans guns in sensitive places, like schools, commercial areas, and government buildings; and it imposes special requirements for the possession of guns by minors, convicts, and the mentally ill.<sup>1</sup> You, an avid gun enthusiast, believe that the statute violates your rights under the Second Amendment. So, you file a lawsuit challenging the statute in federal court.

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<sup>1</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (listing “presumptively lawful” gun regulations).

Assuming that you have Article III standing to challenge more than one of the statute's provisions, which provisions would you challenge in your suit? Perhaps you would target the provisions that curtail the gun-related activities in which you participate most often. Or perhaps you would target those that interfere with what you perceive to be the historical traditions of gun ownership in the United States. In any case, you probably wouldn't worry about *losing* the right to challenge a provision of the statute by not challenging it in your first lawsuit. After all, you might assume, you could always challenge that provision later, in a second suit.

If you thought this, however, you could very well be wrong. Under the doctrine of claim preclusion, a plaintiff may not assert the same claim against the same defendant twice in separate civil actions.<sup>2</sup> For purposes of this doctrine, a plaintiff's "claim" encompasses not just the matters that she actually litigated in a prior action, but also any other matters she *should have* litigated.<sup>3</sup> And although claim preclusion most often applies in disputes between private parties, it can also apply in constitutional challenges to statutes: After all, to challenge your state's new gun-control statute, you would have to file a civil action against the government official responsible for enforcing it and ask the court for an injunction. Thus, if you were to sue the same official twice, seeking an injunction against two different provisions of the statute, claim preclusion could bar your second challenge.

How are you supposed to know what comprises your "claim" in a challenge to a statute?<sup>4</sup> The Supreme Court addressed this question for the first time two terms ago in *Whole Women's Health v. Hellerstedt*.<sup>5</sup> The plaintiffs in that case, a group of abortion providers, first challenged a provision of a Texas statute—the "admitting-privileges" provision—as a facially unconstitutional "undue burden" on a woman's right to have an abortion.<sup>6</sup> After losing their first challenge, they challenged the provision again in a second action, except

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<sup>2</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 17 (AM. LAW INST. 1982) (providing the general rules on the effects of former adjudication).

<sup>3</sup> See *id.* § 24 (providing the "Dimensions of 'Claim' for Purposes of Merger or Bar").

<sup>4</sup> Throughout this Article, I use the term "challenge to a statute" as shorthand for a civil action in which a plaintiff sues a government official seeking a declaration that a statute, regulation, or other legal rule is invalid and an injunction should be issued against its enforcement. I do not mean the term to encompass all of the ways in which a person might seek judicial review of a statute. For example, after being charged with a crime, a defendant might raise as a defense the unconstitutionality of the statute he is alleged to have violated. Because a defense generally does not trigger claim preclusion, this method of invoking judicial review is beyond the scope of this Article. See 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4414, at 371 (3d ed. 2016) ("[T]he traditional conclusion has been that purely defensive use of a theory does not preclude a later action for affirmative recovery on the same theory."). But see *infra* note 273 (listing some lower court decisions to the contrary).

<sup>5</sup> 136 S. Ct. 2292 (2016).

<sup>6</sup> *Id.* at 2300, 2304–05.

this time they argued that it was unconstitutional only as it applied to two specific abortion clinics.<sup>7</sup> They also challenged another provision of the same statute—the “surgical-center provision”—for the first time.<sup>8</sup>

The Supreme Court held that claim preclusion barred neither challenge.<sup>9</sup> According to the Court, the second challenge to the admitting-privileges provision was not the same “claim” as the first challenge because of “changed circumstances” between the two lawsuits—specifically, certain adverse effects that the plaintiffs had merely *predicted* in their first suit “*ha[d] in fact occurred*” by the time of their second suit.<sup>10</sup> And the plaintiffs’ challenge to the surgical-center provision was not the same “claim” as their earlier challenge to the admitting-privileges provision, because the two challenges targeted “separate, distinct” statutory provisions that imposed “independent requirements,” had “different enforcement dates,” and “serve[d] two different functions.”<sup>11</sup>

The Court’s decision in *Hellerstedt* left many questions unanswered. When are two provisions sufficiently “distinct” such that a challenge to one will not bar a later challenge to the other? When are their “requirements” sufficiently “independent” or their “functions” sufficiently “different”? And if a plaintiff decides to challenge the same provision twice, how can a court tell whether circumstances have “changed” enough to permit the second suit?

Much hinges on the answers to these questions. On the one hand, reading *Hellerstedt* too narrowly would unnecessarily deprive prior plaintiffs of their rights to assert later constitutional challenges. True, because claim preclusion ordinarily applies only between the parties to a prior action,<sup>12</sup> in many cases a new plaintiff will be able to assert whatever challenges the prior plaintiff forfeited, and claim preclusion will be of little practical consequence. But in other cases, finding a new plaintiff may be prohibitively difficult. This might be the case where, for example, the statute applies only to a narrow class of persons, or where the prior action was a class action brought on behalf of all persons affected by the statute.

At the same time, too broad a definition would undermine the finality of judgments in constitutional challenges.<sup>13</sup> Allowing the same plaintiff to assert similar constitutional challenges in separate actions would impose unnecessary costs on courts, which would have to consider similar facts and legal arguments in two separate proceedings. It would also impose costs on the government, which may have justifiably assumed that the plaintiff did not intend to assert whatever challenges she omitted from her prior action.

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<sup>7</sup> *Id.* at 2307.

<sup>8</sup> *Id.* at 2305, 2308–09.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2306.

<sup>11</sup> *Id.* at 2308.

<sup>12</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 17 (AM. LAW INST. 1982).

<sup>13</sup> *See infra* Part I.A.

Though claim preclusion cannot ensure complete finality in constitutional litigation—because again, a new plaintiff could always assert whatever challenges the prior plaintiff lost—it can and should encourage a plaintiff to challenge a reasonable grouping of statutory provisions in her first lawsuit.

Building on the factors identified by the Supreme Court in *Hellerstedt*, this Article proposes a more comprehensive theory of claim preclusion for challenges to statutes. Part I begins by demonstrating that *Hellerstedt*'s approach does not fit with the prevailing modern theory of claim preclusion, the “transactional” approach advanced by the Restatement (Second) of Judgments.<sup>14</sup> Under this approach, a plaintiff's claim consists of all of the rights, remedies, and theories of liability that arise out of the “common nucleus of operative facts” underlying her first action.<sup>15</sup> Though this fact-based approach may be sensible for defining a plaintiff's “claim” in an ordinary civil case, Part I argues, there is no coherent factual nucleus out of which a challenge to a statute can be said to “arise.” Thus, Part I concludes, the transactional approach neither explains *Hellerstedt* nor helps courts think about claim preclusion problems in constitutional challenges.

Fortunately, neither *Hellerstedt* nor any other authority requires courts to apply the transactional approach in constitutional challenges. Part II takes a step back and asks what kind of approach should take its place. Drawing on the “jurisprudence of rules and exceptions” for claim preclusion advanced by Professors Robert Casad and Kevin Clermont,<sup>16</sup> this Part proposes that *Hellerstedt* be read as announcing a “clear, simple, and rigid” rule<sup>17</sup>: Closely related statutory provisions—those that impose interlocking “requirements,” serve similar “functions,”<sup>18</sup> and take effect at roughly the same time—ought to be challenged together in a single action.

Like all claim-preclusion rules, however, *Hellerstedt*'s broad rule should be tempered by flexible exceptions. Particularly salient here, Part II argues, is the Restatement's exception for when “it is the sense of [a constitutional] scheme that the plaintiff should be permitted to split his claim.”<sup>19</sup> As written, Part II recognizes, this exception is too broadly phrased to be of much use to

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<sup>14</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. LAW INST. 1982).

<sup>15</sup> As the Restatement (Second) of Judgments notes:

What factual grouping constitutes a “transaction” . . . [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

*Id.* § 24(2).

<sup>16</sup> See ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 39–45 (2001).

<sup>17</sup> *Id.* at 40.

<sup>18</sup> *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016).

<sup>19</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d) (AM. LAW INST. 1982).

courts seeking to apply *Hellerstedt*'s rule for constitutional challenges. To remedy this problem, Part III draws on scholarship from various areas of constitutional law to propose a more particularized set of exceptions to flesh out this broadly-phrased exception. Finally, Part IV addresses successive challenges to the same statutory provision and argues that although *Hellerstedt* does not foreclose the application of claim preclusion to such challenges, its allowance for "changed circumstances" has a wider application than the decision initially lets on.

## I. CLAIM PRECLUSION IN CHALLENGES TO STATUTES

### A. Claim Preclusion and the "Transactional" Approach

Claim preclusion, like the related doctrine of issue preclusion, is an aspect of res judicata, a body of rules that prohibits the relitigation of matters that either were or should have been litigated in a prior action.<sup>20</sup> Though in theory, res judicata's constituent rules could be set by statute or even by the Constitution,<sup>21</sup> in most U.S. jurisdictions (including the federal courts), courts fashion the rules as a matter of common law.<sup>22</sup> As a result, res judicata is a flexible doctrine that courts routinely revise in response to new, policy-driven considerations.<sup>23</sup>

The purpose of res judicata is to promote the finality of judgments.<sup>24</sup> This finality is advantageous to both the parties to a given lawsuit and to the public at large.<sup>25</sup> From the public's perspective, finality reduces the risk of inconsistent judicial decisions, which would undermine the public's faith in the courts. It also reduces the risk of redundant litigation, which is wasteful not only of the parties' resources, but also the judiciary's. From the parties' perspective, finality creates a sense of repose—an assurance that, after a matter has been litigated once, the parties can consider it settled and adjust their real-world dealings accordingly. Finality also makes it more difficult for either party to intentionally vex the other with repetitive litigation.<sup>26</sup>

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<sup>20</sup> See WRIGHT, MILLER & COOPER, *supra* note 4, § 4403, at 17, 25–26.

<sup>21</sup> Both the Constitution's Full Faith and Credit Clause and 28 U.S.C. § 1738 require that the court of one state accord the judgment of a sister state the same preclusive effect that it would accord one of its own judgments—that is, that it apply at least its own rules of res judicata to a sister-state judgment. See U.S. CONST. art. IV, § 1. 28 U.S.C. § 1738 requires that a *federal* court also provide such preclusive effect to a state-court judgment.

<sup>22</sup> CASAD & CLERMONT, *supra* note 16, at 5–6; see also *Semtek Int'l v. Lockheed Martin*, 531 U.S. 497, 508 (2001) (characterizing federal claim-preclusion rules as "federal common law").

<sup>23</sup> CASAD & CLERMONT, *supra* note 16, at 6.

<sup>24</sup> WRIGHT, MILLER & COOPER, *supra* note 4, § 4403, at 26.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Claim preclusion is a defense to a claim.<sup>27</sup> It bars recovery on the claim against which it is asserted if three elements are met: (1) the party asserting the claim (i.e., the plaintiff) and the party asserting preclusion (i.e., the defendant) were both parties to a prior action; (2) the court entered a “valid and final” judgment in that action;<sup>28</sup> and (3) the claim is the “same” as a claim that the plaintiff asserted against the defendant in the previous action.<sup>29</sup> The third element—the “identity” of claims<sup>30</sup>—is often the most difficult to apply, and is the focus of our inquiry here.

To determine whether two claims are “the same,” most courts today<sup>31</sup> follow the “transactional” approach laid out in the Restatement (Second) of Judgments: “When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the *transaction, or series of connected transactions*, out of which the action arose.”<sup>32</sup> The “transaction” out of which an action “arises” is the “natural grouping or common nucleus of operative facts” underlying the plaintiff’s claims in that action.<sup>33</sup> “What factual grouping constitutes a ‘transaction,’”

<sup>27</sup> See FED. R. CIV. P. 8(c)(1) (listing *res judicata* as a defense that must be asserted in a responsive pleading).

<sup>28</sup> See RESTATEMENT (SECOND) OF JUDGMENTS §§ 1–12 (AM. LAW INST. 1982) (setting out validity’s three requirements of notice, territorial jurisdiction, and subject-matter jurisdiction); *id.* § 13 (discussing finality).

<sup>29</sup> See *id.* § 18 (“When a valid and final personal judgment is rendered in favor of the plaintiff . . . [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof.”); *id.* § 19 (“A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.”).

<sup>30</sup> See, e.g., *Turtle Island Restoration Network v. U.S. Dep’t of State*, 673 F.3d 914, 917 (9th Cir. 2012) (quoting *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003)) (using four factors to determine the “identity of claims” to decide whether claim preclusion applies).

<sup>31</sup> Though many jurisdictions today follow the Restatement’s approach, some still follow older approaches. The Restatement summarizes these approaches: Some courts define a claim as “a single theory of recovery, so that . . . a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant.” RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (AM. LAW INST. 1982). Others define a claim as “a single primary right as accorded by the substantive law, so that, if it appeared that the defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary occurrence.” *Id.* Still others “look[] to sameness of evidence; a second action [i]s precluded where the evidence to support it [i]s the same as that needed to support the first.” *Id.* Because modern rules on pleading, joinder, and amendment make it easy to litigate related matters together in one action, the transactional approach “reflects the expectation that parties who are given the capacity to present their ‘entire controversies’ shall in fact do so.” *Id.* For an argument that this rule is too harsh even in the context of ordinary civil litigation, see Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 347 (1948) (arguing that *res judicata* “applies too harsh a penalty”).

<sup>32</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (AM. LAW INST. 1982) (emphasis added).

<sup>33</sup> *Id.* § 24(2) cmt. b. Examples of a “transaction” might include a business deal in a contract case, *id.* § 24 cmt. c, illus. 3, a car accident in a tort case, *id.* § 24 cmt. c, illus. 1–2, or an employer–employee

the Restatement continues, “[is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.”<sup>34</sup> Thus, two claims can be “the same” for purposes of claim preclusion even though they allege different harms, assert different substantive theories of liability, or seek different kinds of relief.<sup>35</sup>

In addition to this broad prima facie rule, claim preclusion is subject to a number of narrow exceptions.<sup>36</sup> For example, if the prior judgment specified that it was “without prejudice” or if the parties agreed that the judgment would not preclude a particular claim, a later court will not treat the judgment as preclusive.<sup>37</sup> Likewise, if the plaintiff could not have asserted one of the claims in a prior action because of a limitation on the prior court’s subject-matter jurisdiction, claim preclusion will not apply.<sup>38</sup> Inferences drawn from the applicable substantive law can also defeat claim preclusion; thus, for example, if “[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim,” then preclusion will not apply.<sup>39</sup> Even in the absence of such a scheme (such as in a contract or tort action), the same is true if “reasons of substantive policy” so counsel.<sup>40</sup>

Thus, the transactional approach aims to strike a balance between “[t]he desire to achieve efficiency and repose” and “the fear of forfeiting just claims.”<sup>41</sup> Perhaps because of this balance, most federal courts and many state courts have adopted the transactional approach as their own.<sup>42</sup>

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relationship. *See, e.g.*, *Wilkes v. Wyo. Dep’t of Emp’t*, 314 F.3d 501, 504 (10th Cir. 2002) (internal quotation marks omitted) (“This court repeatedly has held that all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim-preclusion purposes.”).

<sup>34</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (AM. LAW INST. 1982).

<sup>35</sup> *Id.* § 25.

<sup>36</sup> *See id.* § 20 (providing exceptions to the general rule of bar); *id.* § 26(1) (providing exceptions to the general rule against claim splitting).

<sup>37</sup> *See id.* § 26(1)(a)–(b), cmts. a–b (providing exceptions to § 24 extinguishment of claims).

<sup>38</sup> *See id.* § 26(1)(c), cmt. c (contextualizing the exceptions to § 24 extinguishment of claims).

<sup>39</sup> *Id.* § 26(1)(d) cmt. e.

<sup>40</sup> *See id.* § 26(1)(e) cmts. f–h.

<sup>41</sup> WRIGHT, MILLER & COOPER, *supra* note 4, § 4407, at 173; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (AM. LAW INST. 1982) (“[U]nderlying the [transactional] standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.”).

<sup>42</sup> WRIGHT, MILLER & COOPER, *supra* note 4, § 4407, at 175 n.22, 185 n.44 (listing federal and state courts that have adopted the transactional approach).

*B. The Claim Preclusion Problems in Whole Women’s Health v. Hellerstedt*

The Supreme Court recently considered how the doctrine of claim preclusion applies in constitutional challenges to statutes in *Whole Women’s Health v. Hellerstedt*.<sup>43</sup> That case was the second of two challenges brought by a group of Texas abortion providers to House Bill 2 (“H.B. 2”),<sup>44</sup> a 2013 Texas statute that regulates abortion providers.

In their first action, filed a few months after H.B. 2 was enacted but before it took effect,<sup>45</sup> the plaintiffs challenged a provision of the statute that required all abortion providers to have “admitting privileges” at a nearby hospital.<sup>46</sup> A doctor with admitting privileges is a member of a hospital’s staff and can, at least in theory, continue providing inpatient care to a patient even after she is hospitalized.<sup>47</sup> According to Texas, the purpose of the admitting-privileges provision was to ensure continuity of care and enhance physician communication in the event that the abortion of a woman’s pregnancy required hospitalization.<sup>48</sup> It also served a credentialing function, as hospitals were less likely to grant admitting privileges to poorly qualified physicians.<sup>49</sup>

The plaintiffs countered that abortions almost never required hospitalization, and that in any case, Texas had pointed to no examples where a woman was actually harmed because of a miscommunication between her abortion provider and her emergency-room physician.<sup>50</sup> Moreover, because hospitals

<sup>43</sup> 136 S. Ct. 2292 (2016).

<sup>44</sup> H.B. 2, 83d Leg., 2d Sess. (Tex. 2013).

<sup>45</sup> Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott I*), 951 F. Supp. 2d 891, 896 (W.D. Tex. 2013), *rev’d in part by* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott II*), 748 F.3d 583 (5th Cir. 2014).

<sup>46</sup> See *Hellerstedt*, 136 S. Ct. at 2310 (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)) (providing that “[a] physician performing or inducing an abortion . . . must . . . have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced”).

<sup>47</sup> See Brief for Petitioner at 19, *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (No. 15-274), 2015 WL 9592289, at \*19 (describing hospital admitting privileges in general terms). A doctor without admitting privileges, by contrast, must “hand off” a patient who requires hospitalization to a member of the hospital’s staff. *Abbott I*, 951 F. Supp. 2d at 899. In most cases, however, a patient experiencing complications from an abortion would seek admission at the hospital nearest to her and would receive care from an emergency-room physician who would communicate with the patient’s outpatient physician—even if her outpatient physician has admitting privileges at the hospital. *Id.* at 900. Federal law requires hospitals to admit a patient who needs emergency care, regardless of whether her outpatient doctors has admitting privileges. *Id.* at 899–900 (quoting 42 U.S.C. § 1395dd (1988)).

<sup>48</sup> *Abbott II*, 748 F.3d at 592.

<sup>49</sup> *Id.* (explaining that the State defended the provision as a means of “ensur[ing] that only physicians ‘credentialed and board certified to perform procedures generally recognized within the scope of their medical training and competence’ would provide abortions” and “to ‘screen out’ untrained and incompetent abortion providers, who could not continue in the abortion practice if they were not able to obtain admitting privileges”).

<sup>50</sup> *Id.* at 590–91; see also *Hellerstedt*, 136 S. Ct. at 2311–12 (noting Texas’s lack of evidence on this point);

usually condition the granting of admitting privileges on the number of patients a doctor admits, and because abortions so seldom require hospitalization, admitting privileges would be especially difficult for abortion providers to obtain, and many clinics would have to close if the admitting-privileges provision were to take effect.<sup>51</sup> Thus, the plaintiffs contended, given its marginal safety benefits, the admitting-privileges provision was an unconstitutional “undue burden” on the right of Texas women to have an abortion.<sup>52</sup>

The district court agreed and enjoined the enforcement of the provision, but the Fifth Circuit reversed.<sup>53</sup> Unpersuaded of the difficulties that abortion providers would face in obtaining the requisite admitting privileges, the court held that the provision passed constitutional muster.<sup>54</sup> The plaintiffs did not petition for certiorari, and the admitting-privileges provision took effect.<sup>55</sup>

One week later, the same plaintiffs<sup>56</sup> filed a second action challenging the admitting-privileges provision again. This time, however, they challenged it only insofar as it applied to two specific clinics,<sup>57</sup> alleging that since the filing of their first lawsuit, the doctors at those two clinics had in fact been unable to obtain the required admitting privileges and that as a result, the clinics would soon have to close.<sup>58</sup> The plaintiffs also challenged a different provision of H.B. 2, which required abortion clinics to meet the same physical plant requirements as “ambulatory surgical centers”—facilities that perform surgeries but do not provide inpatient (i.e., overnight) care.<sup>59</sup> Because abor-

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*id.* at 2320 (Ginsburg, J., concurring) (noting that doctors without admitting privileges at a local hospital could perform plenty of more dangerous surgical procedures—including childbirth).

51 *Abbott I*, 951 F. Supp. 2d at 900.

52 *Id.*

53 *Id.* at 901; *Abbott II*, 748 F.3d at 600.

54 *Abbott II*, 748 F.3d at 597–600.

55 *See* *Whole Woman’s Health v. Cole*, 790 F.3d 563, 577 (5th Cir. 2015), *rev’d and remanded sub nom. Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016) (“The time for seeking certiorari from the United States Supreme Court passed, and no petition was filed.”).

56 The plaintiffs in the second suit were not all the same, but the two groups of plaintiffs “largely overlap[ped].” *Cole*, 790 F.3d at 577 n.14.

57 *Hellerstedt*, 136 S. Ct. at 2301.

58 *Id.*; *see also Cole*, 790 F.3d at 591 (“We now know with certainty that the non-ASC abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort.”).

59 *See* TEX. HEALTH & SAFETY CODE ANN. § 243.002 (West 2015) (“‘Ambulatory surgical center’ means a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care.”); *Hellerstedt*, 136 S. Ct. at 2300 (providing that “the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code] for ambulatory surgical centers” (quoting TEX. HEALTH & SAFETY CODE ANN. § 245.010(a))). These requirements included: “scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control.” The costs of complying with these requirements would “rang[e] from \$1 million . . . to \$3 million per facility.” *Id.* at 2315–16, 2318.

tions could be performed safely without these expensive physical modifications, the plaintiffs claimed, the surgical-center requirement was also an “undue burden” on abortion rights.<sup>60</sup> Again, the district court agreed and enjoined the enforcement of both provisions.<sup>61</sup>

The Fifth Circuit reversed in part, holding that claim preclusion barred the challenge to the surgical-center provision but not the admitting-privileges provision.<sup>62</sup> The challenge to the surgical-center provision, the court explained, was barred because it “ar[ose] from the same transaction” as the plaintiffs’ earlier challenge to the admitting-privileges requirement.<sup>63</sup> This was so because the two provisions were “enacted at the same time as part of the same act,” “motivated by a common purpose,” and “administered by the same state officials.”<sup>64</sup> The second challenge to the admitting-privileges provision, however, was permissible because it was an as-applied challenge (i.e., to only two clinics), whereas the prior challenge was a facial challenge.<sup>65</sup>

In a 5-3 opinion by Justice Breyer, the Supreme Court reversed the Fifth Circuit in part, holding that neither claim was barred by claim preclusion.<sup>66</sup> First, the Court agreed with the Fifth Circuit that although the plaintiffs had challenged the admitting-privileges requirement twice in two separate lawsuits, their “preenforcement facial challenge” was not the same “claim” as their “postenforcement as-applied challenge.”<sup>67</sup> This was because their second challenge relied on “later, concrete factual developments” that were “unknowable before [H.B. 2] went into effect”—specifically, the difficulty of obtaining admitting privileges for abortion providers at two clinics and the consequent imminent closure of those clinics.<sup>68</sup> As support for this conclusion, the Court cited the Second Restatement’s position “that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.”<sup>69</sup> It also gave the hypothetical

<sup>60</sup> *Hellerstedt*, 136 S. Ct. at 2300.

<sup>61</sup> *Id.* at 2301.

<sup>62</sup> The Fifth Circuit affirmed the district court’s injunction against the application of the admitting-privileges requirement to the McAllen clinic, because it found that there was no other facility within a reasonable distance where women in the Rio Grande Valley could obtain an abortion. *Cole*, 790 F.3d at 592–96. It reversed the injunction as to the El Paso clinic, however, because women in El Paso could travel to an abortion clinic only twelve miles away. *Id.* at 596–98. And it reversed the statewide injunction as foreclosed by claim preclusion. *Id.* at 581.

<sup>63</sup> *Hellerstedt*, 136 S. Ct. at 2303 (citing *Cole*, 790 F.3d at 581–83).

<sup>64</sup> *Id.* at 2307 (quoting *Cole*, 790 F.3d at 581).

<sup>65</sup> *Cole*, 790 F.3d at 592.

<sup>66</sup> *Hellerstedt*, 136 S. Ct. at 2304–05, 2309.

<sup>67</sup> *Id.* at 2305.

<sup>68</sup> *Id.* at 2306.

<sup>69</sup> *Id.* at 2305 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (AM. LAW INST. 1982)) (stating that “[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first”).

example of “a group of prisoners who claim that they are being forced to drink contaminated water”:

[Suppose that] [t]hese prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. . . . Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim.<sup>70</sup>

Thus, the Court agreed with the Fifth Circuit that the plaintiffs’ as-applied challenge to the admitting-privileges provision was not barred by claim preclusion.

But the Court disagreed that the plaintiffs’ challenge to the surgical-center provision was barred because it could have been brought in their first action. After setting out the passage from the Fifth Circuit’s opinion that explained why the plaintiffs’ challenges to the two provisions arose out of the same “transaction,”<sup>71</sup> the Supreme Court explained that the Fifth Circuit had failed “to take account of meaningful differences” between the two provisions:

The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as “separate claims,” even when they are part of one overarching “[g]overnment regulatory scheme.”<sup>72</sup>

“That approach makes sense,” the Court continued, because the Fifth Circuit’s approach

would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.<sup>73</sup>

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<sup>70</sup> *Id.* at 2305.

<sup>71</sup> *See supra* text accompanying notes 62–64.

<sup>72</sup> *Hellerstedt*, 136 S. Ct. at 2308 (alteration in original) (citations omitted).

<sup>73</sup> *Id.* The Court also pointed to several “other good reasons why [the plaintiffs] should not have had to bring their challenge to the surgical-center provision at the same time they brought their first suit.” *Id.* For one thing, at the time of the plaintiffs’ first suit, the Texas agency responsible for administering the surgical-center provision had not yet issued rules implementing the provision, and given that “more than three quarters” of then-existing surgical centers had been granted full or partial waivers of those requirements, the plaintiffs “might well have expected” that they would receive comparable exemptions and that litigation would be unnecessary. *Id.* Moreover, “the relevant factual circumstances” changed between the plaintiffs’ two suits, as the Court noted in its discussion of the admitting-privileges provision. *Id.*

Thus, the Court concluded, neither the plaintiffs' challenge to the surgical-center provision nor their second challenge to the admitting-privileges provision was barred by claim preclusion.

Having disposed of the claim-preclusion issue, the Court proceeded to the merits of the case. The admitting-privileges requirement, the Court held, offered few "medical benefits" because "[t]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe," and thus "there was no significant health-related problem that the new law helped to cure."<sup>74</sup> By contrast, it placed a "substantial obstacle in the path of a woman[]" seeking an abortion, especially because admitting privileges are difficult for abortion providers to obtain.<sup>75</sup> Likewise, the Court held that although the physical specifications made applicable to abortion clinics through the surgical-center provision made sense as applied to outpatient clinics that actually performed surgeries, they had "such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary."<sup>76</sup> The surgical-center requirement therefore lacked sufficient medical benefits to justify its costs, and it too amounted to an undue burden.

The three dissenting justices disagreed with the Court both on claim preclusion and on the merits of the plaintiffs' claims, but they concentrated their fire on the former issue. Echoing commentators' cries of "abortion distortion,"<sup>77</sup> Justice Alito wrote for the dissenters that "[u]nder the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second suit. . . . In this abortion case, however, that rule is disregarded."<sup>78</sup>

Though Justice Alito expressed skepticism as to whether the Restatement's transactional approach was the correct one to apply to the plaintiffs' constitutional challenge, he nonetheless went through the motions of applying it.<sup>79</sup> "[T]he 'operative fact' in the prior case," Justice Alito wrote, "was the enactment of the admitting privileges requirement."<sup>80</sup> Because "that is

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<sup>74</sup> *Id.* at 2311.

<sup>75</sup> *Id.* at 2312–13.

<sup>76</sup> *Id.* at 2316 (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014), *vacated by Whole Woman's Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016)).

<sup>77</sup> "Abortion distortion" is a term coined by conservative commentators to describe the purported phenomenon whereby liberal judges allegedly disregard ordinary legal rules—both substantive and procedural—to reach pro-choice results in abortion cases. *See, e.g.*, Jay Sekulow, *Supreme Court's Abortion Distortion Puts Women at Risk*, FOX NEWS (June 27, 2016), <http://www.foxnews.com/opinion/2016/06/27/supreme-courts-abortion-distortion-puts-women-at-risk.html>; Travis Weber, "Abortion Distortion" at Work in *Whole Woman's Health v. Hellerstedt*, FAM. RES. COUNCIL (June 28, 2016), <http://www.frcblog.com/2016/06/abortion-distortion-work-whole-womans-health-v-hellerstedt/>.

<sup>78</sup> *Hellerstedt*, 136 S. Ct. at 2330 (Alito, J., dissenting).

<sup>79</sup> Justice Alito's dissent criticized the majority for "simply assum[ing] that we should follow the second Restatement . . ." *Id.* at 2332.

<sup>80</sup> *Id.* at 2334.

precisely the same operative fact underlying petitioners' facial attack [to the admitting-privileges requirement] in the case now before us," the plaintiffs' admitting-privileges challenge was barred.<sup>81</sup> And because the surgical-center provision was also part of the same enactment as the admitting-privileges provision, it too should have been barred.<sup>82</sup> Under the transactional approach, therefore—at least when correctly applied—none of the plaintiffs' claims should have survived.

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*Hellerstedt's* discussion of claim preclusion in constitutional challenges leaves many questions unanswered. Does the Restatement's transactional approach survive for cases where a plaintiff challenges two provisions of a statute in separate actions, or does some other rule apply? We know that a preenforcement facial challenge does not preclude a later postenforcement as-applied challenge to the same statute, at least as long as there are "changed circumstances" between the two suits. But why? Are there any other situations where a plaintiff can challenge the same provision of the same statute twice?

The remainder of this Article seeks out answers to these questions. Part II begins with the first question: What rule governs successive challenges to related provisions of a statute after *Hellerstedt*? Drawing on existing scholarship on facial and as-applied challenges and the structure of constitutional doctrine, Part III considers what sort of exceptions courts should recognize in this area. Part IV then returns to the question of when challenges to the same provision of the same statute ought to be allowed and seeks to explain *Hellerstedt's* holding on this point within the broader context of claim-preclusion doctrine.

## II. SUCCESSIVE CHALLENGES TO RELATED PROVISIONS OF A STATUTE: THE RULE

### A. *The Transactional Approach*

As noted already, the Restatement's transactional approach is the prevailing modern approach to claim preclusion in U.S. jurisdictions.<sup>83</sup> In seeking to extract a rule from the Supreme Court's opinion in *Hellerstedt*, therefore, a natural first question is whether the Court endorsed the transactional approach for challenges to statutes.

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<sup>81</sup> *Id.* at 2340.

<sup>82</sup> *Id.* at 2334.

<sup>83</sup> *See supra* note 31 and accompanying text.

Answering this question proves surprisingly difficult. Though a cursory reading might suggest that the opinion embraced the transactional approach—indeed, Justice Alito’s dissent criticized the majority for adopting the transactional approach *sub silentio*—a close reading of the opinion reveals that the Court in fact carefully avoided either adopting or rejecting that approach. Thus, the question remains an open one.

For example, in its discussion of the plaintiffs’ challenge to the surgical-center provision, the Court began by quoting at length the Fifth Circuit’s conclusion that the challenge “ar[ose] from the same transaction or series of connected transactions” as their challenge to the admitting-privileges provision.<sup>84</sup> But instead of addressing whether the Fifth Circuit was correct to apply a transactional analysis, the Court simply said that the Fifth Circuit had erred because it had failed to account for “meaningful differences” between the two provisions, which it then proceeded to enumerate.<sup>85</sup> Likewise, in its discussion of the admitting-privileges provision, the Court cited in a parenthetical a comment to the Restatement which states that “[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may . . . comprise a *transaction* which may be made the basis of a second action not precluded by the first.”<sup>86</sup> But the proposition for which the Court cited the comment was that “development of new material facts can mean that a new case and an otherwise similar previous case do not present *the same claim*”—the Court never actually stated that the two challenges arise out of different transactions.<sup>87</sup> Indeed, the Court conspicuously avoided using the word “transaction” throughout its opinion—the word appears outside of quotation marks only once, in a passage that criticizes the Fifth Circuit’s own application of the transactional approach.<sup>88</sup>

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<sup>84</sup> Specifically, the Court wrote:

The [Fifth Circuit] explained that petitioners’ constitutional challenge to the surgical-center requirement and the challenge to the admitting-privileges requirement mounted in *Abbott* “arise from the same ‘transaction or series of connected transactions.’ . . . The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts.”

*Hellerstedt*, 136 S. Ct. at 2307 (quoting *Whole Women’s Health v. Cole*, 790 F.3d 563, 581 (5th Cir. 2015)).

<sup>85</sup> *Id.* at 2308.

<sup>86</sup> *Id.* at 2305 (emphasis added).

<sup>87</sup> *Id.* at 2305 (emphasis added) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (AM. LAW. INST. 1982)).

<sup>88</sup> *Id.* at 2308 (“The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion.”).

Given that both the Fifth Circuit and the dissent explicitly applied the transactional approach to the plaintiffs' claims, the Court's care to avoid endorsing that approach cannot be dismissed as an oversight. Whether the transactional approach applies remains an open question.

But if the transactional approach does apply, then what is the "transaction" out of which a challenge to a statute arises? Was Justice Alito right to agree with the Fifth Circuit that, assuming *arguendo* that the transactional approach applies, the relevant "transaction" would be the enactment of the challenged statute?<sup>89</sup> Though the Supreme Court ultimately rejected this definition of the transaction, Justice Alito's analysis provides a useful starting point.

1. Possible "Transactions" in a Challenge to a Statutory Provision

a. The Enactment of the Challenged Statute

Initially, Justice Alito's definition of the relevant "transaction"—the enactment of the challenged statute—is attractive. One can easily imagine the legislative process leading up to a statute's enactment as a "natural grouping" of facts that are "related in time, space, origin, [and] motivation" and would form a "convenient trial unit."<sup>90</sup> Such facts might include committee reports on the proposed legislation, statements made by legislators during floor debates, the legislature's factual findings, and prior drafts or proposed amendments.

But the *Hellerstedt* Court rejected this approach, and for good reason. Recall that under the transactional approach, *all* claims arising out of the same "transaction" as a previously litigated claim are barred in a later action, regardless of whether they state different legal theories, involve different evidence, or seek different relief.<sup>91</sup> Thus, if the "transaction" in a challenge to a statutory provision is the enactment of the statute in which the provision appears, then a challenge to one provision of a statute would preclude a subsequent challenge to *any* other provision that appears in the same enactment. As the *Hellerstedt* Court observed, this would be impractical:

Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts. . . . Statutes are often voluminous, with many related, yet distinct, provisions. Plaintiffs, in order to preserve their claims, need not challenge each such provision of, say, the USA PATRIOT Act, the Bipartisan Campaign Reform Act of 2002, the National Labor Relations Act, the

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<sup>89</sup> See *id.* at 2333–34 (Alito, J., dissenting) (highlighting the admitting-privileges requirement); *id.* at 2340 (noting the surgical-center requirement).

<sup>90</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) cmt. b (AM. LAW. INST. 1982).

<sup>91</sup> See *id.* § 25 (stating that § 24 extinguishes a plaintiff's claim even though the plaintiff "is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action, or to seek remedies or forms of relief not demanded in the first action").

Clean Water Act, the Antiterrorism and Effective Death Penalty Act of 1996, or the Patient Protection and Affordable Care Act in their first lawsuit.<sup>92</sup>

Moreover, the enactment-as-transaction theory is also underinclusive in important ways. If the “transaction” is the enactment of a statute, then a plaintiff who challenges a provision of one statute need not also challenge other provisions of statutes enacted at different times—even if those other rules are “closely related” to the challenged rule. But why should this be?

Assume, for example, that one year after passing H.B. 2, a new Texas legislature passed a law requiring abortion facilities to intermittently undergo state inspections for compliance with H.B. 2’s surgical-center requirement. Under Justice Alito’s approach, a challenge to the surgical-center requirement would preclude a later challenge to the admitting-privileges requirement, but not the inspection requirement, because the two provisions did not arise out of the same enactment. Yet the inspection requirement is *more* closely related to the surgical-center requirement than the admitting-privileges requirement. This makes little sense in terms of judicial efficiency, repose, or any of the other interests that claim preclusion seeks to promote.

In sum, the enactment-as-transaction theory has all the hallmarks of a too-broad theory of claim preclusion. It would “increase litigation of matters that otherwise would be forgotten or forgiven” and punish plaintiffs for “justifiable omissions,”<sup>93</sup> all while only halfheartedly serving the interests of judicial efficiency and repose. Thus, the *Hellerstedt* Court rightly rejected the suggestion—made by both the Fifth Circuit and the dissenters—that the enactment of a statute is the transaction out of which a constitutional claim against that statute arises.

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<sup>92</sup> *Hellerstedt*, 136 S. Ct. at 2308–09. Indeed, H.B. 2 itself contained numerous requirements not challenged by the plaintiffs in *Hellerstedt*. See, e.g., H.B. 2, 2013 Leg., Reg. Sess. § 3 (Tex. 2013) (prohibiting abortions after twenty weeks, subject to certain exceptions, and regulating the distribution of “abortion-inducing drugs”); *id.* § 5 (imposing additional reporting requirements on abortion providers); *id.* § 6 (providing for the revocation of a doctor’s occupational license for failure to comply with § 3); *id.* § 9 (providing that nothing in H.B. 2 should be construed as repealing “any other provision of Texas law regulating or restricting abortion not specifically addressed by this Act”).

In his dissent, Justice Alito seemed to acknowledge the breadth of his proposal and sought to avoid it by allowing for a “relatedness” requirement. *Id.* at 2341 (Alito, J., dissenting) (agreeing with the majority “that we should not ‘encourage a kitchen-sink approach to any litigation challenging the validity of statutes’” but arguing “that is not the situation in this case,” in part because “[t]he two claims here are very closely related”). This “relatedness” requirement flies in the face of the transactional approach, however, whose value lies in its categorical effect: Once a claim arises out of the same “transaction”—here, the enactment—it is barred, regardless of how “unrelated” it may be to the prior claim. The dissent did not explain how to tell whether any given set of rules are “closely related” enough to constitute the same claim. Indeed, the only apparent difference between the dissent’s “closely-related” test and the majority’s “different-functions” test, see *id.* at 2308 (majority opinion), is that the statutory provisions at issue in *Hellerstedt* flunked the former and passed the latter.

<sup>93</sup> WRIGHT, MILLER & COOPER, *supra* note 4, § 4407, at 168.

*b. The Injury to the Plaintiff*

Justice Alito's dissent in *Hellerstedt* also considered another possible "transaction" out of which the plaintiffs' first challenge to the admitting-privileges requirement might have arisen: the "actual clinic closures" that were about to occur because of that requirement.<sup>94</sup> Although Justice Alito was somewhat dismissive of this option,<sup>95</sup> the "likely or actual effects" of a statute's enforcement are in fact a promising candidate for the transaction in a challenge to a statute. This is because in most cases, a statute's effects will form a "natural grouping" of facts that are related in "time, space, origin, or motivation" and hence make up "a convenient unit for trial purposes."<sup>96</sup>

One problem with this proposal is that only some substantive constitutional doctrines—including the "undue burden" test applied in *Hellerstedt*—evaluate statutes based on their real-world effects. Other doctrines evaluate statutes based on their relationship to legitimate state interests, the processes by which they were enacted, or simply their text and semantic content.<sup>97</sup> It would seem anomalous to consider a statute's real-world effects as the "transaction" underlying a challenge when the outcome of that challenge has little or nothing to do with those effects.

There is another sense, however, in which a challenge to a statute must "arise out of" the statute's effects on the challenger: A plaintiff must always assert that a statute has injured her (or will injure her) to establish her Article III standing.<sup>98</sup> The requirement of Article III standing is jurisdictional, moreover, so no constitutional challenge may proceed without it.<sup>99</sup>

<sup>94</sup> *Hellerstedt*, 136 S. Ct. at 2334 n.3 (Alito, J., dissenting).

<sup>95</sup> *Id.* at 2340.

<sup>96</sup> RESTATEMENT (SECOND) OF JUDGEMENTS § 24 (AM. LAW INST. 1982).

<sup>97</sup> See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997) [hereinafter Fallon, *Implementing the Constitution*] (giving a more detailed discussion of these types of tests); see also *infra* Part III.B (discussing the relationship between claim preclusion and different types of doctrinal tests).

<sup>98</sup> See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (explaining that "standing is an essential . . . part of the case-or-controversy requirement of Article III," and that standing entails an "injury in fact" and "a causal connection between the injury and the conduct complained of"). In some cases, the plaintiff satisfies this requirement by showing that the law *could* be applied to her because of conduct in which she is engaged or regularly engages. See, e.g., *Abbott II*, 748 F.3d 583, 589 (5th Cir. 2014) ("Here, the requirements for third-party standing are met in relation to the claims asserted by the physician-plaintiffs on behalf of their patients because[,] [*inter alia*,] the physicians face potential administrative and criminal penalties for failing to comply with H.B. 2."). Alternatively, a plaintiff could satisfy the injury requirement by showing that a law's application to others will have adverse effects on her. *Lujan*, 504 U.S. at 562–64 (recognizing that "[t]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing," such that a plaintiff could in theory challenge regulatory action that did not impose legal obligations on her but rather damaged environmental areas which the plaintiff had "concrete plans" to visit).

<sup>99</sup> *Lujan*, 504 U.S. at 559–60 (explaining that Article III "limits the jurisdiction of federal courts to

To determine the “transaction” underlying a prior constitutional challenge, a court could look to the “injury” that the plaintiff alleged for standing purposes. This injury might include an enforcement action against the plaintiff;<sup>100</sup> the detriment that the plaintiff has suffered by coming into compliance with the law; or, if the plaintiff has not yet complied, the detriment that she would suffer if she were to comply.<sup>101</sup> If two provisions threaten the same injury but the plaintiff challenges only one of them in her first action, then claim preclusion would bar a later challenge to the provision that she initially decided not to challenge.

The problem with this theory is that again, in many cases, a single “injury” could give a plaintiff standing to challenge a great many provisions of a statute. Imagine a case with the same facts as *Hellerstedt*, except that a group of Texas women brought the two challenges, instead of a group of Texas abortion providers. The women’s standing would derive from the fact that the admitting-privileges and surgical-center provisions injured them by impeding their access to abortions.<sup>102</sup> But nearly every other provision of H.B. 2—whose formal title, after all, was “an act relating to the regulation of abortion procedures, providers, and facilities”—would also make it more difficult for Texas women to obtain abortions.<sup>103</sup> Because the question would be not

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‘Cases’ and ‘Controversies,’” and that “the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III” (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Even in a so-called “preenforcement” challenge, where the government has not yet applied the law to anyone, the plaintiff must prove that the law threatens her with an “imminent” injury. *Id.* at 564 (holding that a plaintiff must prove that there has been an injury, or that injury is imminent, to have standing).

<sup>100</sup> Raising the unconstitutionality of a law as a defense in an enforcement action is perhaps the archetypal setting for a constitutional challenge. See *Ex parte Young*, 209 U.S. 123, 163 (1908) (“It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity.”). Because this could put challengers “in peril of large loss . . . if it should be finally determined that the [challenged] act was valid,” however, courts have long recognized a right to sue a state preemptively to enjoin the enforcement of an unconstitutional law. *Id.* at 165.

<sup>101</sup> See *Abbott II*, 748 F.3d at 589 (holding that “the rule for third-party standing requires the named plaintiff to have suffered an injury in fact and to share a ‘close’ relationship with third-parties who face an obstacle inhibiting them from bringing the claim on their own behalf.” (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004))). The fact that the doctors in *Abbott* could avoid criminal penalties by complying with the statute, for example, does not defeat their standing, because compliance would require the expenditure of time and money and, in some cases, would require not performing abortions at all. See *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (“If the physicians prevail in their suit [to invalidate an abortion restriction,] they will benefit, for they will then receive payment for the abortions.”).

<sup>102</sup> The fact that the provisions imposed no legal obligations directly on them would not defeat their standing. See *Roe v. Wade*, 410 U.S. 113, 124 (1973) (noting there was “little dispute” that “a pregnant single woman thwarted by [ ] Texas[’s] criminal abortion laws [ ] had standing to challenge those statutes.”).

<sup>103</sup> See, e.g., H.B. 2, 2013 Leg., Reg. Sess. § 3 (Tex. 2013) (prohibiting abortions after twenty weeks, subject to certain exceptions, and regulating the distribution of “abortion-inducing drugs”); *id.* § 5

whether these laws impose such obstacles as to be unconstitutional, but rather whether they impose any obstacle *at all*, this requirement would quickly reduce to requiring the plaintiffs to challenge nearly all of the enactment. Thus, it would not differ meaningfully from Justice Alito's approach, and it should be rejected for similar reasons.

## 2. *The Breakdown of the Transactional Approach*

So far, this Part's attempts to define a plaintiff's constitutional claim around a "natural grouping" of facts that are "related in time, space, origin, and motivation" have resulted in transactions that are both over- and under-inclusive of claim preclusion's basic rationales. Both the enactment-as-transaction and injury-as-transaction theories could easily bar later challenges to potentially unrelated statutory provisions, while at the same time allowing later challenges to related provisions.<sup>104</sup> Have we simply failed to identify the correct transaction? Or is there a more fundamental reason that the transactional approach is incompatible with challenges to statutes?

The genius of the transactional approach is that in most civil litigation, the facts that a plaintiff must prove to prevail on her claim form part of a larger factual narrative involving real-world interactions between the plaintiff and the defendant.<sup>105</sup> Thus, instead of evaluating the relatedness of two civil claims by directly comparing the evidence or legal arguments required to sustain them, courts today can *approximate* the relatedness of two claims by asking whether they "arise out of" a common factual narrative.<sup>106</sup> If they do, then it is safe to assume they would entail sufficiently similar evidence and legal argument to justify preclusion.

Challenges to statutes are different. For one thing, not all constitutional challenges require the plaintiff to prove facts in order to prevail; many constitutional doctrines simply ask a court to use its tools of statutory interpretation to determine whether a statute is valid.<sup>107</sup> In such cases, *any* "transaction" will have little to do with the substance of the plaintiff's challenge, because a transaction is a grouping of facts, and facts are not relevant to the merits of such challenges.

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(imposing additional reporting requirements on abortion providers); *id.* § 6 (providing for the revocation of a doctor's occupational license for failure to comply with § 3); *id.* § 9 (providing that nothing in H.B. 2 should be construed as repealing "any other provision of Texas law regulating or restricting abortion not specifically addressed by this Act.").

<sup>104</sup> See generally *supra* Part II.A.1.

<sup>105</sup> See, e.g., WRIGHT, MILLER & COOPER, *supra* note 4, § 4407, at 175–76 ("Matters with a common historic origin ordinarily form a convenient package for joint litigation.").

<sup>106</sup> See, e.g., CAL. CIV. PROC. CODE § 426.10(c) (West 2017) (defining "related cause[s] of action" as those that "arise[] out of the same transaction, occurrence, or series of transactions or occurrences").

<sup>107</sup> See *infra* Part III.B.2

Moreover, even when a plaintiff must prove facts to prevail on a constitutional challenge, those facts usually pertain to the characteristics of the challenged statute rather than to interactions between the plaintiff and the defendant government entity. For example, some constitutional doctrines require proof of a statute's effects; others require proof of the legislature's motive in enacting the statute; and still others require proof of the law's relationship to its aims.<sup>108</sup> Thus, any real-world transaction between the plaintiff and the government defendant will poorly approximate the substantive relatedness of whatever constitutional claims that "arise" out of that transaction.

In sum, in interpreting *Hellerstedt* and crafting rules of claim preclusion in its wake, courts should look beyond the Restatement's transactional approach and consider more creative ways of measuring the relatedness of separate statutory provisions. Indeed, *Hellerstedt* itself specifies several such metrics. The majority looked to the substantive and linguistic characteristics of the admitting-privileges and surgical-center provisions, noting that they were "distinct," that their requirements were "independent," and that their purposes were "different."<sup>109</sup> To formulate these observations into a workable claim-preclusion rule, however, it is first necessary to shed the transactional approach applied by the Fifth Circuit and by Justice Alito in his dissent.

### 3. *Coda: Does Claim Preclusion Matter in Constitutional Challenges?*

As we have seen, the "transactional" theory of claim preclusion is a poor fit for challenges to statutes. But even if this is so, should courts really spend valuable judicial resources developing new rules of claim preclusion? In other words, if claim preclusion is seldom of consequence in challenges to statutes, wouldn't it be more efficient to continue applying the existing rules and simply accept that in a very narrow set of cases, they will produce undesirable results?

Ultimately, the answer is no. To see why, however, we need to examine the objection more closely. The objection proceeds as follows: Because claim preclusion only ever applies in later litigation between the same two parties,<sup>110</sup> even if an application of claim preclusion unjustifiably barred a plaintiff from mounting a constitutional challenge, some *other* plaintiff could always mount that same challenge in a later action.<sup>111</sup> This is particularly true if the

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<sup>108</sup> See generally Fallon, *Implementing the Constitution*, *supra* note 97; see also *infra* Part III.B.

<sup>109</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016).

<sup>110</sup> See RESTATEMENT (SECOND) OF JUDGEMENTS § 17 (AM. LAW INST. 1982) (explaining that under claim-preclusion doctrine, "[a] valid and final personal judgment is conclusive *between the parties*" (emphasis added)).

<sup>111</sup> Nor would the doctrine of issue preclusion prevent the second plaintiff from asserting a new challenge that involves the same factual or legal issues as the first, because issue preclusion can only be asserted *against* a party to the original action. See *id.* § 27 (stating the general rule that "[w]hen an

constitutional challenge was orchestrated by an impact-litigation firm like the American Civil Liberties Union, which could easily find a new plaintiff to challenge any statute that claim preclusion might bar the same plaintiff from challenging. Similarly, the court's interest in efficiency and the government's interest in repose are mostly illusory, because even if the government prevails in a challenge brought by one plaintiff, another plaintiff could always mount that same challenge in a later action.<sup>112</sup> Thus, even if the two "transactional" theories are imperfect, why not adopt one of them anyway, safe in the knowledge that claim preclusion is rarely dispositive in challenges to statutes?

There are at least two responses to this argument. First, it overlooks the various scenarios in which a new plaintiff is *not* likely to assert whatever constitutional challenges the prior plaintiff forfeited in her first action. For example, it could be the case that most or all of the eligible plaintiffs joined together in the first action.<sup>113</sup> Or the first action could have been brought on behalf of a class, such that the judgment was binding on all eligible plaintiffs even if they were not joined as parties.<sup>114</sup> The challenged statute could also target a vulnerable minority, such as a religious or ethnic group, or even a relatively powerful minority, such as a small group of the nation's largest banks<sup>115</sup> or the

issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action *between the parties.*" (emphasis added)); *id.* § 29 (providing for non-mutual issue preclusion, but only against "[a] party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28 [which provide certain exceptions not relevant here]").

<sup>112</sup> Theoretically, the second plaintiff could assert the exact same claim as the first plaintiff, so long as her challenge was not foreclosed by precedent. This could be the case, for example, if the first plaintiff unsuccessfully challenged a statute in district court and took no appeal.

<sup>113</sup> See FED. R. CIV. P. 20 (allowing plaintiffs to join together in an action if "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and if "any question of law or fact common to all plaintiffs will arise in the action"). Indeed, why should claim preclusion discourage plaintiffs from joining together to challenge a law that they believe is unconstitutional? The enactment-as-transaction theory would create an incentive for some plaintiffs to "hang back" in case the group later wanted to bring a challenge to a different provision of the same statute. This kind of gamesmanship serves neither constitutional nor procedural values.

<sup>114</sup> See FED. R. CIV. P. 23(c)(3) ("Whether or not favorable to the class, the judgment in a class action must . . . include and describe those whom the court finds to be class members.").

<sup>115</sup> See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165, 124 Stat. 1376, 1423 (2010) (authorizing regulators to "establish prudential standards for [financial institutions] with total consolidated assets equal to or greater than \$50,000,000,000 that [] are more stringent than the standards and requirements applicable to [financial institutions] that . . . do not present similar risks to the financial stability of the United States"); 12 C.F.R. §§ 217.402–403 (2017) (requiring "global systemically important [financial institutions]" to hold additional capital reserves); *Federal Reserve Board Approves Final Rule Requiring the Largest, Most Systemically Important U.S. Bank Holding Companies to Further Strengthen Their Capital Positions*, BD. OF GOVERNORS OF THE FED. RES. SYS. (July 20, 2015), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20150720a.htm> (identifying eight U.S. banks as "global systemically important [financial institutions]").

political parties within a state.<sup>116</sup> Similarly, the statute could be invalid in only a narrow set of applications, or the prior plaintiff could be one of relatively few individuals who believe that the law violates the Constitution. In such cases, the eligible challengers could quickly run out, particularly if the statute in question is large or complex. Thus, an overbroad rule of claim preclusion could insulate provisions of the statute from judicial review entirely.

Second, even if other challengers are available, it does not follow that courts should disregard a prior plaintiff's interest in asserting later constitutional challenges. Indeed, there are good reasons why an individual or an organization may want to be "the" plaintiff who asserts a challenge. For one thing, the plaintiff in a constitutional case is entitled to exercise a degree of control over the litigation strategy in that case, which can in turn shape the court's ultimate constitutional holding.<sup>117</sup> There may also be reputational or psychic benefits to being the plaintiff who successfully obtains the invalidation of an unconstitutional statute.<sup>118</sup> Rather than impose a harsh forfeiture rule on the theory that someone else will come along and vindicate the plaintiff's constitutional rights, courts should provide clear *ex ante* guidance on what claims a plaintiff stands to forfeit by failing to assert them in her first action. An overbroad "transactional" theory of claim preclusion would needlessly deprive both individual and organizational plaintiffs of their entitlement to assert constitutional challenges, and would require those plaintiffs to expend time and financial resources searching for someone else to assert the challenges that they had been unfairly barred from asserting.

Similar arguments counsel against adopting a too-narrow rule of claim preclusion, or abolishing claim preclusion in constitutional challenges entirely. Again, a court might adopt such a rule on the theory that because a new plaintiff can always assert whatever challenges a prior plaintiff has forfeited, plaintiffs and their lawyers can impose the very efficiency and repose costs that claim preclusion seeks to avoid by interposing new plaintiffs, regardless of how robust a theory of claim preclusion courts adopt. In practice, therefore, claim preclusion is pointless in constitutional challenges, and courts should not bother with it.

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<sup>116</sup> See *Utah Republican Party v. Cox*, 177 F. Supp. 3d 1343, 1357–59 (D. Utah 2016) (holding the Utah Republican Party's constitutional challenge of a state statute was not barred by claim preclusion).

<sup>117</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N, 2016) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

<sup>118</sup> Indeed, in many constitutional challenges, impact-litigation firms sue in their own names rather than recruiting individual plaintiffs. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 458–59 (1958) (holding that the NAACP had standing to bring a suit to protect the constitutional rights of its members); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (recognizing that an organization has standing to challenge conduct which results in a "concrete and demonstrable injury to the organization's activities" and a "consequent drain on the organization's resources").

But again, in some cases, a prior plaintiff will not be able to locate a new challenger, either because there are none, or because the costs of locating one are prohibitive.<sup>119</sup> Moreover, claim preclusion is about setting *ex ante* incentives for plaintiffs: If a plaintiff and her lawyers know that the plaintiff will forfeit her right to challenge Provision A of a statute by not including it in her pending lawsuit against Provision B of that statute (or that at the very least, if they decide to challenge Provision A later, they will have to find a new plaintiff), they will think twice before deciding not to challenge Provision A. Though it might not protect the finality of judgments as completely as existing claim-preclusion rules for ordinary civil litigation, such a rule would encourage more appropriately sized, and therefore more efficient, constitutional litigation.

Despite first appearances, therefore, claim preclusion matters in constitutional challenges. Courts should not settle for a poorly fitting approach simply because to do so would be the easiest course of action. Fortunately, moreover, courts are not bound to apply the transactional approach.<sup>120</sup> Rather, because claim preclusion is a judge-made doctrine rooted in federal and state common law, courts are free to formulate new claim-preclusion rules where the old ones cease to function.

### B. Constructing a New Approach

Having established that the transactional approach is inconsistent with both *Hellerstedt* and the broader aims of claim preclusion in constitutional challenges to statutes, the task remains to formulate a new approach to take its place. This will require stepping back and considering from a more theoretical perspective

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<sup>119</sup> For example, the civil-rights attorneys who argued *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated a Texas law criminalizing sodomy, had difficulty finding a plaintiff, because state sodomy laws were rarely enforced. Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER (Mar. 12, 2012), <http://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick>.

<sup>120</sup> See *Semtek Int'l v. Lockheed Martin*, 531 U.S. 497, 508 (2001) (holding that the judgment of a federal court sitting in diversity is subject to the state's claim-preclusion rules); WRIGHT, MILLER & COOPER, *supra* note 4, § 4403, at 17, 29, 38 ("The judge-made character of res judicata doctrine reflects the role of res judicata in regulating relationships between successive judicial or quasi-judicial proceedings. . . . Res judicata is very much a common-law subject. Federal statutes . . . [and] [c]onstitutional theory ha[ve] provided little . . . direction."). Critically, *Hellerstedt* itself never adopted the transactional approach for constitutional adjudication. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (discussing the Second Restatement but never expressly applying the transactional approach); *id.* at 2308 (criticizing the Court of Appeals' application of the transactional approach); *id.* at 2332 (Alito, J., dissenting) (criticizing the majority for failing to identify with greater specificity the method it used to determine whether the plaintiffs' claims were "the same"). This is especially notable given the Court's acknowledgement of the Fifth Circuit's express reliance on that approach in the proceedings below. *Id.* at 2307 (quoting *Whole Woman's Health v. Cole*, 790 F.3d 563, 581 (5th Cir. 2015)).

the optimal structure of res judicata doctrine—what Professors Robert Casad and Kevin Clermont call the “jurisprudence of rules and exceptions.”<sup>121</sup>

Casad and Clermont begin by grouping res judicata’s underlying policy concerns into three categories: efficiency, fairness, and substantive policies.<sup>122</sup> As Casad and Clermont are careful to note, the policy considerations in each category can point in different directions. Most efficiency concerns (such as the desire to avoid inconsistent decisions, to prevent duplicative litigation, or to promote repose) counsel in favor of preclusion, although some (such as the costs of administering res judicata doctrine itself) cut the other way.<sup>123</sup> By contrast, fairness concerns (such as the unfairness of deciding an issue on a procedural technicality) generally counsel against preclusion, although sometimes these too cut the other way (for example, when the party being precluded has sought to harass the other party with repetitious litigation).<sup>124</sup> Substantive policies can tip the balance either way in a specific area of the law, such as real estate transactions (where res judicata should be “fierce . . . to promote an efficient market”) or attorney-client relations (where res judicata should be “wary” about allowing lawyers to escape liability to clients through procedural technicalities).<sup>125</sup> Casad and Clermont then posit a simple formula: Because res judicata is fundamentally a policy-driven doctrine, in any given case, “[t]he law should preclude what our society sees as a person’s normal right to seek adjudication” only where the balance of policy concerns “pushing for preclusion” outweighs the balance of factors “cutting the other way.”<sup>126</sup>

It follows from this formula that res judicata doctrine should be structured in a way that guides courts to the proper balance of policy factors in the greatest number of individual cases. Thus, Casad and Clermont argue, the doctrine should consist of a few “[c]lear, rigid, and simple” rules that “approximate” the balance of res judicata’s competing policies “over the run of past and future cases.”<sup>127</sup> Then, because no rule can perfectly balance the factors in every case, the doctrine should provide exceptions for specific situations where, “in an individual case before a court” that technically falls within the rule, the balance of policies nonetheless tips against preclusion.<sup>128</sup> These ex-

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<sup>121</sup> CASAD & CLERMONT, *supra* note 16, at 39–45.

<sup>122</sup> *Id.* at 29–38.

<sup>123</sup> *Id.* at 31–34.

<sup>124</sup> *Id.* at 32–34.

<sup>125</sup> *Id.* at 35.

<sup>126</sup> *Id.* at 36.

<sup>127</sup> *Id.* at 36, 40.

<sup>128</sup> *Id.* at 36, 41.

ceptions should be “small in scope, even if necessarily considerable in number,” and should also be more flexible—even “ad hoc”—so that courts can exercise greater discretion where the danger of unfairness is especially high.<sup>129</sup>

The transactional approach to claim preclusion provides a good example of Casad and Clermont’s method. Its *prima facie* rule—that one claim precludes another if the two arise out of the same factual transaction—is clear, simple, and sufficient to resolve the majority of cases to which it applies.<sup>130</sup> It is also tempered by a number of exceptions, which identify situations where a plaintiff might have a good reason not to assert one claim along with another even though the two arise out of the same transaction.<sup>131</sup> In this way, the transactional approach first focuses the court’s attention on a simple question designed to dispose of most cases, and then provides a list of exceptions to address the few cases in which the simple, rigid rule misses the mark.

### 1. *Hellerstedt’s Rule for Claim Preclusion in Challenges to Statutes*

To determine whether *Hellerstedt* announces a claim-preclusion rule that fits within Casad and Clermont’s broader framework for *res judicata* doctrine, it is first necessary to determine exactly what *Hellerstedt* holds. Although a cursory reading of the Court’s opinion might suggest that a challenge to one provision of a statute is seldom (if ever) the same “claim” as a challenge to a different provision, a closer reading demonstrates that this is not quite what the opinion says.

In its discussion of the “meaningful differences”<sup>132</sup> that made the abortion providers’ challenge to the admitting-privileges provision a different “claim” than their challenge to the surgical-center provision, the *Hellerstedt* Court repeatedly fell just short of holding that claim preclusion *never* applies between challenges to two different provisions of a statute. For example, after observing that “[t]he surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2,” the Court went on to note that they also “set forth two different, *independent requirements* with *different enforcement dates*.”<sup>133</sup> It continued: “This Court has never suggested

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<sup>129</sup> *Id.* at 41. Whether to phrase a particular principle as a rule or exception should turn on how many cases will be affected by the principle, how much complexity the principle will introduce into the existing doctrine, how much discretion the principle calls for, as well as other concerns that attend the formulation of rules and exceptions in other areas of the law—such as which party ought to bear the burden of persuasion.

<sup>130</sup> *See id.* at 62–66 (summarizing approaches to claim preclusion in U.S. jurisdictions).

<sup>131</sup> *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 (AM. LAW INST. 1982) (setting out exceptions to the general rule of bar); *id.* § 26 (setting out several “exceptions to the rule against claim splitting”).

<sup>132</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016).

<sup>133</sup> *Id.* (emphasis added).

that challenges to two different statutory provisions *that serve two different functions* must be brought in a single suit. And lower courts *normally* treat challenges to distinct regulatory requirements as separate claims, even when they are part of one overarching government regulatory scheme.”<sup>134</sup>

With these qualifications, the Court left open the possibility that two provisions that lack the “meaningful differences” present in *Hellerstedt*—i.e., two provisions that take effect simultaneously, impose “dependent” requirements, serve the same “function,” and so forth—might have to be challenged together in one action. Indeed, as a leading treatise acknowledges:

The only safe general statement [after *Hellerstedt*] is that it is not always appropriate to treat the entire statute as the same transaction . . . . Several complex federal statutes were offered [in *Hellerstedt*] to illustrate the advantages of permitting separate actions. It remains to be seen how far this decision will be generalized. . . . [O]ther cases may involve simpler statutes, with closely interlocked provisions that seem inseparably linked in the facts and the theory of attack.<sup>135</sup>

In such cases, *Hellerstedt* was careful to allow, claim preclusion may still have a role to play.

And why shouldn’t it? The efficiency and fairness concerns that claim preclusion protects are at their highest when two provisions of a statute are closely related. Challenges to such provisions are likely to involve similar legal and factual issues, and hearing them in separate actions would run the risk of redundancy and unharmonious or even conflicting decisions.<sup>136</sup> It could allow a plaintiff to file intentionally vexatious litigation—for example, piecemeal suits that delay the implementation of a statutory scheme by challenging its multiple, interlocking provisions in separate actions.<sup>137</sup> And although we should perhaps not be too sympathetic to a government official tasked with defending an allegedly unconstitutional law, a complete lack of claim preclusion would allow a plaintiff to assert in later actions challenges that the government might have justifiably expected to have been asserted in an earlier one.<sup>138</sup>

<sup>134</sup> *Id.* (emphasis added) (citations omitted) (internal quotation marks omitted).

<sup>135</sup> WRIGHT, MILLER & COOPER, *supra* note 4, § 4408, at 224–25 (footnote omitted).

<sup>136</sup> See *supra* note 119 and accompanying text (arguing against a too-narrow rule of claim preclusion).

<sup>137</sup> Cf. *Hellerstedt*, 136 S. Ct. at 2308 (arguing that too broad a rule would encourage a plaintiff to challenge the entirety of statutes like these in a single lawsuit). In theory, a well-funded impact-litigation firm could achieve the same result by finding separate plaintiffs to challenge separate provisions of such a statute, and even a robust rule of claim preclusion could not prevent such a tactic. But not all constitutional challenges are brought by impact-litigation firms, and the costs of having to find a new plaintiff would discourage firms from pursuing such tactics.

<sup>138</sup> True, because claim preclusion ordinarily applies only between the two parties to a prior lawsuit, no definition of a plaintiff’s claim—no matter how expansive—can prevent a *different* plaintiff from later challenging a law related to one challenged in an earlier action. The repose interest at issue

Thus, both a close reading of *Hellerstedt*'s language and an analysis of claim preclusion's policies suggest that *Hellerstedt* should be read as setting forth a narrow prima facie rule: Where a plaintiff has challenged a statutory provision in a prior action, claim preclusion bars only a later challenge to a closely related provision of the same statute.<sup>139</sup> Two statutory provisions are closely related when they lack the "meaningful differences" recited in *Hellerstedt*—that is, when they take effect simultaneously, impose logically dependent requirements, and serve similar functions. As they do when applying the transactional approach, courts should evaluate these differences "pragmatically," with an eye to whether the two challenges "form a convenient trial unit" and whether they conform to the parties' reasonable expectations.<sup>140</sup>

What sort of claims would fall within this rule? Suppose that your state's hypothetical gun-control statute contained the following provision:

Section 1. Registration of firearms.

- (a) Any person who owns or possesses a firearm shall register that firearm with the Bureau of Firearms pursuant to regulations promulgated by that Bureau. A fee of \$500 shall be assessed for each firearm registered under this subsection.
- (b) If a person fails to register a firearm as required by subsection (a) of this section:
  - (1) The person shall surrender to the Bureau all firearms in his or her possession; and
  - (2) It shall be an offense for the person to possess any firearm for a period of five years after the date of the forfeiture required by paragraph (1) of this subsection.

Suppose further that you, the owner of several unregistered firearms, file a lawsuit challenging subsection (a) of this section (the "registration provision") but not subsection (b) (the "failure-to-register" provision). You argue that the registration provision's \$500 fee violates the Second Amendment because it burdens your ability to possess a firearm and because it is not supported by a sufficiently weighty state interest.<sup>141</sup> You lose. Can you now file a second action challenging the penalties provided for failure to register in subsection (b)?

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here, therefore, is not repose as to *all* later challenges to a statute, but rather a narrower sense of repose as to later challenges *by the same plaintiff*.

<sup>139</sup> It is worth noting that even if *Hellerstedt* did eliminate claim preclusion for constitutional challenges to statutes, the question of whether this was the right decision would still be a live one. Like all of res judicata, claim preclusion is a common-law doctrine; thus, although the Supreme Court can authoritatively establish the content of the doctrine as a matter of federal common law, it is up to the courts of the several states whether to follow its lead. Moreover, because *Hellerstedt* is federal common law, Congress could always override it by statute—which it might do if the Supreme Court's approach were largely rejected by other jurisdictions.

<sup>140</sup> See RESTATEMENT (SECOND) OF JUDGEMENTS § 24(2) (AM. LAW INST. 1982).

<sup>141</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding a ban on handgun possession in the home to be a violation of the Second Amendment); see also *McDonald v. City of Chicago*, 561

Under the reading of *Hellerstedt* that I have advanced so far, the answer should be no. None of the “meaningful differences” between the admitting-privileges and surgical-center provisions which rendered the plaintiffs’ challenges to those provisions different “claims” in *Hellerstedt* are present here. Though subsections (a) and (b) are certainly “distinct,” they serve the same “function”: To encourage the registration of firearms within the state. And far from imposing “independent requirements,” the requirements imposed by subsections (a) and (b) are logically dependent on one another: The penalties in subsection (b) are triggered only when the registration requirement imposed by subsection (a) is violated. Section 1 is a “simpler statute[ ], with closely interlocked provisions that seem inseparably linked in the facts and the theory of attack,” and claim preclusion should require that it be challenged all at once in a single action.<sup>142</sup>

## 2. *Hellerstedt and the Jurisprudence of Rules and Exceptions*

This is all well and good as a simple matter of interpreting the language used in the Court’s opinion. But what about Casad and Clermont’s broader framework for *res judicata* doctrine? Under the reading I have proposed, *Hellerstedt* sets forth a special rule for constitutional challenges to statutes that is significantly narrower than the rule prescribed by the transactional approach for ordinary civil litigation. Can Casad and Clermont’s framework account for this difference? In other words, is there some *reason* that, on balance, claim preclusion ought to apply less frequently in constitutional challenges than in other kinds of litigation?

*Res judicata*’s procedural concerns—efficiency and fairness—account for some of the difference. On balance, these concerns weigh somewhat more heavily against preclusion in constitutional challenges than in ordinary civil litigation. For example, the unfairness of denying the plaintiff an adjudication on the merits will often be more pressing where a plaintiff seeks to vindicate a constitutional right rather than a statutory or common law right, although courts should be careful not to assume that constitutional rights are *ipso facto* more important than rights drawn from other sources.<sup>143</sup> Likewise, although in some cases the desire to avoid repetitive litigation or inconsistent decisions will support reviewing two provisions of the same statute together, this will not always be the case, as different provisions of a statute will often

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U.S. 742 (2010) (holding that the Second Amendment applies to the States through the Fourteenth Amendment).

<sup>142</sup> See WRIGHT, MILLER & COOPER, *supra* note 4, § 4408, at 225.

<sup>143</sup> Plenty of important rights—such as the right to be compensated for grave bodily injury or the right to continue living in one’s home—derive from common law or statutes, rather than constitutional law. See, e.g., CAL. CIV. CODE § 789.3 (West 2017) (prohibiting a landlord from evicting a tenant by cutting off utilities, locking the tenant out, or removing the tenant’s personal property).

suffer from different constitutional infirmities which, in turn, require consideration of different legal issues and proof of different facts.<sup>144</sup> Moreover, as the *Hellerstedt* Court noted, the inefficiency of encouraging a “kitchen sink” approach to litigation counsels in favor of a narrow rule, although this concern is perhaps equally pressing in ordinary civil litigation.<sup>145</sup> Finally, the government’s interest in repose is somewhat narrower in constitutional challenges than in ordinary civil litigation, because unlike in an ordinary civil case, a *different* plaintiff can always assert in a later suit whatever constitutional challenges the first plaintiff omitted in the prior suit.<sup>146</sup> Thus, the only “repose” claim preclusion can really offer in a constitutional challenge is repose with respect to a particular plaintiff.

In sum, the difference in the balance of procedural policies can only account for *some* of the difference in breadth between the transactional approach and *Hellerstedt*’s rule for constitutional challenges. One category of claim-preclusion policies remains: Do any *substantive* policies account for the difference between the two rules?

Here, I think the answer is yes. Both *Hellerstedt* and the Restatement endorse a strong general policy in favor of adjudicating constitutional issues on the merits,<sup>147</sup> and this policy is most pronounced when a plaintiff challenges an allegedly unconstitutional provision of a statute. Several aspects of this type of constitutional adjudication make it more deserving of merits review, on balance, than ordinary civil litigation. For one thing, as already noted, the interests protected by constitutional rights are often—although not always—simply more important to individuals than statutory or common-law rights. Moreover, unlike most statutory and common-law rights, constitutional rights

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<sup>144</sup> See *infra* Part IV (discussing the need to relitigate when a holding is foreseeable from the first case but not proven therein).

<sup>145</sup> See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2308 (2016) (noting that precluding subsequent challenges to other provisions of the same statute “would encourage a kitchen-sink approach to any litigation challenging the validity of statutes[,] [an] outcome [that] is less than optimal—not only for litigants, but for courts”).

<sup>146</sup> See *supra* notes 110–112. Indeed, even if the second plaintiff sought to challenge the very same law as the first plaintiff, the judgment in the first action would only bind the parties in the second action through the doctrines of precedent and *stare decisis*, not issue or claim preclusion.

<sup>147</sup> See, e.g., *Hellerstedt*, 136 S. Ct. at 2305–06 (agreeing with the Restatement that when a claim involves “important human values,” such as a woman’s right to seek an abortion or a prisoner’s right to drink uncontaminated water, “even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.”); RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. e (AM. LAW INST. 1982) (stating that when “inequities in the implementation of a constitutional scheme may result from inflexible application of the rules of merger and bar,” and when “such inequities involve important ongoing social or political relationships, a second action should be allowed even if the claim set forth is not viewed as different from that presented in the initial proceeding”).

ordinarily constrain the conduct of *government actors* rather than private individuals.<sup>148</sup> Because a legal rule promulgated by a government actor (a statute, regulation, or the like) almost always applies to more than one person, when a court declines to adjudicate a person's claim that such a rule is invalid on claim preclusion grounds, it declines not only to adjudicate that person's rights because of a prior procedural misstep, but also the rights of *all persons affected by the statute*—most of whom had nothing to do with the prior litigation.

To put the point another way, consider two competing accounts of the function of the judicial branch that scholars have identified in different strains of the Supreme Court's justiciability jurisprudence. On the one hand is Chief Justice John Marshall's famous statement in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."<sup>149</sup> This statement captures the essence of the "law-declaration" model of the federal judiciary—the idea that "federal courts (and especially the Supreme Court) have a special function of enforcing the rule of law."<sup>150</sup> On the other hand are the Supreme Court's repeated pronouncements that "its law declaration power [is] incidental to its responsibility to resolve concrete disputes."<sup>151</sup> This strain—the "dispute-resolution" model—surfaces in the Court's discussion of justiciability doctrines like standing, mootness, and ripeness and of other doctrines that similarly concern the scope of the judicial power.<sup>152</sup> As scholars have noted, though the Court's more recent statements regarding the judiciary's role have tended to align with the dispute-resolution model, various doctrinal developments in the past several decades can seemingly be explained only by the Court's concern for its law-declaration function.<sup>153</sup>

<sup>148</sup> Of course, this is somewhat of a generalization. Some provisions of the Constitution operate directly on individuals. *See, e.g.*, U.S. CONST. amend XIII, § 1 (prohibiting "slavery" and "involuntary servitude"). And some statutory rights operate against government officials. *See, e.g.*, 42 U.S.C. § 2000bb-1 (2012) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."). Because we are designing a rule of claim preclusion, however, generalizations are permissible, as the goal is simply to "approximate" the balance of claim preclusion's policies over the "run of past and future cases." CASAD & CLERMONT, *supra* note 16, at 36, 40.

<sup>149</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>150</sup> RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73 (6th ed. 2009).

<sup>151</sup> *Id.* Indeed, even *Marbury* recognized this limitation in the less-quoted sentence following its pronouncement of the "province and duty of the judicial department": "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury*, 5 US. at 177.

<sup>152</sup> Examples include the "constitutional avoidance" doctrine, *see, for example*, *Clark v. Martinez*, 543 U.S. 371 (2005); "independent and adequate state-law grounds" doctrine, *see, for example*, *Michigan v. Long*, 463 U.S. 1032 (1983); and the abstention doctrines, *see, for example*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

<sup>153</sup> *See* FALLON ET AL., *supra* note 150, at 75 (citing Richard H. Fallon, Jr. & Daniel J. Meltzer, *New*

When a person files a civil action alleging that a provision of a statute violates the Constitution, she invokes primarily the court's law-declaration power. True, she may have previously been subject to the law, and as we have already noted, she must at least face a threat of "imminent" harm to establish her Article III standing.<sup>154</sup> But this requirement is not so difficult to satisfy so long as the challenger falls within the class of persons whose conduct is regulated by the statute (and even, in some cases, when she does not); thus, there need not be a live "dispute" between the government and the challenger in the sense that the challenger has actually been sanctioned under the allegedly invalid law.<sup>155</sup> When a court declines to hear a constitutional challenge to a statute on claim preclusion grounds, therefore, it declines to perform its law-declaration function—a function which is itself sufficiently weighty to tip the balance of claim preclusion's policies starkly against preclusion. Thus, *Hellerstedt* is best explained as a decision that recognizes—albeit without explicitly saying so—that law declaration is an important function that the law should preserve and protect.

To summarize: Although *Hellerstedt* requires a rejection of the transactional approach to claim preclusion for challenges to statutes, it can still be understood within Casad and Clermont's general framework for claim preclusion doctrine. Its prima facie rule is "clear, rigid, and simple": Two challenges are not the same "claim" unless they target closely related provisions of the same statute. The narrowness of this rule reflects the unique balance of policy concerns in constitutional challenges to statutes, where a strong substantive policy favors courts fulfilling their law-declaration function. Together with the somewhat more equivocal balance of res judicata's procedural policies, this policy counsels against preclusion in constitutional challenges to statutes.

### 3. *Exceptions: The Restatement and Beyond*

As discussed above, *Hellerstedt* announces an especially narrow prima facie rule for claim preclusion in constitutional challenges. Nonetheless, there still may be specific cases that fall within the rule—that is, cases where a plaintiff asserts successive challenges to similar provisions of the same statute—where the balance of fairness and efficiency concerns counsels *against* preclusion. For example, the Restatement suggests that exceptions be made

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*Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779–800 (1991)) (pointing to, among others, the doctrine of harmless error and the mootness exception for cases "capable of repetition yet evading review" as forming "a substantial body of case law . . . in which adjudication functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes").

<sup>154</sup> See *supra* note 99 and accompanying text.

<sup>155</sup> See *supra* notes 98–101 and accompanying text.

in cases where the first claim was dismissed for lack of jurisdiction, improper venue, or failure to join a required party;<sup>156</sup> where the plaintiff voluntarily dismissed her action or the court dismissed the action without prejudice;<sup>157</sup> where the parties agreed that the plaintiff could challenge two provisions of a statute in separate actions;<sup>158</sup> where the prior court stated that its judgment would not preclude a later challenge to the second provision;<sup>159</sup> where the plaintiff could not assert the second challenge because of a limitation on the prior court's jurisdiction;<sup>160</sup> or where "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint."<sup>161</sup> These exceptions have served courts well in adjudicating claim-preclusion issues in ordinary civil cases, and there is no reason to reject them for constitutional challenges to statutes.

One final exception advanced by the Restatement applies specifically to constitutional claims. It holds that claim preclusion does not apply where "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim."<sup>162</sup> In relevant part, this exception applies where "inequities in the implementation of a constitutional scheme may result from inflexible application of the rules of merger and bar, especially when there is a change of law after the initial decision," and where "[s]uch inequities involve important ongoing social or political relationships."<sup>163</sup> Though this exception applies "especially" where there has been an intervening change in constitutional law, by its terms, it can apply whenever "important ongoing social or political relationships" are implicated by a constitutional ruling.<sup>164</sup>

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<sup>156</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) (AM. LAW INST. 1982).

<sup>157</sup> *Id.* § 20(1)(b).

<sup>158</sup> *Id.* § 26(1)(a).

<sup>159</sup> *Id.* § 26(1)(b).

<sup>160</sup> *Id.* § 26(1)(c).

<sup>161</sup> *Id.* § 26(1)(f). This exception applies in cases where, for example, "the question at issue is the validity of a continuing restraint or condition having a vital relation to personal liberty," such as "civil commitment of the mentally ill" or "the custody of a child." *Id.* § 26 cmt. i. To take advantage of it, the plaintiff "must apply to the court that rendered the first judgment for a decision as to whether a second action is maintainable." *Id.* § 26 cmt. k.

<sup>162</sup> *Id.* § 26(1)(d).

<sup>163</sup> *Id.* § 26 cmt. e.

<sup>164</sup> *Id.* The Restatement gives the example of a group of black parents and students who sue to enjoin the enforcement of a state "tuition grant" law that the plaintiffs allege "fosters racial discrimination." *Id.* § 26 cmt. e, illus. 6. The plaintiffs lose their first action; thereafter, the Supreme Court strikes down a similar law enacted by a different state. "Whether or not the claims in the two actions by [the plaintiffs] are regarded as the same," the Restatement holds, "the second action is not barred by the first judgment," because "[i]n a matter of such public importance the policy of

The trouble with this exception should be clear from Part I's discussion of the sparring majority and dissenting opinions in *Hellerstedt*: Who's to say which "social and political relationships" are sufficiently "important" to avoid the application of claim preclusion? Justice Alito highlighted this concern in his dissent when he accused the majority of "disregard[ing]" the claim-preclusion rules "that apply in regular cases" to reach the merits of "this abortion case."<sup>165</sup> And in a separate dissent, Justice Thomas went even further:

Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law. . . . Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.<sup>166</sup>

Keep in mind that the issue in *Hellerstedt* was whether to extend claim preclusion's prima facie rule to bar the plaintiffs' claims—can you imagine the back-and-forth that would have resulted had the Justices been asked to decide whether the plaintiffs' patients' abortion rights were sufficiently "important" to allow for an exception to claim preclusion?

The flexible exception proposed by the Restatement might be a virtue in ordinary civil litigation,<sup>167</sup> and it might even provide needed flexibility in cases where a plaintiff brings a constitutional challenge to a specific government action.<sup>168</sup> But as *Hellerstedt* shows, when judges are called upon to evaluate in the abstract the "importance" of conduct regulated by a statute and allegedly protected by the Constitution, they have little to anchor their analysis other than their own political beliefs. That is not to say that judges are incapable of putting aside their political beliefs to decide cases on the facts and the law; no doubt, they are. But they are also human beings, and asking them to decide

nationwide adherence to the authoritative constitutional interpretation overcomes the policies supporting the law of res judicata." *Id.*

<sup>165</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting).

<sup>166</sup> *Id.* at 2321, 2330 (Thomas, J., dissenting).

<sup>167</sup> In such cases, courts are ordinarily called upon to draw inferences from statutory schemes. The Restatement gives the example of a landlord who institutes summary eviction proceedings against a tenant, and then later sues the tenant for unpaid rent. RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. e, illus. 5 (AM LAW INST. 1982). According to the Restatement, "[t]he [second] action is not precluded if, for example, the statutory system discloses a purpose to give the landlord a choice between, on the one hand, an action with expedited procedure to reclaim possession which does not preclude and may be followed by a regular action for rent, and, on the other hand, a regular action combining the two demands." *Id.*

<sup>168</sup> In such cases, at least, judges can consider the gravity of an alleged constitutional violation *in a particular case*. Thus, a judge who generally favors strong Eighth Amendment protections might conclude that in a particular case brought by a prisoner under 42 U.S.C. § 1983, the violations alleged are insufficiently serious to warrant an exception.

whether the abstract interests implicated by a politically-charged constitutional challenge are sufficiently “important” to warrant an exception to an otherwise-applicable procedural rule is simply asking too much.<sup>169</sup>

But if the Restatement’s catch-all exception for constitutional claims shouldn’t be read to ask judges to evaluate the “importance” of the issues at stake where a plaintiff seeks to challenge different provisions of a statute in separate actions, at least where there has been no intervening change in the law,<sup>170</sup> what is the basis for the exception? Should it be rejected entirely, or can it be salvaged to apply in other situations where it might be the “sense” of a constitutional “scheme” that a plaintiff “should be permitted to split his claim”?

Answering this question will require a careful analysis of the nature of the “schemes” in question—that is, the *structure* (as opposed to the *substance*) of constitutional law. Part III addresses this problem by drawing on two lines of scholarship relating to the structure of constitutional challenges and constitutional doctrine: First, the doctrine of facial and as-applied challenges; and second, one scholar’s taxonomy of the various types of “tests” courts have fashioned to implement constitutional law. From these doctrines, Part III seeks to generalize about certain situations where claim preclusion’s policies tilt predictably against preclusion, even when two provisions are closely related and hence fall within *Hellerstedt*’s prima facie rule.

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<sup>169</sup> Another reason not to ask judges to evaluate the “importance” of the “ongoing social or political relationships” implicated by a constitutional right is that this “importance” is already accounted for in *Hellerstedt*’s prima facie rule, as discussed above. See *supra* Part II.B.2 (“[*Hellerstedt*’s] prima facie rule is ‘clear, rigid, and simple’: Two challenges are not the same ‘claim’ unless they target closely related provisions of the same statute. The narrowness of this rule reflects the unique balance of policy concerns in constitutional challenges to statutes, where a strong substantive policy favors courts fulfilling their law-declaration function.”). Of course, to cite this as a reason for stripping judges of discretion to evaluate the importance of constitutional rights on a case-by-case basis is to embrace a sort of fiction that all constitutional rights are of roughly equal importance. Surely, this is not the case; some rights—such as the Fourteenth Amendment’s proscription on race discrimination or the First Amendment’s protection of free speech—are plainly more important than, say, the Seventh Amendment’s guarantee of a jury trial in civil cases. Nonetheless, it is fair to say that *Hellerstedt*’s rule takes account of the importance of constitutional rights, at least in part.

<sup>170</sup> Where there has been such a change, courts can fairly evaluate the “equities” of barring the plaintiff’s claim by evaluating not the importance of the right involved, but rather the magnitude of the change in law. See, e.g., *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 839–40 (N.D. Ill. 2011) (holding that, under Illinois law, the Supreme Court’s decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), worked “momentous changes in important, fundamental constitutional rights” such that a plaintiff who had previously asserted an unsuccessful Second Amendment challenge to a town’s business-licensing and firearms-registration ordinances could challenge the ordinances again in a later action).

### III. SUCCESSIVE CHALLENGES TO RELATED PROVISIONS: SOME EXCEPTIONS

#### A. *A Framework for Recognizing Structural Exceptions to Claim Preclusion*

This Part begins its search for principles to guide the formulation of structural, rather than substantive, exceptions to claim preclusion in constitutional challenges with a doctrine of constitutional law which, like claim preclusion, asks courts to consider what part of a statute or statutory provision a plaintiff's challenge truly targets: the doctrine of facial and as-applied challenges. Analogies drawn from this doctrine guide the development of specific proposed exceptions later in this Part.

##### 1. *The Doctrine of Facial and As-Applied Challenges*

One of the perennial questions in constitutional litigation is whether a statute should be invalidated facially—that is, as it applies under any circumstances—or only as it applies in a specific set of circumstances. In *Wisconsin v. Yoder*, for example, a Wisconsin statute imposed criminal penalties on any parent who failed to send his or her child to school until the child reached the age of sixteen.<sup>171</sup> On its face, this law did not appear to violate any provision of the Constitution.<sup>172</sup> But when Wisconsin used the statute to prosecute Jonas Yoder—an Amish father who refused to send his fourteen- and fifteen-year-old children to school because of his religious beliefs, which required him to engage his children in agricultural work when they turned fourteen—the Supreme Court held that it impermissibly interfered with Yoder's First Amendment rights.<sup>173</sup>

If the statute was invalid as it applied to the Yoder, was it also invalid as applied to other Wisconsin parents? Common sense would suggest not. The statute was only invalid as applied to Yoder because it interfered with his religious beliefs, which were not then (and are not now) commonly held among Wisconsin parents. Thus, it stands to reason that the statute was only invalid “as applied” to Yoder and other Amish parents of fourteen- and fifteen-year-old children.<sup>174</sup>

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<sup>171</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (introducing the compulsory school attendance law).

<sup>172</sup> *See id.* at 213 (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.” (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925))).

<sup>173</sup> *Id.* at 234–35.

<sup>174</sup> Indeed, this was what the Supreme Court held, although it never explicitly called Yoder's challenge an “as-applied” challenge. *Id.* at 234 (“[T]he First and Fourteenth Amendments prevent the State from compelling *respondents* to cause their children to attend formal high school to age 16.” (emphasis added)).

In *United States v. Salerno*, the Supreme Court codified this intuition with a categorical rule: Courts should only invalidate a statute on its face if “no set of circumstances exists under which the Act would be valid.”<sup>175</sup> This formulation of the doctrine has since been much criticized by scholars, however. Professor Michael Dorf has argued that it reflects neither a coherent account of the difference between facial and as-applied challenges nor an accurate description of the Court’s actual practice.<sup>176</sup> Professor Matthew Adler has argued that it is founded on the mistaken assumption that “rule-applications can be properly described as unconstitutional,” whereas in fact, all constitutional rights are “rights against rules.”<sup>177</sup> Similarly, Professor Nicholas Rosenkranz has argued that any challenge to a statute must be facial, because a close reading of the grammar of the Constitution’s various provisions reveals that courts review not statutes themselves, but rather the congressional *act* of enacting the statute.<sup>178</sup>

Scholars have offered too many glosses on *Salerno*’s no-set-of-circumstances test to discuss them all here.<sup>179</sup> Thus, I shall focus on one particularly salient account advanced by Professor Richard H. Fallon, Jr.<sup>180</sup> Professor

<sup>175</sup> *United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>176</sup> Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 249–51 (1994); *see also id.* at 251–79 (arguing that the Court applies *Salerno* neither to “underinclusive” statutes, nor to statutes that violate the First Amendment’s overbreadth doctrine, nor to statutes enacted for an impermissible purpose); Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 CALIF. L. REV. 915, 935–41 (2011) [hereinafter Fallon, *Fact and Fiction*] (reporting the results of an empirical study showing the “near ubiquity” of facial challenges in Supreme Court jurisprudence).

<sup>177</sup> Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 153–58 (1998).

<sup>178</sup> Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1230–35 (2010). He also argued:

[C]onsider that, at the moment of the law’s making, there has been no enforcement, and there are no facts about the application of the statute. . . . [I]f Congress has violated the Constitution at that moment, the violation must inhere in the text of the statute itself.

*Id.* at 1235 (emphasis omitted). Because Professor Rosenkranz’s account treats a legislative “enactment” as one of the two actions that the Constitution authorizes courts to review (the other being a statute’s enforcement by the executive branch), his account fits with the *Hellerstedt* dissenters’ enactment-as-transaction theory of claim preclusion. *Id.* at 1235–40. If the Constitution authorizes judicial review of enactments, not statutes, then it makes sense to say that a plaintiff’s “claim” in a challenge to a statute encompasses the whole legislative enactment. *See supra* Part II.A.1.a. (discussing the enactment-as-transaction theory advocated by the *Hellerstedt* dissenters).

<sup>179</sup> *See, e.g.*, Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998) (distinguishing between an “‘overbreadth facial challenge,’ which predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law,” and a “‘valid rule facial challenge,’ which predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute’s application to particular cases”); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005) (examining the application of the doctrine of facial and as-applied challenges to legislation enacted pursuant to Section Five of the Fourteenth Amendment);

<sup>180</sup> *See generally* Fallon, *Fact and Fiction*, *supra* note 176; *see also* Richard H. Fallon, Jr., *As-Applied and Facial*

Fallon begins by acknowledging that “all challenges to statutes are in an important sense as-applied,” because “[a] litigant must always maintain that a statute cannot lawfully be invoked against her.”<sup>181</sup> The question, therefore, is whether the challenge is also “facial”: If the court holds that the statute cannot validly be applied to the challenger, can the statute later be validly applied to anyone else?<sup>182</sup> Professor Fallon’s answer to this question proceeds in three parts: “reasons,” severability, and ripeness.<sup>183</sup>

First and foremost, the answer has to do with the *reasons* that the court held the law invalid in the first action: “If the Supreme Court, in holding a statute unenforceable against a particular challenger, gives reasons broad enough to indicate that the statute cannot be enforced against anyone else, either, then it will effectively have held the statute facially invalid, even if it never employs those words.”<sup>184</sup>

To explain why this is the case, Professor Fallon argues that repealing laws—even invalid ones—is a legislative power that courts do not possess.<sup>185</sup> Rather, when a court “invalidates” a law, it simply declines to apply it to the challenger’s case because it is invalid.<sup>186</sup> But because a higher court’s reasoning is binding on lower courts, when a higher court decides not to apply such a law, lower courts are forbidden from applying that law in any later case that is factually similar enough to come within the higher court’s reasoning.<sup>187</sup> The doctrine of *stare decisis*, moreover, generally binds the higher court to its reasoning in its prior decision.<sup>188</sup> Thus, the invalidation of the statute is

*Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*].

<sup>181</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 180, at 1326; *see also* Fallon, *Fact and Fiction*, *supra* note 176, at 923 (making the same argument).

<sup>182</sup> *See id.* at 924–25 (distinguishing between a “nearly purely as-applied ruling” where a plaintiff “advance[s] reasons so specifically tied to the facts of her case as to be unique, or nearly unique, to her circumstances,” and the more “[t]ypical[ ]” case, in which “the extent to which a ruling is as-applied to particular facts will be a matter of degree”).

<sup>183</sup> *Id.* at 950.

<sup>184</sup> *Id.*

<sup>185</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 180, at 1339.

<sup>186</sup> This authority derives from *Marbury v. Madison*, 5 U.S. 137, 177 (1803), which forbids courts to apply federal statutes that violate the Constitution, and the Supremacy Clause, which forbids courts to apply state statutes that violate the Constitution. *See* U.S. CONST. art. VI (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>187</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 180, at 1339–40.

<sup>188</sup> *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (recognizing that “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable” but also that “a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed”).

accomplished de facto through the doctrines of precedent and *stare decisis*, not through any de jure power to strike the statute from the legislative code.<sup>189</sup>

Fallon also notes that in many cases, the reasons that a statute is constitutionally invalid will depend on the doctrinal test applied by the court to invalidate the law. Certain types of tests—such as the first prong of the Establishment Clause test laid down in *Lemon v. Kurtzman*, which asks whether a law was enacted without a “secular purpose”<sup>190</sup>—identify constitutional defects that necessarily permeate all of a statute’s applications.<sup>191</sup> Others, such as the Eighth Amendment’s proscription of “cruel and unusual punishment,” provide more room for as-applied adjudication.<sup>192</sup> Thus, Professor Fallon concludes, there are no “trans-substantive rules governing facial challenges”; rather, “the availability of facial challenges varies on a doctrine-by-doctrine basis” and is a function of the applicable “*substantive* tests” of constitutional validity.<sup>193</sup>

Of course, doctrine is not the sole determinant of a court’s reasons for invalidating a statute. Even within a given doctrinal framework, a court possesses wide latitude to rule on broader or narrower grounds.<sup>194</sup> In *Yoder*, for

<sup>189</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 180, at 1339–40. This picture is not quite complete. In many constitutional cases, a plaintiff asks a court not simply to invalidate the application of a statute to her, but also to *enjoin* the application of that statute to her and, in many cases, to others as well. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2303 (2016) (noting that the district court enjoined the enforcement of both the admitting-privileges and surgical-center provisions). In this sense, courts indeed possess a power that is functionally similar to “remov[ing] a law from the statute books.” Fallon, *As-Applied and Facial Challenges*, *supra* note 180, at 1339. According to the Supreme Court, however, the same principles apply. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006) (“Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.” (citing *United States v. Raines*, 362 U.S. 17, 20–22 (1960); then citing *United States v. Booker*, 543 U.S. 220, 227–29 (2005))).

<sup>190</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>191</sup> See Fallon, *Fact and Fiction*, *supra* note 176, at 937 (noting that most statutes that were held as invalid under the Establishment Clause failed at least one prong of the *Lemon* test); see also Dorf, *supra* note 176, at 279 (explaining that if a statute serves an impermissible purpose, such as lacking a secular purpose under the *Lemon* test, then the court cannot sever the purpose from the application and must find the statute facially invalid); Isserles, *supra* note 179, at 366 (articulating the concept of an overbreadth facial challenge, where a litigant, for whom a law constitutionally applies, argues that the court should find the law facially invalid because “applications of the law to parties not before the court would be unconstitutional”).

<sup>192</sup> See Fallon, *Fact and Fiction*, *supra* note 176, at 924 (positing as an example of “a nearly purely as-applied ruling” the case of “a criminal defendant who challenges a statute prescribing life in prison without parole as the mandatory penalty for possessing an ounce or more of marijuana and who asserts that the statute violates the Eighth Amendment as applied to her because she: (1) was only one day over the age of sixteen at the time of the crime, (2) otherwise had no criminal record, (3) was an honor student, (4) had been abused by her parents as a child, and (5) purchased the marijuana at the request of and for her father, who gave her the money to do so”).

<sup>193</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 181, at 1327 (emphasis added).

<sup>194</sup> See Fallon, *Fact and Fiction*, *supra* note 176, at 951–52 (noting that Justices “who disagree about contentious issues will frequently also diverge in their judgments about when the Court should issue

example, the Court could have held that under the First Amendment, any sincere religious belief can entitle a parent to withhold his children from school. Instead, it expressly limited its holding to beliefs taught by an historically well-established religion, and disclaimed any application to “group[s] claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life.”<sup>195</sup> Thus, were a more “progressive” parent to invoke *Yoder* as a defense to a prosecution under Wisconsin’s school-attendance statute, his defense would likely fail.

The reasons for a law’s invalidity also depend critically on the facts of the law’s application to the plaintiff. Because a law’s applications are not always immediately apparent on the face of the law, courts must develop the content of the law by applying it to concrete cases—a process which Professor Fallon calls “specification.”<sup>196</sup> Wisconsin’s school-attendance law, for example, did not appear to be constitutionally invalid on its face; rather, its constitutional defect was only revealed once *Yoder* was prosecuted under it. Facts therefore drive the process of specification: They act as probes of a statute’s validity, constantly specifying the statute into further applications (or “sub-rules,” to use Fallon’s term) and raising the possibility that those new sub-rules are constitutionally invalid.

The second factor that influences whether a court will invalidate a law facially or as-applied is whether the law’s invalid applications can be severed from its valid ones.<sup>197</sup> Even if a law can be divided into sub-rules, one of which is invalid for a reason that does not implicate the others, a court can only apply the valid sub-rule if, in a later case involving an application of the *invalid* sub-rule, the future court could sever and invalidate that rule.<sup>198</sup> This makes sense from a practical standpoint: Otherwise, the future court would be bound by the prior court’s holding that the rule as a whole was constitutionally valid, even though parts of it were not.<sup>199</sup>

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broad rulings . . . and when it should stick closely to the facts of the case before it”).

<sup>195</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972).

<sup>196</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 181, at 1325 n.31, 1325–26. Under this view, *Yoder* specified Wisconsin’s school-attendance statute into two sub-rules: “all Amish children must attend school until age 16” and “all non-Amish children must attend school until age 16.” Though in a sense, the former sub-rule inhered in the statute from the time of its passage, it was not until *Yoder*’s challenge that the court could evaluate its validity.

<sup>197</sup> See Fallon, *Fact and Fiction*, *supra* note 176, at 953 (explaining that “in the absence of severability, all challenges to statutes would necessarily be facial”).

<sup>198</sup> *Id.* at 953–54.

<sup>199</sup> Though scholars seem to agree that a person *has* a right to have only valid legal rules applied to him, they disagree about the source of this right. Professor Monaghan has proposed that the Constitution protects “a right to be judged in accordance with a constitutionally valid rule of law.” Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (1981). Professor Dorf has located this rule in *Marbury v. Madison* and the Supremacy Clause: “The Constitution does not create, in so many words, an individual right to be judged only by a constitutional law,” Dorf argues, “[b]ut [it]

The classic example is *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*<sup>200</sup> In that case, a Mississippi statute required railroads to settle claims for lost or damaged freight within a set period of time.<sup>201</sup> A vinegar manufacturer brought an action against a railroad for failing to settle within that period the manufacturer's claim that the railroad had damaged its shipment of vinegar.<sup>202</sup> Although the railroad conceded that the manufacturer's claim was potentially meritorious, it nonetheless argued that the Mississippi statute was unconstitutional because it would also require the railroad to settle frivolous claims in violation of the Due Process Clause.<sup>203</sup> Without deciding whether the obligation to settle frivolous claims would in fact violate due process, the Supreme Court upheld the application of the statute to the railroad.<sup>204</sup>

Though the Court never said so in its opinion, scholars have rationalized this decision *ex post* as establishing a presumption that a statute's applications are severable from one another.<sup>205</sup> Thus, in a future case involving a frivolous claim against a railroad, the Court could always sever the statute into two sub-rules—the obligation to settle non-frivolous claims (upheld in *Yazoo*) and the obligation to settle frivolous claims—and invalidate only the latter. This avoids the difficulties inherent in applying a partially unconstitutional law to resolve a particular case.<sup>206</sup>

The final component of Fallon's account the is ripeness doctrine. Often, Fallon argues, when a doctrinal test requires a court to consider a statute's

certainly forbids a court from enforcing an unconstitutional law." Dorf, *supra* note 176, at 248; see also *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[T]he theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."). "In practice, therefore, every litigant *does* have such a right." Dorf, *supra* note 176, at 249.

<sup>200</sup> 226 U.S. 217 (1912).

<sup>201</sup> *Id.* at 218.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 219.

<sup>204</sup> *Id.* at 219–20.

<sup>205</sup> See HENRY M. HART, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 162–63 (6th ed. 2009) (stating that the holding in *Yazoo* was dependent on severing invalid applications from the valid application "without invalidating the statute as a whole"); see also Dorf, *supra* note 176, at 249–51 (interpreting *Yazoo* in this way and also suggesting that *Salerno* be read as reaffirming the presumption that a statute's invalid applications are severable from its valid ones).

<sup>206</sup> Many scholars have pointed to severability as the guiding principle in facial and as-applied challenges. See, e.g., Dorf, *supra* note 176, at 251 (arguing that "facial challenge doctrine really boils down to severability doctrine combined with institutional limits on the *Salerno* presumption of severability"). Yet Professor Fallon has questioned whether severability principles accurately account for the Supreme Court's practice. Fallon, *Fact and Fiction*, *supra* note 176, at 953–55. He concludes that the Court's practice is inconsistent at best, but offers five situations in which the Court is likely to sever a statute's invalid applications: (1) where the applications are "unusual or infrequent"; (2) where the court "can identify a relatively surgically precise way of curing the defect that an applicable test has identified"; (3) relatedly, where the statute is valid as applied to the challenger and its invalid applications can be surgically severed in future cases (as in *Yazoo*); (4) where severing would conform to legislative intent; and (5) where severing does not "feel" legislative. *Id.* at 955–58.

real-world effects, the Supreme Court will categorically reject a facial challenge to that statute if its effects are not yet sufficiently clear.<sup>207</sup> The fact that a statute's effects are not yet clear, however, simply means that the statute has not yet been thoroughly "specified" through case-by-case adjudication; it does not mean that it will *never* be susceptible to a facial challenge. Thus, Fallon posits, many cases in which the Court has categorically held that a facial challenge to a statute is unavailable are better explained as ripeness cases: A facial challenge that seeks to invalidate a law on the basis of too-hypothetical effects should be deferred until those effects become sufficiently clear.<sup>208</sup>

To summarize Professor Fallon's view: Under the doctrine of facial and as-applied challenges, a court must first identify the reason that a challenged statute fails a given doctrinal test of constitutional validity.<sup>209</sup> Then, it must determine whether that reason implicates the entire statute, or only the statute's application to a circumscribable set of factual circumstances.<sup>210</sup> In the former case, the law is facially invalid; in the latter, it is only invalid as it applies in those particular circumstances (assuming that the statute's application in those circumstances is severable from its applications in other circumstances).<sup>211</sup>

## 2. *Parallels with Claim Preclusion*

Under Professor Fallon's account, the doctrine of facial and as-applied challenges has much in common with claim preclusion in constitutional challenges to statutes. It asks a court to identify the applications of a statutory provision that are tainted by the reasons given for its invalidity—in other words, the applications that the plaintiff *ought* to have challenged at the outset of the lawsuit—and enjoin *only* those applications. Claim preclusion performs a complementary function: By encouraging plaintiffs to challenge closely related provisions of statutes together in a single action, it discourages challenges that are too narrow.

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<sup>207</sup> Fallon, *Fact and Fiction*, *supra* note 176, at 960.

<sup>208</sup> *Id.* at 961–62.

<sup>209</sup> *See supra* notes 184–189 and accompanying text.

<sup>210</sup> *Id.*

<sup>211</sup> *See supra* notes 197–199 and accompanying text. One of Professor Fallon's central theses is that the courts consistently follow neither the method that he prescribes nor any other discernible method for distinguishing between facial and as-applied challenges. Fallon, *Fact and Fiction*, *supra* note 176, at 953–55. But certain Supreme Court precedents suggest that even when a court purports to invalidate a law facially, its holding invalidates the statute only insofar as it is invalid for the reasons given in the opinion. *See id.* at 953 (giving the example of *City of Boerne v. Flores*, 521 U.S. 507 (1997), where the Supreme Court seemed to hold the Religious Freedom Restoration Act facially unconstitutional, but noting that in subsequent cases, the Court has treated it as invalid "insofar as it creates statutory rights against the federal government, rather than the states"). This follows from the principle that an appellate court's reasoning is only binding to the extent that it is necessary to reach the judgment rendered in the case at bar.

There are meaningful differences between the two doctrines, of course. Whereas the doctrine of facial and as-applied challenges concerns the relief to which a plaintiff is entitled in a single action, claim preclusion concerns the effect of a prior action on the plaintiff's rights in a later one. Claim preclusion applies not just to applications of a single statutory provision (as discussed later, in Part IV) but also to different provisions of the same statute; and claim preclusion operates with *ex ante* incentives rather than an *ex post* adjustment to the plaintiff's relief.<sup>212</sup> Ultimately, moreover, the two doctrines serve different values: Claim preclusion's efficiency and fairness rationales are arguably of a lower order than the separation-of-powers concerns that motivate the doctrine of facial and as-applied challenges.

Nonetheless, the first step in applying either doctrine is similar: The court must identify the optimal scope of the plaintiff's constitutional challenge to the provisions of a statute. In designing exceptions to *Hellerstedt's* prima facie rule, therefore, it follows that courts might draw lessons from the doctrine of facial and as-applied challenges. For example, Professor Fallon's account of the doctrine teaches that the proper scope of a plaintiff's challenge to a statutory provision depends at least in part on the *reasons* proffered for the provision's invalidity—that is, characteristics of the provision that the plaintiff claims render it invalid under a particular provision of the Constitution. Might these “reasons”—which I'll call the statute's constitutional “defect”—not also have a role to play in limiting the scope of claim preclusion in constitutional challenges to statutes?

Another of Professor Fallon's key insights is that a constitutional defect can apply to some, but not all, of a statutory provision's applications. But just as a defect can affect more than one application of a provision, one defect can also affect *different provisions* of a statute. If a legislature enacts a statute with the same racially discriminatory intent, for example, that intent can render all of its provisions invalid.<sup>213</sup> Similarly, when two provisions contribute to a single unconstitutional effect, that effect can render both statutes unconstitutional.<sup>214</sup> If a plaintiff is entitled to challenge no *more* of a provision's *applications* than are invalid because of a given defect, does it follow by way of analogy that a plaintiff ought to challenge no *fewer* of a statute's *provisions* than are implicated by that defect? Does a defect form a kind of “unit” of litigation in constitutional challenges?

Yes, it does—but because of claim preclusion's procedural policies, not the constitutional values underpinning the doctrine of facial and as-applied challenges. Challenging two provisions of a statute that suffer from the same

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<sup>212</sup> See, e.g., FED. R. CIV. P. 15 (allowing for amendment of pleadings only by “a party,” not the court).

<sup>213</sup> See *infra* notes 255–262 and accompanying text.

<sup>214</sup> See *infra* Part III.B.1.a.

constitutional defect in separate actions is inefficient, because the court will have to consider similar legal and factual issues in the two actions;<sup>215</sup> conversely, there is little to be gained in terms of efficiency by requiring two challenges to provisions that suffer from different defects to be brought together in one action. Thus, a single constitutional defect is an *efficient* unit of litigation because it is likely to require argument of a single set of legal issues and proof of a single set of facts (if any). It is true, of course, that wherever two provisions that suffer from different constitutional defects also are not closely related, claim preclusion will not apply for the independent reason that the provisions fall outside of *Hellerstedt*'s prima facie rule. But there may still be cases where application of *Hellerstedt*'s rule is overinclusive because two *related* provisions nonetheless suffer from *different* defects.

Consider an example. Suppose that your state's new gun-control statute contains the following provision, which appears just after the registration requirement:

Section 2. Exceptions to the registration requirement.

Notwithstanding any other provision of this title, a person shall not be required to pay the registration fee described in section 1 of this title if:

- (a) The person is a woman who is not married to a man and who resides in a city or county with a population density that exceeds 5,000 per square mile; or
- (b) The person demonstrates a severe economic hardship.

Suppose that you, a male resident of the state, challenge subsection (a) of this section (the "unmarried-woman" provision) after your failed challenge to the registration requirement in Section 1. You argue that the unmarried-woman provision is an invalid gender classification because it is based on the stereotype that women are less capable of defending themselves than men.<sup>216</sup> Though the provisions are "distinct," they are not "independent," because Section 2(a) is an exception to the requirement imposed by Section 1(a). Moreover, the two provisions serve the same "function"—to license persons

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<sup>215</sup> Issue preclusion, a related doctrine of res judicata, recognizes this by *directly* prohibiting the relitigation of previously litigated legal or factual issues. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW. INST. 1982).

<sup>216</sup> *United States v. Virginia*, 518 U.S. 515 (1996); *see also* *Heckler v. Matthews*, 465 U.S. 728, 731, 737 (1984) (recognizing that *Matthews*, a male applicant for spousal benefits under the Social Security Act, had standing to challenge a provision of that statute which offset the spousal benefits received by certain male applicants, including *Matthews*, by the amount of any federal or state pension received unless the applicant "could demonstrate dependency on their wage-earning wives for one-half of their support"—even though *Matthews* stood to gain no increased benefit because the statute elsewhere provided that if the gender classification were held invalid, then female applicants too would have to demonstrate dependency, because "the right asserted by appellee is the right to receive 'benefits . . . distributed according to classifications which do not without sufficient justification differentiate among covered [applicants] solely on the basis of sex'" (alterations in original) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975))).

to possess firearms. Thus, the provisions are arguably sufficiently related so that *Hellerstedt* would not bar the application of claim preclusion.

But would it make sense to bar your second claim? The two provisions suffer from very different alleged defects. In your prior suit, you argued that the registration requirement violated the Second Amendment, whereas you now claim that the unmarried-woman provision violates the Fourteenth Amendment's Equal Protection Clause. Moreover, the litigation surrounding the two challenges would look very different: In the first challenge, you would have to prove that \$500 is an onerous amount to pay to register a firearm and perhaps analogize to cases in other jurisdictions where such requirements had been struck down; in your second challenge, you would have to demonstrate (among other things) that the prior law was motivated by stereotypes about a woman's ability to defend herself, which could involve the presentation of statistical or anecdotal evidence or an analysis of the provision's legislative history. Thus, even if you had challenged the two provisions together, you would have avoided little if any redundancy.

As the foregoing example shows, there may be situations where no efficiency gains are made by forcing plaintiffs to challenge related provisions of a statute in a single action. To account for these situations systematically, however, will require a more thorough analysis of constitutional doctrine. The remainder of this Part proposes a series of categorical exceptions that courts can use to resolve claim-preclusion issues that arise under different "tests" of constitutional validity. But first, this Part looks to existing scholarship for a rigorous definition of exactly what kind of legal rule a constitutional "test" is.

### *B. The Structure of Constitutional Doctrine*

As many scholars have observed, courts have created a complex infrastructure of rules—a "code-like sprawl of two-, three-, and four-part tests"<sup>217</sup>—to implement constitutional norms. The difference between these constitutional "doctrines" and the Constitution's "meaning" has been the subject of sustained scholarly attention over the past several decades. Professor Henry Monaghan, for example, distinguished between "constitutional exegesis" and what he called "constitutional common law"—a "substructure of substantive, procedural, and remedial rules," which "draw[] their inspiration and authority from, but [are] not required by, various constitutional provisions."<sup>218</sup> Similarly, Professor Richard H. Fallon, Jr., has argued that "a gap . . . exists between the meaning of constitutional norms and the tests by which those norms

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<sup>217</sup> Fallon, *Implementing the Constitution*, *supra* note 97, at 57.

<sup>218</sup> Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3, 31 (1975).

are implemented.”<sup>219</sup> Most recently, Professor Mitchell Berman has distinguished between what he calls “constitutional operative propositions,” which represent the Constitution’s meaning, and “constitutional decision rules,” which courts use to decide concrete constitutional cases.<sup>220</sup>

Despite their differences in terminology, these analyses all rest on the common premise that while determining constitutional *meaning* is one thing, creating constitutional *doctrine* is something else. To answer questions of constitutional meaning, courts look to the Constitution’s text, history, original public meaning, and so on; to answer questions of constitutional doctrine, they look to second-order concerns, like deference to legislatures or courts’ own limited competencies.<sup>221</sup> As the authoritative interpreter of the Constitution, moreover, the Supreme Court’s determinations of constitutional meaning are binding on Congress, while its determinations of constitutional doctrine can sometimes be modified by legislation.<sup>222</sup>

Take the Fourteenth Amendment’s Equal Protection Clause as an example. Under current equal-protection doctrine, a statute may differentiate between able-bodied people and people with disabilities so long as the government can articulate a hypothetical, non-arbitrary justification for doing so.<sup>223</sup> This is not a very high bar.<sup>224</sup> Does this mean that the Supreme Court has interpreted the Constitution’s guarantee of “equal protection of the laws” to *mean* that Congress and the states may discriminate against people with disabilities in any non-arbitrary manner?

Not necessarily. Courts review laws that discriminate against people with disabilities deferentially not because those people are not deserving of equal treatment, but rather because courts have determined that other values—such as separation of powers and federalism—preclude them from carefully scrutinizing each and every legislative enactment that treats similarly situated individuals

<sup>219</sup> Fallon, *Implementing the Constitution*, *supra* note 97, at 60.

<sup>220</sup> Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 13 (2004).

<sup>221</sup> *Id.* at 93–97 (offering a “provisional catalogue” of these concerns: “minimizing adjudicatory error, promoting greater compliance with the constitutional operative proposition, reducing the extent to which an operative proposition chills socially valuable conduct, reducing constitutional litigation and its associated costs”).

<sup>222</sup> *See id.* at 96 (“The Court could permit Congress to substitute its judgment for the Court’s on just what the applicable decision rule should be.”); Monaghan, *supra* note 218, at 28 (explaining that the Court’s “use of constitutional common law . . . allows a coordinate role for Congress” to use its “special institutional competence” to “protect[] constitutional liberties”).

<sup>223</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

<sup>224</sup> It is not satisfied, for example, if a city enacts a zoning ordinance that entirely excludes homes dedicated for occupancy by people with intellectual disabilities. *Id.* A state law providing a lower burden of proof to commit people with “mental retardation” than with “mental illnesses,” by contrast, passes this standard, because “mental retardation is easier to diagnose than is mental illness,” since “mental retardation is a developmental disability that becomes apparent before adulthood.” *Heller v. Doe*, 509 U.S. 312, 321 (1993).

differently.<sup>225</sup> Thus, courts engage in searching constitutional review only when laws differentiate based on certain “suspect classifications”; in all other cases, they defer to the legislative interpretation of the equal-protection norm.<sup>226</sup>

Unlike the Constitution’s provisions, most of which are phrased as broad prohibitions or guarantees, the doctrinal tests used to implement the Constitution often resemble ordinary civil causes of action. They consist of elements, assign burdens of persuasion,<sup>227</sup> and in some cases, they even require a trial court to make factual findings.<sup>228</sup> At the trial level, therefore, some challenges to statutes look a lot like ordinary civil litigation: A court might hear testimony from witnesses, consider documentary evidence, and then apply a standard of proof to decide which facts the litigants have or have not established. Although higher courts may debate the *legal* significance of those factual findings on appeal, they are usually bound to accept the findings themselves absent a “clear error” by the trial court.<sup>229</sup>

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<sup>225</sup> See *id.* at 319 (explaining that “a classification . . . no[t] proceeding along suspect lines is accorded a strong presumption of validity” because “the judiciary [should not] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.” (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 33 (1976)).

<sup>226</sup> See *id.* (holding that deference to “legislative policy determinations” is appropriate when the legislation does not trammel upon suspect classifications).

<sup>227</sup> Again, the equal-protection test provides a familiar example: Once a plaintiff has shown that a law discriminates on the basis of a protected class, such as race, the burden shifts to the government to prove that the law pursues an actual, non-hypothetical end, and that the law’s means are sufficiently tailored to that end. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’ This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))).

<sup>228</sup> The scholarship that has addressed the role of facts in constitutional adjudication has generally addressed the empirical methods that courts use to make factual findings. See David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 550 (1991) (“Increasingly, commentators and litigants are checking the modern Court’s fact-finding on the basis of empirical research that only sometimes supports, and often contradicts, the Court’s ‘best guesses’ about the world.”); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 657–58 (1988) (examining “the emerging importance of facts to constitutional analysis” and advocating “fact-based standards of constitutionality” that give “lower court[s] freedom from precedent based on factual findings”).

<sup>229</sup> FED. R. CIV. P. 52(a)(6). At least in the First Amendment context, however, the Supreme Court has recognized an exception to this rule: Rule 52 does not bar an appellate court from considering whether a party has adduced “clear and convincing” evidence that a statement was made with “actual malice” (and thus falls outside the scope of the First Amendment’s speech protections). See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984) (“Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’”). For an argument that this rule should be expanded to other constitutional cases, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 238–39 (1985) (arguing that “constitutional fact review at the appellate level is a matter for judicial (and legislative) discretion,” which should “respon[d] to important institutional needs,” such as “the

Other constitutional tests, by contrast, do not require the parties to prove facts. Instead, they simply ask courts to “lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former.”<sup>230</sup> Courts decide challenges invoking these “legal” tests using their tools of statutory interpretation, rather than their fact-finding abilities: They look to the statute’s text and other indicators of its meaning to determine whether it violates a higher principle of constitutional law.

This distinction between factual and legal tests suggests our first claim-preclusion exception: If a plaintiff challenges two different statutory provisions in two separate actions, and if one challenge invokes a factual test while the other invokes a legal test, there is little reason to apply claim preclusion. One challenge calls for an analysis of the provision’s text, legislative history, and other indicators of statutory meaning, while the other calls for the presentation of evidence and testimony. Thus, regardless of how related these two provisions were, few efficiency gains would result from requiring a plaintiff to challenge them together in one action.

When two challenges both invoke legal or factual tests, the claim preclusion question is a closer one. The remainder of this Part focuses on developing categorical rules for these situations. I begin with factual tests, which break down into at least four different subtypes: effects tests, means-end tests, motive tests, and compound tests.

## 1. *Factual Tests*

### a. *Effects Tests*

The first type of factual test requires a court to determine the challenged statute’s real-world effects. Some of these tests require the court to measure a statute’s burden on the exercise of a right,<sup>231</sup> others require the court to balance those burdens against the law’s benefits,<sup>232</sup> and still others require courts to search for some other, more narrowly defined effect.<sup>233</sup> Examples

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danger of systemic bias of other actors in the judicial system and the need for continuous development of constitutional principles on a case-by-case basis”).

<sup>230</sup> *United States v. Butler*, 297 U.S. 1, 62 (1936).

<sup>231</sup> *See, e.g.,* Fallon, *Implementing the Constitution*, *supra* note 97, at 74–75 (giving the example of *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968), which requires heightened scrutiny of a law that regulates conduct that has both “‘speech’ and ‘nonspeech’ elements,” thereby placing “incidental limitations on First Amendment freedoms”).

<sup>232</sup> *See* *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (explaining that the undue-burden test requires courts to balance a law’s burdens on the right to abortion against its medical benefits).

<sup>233</sup> *See, e.g.,* *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (directing courts hearing Establishment Clause challenges to ask whether a statute’s “principal or primary effect [is] one that neither advances nor inhibits religion”).

of “effects” tests include the First Amendment’s test for statutes that regulate conduct with speech-like elements,<sup>234</sup> the “undue burden” test for statutes that regulate abortion,<sup>235</sup> and the emerging Second Amendment test for statutes that burden the exercise of gun rights.<sup>236</sup> In such challenges, of course, the challenged statute’s “defect” is its unconstitutional real-world effect.

The difficulty with determining whether two laws contribute to the “same” unconstitutional effect is that courts can easily reach different conclusions depending on the level of generality at which a statute’s effect is defined. Suppose a state enacts the following hypothetical statute, based on a Utah law that was recently the subject of a constitutional challenge.<sup>237</sup> A state statute provides:

- Balloting of Candidates. For any political party to list its candidates for elective office on the state’s general election ballot, the political party must:
- (1) permit voters who are unaffiliated with any political party to vote for the political party’s candidates in a primary election; and
  - (2) permit a member of the party to seek the party’s nomination for an elective office by gathering signatures in the amount of 5% of registered voters who are residents of the legislative district for which the nomination is sought and are permitted by the party to vote for the party’s candidates in a primary election.<sup>238</sup>

Suppose a political party within the state challenges the first provision (the “unregistered-voter” provision), but not the second provision (the “signature-gathering” provision) as an unconstitutional infringement on the party’s First Amendment right of association and succeeds. May the party later bring a second challenge to the signature-gathering provision separately?

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<sup>234</sup> See *O’Brien*, 391 U.S. at 376 (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

<sup>235</sup> See *Hellerstedt*, 136 S. Ct. at 2310 (reiterating the “undue burden” standard developed in prior case law).

<sup>236</sup> Though the Supreme Court has not yet weighed in on the doctrinal test used to evaluate a law under the Second Amendment rights recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), several courts of appeals have suggested that the inquiry is two-fold: First, the court must determine whether the regulated conduct falls outside the “historical” scope of the Second Amendment; and second, the court must measure the law’s burden on the asserted right, and apply a correspondingly searching degree of judicial scrutiny. See *Ezell v. Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (“Severe burdens on the core right of armed defense require a very strong public-interest justification and a close means-end fit; lesser burdens, and burdens on activity lying closer to the margins of the right, are more easily justified.”); see also *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960–61 (9th Cir. 2014) (“When ascertaining the appropriate level of scrutiny [to apply,] . . . we consider: ‘(1) “how close the law comes to the core of the Second Amendment right” and (2) “the severity of the law’s burden on the right.”’” (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013))).

<sup>237</sup> *Utah Republican Party v. Cox*, 177 F. Supp. 3d 1343 (D. Utah 2016).

<sup>238</sup> See *id.* at 1349, 1357–59 (evaluating the validity of a similar statute enacted by Utah in 2014).

Under the reading of *Hellerstedt I* have proposed, the answer would be no. Though the two provisions are “distinct,” their requirements are not “independent,” because the number of signatures required for a candidate to satisfy the signature-gathering provision depends in part on the number of unregistered voters who, according to the unregistered-voter provision, must be allowed to vote in the party’s primary. Moreover, the two provisions serve the same “function”: to determine whether a political party is qualified to list candidates on the state’s election ballot. Thus, claim preclusion’s *prima facie* rule would apply, and it would be up to the political party to establish that some exception to claim preclusion allowed its second challenge to proceed.<sup>239</sup>

Under the First Amendment, however, the relevant question is how severely those measures burden the right of a candidate to put her name on the ballot.<sup>240</sup> Do the provisions impose the “same” burden on ballot access, such that there is something to be gained by requiring that they be challenged in a single lawsuit?

This is not an easy question to answer. In most cases, a statute’s effects will be too indeterminate for a court to identify with the degree of precision necessary to justify the application of claim preclusion. At a high enough level of generality, *any* statute that is subject to a challenge under an effects test will have the same “effect” as any other such statute, since the legal trigger for such tests is a simply generally phrased effect (like an “undue burden” on abortion rights). Conversely, at a granular enough level of generality, any two statutes will have different effects simply by virtue the fact that they impose different legal obligations.

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<sup>239</sup> In the actual case, the district court allowed the Utah Republican Party’s challenge to the signature-gathering provision. UTAH CODE ANN. § 20A-9-408 (West 2017). This was because “the current signature gathering concerns raised by [the party] were not ‘previously available’ because they arose when the Unaffiliated Voter Provision was struck down [in the first action].” *Cox*, 177 F. Supp. 3d at 1358. Though “[t]he ruling in the First Lawsuit did not change the *number* of signatures required [under the signature-gathering provision],” the court explained, “because it excluded unaffiliated voters from the [party’s] primary and therefore excluded unaffiliated voters from signing petitions, it changed the *percentage* of signatures a U[tah] R[epublican] P[arty] candidate would be required to gather because the pool of eligible signers was reduced.” *Id.* The court also rejected Utah’s reliance on the enactment of the election statute as the “transaction” out of which the party’s claims arose:

While both lawsuits generally arise from the passage of SB54, the passage of a law cannot be the “transaction, event or occurrence” that provides the factual commonality between the two lawsuits, as the [State] argues. If that were the rule, only one as-applied challenge could ever be brought to challenge a law. This certainly is not the intended consequence of the claim splitting doctrine.

*Id.* at 1361.

<sup>240</sup> In *Burdick v. Takushi*, the Court explained:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

One scenario where a court might presume that two statutes contribute to the same unconstitutional effect is where the plaintiff challenges the effects of two statutes in combination. For example, suppose that in her second challenge, the plaintiff admits that individually, the unregistered-voter provision and the signature-gathering provision do not sufficiently burden ballot access so as to be unconstitutional, but argues that in *combination*, the two provisions amount to a constitutional violation.<sup>241</sup> In such a case, the plaintiff's own allegations would amount to an admission that the two provisions contributed to a single, unconstitutional effect.

In all other cases, however, courts are faced with three options: (1) evaluate each effects-based challenge on a case-by-case basis; (2) categorically presume that the two provisions have the same effect; or (3) categorically presume that they have different effects. The first approach recalls the catch-all exception for constitutional rulings proposed by the Restatement, and is untenable for the same reasons.<sup>242</sup> The second option, a categorical presumption of the *same* effect, would in effect be to recognize no exception at all, which would be unacceptably overbroad. The best approach, therefore, is to categorically presume that two different provisions have *different* effects, unless the plaintiff challenges the two provisions as a combination in her second action—in which case, courts should categorically presume that the two statutes have the *same* effect.

Under this proposed exception, if a plaintiff chooses to challenge one statutory provision in one action, she forfeits the right to challenge that provision in combination with any related provision of the same statute in a later action. But if two rules are truly so similar as to have the “same” unconstitutional effect, then the plaintiff's strongest case will be to challenge those laws in combination, since their cumulative effects will presumably be greater than either provision's effect in isolation. Thus, the proposed rule provides an additional incentive for plaintiffs to challenge related statutory requirements in one action: If instead the plaintiff chooses to wind her way through a statute's multiple interlocking provisions, losing each challenge because no single provision is sufficiently burdensome to rise to the level of a constitutional violation, she will eventually forfeit the right to assert her strongest claim—a challenge to the statute as a whole.

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<sup>241</sup> See *Cox*, 177 F. Supp. 3d at 1358 (noting that in the prior suit, a political party argued that “the Signature Gathering Provision was unconstitutional because *unaffiliated voters*’ signatures would ‘drown out’ the [party’s] voters’ voice . . . [by] ‘having unaffiliated voters signing petitions for [the party’s] candidates (candidates who may not subscribe to the [party’s] values and principles)’”).

<sup>242</sup> See *supra* notes 162–169 and accompanying text.

*b. Means-Ends Tests*

The second group of factual tests require courts to apply various levels of judicial “scrutiny” to determine whether a statute’s means are reasonably calculated to achieve its legitimate ends.<sup>243</sup> The First Amendment’s guarantee of free speech, the Equal Protection Clause, and the fundamental-rights analysis under the Due Process Clause are all examples of constitutional provisions that use this device.<sup>244</sup> These tests have a two-part structure: First, a court must determine which level of scrutiny is triggered. Second, the court must apply that level of scrutiny to the challenged law and decide whether it passes constitutional muster.

The second step of this two-part analysis measures the constitutionality of laws by their overinclusiveness with respect to permissible state interests. “Strict” (or “intermediate”) judicial scrutiny requires the government to prove that the law furthers a “compelling” (or “substantial”) government interest, and that it does not burden the protected right more than is necessary (or “sufficient”) to achieve that interest.<sup>245</sup> The government must often prove facts to carry its burden on both the state-interest and the relatedness prongs of the overinclusiveness analysis.

Consider the case of *United States v. Virginia*, where the Supreme Court considered whether the Virginia Military Institute’s (“VMI”) males-only admissions policy violated the Equal Protection Clause.<sup>246</sup> Virginia conceded that the policy discriminated against applicants based on their gender, and thus triggered “intermediate” scrutiny.<sup>247</sup> VMI’s admissions policy was nonetheless constitutional, Virginia argued, because it was “substantially related” to the “important government objective” of providing “the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia,” including its focus on “physical training, the absence of privacy, and the adversative approach.”<sup>248</sup> Because women’s innate physical characteristics made them unable to function in such an environment, there was no less restrictive means of creating that environment than excluding women entirely.<sup>249</sup>

The United States, as plaintiff, argued not only that VMI’s males-only admissions policy treated men and women differently, but also that its means

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<sup>243</sup> Fallon calls these “suspect-content” tests. Fallon, *Implementing the Constitution*, *supra* note 97, at 68.

<sup>244</sup> *Id.* at 88.

<sup>245</sup> See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (reciting the means-ends test under strict scrutiny); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (stating the required means-ends test under intermediate scrutiny).

<sup>246</sup> *United States v. Virginia*, 518 U.S. at 523.

<sup>247</sup> *Id.* at 524–25, 534.

<sup>248</sup> *Id.* at 533, 540.

<sup>249</sup> *Id.* at 524.

(excluding women) were overinclusive of its ends (“to produce educated and honorable men” who are “prepared for the varied work of civil life” but also “ready as citizen-soldiers to defend their country in time of national peril”).<sup>250</sup> Because “*some* women can meet the physical standards [VMI] now impose[s] on men” and would “do well under [the] adversative model,” the Court explained, VMI’s “great goal is not substantially advanced by women’s categorical exclusion.”<sup>251</sup> The Court therefore invalidated VMI’s policy.<sup>252</sup>

As the VMI case demonstrates, the defect identified by a means-end test will usually be unique to a given statutory provision. Different statutory provisions often advance distinct state interests, and even when two provisions advance the same interest, they must necessarily do so by different means—otherwise, the two provisions would not be meaningfully distinct. Because a mismatch between a provision’s means and its ends is not the kind of defect that can pertain to more than one provision, the categorical rule for means-ends tests should be that a means-ends challenge to one provision does not bar any later challenge to any other provision.

This rule makes sense from an efficiency perspective. The facts supporting the conclusion that a law is sufficiently tailored to a sufficiently weighty state interest will ordinarily be different in different challenges. For example, to make its case that VMI’s males-only admissions policy was “substantially related” to the asserted “important governmental objective” of training “citizen-soldiers,” Virginia elicited testimony from several experts to the effect that “gender-based developmental differences” made it so that “[m]ales tend to need an atmosphere of adversativeness,” while “[f]emales tend to thrive in a cooperative atmosphere.”<sup>253</sup> This fact established the purported relationship between the gender discrimination and the asserted state interest in providing “adversative” military education.<sup>254</sup> It is difficult to imagine a context in which Virginia could use such testimony to defend against a challenge to a different law.

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<sup>250</sup> *Id.* at 521–22.

<sup>251</sup> *Id.* at 541–42, 545–46 (alterations in original) (first quoting *United States v. Virginia*, 976 F.2d 890, 896 (4th Cir. 1992); then quoting *United States v. Virginia*, 766 F. Supp. 1407, 1432 (W.D. Va. 1991)).

<sup>252</sup> *Id.* at 558.

<sup>253</sup> *Id.* at 541 (quoting *United State v. Virginia*, 766 F. Supp. at 1434).

<sup>254</sup> *Id.* at 566 (Scalia, J., dissenting) (criticizing the majority for “reject[ing] (contrary to our established practice) the factual findings of two courts below, . . . [including] the finding that there exist ‘gender-based developmental differences’ supporting Virginia’s restriction of the ‘adversative’ method to only a men’s institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution’s character”).

*c. Motive Tests*

A third category consists of doctrinal tests that direct courts to look to the motives of the legislature to determine whether a law is valid.<sup>255</sup> We have already discussed one example: the equal-protection test for facially neutral laws. Similarly, an abortion regulation imposes an undue burden if its “purpose” is to “present[] a substantial obstacle to a woman seeking an abortion.”<sup>256</sup>

Another example is the first prong of *Lemon v. Kurtzman*’s test for violations of the Establishment Clause, which holds that a law is invalid if lacks a “secular legislative purpose.”<sup>257</sup> For example, suppose that a state enacted a statute that (1) allows students in public schools a one-minute period for “meditation or voluntary prayer” at the beginning of each school day; and (2) permits public-school teachers to “lead ‘willing students’ in a prescribed prayer to ‘Almighty God . . . the Creator and Supreme Judge of the world.’”<sup>258</sup> A parent whose child participated in a teacher-led prayer challenges only the statute’s second provision. At trial, the parent adduces evidence showing that the statute’s sponsor inserted a statement into the legislative record indicating that the legislation was an “effort to return voluntary prayer to [the] public schools.”<sup>259</sup> Indeed, the sponsor testifies before the district court that he had “no other purpose in mind” when he introduced the legislation,<sup>260</sup> and the government presents no evidence of any other purpose.<sup>261</sup> The court finds that the teacher-led-prayer provision lacks a secular purpose and strikes it down.

After prevailing in the first action, could the parent later challenge the voluntary-prayer provision under the Establishment Clause? Not under *Hellerstedt*. The two provisions impose dependent requirements—the first provides for a period of prayer and the second provides that a teacher may lead a prayer during that period—and they serve the same function—to encourage prayer in school. This time, however, they also share a constitutional defect: Because the voluntary-prayer provision was part of the same enactment as the teacher-led-prayer provision, the legislature’s unconstitutional motive—the enactment’s constitutional defect—implicates both provisions. These provisions should have been challenged together in the same lawsuit.

Parsing a legislature’s motive in enacting a statute can be a daunting task. Statutes are often the result of political compromises between legislators, and

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<sup>255</sup> These include Professor Fallon’s “aim” tests, “purpose” tests, and “appropriate-deliberation” tests. Fallon, *Implementing the Constitution*, *supra* note 97, at 70–73. See generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016).

<sup>256</sup> *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

<sup>257</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>258</sup> *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985).

<sup>259</sup> *Id.* at 43.

<sup>260</sup> *Id.* at 57.

<sup>261</sup> *Id.* at 59, 61.

different provisions of a statute could share a general purpose while serving more specific and distinct individual purposes.<sup>262</sup> Nevertheless, constitutional doctrine still largely assumes that legislatures act with a unitary purpose when they enact laws.<sup>263</sup> When addressing claim-preclusion issues, therefore, courts should categorically presume that two statutory provisions were enacted with the same motive if they were enacted by the same legislature at the same time. This rule also squares with claim preclusion's efficiency rationale, because the *evidence* required to prove an unconstitutional legislative motive—such as committee reports or floor debates—usually pertains to an entire enactment, not its individual provisions.

## 2. *Legal Tests*

The final category consists of constitutional tests that require proof of no facts. These tests include the Due Process Clause's void-for-vagueness test;<sup>264</sup> the Supremacy Clause's preemption test;<sup>265</sup> separation-of-powers tests, like the nondelegation doctrine<sup>266</sup> and the Presentment Clause;<sup>267</sup> and federalism tests, like the anticommandeering doctrine<sup>268</sup> and the limits on Congress's powers under the Commerce Clause.<sup>269</sup> Indeed, tests requiring proof of no

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<sup>262</sup> See *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 216–18 (4th Cir. 2016) (explaining that the legislature considered separate race-based data specific to each of the provisions of the voting law).

<sup>263</sup> See Fallon, *Implementing the Constitution*, *supra* note 97, at 537 (stating that the Supreme Court often believes the legislature's intentions are in line with the intention of the legislator who proposed or supported a law).

<sup>264</sup> See *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (explaining a penal statute is not vague when the statute “define[s] the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement” (second and third alterations in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))).

<sup>265</sup> See *Altria Grp. v. Good*, 555 U.S. 70, 76–77 (2008) (explaining that when a statute which may preempt state law has two possible readings, courts will use the reading that avoids preemption).

<sup>266</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001) (describing that “[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.”).

<sup>267</sup> See *Clinton v. City of New York*, 524 U.S. 417, 436–40 (1998) (determining that although a president, when presented with a bill that has passed both houses of Congress, can either accept the law or reject it, the president may not reject only parts of the bill as a “line item veto”).

<sup>268</sup> See *Printz v. United States*, 521 U.S. 898, 918–22 (1997) (rejecting the federal government's plan to have state-level sheriffs run background checks for a federal firearms law because the federal government cannot command state officials to act).

<sup>269</sup> See *Lopez v. United States*, 514 U.S. 549, 558–59 (1995) (holding that Congress can regulate three categories of activities under the Commerce Clause: (1) channels of interstate commerce; (2) instruments of interstate commerce, even if they are used exclusively for intrastate activities; and (3) activities with “a substantial relation to interstate commerce”); see also *United States v. Morrison*, 529 U.S. 598, 607–09 (2000) (reaffirming that Congress's Commerce Clause power is limited to the categories articulated in *Lopez*).

facts probably constitute the majority of the doctrinal tests discussed in most first-year classes on constitutional law.

If a defect does not depend on a statute's factual properties, then it must depend on its "legal" properties—that is, characteristics of the statute that the court can ascertain using only its tools of statutory construction. Because such a defect inheres in the language of a statute, two statutes could only have the "same" legal defect if they had the same language—in other words, if they were the same statute. Thus, challenges identifying this kind of defect should have no claim preclusive effect other than to bar a later challenge to the same application of the same statute.

For example, suppose that a plaintiff challenges a provision of a federal statute that prohibits the growing of marijuana for the grower's own private, noncommercial use. This statute, the plaintiff argues, is invalid because it falls outside the scope of Congress's powers under the Commerce Clause and is authorized by no other Article I power.<sup>270</sup> Applying the existing test for Commerce Clause challenges, the court rules against the plaintiff, holding that Congress could rationally conclude that growing marijuana "substantially affects" commerce.<sup>271</sup>

Suppose the plaintiff then asserts a second Commerce Clause challenge, this time to a different provision of the statute, which prohibits the *transfer* of marijuana whose growth is prohibited in the prior provision within a state. Although these two provisions serve similar functions and impose dependent requirements—the transfer prohibition applies only to the type of marijuana specified in the growth provision—they do not suffer from the same defect: The defect alleged in the first challenge was that *growing* marijuana within a state did not "substantially affect" interstate commerce, while the defect alleged in the second challenge was that *transferring* marijuana within a state does not. Indeed, the only way that these two statutes could suffer from the same defect would be if they regulated the same conduct—that is, if they were identical.

This result makes sense from the perspective of claim preclusion's rationales. When a plaintiff challenges a law under a purely legal test, there can be no danger that she will later ask the court to rehear testimony or reexamine evidence in a second challenge. And although the government would probably prefer not to defend against two challenges identifying legal defects in separate lawsuits, it is difficult to articulate an objective basis for the expectation that two such challenges ought to be brought together in a single ac-

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<sup>270</sup> *Gonzalez v. Raich*, 545 U.S. 1, 5–9 (2005).

<sup>271</sup> *Id.* at 20–22.

tion. Finally, if this exception seems too permissive, recall that issue preclusion would prevent a plaintiff from relitigating any issues that she had already litigated in a prior challenge to a different statute.<sup>272</sup>

#### IV. SUCCESSIVE CHALLENGES TO THE SAME PROVISION

Parts I and II focused on the central question of when two challenges to two different provisions of a statute are the “same” claim for purposes of claim preclusion. But the Supreme Court in *Hellerstedt* also addressed a second question: When, if ever, can a plaintiff assert two challenges to the same *provision* in separate actions?

In some ways, this latter question is the more significant of the two. Though it may have fewer theoretical implications for claim preclusion doctrine, it arises more frequently in practice, where courts are often asked to determine the claim preclusive effect of a plaintiff’s failure to challenge a statutory provision in a prior proceeding against the same government entity. Jurisdictions are split on whether claim preclusion bars a constitutional challenge where a plaintiff failed to raise the invalidity of the challenged statutory provision as a defense in a prior civil, criminal, or administrative proceeding,<sup>273</sup> and at least one lower court has addressed the claim-preclusive effect

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<sup>272</sup> Cf. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW. INST. 1982) (discussing the relationship between claim and issue preclusion where the prior challenge was factual).

<sup>273</sup> See, e.g., *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 851 F.3d 746, 748 (7th Cir. 2017) (holding that under Illinois’s transactional approach to claim preclusion, plaintiff employee’s failure to assert in a state-court administrative appeal a First Amendment challenge to a provision of an Illinois labor law, which required payment of union dues by nonmember employees, barred later facial challenge to that provision, because the plaintiff’s “First Amendment claim and his earlier Illinois statutory claim [to be allowed to pay his dues to a charity rather than the union, as expressly provided by statute] arise from the same fact: the existence of an Illinois law requiring that he pay fees to the Teamsters, the union required to bargain on his behalf”); *Willhauck v. Halpin*, 953 F.2d 689, 705 (1st Cir. 1991) (finding that under Massachusetts “same cause of action” approach, plaintiff’s failure to assert in a prior criminal prosecution against him a Fourth Amendment challenge to a Massachusetts law that “makes it an offense for a person operating a motor vehicle to refuse to stop when signaled to stop by a police officer” barred his later facial challenge and as-applied challenges to that provision). But see *Maldonado v. Harris*, 370 F.3d 945, 952–53 (9th Cir. 2004) (holding that under California’s “primary right” approach, plaintiff’s failure to assert a First Amendment challenge to a state outdoor-advertising statute in a prior nuisance proceeding, brought against plaintiff by the state agency responsible for enforcing the statute, did not bar plaintiff’s challenge in a later civil action); *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 78–80 (D.C. Cir. 1997) (noting that under D.C.’s transactional approach, plaintiff lawyer’s failure to raise in a prior suspension proceedings constitutional challenges to D.C. Court of Appeals regulations governing the appointment of members to the D.C. Professional Responsibility Board and the judicial review of orders of that board did not bar his later facial challenge to those regulations, because his later facial challenge concerned “post-judgment events”—namely, the application of the regulations to a future proceeding); *Griffin v. Alabama*, No. 3:16-cv-00480-MHH, 2017 WL 372310, at \*2 (N.D. Ala. Jan. 26, 2017) (concluding that under Alabama’s transactional approach, a plaintiff’s failure to assert in a prior criminal proceedings a First Amendment challenge to a state obscenity

of a plaintiff's failure to challenge a statute's constitutionality in a prior civil suit concerning only the proper *interpretation* of the statute.<sup>274</sup> Given its potential implications for these questions, this second aspect of *Hellerstedt* also warrants careful attention.

By way of review, the *Hellerstedt* Court held that during the period between the plaintiffs' preenforcement facial challenge and their postenforcement as-applied challenge to the admitting-privileges provision, "concrete factual developments" that were "unknowable before [the provision] went into effect" had occurred.<sup>275</sup> Specifically, the Court explained, abortion providers at the two Texas clinics had *actually* been unable to obtain admitting privileges—a result the Fifth Circuit had doubted when it rejected the plaintiffs' prior facial challenge to the provision—and as a result, the two clinics would soon have to close down.<sup>276</sup> Thus, the Court held, the two challenges to the admitting-privileges provision were not the "very same claim," and claim preclusion did not bar the plaintiffs' second challenge.<sup>277</sup>

Though this result makes intuitive sense, its implicit premise—that two challenges to the same statutory provision are not necessarily the same "claim" for claim-preclusion purposes—may seem a bit quixotic at first. But it begins to make sense when viewed in light of Part II's discussion of claim preclusion's competing policy rationales.<sup>278</sup> Where a statutory provision's constitutional defect manifests only after the conclusion of a prior challenge, even if the plaintiff could have *predicted* the defect in the prior suit (as did the *Hellerstedt* plaintiffs), they could not have *proven* it at that time, so relitigation raises little risk of redundant or inconsistent factual findings (even if there may be some overlap in the legal arguments). Moreover, a contrary rule would create a dilemma for plaintiffs: It would force them to choose between gambling on a preenforcement challenge—in which a statute's adverse effects would be more difficult to prove but could be prevented before they occur—

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statute did not bar his later facial challenge to that statute, because "the facts germane to [the facial challenge] d[id] not share a common nucleus with those underlying [the plaintiff's] conviction"—whereas the criminal action required "resolv[ing] factual issues related to whether [plaintiff] knowingly possessed obscene material," the facial challenge "concerned only . . . whether [the statute] places an unconstitutional restriction on free speech").

<sup>274</sup> See *Pittston Co. v. United States*, 199 F.3d 694, 704–05 (4th Cir. 1999) (holding that under the federal transactional approach, a coal company's prior lawsuit challenging the secretary of labor's method of calculating the premium to be paid by the company under the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036 (codified as amended at 26 U.S.C. §§ 9701–22 (2012)), did not bar the company's later challenge to the premium requirement under the Constitution's nondelegation and separation-of-powers doctrines).

<sup>275</sup> *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2306 (2016).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 2307.

<sup>278</sup> See *supra* Part II.B. (discussing res judicata's underlying concerns of efficiency, fairness, and substantive policies).

and opting for a postenforcement challenge—in which the adverse effects (if any) will be more readily apparent, but where the damage to constitutionally protected interests (again, if any) will have already been done. From a fairness perspective, imposing such a dilemma would be unacceptable.

Somewhat more puzzling is the Court's decision to phrase its "changed circumstances" holding as a *rule* of claim preclusion—recall that the Court concluded that the plaintiffs' two challenges were not the "very same claim"—rather than an exception. The Court could have recognized a clear and simple rule that two challenges to the same statutory provision are the same claim, but then recognized an exception for when intervening factual developments demonstrate that the provision in fact suffers from a defect that was previously insufficiently apparent to sustain a constitutional challenge. Though the distinction is perhaps academic—even Casad and Clermont acknowledge that "any distinction between rules and exceptions would seem to have a shaky foundation"<sup>279</sup>—such a formulation might have been more intuitive.

Likely, the Court's contrary choice is best explained as an analogy to a comment in the Restatement, which states that "[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first."<sup>280</sup> But whereas it makes sense to say that a new factual predicate forms a new "claim" under the transactional approach—where the facts themselves can form a new transaction—that reasoning doesn't hold in a challenge to a statute, where facts have proven to be a less useful tool for defining the boundaries of a plaintiff's claim. Indeed, an exception for intervening factual developments would align with the Restatement's existing exception for intervening changes in the *law*.<sup>281</sup> Thus, although *Hellerstedt* binds the federal courts in terms of its phrasing of the doctrine, state courts might consider adopting a different phrasing as they continue to formulate their own claim-preclusion rules.

Perhaps more importantly, Part III's analysis also suggests that *Hellerstedt*'s rule for intervening factual developments applies not only between a prior facial challenge and a subsequent as-applied challenge, but also between any permutation of prior and subsequent facial and as-applied challenges. In *Hellerstedt*, of course, the plaintiffs' first challenge was facial, and

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<sup>279</sup> Casad & Clermont, *supra* note 16, at 39.

<sup>280</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (AM. LAW INST. 1982).

<sup>281</sup> *See id.* § 26(1)(d), cmt. e (recognizing an exception, discussed in detail in Part II.B.3. of this Article, for when "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme," which applies "especially when there is a change of law after the initial decision").

their second challenge was as-applied.<sup>282</sup> Were the situation reversed, however, the same balancing of claim preclusion's policies would result: Preclusion would produce few efficiency gains, because the plaintiffs would have to show in their second suit that the admitting-privileges provision had *in fact* proven an obstacle for *all clinics* in Texas, and it would present the same Hobson's choice between a preenforcement and postenforcement challenge. The same goes for successive facial challenges or successive as-applied challenges to the same provision. Indeed, at least one court of appeals has suggested *in dicta* that, at least in successive as-applied challenges to one provision, the second claim ought not be barred.<sup>283</sup>

The same logic holds for successive challenges to two *different* facial or as-applied defects. *Hellerstedt* does not foreclose the applicability of claim preclusion where a plaintiff challenges the same defect with the same provision of the same statute in two successive actions—that is, where the claims in the two actions are literally the same.<sup>284</sup> Nor does it foreclose the applicability of claim preclusion to a subsequent challenge to a *different* defect that was nonetheless apparent at the time of the prior suit. Such a challenge would represent an attempt to sue a second time on a different “theor[y] of the case,” and so should be barred.<sup>285</sup> But *Hellerstedt* does suggest that, for the reasons given above, where the second challenge identifies a defect that was “unknownable” at the time of the first suit, it represents a new claim not precluded by the first challenge.<sup>286</sup>

One final insight, drawing on Part III's structural analysis of constitutional doctrine, is that new constitutional claims will ordinarily not arise under *Hellerstedt*'s rule for intervening factual developments where the basis of the second challenge is a motive test or a purely legal test. This is because all of the evidence needed to adjudicate such challenges—the text of the statute

<sup>282</sup> *Hellerstedt*, 136 S. Ct. at 2304–05.

<sup>283</sup> In *Stanton v. District of Columbia Court of Appeals*, the D.C. Circuit noted:

We needn't consider here whether claim preclusion ever permits two successive facial attacks on a statute. . . . Assuming [that such challenges would ordinarily be barred], it may seem anomalous that a party litigating successive applications should be afforded greater leeway to discover new theories as time and circumstances march on. One answer might be that a party raising a facial challenge has enjoyed exceptional freedom to select the time (and perhaps forum) of litigation, and should reasonably be viewed as seeking a judgment on all future applications, except as future facts may vary. By contrast, one should perhaps be free to litigate a specific denial without the lawsuit's acquiring such an omnivorous (and costly) character.

127 F.3d 72, 79 (D.C. Cir. 1997).

<sup>284</sup> See *Hellerstedt*, 136 S. Ct. at 2305 (recognizing that “[t]he doctrine of claim preclusion (the here-relevant aspect of *res judicata*) prohibits ‘successive litigation of the very same claim’ by the same parties” (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001))).

<sup>285</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 25(1) (AM. LAW INST. 1982) (applying claim preclusion to a plaintiff's second action “even though the plaintiff is prepared in the second action . . . [t]o present . . . theories of the case not presented in the first action”).

<sup>286</sup> *Hellerstedt*, 136 S. Ct. at 2306.

itself, its legislative history, statements made by its sponsors, and so on—will be apparent at the time of the statute’s enactment, and the plaintiff’s failure to *discover* any such evidence that was in existence at the time of the prior suit will not give rise to a new claim.<sup>287</sup> As a practical matter, therefore, the rule is most relevant for effects tests—as in *Hellerstedt* itself, where an “undue burden” on abortion rights became apparent between the two lawsuits—or means-ends tests, where advances in technology, business practices, or other factual changes could render a particular regulation no longer the least restrictive means of furthering a state interest.

### CONCLUSION

As Casad and Clermont note, “Res judicata presents a truly classic struggle between the need for clear, simple, and rigid law and the desire for its sensitive application.”<sup>288</sup> Nowhere is this struggle more pronounced than in the application of claim preclusion to constitutional challenges to statutes. On the one hand, the need for “sensitive application” of procedural rules is accentuated in constitutional challenges, where the rights at stake are of utmost importance not just to the litigants, but to the public at large. On the other hand, the exercise of traditional equitable discretion in these cases inevitably creates the appearance—if not the reality—of political partisanship. In cases like *Hellerstedt*, abstract questions about the importance of fundamental constitutional rights test the limits of judges’ abilities to set aside their political beliefs and decide cases on just the facts and the law.

Difficult though they may be, these issues are only likely to recur in the coming years.<sup>289</sup> To this end, I have proposed a reading of the Supreme Court’s opinion in *Hellerstedt* that both clarifies the application of claim preclusion in constitutional challenges to statutes and explains it in terms of prevailing theories of claim-preclusion doctrine.

I’ve argued that *Hellerstedt* recognizes a “clear, rigid, and simple”—albeit narrow—prima facie rule: When a plaintiff asserts a challenge to a provision of a statute, she must also challenge any other provision of that statute that is closely related—that is, any provision that takes effect at the same time, imposes logically dependent requirements, and serves the same function. Like all claim-preclusion rules, however, *Hellerstedt*’s rule should be tempered by

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<sup>287</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. c (AM. LAW INST. 1982) (recognizing that claim preclusion applies despite “newly discovered evidence,” but that a plaintiff might seek relief from the prior judgment in “exceptional cases”).

<sup>288</sup> Casad & Clermont, *supra* note 16, at 40.

<sup>289</sup> See Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/nyregion/donald-trump-democrats-lawsuits.html> (explaining that Democratic attorneys general have indicated that they will challenge those of President Trump’s policies that they perceive to be unconstitutional).

exceptions for particular cases that fall within the rule but where the balance of claim preclusion's competing policies nonetheless weighs against preclusion. Because flexible exceptions are especially likely to create the appearance, if not the reality, of political partisanship in constitutional challenges to statutes, courts should deviate from the ordinary practice of recognizing discretionary exceptions. Rather, they should recognize exceptions based on the *structure* of constitutional doctrine, which is sufficiently predictable to support broad generalizations about when claim preclusion's efficiency concerns can and cannot be served.

This structural analysis also helps explain *Hellerstedt*'s holding regarding the second challenge to the admitting-privileges provision, which should be understood to apply whenever intervening factual developments reveal a previously challenged statutory provision to be unconstitutional in ways that were not apparent at the time of the prior challenge. Thus, although *Hellerstedt* leaves room for the application of claim preclusion to the "very same claim"—that is, two challenges to the same provision of the same statute on the same grounds—when a plaintiff challenges in successive actions any combination of facial and as-applied defects with a statutory provision, the second action should be allowed if and only if the defect alleged arises out of factual developments that were unknowable at the time of the first suit.

Clear and uniform procedural rules are essential for the judiciary to maintain its neutrality in constitutional adjudication—especially in today's political climate, where the need for a neutral judiciary is particularly acute. With its elaboration of the claim-preclusion doctrine that should apply in constitutional challenges to statutes, this Article takes a step towards establishing these much-needed procedural rules.